

PRIMARY CARE LAWYERS: A HOLISTIC APPROACH TO PRO BONO BUSINESS LAWYERING

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ABSTRACT

Pro bono programs for business lawyers provide small businesses in low-income communities and nonprofits much needed access to legal representation. However, the dominant pro bono business law model could be reframed to provide better representation to pro bono business clients. Premised on traditional pro bono models of individual representation where a pro bono attorney is assigned to assist on an individual’s discrete litigation matter, the dominant pro bono business law model is not designed to provide business clients with holistic and integrated representation. To provide pro bono business clients with the legal counsel they truly need, we must align our expectations of pro bono business law representation with the realities of transactional practice. This requires shifting away from representation on discrete issues towards a model that provides long-term counsel and advice on the variety of interconnected transactional matters that businesses maneuver on a regular basis. This essay argues for a new archetype for pro bono business law representation structured to address the multilayered legal needs of pro bono business clients and explains why law school clinics may be the best institutional force to lead this essential change.

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I. INTRODUCTION

While some would argue that the corporation is a person,¹ many legal and economic scholars advance a more nuanced and complicated conceptualization of the corporate form.² There is, however, an under-explored arena in the public interest where the characterization of the corporation—and by extension business entities—could best be understood as a metaphoric person. Thinking of the corporation as a person would help reshape how we conceptualize and, subsequently, administer pro bono legal counsel to business entities.

In this essay, I argue that the business lawyer is a company's analog to an individual's primary care physician.³ Just as an individual is an open system of interconnected subsystems, a business entity is comprised of a network of

¹ See Ashley Parker, 'Corporations Are People,' *Romney Tells Iowa Hecklers Angry Over His Tax Policy*, N.Y. TIMES (Aug. 11, 2011), <http://www.nytimes.com/2011/08/12/us/politics/12romney.html>; Philip Rucker, *Mitt Romney Says 'Corporations Are People,'* WASH. POST (Aug. 11, 2011), https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html?utm_term=.472f4d9490b5; Kent Greenfield, *If Corporations Are People, They Should Act Like It*, ATLANTIC (Feb. 1, 2015), <https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/>.

² Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) (recognizing a corporation as "an artificial being, invisible, intangible and existing only in contemplation of law."); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 407 (1989) ("Firms are bundles of unruly phenomena. . . . No single comprehensive, objective theory of the firm has taken hold. Firms still represent different things to different observers.").

³ ERIC J. CASSELL, DOCTORING: THE NATURE OF PRIMARY CARE MEDICINE 20 (1997) ("[P]rimary care should be accessible, comprehensive, coordinated, continual care delivered by an accountable provider of health services.") (citation omitted); Steven K. Berenson, *Is It Time For Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 650 (2001) (describing the legal checkups and preventive lawyering necessary for business and other entity clients).

systems premised on laws, regulations, business norms and contractual obligations that need to be addressed and advised on holistically. Under this view of business law representation, the business client benefits most from regular check-ins with the same primary legal counsel with whom it can develop a relationship and working history. Within this relationship, the business lawyer is able to provide strategic advice that helps the business client not only plan ahead, but also determine whether and when it is prepared to take on various risks and transactions while maintaining its legal standing.⁴

All businesses benefit from continuous access to legal counsel. In fact, most large companies have a general counsel and an on-going relationship with a corporate law firm because they recognize the importance of having continuity of representation. Most small businesses and nonprofits, on the other hand, cannot afford to retain general counsel. Similar to health interventions targeted at individuals with higher risk of chronic disease,⁵ businesses that qualify for pro bono representation are those particularly vulnerable to sustainability issues⁶ and exactly the types of businesses society should have a vested interest in ensuring have access to quality preventive, business law representation.⁷ Small businesses in low-income communities, technology start-ups, social enterprises, and nonprofits, for example, are all at risk of not being sustainable businesses in large part because they are likely to have limited financial resources and legal counsel.⁸

⁴ See Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client's Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 50 (2003) (describing the preventive legal practice of business lawyers as “periodically evaluating a client’s business situation to identify potential legal problems . . . and to develop and recommend appropriate action accordingly.”).

⁵ See Joshua T. Cohen et al., *Does Preventative Care Save Money? Health Economics and the Presidential Candidates*, 358 N. ENGL. J. MED. 661, 661 (Feb. 14, 2008), <http://www.nejm.org/doi/pdf/10.1056/NEJMp0708558> (“Whether any preventive measure saves money or is a reasonable investment despite adding to costs depends entirely on the particular intervention and the specific population in question.”).

⁶ See Rashmi Dyal-Chand & James V. Rowan, *Developing Capabilities, Not Entrepreneurs: A New Theory for Community Economic Development*, 42 HOFSTRA L. REV. 839, 859–60 (2014) (arguing that successful entrepreneurship requires both financial and social capital, resources that are inevitably scarce in communities where poverty is most prevalent).

⁷ See Dana Thompson, *L3Cs: An Innovative Choice for Urban Entrepreneurs and Urban Revitalization*, 2 AM. U. BUS. L. REV. 115, 121 (2012) (identifying “[s]mall businesses [as] a critical part of a healthy economy. They play a vital role in the United States’ economic system by creating the most net new jobs, by bringing innovative products and services to the market, and by providing much needed tax revenues to local and state municipalities.”).

⁸ See Donald R. Korobkin, *Vulnerability, Survival, and the Problem of Small Business Bankruptcy*, 23 CAP. U. L. REV. 413, 426 (1994) (“First and foremost, the typical small business operates under severe financial constraints.”); Anthony Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1468 (1994) (“To the extent that investors continue to undervalue community investments relative to other investments—due to racial, ethnic, or class

Unfortunately, this vision of the primary care business lawyer is rarely modeled in pro bono representation. Instead, the most common model of pro bono business counsel in practice today is more analogous to acute or trauma-related legal counsel. The pro bono business client can move from one “urgent care” pro bono business lawyer to another without having the underlying causes of the “illness” treated, or perhaps even identified, by its short-term pro bono business lawyers.

Pro bono business law models should be designed around the realities of business lawyering. Currently, the dominant model of pro bono business law representation borrows heavily from a half century of effective pro bono representation of low-income individuals in civil litigation suits. I argue in this essay that the traditional pro bono individual representation model, which can work effectively for dispute resolution, does not appropriately apply to business entities because business clients need regular, consistent, and more holistic legal counsel to thrive and compete in the marketplace. This essay seeks to fill a gap in both business law and public interest scholarship by describing what business clients need from their legal counsel and further elaborating upon effective business lawyering to argue for a new archetype of how pro bono business lawyering should be administered moving forward.

II. EVOLUTION OF PRO BONO REPRESENTATION

England’s Magna Carta of 1215 is credited as the genesis of our contemporary conception of equal access to justice.⁹ But our acknowledgment that equal access to justice is predicated on equal access to legal representation was not commonly recognized until much later in history and is, in fact, still evolving.¹⁰ Built on decades of the traditional pro bono individual representation model, the most prevalent model of pro bono business law representation does not provide the essential, wrap-around legal services that business clients need to flourish.

biases, or because small investments for working people seem mundane—there is systemic market failure.”).

⁹ DEBORAH L. RHODE, ACCESS TO JUSTICE, 47 (2004) (“To no one will we sell, to no one will we refuse or delay, right or justice.”) (internal citation omitted) [hereinafter Rhode, ACCESS TO JUSTICE].

¹⁰ See Laura Abel, *Designing Access: Using Institutional Design to Improve Decision Making About the Distribution of Free Civil Legal Aid*, 7 HARV. L. & POL’Y REV. 61, 61 (2013) (“There is a right to counsel in only a few types of civil cases.”); Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2287 (2013) (questioning “[h]ow far [] the obligation of *Gideon*-appointed counsel extend to assist noncitizen criminal defendants with their immigration legal needs”); Nicholas Iovino, *S.F. Public Defender Launches Immigration Unit*, COURTHOUSE NEWS SERV., (Mar. 8, 2017), <https://www.courthousenews.com/s-f-public-defender-launches-immigration-unit/> (describing efforts to extend public defense to detained individuals contesting deportation).

A. The Historical Perspective on Lawyering in the Public Interest

Near the turn of the twentieth century, Clara Shortridge Foltz, the first woman to practice law in California, promoted the establishment of a public defender's office,¹¹ which would function similarly to the prosecutor's office through government funding.¹² Although not instituted nationally until the Supreme Court's decision in *Gideon v. Wainwright*,¹³ Foltz's inception of consistently available and accessible representation¹⁴ to the public helped lay the foundation for the expansion of access to justice in other legal practices. While not considered a constitutional right, civil litigation legal services have been available on an *ad hoc* basis since the late nineteenth century¹⁵ and developed into a systemic structure of legal aid programs during 1960s.¹⁶

Congress created the Legal Services Corporation in 1974, which was established to provide financial support for poverty law programs and legal aid organizations.¹⁷ The evolution of legal aid organizations providing representation in various areas of law were staffed by full-time lawyers dedicated to representing low-income and otherwise marginalized client populations. With increased federal funding and a national network of legal aid organizations as potential employers, "cause lawyers," working full-time for and paid by public interest law firms and legal aid organizations, also grew in number and

¹¹ See Rhode, ACCESS TO JUSTICE, *supra* note 9, at 51 ("[U]ntil the mid-twentieth century only about a dozen states required courts to appoint counsel in all felony cases or to advise defendants of their right to request such assistance. A smaller number required appointments only in capital cases. The rest of the states gave courts discretion to appoint a lawyer No state granted a right to counsel for appeals or for habeas corpus proceedings seeking federal review of a state conviction.").

¹² BARBARA BABCOCK, WOMAN LAWYER: THE TRIAL OF CLARA FOLTZ 2-3 (2011) ("[Foltz] reached the high point of her career as a lawyer and law reformer by her promotion of the public defender through speeches, writing, and lobbying nationwide. . . . She also saw the initial success of . . . the first public defender office in the nation . . . established in Los Angeles in 1913.").

¹³ *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (finding that states are required under the Sixth Amendment to provide counsel in criminal cases to represent indigent defendants).

¹⁴ Rhode, ACCESS TO JUSTICE, *supra* note 9, at 54 (Foltz conceived of "a network of specialized, competent advocates [who] would 'protect the poor, save the innocent, and remove an unjust burden from a generous profession.'").

¹⁵ *Id.* at 58. For example the Legal Aid Society was founded in 1876 "to defend the individual rights of German immigrants who could not afford to hire a lawyer," but expanded its services in 1890 "to render legal aid, gratuitously if necessary, to all who may appear worthy thereof and who, from poverty, are unable to procure it." *The History of the Legal Aid Society*, LEGAL AID SOCIETY, <http://www.legal-aid.org/en/las/aboutus/ourhistory.aspx> (last visited Apr. 24, 2017).

¹⁶ Rhode, ACCESS TO JUSTICE, *supra* note 9, at 62–64.

¹⁷ Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. §§ 2996-2996i (2015)).

reputation.¹⁸ Cause lawyers are often characterized as possessing moral commitments to anti-subordination lawyering and advocacy.¹⁹

Pro bono lawyers, on the other hand, are “lawyers who for no fee donate a limited amount of their work to public service.”²⁰ The pro bono lawyer differs from the cause lawyer²¹ in that the pro bono representation is a fraction of the lawyer’s other work.²² Although not a new phenomenon,²³ pro bono programs have grown substantially over the last twenty-five years, with an increase in both the number of lawyers participating and the diversity of legal practices where pro bono representation is now available.²⁴ The American Bar Association’s (ABA)

¹⁸ See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY, 1195, 1196–97 (2005) (defining cause lawyers as “activist lawyers who use the law as a means of creating social change in addition to a means of helping individual clients.”). In the relevant literature, cause lawyers are also referred to “public interest lawyers.” See *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1069–70 (1970) (describing a new generation of lawyers committed and willing to make personal sacrifices to advance social change).

¹⁹ See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1928 (1999) (“Broadly speaking, cause lawyering encompasses various law-related activities, from rights assertion to legal counseling, that relies on law-related means to achieve social justice for individuals and subordinated or disadvantaged groups. Whether representing individuals or groups, cause-oriented poverty lawyers often adopt an orientation of antisubordination advocacy.”); see also David Luban, *The Moral Complexity of Cause Lawyers Within the State*, 81 FORDHAM L. REV. 705, 706–07 (2012) (describing common function of cause lawyers as “delivering individual legal services, by ‘impact’ litigation or lobbying, and by subordinating lawyering to movement organizing,” characterized as “the service, law reform, and organizing models of cause lawyering.”).

²⁰ Russell G. Pearce, *The Lawyer and Public Service*, 9 AM. U. J. GENDER SOC. POL’Y & L. 171, 175 (2001).

²¹ Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31 (Austin Sarat & Stuart Scheingold eds., 1998).

²² See Pearce, *supra* note 20, at 175 (comparing “governing-class lawyers” in the twentieth century who advocate for organizations such as the NAACP and the National Consumers League while enjoying lucrative full-time employment in the private sector, with “[t]he pro bono lawyer [who] serves the public primarily in her pro bono work. Otherwise, she is a hired gun for her clients.”).

²³ See SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 18 (1990) (“The nation’s first experiment with legal aid was an outgrowth of the Reconstruction era Freedman’s Bureau. Between 1865 and 1868, the Bureau retained private attorneys in the District of Columbia and some southern states to represent poor [African Americans] in criminal and civil cases.”).

²⁴ Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 4 (2004) [hereinafter Cummings, *Politics of Pro Bono*] (“Whereas pro bono had traditionally been provided informally—frequently by solo and small firm practitioners who conferred free services as a matter of individual largesse—by the end of the 1990s pro bono was regimented and organized, distributed through a network of structures designed to facilitate the mass provision of free services by law firm volunteers acting out of professional duty.”).

Rules of Professional Conduct also encourage lawyers to devote at least fifty hours annually to pro bono legal services assisting persons of limited means and charitable organizations.²⁵ “At the local level, many city and county bar associations have made pro bono a priority. For example, Chicago, New York, San Francisco, Los Angeles, and the District of Columbia all have events and projects that bring together law firms and nonprofit legal organizations to enhance pro bono activity.”²⁶ The growth of large law firms, encouragement of the ABA, and underfunding of legal aid organizations²⁷ have led to pro bono lawyers making an incredible impact in bridging the access-to-justice gap for low-income and otherwise marginalized pro bono clients.²⁸ The normalization and institutionalization of pro bono programs at law firms, bar associations, and law schools means that “[m]ost U.S. lawyers now take pro bono for granted and see volunteer work as an expected part of legal practice.”²⁹

The proliferation of pro bono programs means that lawyers can participate in a wide variety of pro bono representations. For example, law firms report established pro bono programs in the following practice areas: immigration, children’s rights or family law, economic development or microenterprise, criminal defense and death penalty work, veterans’ issues, employee rights, civil rights, education, and tenant or anti-eviction representation.³⁰ While theories undergirding some access-to-justice programs and cause lawyering have continued to evolve and mature into more holistic models of individual representation,³¹ traditional pro bono programs have maintained their compartmentalized approach to representation.

²⁵ MODEL RULES OF PROF’L CONDUCT r. 6.1(a) (Am. Bar Ass’n 2016).

²⁶ Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2370 (2010).

²⁷ *Id.* at 2365 (“Four interlocking trends have been critical: growth patterns in large firms, inadequacies in government-supported legal services, bar initiatives to promote pro bono activity, and law firm rankings based on pro bono participation.”). Moreover, law schools encourage or even require students to obtain a certain number of pro bono hours prior to graduation. In 2012, New York state bar changed its bar admission requirements to include a pro bono hours minimum. “Every applicant admitted to the New York State bar on or after January 1, 2015 . . . shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court.” 22 NYCCR § 520.16 (2012).

²⁸ See Cummings & Rhode, *supra* note 26, at 2359 (“The average attorney at an Am Law 200 firm logged over sixty hours of pro bono contributions per year.”).

²⁹ *Id.* at 2364–65; see also David Barrio, *Recession-Proof?*, *AM. LAW.*, July 2009, at 53, 54, available at <http://www.americanlawyer-digital.com/americanlawyer-ipauth/tal200907ip?pg=55#pg55> (describing the widespread, well-organized institutionalization of pro bono programs in large firms as “almost unremarkable”).

³⁰ Cummings & Rhode, *supra* note 26, at 2385.

³¹ See Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 *FORDHAM URBAN L.J.* 1067, 1067 (2003) (“Over the past two decades, public defender offices across the country have broadened the range

Although pro bono programs have been effective at memorializing their quantitative impact particularly in terms of hours of pro bono service, less is recorded on the qualitative impact of these programs.³² Achieving social impact through pro bono lawyering requires more than hours of dedication and a large quantity of clients serviced.³³ Professor Russell Pearce offers a framework for understanding how decades of lawyering in the public interest evolved into the dominant form of pro bono programs.³⁴ He argues that “the idea of pro bono lawyering [is] a less ambitious incarnation of the governing class lawyer who contributes time to helping cause lawyers.”³⁵ The space between pro bono and cause lawyers is a significant gap in the context of business law representation,³⁶ where the model of pro bono business lawyering does not often reflect the dynamics and responsibilities of standard business lawyering.

B. Dominant Pathway to Pro Bono Business Law Representation

Typically, legal services organizations³⁷ work as clearinghouses to vet discrete transactional matters and match them with a pro bono lawyer at a partnering law firm or solo practice. These legal services organizations often also provide a combination of legal education through workshops and drop-in hours with a business lawyer either on their staff or a pro bono lawyer working in partnership with the organization. Through this model, legal services organizations can connect thousands of nonprofits and small businesses with business lawyers who can assist them on their acute legal needs, which is absolutely necessary in bridging the justice gap. Business clients served through these pro bono programs need access to introductory information on business law

of defense services provided to indigent clients. These expanded services, some of which involve representing clients on related non-criminal matters such as housing and public benefits, are included in what is now commonly referred to as ‘holistic representation.’”)

³² See Deborah Rhode, *For Whose Good?*, AM. LAW., July 2009, at 56, 57, available at <http://www.americanlawyer-digital.com/americanlawyer-ipauth/tal200907ip?pg=57#pg57>

(explaining law firm pro bono programs, “[d]espite commendable increases in concern and participation rates, . . . make little if any systematic effort at assessment. That tendency is encouraged by the growing influence of ranking systems that direct attention only to the quantity, not quality or social impact, of pro bono work.”) [hereinafter Rhode, *For Whose Good*].

³³ *The New Public Interest Lawyers*, *supra* note 18, at 1973–74 (discussing the shortcomings of legal services programs that have “led to extremely heavy caseloads, with a necessary effect on the quality of comprehensiveness of the representation given,” which have forced attorneys to admit they have “‘no time for any long-range solutions’”).

³⁴ See Pearce, *supra* note 20.

³⁵ *Id.* at 171.

³⁶ In the relevant literature, business law representation is also referred to as microenterprise representation.

³⁷ I use the term “legal services organization” in this essay to refer to those legal aid organizations, bar association programs, lawyer referral and information service programs, public interest organizations, and other nonprofit organizations that specialize in linking pro bono business clients with pro bono legal counsel.

topics and immediate counsel on urgent business law matters as they arise. But this pro bono model, focused on identifying and addressing discrete legal matters, often falls short of providing the primary care lawyering that business clients need to thrive and compete.³⁸

1. Teach-ins and Community Workshops

Legal services organizations may provide teach-ins and community workshops for small businesses and nonprofits. These workshops often address broad topics in lay terms to provide entrepreneurs and business managers in the room with a foundation for understanding the legal issues they may currently be facing or will likely face in the future. The workshop topics may include, but are not limited to, business entity formation, liability issues, commercial leasing, business licensing, and intellectual property protection.³⁹ The workshops are not meant to provide legal advice or representation, but are instead intended to serve as a primer for the participants, as this may be the entrepreneur's or business manager's first opportunity to hear a lawyer discuss these corporate and transactional matters. Thus, although questions from the audience may be taken, the pro bono lawyer conducting the workshop often provides a generic response or indicates whether or not representation should be sought to determine how best to move forward rather than providing specific legal advice.

2. Intake or Brief Consultations

In addition to the community workshops, a legal services organization may coordinate and host venues for one-on-one consultations where the entrepreneur or business manager can meet with a business attorney to discuss a particular matter.⁴⁰ Volunteer business attorneys may staff these brief consultations and provide their insight and suggestions for next steps, including whether the business should obtain legal representation.⁴¹ These consultations are often designed to allow experienced business lawyers to help a potential pro bono business client identify and articulate the legal issues present.⁴² With this information, the volunteer attorney can advise the entrepreneur or business

³⁸ See Cummings & Rhode, *supra* note 26, at 2430 (“If the predominant objective of pro bono work is, as the definition implies, to promote the *public* good, then the current structure of large-firm programs is not always suited to that end.”).

³⁹ See, e.g., *Legal Services for Entrepreneurs (LSE)*, LAWS. COMMITTEE FOR C.R. S.F. BAY AREA, <https://www.lccr.com/get-help/economic-justice-legal-services-for-entrepreneurs-lse/> (last visited Apr. 24, 2017).

⁴⁰ See, e.g., *Community Economic Development Pro Bono Project*, D.C. BAR, <https://www.dccbar.org/pro-bono/volunteer/ced-project.cfm> (last visited Apr. 24, 2017).

⁴¹ See, e.g., *Resilient Communities Legal Cafe*, SUSTAINABLE ECONS. LAW CTR., <http://www.theselc.org/cafe> (last visited Apr. 24, 2017).

⁴² See, e.g., *Legal Office Hours*, URBAN SOLUTIONS SAN FRANCISCO, <http://www.urbansolutionssf.org/events-legal-office-hours/> (last visited Apr. 24, 2017).

manager whether the legal services organization facilitating the event may be able to provide or find a pro bono legal counsel willing to take on the legal matter. Other times, the matter may be resolved once the attorney, for example, reads through the company's documents and explains what steps the business needs to take in response.⁴³

3. Pro Bono Attorney Assignment for Discrete Transactional Matters

The last crucial service that legal services organizations often provide pro bono business clients is the distribution of their discrete transactional matters to pro bono business lawyers within the legal services organization's portfolio of lawyers and law firms.⁴⁴ Law firms often struggle with determining which business clients qualify for their pro bono services.⁴⁵ Consequently, law firms partner with a legal services organization, if not several, which allows them to identify businesses that not only fit within their definitions of pro bono business clients, but also have discrete matters that can be primarily handled by junior attorneys at the law firm.⁴⁶ In this way, the small business, nonprofit, or entrepreneur is paired with a business attorney who is able to draft the necessary incorporation documents, review and advise on a pending transaction such as a vendor contract or a commercial lease agreement, or counsel the client through a regulatory issue.⁴⁷

III. BUSINESS LAW REPRESENTATION

While there are different specializations within business law,⁴⁸ they are often interconnected and can rarely be fully addressed in isolation. There are

⁴³ For example, an entrepreneur may bring with her to the individual consultation a notice the company received from a regulatory body. The pro bono lawyer can read the notice and provide a summary of the appropriate follow-up that is necessary, which may be as simple as completing a one-page form and mailing it to the regulatory body with the appropriate fee.

⁴⁴ See, e.g., *Community Organization Representation Project (CORP)*, B. ASS'N S.F., <http://www.sfbar.org/jdc/legal-services/legalprojects/corp/corp.aspx> (last visited Apr. 24, 2017).

⁴⁵ See Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J. OF L. & POL'Y 11, 42 (2015).

⁴⁶ Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 700 (2009) ("Matters are often selected that can be appropriately handled by junior attorneys and that will not create conflicts with corporate clients."); Cummings, *Politics of Pro Bono*, *supra* note 24, at 112 n.672 (identifying "incorporating nonprofits or drafting simple contracts" as "the more routine transactional pro bono cases").

⁴⁷ See, e.g., *Our Legal, Financial & Marketing Services*, START SMALL THINK BIG, <http://www.startsmallthinkbig.org/home/services/> (last visited Apr. 24, 2017).

⁴⁸ Ronald Gilson, for example, pioneered legal scholarship in the 1980s that helped define and articulate the value of transactional lawyering by focusing on specific acquisition transactions. See generally, Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

various systems within a business entity that are interdependent and must work together for the overall business to function smoothly. An important element of the business lawyer's role in advising the business client is to maintain these various, and often non-intuitive, considerations. This is the essence of competent business counsel that is not reflected in the dominant pro bono business law model. In standard practice, the business lawyer does not merely triage and address acute legal issues, but instead helps the business client manage a consistent barrage of legal considerations that are likely to go unnoticed by the business client. In this way, the business lawyer fills a role that is analogous to the primary care physician's role in providing preventative health care to her patients. Thus, more pro bono business law representation should reflect this reality of business law practice and the importance of continuous legal representation as matters evolve. This section explores the legal construction of a business client to lay the foundation for understanding why there are a range of interconnected legal issues that business lawyers regularly address for their business clients.

A. Business Entities: Bundles of Legal Rights, Obligations, and Duties

The business entity is at its very core a collection of legal rights, obligations, and duties.⁴⁹ As such, corporate and economics scholars regularly refer to the corporation not as a person but as a nexus of contractual rights and obligations.⁵⁰ While the recent confirmation of Judge Neil Gorsuch to the U.S. Supreme Court has revived the national spotlight on the corporate personhood debate⁵¹ that was further cemented in *Citizens United v. Federal Election*

⁴⁹ Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) (recognizing a corporation as “an artificial being, invisible, intangible and existing only in contemplation of law.”); Bratton, Jr., *supra* note 2 (“Firms are bundles of unruly phenomena. . . . No single comprehensive, objective theory of the firm has taken hold. Firms still represent different things to different observers.”).

⁵⁰ Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1195 (2004) (explaining the aggregate view of corporations as an academic theory that understands corporations as a nexus of contracts and defines corporations as “merely a convenient connection point for a bundle of relationships between shareholders, bondholders, employees, customer, and others.”); *see also* CORNELIS A. DE KLUYVER, A PRIMER ON CORPORATE GOVERNANCE 35, n.15 (2d ed. 2015) (“Nexus of contracts theory views the firm not as an entity but as an aggregate of various inputs brought together to produce goods or services.”).

⁵¹ *See* Alex Swayer, *Sanders Rejects Gorsuch over Citizens United, Roe v. Wade*, WASH. TIMES (Apr. 4, 2017), <http://www.washingtontimes.com/news/2017/apr/4/bernie-sanders-rejects-neil-gorsuch-over-citizens/> (discussing his reservations about Judge Gorsuch's appointment Senator Bernie Sanders said “I suspect that [Judge Gorsuch] will vote to undermine[] our democracy even further by supporting the elimination on all restrictions on campaign finance — something which the Republican leadership in this body wants.”).

Commission,⁵² the theory of the corporation as a constitutional person is fraught with complications⁵³ and inconsistencies.⁵⁴ For these reasons, this essay does not seek to advance the corporate personhood theory in using the human body as a metaphor to demonstrate the quality and substance of the legal care a business entity requires.

In addition to the internal nexus of contracts, there are state laws that allow the creation of the business entity and a wide variety of federal, state, and municipal laws that prescribe what actions a business entity can engage in and how it must function. Understanding the contractual, statutory and regulatory components of a business entity are not learned in business administration or even basic legal education. In a very practical sense, it is much easier to discuss and frame conversations about the corporation by referring to it as a person versus the more conceptual idea of the corporation as an aggregation of contracts and laws. Therefore, it is not surprising that attorneys, media, politicians, etc., are much more likely to refer to the corporate person in conversation simply because it is much easier to articulate. However, the substance of the business client is a legal construction. For this reason, even sophisticated business managers rely on the expertise of business lawyers to help guide and advise the business entity not only in transactions with third-parties, but also in the internal maintenance of the business form.

Although the specific definition of a pro bono business client may be contested,⁵⁵ it is well established in practice that some business clients qualify for pro bono representation.⁵⁶ Accordingly, this essay will not investigate the notion

⁵² *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (holding that corporations have a First Amendment right to spend their own money on political advocacy and “reject[ing] the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”).

⁵³ *Compare* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (finding a corporate right against warrantless inspections by workplace safety regulators), *with* *Wilson v. United States*, 221 U.S. 361, 383-84 (1911) (finding that a corporation has no power to claim the Fifth Amendment right against self-incrimination), *United States v. Unimex, Inc.*, 991 F.2d 546, 550 (9th Cir. 1993) (“Being incorporeal, corporations cannot be imprisoned, so they have no constitutional right to appointed counsel.”), *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012) (finding that “the term ‘individual’ as used in the [Torture Victim Protection] Act encompasses only natural persons.”).

⁵⁴ See Saru M. Matambanadzo, *The Body, Incorporated*, 87 TULANE L. REV. 1 (2013); Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006); Amanda Werner, *Corporations Are (White) People: How Corporate Privilege Reifies Whiteness as Property*, 31 HARV. J. RACIAL & ETHNIC JUST. 129 (2015).

⁵⁵ See Tremblay, *supra* note 45, at 22–23.

⁵⁶ See *ABA Business Law Section Pro Bono Committee*, ABA, <http://apps.americanbar.org/dch/committee.cfm?com=CL600000>. Kimberly A. Lowe, *Business Law Pro Bono: How Business Law Lawyers Contribute to Economic Justice*, ABA CENTER FOR PRO BONO EXCHANGE (Jul. 6, 2015), available at <https://centerforprobono.wordpress.com/2015/07/06/business-law-pro-bono->

of whether or not business clients should qualify for pro bono counsel. The essay instead presumes that the typical pro bono business client is either an under-represented entrepreneur, a nonprofit organization with limited means, or a small, for-profit business working within low-income communities or owned by low-income entrepreneurs.⁵⁷

B. Regularity and Interconnectedness of Business Law Matters

Because a business entity is a collection of interconnected systems, legal issues can be interrelated as well. Consequently, business clients often have legal issues that are not distinct from each other, as they build on one another and overlap. Under the dominant pro bono business law model, where separate attorneys may work on a business client's different legal issues, pro bono business clients may suffer, especially when it comes to interrelated legal issues.

Contract drafting is a prime example of how representation from two different pro bono business lawyers can create issues for the business client. Not knowing that a certain provision is included in one contract could mean that a conflicting term could be included in another, seemingly unrelated contract, creating complications for the business client. However, these complications could have been anticipated and avoided by having one pro bono business lawyer with the requisite access to the client's institutional knowledge work on all of its transactions. Alternatively, a primary care business lawyer who approaches her pro bono representation holistically and thoroughly investigates existing contracts before negotiating the terms for a new one might also avoid this pitfall. Contract drafting is just one example, but there are many other transactional matters that are interconnected in a similar manner. In fact, business issues are so often interrelated that business lawyers are regularly tasked with providing this kind of primary care lawyering to their paying clients.

The following are additional examples of particular legal issues that may appear to be distinct transactional matters but are actually closely connected with foreseeable subsequent legal matters.

how-business-law-lawyers-contribute-to-economic-justice/ ("The business law section [of the ABA] created its own pro bono committee in 1993. . . . '[T]he recipients of [pro bono business law] services can, for the most part, be divided into two broad categories: nonprofits and microenterprises.'").

⁵⁷ See PRO BONO INSTITUTE, LAW FIRM PRO BONO CHALLENGE COMMENTARY TO STATEMENT OF PRINCIPLES (2016), <http://www.probonoinst.org/wpps/wp-content/uploads/Law-Firm-Challenge-Commentary-2016.pdf> ("For-profit business ventures are rarely eligible for pro bono legal services. . . . In order to be eligible for pro bono legal services, if the individuals creating the business do not themselves qualify for pro bono legal services: . . . (3) the business or particular venture would have to possess insufficient operating funds to pay for legal and other professional services and would not be paying legal or other professional fees; and (4) the pro bono relationship would be viewed, from the beginning, as being 'time bound' - to last only until the business becomes successful and can pay for counsel without sacrificing its mission.").

1. Entity Formation as Foundational

There are a host of internal transactions for which the entity form is foundational; and, thus, entity formation is merely one step in a series of subsequent internal transactions and external filings. These internal transactions include, but are not limited to, “equity financings, voting agreements, buy-sell-agreements, and executive employment contracts.”⁵⁸ As Professor George Dent identifies, during the formation stage, business clients “often want a lawyer who can handle financial and business problems as well as give legal advice.”⁵⁹ Because each of these internal matters are interrelated, carving out entity formation as an isolated and discrete transactional representation can be ill-suited for the business clients that need consistent legal advice through each of these transactions.

Moreover, these internal transactions are not necessarily contemplated at the time of entity formation. For example, years after forming the entity, the business client might want to develop an employee incentive plan to help further compensate employees and encourage them to stay with the company even though the company may not be able to provide industry-competitive salaries. While the founders may have intended to provide an employee incentive plan eventually, they could have easily assumed this issue could be sufficiently addressed in the future. Thus, designing an employee incentive plan could come into a legal services organization as a discrete transactional matter a significant time after the business entity was formed. However, the business entity form dictates and sets limitations on the type of incentive plans that are feasible for a company. For example, corporations lend themselves to structuring tax-advantageous employee incentive plans and are relatively straightforward to establish. The limited liability company form, on the other hand, can impose more complicated tax and administration issues for the company. Thus, business entity formation decisions can severely impact future business actions, including the above example of how employee incentive plans can be structured. When taken as separate transactional matters, neither the business client nor the pro bono business lawyer can fully explore and weigh all the possible options.

Thus, transactions that are seemingly distinct and separated in time should be discussed and taken into consideration at the entity formation stage. The role of the business lawyer is to anticipate not only the current but also future needs of the business client from the very inception of the entity, even if the business client does not identify this concern.⁶⁰

⁵⁸ George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 292 (2009).

⁵⁹ *Id.* at 294.

⁶⁰ *See id.* at 306 (“The firm’s success may depend on whether the lawyers create the right capital structure at the outset and revise it wisely as the company moves through each stage of development.”).

2. Business Lawyers Preventatively Maintain Corporate Governance

A significant aspect of a business lawyer's work is not conducted opposite a counterparty but is to maintain the internal workings of the business entity. Business lawyers "advise the board of directors and ensure that it meets its duty of care; proceeds properly when some directors are interested in a matter before the board; and complies with the law in the board's own regular activities, like electing corporate officers and fixing their powers and compensation, holding shareholder meetings, and declaring dividends."⁶¹

Like good nutrition is able to prevent many chronic and often fatal diseases, such as heart disease, obesity, stroke, various cancers, diabetes, and osteoporosis,⁶² maintaining corporate governance⁶³ standards can help prevent fraud, poor business decisions, and government-imposed fines and penalties.⁶⁴ Primary care physicians will advise their patients that regular consumption of fruits and vegetables, as well as regular exercise, reduce the risk of these chronic illnesses. While this does not mean the patient will never develop a chronic illness, statistics have established that these preventative measures can decrease the likelihood of some chronic diseases by up to ninety percent.⁶⁵ Likewise, a method of consistent and regular maintenance for corporate governance practices can lead to healthier business clients who are more sustainable, able to thrive, and prepared to take advantage of financing opportunities. Business lawyers ask their clients the tough questions at the right times. They communicate with their clients regularly to make sure that certain practices and procedures are maintained. They help their business clients prepare for the unknown based on best business practices. Through ongoing corporate governance representation, business lawyers provide the preventive lawyering that allows their business clients to function better and become more resilient.

⁶¹ *Id.* at 297.

⁶² See generally, *Diet, Nutrition and the Prevention of Chronic Diseases*, WORLD HEALTH ORG. (2003), http://apps.who.int/iris/bitstream/10665/42665/1/WHO_TRS_916.pdf.

⁶³ See Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359, 361–62 (2016) (defining corporate governance as both the "internal governance, which relates to the balance of power among shareholders, boards of directors, and managers" and "external constraints on corporate behavior (such as those provided by credit markets, competition, and the market for corporate control)").

⁶⁴ See Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. LAW. 59, 62 (1992) ("By acting early and effectively, directors may prevent small problems from growing into major crisis.").

⁶⁵ See Walter C. Willet et al., *Prevention of Chronic Disease by Means of Diet and Lifestyle Changes*, in DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 833, 837 (Dean T. Jamison et al. eds., 2nd ed. 2006) ("Among U.S. adults, more than 90 percent of type 2 diabetes, 80 percent of CAD, 70 percent of stroke, and 70 percent of colon cancer are potentially preventable by a combination of nonsmoking, avoidance of overweight, moderate physical activity, healthy diet, and moderate alcohol consumption.").

3. Business Lawyers Anticipate Non-Intuitive Legal Matters

Just as good corporate governance is an unseen preventive measure that undergirds most effective business operations, there are other transactional matters that even the most sophisticated business client is not likely to anticipate or intuit. When a business client receives a summons from court or documentation for a loan agreement, it can reasonably deduce that it should seek legal counsel on that matter. However, many legal matters may not come to the attention of the business client until they have already evolved into legal problems, at which point seeking legal counsel may be less effective.

The dominant pro bono business law model places a lot of responsibility on the business client to identify and bring to the pro bono counsel the specific legal issue it would like addressed.⁶⁶ This would be the medical equivalent of requiring the patient to self-diagnose her own illness before she makes an appointment with a physician. However, there are a multitude of situations where the business client could not reasonably be expected to be on notice of the legal issue until it is too late for an easily workable solution. In other words, what too often occurs with the pro bono business client is the medical equivalent of not making an appointment with a physician until the patient is already experiencing the symptoms of an illness.⁶⁷ As attorneys, we are aware that speaking to legal counsel in advance of the legal problem could prevent the problem from ever materializing for the business client. Again, the medical analogy would be having the physician counsel the patient on how nutrition helps prevent illness and maintaining a system of regular check-ups where the doctor's expertise may be able to detect the illness when the least invasive measures can effectively resolve the medical issue.⁶⁸ Thus, the business client may not seek pro bono business law representation until a serious legal problem has already materialized, whereas a business lawyer may have been able to prevent the problem from materializing in the first place.

This characterization is exemplified in securities regulation matters.⁶⁹ It may never occur to a business client that it requires such intricate legal advice to

⁶⁶ See Alice Armitage et al., *Startups and Unmet Legal Needs*, 2016 UTAH L. REV. 575, 585 (2016) (finding “that early-stage startups generally do not accurately foresee all of their legal needs.”).

⁶⁷ Cassell, *supra* note 3, at 36 (“Hypertension, diabetes mellitus, and HIV [], for example, are most often found in asymptomatic people; all three have long periods of latency before their consequences become manifest.”).

⁶⁸ See TEDMED, *David R. Williams – How Racism Makes Us Sick* (Nov. 2016), https://www.ted.com/talks/david_r_williams_how_racism_makes_us_sick#t-953290 at 14:15 (discussing health and social interventions medical and other institutions are making to decrease the adverse health effects of racism on populations of color).

⁶⁹ See Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 498 (2007) (finding “that transactional lawyers add value by reducing transaction costs (namely by reducing moral hazard by drafting transaction documents and agreements to eliminate

structure and document the company's ownership.⁷⁰ For example, an entrepreneur may not anticipate that federal and state agencies regulate how the company distributes ownership in exchange for investments from even the entrepreneur's close friends and family. However, every security issuance is regulated and needs to either be registered or qualify as exempt. If a company does not comply with securities laws, then fines, restrictions on future issuances, or even criminal charges could be imposed, which could significantly complicate future fundraising rounds. The business lawyer who understands and can anticipate these regulatory issues and consequences is invaluable in helping the business client maneuver these non-intuitive legal matters.

IV. REFRAMED PRO BONO BUSINESS LAW REPRESENTATION

Taking into consideration that business clients that qualify for pro bono representation are likely to need more rather than less legal advice,⁷¹ the legal profession needs to revise the standard form for providing pro bono business law representation to these clients. Rather than relying on the traditional pro bono individual representation model where legal issues are compartmentalized, pro bono business lawyers need to represent their pro bono business clients outside of the constraints of discrete matters and time limitations. The issue is how the legal profession should amplify the holistic models of pro bono business law representation that currently exists to redefine a new archetype of pro bono business lawyering. Given the law firm hesitations and legal aid organizations' funding limitations further explained below, law schools have an opportunity to pioneer a new archetype of pro bono business law representation by establishing primary care business law clinics that not only teach future business lawyers the interconnectedness of business lawyering, but also fill an important gap in transactional access-to-justice models.

A. Law Firm Hesitations

While pro bono programs and participation exist across law firms of various sizes, including many solo practitioners, the most institutionalized

adverse actions due to a change in incentives; by reducing agency costs by implicitly monitoring, as independent advocates for their client's position, that their client's officers act on the client's behalf; and by effectively reducing asymmetric information by giving legal opinions.”).

⁷⁰ See Rutherford B Campbell, Jr., *Regulation A: Small Businesses' Search for "A Moderate Capital"*, 31 DEL. J. CORP. L. 77, 81 (2006) (“The failure by regulators to provide a workable Regulation A exemption may be considered in terms of its unfairness to small entrepreneurs, who are unable to access external capital in a cost effective way.”).

⁷¹ See PRO BONO INSTITUTE, *supra* note 57 (describing a pro bono business client as a “business or particular venture [that] possess[es] insufficient operating funds to pay for legal and other professional services”).

segment of pro bono lawyers work at large law firms.⁷² Although “lawyers in large firms (over 100 lawyers) comprise only about 16% of the lawyers in private practice, . . . large firms now have well-organized pro bono programs that enjoy considerable administrative support.”⁷³ Which means that the protocols and procedures of large firms have a significant impact on the administration of pro bono programs. For this reason, this essay focuses its comments on the role of large firms.⁷⁴ Large law firms have the money and resources but often lack the interest to commit to long-term pro bono business clients in the role of outside general counsel.⁷⁵ This is in part because law firms participate and invest financial resources into pro bono programs to accomplish several different objectives. In addition to promoting the public good, law firms support pro bono because it is connected to the firms’ “reputation, recruitment, retention, training, networks, and workplace satisfaction.”⁷⁶

Acknowledging that “[i]t takes an enormous amount of work to do pro bono effectively and ensure that clients are well-served,”⁷⁷ law firms are hesitant to commit to a business client beyond a discrete legal issue. If a large law firm were to spend significant time and attention on a limited number of long-term pro bono business clients, it may not necessarily receive a larger return on its pro bono investments in recruitment of new associates and firm marketing. In their research, Professors Scott Cummings and Deborah Rhode, conclude that much of the problem with large firm pro bono programs lies with “misaligned incentives,” which rank and reward firms for quantity of pro bono hours, not necessarily quality of legal services.⁷⁸

⁷² See Cummings & Rhode, *supra* note 26, at 2365 (“Yet large firms, because of their size and leadership role, have been the focus of bar initiatives and have, in turn, made the most significant internal investments in pro bono infrastructures.”).

⁷³ Levin, *supra* note 46, at 699.

⁷⁴ But see Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1430 (1998) (“Solo and small firm (two to five) lawyers, who comprise 63% of private practitioners, contribute more time and in greater numbers to the pro bono legal representation of persons of limited means than any other group of lawyers.”). Thus, I acknowledge that more research is needed to analyze the impact of the primary care business law representation model on smaller firms, solo practices, and in-house counsels who may collectively have less time and resources to devote to pro bono business clients.

⁷⁵ I knowlege that more empirical data is needed to determine exactly what percentage of law firms have a policy against general counsel representation for pro bono business clients. Moreover, even when not institutionalized at the law firm level, there are examples of partners and senior associates who have developed long-term relationships with pro bono business clients that resemble general counsel representation. This too would need to be taken into consideration.

⁷⁶ See Rhode, *For Whose Good*, *supra* note 32.

⁷⁷ Karen A. Lash, *Pitching Pro Bono: Getting to First Base with the “Big Firm”*, 2 DEPAUL J. FOR SOC. JUST. 141, 144 (2008).

⁷⁸ Cummings & Rhode, *supra* note 26, at 2430.

The interest convergence between training junior associates and offering long-term corporate representation may provide an opportunity to realign the incentives for large law firms towards providing primary care pro bono business law representation. The value that pro bono business representation can provide in terms of training, retention and workplace satisfaction⁷⁹ may increase if business lawyers are allowed and encouraged to develop sustained relationships with their pro bono business clients.⁸⁰ Where professional and public interests align there should be space for large law firms to reconsider their policy on discrete business client matters. Even if firms do not dramatically alter their policies to allow for long-term pro bono business representation, pro bono programs should at least require their volunteer attorneys to complete a comprehensive summary of legal needs the pro bono business client is likely to encounter in the next three months to a year. In this way, pro bono attorneys can facilitate their pro bono business clients in anticipating and proactively planning for subsequent matters that would likely benefit from legal counsel.

B. Legal Aid Organizations' Funding Limitations

A significant segment of legal services organizations that provide access to pro bono business representation are legal aid organizations. There are legal aid organizations that in addition to pairing business clients with pro bono business lawyers also employ cause lawyers who represent their business clients as outside general counsel.⁸¹ However, most legal aid organizations are under constant financial and political pressures to reach more clients with increasingly fewer financial resources.⁸² Legal aid organizations are currently under fire regarding the terms of their government funding⁸³ and thus, are forced to develop

⁷⁹ Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 *BUFF. L. REV.* 1355, 1382–91 (2007) (reporting that the most significant motivating factors were intrinsic satisfaction from doing pro bono work and the normative obligation from being part of a profession).

⁸⁰ See Alina Ball, *Social Enterprise Governance*, 18 *U. PA. J. BUS. L.* 919, 976 (2016) (describing the benefit of training junior associates through pro bono representation for social enterprise clients).

⁸¹ See, e.g., *Community Development Project*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/civil/civilpractice/communitydevelopmentproject.aspx> (last visited Apr. 24, 2017).

⁸² See Rhode, *ACCESS TO JUSTICE*, *supra* note 9, at 105.

⁸³ See Debra Cassens Weiss, *Trump Budget Eliminates Legal Services Corp. Funding*, *ABA J.* (Mar. 16, 2017, 8:45 AM), http://www.abajournal.com/news/article/trump_budget_eliminates_funding_for_legal_services_corp/ (“The LSC is among 19 agencies in line for total elimination of funding [under President Donald Trump’s 2018 proposed budget.]”); *Stand Up for Legal Aid!*, ABA, http://www.americanbar.org/advocacy/governmental_legislative_work/defender.html#talkingpoints (last visited Apr. 24, 2017) (providing information on the effectiveness of LSC and that it “only accounts for 1/10,000th of the total federal budget.”); REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 249 (1919) (arguing that a well-funded civil legal aid network is “of direct concern not only

systems that allow them to reach the largest number of clients.⁸⁴ In fact, the pro bono system in the U.S. evolved against the backdrop of chronic underfunding to legal aid organizations and the increased access-to-justice demands of individuals and organizations.⁸⁵ The three-step pro bono business law model⁸⁶ mentioned above is designed to reach the largest quantity of clients in a systematic method.

Legal aid organizations may also want to advocate for investment in developing a legal technology that would allow them to maintain their breadth of clients without compromising attention to the unique needs of business clients.⁸⁷ A cloud-based platform, for example, could allow a legal aid organization to input client data that could send automated reminders such as board meetings and filing requirements. Moreover, the platform could request new information from the business client based on algorithmic predictors of when the pro bono business client might need to consult with a pro bono business lawyer such as anticipated financings or new contractual relationships. Incorporating technology in this manner allows the organization to more closely resemble the pro bono transactional counsel administered through organizations such as Lawyers Alliance for New York.⁸⁸ Absent co-counsel from the legal aid organization who can coordinate the legal services and ensure that each pro bono lawyer knows the relevant client history and future plans, a well-designed legal technology may help the legal aid organization and the client maintain contact and continuity on interconnected legal matters.

to the fair administration of justice, but to the well-being of the nation. It is of high importance that such developments be encouraged and supported, . . . because in them . . . is contained our best immediate hope for a realization of our ideal of such an equal administration of the laws . . .”).

⁸⁴ See Cummings & Rhode, *supra* note 26, at 2365 (“Despite successful efforts to diversify funding, the current civil legal aid system has remained chronically underfunded; it can meet less than one-fifth of the estimated needs of eligible low-income individuals.”); Cummings, *Politics of Pro Bono*, *supra* note 24, at 19–33 (documenting the efforts to cut funding to the Legal Services Corporation (LSC)).

⁸⁵ See *id.* at 2367–68.

⁸⁶ See *infra* Section I.B.

⁸⁷ See NORC at the University of Chicago, *Understanding the Impact of Health IT in Underserved Communities and Those with Health Disparities*, 2–5 (May 2013), available at https://www.healthit.gov/sites/default/files/hit_disparities_report_050713.pdf (finding that chronic diseases disproportionately affect underserved groups who also face lower quality of life and life expectancy, but evidence shows that health informational technology not only “offers promising tools to address chronic diseases by facilitating the continuity of care and long-term follow-up needed for successful management of these conditions” but also helps decrease health disparities in underserved populations).

⁸⁸ See, e.g., *Our Service Model*, LAW. ALLIANCE FOR N.Y., http://www.lawyersalliance.org/service_model.php (last visited Apr. 24, 2017) (“When Lawyers Alliance matches clients with pro bono attorneys, [their] staff provides co-counseling support. A Lawyers Alliance staff attorney serves as co-counsel on each legal matter placed with a volunteer and is available to provide guidance and resources to the client and volunteer.”).

Recognizing the characteristics that make pro bono business clients distinct from individual clients, legal aid organizations may want to also use their prestige to strongly encourage their partner law firms to take on the same pro bono business clients whenever practically possible. It is hard to imagine law firms being able to maintain the quantity of pro bono business representation without their strategic relationships with legal services organizations that recruit and screen pro bono business clients. Thus, law firms need legal services organizations, many of them legal aids, to provide these connections and to streamline the client selection process. Legal services organizations, and legal aid organizations in particular, may be able to leverage the law firms' dependence on their services to include more stringent guidelines on providing continuous pro bono business representation whenever practically possible.

C. Law Schools as Anchor Institutions

Given the funding limitations on legal aid organizations and the hesitancy of large firms, there is a vacuum of institutional leadership on pro bono business representation reform. Law schools have the opportunity to truly pioneer the institutionalization of primary care counsel that can serve as a new archetype for pro bono business representation. Universities and colleges often develop into institutional anchors within the communities they occupy.⁸⁹ Their ownership and development of real estate as well as their investment in promoting the professional skills of their graduates, leads higher education institutions to become a physical space for community engagement and services.

As anchor institutions, law schools have functioned as hubs for pro bono legal services and representation through clinical and pro bono programs for over fifty years.⁹⁰ However, the overwhelming majority of clinical programs involve individual representation in dispute resolution matters.⁹¹ Although the quantity of

⁸⁹ See HENRY LOUIS TAYLOR, JR. & GAVIN LUTER, ANCHOR INSTITUTIONS: AN INTERPRETIVE REVIEW ESSAY 2–4 (2013), available at http://www.margainc.com/files_images/general/Literature_Review_2013.pdf (describing the historical context of “institutions [stepping] forward as the ‘anchors’ of their communities, particularly institutions of higher education and academic medical centers . . .”).

⁹⁰ As Philip Schrag and Michael Meltsner state, “clinical legal education was born in the social ferment of the 1960s.” New York State Judicial Institute, PARTNERS IN JUSTICE: A COLLOQUIUM ON DEVELOPING COLLABORATIONS AMONG COURTS, LAW SCHOOL CLINICAL PROGRAMS, AND THE PRACTICING BAR 8 (2005), quoting Philip G. Schrag & Michael Meltsner, REFLECTIONS ON CLINICAL LEGAL EDUCATION 5 (1998). See also Richard A. Boswell, *Keeping the Practice of Clinical Education and Scholarship*, 43 HASTINGS. L.J. 1187, 1187–88 (1992) (“In the late 1960s law schools—primarily at the behest of students, the legal profession, and others outside of academia—began developing clinical programs with the objective of delivering legal representation to persons who traditionally were underrepresented.”).

⁹¹ See Tremblay, *supra* note 45, at 15 (“[T]he triage-driven sentiments of the access-to-justice campaigns plainly treat dispute resolution as more critically important than transactional business development.”); Patience Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*,

business law clinics has rapidly increased over the last decade,⁹² business law clinical pedagogy is still evolving and coming into its own identity within legal education.⁹³ Thus, there is an opportunity for clinicians to design business law clinics to fill a distinct void in pro bono business representation.⁹⁴ As outlined above, there are few pro bono programs that provide pro bono business clients with the primary care representation they need to thrive and compete in the marketplace. Business law clinics can alter this by serving as outside general counsel to their business clients over the course of a long-term relationship. By structuring their business law clinic in this manner, business law clinicians would make an important impact on not only access-to-justice models,⁹⁵ but also on business law pedagogy.⁹⁶

19 LEWIS & CLARK L. REV. 413, 415 (2015) (“Law school curricula have historically failed to accurately reflect the realities of law practice by basing instruction almost entirely on litigation practice to the exclusion of business law and transactional practice.”).

⁹² See Jennifer Fan, *Institutionalizing the USPTO Law School Clinic Certification Program for Transactional Law Clinics*, 19 LEWIS & CLARK L. REV. 327, 332 n.14 (2015) (identifying 188 transactional law clinics as of August 1, 2014); Susan R. Jones and Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 J.L. & POL’Y 85 (2013) (noting that in 2013 there were more than 140 transactional clinics at just over 200 American Bar Association approved law schools, which is a twenty-eight times more than the five transactional clinics reported in 1992).

⁹³ See Lynnise Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175, 180 (2017) (“While business law clinics have become quite popular, transactional pedagogy and transactional clinical pedagogy have not developed a clear methodology for incorporating economic and social justice into their teaching.”); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215 (2013) (providing a pedagogical framework for representing social enterprises in a business law clinic).

⁹⁴ See Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 3 (1995) (noting “theory to improve practice provides a solid foundation” for improved pedagogy as well).

⁹⁵ Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 1011 (2004) (arguing that clinicians must do more than “maintain the focus of their teaching on the supervised representation of low-income clients by their students, [clinicians] also must recognize that there is more to the project of enhancing access to justice than simply offering law students the opportunity to learn lawyering skills by representing low-income clients . . .”).

⁹⁶ In providing ongoing and integrated legal representation as outside general counsel to their business clients, business law clinics would better align themselves with the dominant theory of “community lawyering” in clinical legal education. 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, 364 (“[C]ommunity lawyering is an *approach* to the practice of law and to clinical legal education that centers on building and sustaining relationships with clients, over time, *in context*, as a part of and in conjunction *with* communities. It incorporates a respect for clients that empowers them and assists them in the larger economic, political, and social contexts of their lives, beyond their immediate legal problems.”).

Recognizing the need for primary care representation, I established the Social Enterprise & Economic Empowerment Clinic at UC Hastings College of the Law (the “Social Enterprise Clinic”)⁹⁷ with a commitment to representing our business clients on various transactional matters over a long-term relationship. While a business client is able to leave us for other counsel at any time, we do not engage with a business client unless we are invested in developing a long-term relationship with that business client. In this way, the Social Enterprise Clinic provides transactional representation that is contextualized by years of previous representations on other, often interconnected, legal matters. Law students in the Social Enterprise Clinic are learning how to represent business clients in a structure that resembles how business lawyers actually practice, as an associate regularly inherits a relationship with a business client that the law firm has cultivated for years. While the Social Enterprise Clinic is not unique in its outside general counsel model of business representation,⁹⁸ it unfortunately is not the norm for business law clinics.

Providing on-going transactional representation as outside general counsel would not require a drastic transfiguration of business law clinics. Regardless of the legal issue the business client identifies, there are some business law clinics that already perform a robust diagnostic of the business client to determine if any other legal matters are present prior to entering into a legal services agreement.⁹⁹ Serving as general counsel would take the relationship one step further where the business law clinic would regularly check-in with the

⁹⁷ See *Social Enterprise & Economic Empowerment Clinic*, UC HASTINGS COLLEGE OF THE LAW, available at <http://www.uchastings.edu/academics/clinical-programs/clinics/socialenterpriseanconomicempowerment/index.php>.

⁹⁸ Michael Diamond, *Community Lawyering: Introductory Thoughts on Theory and Practice*, 22 *GEO. J. ON POVERTY L. & POL’Y* 395, 400 (2015) (“Our model of practice is to be heavily engaged with our client’s activities. Thus, we participate in the client’s planning meetings and strategy sessions over a range of topics that go beyond the identified legal issues. For example, we help our client with the real estate development process, including the examination of project feasibility, financing, and setting ultimate carrying charge (the co-op equivalent to rent).”). See *Affordable Housing Transactions Clinic*, GEORGETOWN LAW, <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HHHC/> (last visited April 25, 2017). The Ludwig Center for Community & Economic Development at Yale Law School has also continuously represented some of its clients for more than a decade as outside general counsel. See also *Ludwig Center for Community & Economic Development*, YALE LAW SCHOOL, <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/ludwig-center-community-economic-development> (last visited Apr. 25, 2017).

⁹⁹ Interview notes on file with author. See, e.g., *Entrepreneurial Law Clinic*, UNIV. OF WASH. SCHOOL OF LAW, available at <https://www.law.washington.edu/clinics/entrepreneurial/>; *Entrepreneurship & Innovation Clinic*, BOSTON COLLEGE LAW, available at <https://www.bc.edu/bc-web/schools/law/academics-faculty/experiential-learning/clinics/entrepreneurship-innovation.html>; *Social Enterprise and Nonprofit Clinic*, GEORGETOWN UNIVERSITY LAW CENTER, available at <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/>.

business client and be willing to provide representation on a variety of transactional issues over a long-term relationship. If institutionalized as the business law clinic norm at law schools, the general counsel model of pro bono business representation could have rippling effects on pro bono business representation broadly.¹⁰⁰ Although business law clinics are not pedagogically designed to scale and grow large,¹⁰¹ they do now reach a substantial portion of law students who pursue transactional careers. Business law clinics would inculcate in students how to provide pro bono representation that is best for their pro bono business client within a model that provides training that is analogous to their future transactional practice.¹⁰² Thus, junior associates would enter into law firms with an alternative model for pro bono business representation.¹⁰³ This could further influence how law firms and legal services organizations continue to structure their policies on and programs around pro bono business representation. Business law clinics as the outside general counsel of pro bono business clients is one example of how clinical pedagogy's impact on legal practice can also continue to close the access-to-justice gaps still prevalent in our society.¹⁰⁴

V. CONCLUSION

Corporations are not the same as individuals,¹⁰⁵ but they are corporal and dynamic in their inner workings. The complexity of business entities, their

¹⁰⁰ See Robert F. Kennedy, University of Cape Town (June 6, 1966), available at <http://www.rfksafilm.org/html/speeches/unicape.php> (“Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current which can sweep down the mightiest walls of oppression and resistance.”).

¹⁰¹ Wizner & Aiken, *supra* note 95, at 999 (“In order to use clients’ cases for teaching, [clinicians have] to take smaller caseloads and spend more time examining, preparing, reflecting, and in other ways using clients’ cases as teaching ‘texts.’”).

¹⁰² See Robert Granfield & Philp Veliz, *Good Lawyering and Lawyering for the Good: Lawyers’ Reflections on Mandatory Pro Bono in Law School*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 67 (Robert Granfield & Lynn Mather eds., 2009) (empirically demonstrating that when students develop narratives of pro bono around *good lawyering* it has greater salience for the students than *lawyering for the good*).

¹⁰³ Pantin, *supra* note 93, at 180 (highlighting “the uniqueness [] a transactional clinic can offer as a public service model to students.”). *But see* Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations among Lawyers*, 41 LAW & SOC’Y REV. 113, 142 (2007) (noting the workplace, not law school exposure to pro bono, is a stronger predictor of pro bono socialization because of “the institutionalized norms, values, pressures, and constraints that exist within distinct workplaces”).

¹⁰⁴ See Dyal-Chand & Rowan, *supra* note 6.

¹⁰⁵ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting) (“[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey

construction under the law, and the wide variety of non-intuitive regulations to which they must comport makes the representation of business clients fascinating. To continue to advance our representation of the most vulnerable business clients, we must develop pro bono business lawyering models that reflect the true nature of business lawyering. Business law clinics have an opportunity to pioneer and develop a new institutionalized archetype of pro bono business law representation. Those clinics are not only within legal institutions that serve as institutional anchors in their communities, but they are also tasked with training the next generation of competent business lawyers. A general counsel model of pro bono business law representation not only fills a current gap in dominant access-to-justice structures, but also appropriately prepares future business lawyers for the rigor and interconnectedness of transactional practice. Once established as the archetype of business law clinics, other legal institutions—such as law firms and legal services organizations—can innovate to further entrench this model of pro bono business representation. In this way, business law clinics would follow in the footsteps of the transformative power of clinical legal education.¹⁰⁶ For these reasons, law schools can and should develop business law clinics that provide on-going and preventative legal care to pro bono business clients that each have the possibility of maturing into sustainable and resilient engines of economic and innovative activity within their communities.

are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”).

¹⁰⁶ See YALE L. SCH., *Challenging the Refugee and Muslim Ban* (Feb. 1, 2017), <https://law.yale.edu/yls-today/news/challenging-refugee-and-muslim-ban> (describing the first legal action filed in response to President Trump’s executive order submitted by students and clinical faculty in the Worker & Immigrant Rights Advocacy Clinic at Yale Law School); Wizner & Aiken, *supra* note 95, at 1008 (“It is through teaching that we help our students appreciate the broader lessons about power and privilege, about their role in bringing about or inhibiting social justice.”); Lucie E. White, *The Transformative Potential of Clinical Legal Education*, 35 OSGOODE HALL L.J. 603 (1997).