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Patricia Salkin

Touro College Jacob D. Fuchsberg Law Center

Ellen Suni

University of Missouri Kansas City School of Law

Niels Schaumann

California Western School of Law, nschaumann@cwsledu

Mary Lu Bilek

University of Massachusetts School of Law

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LAW SCHOOL BASED INCUBATORS AND ACCESS TO JUSTICE—PERSPECTIVES FROM DEANS

PATRICIA SALKIN,* ELLEN SUNI,** NIELS SCHAUMANN***
AND MARY LU BILEK****

At the end of February 2015, law professors, law deans, incubator staff and attorneys, and self-selected others gathered at California Western School of Law for the Second Annual Conference on Law School Incubators and Residency Programs.¹ “A movement somewhat still in its infancy, it has captured the interest of the American Bar Association² and of those who actively promote access to justice.³ The incubators that are the subject of this article tend to focus on transition to law practice and access to justice, and some are also

* Dean and Professor of Law, Touro College Jacob D. Fuchsberg School of Law.

** Dean and Professor of Law, University of Missouri Kansas City School of Law.

*** President and Dean, Professor of Law, California Western School of Law.

**** Dean and Professor, University of Massachusetts School of Law.

¹ See <https://www.cwsl.edu/incubator>. The program brochure offered the following statements: “[T]he rapid growth of incubator and residency programs over the past 2 years is proof that good ideas spread fast. Law schools, legal aid programs and bar associations across the United States, and now the world, are assuming an increasing role in the development of post-graduate training and support programs for attorneys wishing to establish solo and small firms or not-for-profit organizations. Inherent in these programs is a focus on training lawyers who can help to resolve the unmet legal needs of individuals and entities from moderate to low-income communities while they build economically sustainable practices that will continue to serve those client needs. These incubator and residency programs are expanding rapidly and reflect the fact that increasingly the people who choose to attend law school do so because they are committed to expanding access to affordable legal services for the mainstream groups that have not been adequately served, and because they recognize that solo and small firm practice has long been the most popular career path for lawyers.”

² See http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main.html. (In creating a website to serve as a clearinghouse to share information about incubators, the ABA states, “Law firm incubator and residency programs are emerging as models that enable newly-admitted lawyers to acquire the range of skills necessary to launch successful practices. The alpha incubator was established at the City University of New York over a decade ago. Recent changes in the economy have led to the creation of similar models by both law schools and bar associations. This site provides a directory of current and planned incubators and residencies, profiles of the programs and information about the latest developments.”)

³ See, e.g., Richard Zorza’s well respected Access to Justice Blog which tracks incubators and their ability to address access to justice issues, at <http://accesstojustice.net/category/incubators/>; see also, the California Access to Justice Commission which has published a guide to incubators in California, available at <http://www.calbar.ca.gov/Portals/0/documents/accessJustice/2014%20Incubator%20Guide.pdf>.

working to incorporate technology for the practice of law as a means of enhancing access to justice.⁴ As more law schools decide to host, sponsor or offer an incubator, and following our panel discussion at the February 2015 incubator conference, we thought it would be helpful to consider fundamental issues deans grapple with when asked to launch an incubator. This list may not be exhaustive, but it will certainly more quickly advance the conversation, and offers a roadmap of sorts for an incubator business plan.

According to a 2012 report from the ABA, approximately 70% of lawyers in the U.S. practice in solo or small firm settings (including one lawyer to 10 in a firm).⁵ In 2014, 1,000 law graduates reported solo practice as their first job immediately after law school. While we know the number of jobs in large firms, government and corporate law office settings has decreased, we also know that we have a serious access to justice gap.⁶ It is not that we have too many lawyers, it is that as a whole, neither the academy nor the profession have taken responsibility for training or supporting lawyers who might serve the needs of the modest and moderate means clients who currently go unrepresented, either by focusing their education on the subjects and skills necessary or by developing models for the delivery of legal services to these clients that create economically viable practices. Very few would disagree that upon graduation from law school and licensure following shortly thereafter, the vast majority of new lawyers are not well prepared to hang out their own shingle and practice law. This may be an economic necessity for some and well-planned and supported, it could present an opportunity for community-based legal services that could assist in helping to shrink the justice gap. Additionally, each of us have a significant cohort of students who aspire to be solo or small firm lawyers, community-based lawyers, or lawyers who serve the poor and modest means clients who are cur-

⁴ See, for example, that in 2014 Foley & Lardner in Chicago sponsored an incubator designed to boost its presence in the start-up market, available at http://www.abajournal.com/magazine/article/law_firms_are_sponsoring_incubators_cozying_up_with_young_entrepreneurs; and, in May 2015 the Canadian based Ryerson University opened a law-focused incubator to help develop technology, available at <http://business.financialpost.com/legal-post/canadas-first-legal-incubator-opens-at-ryerson>. While this is true, there are many currently working on technology that can make practice more efficient for those seeking to serve modest-means clients and who see this type of Incubator as a fertile ground for testing that technology.

⁵ ABA PRESS RELEASE, *ABA Serves Solo and Small-Firm Lawyers with New Online Resource Center* (1/19/2012), available at <http://www.abanow.org/2012/01/aba-serves-solo-and-small-firm-lawyers-with-new-online-resource-center/>.

⁶ See LEGAL SERVICES CORP., *Documenting the Justice Gap in America: The Current Unmet Civil Needs of Low-income Americans* (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

rently falling into the gap. The challenge then is whether law schools can better prepare students for these opportunities during law school and create opportunities post-graduation that provide the support that will enable competent practice from day one and launch economically viable small and solo practices serving the large, latent market of unrepresented potential clients. There have been many creative programs designed to address post-JD employment challenges such as Lawyers for America founded by UC Hastings School of Law⁷ and Legal Corps at Miami School of Law,⁸ and residency programs designed in this vein to also help underserved populations such as those who reside in rural areas.⁹

There is an oft quoted phrase from Maimonides, “Give a man a fish and you feed him for a day; teach a man to fish and you feed him for a lifetime.” So, how should law schools respond and teach students to fish in the new normal? One of the most intriguing movements to accomplish this while instilling an access to justice ethic is the law school-based incubator program. Through this effort, about three dozen law schools have developed initiatives to support new graduates by providing curricular and/or shared office space arrangements for graduates to learn how to start, manage and build a law practice. There are many related developments addressing infusion of more business related courses in law school and blogs and virtual mentoring and advice for those starting their own practice.¹⁰ The business of law practice, well beyond the traditional law office economics course, is quickly becoming an important part of the law school curriculum. As the law-school based/supported incubators begin to sprout new law firms (and, by the way, some of the incubators are supported by bar associations such as the Chicago Bar), it will be important to conduct a longitudinal study that benchmarks and assesses both new lawyer preparedness to be successful in this space and the impact of such efforts on access to justice. In addition, a study should examine whether a practice primarily focused on the clients who fall in the

⁷ See <http://www.uchastings.edu/academics/clinical-programs/lawyers-for-america/index.php>.

⁸ See http://www.huffingtonpost.com/2010/10/13/new-postgrad-fellowship-o_n_761130.html.

⁹ Profiles of U.S. based incubator and residency programs are *available at* http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_profiles.html.

¹⁰ For example, UMKC Law School has had an Entrepreneurial Lawyering: Solo and Small Firm Practice course since 2005 (and the school added an Entrepreneurial Lawyering: Solo and Small Firm Workshop a few years later); University of Massachusetts School of Law is offering an Access to Justice course in fall 2015; and, in the 2014-2015 academic year Touro Law Center introduced a concentration in solo and small firm practice and appointed a faculty director to oversee solo and small firm practice initiatives.

“justice gap” can be economically viable, and what strategies and techniques are effective in leveraging lawyer efforts to most efficiently and appropriately serve their clients.

WHY SHOULD THE LAW SCHOOL SPONSOR AN INCUBATOR?

First, as previously noted, a large majority of lawyers in private practice in the United States practice in solo and small firm settings. This is significant, especially given the fact that most law schools offer little beyond an occasional course in law office economics and/or accounting for lawyers. Incubators offer a post-JD opportunity for guided mentoring and experiential learning in the business of starting and running a successful law practice.

A second reason is that we are now heavily populated with millennial students, who are more entrepreneurial, who want to “do good,” and who appear willing to make less money if they feel they are doing meaningful work.¹¹

Third, the reality of the legal job market today is that it has made it more challenging for some law school graduates to find their dream jobs. For those with a JD who desire to practice law but for whatever reason may find it more difficult to secure desired employment, self-employment may be a viable option. However, few people would posit that a recent law school graduate has sufficient knowledge and skill to simply “hang out a shingle.” Incubators provide an environment where graduates can be mentored, trained and assisted by the Law School so that they can launch successful careers. Further, under the current methodology used to calculate employment, it is likely that they would be viewed as employed.

Fourth, as part of their role in professional development and socialization of their students, law schools have an obligation to instill a commitment to access to justice in those students¹². Despite efforts to address the problem¹³, the reality is we still face a significant gap in access to justice. Incubators can further enhance this commitment to pro bono service while also helping to meet important community-based needs. In fact at the Community Justice Center of Long Island,

¹¹ See, e.g., Morley Winograd and Dr. Michael Hais, *How Millennials Could Upend Wall Street and Corporate America*, at http://www.brookings.edu/~media/research/files/papers/2014/05/millennials-wall-st/brookings_winogradfinal.pdf.

¹² AMERICAN BAR ASSOCIATION STANDING COMM. ON PRO BONO & PUB. SERV., MODEL RULES OF PROF'L CONDUCT R. 6.1 (2013), www.americanbar.org/; see also *Law School Pro Bono*, EQUAL JUSTICE WORKS, www.equaljusticeworks.org (last visited Oct. 26, 2015) (many schools help meet this obligation by having pro bono requirements or encouraging and rewarding pro bono activity).

¹³ See AMERICAN BAR ASSOCIATION STANDING COMM. ON PRO BONO & PUB. SERV. (last visited Oct. 24, 2015).

the tag line is “Doing Well by Doing Good,”¹⁴ a hat tip to the commitment to pro bono and low bono work that each of its incubator lawyers makes as a condition of participation in the incubator.

Fifth, incubators provide an outcome/assessment loop that helps us determine what our graduates need to be able to do at what level when they graduate, to use those as outcomes to determine how we need to change and refine our program of legal education and then to measure (after the changes have been in place) whether those changes have had the desired effect.

Sixth, incubators may serve as a laboratory for experimenting with techniques and strategies to try to help develop best practices and key elements of economically viable practices serving these communities.

Seventh, an incubator can provide qualitative and quantitative data to generate engaged scholarship – either focused on legal issues that emerge recurrently or on law practice management, etc.

Eighth, if a number of law schools establish incubators and if we aggregate and anonymize outcome data, law schools will contribute enormously to the study of the profession.

Ninth, incubators link law schools to the community and to the profession in the community in a meaningful way.

Tenth, if faculty participate in the incubator – through mentoring or observing or picking up an occasional interesting or difficult case—faculty become aware in a first-hand way both of the demands of this kind of practice and of the competence of their graduates to practice.

WHAT SHOULD BE THE RELATIONSHIP BETWEEN THE INCUBATOR AND THE LAW SCHOOL?

Law schools have taken different paths with respect to the organizational structure of an incubator within an institution. The answers to this question are not easy and should involve a conversation with legal counsel for the law school. The overriding concerns are driven by exposure to liability and the push and pull of how much financial support and control a law school may wish to provide for the incubators. While the incubator movement is new and there has been no litigation, the following are considerations:

¹⁴ See <https://www.youtube.com/watch?v=Z3TRNmOrc40> (last visited 10/26/15).

1) SHOULD THE INCUBATOR BE PART OF THE LAW SCHOOL OR SHOULD IT HAVE ITS OWN CORPORATE IDENTITY?

Should a law school initiated incubator have an identity separate from the school, such as a non-profit entity or incorporated as a for-profit entity? The reason for the inquiry is one of potential exposure to institutional liability. The question may be less important, however, if the law school is providing space (whether free or at a reduced cost) and if the law school is providing some level of support, oversight and cooperation, in which case it is likely to have already assumed liability. Alternatively, a law school may affirmatively want the law school to be part of its program, to embrace it as a key part of its mission and not an employment add-on.

2) WHAT IS THE LEVEL OF SUPPORT THE LAW SCHOOL MUST PROVIDE TO THE INCUBATOR?

The simple economics of legal education today make the financial considerations for law school supported incubators an important issue. For most schools, the available resources to support an incubator come directly or indirectly from student tuition dollars. Just how much money should be allocated to alumni in an incubator as opposed to allocating the same precious resources in the JD program is a prime concern. Yet the concern is different if the incubator is seen as core to the development of the curriculum for law schools with this mission.

Many law schools have set up their incubators so that the lawyers building their own private practices may do so in a supportive environment. The level of support provided by law schools to its incubator initiatives varies. In part, it depends upon the decisions made with respect to the answer to the question of how much money a law school can raise or justify investing in it. Perhaps an overriding concept is that the incubator offers a transition to enable law graduates to understand the economic investment – both costs and risks – in opening a private practice. Therefore, law schools have to be careful to be supportive while at the same time not becoming enablers to the extent that incubator lawyers are not prepared at the end of their residency to successfully go out on their own. The following is organized into categories of items that should be paid for by the incubator lawyers and items that should be paid for/provided by the law schools.

THE FOLLOWING ARE COSTS THAT OUGHT TO BE BORNE
BY THE INCUBATOR LAWYERS:

1 – RENT. Since the concept of the incubator is to prepare lawyers to go out on their own within a reasonable amount of time (often

18-24 months), getting people in the mindset of paying a landlord rent is a good idea. That being said, the law school could play a significant role in helping to negotiate a reasonable lease space. When the landlord is someone other than the law school or university, it is not uncommon for the property owner to prefer to get one signature on a lease instead of 10 individual incubator lawyers. When this happens, the law school is on the hook for the rent during the term of the lease, regardless of whether the incubator lawyers make payments as agreed, and regardless of whether incubator lawyers leave the program early (leaving the law school to pick up the rent). Another approach may include the use of a graduated rent schedule that could include abatement at the beginning in some cases.

2 – DAILY OFFICE SUPPLIES AND PERSONAL EQUIPMENT. It costs money to run a business. Running a law firm is running a business. To be profitable, your income must exceed your expenses, and there are basic expenses common to all law practices – cost of space, phone, a computer, printer, scanner, business cards, paper, water/coffee/tea, pens, etc. Incubator lawyers should learn how to budget for the basic necessities needed, and these modest costs should be considered the “skin in the game” to ensure there is sufficient motivation and to teach business budgeting, fee setting and reimbursable/non-reimbursable expenses.¹⁵

3 – COSTS OF NETWORKING IN THE COMMUNITY. It can be expensive to network and yet it is essential to business development. Costs present themselves in a variety of ways, first and foremost membership in local bar associations and other professional membership organizations. While it is possible for new lawyers to negotiate free or significantly reduced membership fees, these costs are most appropriately paid by the individual lawyers.¹⁶ Attendance at various bar association events such as dinners and CLEs is important, but they too can be expensive, and while some schools might believe that it would be inappropriate for the law school to bear these costs, other schools routinely purchase tables at these events and encourage students and incubator lawyers to attend. When that is not the case, incubator lawyers may be able to volunteer to help organize and staff these events in exchange for free or reduced admission.

¹⁵ The incubator at University of Massachusetts School of Law provides a printer/scanner because one is needed for their administrative aspects.

¹⁶ Sometimes the sponsoring law schools may negotiate lower membership fees for incubator lawyers.

THE FOLLOWING ARE EXAMPLES OF SUPPORT THE
LAW SCHOOLS MIGHT PROVIDE:

1 – MENTORING SUPPORT. In the model where the incubator lawyers are “on their own” in terms of business development and generation (e.g., they do not receive paychecks from the law school), it is prudent for law schools to provide some level of mentoring support especially recognizing that many of the incubator lawyers are new attorneys. This support may take different forms, but often there is a staff member (who may be an attorney) paid by the law school, not the incubator lawyers, who provides daily or routine mentoring support. This person may help to keep the incubator lawyers functioning as a cohesive group, organizing an office kitty to share in expenses, helping to explain how to get on referral lists, how to network, and how to set up a business model that works. This staff person may also work on identifying areas where training is needed and coordinating such, developing a cadre of subject matter mentors, running the application process (for who gets in), keeping the budget, collecting outcome data, etc. The mentoring attorney should be familiar with start-up practices and dedicate time to helping to direct the incubator lawyers to where they can get help in answering questions.

2 – FURNITURE. It would be disruptive to the shared space environment of an incubator for individual lawyers to be moving in and out large pieces of furniture for their work space every time there is a change in tenancy. A law office should look as professional as possible, and mix-and-match furniture, particularly in common areas may not send the type of message desired. Therefore, another start-up cost for the law school is furniture. While it is possible that some schools may get lucky with donations of furniture, and retiring lawyers can be a good source of furniture, as can firms that are moving and want a new look, beware of all of the items labeled “free.” Nothing is truly no-cost. Someone has to move it, set it up and maintain/repair it. Also, it may be difficult to find additional needed matching pieces to hand-me-down furniture.

3 – LARGE EQUIPMENT. Large equipment meant for sharing among all incubator lawyers should be provided by the law school. This primarily means a photocopy machine, scanner and perhaps a shared computer terminal for research. The reason for this is that it belongs to the incubator as a whole. It is true, however, that today all of this equipment is available in smaller-scale sizes and costs so that each incubator lawyer could purchase their own individual equipment. The law school purchased or leased equipment comes with additional budget implications such as a service contract. Also, the question of

who will be responsible for placing and following up as necessary with service calls. In some cases, with at least one law school supported computer in the incubator, some of the reduced cost technology owned or leased by the school can only be accessed (often the licenses are limited to dedicated terminals for the institution).

4 – INTERNET AND LIMITED IT SUPPORT. Assuming there is a central copy/scanner machine, individually purchased computers may need to access a network. Also, it is not possible to operate a successful law practice today without access to the internet. The cost of internet for off-site incubators is a monthly expense that must be paid to the internet service provider. While it is possible to include this in the rent calculation, the law school ultimately bears the responsibility for paying the bill each month. Further, to network the computers, the incubator lawyers would need to agree to retain the same IT consultant and pay that cost, or the law school could provide a very modest level of institutional IT support, which gets trickier for the off-campus models.

OTHER TYPES OF SUPPORT THE LAW SCHOOL MAY PROVIDE:

It takes a village. There is an enormous amount of hidden support that is poured into helping to ensure the successful launch of an incubator as a whole and the individual careers of the lawyers who participate in the opportunity. Law schools and their deans must be prepared to creatively harness resources and external opportunities to help. This often means adding incubator support to many offices and departments at the school.

EDUCATIONAL SUPPORT. The greatest commodity of any law school is its faculty. Faculty can be invited to support the incubator lawyers by volunteering to provide periodic CLE or training programs specifically for the incubator lawyers on-site. For example, sessions could be offered on law office economics, accounting for lawyers, ethics and professionalism, and practical skills in real estate closings, family law, elder law, tax, etc. that would enable to the lawyers to have confidence to take on basic cases in the beginning. Some faculty, depending on their experience and expertise, could also serve as mentors, and retired faculty may be willing to oversee work at the incubator (such is the case at UMKC School of Law). In addition, if a law school operates a continuing legal education program, it can assist by providing programs that are of interest and importance to new lawyers at little or no cost.

SOURCE OF REFERRALS. Institutionally, law schools can also be an important source of referrals for incubator lawyers. The one thing

that every law school has is a clinic, and clinics cannot possibly accept all clients who seek access to justice through pro bono representation. While these potential clients may not be able to afford the going rate for legal services, in many cases they will be able to pay something, and this is where the low bono commitment of incubator lawyers can help. Faculty, staff and alumni who are familiar with the incubator and its lawyers may also be a good source of referrals. In addition, schools can help to leverage the relationship with community partnerships (e.g., legal services offices, the bar associations, and other non-profit legal service providers) as well as governmental connections the law school has as sources of potential referrals.

PUBLIC RELATIONS. While individual incubator lawyers should do their own public relations work, the mere fact that the law school announces an incubator with a press release, prime real estate in the law school magazine, and other general announcements to the community about the incubator, is a significant “soft cost” value to the incubator lawyers. Many law schools provide a spot on their website for the incubator that includes a listing of member lawyers and their bios. An issue for legal counsel may be the line between promoting the incubator and its individual attorneys when there is intentionally little control and no oversight of the individual law practices. Some law schools, such as Touro Law, have honored the incubator lawyers at a public event, further helping with exposure and positive visibility.

FINANCIAL SUPPORT. Some law school incubators also receive support from various other administrative offices within the law school. For example, those who hire the graduates to provide low-bono assistance, such as Pace Law School, use the payroll and accounts payable staff. At Touro Law the institution accepted a grant specifically designed to reimburse incubator lawyers for accepting clients on a pro-bono basis who needed assistance with immigration matters. Since the incubator is not a 501 (c)(3) the only way to provide this economic opportunity was for the law school to accept and administer the grant. The Institutional Advancement Office wrote the grant application, and the business/finance office is responsible for reviewing bills/receipts submitted for payment/reimbursement to ensure accuracy and compliance with the grant, and for processing payment. That office is also responsible for required periodic reporting to the funder in accordance with the terms of the grant.

WHAT ELSE SHOULD BE REQUIRED FOR INCUBATOR
PARTICIPATION?

Deans have to think about access to all law school sponsored programs. How do we decide who gets the advantage of participation when the number of participants is relatively small? How do we know that the investment of money, time and reputation will be well invested in the incubator lawyers? A selection process could include an application that seeks to determine why the particular alumnus/alumnae is interested in becoming an incubator lawyer. A best practice might include a required submission of a business plan, and a formal interview. An effort should be made to determine whether the lawyer has an entrepreneurial spirit, whether they have a commitment to access to justice, whether they are motivated, whether they can carry the modest start-up expenses, and whether they have the personality to get along well with others in the shared space. An idea about the person's sense of professionalism is equally important since each individual is still connected in some way to the law school.

HOW SHOULD SUCCESS BE MEASURED?

Everyone is thinking about outcome assessment today,¹⁷ and expectations should be part of the discussion from the beginning as to how a law dean will know whether an incubator has been successful. From the perspective of a law school dean, what should be the return on investment for supporting the establishment of a law school supported incubator? Certainly there is value in the ongoing post-JD relationship with alumni (albeit a small number in the incubator), but that is not enough. It is easy to count the number of participants and to measure how many left the incubator to either take their own practice to the next level or to accept employment elsewhere after learning that solo practice is not for them. While it may be complicated to collect certain economic and client data both because of confidentiality rules and because the incubator lawyers are individually responsible for their own practices and may believe that they should not have to report their incomes to the law school, it may be a good idea to include in a contract or memorandum of participation some language that obligates the incubator lawyers to self-report required data in exchange for the supports received as an incubator participant. For example, at the University of Massachusetts School of Law, the contract with incubator lawyers requires that they provide to the Law

¹⁷ See, e.g., the ABA STANDARDS ON LEGAL EDUCATION, available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf.

School detailed information about how they bill, what they collect, how much time they spend, whether they used mentors, whether they used technology in an innovative way, etc. The School promises that it will anonymize and aggregate this information and use it to improve the incubator in the future and for research and analytics related to small firm practice generally.

The following additional data could be helpful in measuring success of an incubator (and someone/office needs to be responsible for compiling the data):

- * Number of applications each cycle
- * Number of lawyers accepted each cycle
- * Average length of stay in the incubator
- * Number of clients in the first month and at key intervals (e.g., 6, 12 and 18 months)
- * Number of faculty interactions with the incubator
- * Number of cases referred from the law school to incubator lawyers
- * Number of lawyers who left the incubator to run their own practice
- * Is each incubator lawyer, at minimum, paying their bills timely (e.g., rent and any agreed-to shared expenses)
- * Increase (by percentage) in income/receivables at key intervals

The following items are of a more subjective nature, but important to try to measure:

- * Professional growth of each incubator lawyer
- * Development of reputation of each incubator lawyer (e.g., visibility in the news, bar association publications/events, speaking at community programs, etc.)¹⁸

Of course, the reasons for measuring success include demonstrating a return on the institutional investment, and making the business case to others, including potential funders, for the incubator.

CONCLUSION

As law schools continue to experiment with the incubator model, experiences will help determine best practices and more data will become available upon which strategic decisions can be made to further develop and grow the opportunities to learn and to serve through

¹⁸ At the University of Massachusetts School of Law qualitative measures of success are being collected through self-assessment and focus groups (i.e., the School is not determining how much they grew, it is relying on the incubator lawyer's report of how much they grew). The School is also looking at some kind of evaluation form for clients.

this movement. We look forward to watching the growth and development of our own incubators, as well as those at other law schools and the ongoing sharing of information.