

2006

## Creating a Client Consortium: Building Social Capital, Bridging Structural Holes

Susan Bennett

*American University Washington College of Law*, [sbennet@wcl.american.edu](mailto:sbennet@wcl.american.edu)

Follow this and additional works at: [http://digitalcommons.wcl.american.edu/facsch\\_lawrev](http://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Law Commons](#)

---

### Recommended Citation

Bennett, Susan D., Creating a Client Consortium: Building Social Capital, Bridging Structural Holes (2006). *Clinical Law Review*, Vol. 13, p. 67, 2006 .

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# CREATING A CLIENT CONSORTIUM: BUILDING SOCIAL CAPITAL, BRIDGING STRUCTURAL HOLES

SUSAN D. BENNETT\*

*This article asks whether, ethically and practically, community lawyers can enhance the representation they provide to their individual community-based organizational clients by representing them collectively. Too often isolated from critical resources, community clients can advance their agendas for economic and social justice only so far when they and their lawyer act alone. These clients need to build connections to other groups in the community, actors whom the lawyer may also represent, as well as to influential players who operate in distant financial and political arenas. Arguably the most effective representation a lawyer could provide to any one client would be to link it with other group clients with complementary strengths and needs. The resulting "Community Client Consortium" would operate as a forum and framework within which those clients could allocate their resources according to their sense of common mission - one of those resources being that of their shared lawyer's representation. The article uses the device of a "Community Client Retainer," an agreement that each new organizational client may choose to sign, and which obligates the client to engage in a process of collective decision-making among all the members of the "Client Consortium" about common goals and resources. The article asks whether lawyers can within the bounds of honoring client autonomy require this kind of collective decision-making, perhaps at perceived cost to any one client's individual institutional advantage.*

*Ethics rules that focus on the inviolability of the dyadic lawyer-client relationship provide only ambiguous guidance to the community lawyer if she attempts to leverage the strengths of community-based organizations by representing them in collaboration with each other. The article addresses how the Model Rules of Professional Conduct and the jurisprudence of entity representation have evolved to accommodate, or continue to frustrate, concerns about conflicts of interest and breaches of confidentiality in "multiple representation." The article concludes by reviewing the "sociology of neighboring,"*

---

\* Professor of Law, Washington College of Law, American University. I would like to thank the Washington College of Law for its generous research support, through which I enjoyed the assistance over the years of many thoughtful students, including Sheryl Rakes-traw, Elizabeth Elia, Alyann Hyder, and Parag Khandhar. I am also grateful to my colleague Louise Howells for encouraging me to persist in writing about this topic, and to Michael Diamond, Adrian Evans and Bill Simon for commenting on previous versions.

*which includes social capital and network theories, and which confirms that organizations are best served individually when they operate collectively. The article then recommends that the community lawyer use her position by acting within network theory as a "manager of structural holes," someone who serves as a critical point of contact among disconnected people.*

## I. INTRODUCTION: THE PROBLEM

Two scenarios: one hypothetical, one less so:

### A.

"... Lawyer has been retained by A and B, each a competitor for a single broadcast license, to assist each of them in obtaining the license from Agency. Such work often requires advocacy by the lawyer for an applicant before Agency. Lawyer's representation will have an adverse effect on both A and B. . . . Even though either A or B might obtain the license and thus arguably not have been adversely affected by the joint representation, Lawyer will have duties to A that restrict Lawyer's ability to urge B's application, and vice versa. In most instances, informed consent of both A and B would not suffice to allow the dual representation."<sup>1</sup>

### B.

Lawyer has been retained by A and B, tenants' associations of adjacent public housing complexes, to assist each of them in basic matters of organization and corporate structuring. The lawyer deals with each association through its elected president, and rarely sees more than one of either association's other officers. In the several years that each association has been Lawyer's client, A (through its president) has maintained contact with the lawyer, reported on regular tenants' meetings, and assisted Lawyer in drafting by-laws and articles of incorporation. By contrast, B has responded only sporadically to Lawyer's calls or requests for information, and has cancelled or failed to appear for appointments to revise defects in its existing corporate documents. Lawyer knows that B's president frequently withholds information from the other officers, who repeatedly threaten to quit.

Lawyer learns about a federal grant for technical assistance to public housing tenants' associations. The grant would provide funds for office supplies, as well as for consultants in bookkeeping, fundraising, organizational assistance, and management training. It is clear

---

<sup>1</sup> RESTATEMENT (THIRD): RESTATEMENT OF THE LAW GOVERNING LAWYERS, §121 (2000).

to the Lawyer that both organizations need such assistance badly, B more than A. But her interactions with B make her question whether B could administer such a grant. Even though either A or B might obtain the grant and thus arguably not have been adversely affected by the simultaneous representation, Lawyer's knowledge of A and B restricts her ability to urge B's application, and vice versa. Lawyer informs A and B of the existence of the grant, and, without going into details, of her concerns that she cannot represent both of them with equal zeal. A and B don't see the problem and signal a willingness to waive any potential conflict of interest. Lawyer declines to write the grant for both.<sup>2</sup>

### C. Postscript to B.:

Neither A nor B gets the grant.

## II. A SOLUTION: LAWYERING AND THE "SOCIOLOGY OF NEIGHBORING"

Scenarios A and B represent similar situations as they might occur in different worlds. Scenario A is hypothetical, one view of how little latitude the common law allows a lawyer in simultaneously advocating for the competing economic interests of current clients.<sup>3</sup> Scenario B is based on an experience in the author's own practice, and reflects more closely what might confront lawyers representing the interests of small organizations in poor communities. In Scenario B, the lawyer - quite unconscious that the drafters of the Restatement had already thought this through for her and reached the same conclusion - brought her considered professional judgment to bear on the situation, and helped no one.

That two similarly situated, financially strapped and organizationally compromised community groups might apply for exactly the same limited source of funds is not surprising. Changes in policies and practices of funding for human services have shifted the burden for providing for basic human needs onto neighborhood-based groups, who are compelled either to collaborate or compete for the same resources.<sup>4</sup> At the same time, changes in policies and practices of fund-

---

<sup>2</sup> This situation derives from the author's experiences beginning in the late 1990's with the representation of several community groups, within the structure of a law-school based community development clinic.

<sup>3</sup> For a different view, see R. David Donoghue, *Conflicts of Interest: Concurrent Representation*, 11 GEO. J. LEGAL ETHICS 319, 320, n.15 (1998) (citing MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3 (1983) to support the position that an attorney may represent the competing economic interests of current clients even without each client's consent). For further discussion of the evolving doctrine of consentable "current conflicts" in light of the work of the ABA's Ethics 2000 Commission, see Part IV.B., *infra*.

<sup>4</sup> See, e.g., Lois M. Takahashi & Gayla Smutny, *Collaboration Among Small, Commu-*

ing for community legal services have made it predictable that, in some legal markets, neighborhood groups compete for the same - maybe the only - lawyer.<sup>5</sup>

“Collaborate or compete” defines the choices that resource-poor organizations face under conditions of scarcity - unless the scarce resource is the lawyer. In that case, ethical complications arising from joint or multiple representation make lawyers skeptical of collaboration as an option. The client groups in Scenario B were untroubled by the prospect of conflict of interest - they had no reason to feel divided against each other, no reason to fear that the lawyer might feel divided against either of them. These were lawyer’s worries, born of what the lawyer thought to be a responsible view of client conflicts and of a duty to steer clear of them. The clients could have considered a three-way conversation about the best allocation of the lawyer’s resources, and concluded that one, the other, or neither client, or both clients together, would benefit the most or (a different consideration) do the most good with the resource of representation. The lawyer would never know, because the lawyer never asked.

As we will see, not only do the law and the norms of transactional practice allow a lawyer facing Scenario B a less constrained approach than the one described in the hypothetical, but the exigencies of community practice may require it. I will join others in suggesting that the lawyer practicing “community development law” in its largest sense must look at her relationships in a different way: not only in terms of her obligations to her clients, but also in terms of her role in supporting her clients’ obligations to others. Community development law requires particular sensitivity to the client’s networks of connection: in any given transaction, the client’s on-going relationships with funders, regulators, and official and unofficial civic leaders will weigh as heavily as the lawyer’s skill. What we may fail to acknowledge is the lawyer’s place as another member of the network, and, by virtue of her special knowledge of her clients’ strengths and needs, her potential place as an arranger and creator of networks.

To illustrate what such a representation might look like in practice, I will use the device of a “Community Client Retainer,” an annotated model retainer agreement.<sup>6</sup> The model presumes the client as

---

*nity-Based Organizations*, 21 J. PLAN. EDUC. & RES. 141 (2001)(noting that decreased resources and requirements of funders force community-based organizations into collaborative partnerships).

<sup>5</sup> For a discussion of the availability of free legal services to community-based organizations, as distinct from individuals, through the federally funded Legal Services Corporation, through projects of state and city bar associations, and through law school clinics, see Part IV.C., *infra*.

<sup>6</sup> In her path-breaking review of the many ethical quandaries that community lawyers

“entity,” an identity with complications. It focuses not on the substance of the representation (surely a subject for many other articles), but on as much as can be captured of the nuances of relationship between the lawyer and this client, and this client and the lawyer’s other community group clients. The “Community Client Retainer” contemplates the creation of a “Client Consortium,” which structures continuous dialogue among clients organized in a network to plan projects for the future. The Consortium establishes a forum in which clients collectively evaluate positional and economic conflicts, conflicts that ethics rules allow but that actually may hurt clients in their community relationships more than other more obvious conflicts of interest do. The Retainer details the ground rules for entry and exit, for sharing information, and for setting priorities. While the Retainer is in one aspect a private document, a contract setting forth what the client organization can expect from its lawyer, it also sets out what the client can expect from that lawyer’s other like-minded organizational clients. In short, it describes a network of relationships with rules, something analogous to the “framework of dealing” to which William Simon has referred in the context of representing one organization with individual constituents.<sup>7</sup>

After setting out the terms of the “Community Client Retainer,” I will address - and, hopefully, assuage - the anxieties that community lawyers might feel in considering this type of representation. The lawyer who assists individual clients in forming small business entities, such as partnerships or close corporations, faces ethical dilemmas analogous to those confronting the community lawyer in the Client Consortium. As I will explain, when a lawyer’s individual clients ask her to form a partnership to structure their shared business interests, she maintains parallel allegiances to her individual clients and to the welfare of the partnership that those clients asked her to create. The lawyer for clients in a consortium will attend similarly to a balancing of those individual and group interests. What clouds this type of common representation is the convention in legal ethics of one lawyer with exclusive and undivided loyalties to one client, the model that

---

face as they try to satisfy obligations simultaneously to individuals in and outside of the defined client-lawyer relationship, to groups, and to groups of groups, Shauna Marshall has advised that the lawyer and community enter into a retainer agreement in which the community decides the strategy and goals of a particular project. Shauna I. Marshall, *Mission Impossible? Ethical Community Lawyering*, 7 CLIN. L. REV. 147, 221 (2000). This retainer originated many years ago with somewhat different concerns, but attempts to address through the creation of an on-going community client group whether any given project supports or obstructs the community’s goals.

<sup>7</sup> William H. Simon, *Whom (Or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 86 (2003).

has monopolized our conceptualization of the client-lawyer relationship.<sup>8</sup> The one-on-one model has been criticized as particularly unhelpful to the representation of small businesses, specifically partnerships and close corporations.<sup>9</sup> My discussion of the ethics of the Client Consortium will refer to that literature and to the developments in the Model Rules of Professional Conduct through which the lawyer's obligations under "multiple representation," "joint representation," "intermediation," and, most recently, "common representation" have been most fully fleshed out. I will suggest that, as the Model Rules of Professional Conduct have evolved to follow the actual practice of lawyers in the representation of groups, the Rules support the activities of lawyers in groups such as the Consortium.

Ethics rules ultimately will inform the lawyer's decision about how or whether to accomplish her clients' goals through the medium of multiple representation. But they stop short of explaining to the lawyer the "why": why she should encourage her community-based clients not only to work in concert with each other on certain defined projects, but to consult as to the most effective combinations of their and their lawyer's strengths in the future. As I will describe, the usual arguments for efficiency, economy and familiarity certainly apply to why community clients might want to retain their lawyers as they partner with other clients, even at the risk of submerging their interests in the collective. But those reasons do not fully explain the benefits of continuing active and consultative relationships with others.

For organizations struggling to secure economic and social justice within their community base, multiple representation offers more than practicality: it throws out a lifeline. Client groups with few resources, working in neighborhoods with even fewer resources, need links to each other and to an indifferent world for their success and survival. Parts V and VI of the article will address this need for links through a review of the "sociology of neighboring,"<sup>10</sup> which encompasses social capital theory, collective efficacy theory, structural holes theory and even "broken windows" theory,<sup>11</sup> and explain why it supports the

---

<sup>8</sup> James Leubsdorf has referred to the traditional treatment in legal ethics of all representations, least helpfully the representation of groups, as consisting of exclusive relationships between lawyers and individual clients, as the "binary client system." James Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 831 (1992).

<sup>9</sup> For an overview of critiques of the applicability of the traditional ethics of one-on-one representation to the representation of small client groups and entities, and of the relevance of those critiques to the role of the lawyer in a "Client Consortium," see Part IV.B., *infra*.

<sup>10</sup> Xavier de Souza Briggs, *Brown Kids in White Suburbs: Housing Mobility and the Many Faces of Social Capital*, 9 HOUSING POL'Y DEBATE 177, 208 (1998).

<sup>11</sup> "Broken windows theory" refers to the hypothesis, first proposed by James Q. Wil-

community lawyer's role in linking otherwise isolated organizational clients with complementary strengths and needs. To borrow a term from the sociology of neighboring, the community lawyer should consider how she can serve her community of clients as a "manager of the structural holes," someone who serves as a critical point of contact among disconnected people.<sup>12</sup> I propose that the sociology of neighboring shows that it is vital - for the sake of her clients - that the community lawyer enhance the network-convening and strengthening skills in which she already excels in her conventional transactional law practice. This part suggests how the construct of the Client Consortium helps the lawyer and her clients reinforce the processes of information-sharing that take place among actors in a healthy community.

### III. THE COMMUNITY CLIENT RETAINER AGREEMENT

\*\*\*\*\*

#### Community Client Retainer Agreement

##### 1. Scope of Work and Fees

The ABC Neighborhood Association, (the Association) with its offices at 6000 Angier Place, Washington, D.C., retains the Community and Economic Development Law Clinic, (the Clinic) 4801 Massachusetts Avenue, N.W., Washington, D.C.,<sup>13</sup> to represent the Association [choice #1: in the following matters (see attached description, which representatives of the Association and the Clinic have signed and which is incorporated into this agreement)] [choice #2: and act as its counsel.]<sup>14</sup> The Association will pay for the Clinic's services according to the attached and signed fee agreement.<sup>15</sup>

---

son and George Kelling, that signs of deterioration in physical plant and in street conduct signal and trigger more troubling processes of decay. See Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 *SOC. PSYCHOL. Q.* 319, 319 (2004)(citing James Q. Wilson & George Kelling, *The Police and Neighborhood Safety: Broken Windows,* 127 *THE ATLANTIC MONTHLY* 29 (1982)). For an overview of the other theories grouped under the "sociology of neighboring," see Part V., *infra*.

<sup>12</sup> See Ronald S. Burt, *The Contingent Value of Social Capital,* 42 *ADMIN. SCI. Q.* 339, 341 (1997) for a definition of "structural holes" and of "manager of the structural holes." For a fuller discussion of structural hole theory, see Part V., *infra*.

<sup>13</sup> The name and address of the client group are wholly fictional. I use the name and address of my own clinic purely as illustration.

<sup>14</sup> As I note in the text, for the purposes of this article I am not dwelling on the subject matter of any particular representation, and have not attached the details of what that might be in any one case.

<sup>15</sup> Obviously, a practitioner should convey to her client a clear written description of any fee arrangement, and could do so as an attachment to the retainer, or in a subsequent writing. See *MODEL RULES OF PROF'L CONDUCT*, Rule 1.5(b)(2002). While reciprocity of obligations, above and beyond the fee and the substantive work, among lawyer, client and



## 2. Participation in the Clinic's Client Consortium

### *a. Agreement to Share Information and to Collaborate on Projects*

The Association understands that, by authorizing its representative(s) to sign this retainer, it agrees to become a part of the Clinic's Community Client Consortium, and that the other members of the Consortium have approved its entry into the Consortium.<sup>a</sup> The Association will not unreasonably withhold its approval of the entry of any new clients into the Consortium. It acknowledges receipt of a list of contact names, phone numbers and addresses of other client members of the Consortium, and agrees to add its contact information to this list, for distribution to the other members.<sup>b</sup> The Association agrees to be available to any member of the Consortium for information and assistance, and to seek collaboration with other members of the Consortium on projects for which the Clinic may provide representation.

The Association agrees to attend a quarterly meeting of Consortium members and representatives of the Clinic, for the purpose of mutual consultation on funding strategies, legislative initiatives, and other matters of concern to the group. It agrees to share information about funding, contracting and training opportunities, and, where sources of funding and training are limited, to participate in a process of group deliberation to decide which member organization can make best use of these resources to serve the community.<sup>c</sup> The Consortium members will develop criteria for these deliberations. Where possible, applications for resources will be joint.

The Association acknowledges that, whenever the Clinic represents it and other members of the Consortium in a collaborative project, any information it releases to the Clinic may in turn be released to the other members participating in the project.<sup>d</sup> The Clinic will release information about one participant to the others when that information may affect the course of the project, such as when insolvency of one participant may compromise completion of the project.<sup>e</sup> The Clinic will advise the Association, in advance of releasing the information, of why the information may be critical to the continuation of the project.

The Association acknowledges that any information about its own affairs, or about any project of the Consortium, that the Clinic circulates to other members of the Consortium will not be protected by attorney-client privilege; that is, if members of the Consortium involved in a project or the Association are sued, the Clinic can be com-

---

other clients is important for this article, details of any particular fee arrangement are not, so I have relegated them to a (non-existent) separate page.

pelled to produce that information in court or in pleadings before a matter goes to court.

*b. Agreement to Have Projects Evaluated for Possible Conflicts of Interest*

The Association understands that, even though some projects in which the Clinic may represent the Association may seem to be unrelated to the collaborative work of the Consortium, or to matters in which the Clinic separately represents other members of the Consortium, the projects in fact may hurt the work of the Consortium, or of its other members. The Association consents to a review by all other Consortium members of any new or on-going project to determine whether such difficulties may exist, and whether they may be resolved by modification of the project or by collaboration.<sup>f</sup>

### **3. Client's Capacity to Participate in the Representation<sup>g</sup>**

The Association certifies that its membership/board of directors has authorized its representatives to sign this retainer. The resolution which reflects the approval of this representation by the Association's membership/board of directors is attached. This resolution was voted at a meeting of which the Association's membership/board of directors received proper notice according to the Association's by-laws.

The Association certifies that it holds regularly scheduled meetings of its membership and/or of its governing body, and that it convenes these meetings according to the notice provisions and schedule set forth in its by-laws. The Association has distributed copies of its by-laws to all the membership and/or to its board of directors. If the Association does not have by-laws, it understands that its representation will include drafting of by-laws.

The Association promises that it will take no major action relating to its case without consultation with and approval of its membership/board of directors. "Major action" means any action for which the by-laws require a vote by at least a quorum of the membership/board of directors.

### **4. Modification and Termination of Representation**

The Association is free to withdraw from membership in the Consortium, or from representation as a non-Consortium client of the Clinic, at any time. If the Association withdraws from the Consortium alone, the Clinic will no longer release to it any information about Consortium projects or about other members of the Consortium.<sup>h</sup> Representation by the Clinic of members in a collaborative Consortium project may also cease if (1) the members involved in a project

decide collectively that their individual interests have diverged to a point where the Clinic no longer can represent the group as a whole, or (2) any one member decides that it cannot release information to the other Consortium members, as contemplated under Paragraph 2.a. of the Retainer.<sup>i</sup>

The Association and the Clinic may always agree to change the terms of their separate representation. The Association, Clinic and Consortium may always change the terms of participation in the Consortium, by consensus of the membership.<sup>j</sup>

## **5. What the Clinic Agrees to Do<sup>k</sup>**

In addition to accomplishing the goals for the individual representation set forth in the attached agreement, the Clinic agrees to do the following:

### *a. Disclosure of Funding Sources*

The Clinic will consult with the members of the Consortium if it plans to apply for any funding from any local or federal government agency or foundation, to underwrite the representation of all its clients. The Clinic will disclose any conditions which attach to the funding, particularly any conditions which might restrict the Clinic's ability to represent members of the Consortium.

### *b. Disclosure of Law Reform Projects*

The Clinic will consult with members of the Consortium if it plans to engage in any systemic projects, such as impact litigation or legislative advocacy, which are not connected with work specifically authorized by the Consortium.

### *c. Agreement to Follow the Consortium's Direction in Securing Resources*

The Clinic will represent the member or members of the Consortium that the Consortium collectively has designated as most likely to benefit the community in seeking funding, contracting and training opportunities, in their attempts to secure such funds, contracts and training. The Clinic will endeavor to bring information about such training and funding resources to the attention of all the members of the Consortium, so that the members may make fully informed deci-

sions about collaborative projects.

---

ABC Neighborhood Association

---

Date

---

Community and Economic  
Development Law Clinic

---

Date

\*\*\*\*\*

IV. THE CLIENTS, THEIR LAWYER, AND THEIR RELATIONSHIPS  
UNDER THE MODEL COMMUNITY CLIENT  
RETAINER AGREEMENT

A. *The Representation of Clients A and B within the  
Community Client Consortium*

What might the representation of Clients A and B, of Scenario B, look like if each were to sign the “Community Client Retainer Agreement”? The Agreement contemplates a model different from that described in Scenario B. Scenario B suggests (and then rejects) the possibility of concurrent, separate representation of organizational clients in a discrete competition for economic resources. The Agreement structures a continuing relationship among any number of group clients and an attorney, under which many types of representation are possible: representation of one client in one matter, of two or more clients jointly in one matter, or of multiple clients in a planned succession of linked matters. Scenario B calls for a one-shot assessment - by the lawyer - of the likelihood that concurrent representation might harm one or the other client, with the possibility of presenting the clients with the option of formally waiving any potential conflict. The Agreement also leaves that assessment to the lawyer, but in addition submits the project in question to an entire collective of clients, for evaluation of whether the project as described *and* as carried out by these particular players might further the aims of the group as a whole.

So if Client A and Client B signed the Agreement, they might expect to meet, together, with their lawyer to discuss what each could bring to the application for the grant and whether the grant allows for them to apply jointly. (The expectation would be the same if either client independently discovered the opportunity to apply for the grant.) As noted at “d” and “e” in the Agreement, this conversation requires disclosure of information about the internal affairs of the organization that each client normally would only share privately with

its attorney. Depending on the number of clients in the Consortium at that point, A and B could count on representatives from group Clients C, D, E (and so on) to be present at the same meeting, to evaluate the merits of the grant and of these clients as applicants from the perspective of the group's collective vision, and of the interests of each client member. All the client members of the Consortium would have the expectation that exactly just this sort of disclosure and exchange of information would take place at group meetings, either regularly or as needed, under the provisions marked at "c," "e" and "f." Under provisions at "a" and "b," each member of the Consortium would have contact information about all the others, to use to expand their base of information - also something out of the ordinary for organizations that might share nothing save their isolated attachment to a particular attorney.

Participation in a Consortium does place certain demands on a client group that might otherwise not be required. For example, as described under the paragraph of the Agreement titled "Client's Capacity to Participate in the Representation" (at "g"), Clients A and B (and C and D and E) are required to affirm, up front, that they operate as organizations at least formally accountable to their constituency and to some articulated and therefore replicable process of meetings and decision-making. Some attorneys might make this an implicit condition of representation, by refusing to represent clients who do not come equipped with bylaws and indicia of representativeness, but the Consortium Agreement makes it an explicit condition of the representation.

In return, the clients of the Consortium would receive information from their lawyer that most clients never expect to get: who if anyone else is paying for their representation, and what other systemic projects the attorney is working on that might pose the problem of a positional, as opposed to a direct, conflict. (See "k" of the Agreement.) Ethics rules require self-policing, self-disclosure, and the client's "informed consent" as to financial arrangements, and require the lawyer to evaluate whether payment by a third party might compromise the representation.<sup>16</sup> While disclosure to clients of other projects does not endow them with veto power over them, it does force the lawyer - consistent with her own duties of confidentiality to clients outside the Consortium - to reveal work that, while not in direct technical conflict with projects of the Consortium, might compromise them nonetheless.

So this leaves the questions: is representation of a Client Consor-

---

<sup>16</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(2002).

tium in community development workable? Is it desirable? Is it ethical?

*B. The Formal Ethics of Representation Within the Community Client Consortium: Conflicts, Convening, Constructing and Confiding*

Lucie White has described how the villagers of Driefontein, a black community in apartheid South Africa, met in open committee to discuss which persons' problems merited the attention of the visiting attorneys.<sup>17</sup> They, and their lawyers, were wholly unconcerned with confidentiality. The residents were willing to disclose very personal information to their neighbors, and to subordinate their individual opportunities for representation to the group's decision about which case would make the greatest political impact - manifestations of openness and self-sacrifice that exemplify the most critical qualities of the successful social change (or any) network. Their lawyers were willing to provide the framework within which these mutually strengthening exchanges could take place. The villagers and their lawyers could approach representation in this way because the villagers were wholly unconcerned with their rights as individuals to have individualized access to justice, and because the lawyers were wholly unconcerned with their obligations as lawyers representing individuals to withhold information in order to preserve their clients' confidentiality.

Driefontein and common law partnerships may not seem to have a lot in common. But White's example highlights the convergence between what political representation may require; what some thoughtful theorists of community lawyering would like to see; more surprisingly, what many transactional lawyers already do; and what a conventional interpretation of American legal ethics of conflicts and confidentiality allows. In fact, particularly in light of recent clarifications of the baseline rules of ethical conduct, one could say that the model of client consortium created at Driefontein exemplifies what the Model Rules of Professional Conduct contemplate as a structure of multiple representation. In this part I will review briefly the ethical concerns that discourage, if not prohibit, multiple representation, and the critique of the default model of one-on-one representation as it has been applied to groups. Then I will evaluate how the current state of play of the Model Rules of Professional Conduct and commentary provides a framework within which the community lawyer can work

---

<sup>17</sup> Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WISC. L. REV. 699, 730 (describing how a committee chose cases for the monthly visit of a team of volunteer lawyers, with preference to claims that would accustom villagers to take stands against oppressive governmental action).

within the Community Client Retainer Agreement to meet the individual needs - and sustain the individual loyalties - of her clients as she helps them address their collective goals.

### 1. Conflicts in Multiple Representation: The Concerns and the Critique

According to one very useful typology, the justifications for the formal rules governing conflicts of interest fall into the categories of “instrumental” and “intrinsic.” First, the rules serve the instrumental effectiveness of representation by prohibiting the joint representation of two parties with adverse interests.<sup>18</sup> Second, the rules protect the intrinsic integrity of the client-lawyer relationship by safeguarding the client’s expectations of undivided loyalty.<sup>19</sup> Each rationale for conflicts doctrine presumes the lawyer’s inability to represent her client competently, and the client’s inability to trust her lawyer, once either breaches the strictures of the exclusive relationship. That presumption is responsible for the default model: that lawyers represent one actor (individual or entity) at a time, one “deal” at a time.

The grounding of the lawyer-client relationship in absolute undivided loyalty has been criticized as promoting “radical individualism”<sup>20</sup> or, more harshly, a rampaging “culture of zeal.”<sup>21</sup> In this critique, the “undivided loyalty” model is a limited vision of representation as linear, serial, and confining, whether informed by rules of ethics, conflicts and norms of undivided loyalties, or constrained by some other boundaries of imagination. Historically, legal ethics rules consistently have reinforced this conception of the one-on-one, exclusive attorney-client relationship as the norm, and have penalized any divergence from that conception.<sup>22</sup> Commentators have noted that, focused as they are on the lawyer’s relationship with the individual client, modern ethics codes provide little guidance to attorneys who

---

<sup>18</sup> John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 481 (1993).

<sup>19</sup> *Id.* at 483.

<sup>20</sup> Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 972 (1987) (criticizing former Model Rule of Professional Conduct R.2.2 sharply, commenting that it assumed joint representation to be an aberration from the norm of individual representation). For further discussion of the creation and demise of Model Rule of Professional Conduct 2.2, see notes 29-37, *infra*, and accompanying text).

<sup>21</sup> Henry Ordower, *Toward a Multiple Party Representative Model: Moderating Power Disparity*, 64 OHIO ST. L.J. 1263, 1265 (2003).

<sup>22</sup> WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 130 (1998) (describing as “dogmatic” the prescription that the risks of collaboration outweigh the risks of separate representation, within the context of the castigation of Louis Brandeis for attempting to represent the interests of multiple parties to a transaction).

represent particular kinds of client groups<sup>23</sup> - let alone to the attorney in the Consortium who may end up representing groups of groups.

The core of the criticism is that the standard conception of exclusive representation is impractical and dysfunctional. It reflects neither what lawyers do nor what clients want. As one researcher into the conflicts policies of large law firms has observed, clients not only do not fear conflicts situations, but actively seek them out:

The core precepts of fiduciary obligation, that trustees cannot serve two masters, is intriguing, not only because real world trustees routinely serve many masters, but also because their masters often want them to. Indeed, the paradox of conflict of interest is that it is at least as likely to be embraced as to be renounced.<sup>24</sup>

Lawyers grapple with obligations to individual and group clients, under conditions resembling multiple representation, all the time. Typically, clients ask their lawyers to form partnerships, with every expectation that their pre-existing relationship will continue and that their lawyer will safeguard their interests and those of the partnership.<sup>25</sup> In that situation, clients opt for the familiar and efficient in continuing with their own or even their other partners' lawyer as the lawyer for the partnership, or in choosing colleagues with like interests to form the partnership.<sup>26</sup> Clients in distinct cases find lawyers with similar specialized expertise, thus augmenting the possibility of conflict among them.<sup>27</sup> The fear of divided loyalty is far less compelling than the faith in the known quantity, be it lawyer or co-venturer.<sup>28</sup>

The ABA acknowledged this reality when it revised the Model Rules of Professional Conduct to permit the lawyer to act as "intermediary" under Model Rule 2.2,<sup>29</sup> in joint representation of parties in a single transaction:

---

<sup>23</sup> See, e.g., Leubsdorf, *supra* note 8 at 827 (1992)(noting that ethics rules intended to address the relationship of the lawyer to the individual client have been applied to the representation of groups); Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward A Realistic Ethic*, 74 CORNELL L. REV. 466, 466-8 (1989) (criticizing the Code of Professional Responsibility and the Model Rules of Professional Conduct for their failure to accommodate a legal and practical reality: that lawyers deal with both the individual members of and the entity of the close corporation itself as clients); James Gray Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 OR. L. REV. 1 (1989)(commenting on lack of attention to the relationship of the lawyer with unincorporated voluntary associations such as unions).

<sup>24</sup> Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 93 (2003).

<sup>25</sup> Darius M. Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 ALA. L. REV. 181, 182 (2004).

<sup>26</sup> Shapiro,, *supra* note 24 at 94.

<sup>27</sup> *Id.*

<sup>28</sup> See Ordower, *supra* note 21 at 1279 (stating that clients may prefer a conflicted attorney to an unknown one).

<sup>29</sup> See MODEL RULES OF PROF'L CONDUCT R. 2.2 (1983).



### Rule 2.2: Intermediary

- (a) A lawyer may act as intermediary between clients if:
- (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney client privileges, and obtains each client's consent to the common representation;
  - (2) the lawyer reasonably believes that the matter can be resolved in terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
  - (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
- (b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
- (c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

As Hazard and Hodes noted while Rule 2.2 was in effect, the concept of intermediation was intended to accommodate the representation of clients with conceivably adverse interests but common goals.<sup>30</sup> The new rule embodied an uneasy amalgam of Model Rules 1.6 and 1.7 (b), signifying the perception that multiple representation was presumptively conflicted, with the lawyer assuming the presumptively impossible task of loyally serving all interests, and of keeping all confidences.<sup>31</sup> Given the perspective that no lawyer could possibly apply undivided devotion to more than one client at one time, the formulation of Model Rule 2.2 substituted "impartiality" for "loyalty,"<sup>32</sup> requiring the lawyer to "reasonably believe that the common representation can be undertaken impartially (underlining mine). . . ."<sup>33</sup> The revision proved unsatisfactory, failing to transcend its origins in

<sup>30</sup> GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 *THE LAW OF LAWYERING* 512 (1993 ed., 1998 Supp.).

<sup>31</sup> *Id.* at 511.

<sup>32</sup> For a discussion of this point, see John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients In the Modern Legal Profession*, 1992 U. ILL.L.REV 741, 802.

<sup>33</sup> MODEL RULES OF PROF'L CONDUCT R. 2.2(a)(3)(1983).

the “radical individualism” of conflicts doctrine.<sup>34</sup> It forced the lawyer into the drastic remedy of withdrawal from the representation of all the clients in the group (including former individual clients) if any one client requested it or if any unforeseen factor threatened to throw off the delicate balance of individual interests.<sup>35</sup> That and other difficulties with the doctrine led the Reporter for the Ethics 2000 Commission to recommend the elimination of Model Rule 2.2 in favor of further annotation of the less rigid conflicts rules under Model Rule 1.7.<sup>36</sup> One reason given for the elimination of Model Rule 2.2 was that it was no longer needed: that lawyers had become accustomed to multiple representation, and were in fact monitoring their representation under the more forgiving provisions of the other rule.<sup>37</sup>

With the dust settled, it is instructive to note what is left of “intermediation.” The concept, with all its anxieties about loyalty and confidences, has been folded into the Comments to revised Model Rule 1.7(b), under the delineation of “common representation.”<sup>38</sup> The new Rule allows multiple representation after consultation with the clients and with their consent, confirmed in writing.<sup>39</sup> The text omits from the Rule itself the “nuclear option” of forced withdrawal from representation of any client in the joint matter if any one client objects or if the lawyer’s self-guarantees of impartiality and equal benefit to all clients fail. Instead, the drafters recast the ultimatum, in the Comments,

---

<sup>34</sup> GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 THE LAW OF LAWYERING, §11.14, pp. 11-40 (3d ed., 2004 Supp.) (commenting that multiple representation’s perceived departure from the norm of undivided loyalty to one client made the drafters so nervous that they “freighted” Rule 2.2 with restrictions that made it unattractive to use).

<sup>35</sup> See Model Rules of Prof’l Conduct R. 2.2(c) (1983), *supra* note 29 and accompanying text; see also Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541,553 (1997) (that consequences of withdrawal under Model Rules of Professional Conduct R. 2.2 - that the lawyer cannot represent any of the parties again - were more severe than those of withdrawal under the contemporaneous version of Model Rules of Professional Conduct R. 1.7, in which client consent could cure the conflict or allow representation of one party).

<sup>36</sup> See Center for Professional Responsibility, *Ethics 2000 Commission Draft for Public Comment, Model Rule 2.2 - Reporter’s Explanation of Changes* (March 23, 1999): “The Commission recommends deleting Rule 2.2 and moving any discussion of joint representation to the Rule 1.7 Comment.” See also American Bar Association, Report to the House of Delegates, *Model Rule 2.2, Reporter’s Explanation of Changes* (No. 401, Feb.2002).

<sup>37</sup> Center for Professional Responsibility, *supra* note 36; see also Moore, *supra* note 35 at 554 (commenting that, in practice, lawyers ignored Model Rule 2.2, and treated joint representation as though it were governed by the more flexible terms of Model Rules of Professional Conduct, R. 1.7).

<sup>38</sup> MODEL RULES OF PROF’L CONDUCT R.1.7(b), cmts. 26-33 (2002).

<sup>39</sup> *Id.* at R.1.7(b)(4). See also *id.* at R.1.7(b)(2)(2002) (stating that the concurrent representation must be permissible under other law); *id.* at R. 1.7(b)(3) (stating that the representation cannot pit the two clients against each other in the same action, in the same tribunal).

as a caution.<sup>40</sup> As with previous formulations of the rules of conflicts, the litmus test is not the clients' perception of whether their lawyer's loyalty to each of them will be challenged, but the lawyer's perception of her ability ". . .to provide competent and diligent representation to each affected client."<sup>41</sup>

The revised Model Rules remind the lawyer that she must maintain her position as ". . .impartial between commonly represented clients. . ." as a condition of continuing representation.<sup>42</sup> Most critically for the lawyer in the Consortium (and for the clients deciding whether to join the Consortium), the commentary retains the key principle that the lawyer for joint clients must discard her unambiguous loyalty for a more balanced approach, with certain unavoidable consequences for the client-lawyer relationship:

. . . When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances, and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented.<sup>43</sup>

The excerpt posits an interesting equation in the traditional lawyer-client relationship: that between partisanship and dependency. That correlation derives from the discretion placed in the lawyer to monitor her own impartiality. "Impartiality," the model of undivided loyalty, and the requirement that the lawyer keep each client informed<sup>44</sup> squeeze the lawyer in joint representation into the position of satisfying each client that she knows enough about every other client's business to proceed knowledgeably, and that the lawyer is keeping her confidences close.<sup>45</sup> The presumed precariousness of the lawyer's position on that tight rope is what led the drafters of Model Rule 2.2 to see withdrawal as the almost inevitable outcome of multiple representation.

Under old and new formulations of multiple representation, the Rules essentially warn, "let the client beware." The lawyer judges whether she is being fair to each and fair to all; she decides whether the welfare of the deal or the collaborative requires her to disseminate

---

<sup>40</sup> *Id.* at R. 1.7, cmt. 29 ("Ordinarily, the lawyer will be forced to withdraw from representing all the clients if the common representation fails.").

<sup>41</sup> *Id.* at 1.7(b)(1).

<sup>42</sup> *Id.* at R.1.7, cmt. 29.

<sup>43</sup> *Id.* at R. 1.7, cmt. 32 (2002); *see also* MODEL RULES OF PROF'L CONDUCT R. 2.2, cmt. 9 (1983).

<sup>44</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2002)("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

<sup>45</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 2.2, cmt. 6 (citing Rules 1.4 and 1.6).

information given to her by each participant. The only check which the client retains is the decision to label critical information as confidential and then force the lawyer to withhold it. The implication is that the traditional relationship allows the client to place unthinking trust in her lawyer. In contrast, under multiple representation the client must maintain vigilance, either because the lawyer cannot possibly be paying close enough attention to her interests, or worse, because behind the scenes the lawyer is balancing off the interests of other clients against her own.

In sum, the revoked and the current Rules governing multiple representation warn the lawyer to alert her collective clients to one of many dangers in the divergence from the conventional one-on-one relationship: that they may have to do more thinking for themselves. One could argue that, rather than some second-best form of representation, representation of a network or consortium of individuals or groups achieves what “rebellious lawyering”<sup>46</sup> strives for: clients “assuming greater responsibility for decisions.” That the Model Rules seem to view this as cautionary, rather than celebratory, does not mean that the community lawyer cannot take great satisfaction in it. Here, the lawyer need not see the ethical rules as problematic. What the rules require is what clients who willingly enter into a Client Consortium expect, and welcome.

## **2. The Consortium and Client Conflicts: The Protections Inherent in Convening**

The Community Client Retainer Agreement informs the client that the Consortium’s lawyer will engage in at least three major activities that might compromise the traditional conception of the exclusive client-lawyer relationship: convening the members; circulating information among (and possibly about) them; and representing the members of the network singly, jointly (perhaps as parties to the same transaction) or as a whole, possibly in advocacy positions. Each of these triggers specific ethical issues, all relating to the possibility of direct or positional conflicts and to the control of clients’ confidences.

The focus of the Consortium on “convening” is designed to mitigate the meltdown which the Rules anticipate under a multiple representation. The single greatest benefit of the Consortium is that it allows the lawyer and her clients to stop guessing about what the interests of the lawyer’s separate clients are, and about whether they support or detract from each other. The Consortium’s purpose is to

---

<sup>46</sup> See GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

provide the forum through which potential conflicts can be brought to the surface, discussed, and either minimized or acknowledged as insuperable. Under the "Retainer Agreement," the prospective "Community Client" agrees to submit projects for review by the other members *before* they become the subject of the lawyer's representation.<sup>47</sup> The Retainer addresses in advance the feared possibility that consensus on any one project may be unachievable, warning of the possibility either that the client members may decide that they cannot achieve their respective goals through multiple representation, or that the refusal of any one to release information to the Consortium may jettison that project.<sup>48</sup>

The difference between the treatment of potential conflicts anticipated under the Rules and of those anticipated under the Retainer is that under the Rules, it is the lawyer who assesses whether the divisiveness impairs her impartiality; under the Retainer, it is the clients in the Consortium who assess whether the apparent divisiveness is unresolvable. As the Rules anticipate, the clients will assume the responsibility themselves for deciding whether the multiple representation compromises their individual goals. The decision-making processes to which the client agrees under the "Retainer" constitute the adoption of an advance waiver, with nuances.<sup>49</sup> The discussions within the Consortium are designed to address the possibility of conflict project by project, for participating *and* non-participating members. The individual client member of the Consortium signs on, in advance, to a process within which potential conflicts will be discussed and the members collectively will decide who gets the direct benefit of the representation.

The greatest advantage to individual clients of membership in the Consortium is the forum it provides for airing information about the conflicts about which formal ethics rules have been the least restrictive, but through which the members could come to greatest harm: "economic" and "positional" conflicts. On balance, formal ethical rules allow Scenarios A and B, as long as they are conceptualized solely as the simultaneous representation of competing, though not directly opposing, economic claims; and as long as attorneys take precautions to alert clients of the problems if the outcome of any multiple representation can only be fashioned as a "zero-sum."<sup>50</sup> Somewhat

---

<sup>47</sup> See "Community Client Retainer Agreement," *supra* Part III, ¶ 2.b.

<sup>48</sup> *Id.* ¶ 4. For discussion of the effect of divulging confidential client information to other clients in a multiple representation, see Part IV. B. 3., *infra*.

<sup>49</sup> See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436 (2005)(re-voking Formal Opinion 93-327's blanket prohibition on advance waiver of conflicts).

<sup>50</sup> See Donoghue, *supra* note 3; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-438 (2006) (explaining the requirements under Model Rule of Profes-

less clearly, formal rules do not automatically prohibit lawyers from engaging in representation that creates “positional conflicts,” such as espousing opposing views before different legislative bodies or even before different tribunals in unrelated proceedings.<sup>51</sup> But that lack of prohibition does not give the community lawyer free rein to risk undermining her clients’ trust by lobbying for legislation that assists one client but is opposed by another, or, more subtly, to create “negotiating precedent” in deals between some clients and third parties that may affect the subsequent chances of other clients to win favorable terms.<sup>52</sup>

The Client Consortium exists to promote the kind of communication that can work out “positional conflicts” before they happen, and thus to support the “intrinsic” justifications for sensitivity to conflicts among clients. More likely than danger from opposing positions in related court cases, clients in a Community Consortium will face the possibility that their lawyer may be involved in some law reform or institutional activity that in the long term could compromise the clients’ individual or collective missions.<sup>53</sup> While some have emphasized that communities are not “monolithic” - that no one position will ever capture their diverse desires and needs, and that thus the lawyer may safely represent the many viewpoints contained within<sup>54</sup> - only through engagement with a network of clients can a lawyer educate herself in the complexity of opinion and thus the complexity of representation.

---

sional Conduct 1.8(g)(2002) that lawyers disclose to multiple clients fully all information concerning settlements throughout the representation, and secure their consent in writing to the multiple representation).

<sup>51</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt.24 (2002); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op.93-377 (1993)(under previous version of Model Rule 1.7, requiring the lawyer to evaluate the risks of undermining either client's representation even if two matters will not be litigated in the same jurisdiction); Dzienkowski, *Positional Conflicts of Interest*, supra note 18 at 474.

<sup>52</sup> See Dzienkowski, supra note 18 at 503 on “negotiating precedent.” I received my hard lesson in “positional conflicts” when my clinic represented at a zoning board hearing a neighborhood association opposed to the construction in its vicinity of a privately-owned prison. Present at the hearing was a small business owner, for whom the clinic had done work in the past but for whom it had no active matter pending. She was very much interested in the prison's application, because supporters had approached her with a proposal for a business venture on the grounds. She was completely cordial, and laughed that we were on the opposite side - but though no concrete damage or malpractice had occurred, much ill will could have ensued.

<sup>53</sup> See, e.g., D.C. Bar Op. 265 (1996)(addressing whether a lawyer's potential role as general counsel for an association of foster parents and probable involvement in policy matters on its behalf might compromise the individual stances that she could take on behalf of individual client children in foster care or individual client foster care parents).

<sup>54</sup> Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 FORDHAM L. REV. 2339, 2348-9 (1999).

### 3. Constructing and Confiding: Intimacy and the Hazards and Benefits of Exchanging Information

As I will describe later, lawyers in transactional work routinely engage with their clients in the act of “constructing.”<sup>55</sup> As the “convener” of the Consortium, the lawyer for the Consortium pulls together existing clients, or adds new ones, with the expectation that the members will benefit from sharing expertise and information. She is in the perfect position to do so; she may have helped some of her clients constitute themselves to begin with. Having created their governance structure, or perhaps advised on the composition of their boards, she knows a great deal about their financial circumstances, their strengths and their weaknesses - particularly if she assisted them with applications for government grants, or, in the case of nonprofits, for federal or state recognition of tax exempt status.<sup>56</sup> Sometimes she knows more about them than they know about themselves. Her knowledge equips her to make mutually advantageous matches of complementary strengths, to avoid dangerous pairings that would exacerbate weaknesses, and to mass the resources of the group for collective action.

Ethics opinions and cases do not seem to address the scenario in which a lawyer uses her superior knowledge of her own separate clients’ strengths specifically to bring clients together. Commentary on the Model Rules assumes that, in the context of the creation of a partnership, the clients initiate the contact; specifically, it is the clients who come independently to the lawyer, untainted by prior dealings with her.<sup>57</sup> But it is precisely that prior knowledge - that omniscience - that establishes the lawyer’s value as a convener. Under both revoked Rule 2.2 and current formulations under 1.7, a lawyer can only represent multiple parties in the same transaction if she knows enough about them to determine whether joint representation would be equally advantageous to all and risk adverse effects to none.<sup>58</sup>

The lawyer’s knowledge about her clients may constitute one of the Consortium’s greatest strengths; it may also contain the predicate to its destruction. Clients who enter into networks - whether they are

---

<sup>55</sup> For an analysis of the lawyer as enhancer of “social capital” through her role as architect of the governing structures of group clients, see Part VI, *infra*.

<sup>56</sup> See, e.g., IRS Form 1023, Application for Recognition of Exemption (2005)(requiring information on revenues and sources of funds, expenditures, fund-raising and programmatic activities, and board composition).

<sup>57</sup> See HAZARD JR. & HODES, (3d ed., 2004 Supp.) *supra* note 34 at 11-43, illus.11-11 (positing how the lawyer could conform to Model Rule 1.7 in forming a partnership among A, B, and C).

<sup>58</sup> See SIMON, THE PRACTICE OF JUSTICE, *supra* note 22 at 130; see also MODEL RULES OF PROF’L CONDUCT R. 2.2(a)(2), *supra* note 29 and accompanying text.

referred to as partnerships, close corporations, or consortia - take risks with information. As I will discuss below, for networks to achieve their purpose of enhancing advantage to all members through disclosure of information about each, the members must divulge secrets about their own weaknesses.<sup>59</sup> The lawyer must distribute information she knows about each client member of the network, not only because it is information that might be mutually useful, but because ethics rules governing common representation require her to handle information in a way befitting her "equal duty of loyalty to each client."<sup>60</sup> The legal risks may be less obvious, but common law and ethical rules make much of them: under new rules and old, members of any client network must understand that they are foregoing any claims in litigation of privilege for their joint communications to each other and to their lawyer.<sup>61</sup> While under the liberalized rules clients can waive their "concurrent" conflicts in advance, they cannot so easily be asked to give up their guarantees of confidentiality.<sup>62</sup> It is the prospect that any one client in a multiple representation may refuse to divulge information critical to the project, not the possibility of any substantive conflict, that may compromise the future of the Consortium irreparably.<sup>63</sup>

The Client Consortium Retainer warns the prospective client about the probability that information about its own "business" may be disclosed for the good of the order - and that it is possible that the client, or any other client of the Consortium, may refuse to consent to such disclosure.<sup>64</sup> Since advance waiver of confidentiality is impermissible, the lawyer must return to her community client for approval each time she thinks that she needs to disclose to the entire group

---

<sup>59</sup> For an overview of network and structural hole theory, and of the lawyer's potential role as "structural hole manager," see Part VI.B., *infra*.

<sup>60</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 31 (2002): "As to the duty of confidentiality, continued representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other lawyer information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit."

<sup>61</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002), cmt. 30 (reminding the lawyer to remind her clients of the common law rule that privilege does not attach among commonly represented clients).

<sup>62</sup> See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436, n.6 (2005) (retaining the prohibition on advance waiver of confidentiality).

<sup>63</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 31 (advising the lawyer to inform clients in a multiple representation at the outset that any one client's refusal to divulge critical information will result in the lawyer's withdrawal).

<sup>64</sup> See "Community Client Retainer Agreement," Part III, *infra*, at internal notes "c" and "i."



something about that client's affairs, or about the make-up of that group client itself. For example, if under Scenario B, clients A and B, now members of the Client Consortium, wished to apply jointly for that grant, the lawyer might feel compelled not only to bring the matter of their application up before the entire Client Consortium for approval, but to disclose the organizational weaknesses about Client B that initially had caused her concern. If Client B refused the lawyer's entreaties for permission to do so, the lawyer would face the quintessential ethical conundrum of being required to disclose this arguably relevant information to all, and to refrain from disclosing what any one client may decline to have disclosed.

One possible solution to the dilemma is to leave disclosure up to the members of the Consortium. In their quarterly group meetings or in other conversations, they can decide to disclose information to each other directly, or to demand disclosure from each other. In short, since "confidentiality" is an issue between lawyer and client, but not between client and client, the clients in the Consortium can decide to bypass their lawyer completely. But avoiding the lawyer will only work for so long. That the client group must always feel free to "confide" in its lawyer lies at the heart of the "intrinsic" justifications for conflicts rules.

The lawyer caught between her contradictory duties to disclose and withhold information within the Consortium faces the same quandary as does the lawyer for a partnership. The law of partnerships requires the lawyer for a partnership to disclose one member's information to all for the good of the order.<sup>65</sup> That obligation is reflected in Model Rule 1.13, which requires the lawyer to assume an identity of interest between the group and its constituent individuals and to treat the organization, and not its members, as her client.<sup>66</sup> But the presumption that a partnership, or even an unincorporated association, is to be treated as an entity without regard for the individual members' concerns about confidentiality, is not absolute. As Simon and others have noted, under the "aggregate theory" of partnerships and unincorporated associations, the lawyer's representation of the constituents of those organizations is considered to be continuing, based in part on the constituents' expectations that the lawyer continues to re-

---

<sup>65</sup> See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991)(interpreting Model Rule of Professional Conduct 1.13 as requiring a lawyer who represents a partnership to divulge to other partners information received from an individual partner, if it relates to the interests of the partnership).

<sup>66</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.13, cmt.1 (2004); see also D.C. Ethics Op. 216 (1991) (commenting that usually the lawyer must deem the corporation, and not one of its principals or constituents, to be her client).

present both their and the organization's interests.<sup>67</sup> Even under "entity theory," attorneys can represent both an individual member of an organization and the organization, if the matters are disparate or if both the member and the organization consent to the representation.<sup>68</sup> Lawyers who represent close corporations also may find themselves in the position of simultaneously advocating for the interests of both the entity and its constituent individuals.<sup>69</sup>

An "aggregate" theory of representation may be exactly what the clients committed to a Consortium want. Client organizations that are willing to share their decision-making and even pool their resources with other clients will do so for both mutual and self interest, in the hope that the success of the collaborative will buoy every member. These clients may hold subtler expectations of the client-lawyer relationship than those contemplated by the standard conception: they may find it desirable that their lawyer is mindful of their collective and particular goals. Seen from that perspective, the presumed clash between the lawyer as champion of the unitary client group and as guardian of its constituents seems less like a fight, and more like creative tension.

### C. *Lingering Questions: Can the Lawyer Force Her Clients to Play Well With Each Other as a Condition of Representation?*

Can lawyers ethically require clients to "play well with others" in a Client Consortium as a condition of representation? The question combines two concerns: can lawyers require client behaviors as conditions of representation; and can that behavior consist of collaboration within the representation?

A colleague of mine has described how he used to set the terms of representation for cash-strapped community groups that sought his

---

<sup>67</sup> See Ibrahim, *supra* note 25 at 186 (comparing the entity and aggregate theories of corporate representation); see also Simon, *Whom Does the Organization's Lawyer Represent?* *supra* note 7 at 69-70 (referring to decisions which treat representation in small corporations as multiple representations, under the assumption that the constituents' frequent, informal relationships with each other may lead them to expect that their lawyer will continue to represent their own and their entity's interests seamlessly and fairly).

<sup>68</sup> See A.B.A. Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361, *supra* note 65 (noting circumstances under which lawyer may continue to represent the interests of an individual partner, even though the lawyer for a partnership is presumed to represent the partnership as an entity); see also, Ernest T. Lindberg, *Speaking of Ethics: Representation of Trade Associations*, WASH. LAW. 10,11(Feb. 2002)(noting that, if there is any possibility that the member's and trade association's interests may be adverse, an attorney may represent an individual member of a trade association only if both the member and trade association consent).

<sup>69</sup> Mitchell, *supra* note 23 at 506-8 (advocating for the lawyer's responsibility towards each member of the corporation as well as to the entity, and developing a "typology" of situations under which multiple representation is ethically possible).

help in incorporating and in securing status as tax exempt organizations. One option he offered was to charge a fee, and take care of all the paperwork himself, with minimal involvement on the part of the group's members. The other option was for the members to meet with him regularly for guidance; and draft their own mission statement, corporate charter, and by-laws for his legal review; and, again with his oversight, fill out the application for tax exemption themselves. As he would tell them, the only fee for option two was his invitation to the barbecue they would hold once their organization was chartered and won tax exemption. No doubt, option two consumed more of his and his client's time. Yet it achieved his real goal of the representation - to build the group's capacity by engaging it in a process of self-definition.<sup>70</sup>

My colleague's example, and my conception of the Consortium, stop short of exacting some sort of outward-looking action on the part of their clients as a condition of representation. Other examples exist in the literature of lawyers who do: the Workplace Project on Long Island,<sup>71</sup> and the use of Time Dollars in Washington D.C.,<sup>72</sup> come to mind. Clearly these conditions express the lawyer's view as to the political significance of representation and of legal action. Engaging in community action or mentoring other clients may amount to a not-so-hidden price exacted by the "free" lawyer, an exercise of her ideology that she might feel less free to impose on a paying client, and an exploitation of her status in the legal services market as a scarce resource. The objection is legitimate, but there are several responses to it.

First, in some cities it is possible that community groups are not stuck in a "no exit" relationship with the only available lawyer in town. Community groups have access to a greater range of legal services for representation in community development projects than ever before. Even before the Legal Services Corporation relaxed its restrictions on the representation of groups,<sup>73</sup> a number of legal services of-

---

<sup>70</sup> My thanks to my colleague at the Washington College of Law, Professor Perry Wallace, for sharing this anecdote a number of years ago.

<sup>71</sup> See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L.REV. 408, 444 (1995)(requiring immigrant workers, in order to receive free legal services, to sign contract obligating them to active involvement in systemic reform work and legal education about workers' rights, including taking a course and joining an action committee).

<sup>72</sup> See Edgar S. Cahn, *Law and Justice: Co-Production as the New Imperative*, 1997 ANN. SURV. AM. L.747, 751 (describing several examples in which legal services providers in the District of Columbia - one a law school clinic, another a major private law firm - required their clients to pay their fees in "time dollars," or hours of community service).

<sup>73</sup> See Legal Services Corporation, *Financial Eligibility - Final Rule*, 70 Fed. Reg. 45545,45564 (Aug. 8, 2005) (amending 45 C.F.R. §1611.6 to allow recipients of LSC funds

fices have engaged for some time in some kind of transactional, community development work.<sup>74</sup> Some fifty law school clinics in the United States represent community organizations in affordable housing, economic development or small business practices.<sup>75</sup> A number of state and local bar associations have inaugurated programs to engage commercial law firms in pro bono representation of community organizations and small businesses.<sup>76</sup> So in some venues a neighborhood association or a non profit can in fact walk if its prospective free lawyer proposes conditions for representation that seem too onerous.

Second, as these few examples illustrate, exacting a condition (as distinct from a price) for representation is nothing new. Exacting a condition of agreement to collaboration for representation is something different. If the condition is to be client-centered, not coercive, the lawyer has to communicate frankly with the prospective Community Client about two concerns. First, the lawyer must feel certain, and must be able to advise her client, that joining the Consortium will not compromise the client's duties to its own constituency. For the lawyer who assisted any one of her client groups in "constructing" itself to

---

to represent groups or entities that lack means to hire private counsel, and that either are composed of or provide services to low income individuals). The version of the regulation that had been in place since 1983 had limited representation to groups primarily composed of members who were financially eligible for services. *Id.* at 45556.

<sup>74</sup> At this time neither the Legal Services Corporation nor the National Economic Development and Law Center keeps a roster of the federally funded legal services offices that engage in community development work. E-mail from Brad J. Caftel, Vice President and General Counsel, National Economic Development and Law Center, to Susan D. Bennett, Professor of Law, Washington College of Law (Aug. 27, 2005) (on file with author); telephone interview with John C. Eidleman, Senior Program Counsel, Legal Services Corporation, in Washington, D.C. (Sept. 9, 2005). For a recent description of the community development work that neighborhood-based legal services offices do, see Brad J. Caftel, *The Relationship between Lawyers and Low Income Communities*, 37 J. POVERTY L. & POL'Y 129 (2003).

<sup>75</sup> Similarly, no one, easily accessible roster exists of law school clinics that engage in some form of transactional, group, or community representation; the figure is the author's estimate. See Gateway to Clinical Legal Education, [http://cgiz.www.law.umich.edu/\\_GCLE/Index.asp](http://cgiz.www.law.umich.edu/_GCLE/Index.asp).

<sup>76</sup> See, e.g., Terry Carter, *Grassroots Growth*, A.B.A. J. 25 (Nov. 2000) (describing state and local bar association programs that link private firms with community organizations); Jennifer L. Henderson, *MVLS Launches Program to Benefit Small Nonprofits*, MD. B. BULL. 5 (April 2002) (describing the Maryland Volunteer Lawyers' Service's Community Development Project, which finds attorneys to represent non-profit organizations that serve low income communities); Hope Winer Sanborn, *Transaction Action: Pro Bono Service Isn't Always Synonymous with Litigation*, A.B.A. J. 30 (Sept. 2005) (noting that the ABA Business Law Section supports over thirty transactional pro bono projects); Maureen Thornton Syracuse, *D.C. Bar Pro Bono Program: Thank You For Your Support*, WASH. LAW. 37 (April, 2002) (describing the efforts of the Community Economic Development Pro Bono Project of the District of Columbia Bar Pro Bono Program, which at the time of writing had placed 28 community organizations with 25 law firms as house counsel, and found firms to represent 77 small nonprofits and small businesses in discrete matters).

serve as a responsible fiduciary to its members and mission, the notion of requiring the group to distribute confidential information and to forego opportunities must give pause. Directors are bound generally to act in "good faith" and in the best interests of the organization.<sup>77</sup> More specifically, duties of loyalty and care impose on the corporate board an obligation to keep close all information about its affairs.<sup>78</sup> Even if the community client is an unincorporated association, bound by purely moral and not by legal duty, the lawyer would wish to encourage it to act in a way likely to earn and keep its constituents' trust. That trust might be undercut if the client's members thought that its leaders were spilling word about its business out on the street, and that they were bowing out of projects and sources of revenue that could move the organization forward.

The Community Client Retainer guards procedurally against the possibility that the Client may act against its constituents' wishes, or what its constituents interpret to be its mission. The Retainer requires each Consortium Client to guarantee that it governs itself under internal institutional rules that promote openness throughout the organization, and that allow for decisions to be made by the group.<sup>79</sup> That requirement serves as the lawyer's assurance that her client's decisions, including consent to any conflict, are fully informed and deliberated, and that the client is articulating the substance of the decisions to her accurately.<sup>80</sup>

By-laws or organizational rules - even assuming they are followed - alone of course will not save a client from arriving, after full transparency and thorough debate, at an institutionally disastrous decision to share information and renounce business opportunities. But it is just as likely that the community client's decision to foresake immediate advantage for a common good will support both the client's fiduciary duties and its organizational health. For the segment of the community development client population rooted in the non-profit sector, representation that fosters synergy of resources and connection with community in return for the potential sacrifice of immediate individual advantage may fit well with the dual mission of doing good and

---

<sup>77</sup> See, e.g., REVISED MODEL NONPROFIT CORPORATIONS ACT, § 8.30 (1987): "(a) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee: 1. (1) in good faith;(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation."

<sup>78</sup> A.B.A. COMMITTEE ON NONPROFIT CORPORATIONS, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 34 (2d ed 2002).

<sup>79</sup> See "Community Client Retainer Agreement," Part III, *infra*, at internal note "g."

<sup>80</sup> See, e.g., Michael J. Fox, *Some Rules for Community Lawyers*, CLEARINGHOUSE REV. (May, 1980) at 3 (recommending that the lawyer for community groups insist that the group adopt a process by which it directs its lawyer with a unified voice).

doing well. More mature community-based organizations, those in a position to apply for and receive recognition of federal tax exempt status, know what the tax code imposes in return for tax exemption: an organization must conform its mission, limit its lobbying, eliminate its partisan political activity and vary its funding sources in order to receive the benefit.<sup>81</sup> Grantors take collaboration of neighborhood based groups in projects as a given, and exact it as a prerequisite.<sup>82</sup>

While the community lawyer's role certainly is not synonymous with that of the IRS or of that of potential funders, for clients to collaborate on a long term perspective for the enhancement of their individual and mutual capability to effect social change may not be such a stretch beyond what some already do, when they collaborate informally to achieve more immediate, targeted goals. It is also what the social theory of groups and observation of the efficacy of groups in neighborhoods suggest that they must do. In the next part, I will describe the "sociology of neighboring" and suggest how it supports the need for groups to disclose confidences, share resources, and generally re-conceptualize their parochial interests in terms of group benefit.

#### V. "BRIDGE" OR "GLUE," "LEVERAGE" OR "SUPPORT": COMMUNITY CLIENTS AND THE NECESSITY OF NETWORKS

##### A. *Getting Ahead and Getting By: The Different Kinds of Social Capital*

Seen through the lawyer's lens, the "Community Client Consortium" may generate multiple representation, "intermediation," or "facilitation." Seen through the perspective of the sociologist, the Consortium generates the opportunity for the development of both a network, and of a kind of "social capital" (a benefit derived from membership in a network). Community groups have everything to gain from linking with peer groups inside their sphere, even though similarly situated and constituted organizations might well consider themselves more as natural competitors than as colleagues, and with resource-rich allies outside. Although social capital theory and the other theories enfolded within the "sociology of neighboring" all differ slightly, all address how multiple, repeated interactions among individuals in rich and poor communities build intangible reserves of

---

<sup>81</sup> See WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS & THE NEW SOCIAL POLICY* 169-173 (2001)(in one example, describing how, in order to insure that tax exempt public charities "escape control by a few contributors, the statute and regulations governing tax exemption require that organizations demonstrate a broad base of public contribution).

<sup>82</sup> Jane Hexter, *Got Collaboration?* <http://Charitychannel.com/publish/templates/?a=62638z=0> (last visited Aug.15, 2005).

solidarity that can lead to civic engagement and political action. A discussion of the construction and operation of the concept of social capital allows for a fuller evaluation of whether a “Community Client Consortium” might serve the needs of individual clients and of clients as collaborators in the promotion of social change.

Depending on who you ask, “social capital” has a long history.<sup>83</sup> It enjoys recent prominence in sociological theory<sup>84</sup> and as a force driving community development research and policy.<sup>85</sup> Extracted somewhat confusingly over time from diverse analyses of the impacts of social relationships on economic behavior,<sup>86</sup> “social capital” has been described both as a process and as a product, as the creation of the network of contacts that generates information and trust, and as the benefits themselves - both as what it is and as what it does.<sup>87</sup> Its malleability has made it attractive as an all-purpose explanation for all kinds of social problems, and for prescribing all kinds of programs as

---

<sup>83</sup> Robert Putnam attributes the first use, in 1916, of the term “social capital” to L.J. Hanifan, state supervisor of rural schools in West Virginia. ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000) (“...those tangible assets [that] count for most in the daily lives of people: namely good will, fellowship, sympathy, and social intercourse among the individuals and families who make up a social unit. . . .” citing L. J. HANIFAN, *THE COMMUNITY CENTER* 78 (1920)); see PUTNAM, *BOWLING ALONE*, *id.* at 445-6, note 12 for a further, brief history of the term. For other historical review, see Michael Woolcock, *Social capital and economic development: Toward a theoretical synthesis and policy framework*, 27 *THEORY & SOC.* 151, 192 n.13 (1998) (crediting the coining of “social capital” to Jane Jacobs, citing JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 138 (1961)).

<sup>84</sup> See Robert D. Putnam, *Preface to Symposium: Using Social Capital to Help Integrate Planning Theory, Research and Practice*, 70 *J. AM. PLAN. ASS'N* 142 (2004) (assessing the wide currency of social capital theory as “conceptual platform” for multidisciplinary exchange); James DeFilippis, *The Myth of Social Capital in Community Development*, 12 *HOUSING POL'Y DEBATE* 781, at 781 (2001) (noting the dominance of “social capital” as the organizing theme for the 1999 meeting of the Urban Affairs Association as an indicator that “. . . social capital had, in only about half a decade, become one of the principal concerns of community development practitioners and researchers.”).

<sup>85</sup> Steven N. Durlauf, *The case “against” social capital*, 20 *FOCUS* 1, at 1 (1999) (citing the “current boomlet in policy and academic circles for social capital”); see also Woolcock, *supra* note 83 at 193-6, n.20, for an exhaustive catalogue of research into the effect of “social capital” in a number of substantive areas.

<sup>86</sup> For an overview of the development of social capital theory, see Ivan Light, *Social Capital's Unique Accessibility*, 70 *J. AM. PLAN. ASS'N* 141, 145 (2004); Woolcock, *supra* note 83 at 159-167 (locating the roots of “social capital” in eighteenth century discussions of how social institutions and social relationships affect market exchange, discussions which re-surfaced early in the twentieth century with the emergence of sociology in the American academy as a distinct discipline, and at mid-century and later with new emphasis on studies of entrepreneurship and comparative institutions).

<sup>87</sup> See ROSS GITTELL & AVIS VIDAL, *COMMUNITY ORGANIZING: BUILDING SOCIAL CAPITAL AS A DEVELOPMENT STRATEGY* 16, fig. 2.1 (1998) (charting features of “social capital” as described by several influential current exponents); Alan Kay, *Social capital, the social economy and community development*, 41 *COMM.DEV.J.* 160, 162 (2006) (summarizing major schools of thought about social capital).

solutions.<sup>88</sup>

Contemporary definitions of “social capital” focus on a few key points. James Coleman distinguished “human capital,” the lode of skills that expands the individual’s capacity for action, from “social capital,” the acquisition and adjustments of relationships between individuals, within which one exercises and acquires “human capital.”<sup>89</sup> Coleman described exchanges between individuals as generating “credit slips,”<sup>90</sup> intangible bonds of obligation that create expectations of what Robert Putnam has described as “generalized reciprocity,” a favor done with no thought to immediate return, but some faith of an answering action in the long run.<sup>91</sup> Expanding on the metaphor of mercantile exchange, others have described social capital as “. . . stocks of social trust, norms and networks that people can draw upon in order to solve common problems.”<sup>92</sup> Ronald Burt has explained social capital as the bond created through a process of exchanging information.<sup>93</sup> In sum, social capital is the product of those “credit slips,” the accretion of connections built through patterns of reciprocal action, and the trust in the eventual fulfillment of the promise of some return for your individual good deed.

Social capital theory became relevant to the study of economic isolation and social exclusion when its proponents folded in Mark Granovetter’s thesis about the operation of “weak ties,” the connections outside one’s immediate circle of family, friends and neighbors that prove to be the most effective in securing the means to long-term advancement and security, such as employment or higher education.<sup>94</sup> “Weak ties” have been recast in the context of social capital theory as “bridging capital” or “social leverage,” and are contrasted with

---

<sup>88</sup> Woolcock, *supra* note 83 at 156-7; see also Xavier de Souza Briggs, *Social Capital: Easy Beauty or Meaningful Pleasure?* 70 J. AM. PLAN. ASS’N 141, 151(2004)(ascribing to social capital theory the quality of “easy beauty,” John Dewey’s coinage to describe a theory that is so immediately satisfying and pleasing that no one bothers to analyze what it means or what it does).

<sup>89</sup> James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S100 (1988).

<sup>90</sup> *Id* at S102.

<sup>91</sup> PUTNAM, BOWLING ALONE, *supra* note 83 at 134.

<sup>92</sup> Robert E. Lang & Stephen P. Hornburg, *What Is Social Capital and Why Is It Important to Public Policy?* 9 HOUSING POL’Y DEBATE 1, 4 (1998).

<sup>93</sup> Ronald S. Burt, *The Gender of Social Capital* 10 RATIONALITY & SOC. 5, 30 (1998).

<sup>94</sup> Mark Granovetter, *The Strength of Weak Ties Hypothesis*, 78 AM. J. SOC. 1360 (1973). For a more recent expansion of the “weak ties hypothesis,” see BENNETT HARRISON & MARCUS WEISS, *WORKFORCE DEVELOPMENT NETWORKS: COMMUNITY-BASED ORGANIZATIONS AND REGIONAL ALLIANCES* 37 (1998) (that widely distributed “weak ties” to strangers, as opposed to the “strong ties” to family and close friends, may produce more leads to jobs).



“glue,” “bonding” or “coping capital,” or “social support.”<sup>95</sup> To illustrate: “bridges/bridging capital” or “social leverage” is the result of the relationship with your guidance counselor, or with Joe’s cousin the office manager who gets your foot in the door of the right college or job. “Glue” or “bonding/coping capital” is the result of the relationship you have with your cousin, who will babysit for you on short notice, or your neighbor, who will lend you a cup of sugar. The difference has been summarized as between what “gets you ahead” and what “gets you by.”<sup>96</sup>

“Glue” in some respects resembles “capacity,”<sup>97</sup> or “collective efficacy,” the cohesion and trust resulting from relationships within a relatively homogeneous group that enable the group to achieve a certain amount, but only within a limited sphere of action.<sup>98</sup> In contrast, “bridging capital” grows from relationships between dissimilar individuals, and also between dissimilar groups, that enable individuals and groups to transcend their insularity and generate networks.<sup>99</sup> Whether social capital accrues among individuals or among groups, too much “glue” and not enough “bridges” builds an unhelpful insularity.<sup>100</sup>

Ivan Light has noted that there are many kinds of “capital” - “human,” “cultural,” “financial,” “physical” - but that the only kind available to poor people is “social.”<sup>101</sup> Poor people can only turn their social capital to advantage when they are free to leverage it into other kinds. There is no one “good” kind of social capital - the “bonding”

<sup>95</sup> For descriptions of the differences between “social leverage” and “social support,” or “coping capital,” see Xavier de Souza Briggs, *Brown Kids in White Suburbs*, *supra* n. at 178; between “glue” and “bridges,” see Lang & Hornburg, *supra* n. at 4 and Putnam, *supra* n. at 22; between “bonding” and “bridging” capital, see GITTELL & VIDAL, *supra* n. at 15.

<sup>96</sup> See Briggs, *Brown Kids in White Suburbs*, *supra* note 10 at 178.

<sup>97</sup> Lang & Hornburg, *supra* note 92 at 4.

<sup>98</sup> See Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *SCI.* 918, 918 (Aug. 1997) (noting that different neighborhoods have different capacities to band together to fight crime and to demand better services, and, *id.* at 919, finding the root of these differences in “collective efficacy,” defined as the “linkage of mutual trust and the willingness to intervene for the common good. . .”).

<sup>99</sup> Colin C. Williams & Jan Windebank, *Self-Help and Mutual Aid in Deprived Urban Neighborhoods: Some Lessons from Southampton*, 37 *URB. STUD.* 127, 137-8 (2000) (finding that, in poor and working class households who rely on self-help and networks of informal mutual assistance to get by, the households with multiple earners, with expanded contacts to colleagues at work, use such networks most successfully).

<sup>100</sup> Lang & Hornburg, *supra* note 92 at 6-7.

<sup>101</sup> Light, *supra* note 86 at 149; for examples of networks that poor people form to make the most efficient collective use of their resources, see CAROL STACK, *ALL OUR KIN* (1974); Kathryn Edin & Laura Lein, *The Private Safety Net: The Role of Charitable Organizations in the Life of the Poor*, 9 *HOUSING POL’Y DEBATE* 541, 554-6 (1998) (interviewing destitute mothers who coordinated their use of benefits to assist members of their extended families).

capital that builds neighborhood cohesion and mutuality of care can provide for sustaining personal and economic relationships.<sup>102</sup> Nor is any one kind of social capital necessarily the marker of any one group; no one socio-economic, ethnic, or racial group is particularly adept at accumulating one kind or another. Poor people as well as affluent people use “bridging” capital to get jobs,<sup>103</sup> and both “bonding” and “bridging” social capital to engage in grass roots advocacy and civic activities.<sup>104</sup> Social capital only becomes hurtful when bonds reinforce exclusion as much as they build solidarity. Gated communities, civic associations dominated by one demographic cohort,<sup>105</sup> exclusionary hiring halls and private clubs all exemplify, and all reinforce, the racial, ethnic or economic insularity of “negative social capital.”<sup>106</sup> The exercise of negative social capital can be overt or unthinking - the bonding among the members of the excluding groups may be so intense that they may fail to see that others are damaged by their insularity.<sup>107</sup> The issue becomes who gets to enforce bonding capital against whom. In short, whether social capital is good or bad depends on how individuals or groups build it and use it: whether they isolate others, or are isolated involuntarily from the kind of bridging capital that enhances opportunity, forms heterogeneous, resource-rich net-

---

<sup>102</sup> BRETT WILLIAMS, *UPSCALING DOWNTOWN: STALLED GENTRIFICATION IN WASHINGTON, D.C.* 76-84 (1988)(describing “the work of the street,” the complicated patterns of exchange of information and favors that characterize the financial and political economy of one neighborhood in the District of Columbia).

<sup>103</sup> Jeanne S. Hurlbert et al, *Social Networks and Social Capital in Extreme Environments*, in *SOCIAL CAPITAL: THEORY AND RESEARCH* 209, 225 (Nan Lin et al. eds., 2001) (research finding that residents of poor neighborhoods use “weak ties,” or bridging capital, proportionally as often as residents of more affluent neighborhoods to get jobs).

<sup>104</sup> Brian P. Conway & David S. Hachen, Jr., *Attachments, Grievances, Resources, and Efficacy: The Determinants of Tenant Association Participation Among Public Housing Tenants*, 27 *J. URB. AFF.* 25, 48 (2005)(commenting that public housing residents in one large study showed levels of civic engagement comparable to and exceeding those of homeowners).

<sup>105</sup> For one example of an abuse of civic activism that grew from the exclusionary use of bonding social capital, see Briggs, *Social Capital: Easy Beauty or Meaningful Resource?*, *supra* note 88 at 154 (white homeowners taking over the board of a community development corporation and then eliminating the previous board’s project to develop affordable multi-family co-op housing that had been purchased by African American buyers).

<sup>106</sup> For examples of the many impacts of “negative social capital,” as not only excluding outsiders, but also stifling innovation and advancement among insiders, see Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 *ANN. REV. SOCIOLOGY* 1, 15-18 (1998).

<sup>107</sup> That unconsciousness of the impact of such intense bonding capital could describe any “white” or any other “privilege”; in one example of the insularity of one group bonded by economic privilege, an association of property owners succeeded in forcing a slumlord out of his eyesore of a property, but throughout the campaign never consulted with the tenants of the building, who as a result of the condemnation were evicted. KRISTINA SMOCK, *DEMOCRACY IN ACTION: COMMUNITY ORGANIZING AND URBAN CHANGE* 73 (2004).

works, and enables different kinds of capital to form. Too much bonding capital among those with access to other kinds of capital insures that social capital is not only the only kind that poor people have, but the only kind that poor people will ever get.

*B. From "Linking" to "Networks" and Why Community Clients Need Them*

Forty-five years ago, Jane Jacobs noted that small, insular neighborhoods often excelled in maintaining control of local conditions, but were powerless to protect themselves from external threats, such as red-lining or absence of municipal services.<sup>108</sup> In her view, neighborhoods needed residents who engaged in what Jacobs referred to as "hop-and-skip relationships," ties to persons with similar interests but different, perhaps more influential connections, outside the immediate community.<sup>109</sup> Urban sociologists and planners since have concurred that impoverished neighborhoods suffer from isolation from a range of resources, and that that isolation keeps their residents from finding rewarding work, decent housing and a high quality of goods and services.<sup>110</sup>

Recent articulations of social capital theory address Light's concerns about the limitations of "bonding" and "bridging" social capital by including a third type: "linking."<sup>111</sup> While "bonding" and "bridging" social capital have been characterized as "horizontal," "linking" social capital is "vertical." "Linking" social capital connects community-based organizations with the sources of real power: local, state and federal governments, large commercial lenders, and major foundations. In that function, linking social capital expands on the usefulness of "bridging" social capital, which develops between persons who may be strangers, but who occupy similar statuses in terms of race, class and political clout.<sup>112</sup>

The construct of "linking social capital" highlights a problem which older social capital theory describes but cannot resolve: that the process of building "bonding" or even "bridging" social capital mainly occurs within the bounds of geographical community. For community

<sup>108</sup> JACOBS, *supra* note 83 at 127.

<sup>109</sup> *Id.* at 134.

<sup>110</sup> See, e.g., PETER DREIER, JOHN MOLLENKOPF AND TODD SWANSTROM, PLACE MATTERS: METROPOLITICS FOR THE 21ST CENTURY, Ch. 3, *The Costs of Economic Segregation and Sprawl* 64-104 (2d ed 2004); Michael B. Teitz & Karen Chapple, *The Causes of Inner-City Poverty: Eight Hypotheses in Search of Reality*, 3 CITYSCAPE 33 (1998).

<sup>111</sup> Alan Middleton, Alan Murie & Rick Groves, *Social Capital and Neighborhoods That Work*, 42 URB. STUD. 1711, 1716 (2005)(citing WORLD BANK, WORLD DEVELOPMENT REPORT 2000-2001 at 128 (2001)).

<sup>112</sup> *Id.* at 1716.

empowerment strategies to work, alliances must transverse boundaries not only of geography, but of race and class.<sup>113</sup> Dependent on repeat interactions between actors within easy or slightly extended reach of each other, in resource-poor neighborhoods the “horizontal” types of social capital suffer from anoxia. Without infusions of the other kinds of capital that have been withheld from poor communities, horizontal capital alone cannot sustain continued development.<sup>114</sup> These concerns about the insufficiency of social capital echo the critique of “place-based” community development policies.<sup>115</sup> Even those who admire the strength of social capital in poor communities acknowledge that, without connections to more influential external actors, local collaborations alone cannot compel changes in state-sanctioned patterns of discrimination and disinvestment.<sup>116</sup> Sometimes the problems are simply too big and too structural for any one group to face without the help of a diverse range of allies.<sup>117</sup>

Network theory supplies a framework for analyzing why the groups with only internal resources can never become groups with

---

<sup>113</sup> Peter Dreier, *Community Empowerment Strategies: The Limits and Potential of Community Organizing in Urban Neighborhoods*, 2 CITYSCAPE 121,139(1996); see also MARION ORR, *BLACK SOCIAL CAPITAL: THE POLITICS OF SCHOOL REFORM IN BALTIMORE*, 1986-1998, at 191-2 (1999)(concluding that even a socially cohesive and internally effective pressure group of black activists could not succeed alone in implementing wide-ranging structural reform in school system, when long-established patterns of segregation had blocked the black community from developing relationships with historically white controllers of political and financial resources).

<sup>114</sup> See Susan Brin Hyatt, *From Citizen to Volunteer: Neoliberal Governance and the Erasure of Poverty*, in, THE NEW POVERTY STUDIES: THE ETHNOGRAPHY OF POWER, POLITICS, AND IMPOVERISHED PEOPLE IN THE UNITED STATES 201, 213-223 (Judith Goode & Jeff Maskovsky eds. 2001)(criticizing programs that invest significant administrative authority in community groups without accounting for their historic lack of access to training and expertise).

<sup>115</sup> For a summary of the “people-based” versus “place-based” debate in community development policy, see GARY PAUL GREEN & ANNA HAINES, *ASSET BUILDING AND COMMUNITY DEVELOPMENT* 6 (2002); for what has become the definitive popular critique against development that focuses on place, see Nicolas Lemann, *The myth of community development*, N.Y.TIMES MAG., Jan. 1994,at 27.

<sup>116</sup> John Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space and Poverty*, 67 FORDHAM L. REV. 1927, 1953-4 (1999)(asking for policies that expand “social leverage” and “social support” capital, to acknowledge that the considerable social capital assets of poor communities alone may be insufficient to compensate for years of malign neglect and deliberate withholding of resources).

<sup>117</sup> Dreier, *supra* note 113 at 124-5(emphasizing that community-based organizations may be able to achieve success in their own neighborhoods, but alone neither can affect statewide or national agendas, nor secure resources that exist only at the state or federal level); see also Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 923 (Aug. 1997)(even cohesive neighborhoods with high levels of internal organization and lower levels of street crime depend on external institutions of formal social control and external resources for their stability).

clout. While “social capital” represents the value that results from interactions between either similar or dissimilar individuals or groups, “networks” can be considered as the structures within which those interactions occur. Networks come in different configurations. Some consist of “peer to peer” relationships which, once created, maintain themselves independent of any one powerful organizing institution. These differ from “hub and spoke” networks, in which several members connect to a central player but not to each other, and from “intermediary” networks, in which a central player such as a community development corporation or university remains as a permanent force for structuring and monitoring relationships among peers, or between peers and itself.<sup>118</sup> Most networks draw a little from all these archetypes.

Successful networks share certain interior characteristics. One is the agreement of the members to subordinate immediate, individual advantage to the achievement of greater goals.<sup>119</sup> There are several necessary predicates to this willingness to adopt collective goals. One is an accumulation of trust, something difficult to attain outside an extended history of repeated, successful interactions in which members have had the opportunity to cooperate in the exchange of information and to have their cooperation reciprocated.<sup>120</sup> It may seem obvious, but for groups collaborating to achieve transcendent social reform, another feature is a shared political vision of social equality, one that internalizes the norms of reciprocity and fair dealing essential to the group’s cohesiveness and that will sustain the faith that every member of the group will pull its weight, even if a failure to assume responsibility is not immediately visible.<sup>121</sup>

Ultimately, however smoothly they may begin to function internally, networks, like individuals, must also reach beyond themselves, expanding and diversifying. “Peer to peer” networks are critical to initial gathering of information and building of relationships. But net-

---

<sup>118</sup> For a description of and schematics illustrating these types of networks, see HARRISON & WEISS, *supra* note 94 at 45.

<sup>119</sup> See Walter W. Powell, *Neither Market nor Hierarchy: Network Forms of Organization*, 12 *ORG. BEHAVIOR* 295, 303 (1990).

<sup>120</sup> For one among many studies of “trust” and reciprocity, this one focusing on dynamics within rather than between groups, see Roderick M. Kramer, Benjamin A. Hanna, Steven Su & Jane Wei, *Collective Identity, Collective Trust, and Social Capital: Linking Group Identification and Group Cooperation*, in *GROUPS AT WORK: THEORY AND RESEARCH* 173, 174-7 (Marlene E. Turner ed., 2001).

<sup>121</sup> MICHAEL H. BEST, *THE NEW COMPETITION: INSTITUTIONS OF INDUSTRIAL RESTRUCTURING* 237-9 (1990) (noting that groups can trust each other enough to learn from each other if they share a collective vision of a just society, in which reciprocity and cooperation are expected behaviors, and that groups always risk damage from the action of “free-riders,” self-seeking actors who harm the collective either through inactivity or through harmful activity).

works that fail to transcend the “peer to peer” model not only risk stagnation as regular members grow too comfortable with established patterns, but threaten discriminatory exclusion of unfamiliar groups. In that sense, the damage done by static peer to peer networks resembles that done by the overly bonded wielders of negative social capital. Network connections with “high constraints,” that is, too, much bonding or coping capital, that reinforce intimacy among a few players, produce cliques, not true networks.<sup>122</sup> More than social capital analysis, network analysis examines the impact of exclusionary practices on both the excluders and the excluded. Those who indulge in the comfort of well-worn, repetitive interactions within the same network of like-minded peers will fail to expand the network, and will choke off not only new members but new information.<sup>123</sup> Failure to expand, and then failure to link up even the expanded network with diverse contacts can cause the network to implode.

Community development theorists have used network theory to describe how levels of the community development system “link” the most disconnected residents with nearby, and then with more remote, resources of increasing capacity and influence.<sup>124</sup> Community development corporations (“CDCs”) self-consciously position themselves in strategic positions between networks, in order to nurture “horizontal” capital and provide “linking” capital.<sup>125</sup> Although types of networks vary, all leverage the resources of the small, local and isolated by linking them with the large, regional or national, and well-connected. A few examples of successful networks illustrate how they integrate many levels of actor and information, maintaining close ties but always working to keep them from getting stale. Generated by a partnership between a national philanthropy (the Pew Charitable

---

<sup>122</sup> Burt, *The Gender of Social Capital*, *supra* note 93 at 30 (1998).

<sup>123</sup> Powell, *supra* note 119 at 305 (stating that networks that rely on repeat relationships among the same players, and fail to bring in infusions of new information from new sources, become insular and exclusionary); Bennett Harrison & Amy K. Glasmeier, *Why Businesses Alone Won't Redevelop the Inner City: A Friendly Critique of Michael Porter's Response to Urban Revitalization*, 11 *ECON.DEV.Q.* 28, 35 (1997) (emphasizing the importance of businesses reaching beyond their like-minded “clusters” to organizations with different specialties, lest their familiar networks become rigid).

<sup>124</sup> See Ronald F. Ferguson & Sara Stoutland, *Reconceiving the Community Development Field*, in *URBAN PROBLEMS AND COMMUNITY DEVELOPMENT* 36-42 (Ronald F. Ferguson et al. eds., 1999) (illustrating relationships among hierarchies of “Level Zero” through “Level 3” organizations, with Level Zero being volunteer organizations with unpaid staff, and Level 3 organizations being national banks, foundations, and legislatures).

<sup>125</sup> GEORGE GALSTER, DIANE LEVY, NOAH SAWYER, KENNETH TEMKIN & CHRIS WALKER, *THE IMPACT OF COMMUNITY DEVELOPMENT CORPORATIONS ON URBAN NEIGHBORHOODS* 13-14 (Urb. Inst. 2005) (describing the “community capacity building” activities and the strategic “structural” position of CDCs as “intermediary” between neighborhood organizations and larger systems).

Trust) and a local quasi-governmental entity (the Philadelphia Industrial Development Corporation), the Urban Industry Initiative in Philadelphia established networks of owners of small manufacturing businesses, to enable them to exchange complementary expertise, combine resources, and match buyers and sellers, with the goal of retaining and strengthening businesses in the city.<sup>126</sup> Some CDCs bolster the economic health and political effectiveness of individuals and organizations by training them in organization-building and advocacy techniques,<sup>127</sup> and by connecting them to previously unapproachable sources of capital and power.<sup>128</sup> Sometimes too small, or too strapped for cash to take on extended projects in affordable housing and other economic development, CDCs themselves often pool resources or work in peer networks organized by foundations to enhance their programmatic capacities.<sup>129</sup> They also combine forces to engage in advocacy affecting their industry and their low income constituents.<sup>130</sup> Operating in many different countries in different contexts, lending circles build relationships and expertise among peer small business owners, while providing the all-important connections to the “hub” lenders or to the “intermediary” mentors and advisers who link the

---

<sup>126</sup> Gregg A. Lichtenstein, *Building Social Capital*, 23 *ECON. DEV. COMMENT.* 31, 33-4 (1999)(describing how two manufacturers had shared a common wall for seventy years and never met, and that until the Initiative brought them together, they had no idea that one could buy the products that the other had been sending out of state).

<sup>127</sup> For an example of one CDC's horizontal networking activities, see William J. Traynor & Jessica Andors, *Network Organizing: A Strategy for Building Community Engagement*, 140 *SHELTERFORCE* 8-11 (March/April 2005) (describing Lawrence Community Works, a CDC in one of many cities in Massachusetts that lost their economic base when their textile mills shut down. The CDC organized dinners for hundreds of students in previously unconnected adult education and consumer literacy courses, enabling the participants to meet each other, hear news about city development projects, and be trained in the skills of civic participation).

<sup>128</sup> See GALSTER, *supra* note 125 at 59-62 (summarizing ways in which five CDCs used their structural position as “intermediaries” to link residents to capital and political influence).

<sup>129</sup> See HARRISON & WEISS, *supra* note 94 at 111-119 (describing the Pittsburgh Development Partnership, instituted by an alliance of Ford and other foundations and the city, which acted as an intermediary to match CDCs, the CDCs' clients, and banks that sought to satisfy their obligations under the Community Reinvestment Act by investing in urban development projects); see also Christopher Walker, *Community Development Corporations and Their Changing Support Systems* 38-41 (Urb. Inst. 2002)(how two national intermediaries concentrated funding, board training and technical assistance in “support collaboratives” for CDCs in twenty-three cities); Nancy Nye & Norman J. Glickman, *Working Together: Building Capacity for Community Development*, 11 *HOUSING POL'Y DEBATE* 163, 180 (2000)(describing how CDCs in Portland, Oregon, pooled resources for projects in their overlapping geographical areas; and how CDCs in Boston contracted with each other for small business lending).

<sup>130</sup> David Holtzman, *The Emergence of the CDC Network*, 144 *SHELTERFORCE* 16 (Nov./Dec.2005).

borrowers with lenders as well as with other resources.<sup>131</sup>

These few out of many examples of networked manufacturers, neighborhood institutions engaged in community development, and nonprofit housing providers support the proposition that individual institutional actors in resource-poor communities can achieve collectively what none can accomplish alone. Regardless of structure, the purpose of all these networks is to create frameworks within which neighborhood groups and institutions of different kinds can collaborate to combine and amplify their strengths. The superiority of the efforts of actors performing in networks to those of actors performing alone has become so accepted that funders expect and even require applicants for grants to apply jointly with other partners, and to demonstrate their past achievements as workers in different kinds of collaborations.<sup>132</sup>

## VI. THE LAWYER AS ENHANCER OF "SOCIAL CAPITAL" AND AS "MANAGER OF STRUCTURAL HOLES"

### A. *The Lawyer as Enhancer of Social Capital*

The real-world examples of networks indicate that organizations can and do ally with others to promote mutual and individual advantage, either spontaneously or with the assistance of an intermediary/organizer. The question is whether that organizer can or should be a lawyer, acting in the ways that lawyers do to structure one-shot and long-term relationships. The answer lies, of course, in the breadth and flexibility of definition of "acting in the ways that lawyers do."

Even within the limitations of one-by-one representation, lawyers clearly can and do enable their clients to build social capital of the "coping" or "bonding" kind. They do so when they help to form groups, and to advise them on how to function as groups. In that kind of representation they advise the different members of the group on the issues involved in creating a collective - a corporation or partnership, or a more informal association that has not transformed itself into a corporate entity. These issues may include how the members will choose to govern themselves within the collective: who will lead

---

<sup>131</sup> See BEST, *supra* note 121 at 214 (1990) (on consortia of cooperatives and small firms in Italy, that collectively evaluate and then package and present members' applications for loans, a vouching system that banks accept in lieu of developing their own underwriting criteria); see also Lisa J. Servon, *Credit and Social Capital: The Community Development Potential of U.S. Microenterprise Programs*, 9 HOUSING POL'Y DEBATE 115, 124 (1998) (describing Working Capital in Boston, in which small business owners form borrowing groups to develop each member's application for a loan from Working Capital, remain responsible as a group for that member's loan, and can each take on more loans only so long as each member stays current in its individual payments).

<sup>132</sup> See Hexter, *supra* note 82.



them, how they will deliberate and make decisions, and where they will set the thresholds for meaningful participation and the standards for admission and expulsion.<sup>133</sup> Clients often demand greater awareness of and engagement by their lawyers in their companies' day to day operations.<sup>134</sup> Lawyers acting as "house counsel" advise on these and other on-going matters of the organization, developing an even richer relationship over time.<sup>135</sup> In short, when lawyers advise clients as to what appear to be merely the minutiae of corporate governance, they are also offering examples of the rules of engagement which create the spaces within which social capital can grow.<sup>136</sup>

Lawyers help individual and group clients "bond." In the context of the sociology of neighboring, when clients with internal capacity (or "bonding capital") reach out to others for mutual advancement, they "bridge," sometimes only formalizing already strong ties with known actors, sometimes leaping to build a new relationship based on a weak tie to a lesser known quantity. As I discussed earlier, lawyers frequently help clients "bridge" when they advise on and articulate the terms for business relationships, in resource-rich and resource-poor neighborhoods alike.<sup>137</sup> They form joint ventures and write contracts for one-time deals or repeat players. For parties that desire longer term relationships, with broader visions for action, they form partner-

---

<sup>133</sup> See Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 *FORDHAM L. REV.* 2449, 2463 (1999)(noting that attorneys who had represented organizations engaged in serious "bricks and mortar" work in their communities spoke of their clients' concrete accomplishments in the way of construction of housing and community facilities, but also of how they assisted them in developing their own capacity to govern themselves and to advocate for their positions).

<sup>134</sup> See Jill Schachner Chanen, *Constructing Team Spirit*, A.B.A. J. 58 (Aug. 1997)(describing active engagement of some law firms in the day to day activities of their corporate clients).

<sup>135</sup> Lisa Finnegan, *A Brand New World: Pro Bono Goes Corporate*, *WASH.LAW.* 24 (May/June 1999)(describing the house counsel relationships formed in the first year of D.C.'s Community Economic Development Pro Bono Project).

<sup>136</sup> Stephen Ellmann's description of how the lawyer for an association could choose to build her client's internal processes of governance to encourage democratic participation exemplifies how a lawyer can think in terms of building her client's social capital, in that instant capital of a "bonding" kind. Stephen Ellmann, *Client Centeredness Multiplied: Individual Autonomy and Collective Mobilization in the Public Interest Lawyers' Representation of Groups*, 78 *VA. L. REV.* 1103,1147-1152 (1992). See also Nancy Cook, *Looking for Justice on a Two-way Street*, 20 *J. L. & POL'Y* 169, 194 (2006) (reminding lawyers to appreciate their clients' "bonding" capital).

<sup>137</sup> See, e.g., Ann Southworth, *Representing Agents of Community Economic Development: A Comment on Recent Trends*, 8 *J. SMALL & EMERGING BUS. L.*261 (2004); Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 *WISC. L. REV.* 1121, 1134-9 (describing a range of non-litigation, transactional activities such as negotiation, drafting, planning, and financing in which a sample of lawyers in a survey engaged in the representation of community-based organizations).

ships and corporations of a range of kinds.<sup>138</sup> Lawyers may also help their individual or their “bridged” clients “link” to sources of influence beyond their usual frame of dealing: when they help them apply for major public or foundation grants or commercial loans, assist them in forming coalitions, or work with them to present legislative testimony. It is in this last activity that lawyers come the closest to placing their clients more permanently in contact with unfamiliar actors by creating networks.

### B. *Lawyers as Managers of Structural Holes*

Another way to view insular networks is as clusters of individuals or groups, benefitting from bonding or even bridging social capital, but stranded from each other on the far side of “structural holes.” “Structural holes” are gaps of information between individuals or groups, different information that each possesses but that none has yet shared.<sup>139</sup> Sharing the information might be useful, but for any one of a number of reasons, none of the actors is aware that all concerned might benefit from an exchange.<sup>140</sup> The most useful actor is the “manager” of the holes, one positioned outside of or at the fringes of organizations, who knows the information, knows the organizations, and knows the optimum timing for connecting the organizations to transmit the information.<sup>141</sup>

I propose that the community lawyer think of herself as the ultimate manager of structural holes. It is a role that she assumes naturally, as one whose status in the community already balances between that of outsider and of insider, a position that encourages empathy but stops short of perfect identification. Community lawyers enjoy daily opportunities to extend themselves beyond the constraints of individual group clients. Informally, throughout their wide-ranging contacts across a range of clients in any one neighborhood, lawyers may come

---

<sup>138</sup> For a quick overview of how a lawyer might counsel business clients as to the range of legally defined associational relationships available to them, see Michael E. Flowers, *Choosing the Right Business Entity*, 40 PRAC. LAW. 21 (1994).

<sup>139</sup> Burt, *The Contingent Value of Social Capital*, *supra* note 12 at 341. For an extremely useful overview of both the history of social capital theory and the parallel development of network and structural hole theory, applied to the debate over the value of independent corporate boards, see Lawrence E. Mitchell, *Perspectives from Law and Social Psychology: Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance*, 70 BROOK.L.REV. 1313 (2005).

<sup>140</sup> RONALD S.BURT, STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION 13-14(1992) (describing the “access, timing, and referral” benefits of transferring information).

<sup>141</sup> In a different context, that of foundations and CDCs collaborating together to engage in workforce development in poor networks, Harrison and Weiss have described a similar concept of “centrality,” a person’s or group’s position in its network resulting from its capacity to receive and transmit information. HARRISON & WEISS, *supra* note 94 at 38.

across groups, unknown to each other, who would benefit by making contact, to exchange information or even to do business together. All the illustrations we have seen about the value of networks suggests that to bring these strangers together would be of benefit to them. In short, to build a "Client Consortium" would be the lawyer's equivalent of creating a network from which the "bridging" form of social capital could germinate. The Consortium would draw closed the "structural hole" - the vacuum of information and the deprivation of continuous contact - that had kept one or more community based actors with potentially complementary strengths apart.

The lawyer who seeks to formalize what she may already do informally - to expand her community capacity-building to the creation of networks, and to the management of structural holes - need not venture so far beyond what lawyers conventionally do. I have noted that lawyers in transactional practices already address the possibilities - and problems - inherent in the "manager" role when they assist existing clients to form partnerships. As structural hole theory suggests, the greater the disconnect between partners in a new business relationship, the greater the discomfort - but the greater the potential benefit. Lawyers can use their connections and knowledge to bridge the gap not only across the structural holes for the benefit of discrete clients, but also for the benefit of the clients' vision of the common good. We have seen that the ethics of lawyering advises caution about - though not total prohibition of - the lawyer's behavior in these relationships. But the sociology of neighboring encourages their formation.

While the role of structural hole manager seems to be a "natural" for the community lawyer, the idea comes with caveats. If it is to apply usefully to the idea of the lawyer convening a Client Consortium, the "structural hole manager" needs some revision from its basis in the sociology of organizations. The sociological model emerges from the study of entrepreneurship and the use of networks to foster individual advantage rather than to achieve some collective vision of social betterment.<sup>142</sup> Too faithful an importation of the model into community lawyering practice would risk repeating all the faults of the "regnant idea" of lawyering,<sup>143</sup> with the lawyer/manager controlling the flow of information - even if she did so out of concern for her clients' welfare,

---

<sup>142</sup> See GITTELL & VIDAL, *supra* note 87 at 20-1 (assessing Burt's model as describing some of the potentially worst aspects of expropriation of information, in which actors, such as local government officials or well-placed organizations, in a position to control flow of resources seize them for themselves and divert them from the community); see also Mitchell, *Perspectives from Law and Social Psychology*, *supra* note 139 at 1324 (assessing structural hole theory as "...a theory of manipulation, opportunism, and inefficiency.")

<sup>143</sup> See LOPEZ, *supra* note 46 at 23.

rather than for personal gain. With that caveat, the manager of structural holes may serve as a model for the connections which lawyers already make among their clients but might seek to develop more self-consciously.

## VII. A CONCLUSION, A CAUTION, AND A CALL FOR MORE WORK

### A. *A Vision or a Client: What Does the Community Lawyer Represent?*

Thomas Shaffer has urged lawyers to think sweepingly about collective representation. . . “. . . not of lonely individuals in circumstantial harmony, but of the harmony itself, or even of the communal source of the harmony.”<sup>144</sup> In commenting on the advisability of multiple representation within a partnership, Steven Lubet has posited a hypothetical very similar to that of the Consortium in a business context, even suggesting a scenario in which the lawyer acts as structural hole manager in bringing the parties together to do what seems to be a mutually advantageous deal. Yet as the scenario spins out of the control and the initially amicable partners end up at each other’s throats, he cautions that the unwary lawyer’s mistake was to be swayed by the client’s superficially harmonious goals, and to ignore the client’s intrinsically adverse interests.<sup>145</sup>

I have concluded that at least the Model Rules of Professional Conduct, and (perhaps) norms of responsible practice, at least condone if not encourage lawyers to represent multiple clients. In the Community Client Consortium as well as in a business partnership, it is that very “. . . harmony itself, and the communal source of the harmony,” evoked by both Shaffer and Lubet in very different contexts, that the lawyer must ascertain in order to avoid Lubet’s scenario. Ideally, a deep understanding of the needs of each client will enable the lawyer to extract and then represent their common needs. Such representation should not require the lawyer to sacrifice her “loyalty” for “impartiality”; she is demonstrating her loyalty to all her clients in the Consortium by recommending a common course of action that she considers to be advantageous to all.

Note that here the lawyer must tread a fine line. Here is the caution. She is not the “lawyer for the situation,”<sup>146</sup> for the “communal

---

<sup>144</sup> Shaffer, *supra* note 20 at 974.

<sup>145</sup> See Steven Lubet, *Malpractice Alert: No ‘Conflict,’ but a Conflict of Interest*, 6 BUS. L. TODAY 33 (Jan./Feb.1997)(telling the cautionary tale of the lawyer who created a joint venture for two friendly entrepreneurs whom he had introduced and who had seemed to meet each other’s business needs perfectly, without fully considering whether their interests were compatible).

<sup>146</sup> See Dzienkowski, *Lawyers as Intermediaries*, *supra* note 32 at 784 (disputing the ap-

harmony,” or even for “the community” - she is the lawyer for the members of the Consortium who have already pledged their willingness to share information and forego immediate individual advantage. As Hazard and Hodes have noted, for a community lawyer operating under the Rules of Professional Conduct, a more precise formulation of “the situation” might be “the totality of interests.”<sup>147</sup> For the clients in the Consortium, the interests might include a project as concrete as lobbying for a traffic light at a busy corner, or as amorphous as improving the neighborhood. It seems to me that it is precisely the mistake of assuming the omniscience typically attributed to the role of “lawyer for the situation” that leads to misunderstandings, hurts, and insults to the “intrinsic justifications” for the ethical rules. Although the lawyer may serve as the point of connection to bring the disconnected members of the Client Consortium together, her knowledge of the members or even of the issues she knows to be of concern to all of them is of itself insufficient to presume consensus. Only continuing conversation among all members of the network, lawyer included, can locate the points of agreement and the necessary direction in which any collaboration will advance. And it is the Consortium that provides a venue for that conversation.

### *B. Multiple Representation: Would You Try This At Home?*

Hazard and Hodes attempt to resolve any lingering concerns about the role of lawyers in multiple representation by re-casting the lawyer’s role. For them, the lawyer who represents a Consortium becomes a “facilitator”; her primary activity is one of counseling rather than advocacy.<sup>148</sup> The lawyer for the Consortium could hardly see herself in this way - nor would her clients imagine that she could not assume an advocate’s role on their individual or collective behalf. As I will note below, it is difficult to find examples from day to day practice to illustrate how lawyers do affirmatively advance the interests of both individual client groups and of the coalitions that they form, relying on communications among those clients to save the lawyer from compromising any of those interests.

However, we can turn to finely drawn descriptions of client-lawyer relationships, in which lawyers reflect on the ethical context of their activities in building social capital and constructing networks. In

---

propriateness of the lawyer acting in a multiple representation as “counsel for the situation,” the formulation attributed to Brandeis, and commenting that “the situation” offers no intrinsic standards for representation, and gives nothing to which the clients can accord informed consent).

<sup>147</sup> HAZARD, JR. & HODES, 3d ed, 2004 Supp., *supra* note 34 at 11-42.

<sup>148</sup> *Id.* at 11-39.

thoughtful examinations of lawyering relationships with hypothetical and real community groups, Shauna Marshall and David Dominguez have assessed how, or whether, the networking and capacity-building activities that community lawyers see as part and parcel of their trade fit within the scope of lawyers' conventional activities.<sup>149</sup> Three of their examples of community lawyering in action are particularly relevant to consideration of the role of the lawyer as manager of structural holes and enhancer of social capital: the lawyer who convenes networks of similarly situated individuals as a possible predicate to collective action (the public education session and the potluck dinner) and the lawyer as the coach in the development of the client's "reporter paradigm." Each example addresses a slightly different facet of the lawyer's part in constructing and maintaining networks.

Marshall's hypothetical lawyer conducted evening classes on basic issues in landlord-tenant law. These classes served multiple functions. One was as training in self-help and lay advocacy, a powerful augmentation to traditional legal services under conditions of scarcity.<sup>150</sup> Another was to inform the lawyer about the problems common to many tenants. Perhaps most important, these sessions connected tenants with each other, forging connections that promoted possibilities for reciprocity and joint advocacy.<sup>151</sup> Dominguez and his students built the foundation for grass roots advocacy groups and community lawyering classes by organizing street festivals and weekly pot luck dinners. Residents of the same housing complex, who had been isolated from each other before, recognized through these informal gatherings that they shared common interests in public safety and public transportation.<sup>152</sup> In terms of the sociology of neighboring, in this instance lawyers saw their function as that of developers of the bridging kind of social capital.

Dominguez's students then went further, to assume the role of managers of structural holes. Using their position as law students in a university with multi-disciplinary resources, they pulled together a team of "experts" from college sociology and political science classes

---

<sup>149</sup> Marshall, *supra* note 6 at 147; David Dominguez, *Getting Beyond Yes to Collaborative Justice: The Role of Negotiation in Community Lawyering*, 12 GEO.J.ON POVERTY L. & POL'Y 55 (2005).

<sup>150</sup> See, e.g., Wayne Moore, *Operating Self-Help Branch Offices in Low-Income Minority Communities*, 37 CLEARINGHOUSE REV./J. POVERTY LAW & POL'Y 369 (2003)(describing one strategy relying on technology and use of paralegals in satellite offices, to instruct poor persons in lay lawyering tasks); Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 Clin.L.Rev.433 (1998)(criticizing the limited scope of conventional legal services' "know your rights" education efforts, and offering new models).

<sup>151</sup> Marshall, *supra* note 6 at 164-5.

<sup>152</sup> Dominguez, *supra* note 149 at 61, n.18.

to survey transportation patterns and organize discussion groups among residents about their transportation needs. The residents used the information which these teams gathered to persuade a local bus company to change its decision to eliminate a crucial bus route.<sup>153</sup>

These are examples of client networks waiting to happen and already in being: lawyer-initiated gatherings of persons whom the lawyers theoretically could have assisted as individual clients, but chose both for reasons of scarcity and strategy to bring together and to assist - if not represent - collectively. Dominguez's training of community members in negotiation skills also illustrates the role of lawyer as enhancer of both social capital and the more basic human capital. In order for residents to negotiate from positions of seeming powerlessness, they need to see themselves not only as supplying something that the adversary needs, but as powerful themselves. One way to build that image of powerfulness was through narrative, in the development of a "Reporter Paradigm": encouraging residents to describe their histories and concerns first to each other, and then, once residents agreed on a common narrative, to adversaries, with the goal of turning adversaries into partners.<sup>154</sup> In essence, Dominguez and his students assumed the role of coaches to residents, assisting them in recognizing the assets that they brought to the welfare of the collective, and in developing their stories into positions that ultimately the residents could use in face to face negotiations and in communications with other parties.

Questions of confidentiality abound in Marshall's archetypal "know your rights" sessions, and Dominguez's neighborhood meet and greets, as they provide settings for multiple reciprocal flows of information, from lawyer to participant and among participants.<sup>155</sup> Marshall is uncomfortable with "know your rights" sessions as a full substitute for traditional legal representation - not from any sense that these sessions are less valuable, but from what she perceives as a disconnect between the value of the network, and the ethical rules that govern the interchanges within the network. Her hypothetical attorney sees herself in a double bind. She must caution the participants that even though she is informing them about the law, she is not their lawyer, presumably because it would be physically impossible for her to form an individual client-lawyer relationship with every one of them. Since she is not their lawyer, the confidences exchanged be-

---

<sup>153</sup> *Id.* at 65.

<sup>154</sup> *Id.* at 76.

<sup>155</sup> See also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 506 (2001) (expressing concerns about inadvertent establishment of lawyer-client relationships in the context of pro se training sessions).

tween her and the participants enjoy no expectation of confidentiality or protection of privilege, and, even if some attorney-client relationships were to attach, somewhere, the confidences exchanged among the participants enjoy no legal status.<sup>156</sup>

Is it enough to say that the network will safeguard what the lawyer cannot? Dominguez describes the sessions in which he and his students encouraged the residents of the Boulders housing complex in developing their “reporter paradigm” as forging greater trust and openness among previously disconnected neighbors, as they saw their increasingly intimate disclosures being treated with respect.<sup>157</sup> His example suggests that the processes of bonding and then networking create a framework within which individually and collectively responsible “aggregate” representation can occur. There is no good answer to the reality to which Marshall and other community lawyers must reconcile themselves: that we are ethically ready for, but physically incapable of, the task of simultaneously representing forty-some constituents adequately. One of the few strategies open to us is to encourage the creation of representative groups (with all the complications I have been discussing), in the hope that the act of combining will both strengthen the individual and coalesced voices of the clients, and ease the logistics of communication with us as lawyers.

My call for further work relates to learning what it is in fact that many community lawyers do when faced with the possibility that multiple representation will serve their clients interests more fully than will individual representation. As noted earlier, many organizations enthusiastically participate in networks in which they share information about their industries, disclose information about themselves, and engage in transactions. But more investigation is required to find out whether someone other than lawyers brings groups such as these together. Ann Southworth’s excellent work, drawing from her extensive structured interviews of practicing lawyers, suggests a model. Anecdotal evidence of the sort gleaned from case decisions, or bar opinions, of necessity only highlights the instances in which multiple representation goes wrong. A next phase of inquiry should include a survey of community lawyers in the field, to get a fuller picture of whether they have worked with *de facto* or deliberately constructed consortia of clients, either for discrete projects or in on-going collaborative relationships, to reach goals that no single client could have achieved on its own.

---

<sup>156</sup> Marshall, *supra* note 6 at 184.

<sup>157</sup> Dominguez, *supra* note 149 at 81.



