The Unmet Legal Needs of America’s Small Business Community

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I. Introduction

That the legal profession faces fundamental problems is not a new observation. Scholars and professionals voice concerns that a huge portion of existing legal need goes unsated while recent graduates continue to suffer through an unforgiving job market. An odd problem: too much demand, not enough supply. This mismatch speaks to issues beyond a particularly poorly performing economy, and one of those issues is the legal market’s untapped potential.

This paper suggests some of that potential could be fulfilled by attacking a persistent need for low-cost transactional legal services. These services would fill the void between limited free services offered by various law school clinics, pro bono organizations, and the occasional legal services non-profit at one end and the notoriously expensive legal services offered by many private practices at the other. Indeed, in recent years the legal market has begun to shift away from the more traditional model of full service legal firms in favor of cheaper alternatives including virtual legal services or quasi-legal document preparation. Whatever the strength of that trend, this paper argues both that more accessible legal services can be used to fill a need for low-cost transactional legal services and that the dearth of research in this particular area makes it an ideal candidate for further exploration.

Not only could such services address a market need, but also serve social justice ends. Although the focus here is small businesses, other entity forms like non-profits and cooperatives fall in this underserved space. While traditionally non-profits and legal services organizations have filled the legal role in community development initiatives, there is no reason why mission-driven, for-profit, or low-profit law providers could not play a part. All three are an important part of community empowerment.

II. The Need for Small, Community-Based Businesses

Small businesses are commonly extolled as the engines of American growth. Over the first decade of the new millennium, small businesses accounted for an outsized 99.7 percent of total employer firms, 60-plus percent of America’s new private-sector jobs, and almost 42 percent of private payrolls. When new enterprises are born from opportunity, economic development follows.

Any success entrepreneurs enjoy in the aggregate, however, belies the often harsh realities associated with starting a new business. Consistently, only about half of all small businesses survive their first five years; only a third survive a decade. The potential for long-lasting positive impact, coupled with the inherently vulnerable nature of small business development, have made small businesses the target of community economic development (CED) efforts across the country. Support for small businesses is an essential element of any effort to build opportunities in low- and middle-income neighborhoods.

Equally importantly, small businesses present an important social justice tool, especially for historically marginalized women and minority owners. This country’s historic racial wealth gap—in recent years white families, on average, enjoy a net worth over twenty times greater than black families—extends to business ownership for both of these groups. In 2007, 14 percent of white families owned equity in a business compared to only seven percent of black families. Additionally, many minority business owners lack necessary access to preferable credit lines, and often resort to alternative means like their personal credit cards to finance expansion. Without access to affordable financing most businesses cannot afford to expand. Accordingly, over 90 percent of black and 85 percent of Latino businesses remain self-employment or micro-enterprises, compared to about three-quarters of white businesses.

Although barriers continue to stunt the growth of women- and minority-owned businesses, theirs is not a wholly depressed narrative. At the end of the last century, between 1982 and 1997, minority businesses doubled their share of all firms and increased employment and receipts. Development of local businesses presents an opportunity for low-income communities to build wealth in ways which circumvents the capital-intensive formal education required for many jobs. Support for small businesses, as a means to generate sustainable income and to encourage participation by women and minorities, is an often neglected element of CED.
III. The Gap in Service Between Free Legal Services and Full-Cost Law Firms

A full retelling of the growth of CED across the country, which began in the late 1960s, is best left to other sources. Briefly stated, CED attempts to "increase[e] employment and income for community residents . . . [through] the creation of businesses and other institutions, like non-profit organizations and tenant owned housing, [to] provide focal points for further organization and influence. By creating durable institutions tied to communities . . . the opportunity will also exist to enhance the economic and political well-being of the community as a whole." Generally, the CED model focuses on building self-sufficiency as a way to empower local populations. This lofty goal, driven largely by non-profit organizations which disseminate human and economic capital towards community-building, requires access to legal services beyond what the traditional market can offer.

At the deep end of the legal pool, market rate billable hours price out the majority of local businesses and non-profit organizations. For example, the Laffey Matrix, a schedule used to determine attorney’s fees adopted in some form by many jurisdictions throughout the country, sets a baseline fee of $250 per hour for attorneys with between one and three years of experience. That hourly rate increases in step with an attorney’s experience, eventually doubling to over $500 per hour for the 20-year veteran. Even these fees offer only a baseline, as the most expensive private attorneys now charge over $1,000 per hour. With legal fees that price out most of the country’s businesses and individuals, necessity dictates that small businesses and community organizations either look elsewhere for legal support or forego it altogether.

To that end, community-based public interest lawyering has been supported by lawyers in three different contexts: transactional branches of legal services providers, pro bono donations from private firms, and law school transactional clinics. For all their virtues and good intentions, it is difficult to describe any of these models as an unqualified success. As currently structured, America’s legal supply does not meet its demand.

A. LEGAL SERVICES ORGANIZATIONS

In 1974, Congress created the Legal Services Corporation “to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel.” Despite the most laudable of motives, legal services organizations have been criticized for an overly rigid model which can only serve certain clients with certain problems, an inability to provide concerted services focused on widespread and lasting change, and an ability to serve only half of those people who sought help from LSC-funded programs. In 2009, almost a million applicants were left without needed service. Even so, because legal services organizations primarily focus on litigation-based issues in areas like family law and public benefits claims, most small businesses are forced to look elsewhere for legal help.

What is more, legal services organizations face increasingly challenging budget constraints. Funding in 2013 for LSC, which in turn issues grants to legal services providers, was the lowest in the organization’s history after adjusting for inflation, at $340 million. Appropriations for the 2014 fiscal year brought that total to $430 million. Even so, budget cuts over time severely limit the ability of LSC grantees to fulfill their mission. In a 2014 letter supporting additional LSC funding, the Conference of Chief Justices wrote that “the adversarial foundation of our justice system is all to often [sic] losing its effectiveness when citizens are deprived of legal counsel.” That letter noted that budget reductions forced grantees to lay off 1,226 employees between 2010 and 2012 and close a projected 24 offices. Whatever benefits accrue to small businesses and other organizations from legal services offices have been dampened considerably as attorney rosters are thinned and local offices are shuttered.

B. PRO BONO

As legal services organizations continue their underfunded struggle, pro bono representation presents one potential alternative. However, the availability of pro bono work, by definition, depends on an attorney’s willingness to donate his or her time “without fee or expectation of fee” to help “persons of limited means.” While New York’s recently-passed requirement that all bar applicants complete 50 hours of pro bono service certainly expands the level of service in that jurisdiction, its requirement is much more of an exception to state bars’ generally laissez-faire approach. Even that seemingly positive, if limited, development brought plenty of criticism: most commonly that demanding pro bono forces a transfer of wealth from the wealthy to the poor.
Arguments about mandatory pro bono aside, the model can only cover so much ground given its limited reach and voluntary (or semi-voluntary) nature. A Legal Services Corporation study in 2009 found that between nine and 18 percent of identified legal needs for low-income households were met. A more optimistic ABA study concluded that one in five legal needs for low-income groups was addressed by a private or legal aid attorney. It is hard to imagine that even an aggressive mandatory pro bono requirement could bridge that gap.

Assuming pro bono services could eventually begin to address existing need more fully, other barriers will limit their effectiveness. Even the most well intentioned attorneys will place their own interests first. Whether that means avoiding cases which might conflict with existing clients, or taking cases with motives which diverge from a client’s, or simply not taking on any cases for business reasons, pro bono representation seems more like a benevolent facsimile of the real thing.

C. TRANSACTIONAL CLINICS

Transactional clinics in law schools, whether focused on CED or not, are an increasingly popular means of teaching substantive legal skills, exposing law students to entrepreneurs, and assisting the local business community. Since the first such clinics opened in the late 1970s, the total ballooned to more than 150 in 2014. Of these, the clinics which focus on CED work are distinct in their lineage and goals from many newer transactional clinics that focus on skill development and service provision generally. Indeed, although almost all of the early transactional clinics focused on CED, most clinics now focus on some other set of offerings, including assisting small businesses with entity formation or intellectual property issues and helping local non-profits.

Whereas CED lawyers and thus CED clinics emphasize high-impact work, transactional clinics typically favor developing the skills necessary for future transactional practice: structuring, and completing, deals. This does not mean, however, that transactional clinics cannot positively impact low-income communities with their work. The University of Pennsylvania Law School’s Entrepreneurial Legal Clinic uses three “impact strategies”—assisting moderate income entrepreneurs, taking on larger projects with a “multiplier effect,” or helping businesses focused on both profit and social benefit—in order to pair transactional skill building with community benefit.

Even with an increasing number nationally, many clinics are concentrated in certain regions, leaving many areas of the country unsupported. For example, California’s 19 clinics and New York’s 15 overshadow the 19 states which have only one clinic or none at all. What is more, by design an education-focused operation adds limited bandwidth to a community’s short term legal capacity. In conversations with small business clinics at the University of Washington’s and George Washington University’s law schools, representatives reported assisting about 30 and between 25 and 50 businesses each year respectively, depending on the complexity of the cases and the size of the clinic that year. Although the impact of these services can be magnified by concentrating assistance in specific neighborhoods, like pro bono efforts, legal clinics cannot hope to bridge the existing gap in legal services alone.

IV. Organizations and Communities Which Need Help

Many, although not all, legal assistance organizations prescribe certain limits to help ensure they only serve the most needy of potential clients. In the pro bono context, these limits often function to guarantee that clients who receive free services could not afford to pay their attorney for the same services.

Public Counsel in Los Angeles accepts single-person clients whose annual income is under $45,640 or four-person households who earn less than $65,200 per year. Even though these relatively high thresholds are fairly generous, they cut out a large portion of the Los Angeles county population. Based on the Self-Sufficiency Standard metric—a more realistic estimate of what a family needs to meet its basic needs than the poverty line—a single adult needs $29,000 to make ends meet while a family of four with two preschool-aged children needs just over $82,000. The median household income for the county is around...
$56,000 according to census data, meaning that a large portion of Los Angeles’s middle class entrepreneurs cannot access these services.

Public Counsel’s permissive standards compare favorably to the threshold at, for example, the University of Washington’s Entrepreneurial Law Clinic. There, services are limited to individual clients who earn less than $21,660 and four-person families under $44,100. These numbers are both below the Self-Sufficiency index, which requires over $22,000 for a single adult and almost $69,000 for two adults and two preschool-aged children. The median wage level in King County, where Seattle is located, and Washington generally are about $71,000 and $59,000 respectively. A substantial number of the area’s residents cannot access these services.

Even without restrictive income standards, the sheer number of small businesses located in major metropolitan regions far outpaces what clinics or pro bono organizations can serve. These numbers, displayed more fully in APPENDIX 1, begin to demonstrate the potential size of a small business-oriented legal services market.

The Los Angeles metro area, home to 12.8 million people at the time of the 2010 census, boasts over 330,000 businesses. Of these, some 95 percent employ fewer than 50 people and over 99.5 percent employ fewer than 500 people, the traditional cutoff for a small business. Similarly, the Seattle metro area’s 3.4 million residents support 97,000 businesses, with 95 and over 99.5 percent of those businesses also employing fewer than 50 and 500 people, respectively. Equally importantly, these percentages hold true for business categories which would, in theory, present the highest level of legal need: small-scale businesses with under 50 employees in construction, manufacturing, wholesale, retail, transportation, or accommodation and food services—as opposed to finance or professional services—make up around 94 percent of total businesses in each region.

Within this broader small business community are several subsets with additional opportunities and challenges, namely minority and immigrant groups and women-owned businesses. For example, Jared Weinman, a former fellow with Los Angeles pro bono organization Public Counsel, emphasizes that because they access potential clients through local small business development centers, Public Counsel is limited in who knows about and can reach its services. One of the hardest groups to reach, he explains, are those whose first language is either Spanish or any number of locally spoken east-Asian dialects. Not only are immigrant groups harder to reach initially, but harder to serve because of the frequent need for a translator and other cultural barriers.

Even with these drawbacks, maximizing “independence and economic opportunity” and “expanding ‘indigenous, self-help neighborhood effects’” are clear benefits to developing businesses in these communities. These outcomes, which also form the foundations of CED work, have the greatest impact in communities with the most need. Developing and maintaining local enterprise, as a means to create jobs and create wealth, can be supported by attorneys in a range of different communities.

V. Existing Low-Cost Service Providers; Market Space for More

In recent years, especially since the beginning of the 2007 recession, the legal profession has undergone significant changes leading towards a commoditization of its services. In particular, several different business models have arisen in response to the current void in transactional legal services. Whether a new form reacting to current market conditions or an emboldened descendent of more traditional practices, these models attempt to limit costs passed onto a client by either reducing the attorney’s own overhead (e.g. in a virtual law practice) or limiting services provided to only those discrete tasks required by the client (e.g. by unbundling services).

A. EXISTING SERVICE MODELS

Traditionally, the dominant source of legal advice for small businesses has been, appropriately, the small law firm. Although the small firm is also the most ubiquitous among all firms nationwide, those firms that serve low- or middle-income clients generally
suffer from a lack of professional or academic attention. Indeed, smaller firms are often either stigmatized, based on perceptions that such a practice is less prestigious and lucrative, or overlooked, as a result of less exposure through law schools' traditional on-campus interviews or sponsored events. On the other side, pursuit of profit sets these firms off from the public interest attorney untainted by a need for market-based returns.

More a subset of the small firm than anything else, virtual law firms are an increasingly common if somewhat contentious style of practice. This more modern approach first gained traction when technological advances empowered remote communication in the mid-1990s and aims to reduce costs and facilitate a more flexible schedule in terms of time and geography. As the legal market and economy continue to react to changing circumstances, a virtual office should continue to present a desirable alternative to traditional practice. Even so, the response to such firms has been mixed: some states actively encourage virtual offices, with others equally actively discouraging it.

While attorneys begin to set up virtual offices, several corporations have taken online service provision to an extreme. Websites like LegalZoom, The Pocket Lawyer, and Nolo provide “[a]ffordable, quick and accurate document preparation services for simple, uncontested business and legal matters.” These websites appeal to consumers’ desire for quick and inexpensive legal service by providing a variety of legal documents and services for a flat rate. Predictably, they have been met with substantial criticism from the private bar and, in some cases, lawsuits. What is more, all of these websites acknowledge that their services neither provide actual legal advice nor substitute for advice from an attorney.

B. THE MODEL BEST SUITED FOR LOCAL BUSINESS DEVELOPMENT

Each method of legal service emphasizes certain elements to the detriment of others: of the three models, personal contact generally increases in lock step with price. Even so, a traditional brick-and-mortar practice offers some substantial benefits which offset its expense. For example, a group of law schools created the Law School Consortium Project in an attempt to connect local small-scale practitioners to each other and to the broader legal community. By connecting firms in a specific geographic area, law schools were able to help small firms or solo practitioners assist each other by providing peer technical assistance, business management workshops, and even substantive legal information. The networks allow members to charge rates lower than they would be able to otherwise, either working pro bono or on a sliding scale based on client income. Some law schools organized attorneys within a substantive specialty, including Northeastern University School of Law’s economic development and domestic violence groups. A holistic, network-based approach provides substantial benefits that a less integrated model simply cannot.

The cost savings seen in online legal websites have some serious drawbacks that may make them a less appealing option. Noted above, while online services like LegalZoom provide inexpensive assistance for certain specific legal tasks, they cannot replace legal advice when resolving more complicated matters. Furthermore, some states have rejected online providers outright—including, for example, a cease-and-desist order sent to LegalZoom in 2008 from the North Carolina State Bar and a similar decision in Ohio that same year—claiming that the services comprise an unauthorized legal practice.

Even without outstanding questions surrounding the legality of such services, such impersonal legal instruction cannot participate in the ecosystem of practitioners—legal or otherwise—which support local businesses. For example, in the context of George Washington University’s small business clinic, faculty member and supervising attorney Susan Jones has identified local small business development centers, community development corporations, and other types of support as important elements of a small business’s success above and beyond legal assistance. Without a nuanced understanding of the local environment and other local resources, any service aimed at serving small businesses cannot provide its clients with the greatest opportunity for success.

C. AN ALTERNATIVE MODEL OF SERVICE

Some organizations have already begun to fill the service gap in new, innovative ways. The Sustainable Economies Law Center, an organization based out of Oakland, California, provides local cooperatives and other small businesses with "essential legal
tools” not available elsewhere. In addition to providing legal resources and support, SELC hosts walk-in clinics and other informational events. Although the fact that SELC is a mission-driven nonprofit sets it apart from many other law firms, its ability to provide services to small organizations makes it a valuable model.

In 2014, SELC started a collaboration with nearby Laney College and other community organizations to put on what it called a “Worker Coop Academy.” The goal of the event was to fill a “lack of training programs and job opportunities for low and moderate income workers.” The businesses that benefitted from the Academy were exactly the type that would otherwise be forced to make do without legal help. One participant, New Hope Farm, was able to use the event to “refine their business vision” of creating a cooperative to provide healthy food to local grocery stores throughout the East Bay. Another, the DIG Cooperative which owns a greywater demonstration system, used the Academy to improve its business plan and rewrite its bylaws.

By providing business advice and legal services and partnering with other local organizations, SELC has helped fill a substantial void. Local entrepreneurs that had little guidance—business, legal, or otherwise—can use the tools this and similar organizations provide to become more successful and resilient. These are the types of results that many CED initiatives seek to achieve, with the result of “[greater] economic and political well-being [for] the community as a whole.”

VI. Conclusion and Next Steps
This paper’s main function is less to argue that one method of service presents a better potential option than others than to assert that a substantial need exists for lower cost transactional legal services. This need is unmet by the current legal system, despite a legal market which graduates so many law students. Although the traditional small firm may be better suited to meet this need than other models, the area clearly requires additional research. Accordingly, this survey of current service forms available to small businesses, with a brief spotlight on a couple of cities, should be viewed more as a call to action: more information must be collected on these cities’ legal markets and others like them. Using both anecdotal evidence through interviews and data collected both by local organizations or other government agencies, a well-focused research and outreach effort could help stimulate this area of the legal profession, bolster local growth, and facilitate economic and social justice goals.

Future research should better define the contours of the existing legal market which aims to serve America’s small businesses. If the research for this paper has shown anything, it is that there remain many unanswered questions regarding the size of that market, how it is currently served, and whether a better method of service could provide both financial and social returns. How many businesses currently go without necessary legal assistance? How many law firms are attempting to solve those problems? What is the economic impact of this mismatch? This paper attempts to bring up these previously unasked questions in the context of transactional legal services affordable to small businesses. Answering some of them will be an essential first step in helping to recalibrate the legal market to serve all parties with legal needs.
APPENDIX 1

Los Angeles Metro Area
Businesses by Size

Seattle Metro Area
Businesses by Size


6 Defined by the Small Business Association as, generally, an organization which employs 500 or fewer employees in most manufacturing contexts and $7 million in average annual receipts for many nonmanufacturing businesses, although many exceptions deviate from these standards. See 13 C.F.R. § 121.201.


10 Frequently Asked Questions, supra note 8, at 1–2.


16 Id. at 23.


18 Laying the Foundation for National Prosperity, supra note 15, at 23.

19 Id.


22 Jones, Promoting Social and Economic Justice, supra note 20, at 252.

23 See, e.g., Jones, supra note 12; Brian Glick & Matthew J. Rossman, Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience, 23 N.Y.U. REV. L. & SOC. CHANGE 105 (1997); Morin, supra note 5; Diamond, supra note 11.

24 Diamond, supra note 11, at 152.


26 Glick & Rossman, supra note 23, at 109.

27 Id. at 110.


29 Id.


See Rigertas, supra note 31, at 81–83.


Documenting the Justice Gap in America, supra note 1, at 7.


Id. at 8–9.


Id. at 6.1(a)(2).

N.Y. Ct. R. § 520.16.


The rule only requires bar applicants—i.e. law students, not lawyers—to fulfill the 50 hour requirement. Attorneys who pass the bar prior to January 1, 2015 remain unburdened.


Documenting the Justice Gap in America, supra note 1, at 17.

Id.


Id.


Id.

Jones & Lainez, supra note 52, at 100.

Kosuri, supra note 54, at 9.

Id. at 30–32.

Law School Entrepreneurship Clinics, supra note 53. See Jones & Lainez, supra note 52, at 98.

Interview with Farah Ali, Research Assistant, University of Washington Entrepreneurial Law Clinic (Aug. 15, 2014); interview with Susan Jones, Professor of Clinic Law, George Washington University School of Law (Aug. 13, 2014).

See Kosuri, supra note 54, at 34.

See supra, Part III(b).

Interview with Jared Weinman, Fellow, Public Counsel (Aug. 18, 2014).

Community Development Project Applications for Legal Assistance, PUBLIC COUNSEL, http://www.publiccounsel.org/pages/?id=0024 (click the “Qualifying Small Businesses” link to open the appropriate .doc file) (last visited Aug. 21, 2014).


State & County QuickFacts: Los Angeles County, California, UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06/06037.html (last updated July 8, 2014).


2010 Census Population and Housing Tables, supra note 71.

2007 Economic Census, supra note 72.

Id.


Id. at 76.


In its most recent publically available data from 2005, the American Bar Association reported that the plurality of attorneys, 49 percent, were sole practitioners with another 20 percent working in firms of ten or fewer. Lawyer Demographics, American Bar Association, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf (last accessed Aug. 26, 2014).


Id.

Id. at 97.


Hausman, supra note 87, at 576.

Id.


See generally Gerard J. Clark, Internet Wars: The Bar Against the Websites, 13 J. HIGH TECH. L. 247 (2013)


Id. at 1252.

Id. at 1258–59.

Jones, Promoting Social and Economic Justice, supra note 20, at 278–79.


Diamond, supra note 11, at 152.

Although the gap in legal services to middle class families is fairly well defined in the context of litigation, see, e.g., Susan D. Carle, Re-Valuing Lawyering for Middle-Income Clients, 70 FORDHAM L. REV. 719, 720 (2001); Luz E. Herrera, Rethinking Private Attorney Involvement Through A “Low Bono” Lens, 43 LOY. L.A. L. REV. 1, 2 (2005), transactional legal service provision is generally uncharted territory, especially outside of the Susan Jones’s work which focuses on law school transactional clinics, see Susan R. Jones & Jacqueline Lainez, Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools, 43 WASH. U. J.L. & POL’Y 85 (2013).