COMMENT

Impact Transactions From a Practitioner's Perspective

by Ann E. Condon

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In *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, Patience A. Crowder proposes a theory of how written agreements can be a vehicle to foster "collective impact" collaborations to address social ills.[1] Collective impact initiatives (CIIs) bring together actors with diverse experiences and perspectives to focus on an issue, with the potential to create new skill sets and solutions to long-standing problems. Professor Crowder posits that the absence of an existing contractual framework is one of the emerging barriers to the effectiveness of CIIs, many of which are currently based on informal relationships and not enforceable agreements. In particular, the author believes we need to develop practical contract drafting strategies to memorialize collective impact strategies. This article is designed as the first in a series on collective impact. Future articles will review specific contract law issues, recommend governance structures, and explore how collective impact can be scaled as a tool in the regional equity movement. One element that is missing from this article is evidence that organizations working on social projects will gain tangible benefits from adopting a formal contract. Articulating these benefits, perhaps through detailed case studies, should be a key element of Professor Crowder's future work.

I. CIIs and Social Change

Professor Crowder is correct that CIIs are a promising vehicle for effecting social change. My perspective is that of a practitioner. For the last three years of my career as a lawyer at General Electric (GE), I acted as legal counsel to the GE Foundation. Using my more than 30 years of experience working on transactions, I supported the program managers as they developed unique collaborations around science, technology, engineering, and math (STEM) education and healthcare, and in particular, developed regional programs to address the opioid crisis. The opioid work stream recognized the need to (1) build collaborations between governmental agencies, such as the police and first responders; (2) involve local service providers, such as hospitals and community health centers; (3) build on the expertise of nongovernmental agencies, such as those providing mental health and housing support to affected families, and (4) find ways to engage addicted individuals. One of the significant lessons learned has been the power of engaging very diverse organizations working with the same populations on related issues. This enables much better utilization of the assets of each organization and minimizes duplicative or competing work. There is not—and likely will never be—sufficient resources to fund every need.

I am also a board member of the Institute for Sustainable Communities (ISC), a nongovernmental organization that has been working with local communities on resilience projects for many years.[2] One of the main lessons of resilience work with communities is that the poor are the most adversely affected when a natural disaster strikes. On the plus side, organizations working on resilience have learned that improving the ability of a local community to plan for, respond to, and rebound from a natural disaster can be done in ways that improve the ongoing lives of members of those communities and their ability to manage more routine upsets to their finances or personal lives. ISC has been working with multiple communities, acting as the convenor and facilitator, to bring together social service agencies, local communities, and environmental organizations to prioritize the needs and discuss what works and how they can collaborate. Just the act of convening the various organizations can have dramatic and often quick benefits. This work has given me some insight on what is needed to foster a collaboration.

The initial formation phase of a new collaboration is one of the most challenging. It requires two things: (1) a funding source that is willing to provide a safe space for what some critics consider "mushy stuff," and (2) a will-

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1. Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 Ind. L. Rev. 621, 622-23 (2016).

2. *See Partnership for Resilient Communities*, Inst. for Sustainable Communities, https://www.iscvt.org/program/partnership-resilient-communities/ (last visited Apr. 4, 2018).

ingness of over-stretched organizations to commit precious staff time to brainstorming, norming, and forming activities. In this age of impact investing, when funders want to see measurable results, funding activities for the health of an organization or for long-term program development is not the norm. In my view, attempting to introduce a contractual form at this formation phase is likely to either create a high barrier to entry in terms of staff time or predetermine the outcome. In the article, Professor Crowder discusses the concept of a backbone agency who will guide the collaboration. It is my experience that trust needs to be built before the backbone organization can form the collaboration or itself be formed if a new structure is needed. Case studies, with clear evidence on how various forms of agreement have accelerated progress at the formation stage, would be an important next step in Professor Crowder's work.

II. The Role of Agreements in Fostering Social Change

Once a group has passed the formation stage and has identified a critical mass of participants, a common sense of mission, and at least a preliminary plan of action, then an agreement is appropriate. I was initially skeptical when asked to provide input or draft a memorandum of understanding (MOU), which Professor Crowder identifies as one of the common means social service providers use to memorialize their arrangements. Over time, I came to see their utility—and not just as a way to document strategic partnerships for grant applications. In my experience, MOUs became a key way to ensure the participants were in fact in alignment, to set up the governance structures, and to establish the working mechanisms for the ongoing relationship. In one case, the negotiation of the MOU surfaced a profound lack of alignment between the parties, which resulted in termination of the discussions. We avoided wasting significant resources on a strategy that never would have worked.

Professor Crowder is fairly critical of the MOU as the main vehicle for documenting these relationships. She suggests that the MOU has created a culture in which groups compete against each other for funding. While acknowledging that groups must compete for funding, I do not believe that is due to the MOU form, but to the priorities of the donors. I have had the experience that an MOU can provide a very useful basis for long-term, flexible relationship management, which in the context of how governments and charities typically disburse funds, may be a sufficient legal structure to facilitate collaborative initiatives.

In the business context, an MOU is often the first phase of an "agreement to agree." The principals to the transaction have established a common vision, and the MOU

provides instructions to the teams that will negotiate a fully binding agreement on how to proceed. In the social project context, the MOU serves a similar "agreement to agree" role, but the next phase is typically grants or contracts, which will control the legal obligations of the parties with respect to the project, the use of funds, reporting, and other legal obligations.

The question I hope Professor Crowder can answer in the next phase of this series is what commitments *need* to be subject to a fully binding agreement. In particular, what is not already adequately documented by the fairly typical social project MOU? This needs to be analyzed in the context of the grant agreements typically used by NGO donors or the government contracting procedures used by public entities to hire contractors to perform specific tasks. As Professor Crowder identifies, there is a significant transaction cost to organizations if they need to engage lawyers to negotiate more complex agreements. If that is to be the recommended model, what is the tangible benefit the organizations can obtain from a more fulsome agreement above and beyond simple MOUs combined with the existing control mechanisms donors provide over funds? And, if there are benefits, how can this evolve from existing practice?

III. The Key Content of a Social Impact Agreement

If the social project involves multiple participants with a common vision and a longer-term work plan, then I fully agree that a written agreement is appropriate. Whether in the form of an MOU, a term sheet, or a more fulsome agreement, I agree with Professor Crowder's identification of some of the key elements of the agreement:

a. **A strong preamble.** When writing commercial agreements, I almost always wrote very short preambles because I wanted all the commitments in the binding portion of the contract. For the Foundation, I often helped the team write detailed preambles because they outlined the vision and because the various actors, who will be working in parallel but independently, need a clear road map. It can also create confidence in the mission if the group hopes to bring additional entities into the relationship over time.

b. **Setting up a clear decisionmaking process.** Creating a working committee with clearly designated individuals is critical. In most cases, the role of this committee should be to develop the detailed work plan specifying clear roles, responsibilities, tasks, and desired outcomes and measures.

c. **Methods for dispute resolution.** One of the main reasons for creating any form of relationship contract is to specify how disputes will be resolved. This could be as simple as creating a committee of principals from the various participants (e.g., the mayor, the president of a donor, the CEO of the local hospital, etc.) to whom disputes would be escalated. It could also specify how an organization could withdraw from the relationship, as well as who owns any assets that are created during the relationship in case an entity leaves or the collaboration ends.

d. **Mechanism for tracking responsibilities.** Reporting to the principals on progress is critical to credibility. Ensuring that the organization can explain its mission and results and that the participants are properly credited for the role they played is also key.

There are some items Professor Crowder does not mention that I believe are also important:

a. **Clear identification of the parties to the agreement.** Surprisingly this is not always clear to the various program managers. Many individuals working in this space wear multiple hats, so understanding exactly whom they represent, and what organizations intend to be bound, is very helpful.

b. **Identifying the processes each organization needs.** Foundations and governmental entities have specific processes for disbursing funds and measuring progress against commitments. Having each group specify, at least at a high level, what those obligations will be can help ensure that a separate agreement does not confuse donor recipients about what will be required to receive future tranches of committed funds and to enable the funding organizations to meet their own controllership obligations and tax compliance.

c. **Specifying how a detailed work plan will be developed.** As Professor Crowder rightly points out, we cannot put all the detailed obligations into the high-level agreement. But the process for development and approval of that work plan can be specified. Professor Crowder suggests putting a list of binding and nonbinding provisions directly in the agreement. Setting up the process to develop detailed work plans that can evolve over time may be a more flexible way of laying out those provisions.

d. **External communications and public relations.** As many participants will want to publicize their role, agreeing on how participants' identities can be used—and when they will have sole control over how their role is discussed—is very helpful.

Depending upon the nature of the underlying agreement, concepts commonly used in business relationship contracts—such as controlling law and jurisdiction for disputes, term length of the agreement, and assignment rights and official notifications—will likely make sense.

IV. Conclusion

Professor Crowder has laid out an interesting theoretical construct for a collective impact approach using contractual means to advance social development. But what seems to be missing is evidence that tangible benefits will accrue to the organizations working on social projects if a formal contract is adopted. For organizations with critical missions and limited means, articulating these benefits—in business parlance, "making the business case"—should be a key element of any future work.