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Joanne Martin

Stephen Daniels

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A BRIEF MOMENT OF OPPORTUNITY: THE EFFECTS OF THE ECONOMIC DOWNTURN ON THE DELIVERY OF LEGAL SERVICES TO THE POOR

Joanne Martin and Stephen Daniels***

ABSTRACT

The legal needs of the poor have long outstripped the resources available in the legal community to meet those needs. This does not in any way discount the substantial contribution of direct funding and services provided by individual lawyers. There are, however, other factors that shape the supply side of the marketplace for the delivery of legal services to persons of limited means – and it is the supply side that interests us. The recent economic downturn provided law firms and legal service providers with the opportunity to examine the business models that support and provide mechanisms for the delivery of legal services through the pro bono contributions of individual lawyers. This article examines the challenges and opportunities experienced by the legal services provider community in a large metropolitan area during a period of economic downturn.

I. INTRODUCTION

The provision of legal services to the poor in the United States is a chronic problem that has been documented since the mid-1970s by a series of national and statewide legal needs studies. This research has consistently shown that as much as 80% of that need is unmet.¹ The problem is a serious one because having a lawyer can make a difference in outcomes for poor people in legal proceedings.² Given that there is no constitutional right to counsel for the indigent in civil matters, the seemingly intractable problem is how to respond to a situation in which demand will always outstrip supply. Examination of this problem has consistently been framed in terms of

* Research Professor Emerita, American Bar Foundation.

** Research Professor, American Bar Foundation.

1. BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 152–57 (American Bar Association 1977); Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1787–90 (2001); Deborah L. Rhode, *Equal Justice Under the Law: Connecting Principal to Practice*, 12 *WASH. U. J.L. & POL'Y* 47, 47–48 (2003).

2. Carroll Seron, Greg Van Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court*, 35 *LAW & SOC'Y REV.* 419, 419–34 (2001).

legal need, in other words, in terms of demand. Little attention has been paid to the supply side of the equation, or to the question of what legal services are actually available to this segment of the population. This perspective is critical because, as a practical matter, individuals only have the legal rights of which they are aware and which they can hope to enforce or use. In other words, access to meaningful legal rights for people of limited means may depend heavily on the interests of those who control the supply of legal services.³

Public funding – one possible response to the problem – is simply inadequate to meet the need. Since the 1970s, there has been a trend of decreasing financial support by government, exacerbated by limitations on the public funds available.⁴ The principal source of federal support – through the funding of the Legal Services Corporation (LSC) – is subject to the vagaries of politics of the moment, and this is reflected in the current threat to the LSC budget.⁵ Private resources—private sources of financial support, private service providers, and increasingly the pro bono services of lawyers—have been filling the gap. One commentator has gone so far as to claim that voluntary pro bono has become “the dominant model of delivering free legal services.”⁶

Scott Cummings, in describing the effects of this privatization and what he calls the “institutionalization of pro bono,” notes that legal services are “distributed through an elaborate organizational structure embedded in and cutting across professional associations, law firms, state-sponsored legal service programs, and non-profit public interest groups.”⁷ This ad hoc structure attempts to match demand and supply by promoting collaboration among the various players and by providing connections between those needing legal services and those willing to provide them. However, this privatization and institutionalization of legal services is only partially successful in meeting traditionally identified needs because it comes with a price tag. Indeed, those providing the resources have their own goals and interests

3. See Stephen Daniels and Joanne Martin, “Legal Services for the Poor: Access, Self-Interest, and Pro Bono,” in *ACCESS TO JUSTICE* (Rebecca Sandefur, ed.) 145-166, for a full explanation of a supply side approach.

4. See generally DEBORAH L. RHODE, *ACCESS TO JUSTICE* 105–06; Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 7–33 (2004); Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of the Law*, 67 *FORDHAM L. REV.* 2187, 2188 (1999).

5. E-mail from the ABA to Joanne Martin and Stephen Daniels (Feb. 17, 2011) (on file with authors). The e-mail circulated by the ABA called for participation in local town hall meetings for comment on a proposed budget that would cut LSC funding to 2008 levels, reducing the previous year’s funding by \$70 million. That cut was passed by the House on Feb. 19, 2011. There was a proposal to eliminate all funding, but it was defeated on Feb. 16, 2011.

6. Cummings, *supra* note 4, at 5.

7. *Id.* at 6.

in supporting such services, some of which go beyond the professional responsibility of providing legal services to the poor.

The recent economic downturn introduced both stressors and opportunities into this model for the provision of legal services to the poor. This article builds on our earlier research that mapped the marketplace for the provision of legal services before the economic downturn, drawing from post-downturn interviews with pro bono coordinators, managing partners, executives at legal services provider organizations, and clinicians to examine the impact of the current economic situation on the organizations participating in and committed to the provision of legal services to persons of limited means.⁸

This article reports on the findings of the second phase of a research project investigating the supply side of the delivery of legal services. The first phase mapped the supply side of legal services in one metropolitan area. The second phase examines the effects of the recent economic downturn on the supply side of legal services in that metropolitan area. The article is divided into seven sections. The next one briefly describes our supply side approach and summarizes the findings of the first phase of our research. The following section discusses the stresses placed on the key actors in the delivery of legal services by the downturn. In turn, the next two sections look in more detail at each of those two key actors – law firms and provider entities. Afterward the broader issue of coordination within the legal services community in the wake of the downturn is briefly discussed. We also include a section on law school clinics – an often-overlooked actor. Finally, the conclusion offers some speculations on the lasting effects of the economic downturn.

II. SUPPLY SIDE APPROACH

Taking a unique approach to studying these issues, our research interest has been in mapping the contours of the supply side of legal services in the large metropolitan community of Cook County, Illinois. The key to this approach is exploring how the goals and interests of the actors controlling and distributing the resources shape the nature of the market of legal services to the poor. A 2005 study of legal needs in Illinois found that “[l]ow-income households had legal assistance for only one out of every six (16.4%) legal problems encountered in 2003 [and that] the most common response (65.8%) to a legal problem was to attempt to resolve it without legal assis-

8. Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, AM. BAR FOUND. (Mar. 2009), <http://ssm.com/abstract=1357680>.

tance [even though] [m]any of these problems were complex matters with potentially serious consequences.”⁹

In the first phase of our research, we drew from documentary research on the fifty-two non-profit, non-government legal service providers in Cook County and on the pro bono activities of the twenty-five largest law firms in the county, in-depth interviews (one to one and one-half hours each) with thirty-one lawyers involved in the local market for legal services and a two and one-half hour focus group involving ten lawyers. To get a cross-section of lawyers who play a major role in legal services, we targeted lawyers who led non-profit legal service providers, managing partners, and pro-bono coordinators in large law firms and those working in law school clinics.

Among the basic findings of the first phase of our research is that large law firms are perhaps the most important private source of legal services for the poor in terms of both money and people—hence, a major factor in the supply side of the equation.¹⁰ Although the largest firms represent only a small segment of the Chicago legal community, their influence on the delivery and the nature of legal services is quite substantial.¹¹ Members of these firms hold leadership positions in local professional organizations and serve on the boards of private funding agencies and the organizations actually providing legal services.¹² The largest firms are also a major source of financial resources for service providers.¹³ Monetary contributions for a single firm can be as high as \$1 million per year, and combined personnel and monetary contributions can total millions of dollars per year.¹⁴ In a second wave of research, we returned to some of these same informants, as well as new sources to evaluate the effects of the recent economic downturn on the community of the entities and of the individuals who are engaged in the provision of legal services to the poor. The group of interviewees once again included pro bono coordinators, managing partners, executives at non-profit organizations, and law school clinicians. As the economy began to recover, we went back into the field to investigate whether anything had truly changed in the marketplace—whether the opportunities that presented themselves for expanding the numbers of lawyers available to provide legal services to the underserved population and for communication and collaboration among the providers had any staying power.

9. CHI. BAR ASS'N, ET AL., THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 1–2 (Feb. 2005).

10. Transcripts of Interviews conducted by Joanne Martin and Stephen Daniels (2005–2009) (on file with authors) [hereinafter referred to as “Transcripts”]. See generally *supra* note 3.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

III. THE DOWNTURN'S MIXED EFFECTS

A. The Law Firms

While one might think the economic downturn would have a substantial negative effect on the delivery of legal services, the actual picture is different—a combination of stresses and opportunities. For instance, the ABA's Standing Committee on Pro Bono and Public Service, drawing upon a national survey of 1100 lawyers conducted in 2008, recently reported that 73% of the respondents provided free legal services to persons of limited means or to organizations that address the needs of persons of limited means.¹⁵ This was an increase compared to the results of a similarly conducted survey in 2004 which reported that 66% of the respondents to that survey performed such pro bono services.¹⁶ While large firms are, of course, not the only sources of pro bono legal services, they too appear to have experienced an increase in the pro bono contributions of their lawyers during this period.¹⁷

One pro bono coordinator suggested that 2008 saw increased pro bono activity in large firms which he attributed in part to increased awareness and commitment among the younger lawyers as a result of the expansion of clinics and extern experiences in law school programs.¹⁸ Another coordinator suggested that some lawyers, with the encouragement of their firm, substituted pro bono hours for declining billable hours as the legal market softened.¹⁹ “It got so bad at some firms that the pro bono coordinators were sort of telling people to slow down—I say that from a management point of view.”²⁰ He also indicated that he expected that the large firms' 2008 pro bono hours, when finally calculated, would increase by as much as 15%.²¹ Another coordinator agreed, commenting that there were “large numbers of associates in practice areas who were not that busy—through no fault of their own. They were uniformly and nationally encouraged to do pro bono work.”²² As the economic condition worsened over the course of the year, the effects on the legal market cut more deeply.

The legal press was full of reports of the turmoil within the legal market in the wake of the downturn. Some firms completely disappeared from

15. ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 1 (Feb. 2009).

16. *Id.* at 3.

17. *Id.* at 2.

18. Transcripts, *supra* note 10.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

the landscape. Others implemented pay cuts, changed their partnership structures, rescinded job offers to second-year law students, and engaged in substantial layoffs of lawyers and support staff.²³ These layoffs escalated in the first two months of 2009. An article in the *Chicago Daily Law Bulletin* likened the rise of large law firms to an economic “bubble” and declared that the “[l]aw firm bubble was bound to fizzle.”²⁴

The effects of the downturn played out at a time when some academic commentators were questioning the viability of the large law firm business model.²⁵ The causes for were identified as the pay wars that led top law firms to pay virtually untrained starting associates \$165,000, rapidly increasing rates charged to clients, high associate-to-partner ratios, high associate turnover, and the narrowing mix of business.²⁶ With regard to client perceptions of the value of having young associates on their account, one pro bono coordinator noted that “firms are getting a lot of pressure from their clients on how they bill out, particularly younger associates . . . so it’s no surprise a lot of the first years aren’t as busy because clients don’t want to pay for them.”²⁷

In addition to layoffs, most often of second, third, and fourth-year associates, law firms announced that they were deferring incoming first-year associates for between six months to two years.²⁸ The law firms, however, had an interest in ultimately being able to reclaim these deferred young lawyers-to-be for several reasons, including the desire not to lose an entire class or two of associates and to avoid the experiential hole that occurred after the dotcom bust of the 1990s.²⁹ They were concerned with their reputations and

23. See, e.g., Martha Neil, *Katten Lays Off 69, Cuts Pay of Associates Low on Billables by 20%*, ABA JOURNAL LAW NEWS NOW (Mar. 19, 2009, 2:06 PM), http://www.abajournal.com/news/article/katten_lays_off_69_announces_pay_cut_for_associates_low_on_billables/; Martha Neil, *January’s Carnage: 1,487 Law Layoffs*, ABA JOURNAL LAW NEWS NOW (Jan. 29, 2009, 2:15 PM), http://www.abajournal.com/news/article/unhappy_new_year_for_many_in_biglaw_hundreds_of_lawyers_lose_jobs/; Martha Neil, *Latest Layoffs: Skadden Staff Attorneys & 65 Akin Gump Staff, Among Others*, ABA JOURNAL LAW NEWS NOW (Jan. 20, 2009, 4:17 PM), http://www.abajournal.com/news/article/latest_layoffs_skadden_staff_attorneys_65_akin_gump_staff_among_others/; Martha Neil, *DLA Piper Asks 275 Non-Equity Partners to Ante Up, Goes to 1-Tier Structure*, ABA JOURNAL LAW NEWS NOW (Nov. 19, 2008, 5:15 PM), http://www.abajournal.com/news/article/dla_piper_which_asks_275_nonequity_partners_to_ante_up_goes_to_1_tier_/.

24. Jerry Crimmins, *Law Firm Bubble Was Bound to Fizzle*, CHI. DAILY BULLETIN (Mar. 25, 2009), <http://lawnewschicago.wordpress.com/2009/04/25law-firm-bubble-was-bound-to-fizzle-experts-say/>.

25. See John P. Heinz, *When Law Firms Fail*, 43 SUFFOLK U. L. REV. 67, 75 (2009); Jeff Lipshaw, *Henderson on Big Firm Woes*, LEGAL PROFESSION BLOG (May 4, 2009), http://lawprofessors.typepad.com/legal_profession/2009/05/henderson-on-big-firm-woes.html.

26. See Lipshaw, *supra* note 25; Heinz, *supra* note 25.

27. Transcripts, *supra* note 10.

28. *Id.*

29. *Id.*

ability to continue to compete and to hire the best and the brightest in the marketplace in the future.³⁰

Another class of law firm employees potentially at risk from the downturn and its effects on the law firm business model was that of the pro bono coordinators. There was concern in this community that if law firms constrained their investment in pro bono and reduced their incoming classes of associates, that the trend toward the creation of pro bono coordinator positions would stall and that some existing positions would be eliminated as the need for such work as a training mechanism diminished.³¹

B. The Providers

Non-profit providers, generally small organizations with few lawyers on staff, often lack the unrestricted financial reserves to regularly contribute to their annual operating budgets. Their financial situations are generally precarious—they rely on the fundraising activities of one year to fund the next. The traditional financial dilemmas faced by non-profits were exacerbated by the economic downturn. Direct dollars received from members of the profession, IOLTA funds, and from law firms were expected to decline. The Lawyers Trust Fund of Illinois, which uses IOLTA funds to make grants to legal aid agencies, saw its interest income slip from more than \$17 million in fiscal year 2008 to a projected \$5.2 million in fiscal year 2009.³² Although none of the providers we spoke to indicated that they had seen a decline in direct dollars from law firms and from individual lawyers, it was expected that, at best, those levels of support will be static from the prior year.³³

In addition, other problems in the financial world enhanced the uncertainty. For instance, the widely publicized Madoff affair touched even the legal services world. For example, the JEHT Foundation, a principal funder of the National Immigrant Justice Center in Chicago providing a \$720,000 grant for a six-year project to help detained immigrants, went under because it had invested its funds with Madoff.³⁴ With the looming possibility of diminished dollars, some of the provider organizations laid off lawyers from their already small staffs. This was done reluctantly because of the likelihood of an increasing demand for their services, as the number of individuals with legal matters they traditionally dealt with began to increase, but also

30. *Id.*

31. *Id.*

32. Stephanie Potter, *Legal Aid Groups Hit by Poor Economy*, CHI. DAILY BULLETIN, vol. 155, no. 81 (Apr. 25, 2009), at 16. The NIJC was not the only non-profit affected by the demise of the JEHT Foundation. The Innocence Project was another one of the “victims.” *Id.*

33. Transcripts, *supra* note 10.

34. Stephanie Potter, *supra* note 32, at 1.

as the demand for services in other areas such as mortgage foreclosure and bankruptcy grew.³⁵

IV. THE EXPECTATIONS OF LARGE FIRMS

To understand the effects of the downturn on legal services we need to understand why large law firms invest in pro bono. ABA Model Rule 6.1 speaks to the lawyer's responsibility to do pro bono work, and firms are encouraged to facilitate the lawyers' responsibility to address the needs of the community through the delivery of legal services to persons of limited means.³⁶ In reality, it is about the self-interest of the law firms—it is about the bottom line. Law firms look at their investment in pro bono very pragmatically. Firm support of pro bono work provides the firm with opportunities for associate training and for reputation enhancement, which can aid in client and lawyer acquisition and retention. In the recent past, these goals have led to the institutionalization of pro bono within large firms, often through the hiring of pro bono coordinators, frequently lawyers, who were not expected to generate billable hours.³⁷ Instead, they act as matchmakers-in-chief forging relationships with provider organizations to develop opportunities that suit the needs of the firm and its lawyers.³⁸

Law firm support for legal service provider organizations comes in the form of direct dollars and through the legal talent of its lawyers. It is this support that gives a firm a significant amount of leverage with the legal service provider community. It also defines the organization and the types of matters to which these resources will be directed. However, those matters may not necessarily reflect the needs of the poor identified in the legal needs studies conducted over the years. For example, as one pro bono coordinator noted:

There are still huge areas in which there is a great disconnect between the legal work that the poor need to have done and the work that law firm lawyers want to do. For example, family law stuff . . . hardly anybody in big firms does family law. I once had the experience of having a litigation department chairman tell me that he affirmatively did not want his lawyers doing divorce work, because one of the functions of pro bono work in the firm is training, and he felt that practicing in divorce court was negative training and it taught his lawyers bad habits.³⁹

35. Transcripts, *supra* note 10.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

Another coordinator noted that the lawyers in his firm did a lot of Seventh Circuit cases, most of them habeas petitions with very little chance of success.⁴⁰ Adding that while no one would place these matters at the highest legal needs priority, he said that the firm's lawyers liked doing them, and it was a service to the court.⁴¹

What the pro bono coordinator is looking for in matching firm lawyers with pro bono opportunities offered by legal service provider organizations is work that is interesting, innovative, and combines pro bono with training. Because training is particularly important, desired pro bono experience for the young attorney will include good mentoring by competent lawyers, the opportunity for skills development, and court experience. If the experiences of the attorneys who want to participate in pro bono activities do not live up to their expectations, the relationship of the firm with the legal service organization may be discontinued.⁴² One pro bono coordinator noted just such a situation:

I had probably about a dozen people lined up to go down to [a non-profit] here in Chicago and take a day and do the attorney of the day program . . . but they dropped the ball on us. They—after training—they never saw fit to find opportunities or to find a day despite, you know, me having the people and badgering them about doing that. So, you know, from my standpoint, that's my worst nightmare is to get people trained and ready to go about an opportunity they're excited about, and not have the agency meet our needs So the reality is, then, in the business model, we choose not to do business with them.⁴³

In some instances, legal service organizations, recognizing that there is an exchange of support for meeting expectations, will alter their traditional missions in order to keep the proffered resources. While service providers have their own priorities, like any organization, their top priority is keeping the door open. Doing so may keep them away to some degree from what they see as their primary mission. For example, when one service provider that preferred to focus its resources on representing individuals with a range of day-to-day legal problems was faced with a request to take on a special funded project involving children, it did so reluctantly.⁴⁴ The project grew because law firms and funders saw it as attractive and consistent with their goals. While this takes the agency away from its own priorities to some degree, the funds cover much of its overhead and staff costs, thereby helping the agency in pursuing its own goals.

40. *Id.*

41. Transcripts, *supra* note 10.

42. *Id.*

43. *Id.*

44. *Id.*

Some providers were able to take advantage of the need of law firms for particular types of cases in a more proactive way. For instance, in New York, in particular, they were in a position to create pay-to-play type situations, offering the “best” cases to the firms that provided the support for those cases. As one Chicago pro bono coordinator noted, this is a delicate strategy:

We regularly give money and have established working relationships with many of the groups in the Chicago area. We depend upon them to evaluate cases, vet the cases for you, and help them with those. If you’ve got a good relationship, you are entitled to get something for that. [With regard to] pay to play . . . in this context, I was willing to bribe, but I would be damned if I was going to be extorted. So if a group came to us, introduced themselves and said we can give you great work, but in order to get that great work you have to be a member, and the membership fee is X, and we have no relationship with them, no thank you. If, on the other hand, you start working with a group, you establish a relationship, the relationship continually grows and the members of your firm like that group and they take cases from them, they get involved in their board, then that’s part and parcel of how you do business.⁴⁵

In the face of the economic downturn, the law firms turned to the providers with whom they had relationships, asking them to take their furloughed associates and, in essence, to provide them with a place to bank their deferred young lawyers. It was their position that they were providing legal service organizations with “an embarrassment of riches.”⁴⁶ They were providing bright, young lawyers with impeccable academic credentials to do public service work. In many instances, they initially paid a stipend or a salary to support these lawyers. From their point of view, the legal service organizations should have been delighted to have these resources.⁴⁷ As we will see, the view of the legal services organizations is rather different. One provider noted sourly, “the firms, it seems to me, have gone beyond, ‘Yeah, I’ve got some people sitting around who aren’t as busy as they ought to be; let’s let them do pro bono work.’ And now they’re saying, ‘If they’re not busy, they’re out of here.’”⁴⁸

45. *Id.*

46. *Id.*

47. Transcripts, *supra* note 10.

48. *Id.*

IV. THE LIMITATIONS OF LEGAL SERVICES ORGANIZATIONS

A. Staffing and Related Issues

With the large firm layoffs and deferrals, the provider entities were offered several streams of potential employees. One was the traditional first-year summer associate while others were young lawyers who had planned to enter firms in the fall but were deferred. In addition, there were those who had been or were going to be laid off and who did, or did not, have some kind of stipend package. Finally, there were lawyers who worked at firms but had excess time and wished to do public service work. Add to this mix the newly graduated lawyers who were unable to find other employment. Finally, there were those who wanted to pursue public service work as a career. Legal service providers were indeed faced with an embarrassment of riches. As an example, the Coordinated Advice Referral Program for Legal Services (CARPLS), an organization in Chicago that basically provides a frontline triage service by providing limited advice over the telephone to individuals who call with legal problems, put out a request for forty volunteers to work for ten to fifteen hours. It received one hundred applications.⁴⁹ Another provider had an open paralegal position for one of its projects and in less than a week after the position was advertised, it had eighty applications, many of them from attorneys.⁵⁰

Legal services organizations operate necessarily in a world of limitations. Most of the legal service organizations in Chicago have small permanent legal staffs – ten or fewer lawyers. The amount of their physical office space mirrors the size of the permanent staff and is not generally set up to house the lawyers who provide volunteer services. Acquiring additional space for the banked or deferred associates offered by the large firms is simply not feasible – and this is just one of a host of practical limitations that come into play. As one provider noted, “they want to be here and they want to be around; they want to be in the meetings; they want a place to hang their hat. The space constraint is a problem.”⁵¹

Taking law firm cast-offs or deferred lawyers means an investment not only in terms of space and the other necessities of the job, it also involves an investment in training and supervision for a lawyer that would stay with the legal service organization for a limited period of time. Adequately training and supervising these “free” people places an additional burden on small, busy permanent staffs. Handling cases competently requires vetting the cases before assigning them only to lawyers equipped to handle them and

49. *Id.*

50. *Id.*

51. *Id.*

making sure that the permanent legal staff is available to catch the ball if, for example, the volunteer attorney is unable to make a court date or the like. These responsibilities place substantial demands on the permanent legal staff even in the best of times.

Taking on firm cast-offs or deferred lawyers also poses a serious threat to the working environment and the morale of the provider organization's staff. While many of these lawyers may be nominally free in terms of some form of salary and benefits, that "free" help can come with a very real cost. Even at a reduced level, the salary and benefits are likely to be higher than those for experienced permanent staff lawyers. The leaders of provider organizations worried that the morale of career legal service lawyers might be eroded by having them train and supervise relatively young and inexperienced lawyers who are making far more than they are.

In addition, there was the problem of the disgruntled lawyer – the lawyer who did not want to be working at the organization at all. This was especially the case with lawyers who had functionally laid off but would receive a stipend from their firm if they work for a legal service provider or other non-profit organization. One provider articulated this concern as follows:

The first call I got was from a firm, a partner at a firm, asking if they fired an associate, but gave that associate a stipend which the associate could only collect by coming to work for me or for another legal aid organization, would I be interested. And I don't know. That gets me a disgruntled person who has no interest in being here except to collect more dollars than no dollars.⁵²

That disgruntled person may not devote the necessary time and attention to the case assigned to him or her.

A deeper concern in taking law firm cast offs or deferrals involved the opportunity costs in terms of human capital. Taking these free lawyers meant there would be no openings for the young lawyer who wants to do public service work as a career. As one provider executive noted:

There are people who go to law school who do this, and they want to do public interest law for their career. They don't want to be 'Big Law.' They want to be public interest law. If I give this job to some other disappointed, you know, 'Big Law' kid who got laid off, I don't have a job for the one who wants to do this for a living—and that's not fair. And that's a big pushback, particularly since the other guy's going to leave, I mean immediately, if they get something better.⁵³

52. *Id.*

53. Transcripts, *supra* note 10.

Whether the cast offs or deferrals would actually want to stay and make a career of legal service work remained an open question, but many provider organizations were skeptical.

B. Ongoing Relationships

Under “normal” circumstances, providers must tend to a number of issues with respect to attracting and utilizing the volunteer services of those willing to provide pro bono services as well as attracting monetary resources. Existing relationships with individual volunteer lawyers may be eroded with a sudden influx of free lawyers, and acceding to requests of one firm to take free lawyers can undermine the relationships with other firms. In both situations, the existing relationships may have been in place for some time and maintaining them is crucial for the providers’ survival.

Individual volunteer lawyers are important for providers because they will be the ones actually providing the needed services to many of the provider’s clientele. One might think that the need for legal services is so great that existing relationships with volunteer lawyers would not be threatened. The providers’ organizational limitations are the problem – particularly their small permanent staffs. Those staff lawyers are the ones with the experience and expertise to vet incoming cases, assign them to the appropriate volunteer lawyer, and provide the needed backup. They are the funnel through which all work passes and they can only handle so much. If they must spend additional, substantial time and effort on the free lawyers, it is the existing volunteers who are likely to be assigned fewer cases and/or not receive the expected backup. Ignoring volunteers or not providing a good experience in the assignment and handling of a case, in the view of the providers, breaks the connection with that individual. And, it could also damage a connection with that lawyer’s firm.

Firms themselves may also pose a problem because a provider cannot accommodate everyone. An existing relationship with a given firm may bring with it certain expectations on the firm’s part. As one provider commented, the law firms come to them and say, “We give you X thousands of dollars, wouldn’t you really like to have one of our people?”⁵⁴ In addition to the other challenges free lawyers pose, such requests present a serious challenge of their own because the provider organizations cannot please everyone. Because large firms are a major source of monetary support, maintaining a good relationship with a number of firms is critical to the providers’ financial well being.

The predicament faced by provider organizations is perhaps best summarized in the words of one organization executive:

54. *Id.*

We depend on raising money every year; we have to raise it or we are in trouble. And most of what we raise, one way or another, does come from the legal community. It comes from partners at these law firms, particularly those who are on our board, but it's also from the law firms. And the reason law firms give us money—because they're hit up by everybody, they're hit up by every legal service organization—the reason they give it to us is because we have a relationship with them. We have a relationship with them because through their pro bono partner or pro bono coordinator, or whoever handles it at that firm, we provide really good, interesting legal matters for their pro bono attorneys to work on . . . Most of our work is transactional, . . . and when I go to them and say 'well we sent you 30 fewer [matters] this year than we did last year,' the relationship is that much more tenuous; they are less grateful, and it hurts us financially. Every case I don't send to a big law firm is one less attachment, one less string, one less favor I've done for them.⁵⁵

C. Conflicts of Interest

Conflicts of interest have always a problem for legal service providers that rely on volunteer lawyers from law firms or monetary support from law firms. Firms regularly vet pro bono activities for conflicts of interest just as they would for any new business coming into the firm. As we learned in the first phase of our research, the bigger problem is likely to be general positional or business conflicts. The firms do want to appear in a negative light to the industries or business sectors in which they frequently work or want to work. This means that entire broad areas of cases are out of the picture.⁵⁶

The potential influx of free attorneys from the large firms exacerbated this problem with the changes wrought by the economic situation. Many of the matters handled by non-profit services increased in demand volume because of the poor economic situation, including mortgage foreclosures, bankruptcy, employment disputes, and other consumer issues. These are precisely the types of cases that young lawyers temporarily deferred from positions in large firms would not be able to work on because of either direct or positional conflicts concerns. As one non-profit executive commented:

Every case they pick up [at the non-profit] has to be cleared for conflicts. And whole big areas in our practice, at this moment in time, are either clearly conflicted out for the firms—are issue conflicted out. I mean, if you want to do mortgage foreclosure defense, good luck trying to find a big firm in town that wants to get within a mile of that kind of work.⁵⁷

55. *Id.*

56. See Daniels and Martin, *supra* note 3 at 162-63.

57. Transcripts, *supra* note 10.

Interestingly, matters that might involve systemic reform can also run into conflicts concerns. As one pro bono coordinator said, “we don’t go courting opportunities that are going to lead to changing the law in any way, shape or form.”⁵⁸ The concern is that successfully pursuing a change in the law, such as a change that could put greater restrictions on employers, would put the law firm in the position of explaining to their clients a decision they created.

These conflicts are not insurmountable; with collaboration and creativity, they can be resolved. For example, one pro bono coordinator noted that in New York, conflicts with regard to mortgage foreclosure matters had been resolved through the intervention of a corporate client.⁵⁹ One of the large banks initiated a meeting with firms in the area to orchestrate a discussion of the way in which these cases could be handled for pro bono clients.⁶⁰ While it was certainly in the self interest of the bank to have these matters handled in an organized and consistent way, the intervention by the bank also inured to the benefit of the individuals facing these traumatic matters.

V. COMMUNITY COORDINATION

To this point our focus has been at the level of service providers, law firms, and lawyers. The economic downturn is also having a broader effect on the supply side of legal services. It has brought renewed attention to the coordination of efforts in the ad hoc world of legal services. The lack of coordination means inefficiencies in the use of very scarce resources. The severity and swiftness with which the downturn affected the legal community provoked an equally swift response from the organized bar and legal professional organizations and this included the provision of legal services. An example of a “national” response can be found in the efforts of the Association of Pro Bono Counsel (APBCo) to promote collaborative efforts between the provider community and law firms.⁶¹ On a local level it can be found in the activities of the Chicago Bar Foundation (CBF) to provide the local legal community with assistance in developing collaborative efforts to address the issues and concerns of the stakeholders to maximize the benefits that are available in the marketplace.⁶² The CBF is the charitable arm of the Chicago Bar Association and it

mobilizes Chicago’s legal community to use their time, money and influence so that low-income and disadvantaged Chicagoans can access the

58. *Id.*

59. *Id.*

60. *Id.*

61. *See infra* Part V.A.

62. *See infra* Part V.B.

legal help they need. Through grants, advocacy, pro bono and partnerships, the CBF takes a system-wide approach to improving access to justice and focuses on objectives we can best achieve by coming together as a community.⁶³

The CBF has made a significant commitment over a long period of time to bring greater coordination and efficiency to the provision of legal services in Cook County.

A. Association of Pro Bono Counsel

In 2009, the APBCo -- a relatively new organization with more than 115 members including about one-half of the AmLaw 200 firms who manage law firm pro bono practices on a full or near full time basis -- developed and distributed a detailed document entitled "Considerations for the Placement of Law Firm Attorneys into Public Interest Organizations."⁶⁴ This comprehensive and thoughtful document identifies and comments upon issues related to the placement of law firm attorneys (or law students intending to be law firm attorneys) with public interest organizations.⁶⁵ It covers employment issues such as who is the employer, and who has the right to hire, discipline, and terminate the placed attorneys; issues related to the integration of placed attorneys into public service organizations; and establishes goals for the placed attorneys.⁶⁶ It also discusses how the status of placed attorneys might impact placement in a public service organization from a balanced perspective.⁶⁷ The following provision serves as an example:

Laid Off Attorney: Depending on the seniority and type of experience, a Placed Attorney who has been laid off from a law firm may be valuable to a public interest organization, particularly if the Placed Attorney needs little supervision or can supervise others. On the other hand, the Placed Attorney may be actively searching for other employment, and lack any substantial commitment to the public interest organization. And, as with deferred associates, laid off attorneys may be of less value to a public interest organization if they are not admitted to the relevant bar.⁶⁸

63. *Mission, Vision, and Values*, THE CHICAGO BAR FOUNDATION (last visited May 29, 2011), <http://www.chicagobarfoundation.org/what-we-do/mission-and-strategic-direction>.

64. See generally Association of Pro Bono Counsel, *Considerations for the Placement of Law Firm Attorneys into Public Interest Organizations*, AM. BAR ASS'N (Mar. 25, 2009), http://apps.americanbar.org/legalservices/probono/downturn/docs/apbco_considerations.pdf.

65. *Id.* at 1.

66. *Id.* at 2–3.

67. *Id.*

68. *Id.* at 4.

The APBCo document also identifies a national clearinghouse hosted by PSLawnet.org, which allows public interest organizations to post descriptions of job openings for placed attorneys in order to promote employment opportunities in the public sector.⁶⁹ Access to this site is facilitated by the National Association of Law Placement.⁷⁰ The impact of such national efforts remains uncertain because of the decentralized and local nature of the supply side of the provision of legal services. Local efforts may have the potential for being more effective.

B. Chicago Bar Foundation

In Cook County, the CBF has taken a very active role working with the Public Interest Law Initiative (PILI), law firms, and legal service provider organizations “to gather information and develop a system to efficiently and effectively maximize the use of placed attorneys.”⁷¹ In response to the effects of the economic downturn, the CBF brought the stakeholders together in a series of meetings, one goal being to quantify the placement opportunities that existed across the landscape of legal service providers.⁷² In addition to acting as matchmaker and bringing the stakeholders together for meetings and discussions, the CBF and PILI developed best practices for utilization of the excess capacity of law firms by legal aid and public service organizations.⁷³ These best practices attempt to articulate and to facilitate the connections between supply and demand while recognizing the goals and constraints of the parties concerned.⁷⁴ They suggest that law firms should be aware of the capacity limitations and the goals of legal service organizations, and that the firms should also provide financial and other support to accompany the “relocation” of placed attorneys.⁷⁵ In turn, legal aid organizations should be sensitive to the goals and the needs of law firms and provide placed attorneys with substantive legal work, meaningful training and supervision, and constructive feedback.⁷⁶

The practicality of some of the suggestions coming from these discussions was questioned by the legal service entities. As one executive said:

69. See *id.* at 10–14.

70. *Id.* at 10.

71. Chi. Bar Found. & Pub. Interest Law Initiative, *Extended Pro Bono Placement in Chicago: Background and Best Practices*, at 2, PUB.INTEREST LAW INITIATIVE (Mar. 2009), <http://www.pili-law.org/documents/ExtendedVolunteerPlacements-BackgroundandBestPractices.pdf>.

72. See *id.* at 1–2.

73. *Id.* at 2–4.

74. *Id.*

75. *Id.* at 2–3.

76. *Id.* at 3–4.

The Bar Foundation wants to be a broker in that, but the legal aid community is pretty ignorant about how firms operate [They suggest that] the firms could just get together and rent space for these castoff associates—have this sort of motley law firm that would be servicing six to eight not-for-profits. Not in a million years will that happen. Another idea somebody floated was, ‘Well, couldn’t the attorneys stay—work for us, but stay in their own offices?’ Well, ever see the movie ‘Dead Man Walking?’ Do you want to be the lawyer sitting next to somebody who’s making, you know, twice as much money as you are and whose job is secure for now?⁷⁷

Providers also questioned the projected availability of “new” positions across the various legal service organizations across the community.⁷⁸ Most of those with whom we spoke suggested that their organizations might be in a position to take one or two lawyers from any source.⁷⁹

VI. LAW SCHOOL CLINICS

In the first phase of our research, we thought that it would be inappropriate to map the supply of the delivery of legal services without including the clinics in the six law schools that operate in Chicago and Cook County. We interviewed clinical law professors at all of the law schools in Chicago and much of the discussion involved their perceptions of the role of the law school clinic—the predominant role being to provide training to law students, rather than to meet the needs of the underserved community.⁸⁰ Meeting the needs of the underserved is not ignored, but it is secondary to the training of students.

During our interviews with these clinicians, many noted that they had no interest in or ability to incorporate the pro bono services of practicing lawyers—again, their mission is to train law students, not to deploy limited supervisory capability to overseeing the efforts of lawyers.⁸¹ However, subsequent interviews showed that the law school clinics were not untouched by the churning experienced in the legal market during the economic downturn. Their phones rang with inquiries from alumni looking for places for their displaced associates, alumni who had themselves been displaced, and also from third years who had been deferred or who had not found positions.⁸² The question for these clinicians was whether they could, or should,

77. Transcripts, *supra* note 10.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

change their current organizational model to respond in any way to these pleas from their alumni.

On the one hand, the purpose of these clinics is to train students⁸³ and their case selection methods require that they turn away cases that are not best suited to their programs—cases that are too complicated or that would continue beyond a time frame suitable for students who are with them for only a semester and cases that involve clients that would be difficult for their students to work with.⁸⁴ On the other hand, the clinicians recognized that there was a need across the community for their services. But they too are subject to some of the same limitations as the private legal service providers. Law school clinics are subject to resource, space, and supervisory constraints, as well as the same conflicts issues faced by non-profit legal service provider organizations.⁸⁵

In determining whether or not to accept these offers for assistance from recent third year graduates and alumni, the clinics were driven by their primary commitment to students. Noting the various competing considerations, a clinical law professor commented:

The biggest disincentive for taking third, fourth, and fifth-year associates from a law firm is that means we can't take the third year [law student]. We can only take a limited number of people. And if we take two experienced lawyers, that means we can't take these two brand new people. And we don't like that, because we want to be able to say, 'All of our graduates had jobs by the time they graduated from law school, or you know, within a few months thereafter' So, I think we have a bias in favor of helping out our third years and not helping out others so much.⁸⁶

If someone wants the clinics to do more, then the clinics are likely to respond in very pragmatic terms. As that clinician quoted above noted, "we're like the law firms—we're motivated by self-interest. I mean, where's the money?"⁸⁷

VII. CONCLUSION

The economic downturn presented potential opportunities for the delivery mechanism for legal services, but the system itself has built-in constraints that affected its ability to take full advantage of those opportunities. Based upon information from our informants and from other sources, we have the beginnings of an assessment of the residual effects of the opportu-

83. Transcripts, *supra* note 10.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

nities and the stresses experienced during this period. The investment markets have returned to their pre-decline levels, so some of the traditional funding sources have recovered. However, as noted earlier, because of the political factors imbedded in the federal funding of the LSC, entities relying on those funds are not in an improved situation. Law firms appear to have used the opportunities presented by the economic downturn to right-size themselves by dismissing underperforming associates and by putting the skids on the rising salaries for incoming associates. While some are still using the furlough mechanism to defer incoming associate classes, they are doing so without the stipends offered in the first wave of reaction to the economic downturn. Non-profits report that they have not seen a significant decrease in the support in personnel or in funds provided by law firms.

The non-profits, however, while having taken advantage of a broader personnel marketplace, did so modestly, not increasing their staff sizes. The communication networks between non-profit providers, law firms, and bar associations benefited from the effects of the situation, and these networks appear to be ongoing. In 2010, the ABA's Second Annual Pro Bono Celebration during which hundreds of law firms, bar associations, and other legal groups across the country recognized work done on behalf of the poor and the underserved, doubled its number of participating programs from the previous year, suggesting a revitalization of such efforts.

In short, while the economic downturn created the potential for significant changes within the delivery mechanism for legal services, the limitations within that mechanism and the short-lived nature of the system shock appear to have thwarted any lasting effects. Were a legal needs study to be conducted today, it is highly likely that the results would be essentially the same as those from Barbara Curran's study conducted in the 1970s. Anecdotal evidence suggests that courts will continue to see increases in pro se appearances by citizens.

While the responsibility for the delivery of legal services to the poor has shifted significantly to the private bar and away from the federal and state supported entities, and the nation's lawyers continue to contribute significant funding and person hours, the problem as measured by demand has not diminished. Perhaps a reexamination of the situation is in order, and rather than thinking of ways to encourage the representation of individuals, it is time to promote systematic changes to the way certain matters are handled by the civil legal system. The answer is not just to turn to technology-based solutions such as making information kiosks available to the public. Such solutions do not address the problems faced by members of the public in dealing with a very formal and ritualized system to address their legal issues. Rather, it is time, perhaps, to remove some matters to an administrative system that will recognize the repetitive nature of the legal issues that are regularly faced by the economically disadvantaged. Given that individuals have only those legal rights of which they are aware and which they can

hope to enforce or use, it would seem that more creativity is required to effect significant change in the marketplace for the delivery of legal services.

