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Gerry Singsen

Joel Feldman

Michael A. O'Connor

Kyle Dandeleit

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DOLLARS AND SENSE: FEE SHIFTING

*Gerry Singsen*  
*Joel Feldman*  
*Michael A. O'Connor*  
*Kyle Dandelelet\**

INTRODUCTION

Individuals with low or moderate incomes are generally perceived as unable to afford hiring a lawyer. As a result, courts are increasingly crowded with “self-represented litigants,” attempting to present their own cases.<sup>1</sup> Legal needs studies reveal substantial percentages of the poor who do nothing when confronted with serious legal problems.<sup>2</sup> Legal aid societies report that they turn away more than half of the income-eligible individuals with meritorious cases because their funding is inadequate to meet the demand. In “Massachusetts[,] [c]ivil legal aid programs turned away sixty-four percent of eligible low-income people in 2013.”<sup>3</sup> The “gap” group, those with incomes too high to qualify for legal aid but unable to afford to pay a lawyer’s fee, is just as disadvantaged when confronting litigation as are the poor.<sup>4</sup>

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\* Joel Feldman is a partner in Heisler, Feldman & McCormack, P.C. and is primarily responsible for the descriptions of his firm’s practice. Kyle Dandelelet wrote a paper about the Heisler firm while a student at Harvard Law School. Mike O’Connor is a partner in Mauk & O’Connor and is primarily responsible for the descriptions of his firm’s practice. Gerry Singsen, a former member of the ABA’s Delivery of Legal Services Committee, and a consultant to legal aid programs who has written extensively on the delivery of legal services to low and moderate income individuals, was responsible for the initial content and editing of this Article, and Joel Feldman is ultimately responsible for the final version which appears here. This Article is adopted from Gerry Singsen, Joel Feldman, Michael A. O’Connor, & Kyle Dandelelet, *Dollars and Sense: Fee Shifting*, in *REINVENTING THE PRACTICE OF LAW: EMERGING MODELS TO ENHANCE AFFORDABLE LEGAL SERVICES* 87 (Luz Elena Herrera ed., 2014).

1. Dave Collins, *States Look to Provide Lawyers for the Poor in Civil Case*, ASSOCIATED PRESS, Mar. 30, 2016.

2. See generally, ABA, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (2016), [http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WEB.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf) [<https://perma.cc/LQV8-93HM>].

3. *Id.* at 12.

4. See generally *id.*

Many idealistic students enter law school with the declared intention to serve the needy with their legal degree.<sup>5</sup> As time passes, their enthusiasm is dampened.<sup>6</sup> Law school debt grows into a mountain. Legal aid, public defender, and even government jobs are hard to get.<sup>7</sup> Private law firms seek to maximize income for their partners, so they serve those most able to pay rather than those with the least assets.<sup>8</sup> Law graduates enter the market for lawyers with their ideals frequently put aside until the time—imagined but rarely achieved—when they can afford to work for lower pay and can find a funded job in public interest practice.

Traditional solutions to this problem involve finding funds that can be used on the potential client's behalf to pay a lawyer a living wage.<sup>9</sup> The most familiar of these approaches are government and charitable funding for legal aid societies and pro bono services. The legal aid client is a third-party beneficiary of a contract between fund sources and legal aid. The pro bono client receives services subsidized by the lawyer's generosity. For clients who have been injured by the acts of another, tort law developed the contingent fee solution. In exchange for a share of the ultimate recovery, a lawyer agrees to provide services to the client. If the potential of the case is large enough, and the lawyer chooses cases carefully, the future asset of the client funds the case.

But there is another possibility. A few energetic lawyers have found a way to provide high quality legal services to low and moderate income individuals and make a living doing it. Their secret? Making the other side pay their legal fees.

Relying on state and federal “fee shifting”<sup>10</sup> statutes and rules, these lawyers succeed by prevailing on the merits for their clients and being paid by the opposing party. The lawyers need to be careful to select meritorious cases.<sup>11</sup> The early going requires a

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5. See William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 9 (2007).

6. *Id.*

7. *Fact vs. Fiction: Public Interest Careers*, YALE LAW SCHOOL, <https://www.law.yale.edu/student-life/career-development/students/career-guides-advice/fact-vs-fiction-public-interest-careers> [<https://perma.cc/2FJN-DJZB>].

8. See Shahin Gozarkhah, *Turnover: The Missing Metric*, 25 GEO. J. LEGAL ETHICS 555, 555 (2012).

9. See ABA, *supra* note 2.

10. See generally, Roberta Baker Jones, Comment, *Court Awarded Attorneys' Fees in Massachusetts*, 2 W. NEW ENG. L. REV. 361 (1979).

11. Andy Norman, *Attorneys' Fees: Maximizing Your Recovery in Fee-Shifting Cases*, 103 ILL. B.J. 2, 32 (2015) <https://www.isba.org/ibj/2015/02/>

capital investment or a period of very low income because the clients do not put up retainers and payment comes at the end of the work. Making successful claims for fees is a separate legal art and may involve some sophisticated record keeping and legal work. Despite these challenges, the model works. With perseverance, lawyers who adopt this model will earn a good living, and will have the substantial additional reward of helping people achieve justice who would otherwise lose their rights.

This Article offers case studies of two private law firms that use fee-shifting statutes to fund their law practice on behalf of low- and moderate-income clients. It offers insights into their business models, goals, and operations, in an effort to encourage replication in other parts of the country. The firms are not unique. Other firms are following the same strategy in a wide variety of substantive areas.

#### I. HEISLER, FELDMAN, & MCCORMICK, P.C.

Heisler, Feldman, & McCormick, P.C. (“HFM”), is a “public interest, private law firm” in Springfield, Massachusetts. At its formation, the conceptual challenge was simple to express: take a few former legal aid lawyers and create a law firm that functioned as a private legal aid office, serving a similar clientele in subject areas that were precisely those of legal aid offices across the country. The firm has now been functioning since 1996 and has not only successfully met its initial objective, but is currently growing.

##### A. *The Business Plan*

The original partners, Hugh Heisler and Robert Fields founded what is now HFM as a professional corporation in 1996, after Joel Feldman and Heisler had discussed forming the firm over a number of years. By that time, the team had a very clear business plan with four central elements: the firm’s (1) practice areas, (2) clientele, (3) cases, and (4) compensation.

##### 1. Practice Areas

HFM specializes in four practice areas: consumer rights, discrimination, employee rights, and tenant rights. The firm estimates that landlord-tenant disputes make up fifty percent of the firm’s caseload, while the other practice areas comprise fifteen to

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twenty percent each. The attorneys do not specialize in any one particular area. Their individual caseloads fluctuate between twenty and thirty cases, meaning that the firm maintains 120 to 150 active cases at any given time.

Of the active cases, ten to fifteen are class actions. HFM deliberately avoids “huge, nation-wide” actions. Instead, it focuses on locally-based claims that involve anywhere between 100 and 1,000 class members which require fewer resources to litigate. The firm chooses to avoid large, impersonal cases that result in coupon settlements for the plaintiffs, but multi-million dollar awards for their attorneys. The attorneys only participate in a class action when they are confident it will result in real relief for their clients.

## 2. Clientele

HFM serves low- and middle-income clients from western Massachusetts. To reach them, the firm relies on its outreach efforts, as well as outside referrals from a variety of sources.

### a. *Targeted clientele*

HFM’s clients come from the entire western swath of Massachusetts, including Franklin, Hampshire, Hampden, and Berkshire counties. Between eighty and ninety percent of the firm’s clients qualify for free legal services. However, HFM does not condition its representation on this characteristic. Gary Bellow, a professor at Harvard Law School, influenced Feldman’s belief that public interest attorneys should not ignore moderate-income clients. The firm does not believe that it should arbitrarily separate very low-income people, or just regular low-income people, from low-moderate to moderate-income people. In fact, none of them can afford legal services.

The statistics are telling. In 2009, an estimated sixty to eighty percent of Massachusetts litigants neither qualified for legal services, nor could afford to pay for private representation.<sup>12</sup> HFM decided to serve this population without regard to an income limit. The population of poor and near-poor is so large that HFM finds

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12. Lynn Holdsworth, *Limited Assistance Representation*, WICKED LOCAL PLYMOUTH, <http://plymouth.wickedlocal.com/x2121670700/Limited-Assistance-Representation> [https://perma.cc/45JC-QE63]; see also Edward M. Ginsburg, *Ways to Make Legal Fees More Affordable for the Public*, MASS. LAW. WKLY. (Mar. 9, 2009) (describing how “[t]he current economic crisis has brought into clear focus the gap between the cost of legal services and what an increasingly large segment of the population can afford to pay”).

itself routinely overloaded.

b. *Outreach and referrals*

When HFM first opened its doors, the attorneys approached every organization that interacted with the populace they wished to serve. As a result, the firm began to receive referrals from diverse sources—everyone from Health Law Advocates in Boston, to former acquaintances at local legal services offices, to HIV/AIDS activists in western Massachusetts. The HFM attorneys knew how important these relationships would be to their ultimate success. Accordingly, they did everything they could to nurture them. They took as many referred cases as possible, and they continued to do trainings at community-based organizations.

These efforts paid off. Local organizations continue to refer HFM the vast majority of its clients. The firm estimates that fifty to sixty percent of the firm's clients come from legal services programs alone. The lawyers consider this a win-win situation. The stream of legal services referrals not only enhances the firm's business, but also fills the voids that local legal services programs are unable to fill. HFM's work in the area of tenant rights offers the clearest example. Although local legal services offices represent tenants, they restrict their services to residents of public or subsidized housing. When private tenants approach local legal services offices for help, the offices refer cases to the firm. Absent HFM, the clients would have nowhere else to go.

Traditionally, HFM's referral sources were limited to those organizations where the attorneys had previously cultivated a relationship. In recent years, however, the firm has seen its referral base deepen. These days, HFM frequently receives cases from people and organizations unknown to the firm. This positive development might be attributed to two factors. First, HFM's success has generated publicity. When the firm wins, and gets good settlements, people begin to hear about the firm. Second, the market is theirs. Given the fact that Heisler and Feldman rooted their practice in areas of underrepresentation, they ended up building a monopoly. The results have been good. The firm does not pay for any marketing, but is still at its capacity.

3. Cases

The partners at HFM screen the firm's cases and make collective decisions about whom they will represent. This allows

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them not only to find meritorious claims, but also to support the firm's larger vision of social justice.

a. *Selection process*

The fact that HFM is overloaded with referrals does not mean its client development work is complete. Only some of the agencies pre-screen the individuals they send to the firm. Thus, the attorneys must still speak with the potential clients and decide which ones to represent. In 2012, HFM employed a paralegal to assist with these tasks. Throughout the week, the paralegal conducts client intake over the telephone. She presents three to ten of the clients' cases at a weekly meeting, where the attorneys make collective decisions about whom they will represent. The meetings generally start at noon on Wednesday and can last for three or more hours. Though demanding, the meetings allow the attorneys to support each other in maintaining the firm's principles regarding the work they will do.

If a prospective client has a meritorious case, the firm will take it. However, in addressing the issue of case selection, the attorneys often find themselves prioritizing cases against large landlords, as would many legal services offices. Though financial considerations are often in the back of the mind of the partners, the selection process is not at all driven purely by financial considerations. The attorneys also seek cases that fit within their larger vision of social justice. They are fairly political in terms of what they want to accomplish both personally and professionally. The firm not only pursues systemic abuse, but also seeks to confront issues that impose widespread harm on low-income populations.<sup>13</sup> Once it identifies an issue, it sets out to correct it. The lawyers believe that one of their roles is to push the law in directions that will either further the rights that are recognized for the clients they work with, or advance the law in a way that they think is desirable. To this end, the attorneys seek legal and factual scenarios that sit on the cutting edge of where the law currently stands.

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13. The attorneys make conscious efforts to "stay in touch" with the communities they serve and the issues affecting them. For example, HFM has collaborated with community groups in the city of Springfield to assess where foreclosures are occurring and provide information to affected residents. The intake paralegal also assists with outreach.

b. *Sample work*

The following cases provide a representative sample of HFM's work in its four different practice areas. The cases illustrate not only the nature of the attorneys' practice, but also the success they have achieved in attaining both lucrative settlements and legal reform.

- *Consumer Rights Practice.* HFM represented a class of consumers who claimed that the Massachusetts Electric Company overcharged them for its services. The firm negotiated a \$2 million settlement on its clients' behalf.
- *Discrimination Practice.* After Jiffy Lube instituted a policy requiring customer-contact employees to maintain "clean-shaven" appearances, HMFG brought suit on behalf of a practicing Rastafarian employee; he claimed the policy discriminated against him on account of his religion. Although HFM lost the case at the federal level,<sup>14</sup> it re-filed the claim under state anti-discrimination law and succeeded before the Supreme Judicial Court of Massachusetts.<sup>15</sup> Through its decision, the court established the rule that an employee's exemption from a discriminatory policy does not impose an undue hardship on his or her employer as a matter of law; the employer must still provide reasonable accommodations.<sup>16</sup>
- *Employment Rights Practice.* HFM represented a class of approximately 2,700 satellite dish installers who claimed that their employer violated the Fair Labor Standards Act by failing to pay them overtime from August 2005.<sup>17</sup> A federal district court approved a final settlement agreement, which provided the plaintiff class approximately \$2.9 million in back-pay.
- *Tenant Rights Practice.* HFM represented two tenants whose apartment building was foreclosed. The new landlord (i.e., the bank) failed to make a series of necessary repairs, forcing the tenants to abandon their home for weeks. HFM brought suit against the bank and settled the case for \$100,000.

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14. *Brown v. F.L. Roberts & Co., Inc.*, 419 F. Supp. 2d 7, 9 (D. Mass. 2006).

15. *Brown v. F.L. Roberts & Co., Inc.*, 896 N.E.2d 1279, 1283 (Mass. 2008).

16. *Id.* at 1286–87.

17. See *Brooks v. Halsted Commc'ns, Ltd.*, 620 F. Supp. 2d 193, 195–96 (D. Mass. 2009) (providing a factual description of the case).

#### 4. Compensation

HFM splits its income evenly among the partners. The firm does not require its clients to pay retainers or advance fees. Instead, it assumes the financial risk of litigation and collects payment through (1) fee-shifting provisions or (2) settlement agreements.

##### a. *Fee-shifting*

Each of HFM's practice areas contains fee-shifting provisions—that is, statutes that require losing defendants to pay the plaintiff's reasonable attorneys' fees.<sup>18</sup> These provisions are designed to encourage lawyers<sup>19</sup> to take the types of cases in which HFM specializes. By itself, for example, Massachusetts General Law Chapter 186 is not enough to promote cases brought by lawyers working for tenants. The statute protects tenants' "quiet enjoyment" of leased premises.<sup>20</sup> If a landlord fails to provide heat or electricity, under Chapter 186, a tenant could sue the landlord and collect actual damages or three month's rent, whichever amount is greater.<sup>21</sup> Thus, if the tenant pays \$600 per month in rent, Chapter 186 would provide minimum statutory damages of \$1,800. Most lawyers will look at that, calculate a third of \$1,800, and conclude that \$600 is not worth the investment of time and resources.

But under the statute's fee-shifting provision, that same attorney could take the client's case and, if successful, petition the court for "reasonable attorneys' fees" paid by the defendant.<sup>22</sup> In Massachusetts, courts assess "reasonable attorneys' fees" in light of various factors, including

the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result

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18. See, e.g., MASS. GEN. LAWS ch. 93A, § 9 (2009) (unfair and deceptive trade practices); MASS. GEN. LAWS ch. 151B, § 4.14 (2009) (unlawful discrimination); MASS. GEN. LAWS ch. 186, § 14 (2009) (landlord-tenant disputes). For a description of the various rationales for fee-shifting provisions, see Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 652–66 (1982).

19. *Stratos v. Dep't. of Pub. Welfare*, 387 Mass. 313, 323 (1982) ("to encourage suits that are not likely to pay for themselves, but are nevertheless desirable because they vindicate important rights.").

20. MASS. GEN. LAWS ch. 186, § 14 (2009).

21. *Id.*

22. *Id.*

obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.<sup>23</sup>

These factors allow Heisler and Feldman to obtain attorney fees of \$275 to \$300 per hour. Recently, the firm represented a tenant who was awarded \$12,000 in a Chapter 186 claim. The attorneys spent approximately sixty-five hours pursuing the case, generating about \$20,000 in fees.

b. *Settlement*

The fee-shifting provisions are important not only as a means of creating income, but also as negotiating tools that allow the firm to settle cases quickly and increase its capacity. The ability to claim a fee increases the pressure on the opposing party, who faces paying their own lawyer, the tenant's claim, and Heisler and Feldman. HFM settles more than ninety percent of its cases.

The firm's representation agreement provides that the attorneys will make every effort to negotiate their attorneys' fees separately from the client's damages. If they succeed, the attorneys collect the amount they receive under the applicable fee-shifting statutes. If, on the other hand, the client accepts a lump sum settlement that does not provide for a separate payment of attorneys' fees, the attorneys collect one-quarter of the settlement amount in unemployment claims, and one-third of the settlement amount in all other cases—even if the applicable fee-shifting provisions would have generated more. The firm is extremely diligent about explaining to people multiple times how the fee structure works. As a result, clients rarely complain about the contingency payment.

In fact, the "attorneys' fee hammer" often makes the pie bigger, allowing clients to collect more than the actual damages they suffered. In one case, HFM brought suit against a landlord who evicted the firm's client because she was pregnant. Initially, the landlord refused to settle the claim, forcing the firm to run up approximately \$20,000 in attorneys' fees. The parties brought the case before a mediator, who valued the client's actual damages at \$5,000. The landlord eventually settled the case for a lump sum of \$25,000, representing \$5,000 in actual damages and \$20,000 in

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23. *Haddad v. Wal-Mart Stores, Inc.*, 920 N.E.2d 278, 281 (Mass. 2010) (citing *Linthicum v. Archambault*, 398 N.E.2d 482 (Mass. 1979)).

attorneys' fees. The attorneys collected one-third of the \$25,000, leaving the client with approximately \$17,000 for a \$5,000 claim.

### B. *Getting Started, Doing It Better, And Replicating The Model*

Since its inception, HFM has experienced "exponential growth." To be sure, the baseline was low. The first three years were tight. By 1998, the attorneys were earning only half their legal services salaries and considered disbanding. But somehow the firm survived. The attorneys not only salvaged their business, but they went on to surpass their legal services salaries and even exceed their own expectations. In 2010, they achieved record returns. They attribute their success to several business decisions.

#### 1. Reducing Overhead

Like any firm, HFM incurs a number of overhead expenses: (1) health insurance, which is the firm's single most expensive item; (2) malpractice insurance, which fluctuates with the firm's class action caseload; (3) rent; (4) copier expenses; and (5) phone bills. In recent years, the firm has also started to pay salaries for a paralegal, two associates, and a bookkeeper.

But what makes HFM unique is the expenses that are not on this list. Early on, the attorneys made a deliberate decision to keep their overhead costs low. Although HFM used to pay for yellow pages, it no longer advertises. In fact, the firm has never even launched a website. HFM does not pay for Westlaw or LexisNexis. Instead, the attorneys rely on the library at the Hampshire County Courthouse and socialaw.com, an online database that provides access to statutes and case law for \$250 per year. The firm does not pay for a secretary or receptionist. The attorneys answer their own phones and schedule their own appointments.

#### 2. Positioning for Growth

Over the past decade, HFM has taken steps to increase its yearly income.

##### a. *Instituting more rigorous screening mechanisms*

When the firm opened its doors, the attorneys took some cases that they later wished they had not. To defeat the urge to take everything that walked in the door, the attorneys instituted weekly screening meetings. The meetings forced the attorneys to act as a check on each other, helping to ensure the firm only took

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worthwhile cases.

b. *Participating in more class actions*

Over the past few years, HFM has participated in an increasing number of class actions. Such cases are helpful because they provide a “bigger bang for the buck.” To be sure, class actions demand their own pool of resources. Class actions make it difficult to operate without support staff. In addition, they spawn higher malpractice insurance premiums. But they achieve efficiencies, too. Rather than taking 1,000 little cases, they can take one class action. Class actions take more time, and they are a little more expensive, but they have produced good results for HFM.

c. *Raising the baseline for damages awards*

Since its inception, HFM has secured increasingly higher damages awards for its clients, including tenants in foreclosed buildings. They are very aggressive in this respect. By raising the bar on damages, HFM has created the ancillary effect of collecting higher attorneys’ fees. They have also gotten more confident as they have done more trials.

As a result of these steps, the firm has experienced significant growth. Equally important, it has provided the attorneys with the flexibility they desired. Today there is room for creativity.

3. Opportunities for Replication

The replication of HFM’s model depends upon two factors: (1) the availability of fee-shifting provisions and (2) a judiciary that is willing to enforce them. This Section analyzes the availability of these characteristics in other locales.

a. *The availability of fee-shifting provisions*

The evidence, though dated, suggests that fee-shifting provisions are widely available under both federal and state law. In a dissenting opinion in *Marek v. Chesny*,<sup>24</sup> Justice Brennan listed more than 100 federal fee-shifting statutes. That same year, a Note in *Law and Contemporary Problems* counted 1,974 state fee-shifting statutes.<sup>25</sup> Although the publication did not specify the provisions’ names or statutory locations, it provided numerical

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24. 473 U.S. 1, 43–51 (1985) (Brennan, J., dissenting).

25. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 *LAW & CONTEMP. PROBS.* 321, 323 (1984).

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breakdowns by subject matter and other relevant criteria. Notably, more than fifty percent of the states maintained fee-shifting provisions in the areas of law in which HFM specializes: consumer rights (thirty-four states), employee rights (thirty-four states), discrimination (twenty-eight states), and landlord-tenant disputes (twenty-six states).<sup>26</sup> The statutes vary dramatically in their specifics. However, it is clear that the viability of an HFM-type practice is not limited to Massachusetts.

b. *A receptive judiciary*

The HFM's model depends on getting good decisions. By the time the attorneys opened their firm, they were familiar with the manner in which local district courts enforced and applied relevant landlord/tenant statutes. Even so, they made special efforts to familiarize the courts with the fee-shifting provisions contained in these statutes. When working in district courts that may be less familiar with landlord/tenant cases, they submitted proposed findings of fact and conclusions of law. In addition, they made clear that they would be seeking attorneys' fees if and when they prevailed. Since the early days of the firm, the jurisdiction of the Housing Court has been expanded to include all four counties in Western Massachusetts. The vast majority of the firm's cases are now in either the Housing Court or the U.S. District Court, where the sitting judges understand the applicable fee-shifting statutes and are accustomed to enforcing them.

## II. MAUK & O'CONNOR

Founded in 2005, Mauk & O'Connor, LLP ("M&O") is a two attorney law firm devoted exclusively to representation of families involved in special education disputes with local schools in northern Illinois. The firm is committed to assuring vigorous, comprehensive advocacy for parents and their disabled children. M&O also seeks to maximize access to representation in meritorious cases by offering flexible fee and retainer policies. The attorneys will not decline representation of a meritorious case based on the family's limited means.

### A. *The Business Plan*

The business plan for the firm relies on recovery of attorneys'

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26. *Id.* at 329.

fees from the local school district, either as part of a settlement or after prevailing in a due process hearing before a state Board of Education hearing officer. Despite the challenges of a Supreme Court decision that eliminated entitlement to attorneys' fees after negotiating a settlement,<sup>27</sup> M&O has been successful over the past eight years. M&O measures its success in two ways: in its ability to represent scores of low and moderate income families each year, and in sustaining the firm through recovery of attorneys' fees from school districts. M&O receives more than ninety percent of firm's revenue from school districts rather than from the clients.

### 1. Practice Areas

M&O's legal work primarily concerns enforcement of the Individuals with Disability Education Act ("IDEA").<sup>28</sup> Congress has established a legal entitlement to a "free appropriate public education" ("FAPE") for all students age three through twenty-one who have a qualifying disability.<sup>29</sup> All school districts in the U.S. are required to identify students who are suspected of having a disability.<sup>30</sup> Categories of impairments include learning disability, emotional disturbance, autism, and cognitive impairment.

School districts also must conduct comprehensive assessments of all areas of suspected disability, and prepare an Individualized Education Program ("IEP") for each eligible student.<sup>31</sup> The IEP includes information about a student's impairments, present levels of performance, and goals for the coming year.<sup>32</sup> The IEP also lists whatever specialized services the student will receive, including "related services" such as speech/language therapy and occupational therapy.<sup>33</sup> The justification for the student's educational placement must also be stated.<sup>34</sup> The range of placements extend from regular classroom, to portions of a day in a classroom with only special education students, to placement for the entire school day with only special education students. More

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27. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't Health & Hum. Res.*, 532 U.S. 598 (2001).

28. 20 U.S.C. § 1400 (2015).

29. 20 U.S.C. § 1412(a)(1)(A) (2015).

30. *Id.*; 20 U.S.C. § 1414(a) (2015).

31. 20 U.S.C. § 1412(a)(4) (2015).

32. *Id.*; 20 U.S.C. § 1414(d) (2015).

33. *See, e.g.*, 34 C.F.R. §§ 300.34(a) (2016) (related services include psychological services, counseling services, and rehabilitation counseling).

34. 20 U.S.C. §§ 1401(9), (26), (29); 20 U.S.C. § 1412(a)(1)(A) (2015).

restrictive options include private therapeutic day placement or residential placement.<sup>35</sup> The statute also established extensive procedural safeguards for students and their parents or guardians.

Parents who are dissatisfied with a school's response to the needs of a student can request mediation or a due process hearing before a state education agency hearing officer.<sup>36</sup> The hearing officer conducts a hearing with a court reporter, and takes testimony from school staff, parents, and the student, if appropriate. In addition, private evaluators and therapists may also provide testimony. The hearing record typically includes hundreds of pages of school records, school evaluation reports, and documents from medical providers, evaluators, and therapists. Hearings typically take two to five days, and can involve dozens of witnesses.

After the hearing, the hearing officer issues a written decision that makes findings as to whether the school district has met its obligation to provide FAPE. The hearing officer has authority to order appropriate relief where necessary to ensure compliance with IDEA. Where a parent prevails at a due process hearing, or prevails in litigation following a due process hearing, IDEA provides that the school district is responsible for "reasonable attorneys' fees" incurred by the parent in the due process hearing.<sup>37</sup>

M&O represents forty to fifty families per year, and files thirty to thirty-five due process hearing requests each year. About twenty of the due process cases settle prior to hearing, and ten to fifteen go through the entire hearing process. The firm's win rate has been about eighty-five percent over the past five years. A case involving a due process hearing can consume 150 to 250 billable attorney hours. In a relatively small percentage of cases, perhaps one in twenty, M&O represents families in federal court on appeals from due process hearings—either initiating an appeal from an adverse decision, or defending a favorable decision appealed by a school district. In addition, federal court is the forum for resolving disputes regarding attorneys' fees claimed by a parent who prevails at a due process hearing.

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35. See, e.g., Ben Conway, *Judicial Approaches to Special Education: Residential Placements for Children with Mental Illness Under IDEA*, 5 U.C. IRVINE L. REV. 49, 50–51 (2015).

36. 20 U.S.C. §§ 1415(a)–(b) (2015).

37. 20 U.S.C. §§ 1415(i)(3)(B)–(G) (2015); 34 C.F.R. § 300.513(a)–(c) (2016).

## 2. Clientele

M&O clients are parents, caretaker grandparents, and other guardians of children age three to twenty-one. Eligibility for special education services ends at graduation from high school. Students who turn age eighteen assume decision-making authority, and become the primary client, although many such students assign decision-making authority back to their parent.

Other than maintaining a website, M&O conducts very little marketing or outreach activities. Clients learn of M&O through referrals from school staff, private therapists, diagnosticians and medical staff, and other legal organizations. Although calls have come in from around the country, M&O accepts clients only in Northern Illinois, with the overwhelming majority living in Chicago or the Chicago suburbs.

Typically, the problem is a difficulty in school that has been festering for some time, perhaps even several years. For example, a child with a learning disability may have difficulty learning to read, and may be falling further behind academically. Another example is a child who has an emotional disorder, which may result in suspensions and even expulsion. In some cases an emerging mental illness may cause deterioration in grades or behavior, or both. In urban areas, children exposed to violence, such as observing a friend or sibling shot on the street, may develop Post Traumatic Stress Disorder. Or a parent may report their four year-old autistic child is in a pre-K program, but seems to spend each day watching television.

Parents may be extremely upset with the responses, or non-responses, from the school district and seek representation with unrealistic goals or objectives such as money damages or removal of school staff. M&O limits its practice to enforcement of IDEA. Claims involving other grounds for relief are referred to other lawyers. M&O attorneys explain to prospective clients that IDEA authorizes equitable remedies, which can include compensatory educational services where loss of educational opportunity has continued for an extended period of time. Examples include additional services after school such as tutoring, counseling, or speech/language therapy. Reimbursement for private school tuition after a “unilateral placement” by parents is another potential remedy. Exploring the full range of compensatory services has been very important both for clients and for the firm’s success.

The Chicago Public Schools are the largest source of cases for the firm, with 50,000 students who have IEPs and thousands more who should have special education services, but have not yet been found eligible.<sup>38</sup> In Chicago, eighty-two percent of students qualify for a free or reduced-price lunch, which means their respective family incomes are below 185% of the federal poverty level.<sup>39</sup> Therefore, a large portion of clients have very limited financial resources. Even those with “middle class” incomes, such as school teachers, postal workers, and fire fighters, have limited resources to undertake a legal battle with a school district. This is particularly true when what limited disposable income there is has been expended on fruitless efforts to provide private tutoring or therapy for a struggling child.

### 3. Cases

The firm’s practice is organized in ways that are typical for a small firm. Initial inquiries are directed to the firm’s sole paralegal (who is bi-lingual in Spanish). A phone intake is completed using an electronic form, which takes about twenty minutes. Generally the family is asked to send any available school records and medical records if the case seems appropriate for the firm. An attorney makes a follow-up call to confirm basic presenting concerns and briefly discusses next steps, which include an in-person interview with the parents and student at the firm. That interview can take two hours or more; the attorney reviews the analysis of the problem that has been made to date, discusses the assessment of the merits of any claims for additional services, and reviews the due process procedures. In addition, the firm’s retainer fee and billing policies are reviewed. M&O will not decline accepting a meritorious claim for representation because of a family’s inability to pay the usual fees involved.

The next step is to collect all available school records, as well as medical records, private evaluation reports, and private therapy progress reports. In addition, brief phone conferences are set up with medical providers and any private evaluators or tutors. Another phase is preparation of the due process request—

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38. See Juan Perez Jr., *CPS Stands to Lose Hundreds of Special Education Positions*, CHI. TRIB. (July 22, 2015, 5:04 AM), <http://www.chicagotribune.com/ct-cps-special-ed-cuts-met-20150722-story.html> [<https://perma.cc/T4FR-9LCY>].

39. See *The 2011 HHS Poverty Guidelines*, U.S. DEP’T HEALTH & HUMAN SERVS., OFFICE OF THE ASSISTANT SEC’Y PLANNING & EVALUATION, <http://aspe.hhs.gov/poverty/11poverty.shtml> [<https://perma.cc/X2NH-JQNT>].

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essentially a complaint listing violations of IDEA or state education requirements and the requested relief.

IDEA requires a “resolution session” be scheduled within fifteen days and, generally, completed within thirty days of the filing of the due process request.<sup>40</sup> The resolution session is intended to be held at the student’s school with the IEP team, and to present an opportunity to explore settlement. M&O attorneys have found that the resolution sessions are rarely productive. Following the resolution session, a second forty-five day period begins to run, during which the hearing should be scheduled and a decision issued.

At least fourteen days prior to the hearing, the hearing officer convenes a “prehearing conference” by conference call (similar to a pretrial conference) and then issues a written report and confirms the date(s) for the hearing.<sup>41</sup>

Preparation for the hearing focuses on organizing records, interviewing witnesses, and preparing for examination or cross examination of witnesses, or both. Expert witnesses are obtained. School reports and assessments are examined. Motions to compel production of withheld school records, or to exclude evidence or narrow issues may be filed during this period. Final preparations by M&O include development of a “hearing binder” containing all documents that will be part of the hearing record (this can run to 700 pages, with copies to the opposing party, hearing officer, school district, parent and perhaps others).

During the period leading up to the start of the hearing, settlement discussions may begin to occur. In some cases, offers from a school district represent serious efforts to settle. In other cases, the offer is not serious, but is intended to cloud claims for attorneys’ fees after the hearing. IDEA has a provision that is the equivalent of Rule 68 Federal Rules of Civil Procedure, which provides that if an offer is made at least ten days before trial and is rejected, fees may not be collected for work after that offer is made unless relief obtained at trial exceeds the offer.<sup>42</sup> Attorneys representing the school districts have made offers, in many cases, on the tenth day prior to the hearing, and later used the offer to challenge a fee award. To date, this specific challenge has succeeded in reducing fees awarded to the M&O firm in only one

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40. 34 C.F.R. § 300.34(a) (2016).

41. 34 C.F.R. § 300.181 (2016).

42. 34 C.F.R. § 300.517(c)(2)(A) (2016).

case.<sup>43</sup>

The hearing itself is as hectic as a multi-day trial in any other forum. Following completion of the hearing, the hearing officer generally has ten days to issue a decision, although this time frame may be extended if the parties agree to submit post-hearing briefs. Where a hearing decision requires some corrective action by the school district, this must be implemented by writing the additional services into the student's IEP. A second IEP meeting may be needed if the hearing officer orders additional evaluations. After all ordered relief has been memorialized in the student's IEP, M&O attorneys prepare a fee petition, which is submitted to the school district for payment. If an agreement cannot be reached on the amount due, the firm files a complaint in U.S. District Court on behalf of the clients seeking judgment for "reasonable attorneys' fees and costs." This litigation, once relatively rare, has become quite common. M&O was counsel on six fee cases litigated to judgment in 2010 alone.

Any party to a due process hearing may seek judicial review if dissatisfied with the result. Perhaps one in twenty due process decisions are appealed. M&O has represented parents in cases appealed by a school district;<sup>44</sup> and in cases where the parent appeals.<sup>45</sup> In relatively rare cases, an affirmative claim for injunctive relief is required to fully enforce a hearing officer's decision.<sup>46</sup>

#### 4. Compensation

As noted above, M&O attorneys complete a detailed attorneys' fee petition for "billable" time expended on a due process hearing in which the parent prevails. In this process, the

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43. See *C.R. v. Bd. of Educ.*, 2011 U.S. Dist. LEXIS 26269 (N.D. Ill. Mar. 15, 2011). For decisions rejecting this challenge to fee awards, see, e.g., *Brianna O. v. Bd. of Educ. of Chicago*, 2010 U.S. Dist. LEXIS 118372 (N.D. Ill. Nov. 8, 2010); *Nicole M. v. Bd. of Educ. of Chi.*, 2010 U.S. Dist. LEXIS 3017 (N.D. Ill. Jan. 14, 2010); *John M. v. Bd. of Educ.*, 612 F. Supp. 2d 981 (N.D. Ill. May 4, 2009); *Benito M. v. Bd. of Educ.*, 544 F. Supp. 2d 713 (N.D. Ill. Feb. 28, 2008).

44. See, e.g., *Bd. of Educ. v. Ill. State Bd. of Educ.*, 741 F. Supp. 2d (N.D. Ill. 2010).

45. See, e.g., *Jaccari J. v. Bd. of Educ.*, 690 F. Supp. 2d 687 (N.D. Ill. 2010); *Brett K. v. Momence Cmty. Unit Sch. Dist. No. 1*, 2007 U.S. Dist. LEXIS 23880 (N.D. Ill. Mar. 30, 2007); *Kevin T. v. Elmhurst Cmty. Sch. Dist. No. 205*, 2002 U.S. Dist. LEXIS 4645 (N.D. Ill. Mar. 20, 2002).

46. See, e.g., *Dominique L. v. Board of Educ.*, No. 10 C 7819 (N.D. Ill. Feb. 25, 2011).

M&O attorney also exercises “billing judgment” which assures that time billed is “reasonable” for the particular task. In addition, some items billable to a client may be adjusted to “no charge” for purposes of the fee petition. For example, IDEA excludes billing for attorney time spent attending an IEP meeting unless the IEP meeting is ordered by a hearing officer.

After filing the fee petition with the school district, negotiations may ensue, or the district may object that fees are not due. If an impasse occurs, the remedy is a claim in state court or U.S. District Court to enforce the fee claim. Typically resolved through cross motions for summary judgment, these cases often take six to eighteen months to produce a judgment. Recently, courts have begun to routinely order prejudgment interest where the parent prevails.<sup>47</sup> Of course, time spent successfully litigating a fee claim is compensable; unfortunately, the claim for fees for litigating the fee claim (fees on fees) may result in a second round of briefing.<sup>48</sup>

#### B. *Getting Started, Doing It Better, and Replicating the Model*

M&O points to five critical steps to achieving success in their practice.

##### 1. Initial Considerations in Making a Business Plan

A carefully thought-out business plan is essential for a smooth and successful start-up of a firm. Elements of this plan include:

- *Types of cases.* Even within special education there are areas of specialization, such as the educational needs of students who have autism, or severe medical issues, or severe learning disabilities. Identifying areas of subject matter expertise is crucial to a successful business plan.
- *Operating costs.* Costs of operating a law office may include staff, furniture, networked computers, a five-figure copier/scanner, and other amenities depending on the type of law office formed. Pricing and timing are important considerations in

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47. See, e.g., *Brianna O. v. Bd. of Educ.*, 2010 U.S. Dist. LEXIS 118372 (N.D. Ill. Nov. 8, 2010); *Christopher C. v. Bd. of Educ.*, 2010 U.S. Dist. LEXIS 88694 (N.D. Ill. Aug. 26, 2010); *Ryan M. v. Bd. of Educ.*, 2010 U.S. Dist. LEXIS 80749 (N.D. Ill. Aug. 9, 2010); *Stephanie J. v. Bd. of Educ.*, 2010 U.S. Dist. LEXIS 77562 (N.D. Ill. July 30, 2010); *M v. Bd. of Educ.*, 2010 U.S. Dist. LEXIS 67531 (N.D. Ill. July 7, 2010).

48. See, e.g., *M. v. City of Chi. Bd. of Educ.*, 2010 U.S. Dist. LEXIS 118305 (N.D. Ill. Nov. 8, 2010).

minimizing operating costs. For example, M&O did not purchase a server or hire a full-time paralegal until one and a half years after start up. In the interim, the firm relied on episodic, part-time assistance when needed for a due process hearing.

- *Cash flow projections.* A strong business plan estimates expenses and revenue. Financial projections must consider that a year or more may elapse from the start of a case until it ends successfully. Further, another six to eighteen months may elapse if litigation is required to collect fees from the school district. A good business plan must take account of the likely delay in collecting court-awarded fees.
- *Financing the “start-up” period.* Along with money in the bank, experience suggests that two and preferably all three of the following should be in place for individuals starting their law practices: (1) a working partner or spouse; (2) a day job with sufficient flexibility to allow the attorney to attend meetings at schools and hearings; and (3) a line of credit.

## 2. Developing Expertise

Another “chicken or egg” factor is the extensive expertise in special education practice that is needed to be a successful practitioner. This is not an area of practice one can jump into full time as a novice in a start-up firm. Attorneys who engage in this area of practice often do so very gradually over time, first being involved in a case for a family member or friend, then doing several more cases, often over a period of years. One very useful way to gain experience is to undertake pro bono cases with a legal services organization in the community.

M&O had a six-year start-up period before being formally organized in 2005. In 1999 the Law Office of Michael A. O’Connor was primarily a consulting practice. Sara Mauk was a part-time paralegal who focused on special education advocacy at IEP meetings, and then began developing due process cases. From 2001 to 2004, Ms. Mauk went to law school and continued to do special education advocacy, and O’Connor’s practice gradually shifted from consulting work to special education. Thus, when the firm was established in 2005, the two attorneys each had several years of experience, and a well-developed recognition in the community.

### 3. Meritorious Cases

It is critical the client understand that the firm accepts representation based on a preliminary assessment, that the case presents a meritorious claim, and that circumstances may change. This language should also be expressed in the retainer agreement. In some cases, collection of additional data or private evaluation reports may show the case is not likely to be meritorious. This judgment should be conveyed to the client along with recommendations on how to proceed (e.g., negotiate a settlement). In most cases, a client will accept the recommendation. However, where a client resists and/or makes demands for relief that are not tenable, the firm arranges to withdraw in a manner consistent with the rules of ethics. Generally, rules of ethics allow an attorney to withdraw from a due process hearing without approval from the tribunal, as long as the separation does not cause undue burden or otherwise prejudice the client.<sup>49</sup>

M&O's success is also based on a willingness to litigate meritorious claims, which can be an emotionally bruising experience, for both the attorney and the client. M&O attorneys counsel clients from the initial intake onward—a multi-day hearing may be required to enforce the educational rights of their child.

### 4. Slow Initial Cash Flow

A firm in start-up mode should plan to operate for one to two years with very limited income, and with the probability that office expenses may or may not be covered. Over time, a flow of cases will gradually build up a flow of revenue on those cases in which the client prevails at hearing or there is a settlement with payment of fees. On a longer-term basis, the firm should be prepared for variations in revenue. One year with negative outcomes on a few cases, perhaps exacerbated by illness, support staff turnover or other problems can result in a significant depression in revenue a year or more later. For these reasons, caution should be exercised in expanding firm resources during a relatively good year.

### 5. Controlling Volume

Maintaining a calendar listing active cases and projected dates for motions, briefs, hearing preparation and hearings is important in managing a reasonable workload. An easy trap to fall into arises

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49. MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2016).

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when an attorney takes on cases, files hearing requests on them, and then finds him or herself completely overloaded six to ten months later. M&O will not shut down phone intake, but may advise prospective clients to look for another attorney or to call back in two to three months if a case does not present a need for immediate attention.

### III. SOME CONCLUDING REFLECTIONS

A lawyer contemplating use of the fee-shifting model would do well to carefully consider the lessons offered by the experiences of HFM and M&O.

First, these lawyers worked very hard to establish their practices. They had to carve out their niche, market their skills, break down barriers, work long hours, suffer doubt, accept risk and endure long dry spells.

Second, both firms are very clear about the kinds of cases and clients they seek. They say “no” to many potential clients whose situations do not fit their business models. This readiness to turn away people with real problems and meritorious claims because they do not fit the model means the lawyers can concentrate all their efforts on their areas of comparative advantage. This ultimately maximizes their return. But turning away people in desperate need who cannot afford to hire another lawyer and do not succeed in obtaining assistance from legal aid programs exacts a high emotional price.

Some public interest private law firms have failed to understand this need for discipline. Their business plans were based on a sliding fee scale, under which they planned to charge clients according to ability to pay. But too many people with too little ability to pay sought their assistance, and the desire to help caused them to accept more clients on the low end of their sliding scale than their business plan projected. The firms did good, but did not do well.

Because they lack paying clients, public interest private practices face inherent financial risks.<sup>50</sup> In some cases, this reality may threaten a firm’s ability to handle large-scale cases or matters outside the most profitable margins. Although a firm can hedge financially risky cases against ones that promise a strong likelihood

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50. See *supra* Section I.A; MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 145–66 (1996) (describing the financial struggles of a four-person criminal defense and civil rights practice).

of recovery, “the constant concern about fee generation” may create incentives to “screen out meritorious but low-value cases.”<sup>51</sup> HFM proves it does not have to be this way. However, the attorneys emphasize they were never “out to make a lot of money,” and that they chose to forego more profitable work to adhere to their collective social consciousness. The fact remains that some attorneys might succumb to less altruistic motives.

Third, the lawyers in these firms had to wait a long time before their model paid off. In the meantime, expenses exceeded income. In a traditional business setting, an entrepreneur facing this problem would convince investors to take an equity interest in the business in exchange for start-up capital or would take on debt to carry the business until profits allowed the loans to be paid off. In either case, entrepreneurs would draw a salary during the start-up years. If the business never turned the corner the investors would lose their stake and the creditors would divide up the remainder through bankruptcy.

Both of these firms were self-financed. The partners brought their own capital to the business and went through years in which they could not pay themselves much, if anything. Ethics rules prohibit an equity interest in law practices,<sup>52</sup> but lawyers are allowed to borrow money to finance a start-up firm if they can find a lender. Of course, if lawyers pay themselves a living wage in the early going they will have a larger debt to pay before they can begin realizing the increasing profits of their firm.

Fourth, each of these firms had a pipeline to legal services programs and other sources of referrals of clients. They did not rely on the Yellow Pages, websites, Facebook, or other advertising media. Without their pipelines, the firms might have faced a major challenge—finding clients who need their services. Lawyers planning to start a law firm on this model should carefully assess where their clients will come from. Early victories, good services, established reputations, and advertising may be less important than a supportive local legal aid program.

On occasion, legal aid programs have contracted with private firms to handle specialty cases for which the legal aid staff lacks expertise. Special education cases fit this description in many locations, and so do proceedings to effectively claim and collect

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51. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 *FORDHAM URB. L.J.* 603, 624 (2009).

52. See MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N 2016).

attorneys' fees. A contract, even at a reduced fee, may help a new law firm get established at the same time that it allows the legal aid society to control its costs for a particular type of specialized work.

Finally, there are many practice areas in which lawyers have created practices like the two discussed in this Article. Among these areas are disability benefits, SSI, civil rights, defense of parental rights, whistle blower litigation, and military and veterans' benefits. Although there is no systematic data on firms like HFM and M&O, there is evidence that they have grown in number. In 1978, there were approximately twenty private law firms that committed themselves to public interest work.<sup>53</sup> By 2008, this number had ballooned to more than 200.<sup>54</sup> To be sure, many of these firms engage in personal injury and commercial matters. However, they also pursue cases that are common in the non-profit sector, including employment and civil rights law.<sup>55</sup> The collective experience of these firms shows that public interest private lawyering is rewarding in many ways, despite being financially risky.

Despite the risk, there is no doubt that "public interest private lawyering" offers distinctive structural opportunities. It allows cause-orientated attorneys to build powerful litigation practices around the issues they value most. Often these issues have little to do with poverty law. There are niche practices in everything from corporate accountability to environmental protection.<sup>56</sup> In the process, these lawyers have freed themselves from fundraising obligations, governmental restraints, and organizational priorities.

In the late 1990s, this feature was especially important to a group of legal aid veterans who found themselves "shackled" by

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53. JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* (1978).

54. See *CTR. FOR PUB. INTEREST LAW AT COLUMBIA LAW SCH. & BERNARD KOTEEN OFFICE OF PUB. INTEREST ADVISING AT HARVARD LAW SCH., PRIVATE PUBLIC INTEREST AND PLAINTIFF'S FIRM GUIDE 10-39* (2008) (providing a directory of private public interest firms). Despite their recent surge, private public interest firms remain relatively unknown or misunderstood among law students. In the words of one scholar, "[t]hese creative, fee-based projects often do not seem to make it onto our students' radar screens as they search for socially meaningful career options in law." Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 *FORDHAM L. REV.* 719, 731-32 (2001).

55. Cummings & Rhode, *supra* note 51, at 623.

56. See Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 133-34 (2004) (describing the law firms of Hadsell & Stormer, which practices corporate accountability law in Pasadena, California, and Chatten-Brown & Associates, which litigates land use and environmental protection cases out of Los Angeles, California).

congressional limitations on Legal Services Corporation grantees. Hugh Heisler, Joel Feldman, and Mike O'Connor set out to prove that as long as they kept the core mission and the income flow intact, they could do whatever they wanted. They have come a long way.