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Collaborative as Client: Lawyering for Effective Change

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INTRODUCTION

Tikkun olam (תיקון עולם) is a Hebrew phrase that has come to be understood as "repairing the world" or "perfecting the world."¹ This formulation resonates for me as a Jew, but I assume there are companion concepts found in other ethnic, religious and cultural traditions. This ideal of "making the world a better place," is what led me to go to law school and, I would contend, has led many others to pursue legal training.² I start here not only because this goal has been the motivation for all my work since leaving law school and continues to drive my work as a supervising attorney in a law school clinic, but also because it has led me to examine various assumptions about the act of lawyering. Most relevant to this paper, I examine the fundamental assumption that lawyers represent *particular* clients to whom they owe all the duties and loyalties defined by the code of professional conduct. And, that a lawyer's representation of that particular client³ must be zealous.⁴ I contend that the standard contours of this relationship between lawyer and client—so central to how most lawyers think about lawyering—are drawn too narrowly. Law schools can, and should, provide opportunities for robust exploration of the

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¹ The connection between this term and social action, now widely recognized, is of recent origin.

http://www.myjewishlearning.com/practices/Ethics/Caring_For_Others/Tikkun_Olam_Repairing_the_World_.shtml (last visited 1/21/10)

²William H. Simon, *The Practice of Justice: A Theory of Lawyer's Ethics*, 1 (1998)

³ Those clients can be individuals, organizations, and even larger communities.

⁴ Even my first paper, written more than a decade ago while I was in law school, Robin S. Golden, *Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing*, 17 *YALE L. & POL'Y REV.* 527, 544 (1998), in which I advocated for a community focused legal services model, as opposed to the individual rights model, reflected a search for more productive ways to lawyer for effective change.

growing body of literature that reflects on a lawyer's ethical responsibilities to her community,⁵ no matter what kind of practice she ultimately chooses. Even more, law schools, through clinics can provide opportunities for students to experience alternative lawyering roles that more holistically embody these ethical responsibilities.⁶ I believe that lawyering to a collaborative can provide one such opportunity.

In this paper, I explore collaborative problem solving as a promising structure for achieving advances in lawyering for effective change.⁷ The lawyering structure I advocate for in this paper does not assume a particular issue. Rather, it focuses on an issue of salience to a community which requires joint problem-solving. Issues can and do change as solutions to past problems are implemented successfully or new urgent needs are revealed. Together with a colleague, I recently considered this structure as applied by a law school clinic to the development of a comprehensive response to the mortgage foreclosure crisis in New Haven.⁸ In struggling to understand the lawyer's role in this collaborative setting, without an obvious specific client, I began to think of the *issue* – in that case, addressing the mortgage foreclosure crisis -- as the “client.”

⁵ See e.g., the variety of essays in Carle, *infra* note X.

⁶ Since starting work on this paper, I have come across many stories of attorneys who have sought out alternative ways to use their legal training see e.g., Christian Nolan, Praising the Lord and the Law”, Connecticut Law Tribune, April 19, 2010 (“As a lawyer, you create conflict for people and I’m a peacemaker, so that was difficult for me. . . .but I’m glad I was a lawyer and practiced, I wouldn’t trade that for anything. It helps me with everything I do now.”) and Becky Beaupre Gillespie and Hollee Schwartz Temple, Working Together, Living Together: sometimes the choice of practice can bring a better balance, ABA Journal, June 2010, (about lawyers who chose “collaborative practice” because, for example, “I saw the terrible waste of clients’ time and money in litigation and the terrible impact emotionally on clients, particularly in family cases, and I decided that I needed to find some other tools.”)

⁷ I am deliberately avoiding the use of such phrases as “social justice,” “social change” or “public interest.” These phrases raise a wide range of conceptions of “doing good” that can and do motivate particular advocates, legal and otherwise. I am using the phrase “effective change” as a grounded concept that assumes some kind of measurable success that is positive for the community. A further important assumption is that such change is directed for the benefit of communities that have been historically disempowered, and therefore disadvantaged.

⁸ Robin Golden and Sameera Fazili, Raising the ROOF: Addressing the Mortgage Foreclosure Crisis Through a Collaboration Between City Government and a Law School Clinic, 2 Alb. Gov’t L. Rev. 29 (2009) [hereinafter Golden and Fazili, ROOF]

However, after another year supervising in the Community and Economic Development⁹ (CED) clinic in which the students and I are now engaged in several collaborative efforts,¹⁰ I have developed a deeper understanding of how lawyers can and should engage in this kind of work. In researching this paper, I have been energized by the other lawyers and scholars who are grappling with similar issues and developing innovative ways of conceiving lawyering¹¹ and have been for generations.¹² Furthermore, research into how others have struggled with similar issues supports my change of frame from “issue as client” to “collaborative as client. Fidelity to the pursuit of a solution to a problem is, I realize, more accurately reflected in the preservation of the *legitimacy of the collaborative process itself*. Thinking of “issue as client” exacerbates a series of difficult questions; for example, whether the lawyer is pushing her own agenda and

⁹ I should note upfront (and it should be obvious after reading the paper) that my conception of community and economic development is broad. Scott Cummings has provided a somewhat narrow definition of traditional CED work that does not involve policy development or legislative advocacy and represents “a focus on *localism*, a commitment to bottom up *neighborhood revitalization* over state sponsored redistributive reform, and a version of mobilization that emphasizes *collaboration* over confrontation.” Mobilization Lawyering:Community Economic Development in the Figueroa Corridor”, in Austin Sarat and Stuart A. Scheingold, Eds., Cause Lawyering and Social Movements, 313 (2006). (I should note that he establishes this narrow definition in order to challenge it with a description of a “new” direction for CED work.) My work with students uses local experience on real projects to inform local, state and federal policy and does not feel limited in the ways defined by Cummings. However, I do subscribe to an emphasis on collaboration over confrontation in CED work, but not just for the reasons suggested by Cummings and others. See infra **XX**.

¹⁰ In addition to the neighborhood planning project discussed infra, we have collaborative projects dealing with food policy and sustainable economies and education.

¹¹ Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 Clinical L. Rev. 427 (2000) (providing a thorough accounting of the theories of practice advocated by “collaborative lawyers” including Lucie White, Anthony Alfieri and Gerald Lopez, including critiques by Joel Handler, William Simon and Gary Blasi, and ending with a reflective accounting of his own example of collaborative lawyering); Susan Bennett, Creating a Client Consortium: Building Social Capital, Bridging Structural Holes, 13 Clinical L. Rev. 67 (2006)(providing the most directly relevant discussion of both the need for and benefit of lawyering to a collaborative, which is different than “collaborative lawyering,” but derive from the same desire to pursue effective change); Shauna Marshall, Mission Impossible? Ethical Community Lawyering, 7 Clinical L. Rev. 147 (2000) (identifying how community lawyers find themselves addressing pressing community issues without a clearly identified single client, whether or not they consciously entered into joint representation of multiple clients); and Scott L. Cummings, “Mobilization Lawyering:Community Economic Development in the Figueroa Corridor”, in Austin Sarat and Stuart A. Scheingold, Eds., Cause Lawyering and Social Movements, (2006) (describing and learning from a complex project driven by a collective of organizations but where “no systemic effort to delineate the client” was made) Id. at 325.

¹² Susan D. Carle, Ed., Lawyers’ Ethics and the Pursuit of Social Justice, (2005) (containing pieces on historical and current alternative conceptions of the “good” lawyer). Louis Brandeis is often mentioned as representing an early model of alternative legal ethics, having “coined the term ‘lawyer for the situation’ to describe a lawyering model under which an attorney seeks to find a just or fair solution to a dispute rather than to advocate solely for his own clients’ interests.” Id at 48.

whether a lawyer can hold herself accountable in such a situation. Alternatively, a lawyer's obligation can be owed to the shared understanding of what the problem is that needs to be solved. For this kind of advocacy, then, the collaborative effort¹³ itself is the client. Using the lens of the collaborative effort as client also makes sense in understanding the actual work I am engaged in with the CED Clinic. In our projects addressing everything from mortgage foreclosure to food policy, we are using a form of the collaborative problem-solving model.¹⁴ What we are just beginning to do, and what I advocate for in this paper, is to formalize the structure as a way to clarify the lawyering environment.¹⁵

Certainly, my understanding of the full contours of this conception—lawyering to a collaborative problem solving effort—is developing as I strive to supervise students and serve the community in a reflective way. My focus on effective problem-solving expands on the work

¹³ In terms of identifying the “client” in this work, I use the terms collaborative, collaborative effort and collaborative problem-solving process interchangeably. I use the concept to mean various parties or interests working together to address an issue around which they have a shared concern. This does not mean that these parties are aligned in all of their interests, thus arises the important ethical issues of confidentiality and conflict that are so thoroughly examined in Bennett’s article (supra note XX at 79-95). I will also use the phrase “multiple representation” (called “intermediary” in the now rejected Model Rule 2.2) to describe the general category in which collaborative as client would fit. This category includes any situation where “a lawyer . . . represents two or more clients with potentially conflicting interests who seek to consummate a transaction or resolve a dispute between or among themselves.” John S. Dzienkowski, *Laywers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. Ill. L. rev. 741, 777 (1992).

¹⁴ Community and economic development clinics in law schools can provide an opportunity for students to explore this non-traditional lawyering role. The interdisciplinary nature of Yale’s CED clinic has created a learning space that includes deep engagement with issues of professional ethics. At Yale, we accept students from other professional schools, most often the schools of management, forestry, architecture and public health. All students are required to attend the general professional responsibility training and several class segments are devoted to further exploration of ethical issues (particularly around working with organizations). All students are expected to understand and apply the Connecticut Code of Professional Responsibility in their project work. Significant time is spent in supervision sessions discussing these issues as they arise. In recent semesters we have added direct exploration of what it means to have a collaborative as client.

¹⁵ Both Bennett, supra note X at XX and Marshall, supra note X at XX, recommend the creation of a document that formalizes, for the multiple participants, the relationship with the lawyer. Bennett’s concept is closest in kind to what the students and I are using in our first effort at formalizing a collaborative as client. At this point, it seems to me that my concept of a collaborative that focuses on an identified current issue as opposed to Bennett’s concept of creating a consortium that will address multiple issues over time is better served by a single memorandum of understanding signed by all participants. One concern I have about creating a collective that is not issue based, is that there is a risk of it becoming an institution with its own separate identity. As such it would no longer represent a collection of voices working together. I do recognize the value of providing an on-going forum for sharing information across parties as identified by Bennett, supra note X at XXX, but I believe that this can occur within a structure of multiple issue focused collaboratives.

imagined by others in the area of multiple representation.¹⁶ In addition, the field of organizational psychology, most particularly group and intergroup dynamics, provides significant guidance for the successful facilitation of sustained engagement across multiple human systems with both shared and divergent interests.

In the first part of this paper I assert that pursuing effective change, particularly in today's complex world, requires that various groups and individuals work together to find and implement solutions.¹⁷ I use the mortgage foreclosure project, which first raised these issues for me, as a starting point. Recognizing that engaging in collaborative problem solving requires new ways of understanding clinical work, I then seek to locate this emerging model of lawyering to a collaborative within existing conceptions of lawyering beyond the traditional single client. I also identify the key lessons learned from the mortgage foreclosure project in advancing this new model of clinical work.

Next, I look at lawyering to a collaborative in practice. I use the example of my most recent collaborative project, one in which my students and I entered with the benefit of reflection on past work. I will explore the implications of defining the collaborative project itself as a client.¹⁸ Here the "client" is made up of a chorus of voices all of whom share an interest in addressing a particular issue. Conflicts of interest are to be expected and must be anticipated and dealt with on

¹⁶ Bennett, note XX at 110-113; Henry Ordower, *Toward a Multiple Part Representation Model: Moderating Power Disparity*, 64 Ohio St. L.J. 1263, 1273-1280 (2003); John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. Ill. L. Rev. 741 (1992). As discussed infra, lawyering to a collaborative is different than "collaborative lawyering" see Piomelli, supra note X at 436-443, but both share the recognition of the need to move beyond traditional lawyer/client relationships in addressing issues facing low-income communities.

¹⁷ I made a similar assertion in a recent paper. *See* Golden and Fazili, ROOF, supra note X at XXX.

¹⁸ I presented an earlier version of this paper to a small group of faculty at the Yale Law School. One interesting theme among the questions from the non-clinical faculty was a questioning of the underlying assumption that a client is necessary for this kind of work at all. I do not pursue that line of thought in this current paper, but could take it up in a future project.

an on-going basis.¹⁹ Susan Bennett provides an enlightening analysis of how the ethical rules and the reality of entity representation “have evolved to accommodate, or continue to frustrate, concerns about conflicts of interest and breaches of confidentiality in ‘multiple representation.’”²⁰ I will use her analysis as the foundation for my examination of the current ethical challenges to lawyering to a collaborative. Finally, borrowing from organizational psychology, I introduce several key concepts related to working with groups in which the members represent different constituencies to guide this type of lawyering relationship in pursuit of effective community change.

In the final section, I explore the roles that lawyers can and should play in facilitating, sustaining and even creating structures that allow for collaborative problem solving.²¹ If one accepts that problem-solving requires collective effort, then it follows that such collaborative work requires some kind of organizing and operating structure.²² In fact, the more well designed the structure—including anticipating the need for reflection and self-correction—the greater the

¹⁹ Related but not explored here, is what it means to lawyer in the government setting where it can appear that there are multiple “clients”. “Who Is the Client of the Government Lawyer?”, Jeffrey Rosenthal, Chapter Two, page 13 from *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, Patricia E. Salkin, Editor, American Bar Association (1999). (“the government lawyer does not *necessarily* represent a single client and, as a result, the client of the government lawyer is not so easily identified.” (p. 13) A government lawyer may be confronted with a situation where it is her belief that advocating for a position that is supported by the agency for which she works may NOT be in the public interest. Does the government lawyer have a duty to the public to protect the public interest? The author cites Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293 (1987) who rejects the notion that the governmental lawyer has a responsibility to represent the public interest because it is so difficult to define a single definitive understanding of “the public interest” (p.15 of Rosenthal). Miller is quoted as suggesting that the Constitution “establishes procedures for approximating [the ideal of the public interest] through election, appointment, confirmation, and legislation. Nothing systematic empowers lawyers to substitute their individual conception of the good for the priorities and objectives established through these governmental processes. “ Miller at 1295. ABA rules appear to suggest that the lawyer owes these duties to the agency that she works for. But does that mean the entity or the individual who runs it? (p.21) The lawyer must go up the chain if she thinks that something is inconsistent, all the way up to the head of the agency.

²⁰ Bennett supra note XX at 67.

²¹ John Bouman, *Growing the Toolbox: Diverse Strategies for Public Interest Lawyers in Campaigns to Expand Access to Health Care for Low-Income People*, Clearinghouse REVIEW Journal of Poverty Law and Policy, 173, 174-177 (July-August 2009) (making a strong case for why lawyers should learn to collaborate with community organizations to enable effective change for the community and describing the need for lawyers in such efforts).

²² Bennett, supra note XX at 95-105 (discussing the value of consortia for creating links, networks and forms of social capital that, in turn, combine and amplify their strengths of the individual members).

potential for success. Lawyers can play an important role in helping lead the collaborating participants through the challenges of working together to address critical issues.²³ In so doing, the lawyers themselves can achieve a sense of integrity between their ideals and their work.²⁴

I. THE NEED FOR COLLECTIVE EFFORT

The case for using collective effort to achieve effective change is multi-faceted. First, the failure to make deep and sustained change through the aggregate zealous representation of individuals or specific groups substantiates a focus of resources on encouraging and supporting collective effort. The minimal community impact of resources focused on individual clients' short term needs has been widely explored.²⁵ Not surprisingly, therefore, even progressive lawyers involved in more traditional lawyering for poor communities through work with individual clients, recognize the limitations of those methods.²⁶ Paul Tremblay describes the difference between the work of poverty lawyers who focus on providing individual representation and those who strive to address a community's larger, long-term needs. He

²³ Id. at 105-109 (traditional lawyers already help clients create collectives and bridge relationships, a natural extension of the community lawyer's role is to "manage structural holes" for a collaborative, that is, enable the closing of information gaps between participants which is possible because the lawyer is both inside the group but also an outsider).

²⁴ Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, 123 (Princeton University Press 2008). While Markovitz holds out small hope that modern lawyers can "preserve their integrity against the ethical assault of their professional lives" I believe the kind of lawyering envisioned here can come close, in large part because it is not adversarial, but also because, if done with self-reflection, has a flexibility unavailable in other lawyering roles.

²⁵ Martha F. Davis, *Historical Perspectives on Pro Bono Lawyering: Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation*, 9 *Am. U.J. Gender Soc. Pol'y & L.* 119, 122 (2001); Marshall, *supra* note X at 158-160 (2000) and Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 *Hastings L.J.* 947, 950 (1992) (suggesting a justifiable allocation of resources from short term individual client needs to longer-term community needs).

²⁶ Corey S. Shadaimah, *Negotiating Justice: Progressive Lawyering, Low-Income Clients, and the Quest for Social Change* 22 (New York University Press, 2009). (Shadaimah interviewed numerous progressive minded lawyers and found that many were frustrated with the ineffectiveness of the available legal tools to do more than chip away at social justice issues. He describes how this dissatisfaction has led lawyers into interdisciplinary practice and small-business lawyering.) It should be noted that, despite their frustrations, many lawyers felt fulfilled by their work on behalf of individual clients. **NEED PAGE NUMBER** and Barbara L. Bezdek, *To Forge New Hammers of Justice: Deep-Six the Doing-Teaching Dichotomy and Embrace the Dialectic of "Doing Theory,"* 4 *RRGC* 301, (2004) (citing the reason that front line poverty lawyers left to join clinical faculties as "the frustration with the limitations of conventional advocacy to effect meaningful change in the legal arrangements that repeatedly ensnare poor people")

describes the former as the primacy of the “ethic of care” versus the latter which represents an effort to empower the community, resulting in more significant, but deferred, rewards.²⁷ While there will always be a significant need for individual poor people to have their rights defended by lawyers,²⁸ for those of us who believe that more large scale change is needed urgently, supporting collective efforts is a promising option.

Second, I contend, as have others,²⁹ that solving problems requires compromise and mutual understanding that cannot be achieved through an emphasis on the advancement of individual interests. Even impact litigation, which has the appeal of addressing the needs of large numbers of individuals simultaneously, often fails to ensure lasting change. For example, the importance of historic successes like *Brown v. Board of Education*³⁰ in advancing social justice generally cannot be denied. However, the continued existence of the achievement gap between white and minority public school students more than fifty years after *Brown* suggests that complex problems like school reform require sustained focused efforts across interest groups—parents, educators, unions, government and business—and not just court-ordered remedies.

Finally, today’s complex world makes the need for collaborative effort even more urgent,³¹ particularly for communities with scarce resources and limited access to power.³² The on-going

²⁷ Tremblay, supra note XX at 949-50.

²⁸ See e.g., William Glaberson, Courts Seek More Lawyers to Help the Poor, NYTs, A26, 1/7/2010 (Discussing the creation of an “attorney emeritus” program to encourage recently retired lawyers to represent low-income clients without the need to buy malpractice insurance as a way of addressing the growing ranks of the unrepresented in New York state.)

²⁹ Mark R. Warren, *Dry Bones Rattling: Community Building to Revitalize American Democracy*, 125-155 (Princeton University Press 2001)(describing a collaborative model used to make progress in addressing racism where other efforts have failed); Kimberlee K. Kovach, Transforming Laywer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation, 28 Forham Urb. L.J. 935, 974-975 (2001) (describing the difference between the mindset needed for problem solving and that of an adversarial lawyer)

³⁰ 347 U.S. 483 (1954)

³¹ Golden and Fazili, ROOF, supra note X, at 34-43.

³² Bennett, supra note X at 105 (“The superiority of the efforts of actors performing in networks to those of actors performing alone has become so accepted that funders expect and even require applicants for grants to apply jointly

debate over multi-disciplinary practice (MDP)³³ further suggests that what we think of as traditional lawyering is changing in response to the complexities involved in addressing problems today. In its simplest form, MDP involves the ability of lawyers and other professionals (such as accountants) to work together, in one firm, and provide a range of services to clients. Ethical strictures have limited the form in which this kind of work can occur currently.³⁴ The several collaborative efforts that already exist, however, show that such arrangements are both successful and desired by clients.³⁵ The popularity of MDP with clients support the idea that today's problems are multi-layered and require a comprehensive approach to finding and implementing solutions. Scholars have noted that new delivery models to serve low and moderate income communities include multidisciplinary practices³⁶ but that the participants in these interdisciplinary efforts have not participated in the American Bar Association (ABA) debate on MDPs.³⁷ My conception of lawyering to a collaborative is interdisciplinary. The effort to find solutions to pressing community issues often requires the

with other partners, and to demonstrate their past achievements as workers in different kinds of collaborations.”
[footnote omitted]

³³ See e.g., Gary Munneke and Ann L. Macnaughton, Editors, *Multidisciplinary Practice: Staying Competitive and Adapting to Change*, Law Practice Management Section, American Bar Association (2001) and J. Michael Norwood and Alan Paterson, *Problem-solving in a Multidisciplinary Environment? Must Ethics Get in the Way of Holistic Services?*, 9 *Clinical L. Rev.* 337 (2002).

³⁴ Model Rule 5.4 has been interpreted to result in “almost any multidisciplinary practice arrangement that is not completely controlled by its lawyer members will subject the lawyers to discipline. Munneke and Macnaughton supra note XX at 5-6 (internal foot note omitted). And Norwood and Patterson, supra note XX at 343 (listing the areas of particular concern regarding MDPs including loyalty to client, independence of legal judgment, keeping client confidences, avoiding conflicts of interest, advancing the quality of justice, promoting access to justice and barring the practice of law by nonlawyers.) See also, Munneke and Macnaughton supra note XX at 5 (suggesting that this requirement is a not-so-subtle form of protectionism on the part of the bar)

³⁵ Id. at 3 (“While the focus of much of the current MDP debate has been on the conflict between law firms and accounting firms, the concept of multidisciplinary practice is not limited to accounting firms: banks, real estate companies, psychologists, engineers and a host of other professionals may have reason to join forces with legal services providers. While much of the attention given to this controversy has concerned multinational business transactions and competition for that business, other substantive areas of practice, such as family law, trusts and estates and elder law, lend themselves to a multidisciplinary approach as well.” and Norwood and Paterson Supra note 16 at 340.

³⁶ Louise G. Trubek and Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 *Clinical L. Rev.* 227 (2000)

³⁷ Norwood and Paterson, supra note XX at 355. Read the entire article for an interesting discussion of how the MDP model can be used to address the needs of at risk children and their families in a holistic way.

engagement of other professionals such as business leaders, environmentalists, city planners and public health professionals. My concept, however, is more expansive than a traditional MDP, because the client itself is made up of multiple voices.³⁸

Lawyers should consider the value of collective effort as they work to support underserved and disadvantaged communities. And, law school clinics should keep this in mind as we consider how to engage students in advocacy for effective change. Community and economic development clinical practice provides opportunities to explore these kinds of projects. The traditional CED work (helping community development corporations successfully pursue projects that impact an entire community) already engages students and clinicians deeply in the community. It is nearly impossible for a CED project not to overlap or involve numerous parties in addition to the identified client. The project described briefly below unfolded into my first “collaborative as client” project. I have learned much from this process in terms of how to engage in such projects going forward. This project also lead to the larger question addressed in this paper: is there a different approach, a collaborative problem-solving approach that should be proactively pursued to respond to community needs?

Real Options, Overcoming Foreclosure Project³⁹

The Mayor of New Haven approached Yale’s CED clinic in fall 2007, to participate in an ad hoc task force that he had assembled to look at the impending mortgage foreclosure crisis in New Haven. The group, composed of representatives of organizations providing direct service to

³⁸ For several reasons, my concept of lawyering in a collaborative problem-solving setting avoids this debate: 1. To the extent that the law school clinic is the “firm” that is providing multi-disciplinary services, the services are controlled by lawyers; 2. We do not collect fees for our work; and 3. A large part of the interdisciplinary nature of the work is in the structure of the “client” and not provided by outside professionals.

³⁹ The development of this collaborative problem solving process is described more fully in Golden and Fazili, ROOF, supra note X at 43-56.

at risk homeowners, the Greater New Haven Community Loan Fund (“Loan Fund”), concerned city aldermen, city staff and others, looked to the clinic first to help define the problem. This became a major clinic project for that semester involving a number of students from both the law school and the management school. The students studied the causes of the crisis, collected data on its projected impact in New Haven, researched national best practices and studied relevant existing and proposed federal and state legislation. This work resulted in a major report that outlined recommendations for a comprehensive response to the crisis and steps to take to implement the response.⁴⁰ The report and its recommendations were accepted by the Mayor and the task force. The clinic, working with the executive director of the Loan Fund, was tasked by the group to lead the design and implementation of what was soon named the Real Options, Overcoming Foreclosure (ROOF) project, a comprehensive response to the mortgage foreclosure crisis in New Haven. The ad hoc task force became the “steering committee” for the effort.

For a full five months, the clinic worked with this collaborative group to address the mortgage foreclosure crisis without a single identified client. Each participant brought his or her particular experience to help forge a common understanding of the crisis and brought different resources and skills to the joint response. It was clear that, working alone, none of these entities or individuals could have had the impact that ROOF had by bringing all of these parties together to work collaboratively. As the supervising attorney, however, the lack of an identified client made me extremely uncomfortable. I had always emphasized to students the importance of knowing “who is the client.” Even under “normal” circumstances, answering this question in the CED context, even when you know which *entity* is your client, was enormously complex (i.e., what happens if there are divergent voices on the board, or the executive director begins to act in

⁴⁰ A copy of the report, much of which is still relevant two years later, can be obtained from the author.

ways that appear to be counter to the wishes of at least some of the board members). These conversations always provide students with rich learning opportunities related to professional responsibility and client management. My concern was that without at least the starting point of an identified client, such inquiries would have no grounding foundation. We continued without a client because the need was urgent and the participants seemed happy with how the clinic's work was being done.

Eventually, once money was raised to hire a full-time coordinator to be housed in the Loan Fund, the clinic entered into a formal engagement letter with the Loan Fund as the client.⁴¹ However, the ROOF steering committee, a group that is not formally affiliated with any single entity, still meets quarterly and a smaller executive committee meets monthly, to review status reports on existing projects, discuss emerging new issues⁴² and needed responses.⁴³ In subsequent semesters, the students and I were able to separate those "projects" that were being undertaken on behalf of our single identified client (the Loan Fund) such as the development of documents to use in the implementation of the neighborhood stabilization program and those that were more appropriately guided by the collaborative group (the Steering Committee) such as working with legal services providers to create pro se materials for homeowners in counseling and advocating for legislation to protect renters in foreclosed building. In our engagement letter, we separated these tasks. But, what we did not do in the ROOF project, but which I advocate for

⁴¹ The Loan Fund is the specific client for the neighborhood stabilization work where students work on every aspect of design and implementation of New Haven's \$3.2 million in federal funds including drafting documents, developing policy and designing programs.

⁴² One example of an urgent issue that was identified later in the process is the impact of this crisis on renters. In response to this issue, the steering committee has been expanded to include representatives from New Haven Legal Assistance (NHLA). Working with NHLA, students have examined the complex pooling and servicing agreements (PSAs) that govern these mortgage backed securities to find ways to encourage servicers to allow tenants in good standing the ability to stay in their units, advocated for new legislation protecting renters, and arranged meeting with national servicers on this issue.

⁴³ In retrospect, it would have made sense, early on, for the clinic to enter into a memorandum of understanding (discussed more infra at X) with the Task Force or Steering Committee members which would have clarified that the clinic was working on behalf of the collective and not for any of the individual members.

and have done in the neighborhood planning project discussed below, was formalize the relationship between the clinic and the collaborative. This was one of the lessons learned from the ROOF project that now informs my current work.

Reflecting on the Work

I spent the summer following the creation of the ROOF project writing an article for a special volume of the Albany Government Law Review on the foreclosure crisis. I knew instinctively that the collaborative nature of this work was necessary to help the New Haven community address such a complex issue. And, given the success of the project, I wanted to do more of this kind of work with my students in the CED clinic. But, particularly given my own initial discomfort about how to manage the work given the lack of a single client, I needed to figure out how to integrate successfully this work into the clinic. I needed to reflect on my experiences with the ROOF project in two ways. First, I wanted to understand where this work fit into existing theories of clinical practice. What could I learn from others who have started to consider more collaborative models? Second, and more urgently as I looked towards beginning a new semester of supervising students in real projects, what did I learn about how to guide students in such work in a way that met the requirements of professional responsibility? This reflective process has taken me on a journey through which I am identifying a new way of approaching CED work. The journey is not at an end. This paper reflects what I have learned thus far, and where I hope to go next.

Locating the Work

My concept of lawyering to a collaborative shares common roots with the various forms of what is called “Community Lawyering.” Community lawyering covers a number of different

theories of practice,⁴⁴ but all share the recognition that progressive lawyering must include the community as an active participant. They also share, therefore, the challenge of defining the needs of the community given the range of relevant institutions and interests. In the clinic setting this means engaging students in frequent discussions of “who is the client” and “who speaks for the client.” Perhaps as a result of this constant examination process, these practitioners and scholars are open to new approaches to achieve justice and change for the communities they serve. The result is a rich literature examining a variety of collaborative approaches to using clinical programs to pursue effective change.

Shauna Marshall, citing Gerald Lopez, Anthony Alfieri and Lucie White, defines community lawyering as an approach which has lawyers collaborating with communities because that is “the locale of the problem” and, therefore, the community should be “an integral part of the development and implementation of the solutions to those problems.”⁴⁵ It is the lawyer’s goal of developing a trusting relationship with the community that leads to “productive problem solving.”⁴⁶ “The zeal is aimed towards the pressing community problems, not necessarily at an individual client.”⁴⁷

Sameer Ashar recently presented a vision of law schools as centers for social justice, based upon his belief of the primacy of collective mobilization,⁴⁸ where collaborations could be born and nurtured. He describes “a place where organizers and collective members interact with each

⁴⁴ See e.g. Carle, *supra* note XX at 187-223 (the section on “Community/Rebellious Lawyering” includes pieces by Gerald Lopez, Christine Zuni Cruz and Victor M. Hwang) and Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. Pa. L. Rev. 173, fn17 (2001) (citing Michael Diamond, Richard D. Marsico, Ann Southworth, and Lucie White).

⁴⁵ Marshall, *supra* note XX at 148 and footnote 3.

⁴⁶ *Id.* at 207.

⁴⁷ *Id.*

⁴⁸ Ashar, *supra* note XX.

other, build alliances, or mediate disputes (that seem inevitably to arise in progressive work).”⁴⁹

Gerald Lopez,⁵⁰ the father of “Rebellious Lawyering”⁵¹ advocates for a greatly expanded understanding of the appropriate role of lawyers working on behalf of poor communities and communities of color.

Instead of focusing principally on the practice of law, I could just as readily, and just as importantly, have concentrated on any institutional order, any specialized practice, or any instance of "ordinary folks" dealing with daily hassles. To be sure, the focus on progressive law practice has served for me and for others as a particularly compelling way of drawing attention to how we work in and with this country's low-income, of color, and immigrant communities and how we work with and in developing nations across the globe. *But the rebellious vision prescribes and provokes ever-evolving ways to improve the quality of problem solving within all institutions and populations and across the critical zones of democratic life (market, politics, civil society). Fastening on our need and capacity to improve - time and again - on what we inevitably together do (poorly or well) is at the heart of the vision I endorse through all my work. . . .*⁵² (emphasis added).

Scott Cummings and Ingrid Eagly provide an excellent history of the struggle of practitioners and theorists to define the appropriate connection between law and social justice.⁵³

In light of what they saw, in 2001, as the need to define innovative advocacy “to address the needs of the poor in this prosperous post welfare, post civil rights era,”⁵⁴ they identify the various forms of what they call the “law and organizing” movement. This is a “politically revitalized approach to progressive legal practice” that insists that lawyers can advance social justice by shifting power to low-income communities through the joining of advocacy and grassroots

⁴⁹ Id at 356.

⁵⁰ The UCLA Law website describes Lopez as “the nation’s leading theorist about lawyering as problem solving.” <http://www.law.ucla.edu/home/index.asp?page=2205> (last visited 10-20-09).

⁵¹ Gerald Lopez, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (1992).

⁵² Gerald Lopez, Commentary: Shaping Community Problem Solving Around Community Knowledge, 79 N.Y.U. L. Rev 59, 69 (2004).

⁵³ Scott L. Cummings and Ingrid V. Eagly, A Critical Reflection on Law and Organizing, 48 UCLA L. Rev. 443, 443-447 and 450-469, 2001

⁵⁴ Id. at 447.

organizing campaigns.⁵⁵ Many of the individuals cited above would also fit under this umbrella. The authors then go on to take a critical look at this approach to “initiate a deeper discussion of the parameters of effective social change lawyering.”⁵⁶

In understanding where my vision of lawyering for a collaborative problem solving process to create effective change fits into the broad movement of law and community organizing, I have two insights (which, I hope, as I do more of this work and engage in more reflection, will become clearer or be proven misguided). First, my focus is on the identification of an urgent issue facing a community and then lawyering to a collaborative formed to address the problem. Therefore, unlike the basis of many other practitioners and theorists, my primary goal is not to empower communities for empowerment’s sake. In this way, this work is less about political mobilization. Success is measured by whether the problem has been effectively addressed and lasting change made. Second, as discussed by Cummings and Eagly, many theorists and practitioners were and are attracted to community organizing in response to compelling critiques of law, particularly litigation, because it “discouraged clients initiatives, diverted resources away from more effective strategies, and [left] larger social change undone.”⁵⁷ My critique of litigation (and other court centric legal strategies) is that it does not *allow for* collaboration which I believe is necessary to solve major issues that impact poor people most severely (i.e., poor public education, lack of access to financial products and poor access to quality food). In another article, Cummings describes CED as, by its nature, non-adversarial, in part because the projects themselves are dependent upon the financial resources it receives from market and state sources (and therefore deterred the community from adversarial tactics to avoid

⁵⁵ Id.

⁵⁶ Id. at 450.

⁵⁷ Id at 454 fn 39 quoting Ann Southworth, Lawyers and the “Myth of Rights” in Civil Rights and Policy Practice, 8 B.U. Pub. Int. L. J. 470-71 (1999).

antagonizing needed supporters).⁵⁸ While I acknowledge that this is often true, my avoidance of adversarial tactics has more to do with what I believe is required to develop successful solutions to complex problems which includes the development of trusting relationships across interest groups.

My concept of lawyering for collaborative problem-solving is informed by all of this scholarship exploring the importance of community defined agendas⁵⁹ and lawyering processes that work “with” rather than “on behalf” of client communities. My concept has the added dimension of looking at the characteristics of the issues themselves. The intractability of difficulties facing disadvantaged communities and the complexity of larger societal issues, leads me to believe that it is often the *nature of the problems themselves* that require collective action and not just the urgency to engage the community or wisely use scarce resources. The complexity of such issues as school reform,⁶⁰ integrating immigrants into the fabric of our communities,⁶¹ and creating sustainable local economies⁶² requires sustained collaborative efforts at defining the issue, developing solutions, and implementing change. Those most impacted by the issue, and often least able to exert pressure for change, must be represented⁶³ at

⁵⁸ Cummings supra note X at 311-312.

⁵⁹ Marshall, supra note X at 148. See also, Ashar, supra note X at 355.

⁶⁰ Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, in THE DERRICK BELL READER 99 (2005) (originally published in 85 Yale L.J. 470 (1976)). Bell’s account of the desegregation litigation calls into question the efficacy of such tactics for achieving better schools for blacks in part because the goals of individual clients to achieve educational improvements were not easily achieved through school desegregation litigation; and Golden and Fazili, ROOF supra note X at fn 12.

⁶¹ Id. at fn 13.

⁶² Id. at fn 14. The Yale CED clinic is held a conference in April 2010 to bring together disparate interest groups to collaborate on strategies to reform the 2013 farm bill <http://www.law.yale.edu/news/foodpolicyconference.htm>

⁶³ There are various ways for affected people to be represented in this kind of process. In the mortgage foreclosure project, at-risk homeowners were represented by front line counselors who saw dozens of individual homeowners a week and, therefore, could provide current information on what they were experiencing and if any interventions were working. Renters were represented by legal services attorneys who were either directly representing or had interviewed dozens of renters facing eviction from foreclosed homes. Affected people can also be represented by community organizations (such as community development corporations) that have boards composed of residents and neighborhood entrepreneurs. Interestingly, in my first article, published in 1998, I first emphasized the importance of representative organizations to empower disadvantaged communities to engage in problem-solving.

the table. Furthermore, the collaborative process must involve constant reflection to ensure that the work is held accountable to the needs of those most affected. However, I contend that success in defining and addressing these complex issues requires that many different parties—in addition to direct representatives of the affected community—should be participants in the collaborative process,⁶⁴ specifically, in some cases, government⁶⁵ and business representatives.

In the case of the ROOF project, the enormity and complexity of the crisis required a collaborative response. The community organizations that were providing housing counseling were suddenly inundated with homeowners facing foreclosure. The complexity of the governing documents and the misinformation given out by servicers responsible for considering loan modifications, created a logjam that appeared unbreakable. City workers were at a loss for how to protect neighborhoods from the flood of vacancies and their corollary challenges (i.e., crime, vandalism, disinvestment). By working together, and addressing all aspects of the crisis simultaneously, New Haven was able to provide pro-active assistance to its residents, particularly those in the hardest hit and most vulnerable neighborhoods.

Lawyering to a collaborative problem-solving effort requires a range of innovative tools to ensure that the purpose, that is to address community defined critical issues in ways that promote effective change, continues to drive both the work of the collaborative and the services

Robin Golden, *Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing* 17 *Yale L. & Pol'y Rev.* 527, 532 (1998)

⁶⁴ Lopez identifies the need for “public and private problem solvers” to engage client communities, but also “to coordinate effectively with one another; to study systematically the effectiveness of a variety of problem-solving approaches and particular interventions; to adapt flexibly to what research reveals about what works and what does not; and to cultivate the willingness to challenge over and over whatever we happen to create, no matter how successful and comfortable the regime.” Lopez, *supra* note X at 76.

⁶⁵ My co-author and I explored what it meant for the clinic to partner with a local government in our project addressing the impact of the mortgage foreclosure project. Golden and Fazilli, *Supra* note X at 73-77

of the lawyer. In his critique of the reigning approach to problem-solving, Gerald Lopez lays out the ideal structure for successful problem-solving:⁶⁶

The rebellious vision challenges the reigning approach along virtually every dimension. The rebellious vision depends upon networks of co-eminent institutions and individuals. These co-eminent collaborators routinely engage and learn from one another and all other pragmatic practitioners (bottom-up, top-down, and in every which direction at once). They demonstrate a profound commitment to revising time and again provisional goals and methods for achieving them; to endlessly striving and foraging about for how better to realize institutional, network, and individual aspirations; and to vigilantly monitoring and candidly evaluating from diverse perspectives what's working and what's not and what such feedback may reveal about both future possibilities and current practices.⁶⁷

This was certainly the case in the ROOF project. For example, Connecticut state lawmakers, when considering new legislation to address various aspects of the foreclosure crisis, would consult with member of the ROOF project. Not only did these lawmakers recognize that, through the work of the students, information had been gathered on national best practices and the latest legislative solutions, but also they understood that we were tracking what was happening to those who were most directly affected by the crisis. We could inform lawmakers on the impact of existing law on at-risk homeowners and renters and we could help them anticipate the actual impact of any legislative changes.

⁶⁶ His critique is worth noting: "The reigning approach [to problem-solving] revolves around powerfully familiar models of human and organizational behavior. In these models, experts, who collaborate principally and often exclusively with one another, rule. . . .these experts issue top-down directives with which subordinates typically comply in order to be rewarded for doing their job. This approach and those who operate within its sway show too little interest in regularly adapting ends and means to what unfolding events and relationships reveal; too little curiosity about the institutional dynamics through which routines and habits form; and a decided aversion to discovering how well any strategy or the overall approach involves and works for everyone affected by its reign." Gerald Lopez, Commentary: Shaping Community Problem Solving Around Community Knowledge, 79 N.Y.U. L. Rev 59, 72 (2004)

⁶⁷ Id.

Lessons Learned

The ROOF project provided the perfect opportunity for my students and me to learn about how best to approach future collaborative problem-solving projects. The major lessons were the importance of: 1) Identifying the collaborative as a client; 2) Maintaining the appropriate relationship between the clinic and the collaborative client and 3) Ensuring accountability.

Identifying the collaborative as a client

From the beginning, the clinic and the other members of the ad hoc task force understood the importance of assembling a coalition to address this crisis. In addition to the representatives of those affected by the crisis that were part of the initial task force, the students researched national best practices for addressing the crisis. This research informed which additional organizations needed to be “at the table” in order to craft and implement a solution, including legal services attorneys focused on the impact of the crisis on renters and organizations focused on data collection and analysis. During the first two years, when the entire country was focused on the crisis, meetings were held frequently and there was tremendous momentum that carried the work of the project forward. What we did not do in the case of the ROOF project, even after the ad hoc task force became the Steering Committee, we never formalized this group as a “client” of the clinic.⁶⁸ Had we done that from the outset, members of the collaborative would have better understood their relationship to the “work” being done by the students. And, the group would have been more effective at maintaining the focus of the collaborative. Despite the fact that the crisis is far from over in New Haven, and the issues that need to be addressed are

⁶⁸ See discussion of the creation of a Memorandum of Understanding as the way to formalize the collaborative as client.

still critical, community attention has moved to other urgent issues such as school reform. The individual members of the collaborative have begun to turn inward to focus on the aspects of the continuing crisis that most effect their organization. I believe that a more formal structure would have been helpful to the collaborative in times of transition.⁶⁹

Maintaining the appropriate relationship between the clinic and the collaborative client

At the outset of our rapidly developed collaborative response to New Haven’s mortgage foreclosure crisis⁷⁰—I took a leadership role, which I continue to hold, as Chairperson of the ROOF Steering Committee. Given what I now understand about the unsettled nature of guidance on multiple representations by the model code,⁷¹ I would not have taken on that role. The tension between my leadership role and my responsibilities as lawyer for the collaborative is most apparent around agenda setting. As Chair of the Steering Committee, I feel an urgency to push the group towards action on areas that I think will be most effective to address the crisis. As the attorney, and supervisor for the students, I recognize the importance of ensuring that the agenda is set by the group, and not by an individual. My role as lawyer for the collaborative should be a check on the domination by any individual participant. This creates an obvious conflict that could be avoided by my not accepting a formal leadership position. At the end of this paper, I suggest additional ways that the lawyer’s relationship to the collaborative can be structured to minimize lawyer dominance through such things as appropriate training, careful drafting of the document that defines the relationship, appropriate division of labor as between the lawyer and the members of the collaborative, and accountability measures.

⁶⁹ In recognizing this, it is possible that the members of the collaborative will reinvigorate the process. But, this may also represent the natural end of the collaborative.

⁷⁰ Golden and Fazili, ROOF supra note **XX** and infra at II a.

⁷¹ The “rise and fall” of Model Code 2.2 traces the most recent struggles of the profession to provide guidance to lawyers who engage in multiple representations. See fn **XX** infra.

Ensuring Accountability

Given the particular challenge of maintaining the effectiveness of a collaborative effort (i.e., helping to maintain a shared focus among disparate groups), accountability processes take on added saliency. In addition, it is important to consider accountability in both the context of concrete accomplishments and process. The ROOF project has always ensured that its work is measured against data. The Steering Committee receives monthly reports on such things as: the number of new foreclosure cases; the number of new intakes to counseling; the number of successful modifications; the number of new vacant buildings; the number of properties put back into productive use. We did not, however, develop a shared understanding of how to measure and ensure the success of the collaborative itself.

I believe that, had we created a Memorandum of Understanding (MOU) which defined the relationship between the clinic and the Steering Committee, that we could have developed accountability processes related to the maintenance of the collaborative itself. As we have found in the neighborhood planning collaborative, the process of drafting and approving such a document provides the space to develop shared understandings of success in both the concrete and process realms.

II. COLLABORATIVE PROBLEM-SOLVING IN PRACTICE

The opportunity to lawyer to a collaborative problem-solving effort can take many forms. Defining the contours of the particular collaborative is essential. The fundamental question of “who is the client,” which then provides the lawyer with access to guidance through the relevant code of professional responsibility, takes on an immediate urgency whenever a lawyer initiates work on a “project,” whether that project is a case in litigation, negotiation of an agreement or

providing advice. In my conception of lawyering to a collaborative problem-solving effort, the issue itself retains a place of primacy while the structure of the cooperative group is put in place. Sometimes the lawyer will help build the collaborative which will then become her client. Of course, this raises many challenges.

The experience of international human rights clinics can be instructive in that their relationship to issues and clients share many of these same challenges.⁷²

Unlike direct services clinics, where the client is the object of the case, international human rights clinics are not a client-centered program. They support, instead, a norm-centered pedagogy. . . . The subject may be a variety of legal and non-legal strategies. ‘Clients’ are rarely individuals, and they are often physically distant from the clinic itself. Indeed, although projects are generally organized through non-governmental organizations, it is more accurate to refer to these as partner organizations than as clients.⁷³

What is novel about the domestic collaborative problem-solving approach is that, generally, the lawyer will be helping *to develop* the client by first encouraging the engagement of the participants in a collaborative process and second, by managing the collaborative process to ensure that the “client’s” interests are clear and are being served. In a sense, as in the international human rights arena, the issue comes first and provides the energy for parties to come together to collaborate. Because domestic work allows for direct connection—in terms of

⁷² Practitioners in international human rights clinics struggle to understand how the concept of lawyering fits in with the reality of the work. “Is the human rights clinic best understood as a model law firm (as reflected in the ‘professional,’ client-based mode of practice), an NGO (which uses the law to advocate an identified set of objectives in support of a particular agenda), neither, or both? Clinics resolve this question in different ways.” Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 *YALE J. INT’L L.* 505, 545-546 (2003).

⁷³ *Id.* at 533). *But see* Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 *CLINICAL L. REV.* 379 (2006) (arguing that a powerful way to address common concerns and criticisms of the practice of human rights law is to emphasize a client-centered approach).

both physical meetings and shared environments—it is more feasible to support the creation of a collaboration that can become the “client”⁷⁴ to which the lawyer owes her duties and loyalties.⁷⁵

The Community and Economic Development Clinic Setting⁷⁶

In this section I will introduce one of our current CED projects⁷⁷ that best reflects a proactive approach to lawyering to a collaborative problem solving process. This work, on behalf of a collaborative group of community organizations and leaders working collectively to transform a particular neighborhood into a vibrant economic corridor, was undertaken with a conscious effort to integrate lessons learned from the ROOF project. I will use our work on this project as a way to illustrate both the challenges to collaborative work and the benefits. Finally I will introduce strategies to use to ensure that this kind of work is effective and avoids the risks of attorney domination. After introducing this project, I will examine the implications of lawyering with a collaborative as client including such issues as how to apply the code of professional responsibility, how can lawyers hold themselves accountable in such relationships and what tools will be helpful to the lawyer in this work?

⁷⁴ While I still believe that, theoretically, it is possible for that “client” to be an idea (i.e., issue), it is difficult to manage the reflective process that is required (i.e., a lawyer must continually ask herself if she is acting in the best interest of the client). In a sense, with the “issue as client” the lawyer is put in a conflict as she must define the interests, or ensure that the interests are being defined, and then maintain her duties to further that interest.

⁷⁵ The precise understanding of how to meet these duties and loyalties in this new context require discussion and documentation in the MOU.

⁷⁶ Recognizing this approach as legitimate lawyering, I believe, will allow for its wide application. A recent Yale Law School graduate went to work for the City of New Haven on a fellowship to address prisoner reentry issues. Her approach was to create a round table of individuals and organizations working on this issue to share ideas and develop strategies to implement. This work led to changes in hiring policies for the city and led to a proposed program to open public housing to the formerly incarcerated. <http://www.yaledailynews.com/news/city-news/2008/10/09/city-focuses-on-prison-reentry/> (last visited 1/20/10)

⁷⁷ I have found many ways to identify issues around which collaborative problem-solving is needed in the clinic setting. Our other collaborative projects address such issues as food policy, raised by a current client and education, brought to the clinic by an elected official

Neighborhood Plan⁷⁸

The Yale CED clinic has been serving numerous community development corporations as clients for over 20 years. In a particular neighborhood, strategically located between the university and a major thoroughfare, the clinic currently has no fewer than five clients with projects that are in some stage of development.⁷⁹ This area has a rich history for the New Haven African-American community, and was the location of a successful HOPE VI project.⁸⁰ However, it has never reached its potential, particularly as a retail and economic center for the community.

As the CED students and I reviewed the projects for which these five clients were requesting assistance for the coming year, I was struck by the amount of attention being focused, individually, by each client within the same geographic area. While we could, and would, provide assistance to each group to further their individual goals, it seemed clear that all of our clients would benefit from some general information (e.g., infrastructure investments planned by the city, market data, traffic studies, historic data, environmental condition data, grant opportunities) and that the community and city as a whole would benefit from a coordinated planning process.⁸¹

We approached each client individually to determine their interest in collaborating on a neighborhood planning process. The response from all clients was positive, if somewhat

⁷⁸ Because of issues of confidentiality, I am not going to go into great detail about the particulars of the participants in this project.

⁷⁹ Most recently, the clinic has helped these clients individually complete two elderly housing projects, assemble properties for a new mixed-use development, and plan for the redevelopment of an older retail property.

⁸⁰ Hope VI is a major grant program of the U.S. Department of Housing and Urban Development (HUD) meant to revitalize the worst public housing projects into mixed-income developments.
<http://hud.gov/offices/pih/programs/ph/hope6/> (last visited 1/20/10)

⁸¹ This proposed collaborative shares many similarities (focused geographic location, similar types of entities, need to make best use of scarce resources) with the one envisioned by Susan Bennett, supra note **XX** at 77-80.

skeptical (several past neighborhood-wide planning efforts had resulted in no real progress). The clinic, as a trusted entity for each client,⁸² would facilitate the collaboration of the groups towards this joint effort.⁸³ Aware of the history of past planning attempts, the clinic, working with other community resources, is committed to ensuring that this effort is perceived as a success and results in meeting certain objectives that will be established by the group. By the end of the first meeting, everyone agreed that the group should meet quarterly and take steps to formalize the clinic's relationship to the group.

Given the willingness of the various groups to collaborate on a joint problem-solving effort, it was now left to my students and me to take the lessons learned through the ROOF project and ensure that effectiveness and legitimacy of this effort.

Addressing the Challenges of Collaborative as Client

As powerful as I believe this model is to allow lawyers to engage in substantive, community driven change, in practice, without significant attention to process, each collaborative is likely to lose its legitimacy and its ultimate effectiveness. Specifically, attention must be paid to the establishment and maintenance of the collaborative and to ensuring accountability to the purpose for which it was formed. The nature of collaborative problem-solving efforts is that they are made up of individuals who "represent" a variety of interests.⁸⁴ Most obviously, each participant represents the organization that she works for or is on the board of (for example, three of the participants in the neighborhood collaborative project represent community development

⁸² The trust was earned, for the most part, from years of successful representation of these individual clients.

⁸³ There still a some skepticism, particularly from representatives of organizations that are were not past individual organizational clients of the clinic.

⁸⁴ David N. Berg, Senior Executive Teams: Not What You Think, *Consulting Psychology Journal: Practice and Research*, Vol. 57, No. 2, 109-112 (describing the representational dynamics when individuals form a group, such as a senior executive team, where they both represent their part of the organization and are members of the team).

corporations affiliated with different area churches). Like Susan Bennett, who borrows social science concepts to explain the structure and potential benefits of this kind of collaborative work,⁸⁵ I take some guidance from the field of organizational psychology, most particularly the areas of group and intergroup behavior.⁸⁶ Organizational theory about these “representational” groups suggests ways that a lawyer can help ensure their success.⁸⁷ I have adapted these recommendations for the specific work of lawyering to collaborative problem solving efforts.

First, transparent steps must be taken in the establishment of the collaborative group⁸⁸ to ensure that all necessary parties are represented and that the framework for the lawyer’s work with the group is fully defined. This includes ensuring that all of the participants understand the implications of the collaborative as client on the lawyers’ ethical responsibilities to the individual participants versus the collective. I prepare my students for this work by introducing, both through lecture, reading and experientially, critical concepts of organizational dynamics. First, the students go through a community building process with their fellow students at the beginning of the semester. In that process, they explore the implications of their own individual group memberships (religious, ethnic, socio-economic group, etc.) on their work with other students and their anticipated work with clients. This same kind of process needs to be facilitated when a collaborative client group is forming. In this case, in addition to whatever individual level identities the participants might have, they are also representatives of their organizations. Space

⁸⁵ Bennett, supra note XX at 95-110

⁸⁶ My undergraduate degree was in this field and I have integrated several sessions, one on “team building” and one based upon Clayton P. Alderfer’s, *Consulting to Underbounded Systems*, (Advances in Experiential Social Processes, Vol. 2 (1980)), into my CED class that use organizational behavior theory to assist students in understanding interactions with the client and using that understanding to improve their client work.

⁸⁷ Id. at 114-116. These include: allowing individuals to own their competing and conflicting group memberships; enabling open discussion by participants of their parochial interests; developing shared understandings explicitly, instead of assuming that views about facts and experiences are shared; and creating strong but permeable boundaries.

⁸⁸ I include in the notion of “establishing” the collaborative both assisting in the creation of a brand new group and formalizing an existing group into an identified collaborative with which an attorney or clinic would establish a formal relationship.

must be made for the individuals to express the interests of the organizations they represent. Instead of being asked or expected to adopt a monolithic set of interests defined by the collaborative, part of the value to the problem-solving effort is derived from each participant retaining her original, sometimes conflicting, interests. These individuals then work together to find and implement solutions to shared concerns.

As part of the maintenance of the collaborative system, a process must be defined up-front – and then followed – that allows for reflection and adjustment of the group’s strategies when needed to align them with any changed reality surrounding the defined problem. This includes allowing for new information to be researched and presented to the group on the current status of the issue they are working together to address. And, accountability measures—defined at the establishment phase—must be reported, reviewed and discussed by the group. In this way, the collaborative group develops a shared understanding of the goals and can then agree on what success is and if they have achieved it. The accountability measures must also extend to the collaborative itself. So, for example, one concrete goal of the collaborative might be to obtain grant funding to support the development of the initial phase of the neighborhood plan. A process goal would be to re-assess, as a group, the overall goal of the collaborative at the end of each semester. The structure of the MOU, which defines goals to be accomplished each semester and a process for assessing progress, will assist in ensuring that these processes take place.

Again, to help prepare students for facilitating the maintenance and accountability of the collaborative, students explore the theories of “consulting to under-bounded systems.”⁸⁹ Generally speaking, non-profit organizations tend to suffer from “underboundedness” (e.g., the lines of authority are unclear, the boundary defining who is “inside the organization” and who is

⁸⁹ Alderfer, supra note XX.

“outside the organization” is fluid, making decision making difficult). While many for-profit corporations or organizations like the military experience symptoms of “overboundedness” (e.g., lines of authority are inflexible and discourage critical information sharing). Understanding the differences between these two extreme conditions, allows students to help the collaborative participants reach and maintain an equilibrium which allows for optimum flow of information and ideas, while still enabling efficient decision making and implementation. Simple tools such as taking notes, making agendas, starting meetings on time, can facilitate effective operations.

Facilitating client meetings, which requires the sharing of information, and engaged (sometimes difficult) discussion to reach consensus, is not easy. The supervising attorney must be hyper observant to data from client meetings (i.e., who spoke up, who did not speak, were the participants making decisions or were they looking to the clinic for guidance). This data should be discussed and analyzed during supervision to ensure that the clinic is supporting effective control of the process by the participants themselves and that progress continues towards the accomplishment of the shared goals.

Identifying the collaborative as a client

In beginning to imagine an environment where lawyering to multiple entities might provide effective advocacy for all participants, Bennett first presents a story of lost opportunity. Two public housing tenant organizations, both clients of one lawyer, would both benefit from a federal grant opportunity that the lawyer could assist them with. However, because the lawyer feels constrained by the rules of professional responsibility from helping both organizations apply for the same grant, despite the willingness of both to waive any potential conflict, she helps neither. And, in the end, neither organization is successful in obtaining the grant. From this

starting point, Bennett imagines the possibility of establishing a continuing relationship among a number of group clients and an attorney which would then allow many different types of representation. “[R]epresentation of one client in one matter, or two or more clients jointly in one matter, or of multiple clients in a planned succession of linked matters.”

In my experience, collaborative problem-solving efforts can take many different forms. How the appropriate collaborative is identified will change depending upon these varying circumstances. In the case of the neighborhood planning effort, the existing clinic clients identified the additional key players that needed to be invited.⁹⁰ Consultation with other engaged parties such as the City and Yale also added to the understanding of the key interests in the neighborhood. A local church hosted the initial meeting which helped to give a sense of neutrality to the setting.

Once the multiple parties are identified, some formal written document should be created that outlines key issues such as sharing information and creating processes for dealing with potential, perceived or actual conflicts of interest. It is essential that the lawyer—and in the clinic setting, the students—fully engage in the ethical implications of this work with the participants and then reflect that joint understanding in the document. As identified by Susan Bennett, the treatment of multiple representations within the Model Rules provides, at best, conflicting guidance. But, she ends her analysis by concluding that “the Model Rules of Professional Conduct, and (perhaps) norms of responsible practice, at least condone if not encourage lawyers

⁹⁰ There have already been adjustments made to the group members. At each of the first two meetings, the general consensus of the group was that a particular group that needed to be represented was missing. Between meetings, efforts are made, and have thus far been successful, at encouraging the identified participant to attend the next meeting and become members of the steering committee.

to represent multiple clients.”⁹¹ In fact, Bennett finds a potential benefit in that clients have to be more actively engaged as they cannot “place unthinking trust” in the lawyer given that she must divide her loyalties.⁹²

In terms of what form the document discussed above should take, Bennett suggests that each individual entity that decides to join a consortium should sign its own copy of a document that she calls the “Community Client Retainer Agreement.” The Agreement outlines the expectations of membership.⁹³ Each individual group must get their own board’s approval to sign its own copy of the Agreement.

Bennett goes on to identify the key ethical issues facing lawyers, and participants, in multiple representations. First, all participants must understand that they lose “any claims in litigation of privilege for their joint communications to each other and to their lawyer.”⁹⁴ Second, participants must be willing to waive their “concurrent” conflicts in advance, which is allowed under the rules (after sufficient explanation by the lawyer to each participant).⁹⁵ Participants cannot, however, be asked to waive issues of confidentiality in advance. “It is the prospect that

⁹¹ Bennett, supra note XX at 109. Bennett takes her readers through a description of the relatively short-lived Model Rule 2.2 Intermediary (it was suggested by the ABA’s Kutak Commission, adopted in 1983 and then eliminated after the 2000 Commission provided its report). Id. at 81-85. Model Rule 2.2 was generally recognized as an attempt to specifically address lawyer’s participation in multiple representation, even codifying Brandeis’ concept of “counsel for the situation.”; Dzienkowski, supra note XX at 740. Due to the ABA’s discomfort with what it presumably saw as the presumptive conflicts involved in multiple representation, the rule required “the drastic remedy of withdrawal from the representation of all the clients in the group (including former individual clients) if any one client requested it or if any unforeseen factor threatened to throw off the delicate balance of individual interests.” Bennett, supra note XX at 82-83. Lawyers now seeking guidance on multiple representations are to refer to the expanded Comments to the more “lenient Rule 1.7” Geoffrey C. Hazard, Jr. & William Hodes, 1 the Law of Lawyering 11-41 (XXXXXX ed., 2004 Supp.)

⁹² Bennett, supra note XX at 85.

⁹³ Bennett also believes it is important that each entity separately “guarantees that it governs itself under internal institutional rules . . . [which in turn] serves as the lawyer’s assurance that her client’s decision, including consent to any conflict, are fully informed and deliberated, and that the client is articulating the substance of the decisions to her accurately.” Supra note XX at 94.

⁹⁴ Id. at 89.

⁹⁵ Id. see e.g. CT Bar Informal Opinion 09-01 at http://forctlawyers.com/wp-content/uploads/2009/12/CT_INFORMAL_OPINION_09-01_Collaborative_Divorce1.pdf (finding that a client’s *informed* consent to concurrent conflicts does not conflict with Rule 1.7(a)(2) in the case of Disqualification Agreement in a Collaborative Divorce process).

any one client in a multiple representation may refuse to divulge information critical to the project, not the possibility of any substantive conflict that may compromise the future of the Consortium irreparably.”⁹⁶ Therefore, the lawyer must continually engage the participants whenever an issue of sharing potentially confidential information arises. Armed with this initial guidance, any clinic that seeks to undertake this kind of representation must spend significant time with the students reviewing the history, the plain language of the appropriate state code and the commentary. Thoughtful articles like Bennett’s⁹⁷ will also provide a strong foundation which students can use as they confront anticipated, potential or actual conflicts in their work on behalf of collaborative problem-solving efforts. Walking the collaborative participants through the various sections of the MOU serves to flag both the importance of confidentiality and the importance of a commitment to sharing critical information.

The structure suggested by Bennett would work well when a decision is made to create a consortium that will exist for an extended period of time to address a series of issues for a particular group of organizations. My vision of the need for collaborative problem solving (i.e., particular needs may emerge, change and even dissipate), suggests the use of a single document, a memorandum of understanding (MOU), that all participants will sign jointly. The mortgage foreclosure crisis, and the corresponding response reflected by the ROOF project, provides a perfect example. A permanent or even semi-permanent coalition was not needed for the members of ROOF to successfully assess and design a response to the foreclosure crisis. While the effects of the crisis are not over, the participants in the ROOF project are beginning to see the end of the need for an active collaborative response. And, the funding sources to help support such a response are drying up. If an MOU had been developed, I believe that the transition process that

⁹⁶ Bennett Supra note XX at 85.

⁹⁷ Id. see also Marshall, supra note XX.

the ROOF project will go through over the next 12 months would have been anticipated. Because no document required regular assessments of the goals of the collaborative, the group has been caught somewhat off-guard in the need to plan for a successful transition which will maintain those elements that need to continue (i.e., the completion and on-going monitoring of the neighborhood stabilization program).⁹⁸

A single MOU outlines the shared understanding of all the participants around the particular issue that is being addressed—such as a comprehensive response to the mortgage foreclosure crisis or a joint vision for the physical development of a neighborhood—by the collaborative. The MOU defines the obligations of the lawyer to the collaborative as opposed to individual participants who may also be individual clients of the clinic, and the processes for dealing with information sharing and conflicts of interest. Importantly, defining who signs the MOU clarifies which organizations are part of the decision making process for the collaborative. Originally, the clinic’s conception of the neighborhood planning group was that it would be open to all interested community parties willing to attend meetings. The participants themselves soon determined that such a large group could not function effectively. A smaller group, such as a steering committee, was needed to meet more frequently and to ensure that decisions could be made in a timely manner and progress made. All interested community members are considered participants in the collaborative, however it is the members of the smaller steering committee, identified by the larger group, that are expected to sign the MOU. In order to sign the MOU each individual must get their own governing board to formally approve the MOU. Signers of the MOU are held to higher expectations in terms of disclosing information and agreeing to work through potential conflicts.

⁹⁸ Needless to say, this could have been anticipated without an MOU and, the clinic is now helping facilitate an orderly transition, but the creation of an MOU, signed by all participants, sets out necessary expectations that assist in the maintenance of a successful collaborative.

In the case of the Neighborhood Planning Project, the students drafted a memorandum of understanding (MOU) along the lines discussed above.⁹⁹ They started by reviewing and adopting many of the elements in Bennett's sample document. They have had several meetings with the participants to discuss the various elements in the MOU. In addition, the students expect to help the group develop a successful operating and decision making structure, to set goals and agree on clear accountability measures.

Despite the newness of this effort (the MOU has been finalized but not yet executed by all parties), we have already experienced the emergence of conflicts of interest and the ability of the collaborative to work through them successfully. The collaborative was provided with an opportunity to obtain a small planning grant. In order to do that, an application had to be created that outlined the initial priorities for the group. Despite the fact that each individual organization had its own development priorities (i.e., several of the Community Development Corporations are primarily interested in housing development), the entire group was able to agree on two priorities, which represented the immediate interests of only two of the participants. The group realized that these two initial concerns (redevelopment of the retail strip and preservation of a historic African American cultural organization) were foundational to any successful overall neighborhood plan. A second example was somewhat more contentious. At the meeting where the application had to be approved (in order to meet the application deadline), one of the organizational representatives refused to agree to the draft until she was able to get approval from her board. The individual claimed that she was not authorized to agree to anything on her own. Finally, after the urging of others on the steering committee, she agreed to call all of her board members and email their approval (with changes) by midnight, still allowing the

⁹⁹ We have adopted many of the elements of the "Community Client Retainer Agreement" so described by Bennett Id. at 73-77.

application to go in on time. We are hoping that, once the MOU is signed by the board of that organization, it will be clear to the representative and to her board that she is authorized to act on their behalf in making decisions as part of the collaborative. By actively engaging all of the participants of the steering committee in the process of creating the collaborative and defining the elements of the MOU, we expect that they will continue to facilitate the navigation of conflicts as they arise. In the end, I believe that this larger effort will improve the chances of success of each of the individual client efforts.¹⁰⁰

Maintaining the appropriate relationship between the clinic and the collaborative client

As noted, lawyers can play an important role in the identification of the collaborative. In particular, those who have represented individual participants in the collaborative in the past have likely earned the trust of their former clients and others in the community that are aware of the positive relationship. However, a past relationship might also lead to a greater risk for lawyer domination due to their perceived status and. In that case, there is a major risk that lawyers will, either consciously or even unconsciously, control the agenda of the group and therefore dominate and define the goal setting of the collaborative.¹⁰¹ There may be no way to guarantee that this kind of undesirable influence does not happen. In fact, because having the lawyer actively engaged in the collaborative effort is desirable, it becomes an issue of line-drawing. How can the lawyering relationship with the collaborative be structured to enable the lawyer's productive involvement while protecting against domination? There are steps that can be taken to minimize

¹⁰⁰ One immediate benefit to all of the participants, which was anticipated by Bennett Id. at 86-87, and was apparent at the first meeting, was the creation of a forum in which they could share information.

¹⁰¹ Concern regarding lawyer dominance has been noted during other efforts on the part of lawyers to pursue social justice. See e.g., Matthew Diller, Law and Equity: Poverty Lawyering in the Golden Age, 93 Mich. L. Rev. 1401, 1410 (1995) (In a review of Martha F. Davis's book "Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973" discusses Edward Sparer's "test-case" model as being ill suited to poverty law because it put lawyers at the center of power and decision making and not clients) and Tremblay, supra note XX at 959 (suggesting that even in rebellious lawyering, which defers present benefits for greater future community benefits, requires the imposition of future interests by, in some cases, the lawyers).

lawyer domination, including ensuring the appropriate role in the collaborative for the lawyer, being explicit about the need to have all voices heard in the setting of agendas and goals, and setting expectations for accountability.

Keeping this dynamic in check requires a self-conscious awareness on the part of the lawyers (and law students). This need for “reflection” is the mark of the most effective professionals in any field.¹⁰² In “Appreciating Collaborative Lawyering,” Ascanio Piomelli captures both the importance and challenge of the work:

[W]e engage in careful introspection on our lawyering experience (and the experiences of others that we observe or learn about). Such reflection is not undertaken to develop scientifically verifiable truths, but rather to improve our craft and refine our understanding of what it means to do our jobs well. Like many professional problem-solvers, we regularly act in conditions of uncertainty. . . . As lawyers, we understand that we will rarely be able to avoid ambiguity. We do, however, try to think deeply about experiences, attending to as many aspects of a situation as we can and examining as many perspectives and dimensions as possible. These reflections lead us not to verities, but hypotheses – hypotheses that we test by acting and then reflecting upon the results.

As discussed earlier, based upon my reflections on the ROOF project, I argue that lawyers not take on formal leadership roles in a collaborative that is or will be a client.¹⁰³ My clinical work with students on the neighborhood planning project follows this recommendation. At our first meeting, the participants looked to me and the students and asked, “well what is Yale’s plan for the neighborhood?” We assured them that we were not there to represent Yale, but rather to facilitate their collaboration. We continue to resist taking control over defining the agenda, even if that means that progress is slower than it might otherwise be. Over time, the participants have come to accept our roles as facilitators. Their understanding of this has proven critical to allow the various community organizations to settle into a process of developing trust and sharing information amongst themselves.

¹⁰² Piomelli, *supra* note XX at fn 21 citing Donald A. Schon, *The Reflective Practitioner: How Professionals Think in Action* 21-69, 128-67, 287-354 (1983).

¹⁰³ A more in depth examination of the lawyer’s role in the collaborative is needed than is possible in this paper,

Susan Bennett suggests that representation of a coalition or network, rather than being a lesser form of representation, achieves specific goals of rebellious lawyering.¹⁰⁴ Unlike traditional lawyer client relationships, a participant in a collaborative cannot depend upon the lawyer to keep its information confidential as to the other participants and cannot be guaranteed that there will be no conflicts of interest. This requires the participants to “do more thinking for themselves”¹⁰⁵ and, therefore, “assume greater responsibility for decisions.”¹⁰⁶ This does not mean, however, that a collaborative as client will be safe from undue influence from the lawyer. Paradoxically, perhaps, it takes leadership to ensure that a collaborative is self-reflective, self-correcting and adaptive. While I think that lawyers can and should play a role in ensuring this happens, such a role does not come without its risks for lawyer domination.¹⁰⁷

Lucie White provides a clear description of this issue:

There is always going to be tension in a community-based work that aspires to be both participatory and emancipator, between the directive role that an organizer, lawyer, leader, or teacher, must play to get the work going and keep it on track, and the teacher’s aspirations to draw out, rather than dictate, the group’s own voices. William Simon has referred to this paradox as “the dark secret” of community-based poverty lawyering. You need powerful leadership to get a community-based group together and to help it undertake meaningful action. Yet with that leadership comes the obvious risks of domination and exploitation.¹⁰⁸

Scott Cummings, in describing a successful project, involving multiple entities, indicates that the lawyers were successful at managing their multiple roles (both as members of the team and “lawyers” for particular aspects of the project) “by being

¹⁰⁴ Bennett, supra note XX at 85.

¹⁰⁵ Id.

¹⁰⁶ Id quoting Lopez.

¹⁰⁷ Paul Tremblay raises some critical questions about conflicts between the rebellious lawyering goal of client-empowerment and the reality of imposing a long-term, deferral of benefits view. He suggests that by working with groups, this conflict can be diffused. Tremblay, supra note XX at 969-970.

¹⁰⁸ Lucie E. White, Facing South: Lawyering for Poor Communities in the Twenty-first Century, 25 Fordham Urb. L. J. 813, 825 (1998)

consciously self-reflective.”¹⁰⁹ The best way to ensure that the clinic students and supervising attorneys manage this tension successfully is by exposing students to appropriate theories of organizational dynamics and then engaging in reflective discussion during supervision sessions.

Ensuring Accountability

Maintaining the effectiveness, legitimacy and viability of the collaborative requires effort. Lopez is explicit about the need for accountability in collaborative work:

Research about problems and problem-solving resources - regular inventories, periodic check-ups, full-blown evaluations - must become part of ordinary operating procedure, part of "business as usual," and linked through healthy feedback loops to street delivery of services. This is true no matter the social problem addressed (health, environment, economic development, or criminal justice) and no matter the mix of public and private organizations implicated in overlapping networks of resources.¹¹⁰

Lawyers can help promote these processes by establishing regular meetings, each with a clear agenda the elements of which are established jointly. Early on, the group should define what they all will recognize as “success” and how progress to achieve that success can be measured concretely. At the regular meetings, reports should be given on progress made toward the identified goals. Minutes should be taken and distributed prior to the next meeting. In addition, on a regular basis new relevant information should be provided to the group (potentially collected by the students) on the current nature of the issue that is the basis of the collaboration. If, based upon this new information, changes are needed to the approach or critical new members added to the group or even questions raised about the continued need for the group

¹⁰⁹ Cummings, supra note XX at 325.

¹¹⁰ Lopez, supra note XX at 81.

at all, there must be a process by which such information can be presented, absorbed and processed.

In the Neighborhood Planning Project, the clinic students have been proactive about supporting regular meetings, documentation, establishing success measures, and researching and presenting relevant information. In the MOU, the goals to be accomplished during the current semester are outlined explicitly. The MOU lasts until the end of the semester at which point a process of assessing progress made on each of the goals is conducted. The MOU is to be re-signed at the beginning of each new semester, after the group has defined the goals for the next semester. The first MOU is to be signed this summer, so it is not clear how successful this process will be. However, the participants in the collaborative have all expressed their desire to hold themselves accountable to setting and meeting goals.

If the steps outlined here are followed, and the participants are informed, educated and engaged in both the reasons for these procedures and their development, lawyer dominance will be minimized and effective collaborative problem-solving can occur. In this way, lawyers and communities can work together to make their world a better place.

III. THE ROLE OF LAWYERS IN COLLABORATIVE PROBLEM-SOLVING

The relationship between lawyering and the pursuit of social justice¹¹¹ has been examined from multiple angles.¹¹² Many people enter the profession in hopes of using it to improve society. In practice, “justice” is protected, through the adversarial system and zealous

¹¹¹ Here I use the phrase “social justice” in order to connect my paper to a recognizable shared history (see FN **XX** on why I use the phrase “effective change” in the rest of the paper).

¹¹² Shadimah, supra note **XX** at xii (“Law has long been seen as a problematic but necessary tool for working for social justice (however defined)”) See also, David Luban, *Lawyers and Justice, An Ethical Study* (1988) (an thorough ethical accounting of the conflict between role morality and common morality and a lawyer’s obligation not to forego the later for the former); Simon supra note **X** (presenting an approach, the “contextual view” that supports lawyers taking actions in regards to particular cases that seem likely to promote justice); Carle, supra note **XX** at 145-223 (presenting a variety of clinical perspectives on the lawyers role in pursuit of social justice from client-centered to rebellious lawyering).

representation of the rights of specific clients. This dominant paradigm means that a lawyer's ability to engage in the pursuit of social justice is limited¹¹³ often leading to a lack of fulfillment¹¹⁴ or, even, a disconnect between work and self identity.¹¹⁵

Instead of arguing that lawyers have a responsibility to pursue social justice,¹¹⁶ I start from the premise that if a lawyer feels that she has a responsibility to pursue social justice, or, if not a responsibility then a strong desire to do so, that the tools for realizing that work as a lawyer should not be limited by the narrow interpretation of the code of professional conduct or by the domination of the adversarial approach to lawyering.¹¹⁷

As discussed above, pursuing effective positive change particularly in our complex time requires strategies that bring disparate groups together to address problems. In fact, there are more and more instances of main-stream recognition of the need for and value of collaborative efforts. For example, one half of the 2009 Nobel Memorial Prize in Economic Science this year

¹¹³ Ashar, supra note XX at 357-358 (“...the kinds of advocacy currently taught and reinforced in most law clinics. . . which focus nearly exclusively on individual client empowerment . . . are not sufficient to sustain effective public interest practice.)

¹¹⁴ Deborah Rhode, Law, Lawyers, and the Pursuit of Justice, 70 Fordham L. Rev. 1543, 1545 (2002) (“Only one-quarter of lawyers find that legal practice has lived up to their expectations in contributing to the social good, and this lack of contribution is the greatest source of career dissatisfaction”) citing 2000 ABA Young lawyers Div. Surv.

¹¹⁵ Markovits, supra note XX at 2 (“... lawyer's professional obligations to behave in ways that would ordinarily be immoral are not simply the result of excessive or perverse partisanship. Instead, they are deeply ingrained in the genetic structure of adversary advocacy”) and Mitchell M. Simon, Navigating Troubled Waters: Dealing with personal Values When Representing Others, 43 Brandeis L. J. 415, 417 (2005) (describes story of young legal services lawyer who left her job after winning a case that allowed a mother to keep her children when it was clear to the lawyer that the children were better off in foster care. She went to work for a non-profit that worked on child advocacy issues.)

¹¹⁶ I do, however, find such arguments compelling. See Steve Wizner, The Law School Clinic: Legal Education in the Interests of Justice, 70 Fordham L. Rev., 1929,1929 (2002) (“The public interest requires law students to learn that they have a social and professional responsibility to challenge injustice and to pursue social justice in society.”)

¹¹⁷ Litigating for the rights of individuals, groups or communities can and does further social justice and I do not mean to suggest otherwise. However, as the dominant mode of lawyering, the adversarial stance to achieving public interest objectives diminishes the opportunity for other forms of lawyering and may make problem-solving itself more difficult.

was awarded to Elinor Ostrom of Indiana University¹¹⁸ under the title of, “Economic governance: the organization of cooperation.” Yale University used the recent purchase of a large research center in West Haven-Orange, Connecticut to establish five multi-disciplinary research institutes that, through collaboration, hope to achieve breakthroughs more quickly than can be achieved through the more traditionally separated medical, research, and engineering campuses.¹¹⁹ The City of New Haven was recently heralded by the Obama Administration for negotiating a new teacher’s contract that allows student achievement data to be used as part of teacher evaluations, believed to be a key to closing the achievement gap. This contract was overwhelmingly approved by the rank and file teachers. The teacher’s union, school administration and the mayor, all attributed the success of this negotiation to a collaborative approach.¹²⁰

Is a lawyer “necessary” to provide support to collaborative problem-solving efforts? Some might say that a non-legally trained “project manager” or a experienced practitioner in organizational behavior, should be able to do just as good a job as a lawyer in supporting such an effort. Having various facilitators from different fields might, in fact, be desirable depending upon the size of the effort and the nature of the problem being addressed (think again about the popularity of MDP among clients and practioners). However, I believe that having legally

¹¹⁸ Information provided on the Nobel Memorial Prize website about the award to Ms. Ostrom’s work says, “If we want to halt the degradation of our natural environment and prevent a repetition of the many collapses of natural-resource stocks experienced in the past, we should learn from the successes and failures of common-property regimes. Ostrom’s work teaches us novel lessons about the deep mechanisms that sustain cooperation in human societies.” Information for the Public, October 12, 2009, http://nobelprize.org/nobel_prizes/economics/laureates/2009/info.pdf (last visited October 20, 2009). I also think it is worth noting, that the Nobel Peace Prize awarded to President Obama was for “his extraordinary efforts to strengthen international diplomacy and cooperation between peoples.” http://nobelprize.org/nobel_prizes/peace/laureates/2009/index.html (last visited October 20, 2009).

¹¹⁹ Ed Stannard, “A Cure for Cancer or Alzheimer’s? It could happen at Yale’s new suburban campus”, New Haven Register, 11/8/2009 A1.

¹²⁰ Report from New Haven Federation of Teachers web-site: <http://ct.aft.org/NHFT/index.cfm?action=article&articleID=3d6f433d-1603-4cd9-b1b0-014bad632a26> (last visited on October 30, 2009)

trained advocates supporting these collaborative efforts is both desirable and, for many projects, necessary.¹²¹ First, the status of lawyers in our society¹²² provides an almost immediate legitimacy to endeavors involving attorneys (at least attorneys with good reputations). Just as others have noted that particular lawyers with significant reputations can lend “prestige and weight” to an issue during high stakes litigation,¹²³ I believe that having lawyers involved, particularly those affiliated with a law school clinic, can provide a sense of legitimacy to a community effort. This is particularly true where a law school clinic has a long history of successful work with a variety of community groups as clients.¹²⁴

Second, operating under a code of professional conduct, despite its shortcomings,¹²⁵ provides lawyers with a framework to develop critical skills in handling heterogeneous interests. Lawyers are, if adequately exposed and engaged in the study of professional ethics,¹²⁶ uniquely qualified to manage the disparate voices in a collaborative process and many already address these issues regularly.¹²⁷ Further, by learning and incorporating theories from group and intergroup psychology, lawyers can enhance their ability to successfully manage their role in these multiple representations. As noted by Trubek and Farnham:

. . .[T]he legal profession has often been noted as embodying both/and approaches; lawyers can represent criminals in the name of upholding justice. The social justice practices are able to figure out how to be both conscientious lawyers and dedicated collaborators. They understand when clients are protected by sharing information rather than hiding it. They

¹²¹Is it possible that a lawyer is even more essential to these collaborations than I suggest here. I look forward to collecting more “data” over the next few years and then explore this issue in more depth in a future article.

¹²² Trubek and Farnham, supra note XX at 260-261 (“Thus, lawyer status legitimates the role of nonlawyers as actors. It also contributes to the ability of community organizations to attract support from for-profit institutions.”)

¹²³ Davis fn X at 121,

¹²⁴ In the neighborhood planning project, the success of the first meeting can be attributed directly to this dynamic.

¹²⁵ As discussed at length by Bennett, supra note XX at 79-85, the model rules focus on traditional one-on-one representation and provide limited, or at least less useful guidance to those interested in multiple representation.

¹²⁶ Many have bemoaned the fact that the study of professional responsibility receives minimal attention in law schools, but, as noted by Robert Gordon in his forward to Carle’s critical reader on ethics, supra note X at xiv-xv, law schools are starting to do better, and there is a growing literature to support that change.

¹²⁷ Bennett, supra note XX at 81.

create protocols and use the time-honored waivers when necessary to deal with conflicts or confidentiality. They are exploiting the opportunity of moving between the private and the public sphere by assisting entrepreneurs. They are active in associations of lawyers to preserve their skills and identify with their professional status. They are able to contribute this status to the benefit of the other professionals they work with and to the benefit of their clients.¹²⁸

Transactional lawyers craft agreements between parties with disparate interests and partnerships are formed using one attorney. Lawyers who serve corporate clients are often faced with managing potential and actual issues of conflict of interest (as between the board and management or between different classes of stockholders).¹²⁹ This is even more apparent for lawyers who serve not-for-profit clients where diverse interests may be formally structured into the board membership through requirements in the bylaws.

Third, in my experience discrete legal tasks and general legal skills are required at various points within a collaborative problem-solving process – for example drafting operating agreements and contracts, negotiating the design of institutional structures, researching the current legal environment, developing proposed legislation to change the legal environment. While it is possible to outsource each discrete legal task to an outside lawyer when it arises, having a lawyer at the table, throughout the process facilitates the completion of the legal tasks and improves the quality of the product.¹³⁰ Further, it's cost-effective; imagine the transaction costs and time that would be required if, alternatively, the various participants each engaged their own attorney to negotiate for its particular interest in the structuring of a relevant agreement within the collaborative. In the world of community and economic development, most

¹²⁸ Trubek and Farnham, *supra* note XX at 261.

¹²⁹ It has even been proposed that an increased need for lawyers to advise corporations in Brandeis' day, may have contributed to the understanding of lawyering beyond pure advocacy, Dzienkowski, *supra* note XX at 756.

¹³⁰ For example, as part of the clinic's mortgage foreclosure project, the students have drafted all of the relevant documents for the Neighborhood Stabilization Program (NSP) (a federal grant program to enable cities hard hit by the foreclosure crisis to purchase and renovate foreclosed properties). Because the students were immersed in these issues, the resulting documents were so excellent that many have been used as models by the State of Connecticut Department of Community and Economic Development for use by other Connecticut NSP recipients.

participants would have limited, if any, funding to pay for legal representation and securing pro bono services cannot be assumed. Finally -- and importantly -- because not all needs for legal skills present themselves as discrete tasks or even lawyer-necessary issues, having a lawyer as a key participant who is consistently present to identify tasks and issues is almost essential.

Finally, many students in Law School have professional goals that will engage them in leadership problem-solving roles in their communities, whether for their actual profession (elected office, government or non-profit leadership roles, facilitators of complex deals) or avocation (roles on board of directors). They will engage these complex issues on a frequent basis. Exposure to interdisciplinary and complex problem-solving while in a learning environment is critical. In my direct experience supervising law students in this kind of interdisciplinary work, a large number of them are looking for a way to be “a lawyer” in an expansive way. Those students welcome the need to develop a variety of skills and to struggle with their role vis-à-vis the client, the law and the work. I have had students who take my clinic for one semester (at Yale, students are able to be engaged in clinic for up to five semesters) and then decide that they are more suited to litigation. I suspect that the students are self-selecting and those who leave would experience a greater sense of role confusion as noted by Cummings and Eagly.¹³¹ The reason I advocate for the collaborative problem solving model in to be used in the clinic setting is to train practitioners to be nimble advocates. This requires ground in theories of organization dynamics and adequate debriefing in supervision sessions through which the supervising attorney models the self-reflective stance that is required for this work to be successful.

¹³¹ Cummings and Eagly supra note XX at 495.

CONCLUSION

In a new book entitled “The Leading Lawyer: A Guide to Practicing Law and leadership,” Robert Cullen distills what he has learned from interviewing ten “Leading Lawyers” from a cross-section of industries about what is required to be both a lawyer and a leader.¹³² It is not surprising to me that an entire chapter of this book would be devoted to collaboration.¹³³ To me it is not a question of *if* the legal profession should embrace a more expansive concept of lawyering, rather it is a question of how. I hope that this paper has contributed to the growing literature on how lawyers can move beyond the limits of single-client representation and, in so doing, both improve community problem-solving and find personal fulfillment.

¹³² Robert W. Cullen, *The Leading Lawyer: A guide to Practicing Law and Leadership*, (West, 2009). Interviewees include Leon Panetta, Ben W. Heineman, Jr. and Justice Joyce L. Kennard.

¹³³ *Id.* at 111.