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# Offering Transactional Legal Aid to Low-income Entrepreneurs

Jared Nicholson\*

## INTRODUCTION

Transactional legal aid practices have been growing throughout the country.<sup>1</sup> This is particularly true at law schools, whose clinics share a joint mission of educating law students and serving their communities.<sup>2</sup> But it is also true at traditional legal aid agencies.<sup>3</sup> In the field of community economic development (CED) more generally, programs assisting entrepreneurs are on the rise.<sup>4</sup> All this suggests that the number of transactional legal aid lawyers will continue to grow.

Starting a transactional practice at a traditional legal aid agency raises difficult questions that all poverty lawyers face about how to allocate limited resources.<sup>5</sup> As the practice area grows, these are questions that more legal aid lawyers will have to confront. The goal of this Paper is to help transactional legal aid lawyers make hard decisions about how to allocate resources to meet client needs.

This Paper builds upon the rich literature on triage in legal aid, both in the sense of designing a transactional legal aid practice and selecting individual clients for that practice, by extending the triage literature to the context of transactional legal aid. As the transactional legal aid practice area has grown, the literature surrounding it has begun to grapple with the questions of triage that the literature on legal services has dealt with for decades. This Paper builds on the transactional legal aid literature by addressing those questions about triage based on the

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1 See generally Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J.L. & POL'Y 11 (2015) [hereinafter Tremblay (2015)] (presenting arguments for and against the allocation of legal resources to entrepreneurs and emerging businesses).

2 See generally Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997) [hereinafter Jones (1997)] (analyzing the benefits of transactional clinics to legal education).

3 See, e.g., *Community Development*, PUBLIC COUNSEL, [http://www.publiccounsel.org/practice\\_areas/community\\_development](http://www.publiccounsel.org/practice_areas/community_development) (last visited Aug. 27, 2017) (Los Angeles); *Community and Economic Development*, BROOKLYN LEGAL SERVS. CORP. A, <http://bka.org/our-work/community-and-economic-development> (last visited Aug. 27, 2017) (Brooklyn); *Our Services*, CHI. LAW. COMM. FOR C.R., <https://www.clcrrl.org/services> (last accessed Sept. 18, 2017) (Chicago).

4 See, e.g., Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 252–53 (2004) [hereinafter Jones (2004)]; *Active Grantee Locations*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.acf.hhs.gov/ocs/programs/ced/ced-grantees> (last accessed Aug. 27, 2017); *Small Business and Community Development Programs*, U.S. DEP'T TREASURY, <https://www.treasury.gov/resource-center/sb-programs/Pages/default.aspx> (last updated Nov. 19, 2015).

5 See, e.g., I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 222 (2013); Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2499 (1999) [hereinafter Tremblay (1999)].

experience of a transactional legal aid practice. Contributing to the literature based on the experience of that practice, this Paper addresses arguments for and against providing transactional legal aid and takes up questions about how to set priorities in designing a practice, selecting its clients, and evaluating success to achieve the greatest impact.

The practice I refer to was established in Lynn and Lawrence, Massachusetts—two midsize cities like the ones that I argue are a particularly good fit for the provision of transactional legal aid to low-income entrepreneurs. I started the practice in September 2014, and over the course of two years worked with almost eighty low-income entrepreneurs, half of whom were women and almost ninety percent of whom were people of color.

Section I of this Paper makes a theoretical case for legal aid for low-income entrepreneurs, particularly in midsize cities. Section II explains how to operationalize the goals of working with low-income entrepreneurs into factors to use in selecting clients and evaluating the impact of client work. Section III discusses how to tackle broader impact projects based on the experience of the practice example. Section IV presents dilemmas that will come up in a transactional legal aid practice.

## I. THEORETICAL CASE FOR LEGAL AID FOR LOW-INCOME ENTREPRENEURS

Resources in legal aid are scarce.<sup>6</sup> As a result, practitioners must triage potential clients and make hard decisions about who they should help.<sup>7</sup> This section provides a theoretical grounding for why transactional legal aid is worthwhile. It also responds to potential objections to providing this kind of service. However, it does not answer the difficult question of the relative value of different legal aid practice areas. After presenting the arguments as to why this practice is valuable, I assume that there is a place for it in legal aid and the following section moves on to how to triage clients for transactional legal services.

### A. *What is CED and Why It Matters Today*

Legal aid is free legal help on civil matters for indigent clients. From its beginnings, legal aid has been affiliated with other, non-legal strategies to fight poverty.<sup>8</sup> Community economic development (“CED”) is a basket of strategies that seeks to empower low-income communities to pursue and achieve their own vision for

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6 AM. BAR ASS’N, *Part I: The Delivery of Legal Services in the United States: The Commission’s Findings, A REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES*, 10–18 (2016), <http://abafuturesreport.com/2016-fls-report-findings.pdf>.

7 See Cohen, *supra* note 5, at 222–23.

8 See generally William H. Simon, *The Community Economic Development Movement*, 2002 WISC. L. REV. 377 (2002) (exploring the CED movement through its focus on public programs and “logics of community action”).

growth.<sup>9</sup> Legal aid lawyers have a role to play in the CED movement by providing legal help to individuals and organizations engaged in CED. CED lawyering is particularly relevant today because of rising inequality and an increased focus on entrepreneurship (which aligns naturally with the emphasis that CED puts on growth from the bottom up).<sup>10</sup> As a result, there has been increased interest in CED lawyering, especially in law school clinics.<sup>11</sup>

### B. Why Provide Legal Aid to Low-Income Entrepreneurs

The type of legal help that makes up the practice of CED lawyering has changed over time as the CED movement has evolved and legal aid for low-income entrepreneurs has become more prevalent.<sup>12</sup> This Part makes the theoretical case for providing legal aid to low-income entrepreneurs.

Providing legal aid to low-income entrepreneurs helps low-income people be part of reaching their own community's potential and meet the needs of their own community.<sup>13</sup> Entrepreneurs build businesses that create jobs.<sup>14</sup> Business growth and job creation benefits communities as local business owners and employees can better provide for their families and social capital accumulates through increased economic

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9 See generally Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 409–47 (2001) (setting forth an indigenous critique of market-based CED).

10 See Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85, 87–88 (“The heightened U.S. emphasis on entrepreneurship innovation, and creativity has been fueled by a global financial downturn and the emergence of a global economy.”); see also Susan R. Jones, Jacqueline Lainez & Debbie Lovinsky, *Viewing Value Creation by Business Lawyers Through the Lens of Transactional Legal Clinics*, 15 U.C. DAVIS BUS. L.J. 49 (2014).

11 Jones et al., *supra* note 10, at 54 (“[I]ncreased interest in [transactional clinics stem from various] factors, includ[ing] . . . government support for microbusinesses, a renewed emphasis on entrepreneurship fueled especially by a recent downturn in the U.S. economy, an expansion of early community economic development clinics beyond housing to include asset-based community development, and concern for closing the economic and racial wealth gap.”).

12 Jones & Lainez, *supra* note 10, at 96 (“[W]elfare reform in the 1990s heightened the national discourse on personal responsibility and self-employment through microbusiness as a viable option for achieving economic self-sufficiency.”).

13 See Cummings, *supra* note 9, at 444 (“CED scholars have suggested that if neighborhood residents are incorporated as active participants in the reconstruction of their local economies, they will be empowered through the process.”); see also Laurie Hauber, *Promoting Economic Justice Through Transactional Community-Centered Lawyering*, 27 ST. LOUIS U. PUB. L. REV. 3, 14 (2007) (“By building wealth through the development of community businesses, individuals can live above a basic subsistence level, which, in turn, encourages people to participate in their own development and to become more active in community affairs.”).

14 Jones et al., *supra* note 10, at 84 (“If just one in three microenterprises hired a single employee the U.S. would be at full employment”) (quoting ASS’N FOR ENTER. OPPORTUNITY, THE POWER OF ONE IN THREE: CREATING OPPORTUNITIES FOR ALL AMERICANS TO BOUNCE BACK 1 (2011), [http://www.aeoworks.org/pdf/one\\_in\\_three.pdf](http://www.aeoworks.org/pdf/one_in_three.pdf) (findings based on 2010 data)); Jason Wiens & Chris Jackson, *The Importance of Young Firms for Economic Growth*, KAUFFMAN FOUNDATION: ENTREPRENEURSHIP POLICY DIGEST (Sept. 13, 2015), <http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-importance-of-young-firms-for-economic-growth>.

stability.<sup>15</sup> In addition to the direct economic effects, as individual, community-based entrepreneurs do well, the well-being of their families and neighborhoods improve.<sup>16</sup> Supporting low-income entrepreneurs is therefore a strategy to combat wealth inequality, and working with entrepreneurs of color is a strategy to address the racial wealth gap.<sup>17</sup> Because immigrants tend to be disproportionately entrepreneurial,<sup>18</sup> it is also a strategy to support immigrants, an often vulnerable population, achieve stability.

Support for low-income entrepreneurs also leads to intangible benefits. An entrepreneur with a commitment to a particular low-income community has a direct stake in that community's future<sup>19</sup> and an intimate knowledge of its needs and strengths.<sup>20</sup> Small businesses provide goods and services that their customers need and want.<sup>21</sup> Successful small business owners can be role models for their communities.<sup>22</sup> Businesses help advocate and pay for clean and safe neighborhoods.<sup>23</sup> They facilitate social ties by creating opportunities for people in the community to meet and build relationships and networks.<sup>24</sup>

Providing legal aid to low-income entrepreneurs also supports the development of client capabilities<sup>25</sup> and community leaders.<sup>26</sup> Success in small business is

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- 15 See Cummings, *supra* note 9, at 438 (“A central component of market-based CED strategies has been the promotion of local business development as a vehicle for creating jobs for low-income workers.”); Tremblay (2015), *supra* note 1, at 35–36 (“A successful business not only provides that client with capital and economic power; it might even have ripple effects, such as employment of others to assist in the business.”).
- 16 Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L.L. REV. 487, 503 (1995) (“At a minimum, however, spreading entrepreneurship to talented African-American youths who are not college-bound increases the socioeconomic mobility of these individuals and, potentially, the human and social capital wealth of their own personal and business networks, which would likely include friends and family from their former neighborhoods.”).
- 17 Jones et al., *supra* note 10, at 92 (“Transactional clinics can play an important role in alleviating poverty and closing the racial wealth gap by representing community groups and individual entrepreneurs who are actively trying to end poverty and wealth disparities.”).
- 18 See generally RICHARD T. HERMAN & ROBERT L. SMITH, IMMIGRANT, INC.: WHY IMMIGRANT ENTREPRENEURS ARE DRIVING THE NEW ECONOMY (AND HOW THEY WILL SAVE THE AMERICAN WORKER) 5 (2d ed. 2010) (“America’s immigrants are far more likely than non-immigrants to launch a company.”).
- 19 Lewis D. Solomon, *Microenterprise: Human Reconstruction in America’s Inner Cities*, 15 HARV. J.L. & PUB. POL’Y 191, 207 (1992).
- 20 Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV., (May–June 1995), <https://hbr.org/1995/05/the-competitive-advantage-of-the-inner-city>.
- 21 Hauber, *supra* note 13, at 14.
- 22 See Jones et al. *supra* note 10, at 84.
- 23 See generally Stacey A. Sutton, *Rethinking Commercial Revitalization: A Neighborhood Small Business Perspective*, 24 ECON. DEV. Q. 352 (2010) (focusing on the agency of small neighborhood business owners as underexplored stakeholders).
- 24 See *id.*
- 25 See Rashmi Dyal-Chand & James V. Rowan, *Developing Capabilities, Not Entrepreneurs: A New Theory for Community Economic Development*, 42 HOFSTRA L. REV. 839, 895 (2014).
- 26 See Hauber, *supra* note 13, at 13; see also Jones & Lainez, *supra* note 10, at 97 (“[T]ransactional work often attracts a more sophisticated client than one might find in a nontransactional clinic—that is, a client who has harnessed the expertise, energy, and personal or borrowed funds to launch a forprofit or nonprofit enterprise.”).

difficult.<sup>27</sup> It requires strong organizational, management, sales, and other skills.<sup>28</sup> Entrepreneurs need to manage risk, know their market, and beat competitors.<sup>29</sup> Attempts, whether successful or not, at entrepreneurship offer someone an opportunity to develop those skills, which are also useful in other contexts. Entrepreneurship should not be encouraged recklessly.<sup>30</sup> But, as discussed in more detail below, the cost of skill acquisition will have been lowered by legal help in the event of a failed venture.

A good practitioner will make capability building<sup>31</sup> an explicit goal of her work.<sup>32</sup> That means explaining to clients the work she is doing and what the client might be able to do on his own the next time versus when he might need a lawyer's help.

Capability building should also include network building. A well-connected entrepreneur is a more capable one<sup>33</sup> (and a more capable community leader). The lawyer can make introductions to other helpful services and groups, for example, chambers of commerce for marketing, technical assistance providers, lenders, accountants, and other lawyers.<sup>34</sup> In addition, a lot of transactional work for low-income entrepreneurs is also about guiding the entrepreneur through the regulatory process. Particularly for local regulation, success in that area depends a lot on relationships. An attorney can set an entrepreneur up for future success by making introductions to the regulators.

### C. Why Focus on For-Profit Businesses

Legal services are important to entrepreneurs because they lower transactional barriers to growth and protect individuals even if the business goes

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27 See Dyal-Chand & Rowan, *supra* note 24, at 865.

28 See generally Marco Caliendo & Alexander S. Kritikos, *Is Entrepreneurial Success Predictable? An Ex-Ante Analysis of the Character-Based Approach*, 61 KYKLOS 189 (2008) (identifying the variables assumed to be crucial for entrepreneurial development).

29 See Susan R. Jones, *Representing Returning Citizen Entrepreneurs in the Nation's Capital*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 45, 57 (2016) [hereinafter Jones (2016)] (“[C]ertain striking and defining qualities, including a strong need for achievement; internal drive and perseverance; a tolerance for ambiguity and uncertainty; resourcefulness; and a powerful passion to change the world with their ideas, services, and the persons they employ.”).

30 See Dyal-Chand & Rowan, *supra* note 24, at 865.

31 See *id.* at 894–95 (“[U]sing small business development to enhance income, longevity, literacy, and social inclusion.”).

32 See *id.* (“It is critical to note that these potential means of using small business development to enhance income, longevity, literacy, and social inclusion are only realizable if, and to the extent that, the individuals involved receive targeted support for these purposes.”).

33 See Jones (2004), *supra* note 4, at 288; Dane Stangler & Jason Wiens, *The Dos and Don'ts of Local Entrepreneurship Promotion*, EWING MARION KAUFFMAN FOUND. (Sept. 10, 2015), <http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-dos-and-donts-of-local-entrepreneurship-promotion> (“Entrepreneurship often is a lonely, emotional, and challenging process that evolves over time. To be successful, entrepreneurs need connections to potential mentors, networks for learning, and emotional support from peers at all stages of the entrepreneurial process.”).

34 Hauber, *supra* note 13, at 17.

poorly.<sup>35</sup> Private attorneys are often cost prohibitive or lack progressive fee structures that are accessible to low-income entrepreneurs.<sup>36</sup> Promoting legal compliance helps those individual entrepreneurs. It also helps communities as laws aimed to protect important interests (e.g., consumers, workers, the environment) are better implemented. When lawyers counsel businesses on how to meet their legal obligations, they fulfill Louis Brandeis's view of "economic statesmanship."<sup>37</sup>

Focusing on for-profit businesses also positions community members to benefit from growth in their communities. In this way, it can be a strategy to combat displacement. Growth increases people's income, but it can also raise rents, resulting in displacement of the people in the communities the original goal for growth was supposed to benefit.<sup>38</sup>

A for-profit entrepreneur is still at risk of displacement if she leases her location.<sup>39</sup> But a lawyer can help better position her by negotiating the terms of the lease. A lawyer can also help guide her through the decision of renting versus owning, including making introductions to realtors and lenders.

More fundamentally, a for-profit entrepreneur can herself take advantage of a neighborhood's rising incomes.<sup>40</sup> One of the greatest challenges to entrepreneurship in low-income communities is that potential customers cannot afford to pay for the goods or services the entrepreneur offers. As incomes rise in a neighborhood, more potential customers can afford to pay. However, rising incomes that change neighborhoods can lead to tastes changing in a way that harms low-income entrepreneurs.<sup>41</sup> The hope is that a low-income entrepreneur who is connected to a good community economic development practice will also be connected to a good technical advisor<sup>42</sup> who can help the entrepreneur adjust. They might be connected

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35 See *id.* at 15–17; see also Jones et al., *supra* note 10, at 71 (quoting Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 500 (2007)) (“[S]cholars contend, when tested against empirical evidence, the findings ‘strongly support the hypothesis that transactional lawyers add value by reducing regulatory costs.’”).

36 See Tremblay (2015), *supra* note 1, at 22; see also James L. Baillie, *Fulfilling the Promise of Business Law Pro Bono*, 28 WM. MITCHELL L. REV. 1543, 1547 (2002) (“[New and small businesses] cannot receive legal services in the marketplace.”).

37 See Louis D. Brandeis, Address at Phillips Brooks House Before the Harvard Ethical Society: The Opportunity in the Law (May 4, 1905), in 39 AM. L. REV. 555, 558 (1905). For a discussion of Brandeis's view of “economic statesmanship,” see James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1057 (1994) (reviewing ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993)).

38 See MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 14 (2001), <https://www.brookings.edu/wp-content/uploads/2016/06/gentrification.pdf>.

39 See *id.* at 15.

40 See *id.* at 15, 17.

41 For example, customers of the independent corner store move out and new residents prefer Starbucks. See, e.g., Sarah Goodyear, *Malls of America: Can San Francisco's Solution to Protect Mom-and-Pop Shops Help Preserve the Character of City Neighborhoods Everywhere?*, N.Y. DAILY NEWS (Apr. 5, 2016), <http://interactive.nydailynews.com/2016/04/save-mom-pop-shops-gentrification> (Brooklyn); Jon Kamp, ‘Southie’: New Blood, Old Problems: While Gentrification Spreads, Neighborhood Where ‘Whitey Bulger’ Reigned Remains Rife with Addiction, WALL ST. J. (Aug. 16, 2013, 8:31 PM), <http://www.wsj.com/articles/SB10001424127887323455104579015193063024308>.

42 See Jones (2004), *supra* note 4, at 303–07.

because the lawyer made the introduction or because the services are linked as part of a broader community economic development movement.

Is a practice that helps certain lucky or talented low-income individuals benefit from growth at odds with other work that seeks to combat gentrification? This paper will not get into sorting out the winners and losers in neighborhoods that experience rising incomes (whether because of new residents with higher incomes, or more hopefully, current residents whose incomes rise).<sup>43</sup> But there seems to be little tension in helping low-income entrepreneurs profit and continue to benefit from whatever economic growth takes place even while people work to help low-income residents continue to live in their own community. Even if the entrepreneurial client and the renter client may have different preferences for the future of the neighborhood, a legal aid lawyer helping the entrepreneur with her legal needs does not conflict with a different legal aid lawyer helping the renter with his.

#### *D. Why Midsize Cities Are a Particularly Good Fit*

A transactional legal aid practice is a particularly good fit in midsize cities with large immigrant populations and high concentrations of poverty. These kinds of cities are common across the Northeast and Midwest, like Springfield, Massachusetts; Rochester, New York; Allentown, Pennsylvania; Columbus, Ohio; and South Bend, Indiana.<sup>44</sup>

The practice is a good fit for those cities because small business ownership can be especially attractive to immigrants who lack English skills or ties to existing employers.<sup>45</sup> Also, for undocumented immigrants who cannot lawfully become employees, business ownership is a legally available path to economic opportunity.<sup>46</sup>

In addition, these cities have been hit particularly hard by long-term economic change. Many were built on manufacturing, which globalization and technological advances have undermined as an economic driver over the last several decades.<sup>47</sup> But that decline presents low-cost opportunities in cities that have infrastructure that is already built and downtowns that are ripe for growth. Transactional legal aid can help low-income entrepreneurs take advantage of those opportunities.

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43 See generally Isis Fernandez, Note, *Let's Stop Cheering, and Let's Get Practical: Reaching A Balanced Gentrification Agenda*, 12 GEO. J. ON POVERTY L. & POL'Y 409 (2005) (providing a framework to analyze gentrification and help policymakers make decisions that minimize its negative effects).

44 See LEGACY CITIES PARTNERSHIP, <http://www.legacycities.org> (last visited Aug. 28, 2017).

45 See generally DAVID DYSSEGAARD KALLICK, BRINGING VITALITY TO MAIN STREET: HOW IMMIGRANT SMALL BUSINESSES HELP LOCAL ECONOMIES GROW (2015), <http://www.as-coa.org/sites/default/files/ImmigrantBusinessReport.pdf> (analyzing quantitative case studies from three metro areas).

46 See CMTY. ENTER. PROJECT OF THE HARVARD TRANSACTIONAL LAW CLINICS & THE IMMIGRANT WORKER CTR. COLLABORATIVE, A LEGAL OVERVIEW OF BUSINESS OWNERSHIP FOR IMMIGRANT ENTREPRENEURS IN MASSACHUSETTS 3 (2015), <http://clinics.law.harvard.edu/tlc/files/2015/09/TLC-Immigrant-Entrepreneurs-Overview.pdf>.

47 See ALAN MALLACH & LAVEA BRACHMAN, LINCOLN INST. OF LAND POLICY, REGENERATING AMERICA'S LEGACY CITIES 2 (2013), [http://www.lincolninst.edu/sites/default/files/pubfiles/regenerating-legacy-cities-full\\_0.pdf](http://www.lincolninst.edu/sites/default/files/pubfiles/regenerating-legacy-cities-full_0.pdf).

The argument for midsize cities focusing on low-income entrepreneurs is similar to the argument made by Susan R. Jones for focusing on returning citizen entrepreneurs.<sup>48</sup> Both midsize cities and returning citizens (people who were previously incarcerated) face structural barriers to growth.<sup>49</sup> Entrepreneurship offers a potential path to growth for both midsize cities and returning citizens, building on their respective, inherent strengths. Entrepreneurship is relevant as a strategy for growth to both returning citizens and midsize cities in part because entrepreneurship empowers people who might be otherwise left out of economic growth trends to forge their own path to prosperity.

Finally, while the major cities in the same regions in the Northeast and Midwest also have areas with high concentrations of poverty—Boston, Massachusetts; New York, New York; Philadelphia, Pennsylvania; and Chicago, Illinois—they also generally have major institutions and a more established CED infrastructure.<sup>50</sup> It is more likely that those larger cities already have transactional legal aid practices.<sup>51</sup> So while the discussion of whether to start such a practice is therefore not helpful for practitioners in these cities, the rest of this Paper’s attempts at answering various questions about the work will hopefully still be relevant to lawyers who have already established a transactional legal aid practice.

Some of these arguments for establishing a transactional legal aid practice for low-income entrepreneurs might also apply to rural or suburban areas with high poverty. The presence of immigrants and need for growth certainly would apply.<sup>52</sup> A transactional legal aid practice serving as the basis for a broader CED movement might be more of a stretch in these areas since such a movement would presumably be more difficult to organize with fewer people across greater distances.<sup>53</sup> Such a practice might bring other unique opportunities though, such as developing cooperatives, which seem to be more prevalent in agriculture than other areas of the economy.<sup>54</sup>

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48 See Jones (2016), *supra* note 28, at 51–52.

49 See *id.*

50 See, e.g., HARLEM COMMUNITY DEVELOPMENT CORPORATION, <http://www.harlemcdc.org> (last visited Aug. 28, 2017) (Harlem); LISC CHICAGO, <http://www.lisc-chicago.org/index.html> (last visited Aug. 28, 2017) (Chicago); URBAN EDGE, <http://www.urbanedge.org> (last visited Aug. 28, 2017) (Boston).

51 See, e.g., *Community and Economic Development*, BROOKLYN LEGAL SERVS. CORP. A, <http://bka.org/our-work/community-and-economic-development> (last visited Aug. 27, 2017) (Brooklyn); *Economic Justice*, LAW. COMM. FOR C.R. & ECON. JUST., <http://lawyerscom.org/projects/economic-justice> (last visited Aug. 30, 2017) (Boston); *Our Services*, CHI. LAW. COMM. FOR C.R., <https://www.clccrul.org/services> (last visited Sept. 18, 2017) (Chicago); *Transactional Law Clinics*, HARV. L. SCH., <http://clinics.law.harvard.edu/tlc> (last visited Aug. 30, 2017) (Boston); see also Jones & Lainez, *supra* note 10, at 98 (“Transactional clinic opportunities for law students are not equally distributed across the country.”).

52 See Daniel T. Lichter, *Immigration and the New Racial Diversity in Rural America*, 77 RURAL SOC. 3, 4 (2012).

53 Steven M. Virgil, *Community Economic Development and Rural America: Strategies for Community-Based Collaborative Development*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 9, 25 (2010).

54 *Id.* at 30.

### *E. Why the Work Should Be Transactional*

While legal aid work is typically litigation, I argue that legal aid for low-income entrepreneurs should be limited to transactional work. A legal aid litigator needs to be thoughtful about whose side of a case she is entering on. When one side gets a free lawyer, it should tip the balance of power from what it otherwise would have been. This is particularly true in litigation, where the parties are more likely to find themselves in a zero-sum game than in a transactional matter.

Because of the advantage a free lawyer offers and the mission of legal aid to help the disadvantaged, legal aid generally has a system to determine which side of a case it represents. The system aims to counteract what would have been an imbalance of power in favor of the opposing party. Litigators in housing cases typically only represent tenants because landlords can afford attorneys. In family law, legal aid litigators usually look for factors to determine which side is more deserving of representation (for example, victims of domestic violence).

For disputes between businesses, it would be too hard to come up with a global policy to pick which side to get involved in on any given case. While the government will generally have more resources than a small business, in a dispute against a small business the government is likely acting on behalf of the public good (unlike in housing, where it is acting as a landlord) and there are already other public interest lawyers whose mission is to hold the government accountable. Small businesses may find themselves outmatched by well-resourced opposing parties, but it is difficult to imagine arriving at bright lines for when it is worth legal aid getting involved in a business dispute.

In some transactional matters, there is no opposing party to be concerned about, for example, incorporating a client's business. However, many transactional matters involve multiple parties. Yet even though parties can have opposing interests in a transactional matter (for example, a contract negotiation), if the situation has not risen to the level of a dispute, then it is less likely that a legal aid lawyer will unfairly aid one side in a zero-sum game. Because negotiations can be contested, the lawyer should be thoughtful about the balance of power in a prospective case in determining whether to represent a client in a negotiation. Examining the balance of power in a potential case as an intake criterion is discussed in more depth below.

A prohibition on litigation has the practical advantage of allowing an attorney's expertise to be cultivated, in a more focused way, on transactional issues. The hope is that an entrepreneur with good representation in the negotiation of leases, customer contracts, etc., will be less likely to be involved in disputes to begin with.

## F. *Objections to Supporting Entrepreneurship in Legal Aid*

### i. *Objection One: Entrepreneurial Success Is Often Unattainable*

The first objection raised to providing transactional legal aid is that it would be counterproductive to lead low-income clients toward failure, and failure is common in new ventures.<sup>55</sup> Entrepreneurship is a worthwhile strategy even if it is not appropriate for all low-income individuals.<sup>56</sup> Furthermore, many clients served by a transactional legal aid practice have already started businesses or would have done so without the help of a lawyer. Getting those clients appropriate legal help offers those clients protection. A lawyer can help a client think through her plan's viability and potential consequences. Advising a client against a risky venture, or alerting clients to risks of which she was unaware, can be just as valuable as counseling a successful business.

Legal protections also help mitigate the effects of failure. If a client forms and maintains an entity, then her personal assets are protected from her business's liabilities. Lease provisions that put the client at the mercy of a landlord can be negotiated to provide more flexibility.

Finally, as mentioned above, the entrepreneurial experience itself can be valuable in building client capabilities<sup>57</sup> and client, as well as community, empowerment. This is true even if the resulting business is not high growth, particularly if risk is managed well.

### ii. *Objection Two: Other Types of Legal Aid Are More Deserving of Support*

The second objection to providing transactional legal aid for low-income entrepreneurs is that other types of legal aid are more deserving of support. As I mentioned in this section's introduction, this Paper does not present an argument about the relative worth of different types of legal aid practices. However, I will make the affirmative argument here for transactional legal aid for low-income entrepreneurs. Legal aid should help clients and the client community with long-term

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55 See Dyal-Chand & Rowan, *supra* note 24, at 866 (“Entrepreneurship programs have not been able to make systematic use of a program of targeted support for a few small businesses with high-growth potential.”); see also Cummings, *supra* note 9, at 447 (“[T]he literature analyzing the efficacy of market-based CED efforts suggests that this simple equation does not accurately capture the relationship of market strategies to poverty alleviation.”).

56 See, e.g., Jones (2016), *supra* note 28, at 57 (“[E]ntrepreneurship for returning citizens is not a panacea and will not be a viable opportunity for every person.”) (emphasis omitted).

57 See Dyal-Chand & Rowan, *supra* note 24, at 894 (“More broadly, small business development is a means of connecting one's actions as an individual economic actor to the economic success of one's community. It is also a compelling way to teach life skills.”); see also Cummings, *supra* note 9, at 443–46 (discussing the ways in which community economic development fosters individual and community empowerment); Tremblay (2015), *supra* note 1, at 21 (noting that successful transactional legal services foster the development of autonomy and capital in participating clients).

goals.<sup>58</sup> If those goals include stability and self-sufficiency, then there is a place for transactional legal aid for small businesses.<sup>59</sup>

It makes sense for legal aid to host the transactional practice. The practice should seek to help clients in marginalized communities. Legal aid practices have been serving those communities for decades. Even if individual potential clients are not aware of the legal aid agencies, people who come into contact with those potential clients hopefully will be. Those people can confer the trust that the transactional legal aid practitioner needs to reach a new client base, in a sense lending their reputation to the transactional legal aid practice.<sup>60</sup> People who could make those kinds of referrals might include local officials, clergy, neighborhood leaders, activists and organizers, and other nonprofits.

While this Paper does not weigh the relative value of different legal aid practice areas, legal aid funders and practitioners have to make those tradeoffs. However, offering new services is not always a zero-sum proposition. In this case, transactional legal work should appeal to funders not traditionally involved in legal aid.<sup>61</sup> If that happens, offering transactional services would not divert resources from litigation in support of securing basic needs.

### iii. *Objection Three: Other Types of CED Are More Deserving of Support*

Even starting from the premise that transactional legal aid in support of community economic development is worthwhile, it could take multiple forms. Another objection to transactional legal aid for low-income entrepreneurs is that there are more effective ways to pursue CED. I argue that transactional legal aid for low-income entrepreneurs is particularly valuable and a particularly good starting point relative to other types of community economic development work for the following reasons.

#### a. *As Compared to Work with Nonprofits*

Some transactional legal aid practices focus on helping nascent nonprofits rather than for-profit entrepreneurs. That kind of help is valuable, and would be supported by many of the same arguments for working with for-profit entrepreneurs.

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58 See Tremblay (1999), *supra* note 5, at 2511 (arguing that legal service offices should proactively maximize constituent power).

59 See Tremblay (2015), *supra* note 1, at 18 (“TLS [transactional legal services] serves, in this sense, as a form of public health legal services.”).

60 See Jones and Lainez, *supra* note 10, at 104 (“Like transactional lawyers, students in transactional clinics add value to clients in many ways, by . . . being a ‘reputational intermediary’ or resource builder, and helping entrepreneurs exploit social capital through referrals to professionals in banking and insurance.”).

61 See, e.g., *10,000 Small Businesses*, GOLDMAN SACHS, <http://www.goldmansachs.com/citizenship/10000-small-businesses/US/index.html> (last visited Aug. 28, 2017); MASS. GROWTH CAP. CORP., <http://www.massgcc.com/products#Technical> (last visited Aug. 28, 2017).

There might also be fewer dilemmas about the impact that a client's venture has on the community discussed in the next Section.

I argue that a transactional legal aid practice should balance its work with nonprofits with work with for-profit businesses. First, not all nonprofit legal needs would be appropriate for a transactional legal aid practice. A common legal need for small nonprofits is obtaining the tax exemption, which has become much easier with the IRS's new 1023-EZ.<sup>62</sup> Larger nonprofits with more complicated legal issues can sometimes afford to pay private attorneys.

Also, there are some downsides to working with nonprofits. A low-income person who founds and grows a nonprofit is allowed to get compensated for her time in the form of a salary.<sup>63</sup> But she has no ownership of the entity or the organization's assets, so it is not a path to building empowerment through wealth creation. The growth of nonprofits is also dependent on decisions made by funders. This aspect can potentially undermine the community-driven nature of the organization if the funders required to make an organization sustainable are hard to find within a low-income community. The presence of fewer large funders in midsize cities like the ones found in major cities might make it particularly difficult to fundraise in midsize cities. Finally, starting new nonprofits is relatively easy, which creates a risk that new entrants duplicate the work of charities already in operation.<sup>64</sup>

One area in which support for low-income for-profit entrepreneurs and nascent nonprofits overlap is the initial decision about whether to be for-profit or nonprofit. Legal aid lawyers can be quite helpful in what is a very important initial decision for an entrepreneur. Section IV will discuss in more depth how to counsel a client facing this decision.

### *b. As Compared to Broader CED Work*

Others have argued that CED should focus less on individual entrepreneurs and more on the broader community.<sup>65</sup> However, a transactional legal aid practice focused on individual low-income entrepreneurs is a good basis for and complement to broader work.<sup>66</sup> Working with low-income entrepreneurs can lay a foundation for

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62 Press Release, Internal Revenue Serv. No. IR-2014-77, New 1023-EZ Form Makes Applying for 501(c)(3) Tax-Exempt Status Easier; Most Charities Qualify (July 1, 2014), <https://www.irs.gov/uac/newsroom/new-1023-ez-form-makes-applying-for-501c3tax-exempt-status-easier-most-charities-qualify>.

63 See *Mabee Petroleum Corp. v. United States*, 203 F.2d 872, 876 (5th Cir. 1953) (“We concede the logic of appellant’s argument that the payment of reasonable salaries to corporate officers does not constitute inurement of net corporate income to the recipient within the meaning of [26 U.S.C. §] 101(6).”).

64 See, e.g., Sacha Pfeiffer, *Does Boston Have Too Many Nonprofits?*, BOS. GLOBE (July 4, 2016), <https://www.bostonglobe.com/business/2016/07/04/does-boston-have-too-many-nonprofits-some-say-yes/XMnV259wjXdugZqrOl3CvI/story.html>.

65 See, e.g., Cummings, *supra* note 9, at 458.

66 Jones et al., *supra* note 10, at 71 (“[Transactional work] links micro-level direct representation with law and policy initiatives that have an impact on law reform efforts and benefit multiple clients simultaneously.”).

a broader CED practice in midsize cities that have gaps in their CED movement<sup>67</sup> because practitioners can advocate for low-income entrepreneurs at broader levels, on policy and planning, drawing on their experience in practice.<sup>68</sup>

What we refer to as small business represents a diverse set of companies of varying sizes that do not have uniform interests on questions of public or community importance. Low-income entrepreneurs can lack representation in local leadership conversations, particularly in those about what kind of growth and development decision makers consider to be desirable. CED practitioners help make sure that the voices of low-income entrepreneurs are included in community conversations. One example of this happening was provided by Susan R. Jones, Jacqueline Lainez, and Debbie Lovinsky in their discussion of work done by The George Washington University Law School's Business and Community Economic Development Clinic supporting a bill before the D.C. City Council to offer entrepreneurship training to returning citizens and to draft a Returning Citizens' Legal and Business Entrepreneurship Tool Kit.<sup>69</sup> CED practitioners can also fill gaps in midsize cities where low-income entrepreneurs do not have large city departments or institutions to turn to and would otherwise lack the technical knowledge and capacity to identify and pursue opportunities to support low-income entrepreneurs as a way to help the city and its neighborhoods prosper.

In addition to taking on broader impact projects in a particular city, transactional legal aid practices across different midsize cities can organize<sup>70</sup> at the state and regional level.<sup>71</sup> This helps develop a different agenda on regional development issues than the typical urban-suburban divide<sup>72</sup> described in CED literature.

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67 See Dyal-Chand & Rowan, *supra* note 24, at 902 (“Finally, it is also critical to emphasize that one significant difference in the methods of CED practitioners relying on a capabilities approach would be the emphasis on continued and heavy investment in infrastructure.”); see also Cummings, *supra* note 9, at 454 (“[T]he failure to confront the politics of poverty has limited the effectiveness of CED efforts.”).

68 See Cummings, *supra* note 9, at 463–64 (“CED lawyers have recognized that collaboration with organized labor, faith-based entities, and poor people's organizations—which have large, relatively cohesive memberships and, in the case of unions, financial power—is critical to achieving the political clout necessary to push through economic justice measures.”); see also Jones (1997), *supra* note 2, at 224 (discussing the various lawyering roles with different degrees of involvement in assisting clients and communities take control and effect positive change).

69 Jones (2016), *supra* note 28, at 48, 55.

70 This type of organizing has already happened in research, economic development, and politics through the Gateway Cities program in Massachusetts and the Legacy Cities Partnership. See, e.g., Mass. Dept. of Hous. & Econ. Dev., *Gateway Cities and Program Information*, MASS.GOV, <http://www.mass.gov/hed/community/planning/gateway-cities-and-program-information.html> (PDF on file with the *Indiana Journal of Law & Social Equality*); LEGACY CITIES PARTNERSHIP, *supra* note 43.

71 See Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131, 144 (2004) (“[A] regional perspective has the potential to achieve greater equity in urban development without significantly sacrificing the hard-won gains of community participation associated with the best aspects of decentralization.”).

72 See David J. Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 735 (2003) (“As has become increasingly clear, there are a variety of supposedly affluent jurisdictions beyond the urban core.”).

As I mentioned above, clients will build capabilities by working with CED practitioners.<sup>73</sup> A transactional legal aid practice should also connect CED practitioners with clients who are resourceful leaders in low-income communities. That can lead to collaboration beyond the initial small business venture, and when that possibility is realized, it puts the transactional practice squarely within the tradition of community lawyering.<sup>74</sup> For example, a CED practice might connect an entrepreneur with an opportunity to testify on a proposed city ordinance and introduce that client to local politics. Section III explains in more detail how such broader projects can come together.

## II. INTAKE CRITERIA TO DECIDE WHICH LOW-INCOME ENTREPRENEURS TO WORK WITH

This Section offers a framework for how to triage within a transactional legal aid practice.<sup>75</sup> It deals with many of the same tensions and tradeoffs present in the literature about the role of the lawyer in antipoverty work.<sup>76</sup> I present the criteria with the aim of helping practitioners operationalize the goals of a transactional legal aid practice into specific intake factors. I also discuss how to evaluate the work's success after a case is over using those same criteria, since any practice should seek to continuously calibrate its client selection process to find the clients that best advance its mission.<sup>77</sup>

### A. Intake Criteria—Financial

The first and most fundamental criterion for deciding which entrepreneurs to offer free transactional legal aid to is financial eligibility. This is necessary for the practice to stay within the mission of legal aid. Evaluating financial eligibility can be difficult in transactional legal aid compared to other legal aid practices because the clients are often earning money and the work is actively trying to help them earn more. But a client whose business grows to the point where the client no longer qualifies and hires a private attorney is a success story for everyone involved.

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73 See Tremblay (2015), *supra* note 1, at 21 (“TLS focuses the available lawyering expertise on supporting and furthering strategies that originate with the clients, rather than from the lawyers.”).

74 See Jones et al., *supra* note 10, at 89–90 (explaining how community lawyering links poverty law with community organizing to remedy historical inequity and injustice). *But see* Cummings, *supra* note 9, at 458 (“As CED advocates target resources to specific underdeveloped neighborhoods, they neglect to foster inter-community collaboration around issues of common concern to poor city residents.”).

75 See, e.g., William H. Mellor & Patricia H. Lee, *Institute for Justice Clinic on Entrepreneurship: A Real World Model in Stimulating Private Enterprise in the Inner City*, 5 J. SMALL & EMERGING BUS. L. 71, 80–81 (2001).

76 See, e.g., Cohen, *supra* note 5, at 284–88; Tremblay (1999), *supra* note 5, at 2489–98.

77 See Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 55 (2012) (explaining how legal aid evaluates its services).

There will be clients who have cash flow from an existing business or a paid job they feel is limiting. To deal with that, the practice can borrow the framework that legal aid generally uses—household income as it compares to the poverty line—but raise the thresholds. The main funder of legal aid around the country, the federal Legal Services Corporation (LSC), uses two hundred percent of the poverty line as a threshold for eligibility.<sup>78</sup> It is not unprecedented in legal aid to raise that threshold. For instance, when legal aid lawyers got involved after the foreclosure crisis in representing homeowners, they similarly had to relax some of their financial eligibility thresholds.<sup>79</sup>

The financial eligibility threshold is also important so as not to compete with private attorneys. If a legal aid attorney is providing a service for which a client could afford to pay, not only is it a waste of legal aid resources, but it also upsets the local bar and can be counterproductive for community economic development (private small business lawyers are often themselves local small business owners). If a client's business grows to the point that it can afford to pay a lawyer, that transition should happen.

Over time, through tracking and evaluation, practices will hopefully get better at recognizing potential clients who have financial situations that put them in the best position to work with a transactional legal aid lawyer. That is, they are in a financial position to take on the risks of starting a business but do not have the ability to pay a private attorney to meet their legal needs.

## *B. Intake Criteria—Business Potential*

### *i. Business Potential as Likelihood of Success*

Business potential is another important consideration in deciding which cases to take.<sup>80</sup> The practitioner should consider the viability of the client's plan and its potential for wealth creation for the owner and job creation for the community.<sup>81</sup> The practice should also avoid supporting a plan the attorney believes will be detrimental to the client's own interests, in that the client is not in a position to take on the risk of starting a new venture. Nevertheless, there is good advice the attorney can give such a client regardless of her state of readiness (for example, why the client is not ready, how the client can protect his assets).

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78 45 C.F.R. § 1611.5(3) (2015).

79 MASS. LEGAL ASSISTANCE CORP., FACT BOOK: FISCAL YEAR 2015 OVERVIEW (2015), <http://mlac.org/wp-content/uploads/2016/07/MLAC-Fact-Book-FY15.pdf>.

80 See Cohen, *supra* note 5, at 258 (“‘Best Outcomes’ is [the] consequentialist and forward-looking principle that looks at how much an individual will gain (or avoid losing) from the intervention as opposed to other possible claimants.”). Cohen uses this principle to argue for cases that will have the most impact on people's life spans. In the context of this practice area, the best individual outcomes are the most successful businesses.

81 See Tremblay (2015), *supra* note 1, at 35–36.

The success of a business is difficult to predict. But predicting outcomes happens (and is difficult) in all legal aid triage.<sup>82</sup> Assessing a potential client's likelihood of success also runs the risk of undermining the community-centered nature of the practice. A lawyer that lacks the entrepreneur's community ties might not appreciate the opportunity for the potential client's viable idea.

To guard against making bad assumptions, the lawyer should focus her analysis not on whether the entrepreneur's assumptions are correct, for example, a certain number of customers will buy a particular product. Instead, the lawyer should gauge whether the client has thought through her plan and held her own assumptions up to basic scrutiny, for example, the number of customers needed for the product to be viable does not seem unreasonable given the neighborhood's population and access to transit. Clients will vary in their ability and willingness to assess how far they are from realizing their vision. That variation will form at least something of a basis for the attorney to make her own assessment of the client's likelihood of success.

For example, a CED attorney may find that clients who have a written business plan that answers important, basic questions are in a position where it makes sense for the attorney to get involved. Even if it is impossible to predict the long-term success of the business that will ultimately be created, the lawyer should have a sense of whether the entrepreneur is ready to move to the next step in the entrepreneurial process (for example, getting a bank loan).

To be able to make these assessments of an entrepreneur's viability, the attorney should work on developing some business sense. While an attorney should be able to refer her client to providers of technical assistance who can help the client develop a business plan, an attorney's ability to review a client's business plan and help spot weaknesses will be helpful in evaluating this criterion (and is good feedback for someone who becomes a client).<sup>83</sup>

An example of a legal review leading to strategic feedback is a common legal issue that comes up in practice – helping a business prepare a contract to use with customers. Not only does preparing a customer contract offer the business legal protection, but it also allows the lawyer to deliver strategic value. Writing out a price list of various services and the process to go from the estimate to the final cost in a format that can be shared with customers gives structure to the client's business.

The practitioner should also try to develop some knowledge about the local economy to help think through whether an idea is viable. It is the client's responsibility to understand his business's market and opportunity, but the attorney can ask questions to gauge how far along the entrepreneur is in arriving at those answers.

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82 D. James Greiner, *What We Know and Need to Know About Outreach and Intake by Legal Services Providers*, 67 S.C. L. REV. 287, 292 (2016).

83 See generally Susan R. Jones, *Current Issues in the Changing Roles and Practices of Community Economic Development Lawyers*, 2002 WIS. L. REV. 437 (2002) (pointing to the rising importance of multidisciplinary practice for CED practitioners in the context of the multidisciplinary needs of small businesses).

Even if a business is likely to create jobs, not all jobs are of equal value to the community.<sup>84</sup> A client that is poised to create a business with jobs that pay well and provide benefits, or share profits, should be of greater interest to the practitioner seeking to serve the low-income community.<sup>85</sup> Therefore, at the intake stage, the attorney should ask the potential client not just about how many jobs the entrepreneur expects to create, but how employees will be compensated. During its initial stages as the client base is still developing, a practice is unlikely to turn down what would otherwise be an ideal low-income entrepreneur with promising plans because the client wants to pay modest market wages. But asking the question might have the added benefit of introducing potential clients to different ways of organizing a new business that the potential client had not thought of (*i.e.*, a workers cooperative).

This criterion will require the practitioner stay in touch with the client to determine the success of the business: for example, revenue, profitability, assets, number of jobs, or employee compensation.<sup>86</sup> Even more relevant, although harder to measure, will be the role of the legal work in the success of the business.

## ii. Business Potential as Effect on Community

The practice should take a client's vision for a small business and try to help her make it happen. But as a legal aid program, it also has a responsibility to the community to make sure that the business has a positive effect there.<sup>87</sup> So it is relevant whether the client's plan will lead to the provision of a service needed in the community, like daycare.<sup>88</sup> This also raises a dilemma for businesses whose community impact might be mixed, which is discussed later in this Section when it addresses how to make decisions when the criteria conflict.

## C. Intake Criteria—Client Potential

Practitioners should also consider the individual client's potential trajectory in the community, and invest in clients who could become community leaders. This criterion is a way to explicitly advance one of the reasons for having a transactional legal aid practice discussed in Section I—building client capabilities. The practice

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84 See Tremblay (2015), *supra* note 1, at 30 (“[I]n evaluating a TLS strategy through an access-to-justice lens, the collectivist stance simply holds that it is better to choose to represent collectives rather than individual entrepreneurs and to establish worker cooperatives instead of individual LLCs or Subchapter S corporations. . . . But that view of the stance assumes that certain selected clients come to the lawyers asking for worker cooperatives, and the world may be much more fluid and ambiguous than that.”).

85 Looking at future job creation considers unknown future beneficiaries. Cohen argues that is okay. See Cohen, *supra* note 5, at 254 (arguing against favoring identified lives).

86 See Jeffrey Selbin et al., *supra* note 76, at 55 (“Beyond scorekeeping and client satisfaction surveys, research can help us learn more about the socioeconomic benefits we deliver to clients.”).

87 But see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512 (1976).

88 See Jones & Lainez, *supra* note 10, at 114–15 (including community impact as an intake factor).

should take clients who are more likely to see their skills develop and be able to use them to improve their community in the future.

This factor can be difficult to determine before working with someone. But over time, the practitioner will see helpful patterns. Clients that come referred from a particular community group may be more likely to stay connected to that group and work for the common good. Or someone at the referring community partner may be able to offer insight. The attorney can ask potential clients about their motivations for pursuing their project. Some clients will themselves explain their ambition to become a community leader, or at least emphasize their hope that their plans have a positive impact on their community. The attorney will learn about the client's background and skills during the intake process.<sup>89</sup> A client that has already shown a commitment to community projects, or that has a demonstrated record of achievement, may be more likely to become a successful community leader.

An attorney must provide zealous representation to all her clients to satisfy her legal professional responsibility.<sup>90</sup> But emphasizing this factor might change how the attorney interacts with clients beyond the legal work that the attorney performs. For example, the attorney might invest more time proactively calling a former client who has a lot of potential as a community leader than she otherwise might.<sup>91</sup> That will help build their relationship, and if one of the goals of working together (beyond accomplishing the client's legal objective) is building that client's capabilities, that relationship is important for success. A good relationship can also help distinguish the attorney from others who see the same potential and offer to help, but cannot follow through. It has the added benefit of making it more likely that the client continues to take the legal advice the attorney offers.

To evaluate the success of the work on this criterion, practitioners will need to stay in contact with former clients and try to keep tabs on what community work they become involved in. This is also a great criterion to evaluate using client surveys.

#### *D. Intake Criteria—Clients from Historically Underrepresented Groups*

A transactional legal aid practice can be part of a local strategy to address inequality when it helps clients from historically underrepresented groups.<sup>92</sup> As the practice helps women and people of color start and grow their own businesses, it is

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89 One problem with making subjective personal evaluations like this is that it makes it more likely that attorneys let personal biases affect intake decisions. *See generally* Damian A. Stanley, Peter Sokol-Hessner, Mahzarin R. Banaji & Elizabeth A. Phelps, *Implicit Race Attitudes Predict Trustworthiness Judgments and Economic Trust Decisions*, 108 PROC. NAT'L ACAD. SCI. 7710 (2011) (conducting two behavioral studies investigating the relationship between implicit race attitude and social trust, and finding that race disparity in both explicit evaluations of trustworthiness and economic decisions to trust is predicted by implicit race attitude).

90 *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

91 *See* Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L.J. 771, 773–74 (1998) (“Client-lawyer relationships in a community development practice are intense because they are born of no one single moment. They are the product of a mutual evolution over time: of the long-haul lawyer and the client for life.”).

92 *See* Hauber, *supra* note 13, at 18.

combating inequality one client at a time.<sup>93</sup> Evaluation of the practice's success in representing clients from historically underrepresented groups is simple to track quantitatively (though the ultimate goal of addressing societal inequality is not).

#### *E. Intake Criteria—Balance of Power*

Even in a practice that does not litigate, clients often face negotiations in which a legal aid lawyer might be able to help address an imbalance of power. Such negotiations happen, for example, in a partnership dissolution where one side can afford to hire a lawyer, or a negotiation between a well-resourced landlord and a low-income commercial tenant. An attorney should be more likely to take a case in which the potential client faces an imbalance of power in a negotiation, and should avoid taking cases that would create an imbalance of power by giving one side a free lawyer.

This criterion is harder to evaluate since it anticipates what would happen if an attorney did not get involved in the case where the parties are imbalanced. Other legal aid practices have looked to statistical methods to evaluate a criterion like this one (the statistical effect of having a lawyer versus not having one).<sup>94</sup> However, it might prove difficult here to reach the volume of cases that meet this criterion needed to use those statistical methods.

#### *F. Intake Criteria—Legal Need*

Another important criterion is the client's legal need.<sup>95</sup> The first question is whether there is a legal need. All businesses have rules that they need to comply with and are classified as some kind of entity (even if they default into being a sole proprietorship). So just about any business would benefit from an initial consultation with an attorney, particularly when the entrepreneur is actively seeking a lawyer's services. But when signing on to do more extensive work for the client, the practitioner should consider how meaningful the work will be to the client's business. For example, without the proper regulatory approvals, the client will not be able to conduct business legally.

The legal need may not be immediately apparent. For example, a major hurdle for a lot of small businesses is obtaining financing. That obstacle is not one a legal aid lawyer can immediately help a client overcome; it is up to the client to prepare a business plan that someone is willing to finance. However, a lawyer that gets to know a client's situation can help the entrepreneur put himself in a better position to get financing. For example, the lawyer can negotiate with former lenders when prior loans are making it difficult for an existing business to get the financing it needs to grow. In our practice at Northeast Legal Aid, we cleared the way for a business to get a new loan that it desperately needed by drafting and getting a prior lender to sign a

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93 See, e.g., Jones (1997) *supra* note 2, at 233; Jones et al., *supra* note 10, at 93–94.

94 See generally D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012) (reporting the results of randomized evaluations of legal assistance programs).

95 See Baillie, *supra* note 35, at 1567.

release of liability that improved the business's credit history. In another matter, we negotiated a loan modification with one of a client's lenders that lowered the client's payments and freed up enough cash that a new lender was willing to lend.

Another element of assessing the legal need is the urgency of the work. If work need not happen right away, it could be postponed until the practice has more capacity. For example, it will ultimately be quite important to many businesses to have a good contract to use with customers. But unlike signing a lease before moving into a location, the contract is unlikely to be time sensitive. Finally, the complexity of the work matters. The more complex the legal need, the less likely it is that the client could find another way to meet it (either by doing it herself or finding help from some other source). Over time, the practice can evaluate how its impact varies by type of work, both through client satisfaction and the business results that clients achieve.

### G. *Intake Criteria—Community Relationship*

Practitioners should also consider the practice's relationships with community partners when taking cases. It is helpful to try to take "warm referrals" from important partners, such as a membership-based community group that is well connected to the community the practice hopes to serve.<sup>96</sup>

For example, our practice at Northeast Legal Aid had a series of relationships with important community partners that were not only a strong source of referrals to the practice, but also provided services to entrepreneurs that were a great complement to our legal help. One was Entrepreneurship for All, a small business/nonprofit accelerator program, which offers training and mentorship to entrepreneurs, whose mission is to support entrepreneurial growth in midsize cities.<sup>97</sup> Another was ACT Lawrence, a community development organization that offers individual development accounts (IDAs), a federal initiative that matches savings from low-income participants, allowing them to build assets to one day pay for school, buy a home, or start a business.<sup>98</sup> The small business option in the IDA program offered a great opportunity for collaboration with our practice. A third example from our community partnerships was the Lawrence Partnership and Mill City Community Investments (MCCI). MCCI is a community development financial institution (CDFI), a federal designation that allows it to provide loans and technical assistance to small businesses in low-income communities.<sup>99</sup> MCCI became the loan servicer for the Lawrence Partnership, a loan fund established by local banks.<sup>100</sup> Both

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96 See Jones & Lainez, *supra* note 10, at 114–15 (including source of the referral as an intake factor).

97 *About Us*, ENTREPRENEURSHIP FOR ALL, <https://eforall.org/about> (last visited Sept. 1, 2017).

98 ACT LAWRENCE, <http://actlawrence.nationbuilder.com> (last visited Sept. 1, 2017); see also *Assets for Independence*, OFF. COMMUNITY SERVS., <https://www.acf.hhs.gov/ocs/programs/afi> (last visited Sept. 1, 2017).

99 MILL CITIES COMMUNITY INVESTMENTS, <http://mccinvest.org> (last visited Sept. 1, 2017); U.S. DEP'T TREAS. COMMUNITY DEV. FIN. INST. FUND, <https://www.cdifund.gov/Pages/default.aspx> (last visited Sept. 1, 2017).

100 *Venture Loan Fund*, LAWRENCE PARTNERSHIP, <https://www.lawrencepartnership.org/ventureloanfund> (last visited Sept. 1, 2017).

MCCI and the Lawrence Partnership provided referrals to our legal practice and provided resources that we could connect our clients with when appropriate. Other examples of potential community partnerships include business incubators and shared workspaces.<sup>101</sup>

One of the hurdles to setting up a practice like this is getting the word out and establishing trust. Community partners who have established that trust for their own organizations can help a practice overcome those hurdles in a time-efficient manner. As much as one would like to train those partners to understand what kind of clients would be a perfect fit for the work, it can be difficult for a non-lawyer to fully understand. It is bad for the relationship with a community partner to turn down a referral both because it is a wasted opportunity to demonstrate the practice's value and because it undermines their trust if they have something vested in whether or not you help the person (which often times they do, particularly for membership-based organizations, which are under constant pressure to demonstrate the value of membership to its members to keep them engaged).

Other factors are more important; for example, a practice will likely be prohibited from helping someone who is not financially eligible, regardless of who referred them. But for cases on the margin, it is helpful to keep the practice's relationship with the referring community partner in mind. When a referral is turned down (as they often are), the practice should follow-up with the referring partner and try to connect the turned down potential client with other potential resources.

One way to evaluate the practice's success on this criterion is to regularly check in with community partners and seek their feedback on how the practice is doing and how it could improve.

#### *H. Intake Criteria—Expertise*

Another important criterion is the practice's expertise. Practitioners must take cases responsibly that they are qualified to handle.<sup>102</sup> But it also makes sense to take cases with an eye toward building new capabilities for the practice, so long as it is feasible for the practitioner to get up to speed on the issue at hand. For example, on regulatory issues, the practitioner can often learn what the work requires from regulators (that is, the attorney does not need prior expertise).

As a practice grows and evolves, it should evaluate what types of projects become most meaningful to the success of clients and the client community, and actively cultivate its expertise on those issues through research and recruitment of personnel with the right background.

#### *I. Intake Criteria—When Selection Criteria Conflict*

One could probably think of more selection criteria. A client who meets all of them presents an easy decision to accept. What is more challenging are the trade-offs

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101 Jones et al., *supra* note 10, at 66.

102 See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

a practice needs to make when the criteria conflict. For example, a client might have a winning business plan that will be highly profitable but create only low-paying jobs. Or a client might share that she intends to leave the neighborhood once her plan succeeds. Rarely will cases meet all the criteria, so practitioners need to make decisions about how to balance them.

Over the short term, any practitioner must be mindful of her practice's capacity so as not to overwhelm it. Managing capacity through intake touches on a fundamental question about how much work to do with clients once the practice has decided to work with them, a question I take up in more detail below in Section V. At the stage of initial consideration of whether to take the case, the practice should reflect on whether other assistance is available to a potential client. If so, the practice should consider referring the potential client to the other assistance in order to free up the practice's resources to help others.<sup>103</sup>

The most important criterion is financial. The client cannot be in a position where she can afford a private attorney. The next most important criterion is the business's potential effect on the community. The practitioner should avoid harming the community it seeks to help, for example, by supporting a business that illegally scams consumers, exploits workers, or harms the environment. But how does the principle of "do no harm" apply to a business that might harm the community if it is conducted in a certain way? The next Section will address this question.

#### i. When Criteria Conflict—Promoting Compliance

An attorney can help businesses whose impact might be questionable to conduct themselves in a positive way. This would mitigate the concern about the effect of a business that could harm a community depending on how it operated, and was one of the arguments for the value of transactional legal aid presented in Section I.

As an example, take the "multiservice center" business that offers document translation, money remittance, travel booking, copying/faxing, etc. These kinds of businesses are all over the downtowns of midsize cities with large immigrant populations.

Multiservice centers are viewed with skepticism by immigration regulators and advocates because some scam customers, particularly immigrants. For example, people become notaries and hold themselves out as a "Notario Público."<sup>104</sup> In some countries, like the Dominican Republic, that is a title for a role similar to an attorney. If the practitioner can take on such a business as a client and educate the entrepreneur about the dangers of the unauthorized practice of law, and how to avoid engaging in the unauthorized practice of law, she does the client and the community a great service. It would be even better if the attorney can help the client find another

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103 See Jones & Lainez, *supra* note 10, at 114–15 (including "whether the client has access to other pro bono legal counsel" as an intake factor).

104 See, e.g., Press Release, Martha Coakley, Attorney General of Mass., Waltham Man Ordered to Stop Engaging in the Unauthorized Practice of Immigration Law (Dec. 15, 2014), <http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-12-15-barahona-pi.html>.

local attorney with expertise in the right practice area to supervise the client to help make sure the client avoids mistakes.

The value of attempting to guide such a client is even more apparent when compared with the alternative of withholding guidance and sending the client out on her own. After all, the demand for multiservice centers shows that people struggle to find the help they need to navigate various bureaucracies (particularly immigration) in the language they speak. An entrepreneur in this industry is someone people in need in the community already trust and turn to.

## ii. When Criteria Conflict—The Growing Gig Economy

Another difficult example of the conflict between a potentially successful business and its effect on the community is how small business promotion relates to the downsides of the growing gig economy.<sup>105</sup> For example, the practitioner creates an LLC for an entrepreneur's delivery company. Will that new company be doing work formerly done by employees of the entrepreneur's customers? In other words, is the entry of the new company just shifting work from established employees to a lower cost independent contractor? This is particularly concerning when the business model seems to be being pushed by the entrepreneur's business partners as a way for those business partners to avoid hiring employees.

When confronted with this issue, practitioners should investigate to determine if the growth of one business will be at the expense of higher paying jobs at another and try to avoid working with those businesses. Avoiding businesses that would undercut established jobs in the community might be a blow to the autonomy of the potential client because it fails to support a viable opportunity identified by the low-income entrepreneur. But it is in keeping with the idea that the transactional legal aid practice should seek to avoid doing harm. Dealing with developments and dilemmas like these requires reflection on the part of legal aid lawyers and collaboration with other providers of CED support and experts to identify trends.

## iii. When Criteria Conflict—Use of Retainers

One way for practitioners to manage the risk of taking clients whose businesses harm the community is to write their retainers narrowly enough to allow opportunities to evaluate a client's impact on the community as the work unfolds. If the initial expectation is set that a lawyer will only work with a client on a particular project or until a specific milestone, the lawyer is in a position to decide whether to

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105 See Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, U.S. BUREAU LAB. STAT., (May 2016), <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm> (“[A] gig describes a single project or task for which a worker is hired, often through a digital marketplace, to work on demand.”); see also Heather Scheiwe Kulp & Amanda L. Kool, *You Help Me, He Helps You: Dispute Systems Design in the Sharing Economy*, 48 WASH. U. J.L. & POL’Y 179, 185 (2015) (“In contrast, many CCMs [collaborative consumption models], especially smaller, more localized CCMs, are based on nuanced, collaborative relationships that do not fit traditional, binary, buyer/seller or employer/employee relationships.”).

continue working with the client once that project has been completed or the milestone achieved.

That gives the lawyer power in a practice where one of the goals is to empower the client. But the goal of not harming the community that the practice seeks to serve should take priority over empowering an entrepreneur whose business is harmful.

#### iv. When Criteria Conflict—Avoiding Judging the Tastes and Preferences of the Community

The priority of not harming the community is easier to implement when an entrepreneur just needs to be guided towards compliance. It is harder to implement when an entrepreneur proposes a perfectly legal idea that some community members might consider to be harmful, for example, check cashing, liquor, or dollar stores. However, the attorney should be careful about invoking moral values to avoid an otherwise legally compliant business just because of the tastes and preferences of its customers. Often, there are already protections in place or the harm posed by the business is overstated. For example, check cashing stores in Massachusetts must prove to a state regulator that the service is needed and that the entrepreneur is capable of taking the required precautions.<sup>106</sup> Dollar stores, often maligned by visitors to downtown commercial districts, provide affordable goods to consumers for whom that is important.

Rather than serve as a moral gatekeeper when she makes intake decisions for individual entrepreneurs, if an attorney sees businesses legally taking advantage of opportunities that are harmful to a community, she should work with community members and community organizations to change the regulatory landscape to prevent those harms. However, a regulatory impact project that would affect a business that is already a client would require the attorney's ethical scrutiny before the attorney got involved.<sup>107</sup>

#### v. When Criteria Conflict—Balancing the Other Criteria

After confirming the client is financially eligible for the practice's services and that her venture will not harm the client community, the attorney must balance the other criteria. The business's likelihood of success and the client's potential for building capabilities are more relevant for scope. The practitioner will want to build a recurring relationship beyond the scope of the initial project with clients who show more potential. And the practitioner will make better judgments about the client's potential once they have started working together.

The other criteria will not be enough for a practice to take a case in isolation, but are important to keep in mind. Taking clients from historically underrepresented groups, for example, immigrants who face language barriers, can require sustained outreach when those groups are not already connected to local nonprofits and seeking

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106 See 209 MASS. CODE REGS. 45.03 (2017).

107 See MODEL RULES OF PROF'L CONDUCT r. 6.4 (AM. BAR ASS'N 1983).

out services on their own. Successful outreach includes special attention to referrals from important community partners. The other criteria, addressing an imbalance of power and developing experience for the practice, might be helpful for making an intake decision about cases that would otherwise be on the margin.

### III. IMPACT WORK

The potential to use transactional legal aid for individual entrepreneurs as a starting point for projects that contribute to CED in the broader community served as one of the arguments in Section I for the value of a transactional legal aid practice. The theoretical rationale for taking on broader CED projects is that the transactional legal aid practice can leverage its resources to positively impact more people and draw on experiences from representing individuals to provide relevant insight into issues affecting multiple entrepreneurs or the entire community.<sup>108</sup> There is also a practical argument for doing CED impact work. Broader impact projects expand the practitioner's network and expertise, both of which are helpful in her work in service of individual clients. This Section describes an example of a practice that did that, and then offers a more theoretical discussion on the criteria that a practice might use in deciding whether to take on a particular impact project.

#### A. *Practice Example—Impact Projects*

The practice example is based on my experience starting a successful transactional legal aid practice and the lessons I learned from that work. I started the practice in September 2014, and over the course of two years worked with almost eighty low-income entrepreneurs. As my practice developed, I sought out projects that could have a broader impact.

First, I helped develop a city publication on how to open a business in one of the cities I was working in. While the city did not engage me as an attorney, I was part of a working group with representatives from various city departments. Hopefully the publication we created will be a helpful introduction for entrepreneurs. In addition, the act of getting the right people from different city hall departments to agree what the process was (or should be) to open a business and writing it down helped get everyone on the same page.

Another way to pursue impact projects is to identify issues that are affecting multiple businesses.<sup>109</sup> For example, through advocacy, we changed a city hall practice to collect multiple inspection fees for businesses in the same co-working space.<sup>110</sup>

An example of a CED impact project is zoning reform. My practice got involved in rezoning efforts in Lynn. We recommended zoning changes adopted by the City

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108 See, e.g., Cohen, *supra* note 5, at 271.

109 See, e.g., Jones et al., *supra* note 10, at 75 (“[A] city’s regulatory system, particularly the administration of that system, can serve to facilitate or hinder business development and growth in the area”).

110 This work was led by my colleague at Northeast Legal Aid, Attorney Sumbul Siddiqui.

Council to make the code easier to navigate for small businesses. Midsize cities are particularly in need of this kind of help because their city departments will generally have less capacity than larger cities whose larger tax bases allow them to hire more personnel and outside experts. Zoning law is a highly specialized area of practice, and it is imperative that individuals with the right expertise be involved in such a project. Those individuals are not always lawyers; in our work we got very helpful support from experts at the Metropolitan Area Planning Council, the regional planning agency for the Boston area.<sup>111</sup>

Finally, a practice can broaden its impact by working with similar practices around the state or region. For example, since 2014, three Massachusetts legal aid agencies in different midsize cities have started working with low-income entrepreneurs and are attempting to coordinate with one another. The practices can be helpful to one another in advising on practice issues, but can also present an opportunity to organize on statewide issues.<sup>112</sup> This is relevant because corporate law is principally an issue of state law, and many main street industries or occupations are regulated at the state level, for example, beauty salons and home daycares.

### *B. Practice Example—Organizational Support*

A transactional legal aid practice can also have a broader impact by representing an organization that works with the clients that the practice hopes to serve.<sup>113</sup> In this scenario, the lawyer should set clear expectations about who the client is, for example, only the organization itself or both the organization and particular members or affiliated individuals.<sup>114</sup> Depending on the relationship between the organization and its individual participants, there is the potential for conflicts that the lawyer needs to clearly sort out beforehand. For example, if a lawyer helps a community lending institution, she may be conflicted out of representing individual small business borrowers. If the group is not already structured, and part of the lawyer's role is helping the group create and define itself, the lawyer should give extra care to determining who the client is and structuring the work.<sup>115</sup>

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111 See *About MAPC*, METROPOLITAN AREA PLAN. COUNCIL, <http://mapc.org/about-0> (last updated Jan. 28, 2017).

112 See Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 423 (1998) (arguing for a reimagining of legal services delivery so that it is coordinated at the state level).

113 See Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2141 (2007); see also Jones et al., *supra* note 10, at 82 (explaining that an organization serving microenterprises has legal needs, including help with loan documents and other contracts, commercial lease review, and business negotiations, as well as regulatory compliance, tax advice, and intellectual property protection).

114 Amanda L. Kool & Brett Heeger, *Many Advocates, One Goal: How Lawyers Can Use Community Partnerships to Foster Local Economic Development*, (Am. Bar Ass'n/Bus. Law Section, New York, N.Y.), COMMUNITY ECON. DEV. NEWSL. July 2014, at 4.

115 See Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV., 45, 70 (2002) ("To identify who speaks for the client group, or to elicit a 'group voice' out of a tangle of discordant voices, one upon whose authority the lawyer reasonably may take direction, can become an endlessly involving activity.").

In our case, the organization we worked with was the North Shore Latino Business Association (NSLBA), a Latina-led, membership-based, Latino business league. We represented the NSLBA itself and gladly took qualified referrals from its membership (who went through our normal intake procedures). In our direct representation of NSLBA, we represented them in the commercial real estate purchase of their headquarters. The client's membership felt like the purchase secured their stake and role in the city's future. By helping, we made a contribution to the collective efforts of our client community to help themselves achieve greater commercial and community success.

Over the course of our representation, we built a relationship that went beyond the real estate purchase. I advised on issues of corporate governance and served as a sounding board for strategic issues. The NSLBA had an explicit political agenda to support low-income entrepreneurs. Supporting the NSLBA felt like an effective way for our practice to have a broader impact. While legal aid attorneys often have restrictions on their political activity,<sup>116</sup> supporting a membership-based group advancing its own agenda can be effective politically and empowering for that client community.<sup>117</sup> That relationship and the trust it signified initially developed because of my individual client work for NSLBA members.

### C. *Balancing Impact Work with Direct Representation*

Like any legal aid practice that does impact work, the practice should balance the needs of individuals versus the needs of the group.<sup>118</sup> Taking on impact work requires resources that would otherwise go to more clients receiving direct representation. The practice needs to acknowledge this trade-off and try to arrive at a good balance.<sup>119</sup> The trade-off is a little easier to stomach in a transactional practice because the clients who are missing out on direct representation are not facing the same calamitous consequences as clients who are denied a legal aid litigator. In addition, the transactional practice can keep a waitlist since many issues will be important to the client's long-term success but not immediately urgent. There is a cost to deferring representation, but that cost is less than denying representation altogether.

I am not aware of a formula that would help a practice achieve an optimal balance between direct representation and impact work and do not offer one here. The practice can estimate the number of persons benefited and jobs created in its impact work, and compare that to its direct representation work. But those estimates will be difficult and even doing that will not take into account all the factors at play,

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116 See, e.g., 45 C.F.R. § 1612.3 (2016).

117 See Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213, 222–26 (1993) (reviewing GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW* (1992)).

118 See Tremblay (1999), *supra* note 5, at 2513–14 (observing that individual representation has less potential to increase power than impact work, but that impact work's achievement of results is less guaranteed and recommending to therefore blend the risk and potential reward of the different methods of lawyering to create a “balanced portfolio”).

119 See *id.*

for example, the intangible benefits of direct representation or the practical benefits of impact work discussed above. Practices will need to continue to work on this.

#### *D. Considerations for Selecting Impact Projects*

In taking on projects that are meant to benefit a broader client constituency, the practice must define who the client is. This is a question of both theoretical and practical importance.

From a theoretical perspective, practitioners should only want to take on projects that will benefit their client community and advance the ultimate mission of the work. That means before taking on a project, the practice should be careful to identify intended beneficiaries and make sure that the work will not harm other legal aid constituencies. This is not only a decision of whether to take on the project, but also a question the practice should ask after it completes the work.

For example, if a midsize city asked for a transactional practice's help with rezoning, and one of the city's goals was to prohibit an unwanted use, like methadone clinics, the practice would have to think carefully about the implications. Apart from the legality of the zoning changes would be the fairness of whether this might lead one practice of a legal aid agency to harm the clients of another practice of that same agency. For that reason, impact projects should be reviewed by legal aid practitioners in other fields before taking them on, requiring a more involved process than intake decisions for individual clients.

In addition to considering the mission of the work, the lawyer should give the same care in the selection of policy projects with regard to potential conflicts with other clients as with the selection of an individual client.

From a practical perspective, the practice needs to work out who is technically the client of the work, for example, who is making decisions about the work's direction.<sup>120</sup> For example, if the practice is helping the city with rezoning, is the city itself the client? Assuming it is, the practice will have to establish who will be making the decisions on behalf of the city and be confident that this person's or group's decisions will be consistent with the practice's mission.<sup>121</sup> In addition, the attorney will need to clearly establish expectations for her role, for example, advising on proposals to update the zoning code but not defending the city in zoning-related litigation.

If a transactional legal aid practice is helping an organization like a Latino chamber, is the chamber a client or is the individual who runs the chamber a client? If the practice is taking the case to ultimately serve the organization's members rather than its founder or management (which it must if the founders or management

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120 Another practical issue of importance to LSC-funded legal aid programs is the prohibition in LSC regulations against lobbying. 45 C.F.R. §§ 1612.3, 1612.9 (2016). If the project involves lobbying, an LSC-funded program would need to be invited to work on it by an official. *Id.* § 1612.6.

121 Or at least as consistent as one can predict in advance.

would not be financially eligible), then it should set that expectation with all parties involved and elevate the entity's interests above its individual leaders' interests.<sup>122</sup>

In all cases, the practice should consider the same criteria described in Section II for the practical considerations of whether to take a client with an agenda for an impact project.<sup>123</sup> Most importantly among these, the attorney should not take on work that someone would otherwise pay for and avoid projects that harm other parts of the community.

#### IV. PRACTICE DILEMMAS

Once the clients are selected, whether for individual direct representation or broader impact projects, transactional legal aid practices will still face dilemmas. Here are a few.

##### A. *Nonprofit Versus For-Profit*

Some clients, particularly those who are closely embedded in the low-income community in which they hope to start their venture, could go either way on the question of whether to be nonprofit or for-profit.<sup>124</sup> For example, a private dance studio or an afterschool program that coaches and tutors athletes may feel that there are more funds available locally for nonprofit grants than private financing and that their customers could not afford to pay. But while a nonprofit can pay compensation, the client has no ownership rights and may find the rules restrictive as the entity grows.

This can be a difficult counseling conversation because the decision leads to quite divergent paths and is hard to reverse, and only the client can reconcile the tradeoffs. It is also heavily influenced by future considerations that are hard to predict, like the idea's growth potential or the availability of grant funding. The practitioner can recommend that the client try to picture a successful venture five years out. If it grows, does the client want to benefit financially from that growth? Also, to form a nonprofit, the client should be confident that she can put together a

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122 See Jones & Lainez, *supra* note 10, at 121 ("Community groups might often be more loosely structured, so a transactional community lawyer must develop 'an authority scheme' to determine whom she 'may rely on for direction.'").

123 See *id.* at 114 (discussing working with an organization that supports microbusinesses) ("While the overarching determining factor for transactional pro bono case representation is whether the client can afford to pay a lawyer, other factors include the nonprofit organization's budget or the revenue from the microenterprise business, and the project's impact, as well as a successful lawyer-client relationship.").

124 See, e.g., Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives As a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLINICAL L. REV. 255, 259–61 (2010). Among for-profit entities, there are many options, some of which might also carry some of the benefits of a nonprofit, that is, benefit corporations, worker cooperatives. Whether these other entities are a good fit will depend on the client's goals. But the practitioner should present and explore all possible options. Client interest in options that offer ancillary benefits to the community that the practice serves should be weighed at intake (the effect on the community).

board that will buy into a shared mission and take on real responsibility to direct the nonprofit.

### B. *Advising on Compliance and the Threat of Enforcement*

In Section I, I discussed the value of transaction legal aid lawyers in promoting compliance with important laws as a reason to create the practice. The CED attorney will often face the dilemma of advising a client who contemplates willful non-compliance of legal obligations. This comes up frequently, for example, in the case of employee/contractor misclassification, which is particularly common in certain industries, like beauty salons.

When this comes up, the easy part for the attorney is to tell the client what the rule is. For example, in Massachusetts a beauty salon owner must classify anyone that does customers' hair as an employee.<sup>125</sup> It is also fairly easy to advise the client of the risks of noncompliance—substantial damages and penalties.<sup>126</sup> The hard part is when the client asks for an honest appraisal of the likelihood of enforcement.

First, it is a difficult question to answer. But so are many questions in business, and smart business owners make decisions based on relative likelihoods all the time.

For the legal aid lawyer, however, the question may indicate that the client is actively contemplating willful noncompliance. In the case of employee misclassification, this results in a harm to workers, likely low-income workers, who come from the very community that the lawyer's office seeks to serve.

Not all questions of compliance have the same stakes for the community.<sup>127</sup> Entrepreneurs who ignore minimum wage laws clearly hurt those workers. But an entrepreneur who has neglected to register as a foreign entity with a neighboring state's Secretary of State's office, even though he has a few clients across the border, does not have clear consequences.<sup>128</sup>

Though the legal aid lawyer should know and communicate all the rules, the practitioner should help the client think through how to prioritize the many steps an entrepreneur needs to take to achieve full compliance. The lawyer has a professional duty not to counsel a client to engage, or assist a client in criminal or fraudulent conduct.<sup>129</sup> But a lawyer can go beyond that, and attempt to counsel the client away from committing harm.<sup>130</sup> If a client indicates that he plans to ignore the attorney's advice and willfully choose not to comply, the attorney may find it necessary to

125 See Advisory from the Attorney General's Fair Labor Division on 149 M.G.L. § 148B, 2008 Op. Mass. Att'y Gen. 1, 3 (2008).

126 *Id.* at 5.

127 See, e.g., Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1546, 1576 (1995) (distinguishing *malum in se* (conduct wrong in itself) versus *malum prohibitum* (conduct merely prohibited)).

128 See Nellie Akalp, *When Do I Need to Register My Business in Another State?*, SMALL BUS. TRENDS (Mar. 7, 2014, 1:00 PM), <http://smallbiztrends.com/2014/03/register-business-in-another-state.html> (assuming the out-of-state clients know the businesses' home states and can look them up there if they need to).

129 MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983).

130 See Pepper, *supra* note 126, at 1563 ("A lawyer can (and should) engage in what has been called a 'moral dialogue' with clients who are contemplating wrongful or harmful conduct.").

withdraw after careful consideration of the legal ethics of the situation.<sup>131</sup> Writing narrow retainers with new clients may help practitioners avoid this predicament.

### *C. The Risk of Undermining Regulatory Screening*

Does helping a client through the regulatory process diminish the screening value of a regulatory burden that must be overcome by someone who wants to be successful in that industry? This is particularly relevant when the industry regulations are meant to protect potentially vulnerable consumers. Should the client be able to comply with the regulations on her own?

On the other hand, bigger companies routinely pay lawyers to help them meet regulatory requirements. Why should a business that cannot afford to hire an attorney be barred from getting that help? In addition, regulatory requirements can often create unnecessary hurdles, particularly if individual bureaucrats drag their feet or interpret rules incorrectly. There can also be disproportionate enforcement of rules based on regulators' biases, which a practitioner should hopefully be in a position to counteract.<sup>132</sup> Finally, when the practice helps clients who are immigrants or do not speak English deal with an unfamiliar system, it helps an entrepreneur overcome a transaction cost that may be entirely unrelated to whether the entrepreneur is qualified to offer his planned good or service.

Another way to look at this dilemma is that a case with a long regulatory process might offer an opportunity for the practitioner to hand more of the work over to the client herself as the case progresses. This is particularly meaningful if one of the goals of the work is building client capabilities. That goal also suggests that even if the attorney is doing work that might be done by the business owner, so long as the attorney is teaching the client how to do it along the way, some of the concern about undermining the regulatory screening is diminished because the business owner becomes capable of future compliance.

### *D. Determining the Scope of Representation*

Once a practice decides to take on a client, deciding when to close the case can become a dilemma. The obvious answer is to close the case once the practitioner has completed the work set out in the retainer. But some practices will want to continue

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131 See MODEL RULES OF PROF'L CONDUCT r. 1.16(b) (AM. BAR ASS'N 1983) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client; . . . [or if] the client insists upon taking action that the lawyer considers repugnant.").

132 This kind of bias has been demonstrated to be pervasive in our society. See, e.g., Stanley et al., *supra* note 88, at 7714. For an example of the effect of racial bias on entrepreneurs, see ALICIA ROBB & SAN RAFAEL, SMALL BUS. ADMIN. OFFICE OF ADVOCACY, ACCESS TO CAPITAL AMONG YOUNG FIRMS, MINORITY-OWNED FIRMS, WOMEN-OWNED FIRMS, AND HIGH-TECH FIRMS 1, 20–21, 25, 27 (2013) <https://www.sba.gov/content/access-capital-among-young-firms-minority-owned-firms-women-owned-firms-and-high-tech-firms>.

to work with the same clients on different projects, or write broader retainers.<sup>133</sup> This is particularly true when an attorney is confident that the client's business will have a positive effect on the community and the other intake considerations point to a good fit.

There is a broader question about the practice though, that extends beyond any given client. Will the practice work with a handful of clients really closely and play the role of a general counsel to those businesses? Or will the practice narrow the scope of its cases in an effort to touch as many businesses as possible?<sup>134</sup>

Particularly when starting a practice from scratch, the lower-touch, higher-volume model leaves less up to chance to find the clients who are the best fit and establish the practice as a basis for a broader CED movement. However, on cases in which one of the goals is client capability building, practitioners should take a longer-term view of the client relationship to provide enough time to see and be a part of the client's development.

## CONCLUSION

Deciding which clients to work with is one of the most difficult and important questions that comes up in designing and running a legal aid practice. Legal aid lawyers have always had to do it, but the growth in transactional legal aid requires the use of new criteria to select the right clients. Hopefully this article helps transactional legal aid practitioners make those decisions.

As the practice area grows, CED attorneys should try to design programs and implement them in places where they will be most effective. Hopefully the experience from the practice we established at Northeast Legal Aid will be helpful to decisions about whether and how to start similar programs in other cities. Particularly in formerly industrial, midsize cities, transactional legal aid has the potential to support and empower low-income entrepreneurs and form the basis for broader CED work.

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133 See Selbin et al., *supra* note 76, at 57 ("At the office level, programs make two related distributive decisions about gatekeeping, or who gets in the door, and about scope, or how much service we offer to people we screen in.") (emphasis omitted).

134 See David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 969 (1998).