Community Lawyering: Introductory Thoughts on Theory and Practice

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PRACTITIONERS’ DISCUSSION: COMMUNITY LAWYERING

Community Lawyering: Introductory Thoughts on Theory and Practice

Michael Diamond*

This Practitioners’ Discussion is dedicated to the idea of community lawyering, a very ambitious undertaking. I say that for several reasons. As someone who has thought and written about community lawyering for many years, I am all too aware of how opaque and difficult the concept is. It has been used, often without critical thought, by a wide range of people—from practitioners to academics to politicians to critics. Rarely do users of the term consider its possible meanings. I would like to articulate some of the more prominent ones and then suggest some thoughts on community practice.

There are several fundamental questions that one might ask in seeking the meaning of the term “community lawyer.” Albeit somewhat theoretical, the most basic questions involve delving into exactly what is meant by the term “community.” For what, exactly, is the community-lawyer lawyering? Further, once a client has been identified, questions will arise about how the lawyer should relate to that client and about the role the lawyer ought to play in assisting the client to achieve its goals. There is a long and rich literature concerning the latter question but a fairly sparse body of legal writing on the former. In this essay, I would like to elaborate on both of these issues and then bring these ideas together to develop a concept of community lawyering. I will then discuss some practical applications of community lawyering in the context of an affordable housing program I run at the Georgetown University Law Center.

I. THE NATURE OF COMMUNITY

Among the most basic questions about community lawyering involves determining what is meant by the notion of “community.” For what, exactly, is the community-lawyer lawyering? In answering this question one will have to consider the lawyer’s relationship to people, places, and ideas.

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Let us consider some established meanings of the term “community.” The Oxford English Dictionary devotes twenty-six pages to definitions and examples of community and its various combinations. Two of them have special resonance here:

1. “A body of people who live in the same place, usually sharing a common cultural or ethnic identity. Hence, a place where a particular body of people live.”

2. “...a group of people distinguished by shared circumstances of nationality, race, religion, sexuality, etc.; esp. such a group living within a larger society from which it is distinct.”

Combining elements of these two definitions, we can derive what may be the most prevalent operative definition of community: a bounded geographical space (that is often used interchangeably with the idea of “neighborhood”) in which the residents share a common culture, religion, language and values.

Certainly, there are other plausible definitions of community. For example, community could entail a group with a shared fundamental characteristic, regardless of their geographic proximity. Thus one could conceive of a community of the poor, or of Catholics, or of Georgetown alumni. Another resonant meaning, also provided by the Oxford English Dictionary, defines community as “[t]he civic body to which all belong; the public; society.” This definition offers a broader meaning to the concept of community and might include the District of Columbia, as a whole, as opposed to a particular neighborhood with a cultural, ethnic, or racial identity. Accepting this definition would offer a very different gloss on the term.

A more abstract example of community might entail a cause, such as that of affordable housing or of racial integration. Over the past two decades, these latter concepts have arisen in the legal literature under the banner of “cause lawyering.”1 Given these different possible meanings of the term community, among the first questions to be asked is who or what does the so-called community lawyer represent? This depends on a variety of factors, perhaps the most important of which is the lawyer’s own view of the matter.

Of course, a lawyer who works in a geographically bounded area and takes his or her clients from that area might qualify as a community lawyer, regardless of any philosophy or theory of practice that lawyer might hold. It seems clear, however, that the concept of a community lawyer must mean more than that because if it does not, most practicing lawyers in the United States would be community lawyers. Thus, the term almost certainly connotes a conscious or unconscious set of goals concerning the community in question. The community lawyer brings a particular sensibility to his or her tasks, but this sensibility, while

1. See, e.g., CAUSE LAWYERING (Austin Sarat & Stuart Scheingold Eds. 1998).
necessary, is not sufficient to identify a community lawyer. The sensibility must be coupled with a coherent social theory towards which the lawyer works. More about this issue to follow.

II. THE COMMUNITY LAWYER

In order to be considered a community lawyer, I believe that several elements must be present. These include, among other attributes, an expansive view of the role of a lawyer; a particular type of relationship with the client; a knowledge of the community in which the lawyer works, and of its leadership; and a theory of action, which has both legal and political features, with a goal of improving for its residents the physical and social environment of the community. I would like to elaborate briefly on each of these elements.

A. The Lawyer–Client Relationship

There has long been a concern that when lawyers represent clients in disempowered communities, the lawyer’s will would overbear that of the client so that the lawyer’s goals, and the lawyer’s sense of what-should-be, would prevail over the client’s. A good deal of literature over the past several decades has called for a self-conscious effort by lawyers to create a non-hierarchical relationship in which clients are both educated about the choices with which they are confronted and about the implications and consequences of any particular choice. The choices, then, are to be left to the autonomous and empowered client.

This literature raises questions about whether the lawyer is merely the provider of information or instead is a participant in the clients’ decision-making process. While there is significant debate on this point, my own view is that the lawyer should give the client the benefit of whatever experience and viewpoint the lawyer has. After all, in seeking a successful outcome for the issue in question, the client almost certainly came to the lawyer for those very attributes. By giving the fullest level of both information and opinion, the lawyer is most likely to meet the autonomously expressed desire of the client. At the same time, the client would have a greater store of information and a direct expression of the lawyer’s view. This credits the client’s autonomy with being able to digest and evaluate the lawyer’s description of the situation, the choices presented and their consequences, and the lawyer’s opinion about which course to follow. Given a level of faith in the client’s ability, this direct approach limits the risk of what many progressive lawyers fear most—the lawyer’s manipulation of the client so as to overbear the client’s judgment and will.

B. The Political Demography of the Community

The issues presented in this section relate closely with the discussion about the nature of a community. As I mentioned, the term “community” is regularly used without the user giving much attention to its meaning. Community is often thought of, one might say rather superficially, as a monolith. Of course, community is not that. It is comprised of people with different priorities and often widely disparate views on common issues. Therefore, community typically contains not one but many variations among priorities, goals, and strategies. How, then, does a “community lawyer” decide who and what to represent? In making these decisions, the lawyer will have to consider several factors, some internal to the lawyer (more about this in the next section) and some related to the community to be served.

As to the community, the lawyer will need to get out into the street (actually or virtually) and talk to residents in order to get the sense of the physical and political conditions, the community groups that are active and the issues with which they are concerned, the conflicting goals and strategies, the personalities of the leaders, and the degree of support for the different groups and their leaders. The lawyer also needs to talk to such other professionals as lawyers, physicians, educators, organizers, and clergy who live or work in the community. The process of gaining knowledge and trust must be an ongoing one for as long as the lawyer works in the community, but there must be a foundation from the beginning. The first job, then, is to get to know the people, places, issues, and points of contention in the area, while at the same time creating and building relationships with residents, institutions, and political players.

C. The Need for a Socio-Political Theory

Even with a good knowledge of community issues, people, and politics, a community lawyer needs something more—a coherent theory of how to address the identified problems. This means that the community lawyer needs to understand the underlying causative factors in community disempowerment, the symptoms they produce, and a theory to combat the causative factors and to ameliorate the symptoms.

Of course, people, including community lawyers, will differ about the nature of the causative factors. If we were certain of causation, solutions would be more readily apparent. Thus, the theory adopted by a community lawyer will be somewhat personal and, perhaps, highly contested. Given the wide range of issues and strategies, some in competition with others as to goals and/or priorities, the community lawyer must be very careful about the projects he or she chooses to work on. To be effective, these projects ought to be complementary of a clearly delineated set of goals. Thus, the case-selection process is critical to implementing the coherent theory that I believe is an essential element of community lawyering. The lawyer should choose to work on those projects that
are important within the subject community that most closely further the lawyer’s own theory of community lawyering—what I have elsewhere called “a defensible set of community goals.” In this way, the lawyer can remain faithful to his or her own theory of community and of lawyering while honoring the wishes and desires of a legitimate segment of a community that may have highly diverse views. With such a model, both the lawyer and the community can be seen as having a significant level of autonomy.

III. SOME PRACTICAL APPLICATIONS OF ABSTRACT THEORY

In this Part, I will tie the earlier, somewhat abstract, discussion to a more concrete situation. I will use as an example a clinical program, the Harrison Institute for Housing and Community Development, which I direct at the Georgetown University Law Center. The essence of the program involves assisting tenant associations in the purchase, renovation, and operation of their buildings as long-term affordable housing. We think of ourselves, although with a questioning approach, as community lawyers.

Our work is done throughout the District of Columbia, rather than in a single neighborhood. It focuses, however, on two distinct situations. The first involves neighborhoods that have had persistently high levels of poverty and low levels of social amenities and city services. These neighborhoods have a good deal of housing that is affordable, but it is often in deteriorating condition.

The second situation involves neighborhoods undergoing rapid gentrification. In these neighborhoods, the supply of affordable housing is dwindling, and lower-income residents are being displaced at the same time that amenities and city services are increasing. These situations present different kinds of issues for a community lawyer, but the methodology of our practice remains very similar. In presenting some thoughts on the nature of our practice as it relates to community lawyering, I will track the headings set out in Part I, above.

A. The Lawyer–Client Relationship

The first significant element of the lawyer–client relationship for us is that our client is always a group, a tenant association, or a cooperative, typically organized as a non-profit and cooperative corporation, respectively. As such, we have several different legal and personal relationships. From an ethical point of view, our relationship is with our client, the corporate entity. However, as a practical matter, our relationship is most strongly constructed with the corporation’s leadership and board of directors. This can occasionally present a difficult dilemma, as the wishes of a leader with whom we have strong ties varies from our view, or perhaps from the views of others in the group.

3. See Diamond, supra note 2, at 114.
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 charges (the co-op equivalent to rent). We also assist in organizing building residents and in training them about the development process, board governance, and operating a building. Part of the reason for the broad scope is that there are so few other professionals available to fill the client’s needs. Another reason is that the issues with which we are dealing are inextricably intertwined. Another reason is that it enhances the knowledge and skill base of our clients so that they might more easily assess their options and choose among them. This serves the dual goals of autonomy and community development.

In order to perform these tasks, we must have the trust of the client and of its membership, particularly its leaders. We do this by being present and available at meetings, typically at the client’s building. At these meetings we engage in discussions, including explanations of difficult concepts, with the members of the group. We delve deeply into the goals, legal or non-legal, of the group and present options and opinions. This level of participation is unusual for the typical lawyer but essential for one who aspires to be a community lawyer.

Our students, who put in fifteen to twenty hours per week during the school year, much of which is in client contact situations, also develop a deep and interactive relationship with the client’s leadership. To do so, they must address apparent differences between themselves and the members of the leadership, including differences of race, class, gender, educational achievement or language. We spend a good deal of time in seminar and in supervision meetings discussing these possible differences, student consciousness of them, and ways of overcoming any barriers these differences might present. The same issues present themselves for anyone seeking to work in a community setting as a community lawyer, and they must be addressed.

B. The Political Demography of the Community

Harrison attorneys work within two different concepts of community. The first is akin to a conventional geographic neighborhood. For example, we have done a good deal of work in the Marshall Heights section of Southeast Washington and in Columbia Heights in the Northwest quadrant of the City. In the second concept of community, we work in a more abstract environment, that of a cause. Our cause, as I have mentioned, is the preservation of affordable housing.

In the first concept, we have been repeat players in the process of tenant-owned affordable housing development. As such, we have regularly been engaged with local non-profit organizations, churches, and politicians; we have appeared and presented material at local events and workshops; and we have connected with community leaders of a variety of interests and positions. Most importantly, we
have engaged in on-going dialogue with the membership of our various clients. From these contacts and activities, we have learned about the communities in which we work on a very deep level, and we have become known by a variety of parties and participants in these communities.

Our involvement in the second type of “community” is subtler and more complex. Because it is not geographically delineated, the kinds of knowledge and familiarity we achieve is quite different. Here the community is a mission or cause. We have to understand the competing issues we face and the different priorities of members within this community. For example, a municipality may prefer gentrification and upscale development. Such activities will likely increase a tax base and reduce the social welfare costs required of the government. There may be ancillary benefits as well, through the creation of mixed-income neighborhoods and the reduction in the high concentrations of poverty that exist in many municipal neighborhoods. However, these benefits would come, if at all, at the cost of displacement and its ensuing loss of personal connectivity. Others might seek to preserve and improve internally the existing community at the risk of entrenching economic segregation.

Similarly, there may be very different priorities among social welfare activists, including health, nutrition, education, and jobs, as well as the production and preservation of affordable housing. These action-areas may be competing for scarce funding where all such needs cannot be met. Even within the sphere of affordable housing activists, there are many highly debated issues. Among these is the question of home-ownership or rental; preservation of affordability or wealth creation; and affordability or fully accessible or highly green renovations. These different goals and priorities are all part of what I call the conflict of competing social goods. In a world of finite resources, where these social goods cannot all be maximized at the same time, the question is how should society chose among these things that most people would say are socially desirable. Questions of this sort lead us directly into the final element of community lawyering: the need for a theory.

C. The Need for a Socio-Political Theory

There is more to being a community lawyer than merely working and accepting clients from a community. It also involves the lawyer having a theory of how to engage with clients and of the ends toward which the practice is oriented. At Harrison, we believe in a collaborative relationship with our clients and, to the extent it is possible and ethically appropriate, a similar relationship with outside participants such as organizers, funders, developers, and municipal agencies. We also have a particular theory about tenant ownership and the goals of that ownership. We believe ownership enhances resident participation, capacity, and social capital.

We also believe that because the demand for decent affordable housing is increasing while the supply of such housing diminishes, the goal should be to
preserve what exists. This goal, however, is often pursued at the expense of wealth creation for the resident-owners of the housing. This is because in an upwardly spiraling housing market, if owners can sell at the market price, that price will often be out of the reach of low-income buyers. Thus, the transactions with which we deal typically have restrictions (often imposed by mission-driven lenders) on the amount of equity that an owner can take out of the property when he or she sells. Any excess equity remains with the property for the benefit of subsequent low-income buyers.

To give an example of this form of preservation, we represented a large building in a very heavily gentrified neighborhood in D.C. Through a variety of subsidies, the residents were able to purchase and renovate the building while keeping it affordable to low-income households. Over time, as might be expected, some households chose to move and were in a position to sell their interest in the development. Had they been able to sell at the market price in the area, they would have received a significant financial benefit. However, no other low-income family could have afforded to buy the interest. To prevent this, a covenant that ran with the land restricted, through a formulaic calculation, the selling price of the interest to one that would be affordable to another low-income household. In this way, while the selling household received less than the market would have allowed, the buying household got the benefit of the subsidy available to the seller at a price it could afford to pay. In this way, the equity buildup was shared among generations of buyers, and affordability was preserved, while some equity was still available to the seller.

These basic principles are particularly relevant in our client-selection process. Since there is a demand for service that far exceeds our ability to provide, we choose clients with whom we see the best chance for an ongoing collaborative relationship and whose goals are for the preservation of affordable housing for the long-term future. In this way, we retain our own sense of mission while taking on a defensible set of community goals. At the same time, we limit the possibility of taking on any project that would present a potential conflict (real or apparent) with these goals.

We would not, for example, represent a developer, even an allied, mission-driven developer, because that would present conflicts (albeit sometimes only cosmetic ones) with our goal of tenant ownership and empowerment. It is a positional conflict because there are times that the developer’s goals will be contrary to those of the residents of a building—and we believe we should not be seen as representing both sides of a political divide. Similarly, we will not take on a tenant group whose goal it is to flip its building to a market-rate developer in order to obtain a significant financial benefit. Here the conflict of competing goods comes into play. We surely support the ability of low-income residents’ acquiring wealth—a goal that most people, in the abstract, would applaud. However, when it comes at the cost of preserving affordable units, our wealth-creation sympathies give way to the preservationist mission we have undertaken.
While people, including other community lawyers, can certainly disagree with our theory and priorities, the important point is that without the theory, the practice risks becoming incoherent or even self-opposing. Such a practice may be what conventional lawyers engage in, but it is antithetical to that of a community lawyer.

IV. Conclusion

Lawyering to combat poverty and oppression can take many forms. There have been victories won through litigation, advocating for legislative and regulatory reform, and through transactional activities. Community lawyers may engage in all of these activities, but the community lawyer is set apart from his or her conventional colleagues. The community lawyer engages in expansive lawyering, with a non-hierarchical and collaborative relationship with clients, and with a coherent social and political theory that guides his or her practice. The practice may be circumscribed by geographical or conceptual boundaries, but within those boundaries, the engagement is conscious, continual, and deep.