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Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change

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PROMOTING WORKER-OWNED
COOPERATIVES AS A CED
EMPOWERMENT STRATEGY: A CASE
STUDY OF *COLORS* AND LAWYERING IN
SUPPORT OF PARTICIPATORY DECISION-
MAKING AND MEANINGFUL
SOCIAL CHANGE

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Empowerment driven CED lawyering, in a transactional context, is an emerging approach to progressive lawyering that fosters the collective action and active democratic participation of low-income and working-class people to reshape our social, economic, and political system. This Article examines three main approaches to CED and argues for a CED project and lawyering approach that is empowerment focused and not limited to a geographic locality. It provides a concrete example of an empowerment driven approach that adopts an expansive definition of community through a case study of Colors, a worker-owned cooperative. Worker-owned cooperatives are ideal empowerment driven CED projects because they alter conventional wealth and power dynamics by enabling low-income working people to exercise democratic control over the formation and day-to-day governance of collective enterprises – challenging capitalism’s assumption that enterprises must be privately owned and autocratically managed. In addition, promoting worker-owned cooperatives and participatory decision-making creates opportunities for collaborative lawyering that can further empower communities. The case study carefully explores how lawyers can best support this empowerment driven CED model and identifies the challenges and opportunities lawyers face in applying it – chief among them, the need for lawyers

* Associate Professor, CUNY School of Law and Director of its Community and Economic Development Clinic. I thank the Restaurant Opportunities Center of New York and *Colors* for the privilege and honor of working with an amazing and inspirational group of people dedicated to empowering restaurant workers and contributing to the larger movement for economic justice. I also thank Sameer Ashar, Susan Bryant, Brian Glick, and Shirley Lung for their invaluable mentorship and guidance in writing this article. I thank the NYU Clinical Writing Workshop, my editor of this article and my research assistants Stephen Edel, Emily Langdon and Alexa Woodward for each of their unique roles in helping me move this article forward. I thank my husband, Daymond, my sisters Darlene and Jessica and my daughter Maya for providing the emotional support and space to write this article, especially during evenings and weekends when I was less accessible to many of the people I love. Last but not least, I thank Beryl Blaustone, Dorothy Matthew and Liliana Yanez for their wise counsel in balancing clinical, scholarship and familial responsibilities.

to consciously create participatory decision-making processes that give clients a meaningful opportunity to take collective ownership of their decision-making, as well as the need for thoughtful collaboration among lawyers and activists to support such a labor- and time-intensive counseling process. The Article concludes by deriving lawyering lessons in supporting this strategy.

INTRODUCTION

A growing number of legal scholars and practitioners view lawyering for community economic development (“CED”) as an opportunity to collaborate with and empower clients and communities.¹ Not all CED lawyering serves these purposes,² but there are projects and lawyering approaches that bring it closer to this ideal. Through a case study of work I did as a social justice lawyer and clinician, this Article explores how CED projects and CED lawyering can serve as an effective client and community empowerment approach.³ The Article identifies strategies and tactics that support clients’ and communities’ ownership and control of solutions to problems they face – solutions

¹ See Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001) [hereinafter Cummings, *CED as Progressive Politics*]. See also Alicia Alvarez, *Community Development Clinics: What Does Poverty Law Have to Do with Them?* 34 FORDHAM URB. L.J. 1269, 1275 (2007) (“community development appeals to progressive advocates of local empowerment”); Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 185-91 (1999) (discussing CED and economic reform and highlighting that cooperatives, as part of CED strategy, provide forum for low-income workers to organize and act collectively, thereby empowering members to become agents of social change) [hereinafter Cummings, *Developing Cooperatives*]; Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLIN. L. REV. 195, 202-07 (1997) (“Central to the notion of ‘community development’ is the ability of people in a community to work together to solve common problems”); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 479 (1994) (defining elements of lawyering for empowerment – joining rather than leading, listening rather than speaking, and learning to assist people in empowering themselves rather than manipulating levers of power for them – and explaining that through mastery of these elements, lawyers can help people join together to gain more control over forces affecting their lives); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLIN. L. REV. 217, 217-22 (1999) (although ultimately skeptical about achieving it in highly technical CED projects, arguing that collaborative counseling enables client-attorney relationship to become route to empowerment).

² See Cummings, *CED as Progressive Politics*, *supra* note 1, at 407-09 (critiquing apolitical free market-approach to CED and calling for new model that reconnects CED to its activist roots and prioritizes economic justice); Shah, *supra* note 1, at 217-22 (critiquing some forms of CED as counterproductive to empowerment, including projects employing market-based strategies and CED lawyering for highly technical and sophisticated projects).

³ See text *infra* accompanying notes 39-42 for the definition of empowerment used in this Article, as well as for a general critique of the term

that not only benefit them, but also bring about systemic change to benefit other similarly situated people and communities. It argues that the success of such strategies and tactics depends heavily, although not exclusively, on a client's approach to development, which in turn shapes both the nature of specific CED projects and the nature of CED lawyering.⁴

Part I.A. of the Article examines three broad approaches to CED and argues for an approach that consciously emphasizes empowerment. Part I.B. urges the adoption of a broad definition of community that is not limited to a geographic locality. Part I.C. explores the creation of worker-owned cooperatives in general, as an illustrative example of this empowerment-focused and non-geographically bounded approach to CED. By exploring the creation of *Colors*, a worker-owned cooperative restaurant in Manhattan formed by the Restaurant Opportunities Center of New York (ROC-NY), Part II provides a concrete example of this approach as a promising model of CED that communities should advance and build upon.⁵ The case study addresses how lawyers can best support this CED model and identifies the challenges and opportunities lawyers face in applying it. These challenges and opportunities include the need for lawyers to consciously create participatory decision-making processes that give clients a meaningful opportunity to take collective ownership of their decision-making, as well as the need for collaboration among lawyers and activists to support such a labor- and time-intensive counseling process. Finally, Part II.D. derives lawyering lessons in supporting this strategy with the aim of informing the future work of practitioners interested in using CED as an empowerment strategy.

I. APPROACHES TO CED

A. *Adopting a CED Approach that Empowers Communities*

Though commentators offer multiple definitions of CED, analysts have identified three main approaches that are distinguishable by whether they primarily emphasize “economics,” “development,” or

⁴ To be sure, a lawyer's orientation to CED also plays a significant role in helping to ensure that his or her counseling choices support and do not undermine a client's empowerment goals. But in the absence of a client who shares empowerment goals, a lawyer becomes much more limited in his or her collaborative counseling choices. Consequently, I tend to seek out clients who share a vision of CED as an empowerment strategy. While I also represent service organizations, I actively seek out organizing clients because I believe there are not enough lawyers willing and able to adopt a collaborative counseling approach that supports the empowerment process goals of organizing clients.

⁵ See Carmen Huertas-Noble, Jessica Rose & Brian Glick, *The Greening of CED: Dispatches from New York City*, 31 W. NEW ENG. L. REV. 645 (2009) (noting apparent resurgence in national cooperative movement).

“community.” The three approaches are: 1) the economic profit-driven approach (“cEd”), which primarily emphasizes economic growth (measured in the aggregate, rather than by the distribution of its benefits), 2) the institutional development approach (“ceD”), which primarily emphasizes the development of community-based organizations and non-profits, and 3) the community empowerment approach (“Ced”), which primarily emphasizes increasing the role of marginalized stakeholders as decision-makers and beneficiaries in a community’s development processes.⁶ Each approach’s distinctive primary emphasis (economics, development, or community) is visually reflected in its abbreviation by capitalizing either the letter E, D, or C.

Understanding these three main approaches provides deeper insight into the uneven track record of CED as an empowerment strategy. While the same activity can be conducted under each approach, the distinct primary emphasis of each approach leads to a different way of balancing multiple and sometimes competing interests. These different balances result in very different outcomes for low-income communities. As elaborated below, a community-empowerment approach, coupled with an institutional development approach, has the most potential to serve as a transformative strategy that restructures wealth and power and thus effects systemic change.

Under the economic profit-driven approach (cEd), development is pursued in a way that privileges the values and interests of typically externally-based, private developers. These developers tend to prioritize increasing the *monetary* value of land and maximizing their own profits over the values and interests of residents, who are typically more concerned with a parcel’s *use* value (e.g., its provision of affordable housing or green or other community-enhancing spaces).⁷ The overemphasis on profit maximization of private developers and local government officials under this approach, when carried out in communities that have been historically under-capitalized and under-developed, has often destabilized such communities by directly or indirectly displacing low-income residents and the community organizations, churches, cultural institutions, and small businesses that serve and em-

⁶ See Peter Boothroyd & H. C. Davis, *Community Economic Development: Three Approaches*, 12 J. PLAN. & EDUC. RES. 230-40 (1993). See also Margaret S. Sherraden & William A. Ninacs, *Introduction: Community Economic Development and Social Work*, 5 J. COMMUNITY PRAC. 1 (1998) (discussing Boothroyd and Davis’s three approaches to CED); Janice Tulloss, *Transforming Urban Regimes – A Grassroots Approach to Comprehensive Community Development: The Dudley Street Neighborhood Initiative* (1998), available at <http://comm-org.wisc.edu/papers98/tulloss.htm> (adopting Boothroyd and Davis’s model). This Article tailors these approaches to more accurately capture community economic development efforts in the United States.

⁷ See Randy Stoecker, *The Community Development Corporation Model of Urban Re-development: A Critique and an Alternative*, 19 J. URB. AFF. 1 (1997).

ploy them.⁸ The development of “big box” stores, sports stadiums, and luxury housing in historically underserved communities are prime examples of development projects under this approach.

The institutional development approach (ceD) counterbalances the emphasis on aggregate economic growth and private developers’ profit maximization with an emphasis on short- and long-term stability through building community-based institutions that initiate development. A typical strategy, under this model, is to establish not-for-profit community entities, such as community development corporations (“CDCs”), that fill gaps in services and implement their own development projects – most commonly affordable housing, but sometimes also commercial or other enterprises. A common critique of CDCs is that in their housing or commercial development role, they involve only local elites (often through membership on their boards of directors) and they depend so heavily on outside corporate, government and foundation funding that they are severely limited in the options they can pursue.⁹ CDCs are often vulnerable to the same market pressures as traditional developers, which can lead them to impose values and strategies that undermine the fullest empowerment of community residents.¹⁰

Like the institutional development (ceD) approach, the community empowerment (Ced) approach emphasizes creating community institutions. But community-empowerment Ced also explicitly seeks to redistribute economic and political power and to promote systemic change.¹¹ This redistribution is achieved by developing grassroots leaders and by fostering broad-based, community participation in planning, decision-making and governance processes. It is also achieved by creating more democratic forms of ownership and enterprise governance. As one proponent of the community empowerment approach has noted, broad-based participation in neighborhood organizations increases community members’ “confidence, efficacy, power, identification with the community, interaction, mutual aid, leadership development and problem solving capacity.”¹² Enabling such partici-

⁸ See generally William H Simon, *Introduction: Lawyers and Community Economic Development*, 95 CALIF. L. REV. 1823 (2007). For New York City examples, see Ben Gibberd, *Who Hurts?*, N.Y. TIMES, June 19, 2005, § 14, at 6 (Brooklyn); John Freeman Gill, *Paint It White*, N.Y. TIMES, July 30, 2006, § 14, at 1 (Harlem); Fernanda Santos, *A Confrontation over the Future of Willets Point*, N.Y. TIMES, Aug. 14, 2008, at B1 (Queens).

⁹ See Stoecker, *supra* note 7.

¹⁰ See Cummings, *CED as Progressive Politics*, *supra* note 1, at 453; Shah, *supra* note 1, at 231-34 (describing effect of conservative politics of 1980’s and 90’s on disempowering low-income communities).

¹¹ See Cummings, *CED as Progressive Lawyering*, *supra* note 1, at 458-62.

¹² Stoecker, *supra* note 7, at 13. See also Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1400 (“democratic connection also poten-

pation increases residents' control and ensures that local control is diffused throughout the community, rather than limited to a (less representative) board of directors of a CDC. Community empowerment Ced's core goal is to couple individual efficacy with collective empowerment, by creating institutional processes and forms that enable communities as a whole to benefit in the both the short and long term.

All three CED approaches bring about material improvements, such as new businesses, housing, service institutions and jobs, but they do so with very different impacts on low-income communities. Economic-profit-driven cEd provides material improvements such as housing, but often in a way that does not directly or meaningfully benefit low-income communities and can harm residents by intensifying gentrification. Housing development under cEd is typically luxury housing or nominally "affordable housing" that isn't quite affordable to current residents. The institutional-development ceD approach provides material improvements, such as service organizations and community centers that more often benefit low-income residents. However, these improvements are often difficult to sustain, given the need for continuous outside funding,¹³ and typically do not address the underlying reality that while low-income people often have little control or influence over the conditions and development processes negatively impacting their lives, they do have the power to potentially alter these dynamics.¹⁴ The community empowerment Ced approach,

tially creates feelings of solidarity and community that engender hope, courage, a sense of efficacy, and the will to persist.").

¹³ Service organizations are often governed by elites and are dependent on outside funding they must continue to receive in order to provide services. This dependence often results in the leadership of these organizations not wanting to upset the status quo and therefore limiting protest activities. See James DeFilippis, *Community Control and Development: The Long View*, in THE COMMUNITY DEVELOPMENT READER 28, 32 (James DeFilippis & Susan Saegart eds. 2008). See also Cummings, *CED as Progressive Lawyering*, *supra* note 1, at 454.

¹⁴ It is important to note that larger systemic forces create communities that lack these skills and powers. Here, however, I focus on individuals in communities because I believe communities need to empower themselves, including by working in concert with others. In the CED context, developers and government officials are not going to voluntarily hand over control or influence. In his seminal piece, Stephen Wexler writes: "Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together." Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970). See also Piomelli, *supra* note 12, at 1400 ("it is through effective connection and joint action with others that low-income and working class people and people of color can best protect themselves and achieve their goals.").

Notwithstanding, this does not relieve government officials of their responsibilities to their constituencies. Bill Quigley notes that "Some well-intentioned persons may ask: Why do people need to gain power over their own lives? Why can't we just help give them what they need?" Quigley, *supra* note 1, at 476. As Joel Handler has explained, even if we were

however, provides for material improvements in a way that empowers individuals and contributes to the creation and sustenance of community-controlled institutions. These institutions are more likely to be sustained by low-income communities and in a way that advances a more fundamental restructuring of wealth and power. This is the CED that this Article promotes: CED as an empowerment strategy.

B. Beyond Geography: Moving CED from a Predominantly Placed-Based Definition of Community to a People-Based Definition

The meaning of community in CED has historically been place-based. This geographic focus was a logical starting point, given the origins of CED as a response to urban renewal programs. These renewal programs, aimed at restoring and improving the physical and service infrastructure of urban neighborhoods, were supposed to benefit local residents, but instead came to be known as urban or Negro removal programs.¹⁵ As William Simon observes, “The early stages of CED reacted to urban policies of the 60s and 70s, which neglected residential neighborhoods for the benefit of downtowns or squeezed out their residents to promote development for incoming higher income groups.”¹⁶ Simon further explains that this led to “a tendency to view community as [a physical] enclave against the outside world, trying to protect itself from expropriation.”¹⁷ This threat of expropriation initially meant that residents who remained and chose to fight to reclaim their neighborhoods initially focused on their physical environment. These residents realized that they needed to anchor themselves in a geographic community by advocating for the preservation and provision of additional affordable housing, often by forming nonprofits to pursue this agenda.¹⁸ Indeed, much of the early work of community organizations, mainly in the form of nonprofit CDCs, focused on

to provide more funds for social programs, enact better laws, and provide many more dedicated lawyers to help them, powerless people still need to work on the imbalance of power in our society or they will, by definition, remain powerless and trapped. See Joel Handler, *Community Care for the Frail Elderly: A Theory of Empowerment*, 50 OHIO ST. L.J. 541, 557 (1989). Granting codes of legal rights and protection to the powerless is not enough.

¹⁵ See WILLIAM H SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* 9 (2001).

¹⁶ Simon, *supra* note 8, at 1823. See also Roger A. Clay & Susan R Jones, *A Brief History of Community Economic Development*, 18 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 257 (2009); Cummings, *CED as Progressive Lawyering*, *supra* note 1, at 399-447 (exploring historical development of CED); Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105, 107 (1997) (explaining that CED was also response to decline of U.S. manufacturing base in many cities during that time).

¹⁷ Simon, *supra* note 8, at 1823.

¹⁸ See Huertas-Noble et al., *supra* note 5, at 648.

affordable housing and its development.¹⁹

As nonprofits helped residents become more anchored in their neighborhoods, they expanded their services to include additional financial and social services, such as providing low-interest loans, child care and health care services. In time, nonprofits also expanded their definition of community to explicitly include communities of identity and purpose. For example, nonprofits choose to serve ethnic communities, such as African American, Latino and Asian American communities,²⁰ as well as communities of purpose,²¹ such as low-wage workers fighting for better working conditions.

The expanding definition of community, and its new articulation within CED, is a natural progression of the expanding and sharpened focus of nonprofits. When CED was a neighborhood response to failed local markets and urban renewal programs, localness was a key characteristic of its place-based focus.²² Today, localness or place need not be synonymous with community.²³ Localness is one form of community, but it is not the only form. Many nonprofits have historically

¹⁹ The National Congress for Community Economic Development documented the magnitude of CDCs' affordable housing development in two major studies. See NATIONAL CONGRESS FOR COMMUNITY ECONOMIC DEVELOPMENT, *AGAINST ALL ODDS: THE ACHIEVEMENTS OF COMMUNITY-BASED DEVELOPMENT ORGANIZATIONS* (1989); NATIONAL CONGRESS FOR COMMUNITY ECONOMIC DEVELOPMENT, *TYING IT ALL TOGETHER: THE COMPREHENSIVE ACHIEVEMENTS OF COMMUNITY-BASED DEVELOPMENT ORGANIZATIONS* (1995).

²⁰ One example of communities of identity has been what some have called ethnic-based CDCs or ethnic-based nonprofits. See Shomon Shamsuddin, *Have Community, Will Travel*, 152 *SHELTERFORCE: J. AFFORDABLE HOUSING & COMMUNITYBUILDING* (Winter 2007), available at http://www.shelterforce.org/article/235/have_community_will_travel/ ("Ethnic-based nonprofits are different than traditional nonprofits because they employ a broader definition of community, choosing to serve immigrants of a specific national or ancestral origin, rather than by geographic neighborhood."). Shamsuddin highlights Chhaya, a nonprofit that focuses on the housing and community development needs of South Asians and uses this broader, people-based definition of community. *Id.* The founder of Chhaya explains that "[b]ecause the community is so spread out, there is no single neighborhood base." *Id.*

²¹ Judith Garber, *Defining Feminist Community: Place, Choice, and the Urban Politics of Difference*, in *GENDER IN URBAN RESEARCH* 24, 42 (Judith Garber & Robyne Turner eds. 1995) (discussing communities of purpose "where shared situations foster local political action").

²² See Clay & Jones, *supra* note 16, at 257, quoting Scott L. Cummings, *Global Local Linkages in the Community Development Field*, in *PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY* (Clare Dalton ed., 2007) ("CED has been commonly described as a quintessentially local project, one in which communities reconstruct dysfunctional markets as a way of reconstituting social relations and building political strength.").

²³ See Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 *WASH. U. J.L. & POL'Y* 359 (2008) ("community lawyering, while finding a 'home' in a geographically significant place, is not confined or defined by that space").

focused on ethnicity. These groups however, were also neighborhood based.²⁴ The two forms of community were nested and not necessarily seen as distinct. For example, many nonprofits represented at the Urban Justice Center and Lincoln Square Legal Services were formed by local residents who initially sought to make improvements in their immediate neighborhood. These residents, however, also expressed a desire to eventually expand, recognizing shared problems by similar geographic communities elsewhere, communities consisting mainly of people of color, people who are poor and people who work for low-wages.²⁵ Many of these clients also articulated a people-based definition of community.²⁶

In addition to a people-based definition focused on communities of identity, scholars and activists have increasingly articulated definitions based on communities of purpose. These definitions understand community as a group of people who share a set of experiences and come together to foster political action, from local to global in scope.²⁷ These scholars and activists also envision community “as a space for contesting the social costs of capitalism to working class and marginalized people.”²⁸ ROC-NY and its membership base, as described more

²⁴ An example from San Francisco is the Chinatown Community Development Center, which has been around for more than 25 years and has combined housing development, community organizing, and neighborhood planning initiatives and advocacy. See <http://www.chinatowncommunitydevelopmentcenter.org/pages/main.php?pageid=8&pagecategory=2> (last visited Sept. 12, 2010).

²⁵ See Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131, 140-141 (discussing community as both chosen and imposed).

²⁶ While CED should allow for a people-based definition of community, the interaction between place and people remains significant. See James DeFilippis & Susan Saegert, *Communities Develop: The Question is How*, in THE COMMUNITY DEVELOPMENT READER, *supra* note 13, at 1, 4 (“People who share a space together [are likely to] build a common set of experiences, that, when accumulated over time and in different parts of life . . . form much of the basis of people’s support networks in their daily lives.”). In addition, place is important because, as Judith Garber points out, “an African American community in rural Georgia can be politically and culturally miles away from an impoverished African American community in urban St. Louis.” Garber, *supra* note 21, at 299. My aim is not to deny that place may be significant and influence culture and politics, but to acknowledge that “one’s sense of identity [and community] might well encompass people far beyond the neighborhood or city limits.” *Id.* at 295. I seek, in short, to create room for a people-based definition of community and to argue that two the definitions can co-exist.

²⁷ See Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1829 (2007) (discussing worker center’s campaigns and involvement in local-global networks of advocates); Cummings, *supra* note 22.

²⁸ DeFilippis & Saegert, *supra* note 26, at 2. As DeFilippis and Saegert note, people can and do form communities by virtue of facing common sets of issues in their daily lives. See *id.* at 5. These broader definitions of community can also counter some of the initial criticisms of CED being too local.

For example, from observing ROC-NY and listening to its members’ public statements when I worked at the Urban Justice Center, I learned that although ROC-NY is located in

fully below, meet both a people-based and purpose-based definition of community. Low-wage, mainly immigrant restaurant workers constitute the community that ROC-NY organizes and serves. This community shares experiences of being exploited and discriminated against by owners and managers in the restaurant industry who fail to pay minimum wage and overtime and engage in other forms of autocratic and abusive behavior. ROC-NY provides spaces for this community to come together to contest this exploitation and to foster political action to change these conditions. As part of its multi-prong strategy, ROC-NY created the worker-owned cooperative, *Colors*, as one such space.

C. Worker-owned Cooperatives as Illustrative of a New CED Model that Expands the Definition of Community and Focuses on Community Empowerment

1. Worker-owned Cooperatives as a Form of Job Creation that Advances a More Fundamental Restructuring of Wealth and Power

Worker-owned cooperatives create a space for democratizing the workplace and contesting capitalism's claim to be the only effective model of ownership, control, and day-to-day enterprise governance.²⁹ The distinguishing characteristic of a worker-owned cooperative is its allocation of governance and profit-sharing rights. Unlike traditional business arrangements, worker-owned cooperatives provide for governance rights that are not tied to capital investment, but are based instead on the democratic principle of one-person-one-vote.³⁰ In a

Manhattan, one of the five boroughs of New York City, it is concerned about restaurant workers citywide and does outreach into other boroughs to ensure that it reaches people in their neighborhoods. While some may point out that citywide organizations are local, the founders of ROC-NY also created ROC-United ("ROC-U") to address their issues nationally. ROC-NY, like many other groups, realized there are limits to local reform and thus a need to build a movement that can shape national policy. Nonetheless, appreciating the importance of presence and the logistics of carrying out campaigns, ROC-U realizes that one national organization housed in one state is not enough to sustain strong ties in each of the different states to which it will expand. Thus ROC-U is setting up additional ROCs in each of those states – not because these other workers are not part of the same community, but because local interaction remains important to holding national organizations accountable and ensuring that the nuances of place are taken into account. This accountability function makes localness or a local presence important. In addition, localness is helpful in coordinating collective action. For me, this is the importance of localness in CED.

²⁹ See Huertas-Noble et al., *supra* note 5, at 648 (highlighting work of Green Worker Cooperatives, which creates and incubates worker-owned cooperatives as alternative to capitalist model of profit-sharing and governance rights). As elaborated below, the cooperative structure calls for workers to be owners based on their labor and for democratic governance.

³⁰ See David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker*

worker-owned cooperative, every worker-member is an owner by virtue of working in the business and has one vote, regardless of the extent of their economic interest in the cooperative.³¹

The democratic principle of one-person-one-vote makes a cooperative form of worker ownership the most empowering in terms of control over one's working environment. In terms of empowerment through profit-sharing and increasing wealth, cooperatives may not always trump other forms of worker ownership, such as ownership through various employee stock options, because wealth creation is highly dependent on a business's profit margin. For immigrant and marginalized workers, however, a cooperative structure does usually result in increased income. A worker-owned cooperative is less likely to exploit its workers by not paying minimum wage and overtime,³² an upsettingly too common experience for low-wage, immigrant workers employed by more traditional businesses.³³ This, in fact, is partly why some nonprofits, especially those that focus on community organizing,

Cooperative Statute in Massachusetts, 11 N.Y.U. REV. L. & SOC. CHANGE 441 (1982-83) (explaining that worker cooperative, unlike employee stock ownership plan, is designed to provide democratic control). See also Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1747 (1990).

For readers unfamiliar with corporate structures and distinctions between different forms of worker-ownership (how workers own and what they receive in return for their ownership), it is important to recall that ownership implies two fundamental rights: governance rights and profit-sharing rights. Various ownership forms allocate these rights differently. For example, while Employee Stock Ownership Plans ("ESOPs") provide a mechanism for workers to share in a company's profits, ESOPs do not generally provide for democratic governance. Governance rights in an ESOP generally remain connected to capital investment. Cooperatives, however, provide for profit-sharing and democratic governance.

³¹ See Ellerman & Pitegoff, *supra* note 30. Notably, some worker cooperatives that have non-worker members (e.g. members who are outside investors) create weighted voting structures to give outside investors weighted votes on limited matters that have a substantial financial impact. Limiting weighted voting to a very narrow category of financial matters protects the outside investors' financial interest while also maintaining democratic governance.

³² Generally, worker-owned cooperatives provide living-wage jobs and benefits for their workers-owners. See Jessica Gordon Nembhard, *Principles and Strategies for Reconstruction: Models of African American Community-Based Cooperative Economic Development*, 12 HARV. J. AFR. AM. PUB. POL'Y 39 (2006). As Jessica Gordon Nembhard notes: "cooperatives have operated as a form of successful business ownership for centuries, some more democratically run than others, following a set of principles that include one person one vote, open membership, shared profits, continuous education, and concern for the community." *Id.* at 44.

³³ Segments of the restaurant industry in New York City are notorious for not paying immigrant workers minimum wage or overtime and treating its workers as if they were disposable. For example, despite years of service, many workers who find themselves ill are simply let go. In addition, many immigrant restaurant workers do not have medical insurance, a serious deprivation exacerbated by the prevalence of unsafe conditions that make worker injuries commonplace in the industry.

have helped to create worker-owned cooperative businesses as part of their missions to advance social and economic justice.³⁴ These nonprofits, which emphasize community organizing, prefer the cooperative form because it not only empowers worker-owners, but also contributes to a larger movement for economic justice.

2. *Worker-owned Cooperatives as a CED Empowerment Strategy: Empowering Workers and Larger Segments of Communities*

Worker-owned cooperatives can foster two essential goals of empowerment-centered Ced: 1) promoting individual efficacy through meaningful job creation and 2) promoting collective empowerment by keeping jobs, income and profits within the community and by serving as a space for community organizing that enables cooperative members to participate in the larger economic justice movement.³⁵ In this way, a worker-owned cooperative can empower not only its members, a laudable achievement in and of itself, but also larger segments of communities.³⁶ Promoting worker cooperatives may be “viewed not as an end in itself, but rather a [vehicle] for mobilizing community members around issues of economic justice.”³⁷ As Patricia Wilson has described, this mobilization “creates a feeling of belonging and interconnectedness, which in turn produces commitment and cooperation . . . [which constitutes] the raw energy for sustained CED . . . [and] the greatest resource at the community’s disposition.”³⁸

Although the value and use of the term “empowerment” has been questioned,³⁹ this Article reclaims the term, defining empowerment as a collective, participatory process that redistributes power and wealth and enables communities and their individual members to gain more control over the forces that affect their lives. The term has been diminished by depoliticizing and reducing its meaning to individual efficacy.⁴⁰ While individual efficacy is valuable, and needed for

³⁴ It should be noted, however, that the typical arrangement is for the nonprofit to set up a business and retain majority control that is slowly handed over as workers gain managerial skills and buy out the nonprofit. See Huertas-Noble et al., *supra* note 5, at 651.

³⁵ See Cummings, *Developing Cooperatives*, *supra* note 1, at 190.

³⁶ Similar to impact litigation, empowerment-centered Ced seeks to have a multiplier effect by benefiting a large number of clients or people. This multiplier, however, becomes difficult to measure. As Daniel Shah points out, “community empowerment is a long-term process rather than a measurable event.” Shah, *supra* note 1, at 250.

³⁷ See Cummings, *Developing Cooperatives*, *supra* note 1, at 211.

³⁸ Patricia A. Wilson, *Empowerment: Community Economic Development from the Inside Out*, 33 URBAN STUDIES 617, 627 (1996).

³⁹ See, e.g., Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427, 472 n.218.

⁴⁰ See *id.* (arguing term has been co-opted by conservative politicians who have changed meaning to libertarian notions of individual self-help). See also Paul W. Speer & Joseph Hughey, *Community Organizing: An Ecological Route to Empowerment & Power*,

collective empowerment, increasing individual efficacy alone will not create systemic change. Because power is only realized through struggle, mobilizing people to create power for themselves is essential. Thus, empowerment must be linked to the redistribution of power and to community organizing for social change.

The link between empowerment and community organizing is important because “within community organizing, power is posited as operating not only at the individual level, but by influencing economic, social, educational, legal and political systems, which in turn affect individuals.”⁴¹ Empowerment is a process that enables people to join together to fashion solutions to the problems that they face – solutions that not only benefit them, but bring about systemic change that benefits other similarly situated people and communities. It includes enhancing individual efficacy, but moves beyond it to effect systemic change and to produce collective mobilization that benefits larger segments of the community in both the short and long run.⁴²

In bringing people together to fashion their own solutions to problems that they face, a participatory decision-making process is essential to furthering long-term empowerment. Most scholars agree that a participatory decision-making process is “important to any collective endeavor in which a significant interdependence of task is essential to achieving and maintaining the group’s goals.”⁴³ Beyond its instrumental value, however, participatory decision-making also has the potential to create a ‘collective ability to analyze and act upon complex social problems [that] can be more powerful than the aggregate of each individual’s capacities for analysis and action.’⁴⁴ By increasing the likelihood of obtaining sustainable agreements that result from informed and well reasoned decisions, a participatory decision-making process not only adds value to the quality of the process, but

23 AM. J. COMMUNITY PSYCHOL. 729, 745-746 (1995) (arguing that definition of empowerment that only speaks to individual efficacy avoids necessary linkage to social change).

⁴¹ *Id.* at 746.

⁴² *See id.*

⁴³ *See* Michael Diamond & Aaron O’Toole, *Leaders, Followers, and Free Riders: The Community Lawyer’s Dilemma When Representing Non-Democratic Client Organizations*, 31 FORDHAM URB. L.J. 481, 518 (2004) (explaining that lawyers should support democratic decision-making by cooperative client, not because it protects members’ individual autonomy, which is additional benefit, but because participatory process is instrumental to client’s substantive goal of effective cooperative ownership). Diamond and O’Toole question whether decision-making must always be democratic and argue through case examples that democratic client organizations should not necessarily be privileged over non-democratic client organizations. Nonetheless, they agree that in the context of worker cooperatives, participatory decision-making is key.

⁴⁴ Fauzia E. Ahmed, *Beyond Beijing ‘95: Building the Road as You Walk* 21 (Radcliffe Pub. Policy Inst. Working Paper, 1996), quoted in Lucie White, “Democracy” in *Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073, 1087 (1997).

also to the quality of the outcome.⁴⁵ Such a process strengthens groups internally and allows them to be more influential externally.

Because a participatory process is linked to the goal of promoting CED as an empowerment strategy (and thus of redistributing power), this Article focuses not only on the end product of CED (material improvement) but also on the process (democratic participation and leadership development). Indeed under the community empowerment approach, the process is a valuable end in and of itself.⁴⁶ Thus, CED lawyers and community groups should set up democratic decision-making processes and invest in community education, when needed, to enable community members to meaningfully participate in both the planning and implementation of development projects.⁴⁷ To be sure, democratic decision-making is time consuming and can even delay a project, but it is essential to empowerment.

While CED lawyers could choose to support any project that creates jobs, they can more directly facilitate empowerment by collaborating with community organizations to create living-wage jobs.⁴⁸ They can also choose to collaborate *with*, and not just work *on behalf of*, communities they intend to serve or organize.⁴⁹ In particular, promoting worker-owned cooperatives and participatory decision-making as a CED empowerment strategy creates opportunities for collabora-

⁴⁵ See SAM KANER WITH LENNY LIND, CATHERINE TOLDI, SARAH FISK & DUANE BERGER, FACILITATOR'S GUIDE TO PARTICIPATORY DECISION-MAKING 29 (1996).

⁴⁶ For a warning against elevating process over outcome, see Diamond & O'Toole, *supra* note 43, at 517-21). They may perhaps be correct that process should not always be elevated over outcome, but in an empowerment-centered approach to CED and CED lawyering, an earnest effort should be made to ensure a participatory process, as a significant outcome in and of itself.

⁴⁷ See Shah, *supra* note 1, at 234-37 (discussing problems with token community participation).

⁴⁸ Ced lawyers can also support the creation of living-wage jobs in non cooperative businesses, especially given the difficulty of raising start-up capital for cooperatives; but cooperatives bring with them the significant added value of democratic governance rights. In addition, when approaching CED lawyering from the prospective of a poverty lawyer, the goal should be empowering the poor. See Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 665 (1987-88) ("Empowering the poor should be the political object of poverty law."); see also Alvarez, *supra* note 1, at 1269. In the empowerment-centered Ced context, clients are groups or entities who may not be poor, but their membership often includes people who are poor or who work for low-wages and/or groups who work to empower them.

⁴⁹ See text *supra* accompanying notes 39-42. Working *on behalf* is valuable, but working *with* is more transformative, as an extensive literature explores, under labels such as "collaborative," "rebellious" or "democratic" lawyering. See, e.g., GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Piomelli, *supra* note 12; Symposium, *Race, Economic Justice, and Community Lawyering in the New Century*, 95 CALIF. L. REV. 1821 (2007); White, *Collaborative Lawyering in the Field? On Mapping Paths from Rhetoric to Practice*, 1 CLIN. L. REV. 157 (1994); White, *supra* note 44. See also works cited in Piomelli, *supra* note 12, at 1383-85, n.1.

tive lawyering that can further empower communities. Such collaborations create greater space for lawyers to promote and advocate for this approach to CED in a client-centered framework, because empowerment is part of the client's goals.

II. CASE STUDY OF AN EMPOWERMENT-CENTERED CED STRATEGY: ROC-NY'S PROMOTION OF *COLORS* AND LAWYERS' ROLE IN SUPPORTING A PARTICIPATORY DECISION-MAKING PROCESS IN ITS FORMATION

A. *ROC-NY and Its Goals in Forming Colors*

ROC-NY is a worker center that “works to build a base of power among non-union restaurant workers and win justice for those who work at exploitative and abusive workplaces.”⁵⁰ ROC-NY's work is, in part, a community response to widespread abuses that take place at high-end, profitable NYC restaurants. Despite their capacity to provide living wage jobs, these restaurants pay poverty-level wages and exploit immigrant and low-wage workers by violating minimum wage and overtime laws.⁵¹ These abuses are exacerbated by poor working conditions that contribute to high rates of workplace injuries and negative health consequences such as lacerations and chronic back problems for workers.⁵² These injuries and health consequences occur in the absence of benefits such as medical insurance and paid sick time, contributing to perceptions that the industry views its workers as disposable, callously firing workers with years of service when they become ill or unable to work.⁵³

In forming the worker-owned cooperative restaurant, *Colors*, ROC-NY sought to create a model that provides better working conditions for workers and opportunity for workers to earn a living wage and gain equity. Its goal was to begin to transform the industry. ROC-NY wanted to provide a worker-ownership model that would also mobilize and empower its members to show its concern for community

⁵⁰ See Restaurant Opportunities Center of New York, <http://www.rocny.org/what-we-do/workplace-justice> (last visited Sept. 12, 2010). For extended discussions of ROC-NY, see Ashar, *supra* note 27; Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232 (2009). For an address by one of ROC-NY's co-founders, see Saru Jayaraman, *Symposium Speech: Making Movement: Communities of Color and New Models of Organizing Labor*, 16 BERKELEY LA RAZA L.J. 177 (2005).

⁵¹ See Restaurant Opportunities Center of New York (ROC-NY) & New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* at i-ii, 14-15 (Jan. 25, 2005), <http://www.urbanjustice.org/pdf/publications/BKDFinalReport.pdf> [hereinafter *Behind the Kitchen Door*].

⁵² See *id.* at 15 (findings of Restaurant Industry Coalition survey).

⁵³ See *id.* at 42.

through direct action and participation in the larger movement for economic justice for restaurant workers.

ROC-NY's mission is to improve the working conditions of restaurant workers in NYC, particularly those workers who are most vulnerable to exploitation and economic marginalization. ROC-NY integrates organizing, research, policy and legal strategies to win improvements for restaurant workers.⁵⁴ These improvements range from helping individual workers when their rights have been violated to pursuing strategies, such as worker beneficial legislation and the restaurant cooperative, to create systemic changes in the industry. For example, in addition to helping individual workers obtain back wages from restaurants who have failed to pay minimum wage or overtime, ROC-NY ensures that structural protections are implemented at those restaurants for future workers' individual and collective empowerment.

Notably, ROC-NY also uses organizing as a tool to promote social justice by bringing restaurant workers together to alter the power relationship between restaurants that exploit their workers and workers who work hard but find themselves marginalized because of their economic and immigrant status. ROC-NY's members participate in every level of the organization's decision-making processes and campaigns and play a pivotal role in ROC-NY's activities, including forming the restaurant cooperative.⁵⁵

ROC-NY chose to form *Colors* as a worker-owned cooperative restaurant that operates democratically, with the worker-owners having majority control of the Board of Directors. All worker-owners receive a living wage and an equal share of the worker-owners' profits. No worker-owner can be fired over the objection of a majority of the other worker-owners. *Colors* is ergonomically designed to prevent common restaurant workplace injuries and is used as a space to train other restaurant workers in the City.⁵⁶ Worker-owners also participate in ROC-NY activities. Thus, *Colors* is a model of business develop-

⁵⁴ See Restaurant Opportunities Center of New York, *supra* note 50 ("Through a combination of worker organizing and empowerment, litigation, and public pressure, ROC-NY wins back unpaid wages and discrimination claims for workers as well as important changes in the industry, such as vacations, paid sick days, mandated breaks, and more. In the last six years, we have won nine campaigns against abusive restaurants, totaling over \$4.5 million in discrimination and unpaid wages.").

⁵⁵ Members were included in virtually every stage of the process, from meeting with potential equity investors, including Good Italian Food in Italy, to meeting with the lawyers, choosing a name, a chef, a menu, etc.

⁵⁶ There is also value to wanting the cooperative to directly benefit others and not just a few "lucky ones." See Tulloss, *supra* note 6, at 10 (discussing community's reaction to development plan perceived to benefit a few minority-owned businesses, but not larger community).

ment that furthers an empowerment strategy. It promotes individual efficacy by increasing restaurant workers' incomes and by providing them day-to-day and strategic governance rights that translate into significant control over their work lives. *Colors* also provides for collective empowerment by providing:

- a safe space for training other restaurant workers and thus increasing those workers' opportunities for advancement at other restaurants;
- an insider voice in the restaurant industry,⁵⁷ as its membership in the Restaurant Industry Trade Group gives it access to timely information regarding industry trends and policies, as well as a voice at the table; and
- a contribution to the larger struggle for economic justice for all restaurant workers by requiring that its worker-owners participate in ROC-NY activities that promote the rights of all restaurant workers.

B. Forming the Legal Team

For legal support in forming the worker-owned cooperative, ROC-NY originally engaged the Community Development Project (CDP) of the Urban Justice Center, a non-profit law firm committed to implementing innovative lawyering strategies.⁵⁸ In CDP's first meeting with ROC-NY regarding the cooperative, the client made clear that it wanted a participatory process and that its Board, its two Co-Directors, and members of its Cooperative Committee⁵⁹ would be actively involved in the development process. Realizing the scale of the project, both in terms of the substantive legal tasks the lawyers would have to perform and the extent of the counseling process they

⁵⁷ See Sheila Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2011 (2007) (discussing importance of developing insider-outsider strategy).

⁵⁸ The Urban Justice Center ("UJC") started as a single legal clinic at a shelter in East Harlem; today it is made up of nine independent projects which serve low-income individuals, families and communities throughout New York City. See <http://www.urbanjustice.org>. As I learned as an attorney there, its founder, Raymond Brescia, launched the Project in 2001. CDP provides a wide range of legal, technical and research-based assistance to grassroots groups. CDP's definition of CED is shaped by client need in order to promote CED as community-controlled, bottom-up practice. It is also guided by the principle that grassroots groups made up of local residents serve as invaluable agents for social change. See Raymond H. Brescia, Robin Golden & Robert A. Solomon, *Who's in Charge Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 840 (1998) (arguing for need to shift from individualized legal service provision model to community-based model to become "positive force for structural change"). See also Projects: Community Development, <http://www.urbanjustice.org/ujc/projects/community.html?id=nzjir6F5> (last visited Sept. 12, 2010).

⁵⁹ All Co-op Committee members were ROC-NY members.

would need to facilitate, the attorneys in CDP approached the Fordham CED Clinic,⁶⁰ a transactional clinic that represents groups fighting for social justice in low-income and low-wage communities, to serve as co-counsel on the project. CDP lawyers decided to heavily invest in this project to support ROC-NY as an organizing group, based on their belief that lawyers who want to serve and empower marginalized communities should put their skills to the task of helping people organize themselves.⁶¹ Fordham agreed to co-counsel and suggested bringing in additional corporate and real estate counsel.

CDP and Fordham then arranged for the legal team, the co-directors of ROC-NY, and a few of ROC-NY's Co-op Committee members to meet with several large New York City law firms to select the additional co-counsel. This vetting of private firms with the client's members was an important part of the client's and lawyers' empowerment strategy. This vetting gave the client a choice, closer to that of a paying client, and ensured that its counsel would not only be technically competent, but also culturally competent. For example, while all the firms were for the most part gracious hosts, one seriously offended the group. One of its associates mentioned that his firm would have to review the USA PATRIOT Act⁶² to ensure that representing a non-profit whose membership might include "illegal aliens" was not a violation of the Act. The reference to undocumented people as "illegal aliens," revealed a lack of cross-cultural competency on the part of that attorney. While perhaps technically accurate in terms of statutory language, no human is illegal and alien has a negative connotation that is dehumanizing. A cross-culturally competent attorney would have been aware the term is offensive to immigrants and others and would have avoided using it. Thus, the legal team and client did not choose to work with that firm. They selected instead another law firm, Cadwalader Wickersham & Taft LLP.⁶³

⁶⁰ Professor Brian Glick, who has over 20 years of CED experience, started the Fordham CED Clinic in 2000. *See* Brian Glick Faculty Page, <http://law.fordham.edu/faculty/1097.htm> (last visited Sept. 12, 2010). The clinic helps established nonprofits sustain effective organizations, build institutions such as worker-owned enterprises and support neighborhood efforts to shape development, limit gentrification and win community benefits agreements. The clinic also helps local residents form nonprofits to provide needed services and opportunities in their communities. The legal work of the clinic includes supervising students in counseling clients, advocating and negotiating on behalf of clients and drafting and presenting legal documents and community education materials. *See generally* Fordham Clinical Legal Education, <http://law.fordham.edu/clinical-legal-education/clinics.htm> (last visited Sept. 12, 2010).

⁶¹ *See* Wexler, *supra* note 14, at 1053.

⁶² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

⁶³ Cadwalader is a prominent financial services law firm whose clients include Fortune 500 companies, other corporations, financial institutions, government entities and charita-

While the client and legal team would have preferred to not have experienced the “illegal alien” statement, the ability to “shop” for different co-counsel empowered the ROC-NY members. Community-based groups rarely have meaningful choice in selecting pro bono counsel. The ability to choose pro bono co-counsel meant that the group did not have to be subjected to a client-attorney relationship that would reinforce negative power dynamics. Having access to culturally competent lawyers helps guard against this reinforcement of negative power dynamics.

C. Legal Tasks Involved in Forming Colors

Forming *Colors* took approximately three years. As one would suspect, there were many technically complex lawyering tasks involved in representing ROC-NY throughout the process. These tasks included:

- researching different models of worker-owned cooperatives, including their legal structure and governance provisions;
- counseling the client⁶⁴ on the type of entity to form, i.e., whether to form a Corporation, a Limited Liability Company or a Cooperative under the New York Cooperative Statute;⁶⁵
- forming two Limited Liability Companies (LLCs), 417 Lafayette and ROC-NY Worker Owner Restaurant (“RWOR”), and drafting detailed operating agreements for each;
- structuring the relationship between the not-for-profit (ROC-NY) and the cooperative (417 Lafayette and RWOR), including what governance and financial role the not-for-profit would have in the cooperative and the nature of its ongoing relationship with the cooperative;
- drafting employment contracts, such as the chef’s contract, for executive positions;

ble organizations. See Cadwalader, http://www.cadwalader.com/view_about_cadwalader.php?page=1 (last visited Sept. 12, 2010). The firm has a stated commitment to providing its pro bono clients the same level of commitment and expertise it provides its private clients. See *id.* Its areas of expertise include tax, corporate and real estate law. See *id.*

⁶⁴ The lawyers took direction from the ROC-NY Board and at times from ROC-NY’s Co-op Committee and/or its co-directors (when the Board delegated its decision-making power to them). The issue of who speaks for the client has been the subject of an interesting scholarly debate. See, e.g., Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103, 1128 (1992); William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 59 (2003).

⁶⁵ See N.Y. BUS. CORP. LAW § 101 et seq. (McKinney 2010); N.Y. LTD. LIAB. CO. LAW § 101 et seq. (McKinney 2010); N.Y. COOP. CORP. LAW § 80 (McKinney 2010).

- negotiating with potential outside lenders and investors, including the small business administration and Good Italian Food;⁶⁶
- negotiating and drafting a commercial lease and a construction contract;
- drafting loan agreements and board resolutions; and
- counseling the board and the cooperative committee regarding the decisions connected to these technical tasks.

While the technical legal work was intellectually stimulating and engaging for the legal team, and essential to creating legal structures that would assist in the ultimate goal of empowering workers, this Article focuses instead on the collaborative counseling process used to determine *Colors*' governance structure. This collaborative counseling process, more fully described and analyzed below, was central to the workers' empowerment during the cooperative formation process.⁶⁷ It serves as a powerful illustration of how lawyering in support of worker-owned cooperatives and participatory decision-making can achieve and add value to empowerment goals.

D. The Collaborative Counseling Approach to Determining and Memorializing the Restaurant's Governance Provisions

A collaborative counseling approach is one that engages the client not only as the ultimate decision-maker, but as a shared decision-maker in every phase of the process that leads up to the client's ultimate decision. Such a collaborative counseling approach requires lawyer and client to collaboratively identify: the decisions that need to be made, the people empowered to make those decisions and the process for engaging decision-makers in making and evaluating those decisions. This includes involving the client in the generation of strategies and the development of options to choose from.⁶⁸ Thus, in preparing to counsel the client regarding *Colors*' governance structure, the legal team remained in dialogue with the client at every stage of the counseling process. The legal team consulted with the client about how

⁶⁶ Good Italian Food (GIF) is a consortium of food cooperatives from Northern Italy that invested in *Colors*. See Stefania Marcone, *Good Italian Food Partners in Colors*, Mar. 22, 2006, http://www.italianmade.com/trade/release.cfm?art_ID=226.

⁶⁷ See text *infra* accompanying notes 68-89. This Article focuses on the start-up process and does not cover ongoing operational issues, which I plan to address in a subsequent article in the context of working with *Colors* and other cooperatives.

⁶⁸ See Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 446-50 (lending support for concept of engaging clients throughout every phase of counseling and noting that in collaborative lawyering model, "lawyers and clients are encouraged to work together as partners to decide strategy, to implement it, and to assess its effectiveness.").

they should seek advice from the client throughout the process, who would speak for the client and give direction to the legal team, and what types of decisions the client wanted the lawyers to engage them on.⁶⁹

1. *Planning the Collaborative Counseling Approach for Colors*

One of the first steps in the counseling process was to identify what decisions the client needed, should, and/or wanted to make regarding the governance structure. The client and legal team were generally familiar with cooperatives in India, Spain and Italy⁷⁰ and construction cooperatives in the U.S., but none were quite sure how a cooperative structure would work for a large, high-end restaurant in New York.⁷¹ Thus, the lawyers and client jointly decided that the first step would be to research different cooperatives with a focus on restaurant cooperatives. The goal was to benefit from people's experience and ascertain whether the cooperatives identified had any particular advice, in the form of lessons learned, based on their experiences. The research on different models served as a starting point and a frame of reference for questions the lawyers should ask, how the client might think about answering those questions and what to incorporate into *Colors'* governance structure. For this task, the ROC-NY Board, composed of ROC-NY members who were restaurant workers, decided that the legal team would conduct the models research.

While conducting the models research, the legal team did not just go away and come back with the results. The team, instead, consulted with the client regarding the questions it was planning on asking the cooperatives. Listing all the questions it thought the client might ask if they were conducting the surveys, the legal team sought feedback, additions and deletions to topics or issues. Here, the lawyers wanted to

⁶⁹ While this client-centered approach is not unique to progressive lawyering, client-centeredness does take on an added dimension, a collective dimension, in transactional lawyering on behalf of organizing groups. The reality of the organizing group being composed of many activist members, who individually and collectively need to be meaningfully included as full partners in the decision making, translates into a need to reject an individualistic framing of client (in the transactional context, as an individual entity with one point-person) and an acceptance of working with the collective in decision-making processes. See generally, Piomelli, *supra* note 12, at 1399-1401 (exploring individualistic nature of client-centeredness and the law and need to "swim against these individual cultural and professional currents").

⁷⁰ For interesting articles on international cooperatives, see, e.g., David F. Ellerman, *The Mondragon Cooperative Movement*, CASE NO. 1-384-270, HARVARD BUSINESS SCHOOL (1984), <http://www.ellerman.org/Davids-Stuff/The-Firm/Mondragon-HBS-Case.pdf>; G. Mitu Gulati, T.M. Thomas Isaac & William A. Klien, *When a Workers' Cooperative Works: The Case of Kerala Dinesh Beedi*, 49 UCLA L. REV. 1417, 1427-28 (2002).

⁷¹ There were only a few restaurant cooperatives and they were much smaller businesses.

make sure that ROC-NY members were given the option and opportunity to be engaged at important stages. Once the legal team finished the research, it then went back to the ROC-NY Board to discuss creating a participatory decision-making process. This discussion included identifying who would have the power to make decisions involved in forming the cooperative, who would direct the legal team at various stages in the counseling process, and how those decisions would be made. At first, the decision was to meet weekly with Cooperative Committee members – ROC-NY members who could potentially become worker-owners – to identify questions and generate proposals on which the Co-op Committee would ultimately vote.

2. *Meetings with Co-op Committee Members to Generate Proposals Regarding Governance: Process Lessons Learned in Collaborating with Clients*

The Fordham law students and CDP lawyers jointly facilitated weekly meetings with Co-op Committee members at ROC-NY over the course of four months. While the legal team intended a collaborative process, a number of factors contributed to lawyers and law students initially dominating these meetings. First, very few Co-op Committee members attended these meetings, despite efforts to create accessible meeting times. Low attendance was not surprising, given that people had full-time jobs and other responsibilities. However, the low turnout also unfortunately meant that at times more lawyers and law students than committee members attended,⁷² which contributed to many conversations occurring mainly among lawyers and students. The legal team, caught up in the excitement of the project, overlooked this imbalance. It was planning a new, innovative structure and having some of the substantive conversations for the first time. In addition, because the project was complex, the legal team may have instinctively focused more on content than on how it would have the conversation.

This initial experience reminded the lawyers of two important lessons. First, even the best intentioned lawyer needs to work at remaining cognizant of traditional power imbalances between client and lawyer and the likelihood that lawyer voices, unless lawyers are rigorously mindful, are likely to dominate.⁷³ Second, all lawyering commu-

⁷² While certainly not a conscious choice, perhaps this over-abundance of legal team members was a little self-interested, as we all, lawyers and students, wanted to be part of the process.

⁷³ See Lucie White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 739-43 (providing example of lawyer who while sensitive to power dynamics between himself and his client, struggled with exercising his own power). As Lucie White notes, the lawyer viewed his role as helping his clients – a group of Black

nication must be deliberate, even initial brainstorming with a client early in the counseling process. Deliberate communication requires planning and structuring to ensure that lawyers communicate as effectively as possible in providing and obtaining information. In obtaining information, it is important for lawyers to learn and plan to meaningfully listen, rather than predominantly speak.

a. Creating and Ensuring Space for Clients: “Learning to Listen Rather than Speak”⁷⁴

Recognizing that lawyer-dominated meetings would not accomplish empowerment goals, the legal team took steps to self-correct.⁷⁵ To amplify the members’ voices at subsequent meetings, the lawyers and organizers structured the meetings to ensure that the client’s members had more space to speak.⁷⁶ Legal team members curbed their own excitement and intellectual curiosity to play out different scenarios in the meetings and instead did that ahead of time and thus came to client meetings with more process structure, including a meeting facilitation plan. Additionally, to ensure fuller participation, the lawyers employed facilitation skills that created space and drew people out. The legal team reiterated at meetings that its role was to facilitate and learn from the members’ expertise and to translate that into a legal document. At these meetings, the legal team asked questions, listened to those who volunteered their thoughts and then deliberately asked others for additional thoughts, often going around the room for each person’s reactions and questions. The lawyers and students used this structured approach to foster and maximize active worker participation and empowerment.

South African villagers fighting the Apartheid regime’s plans to destroy and relocate their village – to develop their own power, yet “the lawyer would be the first to admit how much easier it is to articulate such aspirations than to live them out.” *Id.* Notwithstanding, she also notes that while the lawyer did not always live up to his aspirations, he did consistently look to these aspirations to give him direction in his lawyering. *Id.*

⁷⁴ Quigley, *supra* note 1, at 479.

⁷⁵ I do not think our initial dominance in the brainstorming occurred because we thought we had more to offer in the conversation than our clients. We actually knew and shared with them at the first meeting that we needed to learn from them about the restaurant industry and how to shape the operating agreement, because they were the experts. Whenever one puts law students, lawyers and professors in a room, however, there is a danger of falling into theoretical conversations outside the purpose of the meeting. Had our clients been corporate clients, I believe they would have been less patient and forgiving of us.

⁷⁶ Attempting to be client-centered, we tried to brainstorm simultaneously with the Copop Committee members. We realized, however, that an unstructured conversation was not going to work, particularly when there were so many of us and so few of them. Even if we went around the room, giving each participant a chance to speak, there were still more student and lawyer voices.

Going around the room also played an equalizing role among the members. In groups where all feel empowered to speak, open discussion can be effective, creating space for those who want to contribute; however, it can also reinforce inequity in groups where not everyone feels empowered to speak.⁷⁷ If members did not raise certain considerations, lawyers or students asked follow up questions. It quickly became apparent, in facilitating meetings, that if legal team members allowed clients to identify issues and topics, rather than lecturing on the issues, the clients often raised many of the same issues the lawyers wanted to discuss.⁷⁸ Giving clients the space to speak enhances the individual leadership skills of group members, while also enhancing a group's decision-making and problem-solving skills.

Ultimately, ROC-NY members who attended the weekly meetings contributed valuable information about both the industry and what they wanted to see done differently. In the end, their participation enabled the legal team to process and reflect upon the information and more fully develop and analyze the advantages and disadvantages of the various governance options.

b. Deciding to Meet for a Full Day: Balancing Competing Interests of Maximizing Democracy and Efficiency

Even though the weekly meetings were restructured to improve participation, turnout remained low and inconsistent. To address the low turnout and to ensure greater member participation and representation, the ROC-NY Board, in consultation with the Co-op Committee, decided to hold a full day meeting on a Saturday in Queens at the house of one of ROC-NY's co-directors to make decisions about structure. As the project moved to critical decision-making stages, the decision-making process needed to be changed to become more efficient. Recognizing the importance of creating a decision-making process that was both democratic (maximizing participation) and efficient (ensuring that the project would move forward and come to fruition),⁷⁹ the law students were asked to develop a process that would balance these two goals. Creating this balance raised several ques-

⁷⁷ See KANER ET AL., *supra* note 45, at 56-57 (explaining that while open discussion can be effective, it usually translates into whoever wants to speak will speak and thus can actually reinforce inequity.).

⁷⁸ This also provides an opportunity for clients to recognize their own analytical ability. See Ellman, *supra* note 63, at 1141-45 (warning lawyers of usurping leadership roles or depriving people of opportunities to develop that leadership).

⁷⁹ See *id.* at 1145-46 (explaining importance of democratic decision-making). Cf. Diamond & O'Toole, *supra* note 43, at 518 (questioning whether democratic processes are always needed, but acknowledging that in co-op context, democratic structures make sense, given ongoing nature of relationship between worker-owners).

tions, such as: When is representative democracy, as opposed to direct democracy, the best route to take? How do you avoid making people feel constrained by a structured process? When should deliberation end on any given decision? These and other questions were explored with the Board and Co-op Committee.

Ultimately, before the full-day meeting, the Board and Co-op Committee decided to form a representative Working Group consisting of ROC-NY Co-op Committee members and ROC-NY board members to make decisions at the meeting. Representative democracy was chosen to address scheduling difficulties and external deadline pressures. Representatives were elected, not just self-selected, to help ensure legitimacy. The Co-op Committee members of the Working Group were elected by the Co-op Committee and the ROC-NY Board members elected by the ROC-NY Board. To be more inclusive, the meeting, however, was open to any Co-op Committee member or Board member who wanted to attend.

The legal team generated proposals developed with the Co-op Committee members, followed by a separate day of recap and voting. This process proved very beneficial. Before the full-day meeting, the lawyers were able to provide the Working Group with an outline of the plan for the meeting, as well as the suggested proposals in writing. Providing written information beforehand gave the Working Group more time to absorb the information and allowed the proposals and pros and cons to be presented in a more time efficient yet interactive way.

c. Meeting Facilitation Plan: Paying Attention to the Process as Well as the Content Covered at the Full-Day Meeting

Paying attention not just to the innovative content of the entities and forms being created, but also to the quality of the decision-making process, actively furthered the goal of empowerment. Having the governance proposals and considerations developed from within the group, with guidance and support from the lawyers, allowed for group ownership of the process. Group ownership of the process created more buy-in and acceptance of the decisions and outcome.

The CDP lawyers⁸⁰ and the Co-op Committee organizer co-facilitated the full day meeting. The organizer initiated the meeting and reviewed the decision-making process.⁸¹ This was critical to establish-

⁸⁰ The students did not participate because the meeting occurred in the summer and they had summer work conflicts.

⁸¹ The legal team covered the following topics at the full day meeting: the powers of the worker owners, the function of work teams, decision-making processes for governance of the restaurant, requirements for becoming and staying a member, how profits would be

ing common ground among the decision-makers. The lawyers emphasized that most of the options presented were based on the input they had received from the Co-op Committee members in earlier meetings. Stressing that many options and considerations were generated by Co-op Committee members gave those members credit for their ideas. It acknowledged the importance of their contribution and demonstrated faith in their decision-making capacity.

To maximize the efficacy of the meeting, we decided to present on the easier decisions first – easier in the sense of the likelihood of gaining consensus or a majority vote – and to “park” issues that might prove difficult to resolve quickly. This “parking lot” idea was suggested by the ROC-NY Coop Organizer and was an effective alternative to using the phrase, “let’s table these decisions.” The parking lot concept was more accessible and better resonated with the client’s members. The legal team used flip chart paper to present each question and to obtain and record the participants’ ideas about what to consider in answering those questions. Using flip chart paper, a simple tool, created a more interactive process that led to greater participation.⁸² Using the flip chart paper to record peoples’ comments also served to validate each person’s contribution.⁸³ In addition, it gave people a place to focus their attention and to see and keep track of their proposals and ideas. This helped the group to integrate its individual members’ ideas.⁸⁴ While using flip chart paper to facilitate group decision-making and to validate everyone’s ideas is common to training and teaching, it is not as common in client-attorney meetings. Lawyers for organizational clients, however, can benefit greatly from using flip chart paper when facilitating group decision-making.

d. Client Decisions as Examples of “Client Knows Best” and Lawyers Learning from the Client

One of the key discussions and decisions that took place at the full-day meeting was how worker-owner representatives would be chosen to sit on the cooperative’s board of directors. One member suggested that because a power imbalance exists in the restaurant industry by job category, work teams should be organized by job category with each team electing a representative from their group. The member was referring to the racial and salary divide between the “front of the house” (i.e., the waiters, waitresses, and bartenders, all

distributed and the composition of the board.

⁸² See KANER ET AL., *supra* note 45, at 86 (using flip chart paper helps create more interaction and strengthens full participation).

⁸³ *Id.*

⁸⁴ *Id.*

better paid and disproportionately White) and the “back of the house” kitchen staff, disproportionately comprised of people of color and paid much less.⁸⁵

A Board member from each job category would help to balance the power between the traditionally more powerful front and the traditionally less powerful back of the house. Some suggested at-large elections instead, reasoning that they would all be worker-owners, so team representation was unnecessary. Others insisted that providing structural protection was better than aspiring toward balance or leaving it to chance.⁸⁶ In the end, they decided to go with director positions connected to the work teams and agreed that at-large elections could be disempowering for people who traditionally operated at the margins in the restaurant industry. After the full-day meeting, the legal team memorialized the decisions made, which then became the guiding principles for the legal team to draft the operating agreement. The legal team then checked in with the Working Group to make sure it captured all the decisions correctly. The ROC-NY Board ultimately approved all the proposals.

e. Ensuring Client Understanding of Complex Structures and the Role of Community Education in Sustaining Meaningful Participation

After the full-day meeting, the legal team decided to create a two-tier LLC structure for the restaurant and needed to explain this structure to the ROC-NY Board and the Co-op Committee.

Two LLCs would be created, one called 417 Lafayette and one called the ROC-NY Worker Owner Restaurant (RWOR). 417 Lafayette would own and operate *Colors* (the restaurant) and would have three members: RWOR, ROC-NY and Good Italian Food (GIF). RWOR would be the LLC created to allow the worker-owners to collectively participate in the joint ownership of *Colors*. RWOR would have a majority of the seats on the board of directors of 417 Lafayette and thus be able to make day-to-day governance decisions. The worker-owners would start out eligible to receive 20% of the restaurant’s profits, a share that could eventually grow to 51% or more as they incrementally bought out GIF.

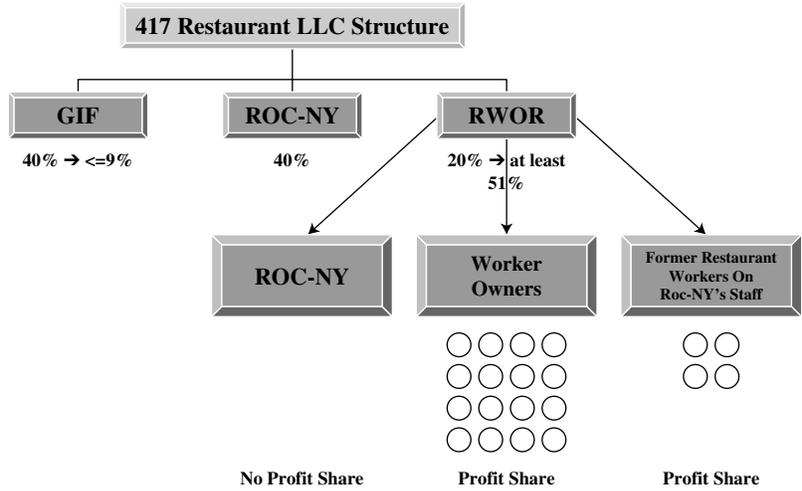
The legal team needed to communicate dense language and con-

⁸⁵ ROC-NY had recently conducted a study showing widespread discrimination in the industry that systemically provided less opportunity for advancement for people of color than their White counterparts. See *Behind the Kitchen Door*, *supra* note 51.

⁸⁶ Perhaps not surprising or dispositive, those advocating for representation by work teams were those who held traditionally less powerful positions and those advocating for at-large elections were those who held traditionally more powerful positions.

cepts in an understandable way. It decided that a visual aid in the form of a chart would help in communicating the information. The legal team’s first chart, reproduced below, did not, however, prove helpful to the members.

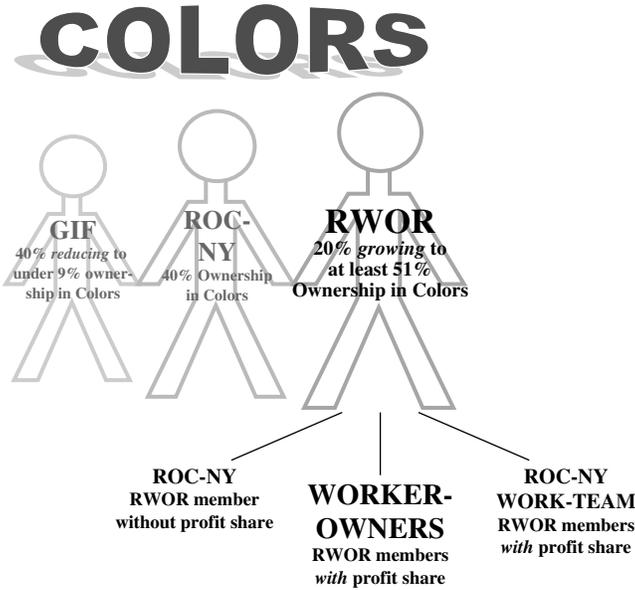
CHART 1:



Consequently, the legal team re-explained the concept over the course of several meetings and experimented with different approaches. Every time the team presented, it also asked if there were ways it could make its presentation clearer. The legal team viewed this approach as essential to ensuring that each member clearly understood the structures and his or her role within them. Each member needed to understand the structural arrangement in order to meaningfully participate in the decision-making and to ultimately exercise her or his powers when the restaurant opened.⁸⁷ Eventually the legal team developed the following chart, which ultimately proved successful in communicating the complex structures.

⁸⁷ Occasionally, lawyers take the position that sometimes people do not have the individual capacity to understand complicated information. While one can imagine a scenario in which this might be true, lawyers should not leap to that conclusion too quickly. Instead they should instead query whether they explained the information well enough, and whether, if explained differently, they would be more successful. Our adoption of this approach allowed us to work well with all the Board and Co-op Committee members, not just those with formal education.

CHART 2:



In the end, the legal team memorialized all the governance decisions in the RWOR Operating Agreement. They then created a guide to the Operating Agreement, explaining how RWOR interacts with 417 Lafayette, and translated it into two other languages.⁸⁸ The legal team went over the guide with the Co-op Committee several times. It also went over the guide with the worker-owners at the time of the restaurant’s opening. Since completing the operating agreements for both LLCs, the legal team has also shared the documents with other cooperatives and their lawyers.⁸⁹

CONCLUSION

As the case study of *Colors* illustrates, CED projects are complex and implicate a range of substantive legal knowledge, such as corporate governance, real estate, employment, and tax laws. The complexity of technical legal work itself often necessitates a team of lawyers to work on a project. The community empowerment approach and the collaborative counseling approach to CED add to the need for a large and diverse team, to ensure that the technical legal matters do not crowd out the vital attention that must be paid to empowerment and

⁸⁸ The legal team was able to recruit student translators.

⁸⁹ See e.g. Green Worker Cooperatives, http://greenworker.coop/website_j/ (last visited Sept. 12, 2010) (non-profit dedicated to incubating work-owned and environmentally friendly cooperatives in South Bronx); People’s Grocery, <http://www.peoplesgrocery.org/> (last visited Sept. 12, 2010) (community based organization in West Oakland, California working in area of “food justice”).

meaningful participatory decision-making. The collaborative counseling approach described in Part II is a labor- and time-intensive process. It insists on supporting participatory decision-making and on providing community education (when, and as often as, needed) to ensure meaningful participation and decision-making throughout the development of a CED project. Ensuring meaningful participation means engaging the client – understood not simply as an entity, but also as a group of individual community members – in every phase of the decision-making process. This includes: 1) collaboratively identifying the legal tasks and decisions the client needs to, should or wants to make, 2) employing planning and meeting facilitation skills that encourage active participation to maximize individual and group participation and 3) ensuring that all stakeholders understand the content and concepts necessary for informed decision-making.

The example of *Colors* also illustrates the vitality of a community-empowerment approach to CED that builds on an expansive, non-geographically bounded, understanding of a community of identity and purpose. This approach effects systemic change by creating forms and processes that alter conventional wealth and power dynamics by enabling low-income working people to exercise democratic control over the formation and day-to-day governance of collective enterprises – challenging capitalism's assumption that enterprises must be privately owned and autocratically managed. This empowerment-driven approach to CED lawyering is another manifestation of an emerging approach to progressive lawyering that emphasizes fostering the collective action and active democratic participation of low-income and working-class people, immigrants, people of color, and other marginalized groups in governing their living and working conditions and in reshaping our collective social, economic, and political system.