

## Taking Care of Business Where Business Takes No Care

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**PROFESSOR ADAMS:** My name is Chris Adams. I am currently an adjunct instructor at the CUNY School of law in the Community and Economic Development Clinic (“CED Clinic”).

**PROFESSOR RISSER:** Hi, everybody! I’m Missy Risser. Apologies for not being able to be there in person. But I work with Chris at CUNY School of Law. I codirect the CED Clinic there and we’re excited to share a little bit about our clinic, and how we approach transactional drafting, and to engage in dialogue with all of you, as well. As a short roadmap for our time, in the first part, I’m going to speak a little bit about how we familiarize students with business and finance in a cooperative model. In the second section, Chris is going to go into more detail about the format and substance of some of our transactional drafting classes. In the third part will be Q&A and dialogue to hear from you all about how you approach the same things.

So, a little bit of context in our clinic. A couple of things, I think, are a bit distinct. First of all, we have a full-time and a part-time program. Our clinics run in the fall and for the full-time program, it’s a 12-credit clinic, so it’s a higher credit load than some other places. The part-time clinic is a 10-credit clinic. We also have a non-mandatory but very commonly taken prep seminar that runs in the spring for four credits, that students in the full-time program take. So, everything we’re talking about spreads across those three different courses. Another thing that I think makes our clinic a bit distinct from some other transactional clinics is that we take a Movement Lawyering approach to all of our work.

Movement Lawyering entails decentering law and instead using law in support of social movements. So, all of the transactional drafting that we work on with our students is contextualized to movement work. Which is why we’re going to be talking about cooperatives today. Specifically, because that’s one way in which we contextualize some of our transactional work. Another thing that I think describes the Movement Lawyering approach is

that we work with groups that are organizing to dismantle inequitable structures. So, a lot of our work is done in partnership with community based organizing groups that are trying to create alternative institutions. And under our current political economic system, one type of alternative institution—or sometimes we call them counter institutions—is the cooperative, which we think has the potential to redress some of the inequality in income and the racial wealth gap, both at the individual and structural level. For those who are not familiar with cooperatives, we tend to work primarily, though not exclusively, with worker cooperatives. A worker cooperative is a business model, not a specific entity type, just a business model where the workers are the owner of the business and fundamental governance decisions are determined on a “one worker, one vote” basis, regardless of capital investment. Profits are generally distributed to the workers based on the labor they put in again, independent of any kind of capital investment.

We believe that worker co-ops undermine traditional capitalist business logic, where control and profits are allocated based on capital investment thereby perpetuating privilege among the propertied and wealthy while treating workers, their earnings, and their consequent well-being as an expense to be minimized. We think that cooperatives meaningfully re-align that value system, centering people, individuals, the community, and also the planet. So, there’s what we refer to as a triple bottom line—the people that are affiliated with the business, the community, and the planet. To reiterate how we view coops as counter institutions, consider the work conditions under racial capitalism today. You all probably know this, but the context in which many of the prospective workers are working in reflect unlivable wages, inconsistent schedules, lack of benefits, unsafe work conditions, little to no input on the functioning of the workplace, and for highly exploitable groups, like certain immigrants and domestic workers, often nonpayment and harassment. We believe, and they believe, that co-ops can function as tools to help people survive in this increasingly precarious economic climate. Some features of worker cooperatives is that you know they can offer safe, stable, dignified, and better paid jobs. Co-ops can improve the working conditions of the people I just mentioned for people with barriers to good jobs, and people who work in sectors with high levels of exploitation. I mentioned immigrants and some other folks, but that also can include people

who are or were formerly incarcerated. It could be people with high propensity for experiencing discrimination in the workplace. So, it's a broad base of people that we work with to develop worker cooperatives.

A co-op has other benefits. It allows people to control their workplace, build individual and community wealth, and historically, they've been used as vehicles for mobilizing communities around broader movements, for racial and economic justice. As you can imagine, a lot of co-op work is tied explicitly to broader movements. For instance, immigration justice and prison labor justice, and so forth. To dig a little more into what we do and how we teach about cooperatives, I'll go through the laundry list of various ways we do this. First, we give an overview. We really do a deep dive into cooperatives, primarily in that clinic prep seminar that I mentioned. The first class that we offer on cooperatives, we give an overview of the business model and financing, and we highlight structural distinctions from traditional corporate models. So, while we're talking about the cooperative model, in highlighting distinctions, we're also talking about more traditional business models. We highlight specific cooperative models, including employee free cooperatives and unionized cooperatives. We have a class dedicated to each of those in our seminar.

We also review various states and their statutory frameworks with regard to entity formation. Some States have a specific cooperative law that we familiarize students with; some states do not, and instead form cooperatives under either their corporation law or their LLC law. So, we talk about what that looks like in New York and in other places to a more limited extent. We also introduced the international cooperative perspective and how that can inform the work that we do here. In terms of some of the how of how we go about this, we don't just lecture about these things as the professors. We invite cooperative incubators and worker-owners to help facilitate those classes as guest speakers. Then we also take parts of those classes where students can perform what I call applied questions—having them navigate, for instance, the cooperative law and having to answer some structural questions around cooperatives or hypotheticals. Once we move towards the clinic, we shift towards the skills that are required for the types of representation we tend to do in the clinic. So that includes entity type

counseling and legally forming the businesses—filing certificates of incorporation or articles of organization, drafting governance documents, whether that be bylaws or operating agreements, assisting with business plans, license applications, employment issues, lease negotiations, some IP and an assortment of other operational issues.

But what we're going to primarily focus on today is the drafting of contracts. So, I just listed here a few contexts in which contracts come up frequently for our cooperative clients in the clinic. The first is cooperative conversions. That's where a business, an existing business, that is not a co-op desires to convert that business to a worker owned co-op, usually by negotiating a deal with the existing employees, or at least some subset of the existing employees, to become owners of that business. That's one setting where this comes up. Also, there's often contracts between the cooperative and cooperative incubators or other supporting nonprofits, like nonprofits that are helping train members and provide business management marketing or financing. There's a whole universe of cooperative financing organizations, and I think Chris is going to speak about one example of that. There are also client contracts which seem standard, but actually, for many of the co-ops that we work with, because they have that triple bottom line, there are some additional considerations that students must take into account when drafting. Then there are also some IP contracts.

The last point I'll say, before transitioning it to Chris who will talk in more detail about how we how we structure these transactional drafting classes, is that other skills inform these transactional drafting classes. We build these other skills throughout the semesters as well. That includes our research classes, our ethics classes, especially regarding representing groups and organizations, and our negotiation class. And I would just note that when we're teaching the drafting of contracts, I think we highlight some things, including drafting accessibly so that our clients and their clients can easily understand the contracts without diluting any of the legal necessities within them. We also talk about gender norms when drafting and trying to be gender inclusive, and the terms that are used. And because we have a number of clients whose primary language is not English, we also talk through language justice issues with our students. And you know, when you're creating

bilingual documents, we talk about being mindful about what controls and other things to help develop best practices when working with people whose primary language is not English. With that I'm going to pass it off to Chris to talk more in detail about our transactional drafting classes.

**PROFESSOR ADAMS:** Thank you, Missy.

**AUDIENCE MEMBER:** I just had some questions about the clinic itself. It sounds like it's just the one semester, is that correct? And I wondered about the number of students and whether you were able, during that semester, to kind of take your clients from start to finish, or kind of what happens with the with the business after the semester ends?

**PROFESSOR RISSER:** The way our clinics are structured, the required clinic is in the fall, so it is just one semester. But students have an option to enroll in what we call advanced clinic, which is a two to four credit spring semester continuation of the clinical component of the work. There's no classroom component. So, we do have some flexibility in extending the representation with the students. We also have staff attorneys generally through our grant funding, that allow us sort of have some continuity with the work and not just have to do all that work while also teaching. In terms of lining things up throughout the semester, we do our best to try to line up projects a month or two in advance with some clients that have some flexibility in their start time, so that we can do our best to plan to handle the matter start to conclusion. Oftentimes that works, and sometimes it doesn't. And like I said, we have staff attorneys and advanced clinic students that can continue the representation. And another thing that we sometimes do is co-counsel with colleagues who do this work as well, and that way they can continue the representation, and we don't have that responsibility in-house.

**AUDIENCE MEMBER:** I just want to ask a really basic question. Can you tell me some examples? I mean, with the movements who want to form cooperatives, how do they find out about you? And how do you bring them in?

**PROFESSOR RISSER:** Sure, it's a wide range. We're part of a city funded initiative in New York City called the Worker Cooperative Business Development Initiative, which has been in existence for almost ten years now. The contract is managed through our small business services agency and so that's one place where we get some referrals. And our information is posted publicly. Additionally, we partner with some of the nonprofit cooperative incubators, some of which are academies where you know an aspiring worker co-op will run through the academy and then need legal support either towards the tail end of that academy, or once they graduate. So, we'll sometimes partner with organizations and get clients that way. Some incubation programs have a more intensive structure where they'll have like a year or 18-month incubation program and we partner with them to provide legal services to the co-op as part of that incubation program. And some of the groups that we work with are through that initiative. And then there are other nonprofits that are not part of that initiative, but that we partner with as well. That's sort of on the front end of co-ops that are forming. So often, you know, we'll do the counseling and the governance drafting and things of that nature. We also then have sort of an existent network of cooperatives. In New York City we have a business association called the New York City Network of Worker Cooperatives or NYC�WK. So, we also partner with them to do legal clinics. And then I think we also just have personal relationships from having done this work for the past ten years or so in New York. So, we'll often get referrals just through previous clients and sometimes previous clients that come back to us, or sometimes, you know, colleagues of previous clients. Alright, now I'll pass it off to Chris to talk more in detail about our transactional drafting classes.

**PROFESSOR ADAMS:** So, I teach in the evening clinic. We don't have a full transactional drafting course at the school at this point in time and have not for a while now. So, we are trying to cram as much as possible into a six-hour per week seminar. I've tried to organize it in almost two-hour chunks. Although we try not to lecture too much, these skills especially require us to do so. It is pretty tedious, so I just explain to the class, you know, with apologies, we're going to be spending the next fifty minutes or an hour talking about writing, which is painful for everyone but important, I think, to frame what's going on overall. We talk about the drafting as a process, and I

usually recommend the mark-up process because I'm interested in what's happening.

Which brings me to what I try to emphasize—knowing facts and laws and organizing and drafting and editing. Those are kind of concrete things that everybody's pretty much used to. I don't think anyone's confused about what it is to know the law. We've just gone through two years of law school and so we don't mind doing research. Now knowing the facts, that's a little bit tricky in this context. Because the facts we're aware of are often litigation based, where what you're doing involves something that is actively happening. You're trying to show that it happened or did not happen and now you're trying to build some narrative around it. For us, the United States is happening, or I like to say it's happening in the present or may happen in the future. Whereas in conjunction with our course, you are only imagining something that could happen.

In that context, I really emphasize that you have to consider who you are talking to—your audience. And I found that this term audience sometimes, I think, has limited association in people's minds. Recently in the class, for example, I've had a student ask, "Okay, so we'll just work with the IRS as an audience." But what does that mean? At the IRS, there's somebody that's a human being behind the business. But the administrative agency has a technical manual that that human being is working from. It has statutes and a regulatory framework that exists around that rules all. It is not for profit. In fact, it's particularly interesting, because it has all these different facets. Putting this in a framework, when you're writing in that context, speaking to a human being at an administrative agency, many questions arise. Where are you in that administrative agency? Where are you in that process? If you're writing an email, did you write the email to the IRS in the same way that you write it to your friend? What is the consequence of this email not achieving the result that you desire?

So, a lot of what we're trying to do is shift from having only passive knowledge. In one exercise, we provide the students with the terms of an agreement between parties in a certain jurisdiction. Then we have to ask the students, "What, in this context, are the facts? What is the client actually

purchasing? Is it possible to have an unexpected loan? What do you see?” Usually, we end up pulling apart the finances and figuring out how much money the student’s client is going to owe at the end of this term. We do this regularly by passing out the term sheet to working groups and giving them a few minutes to look at it. Or we might have them view it all together as a class. Either way, it is usually not too hard for the students to establish who the parties are, and what the jurisdiction is, and what the finances are. Then we walk step-by-step through the math. We also look at operating agreements, and this section is intended to emphasize translation. We’re actually doing a case where we had client had quite a detailed way it wanted the organization to be structured. Obviously, that varies of course, but it was really nice to look at that complex agreement and to have discussion about “How would you put that into another form? How would you organize it?” And recently I have let students guide that discussion by picking out which parts of the agreement they want to discuss. That way if a student has some sort of specific background and knowledge, and they want to get into that portion of it, I can say “Go for it.”

We start the semester with a simulation surrounding a non-profit’s corporate governance, and that ends with an assignment to draft a membership section of the entity’s bylaws bylaws. During this assignment, they’re talking about some tools and legal research that we can use to try to improve this area of the bylaws, while emphasizing that a number of ingredients can be changed within the bylaws. And by this point in time the students should have the process together. This, to be honest, may seem daunting to the students. For instance, the last class I did, probably a week and a half ago, for at least the first five minutes it was just student’s worrying about the information and how there’s no right or wrong answer. So, I’ll have them go in break out rooms for half an hour to forty minutes. Then we come back and bring the bylaws up on the screen for discussion. Interestingly, in this last class I did, we ended up on the section about distribution of prior profits. And all the students kept talking about profits, and after some back and forth, we did a search for “profit” in the document, and we saw that there were only two instances of it in the document. So that was a whole lot of effort to talk about appropriate distributions and everything else. That’s not really how it works. So, we’ll discuss distributions and profit. What is a



profit? So, we can cover multiple points, with the bylaws to frame it all. And we make the point that, between public and private rules or law and various ideas, we want to get the deal done. The client wants to move forward. And that might not be exactly in line with all of your interests. They're not approaching this as if we're trying to poke holes in it, but in order to edit and to make sure we're testing all of the consequences. Virtually all clients will.

**PROFESSOR RISSER:** Chris, can I add two examples of other drafting exercises we've done in the past, especially as they relate to cooperatives. So, I made brief mention about two models that we familiarize students with. One is the employee-free cooperatives. And from the drafting perspective, this has been a really difficult leap for students. So, to support students in understanding the model we will sort of lecture on, you know, a fundamental understanding of employment law, a really brief overview around immigration law, and we'll have them read federal and state case law on factors that courts have considered when determining if a business owner is an employee or an owner, or both. And students have an easy enough time. It's not simple but wrapping their heads around the case law helps. But then we'll say, "Okay, so draft the operating agreement that reflects some of these factors that the courts have discussed in a way that would be advantageous to your client if they do not want to be immediately classified as employees." Now making that leap is really challenging for students. So we try to make that really concrete in a slightly closed universe. I think, is very helpful for trying to build the skill set that they'll need when they're creating a fuller contract or other written document.

And another way we do that in the co-op courses involves the unionized cooperative model I mentioned as well. And for that, we assign mostly federal statutes under the NLRA, and we'll do a drafting exercise primarily focused on the issues surrounding company dominated unions cause an issue that comes up in our work is that unions are interested in helping to form cooperatives. But there is statutory law and case law that's designed to prohibit companies from basically squelching true organizing by creating a company dominated union that doesn't actually reflect workers interests. And the unions that are well intentioned trying to form these co-ops could fall under those provisions. And so, we also say, "Okay, if you

were helping to form this co-op, and they have bylaws around and you know whether or not they're unionized or the union's role in this business—how would you frame that? Given this Federal statute statutory framework?” And that's also been challenging for students. But I think it is a little bit less challenging from the drafting perspective, because often the most conservative route is to just say they have no statement about the unionization of that of the workers until the workers have elected to do that for themselves.

**AUDIENCE MEMBER:** How much of the class is simulation? And how much is working with real clients? And how do the two of you integrate together? If one or both of you could just talk to like which part is simulation, which part is real, and how does it all fit together for the student.

**PROFESSOR ADAMS:** Yeah, so the evening program doesn't have a seminar component. Excuse me, there is a seminar component to the clinic, but there is not a separate seminar that covers the topics that would be ahead of the clinic in the same way that the daytime program does. Instead, there's a simulation in the daytime program that is incorporated in the drafting of the membership section of their bylaws that I use at the beginning of the evening program. So first, it's a simulation, and that's occurring during class time. Well, first, it's the background information you need to know—interviewing, counseling, and ethics and all that sort of thing that's necessary both for the simulation and for the real and for actual client interaction. And then we move into two simulations. The second one is a negotiation simulation and this occurs in the middle of the semester. So, there is the first simulation I discussed earlier then the negotiation simulation in the middle of the semester, and then from then on out there's presentations, rounds, and it's all client work. The client work generally is occurring outside of class, although we bring the discussion inside of class. The number of credit hours, I think, are intended to set up a structure or an expectation that the students will comply with the ABA rules for numbers of hours that are required for different credits. Missy has the seminar, so she does it a little bit differently.

**PROFESSOR RISSER:** Yeah, so just a bit about our clinical program sort of teaching structure: we have the prep seminar in the spring, which is co-taught

by two professors. It's often me and Chris right now, but it could be others and then we also rotate faculty across our full-time and part-time programs. And then we try to do cross clinic collaboration in the fall. But it's challenging scheduling wise, because many of our part-time students are working full-time jobs during the day and also just because the part-time clinic does not have the prep seminar, like Chris mentioned. Just the pacing of the semester is a little bit different. That's sort of how we interrelate. But we have teaching team meetings about all of this, and we do sometimes do cross clinic work together. For instance, both clinics have six hours of seminar a week. It's two three-hour sections, on Tuesdays and Thursdays. In the prep seminar, it's four hours of class a week, so two hours twice a week. And I think Chris kind of mentioned this when he explained how the part-time program functions. But in the prep seminar there's no live client work. It's all simulations and instruction. Then in the clinic we do that negotiation simulation Chris just mentioned. We also just finished that, but they've been doing client work. They were assigned client matters about a month ago, so that the negotiation simulation comes mid-semester but not before they start their client work. Other questions?

**AUDIENCE MEMBER:** So, my final question is about audience—you mentioned audience before, Chris. And so, I'm thinking if it's a co-op of workers and they have asked the students to draft an operating agreement for this co-op made up of employees who are, you know, all different levels of education presumably—what do you tell them about addressing that audience in the operating agreement?

**PROFESSOR ADAMS:** Sure. I mean this question makes me think of plain language and drafting to your audience and making the documents useful working documents. There's kind of two things going on in one. I've heard it said, and I kind of agree with this, that once these governance documents are complete, they should be kind of put on the shelf, and you should never have to consult them again because if you do that means something's gone terribly wrong. I don't know how much I feel about that being the case. I think we think of them, or I think of them more as working documents. Everyone should be able to look at this and if a conflict arises, have a clear idea of what should occur. And so, it's a matter of organizing the document,

and very clearly including information. So distinguishing between information that should be incorporated by reference, like a membership manual or something like that, where you know things that you wouldn't necessarily have to dig through all of the governance provisions for. Maybe you have a separate document that you can just work with. That's a little more manageable. So, I guess this falls under the category of organization and being very specific about organizing things, not having long paragraphs with a lot of descriptors, making sure you know you have references to different portions that actually make sense and line up.

So many agreements that we have seen, a lot of people we work with, or a lot of what comes in the door is something people have pulled and copied and pasted from all over the place. For instance, maybe they downloaded sample bylaws from another organization, but they only got parts of them, and they put this over here and all that over there. And this can get very confusing for students, because sometimes it just doesn't make sense. This doesn't link p with that or that, and the students are asking why this doesn't make any sense. But the students are internalizing that the document must be correct, and it must make sense, so they think the problem must be with them. And I have to say, "If it doesn't make sense, maybe it doesn't make sense." Like maybe it's just not referring to the proper thing. So, what do you do? How do you make it make sense? And that seemed to resonate and move the process a little bit forward for the students. I'll pass it over to Missy.

**PROFESSOR RISSER:** I want to second what Chris is saying about formatting and accessibility. I am a real big nerd about this stuff, but I really think proper numbering, labeling, and subheadings, and proper margins can make a document much more navigable and appealing to a group so that they don't just want to shelve it and never look at it again. Formatting can't do everything, but I do think that it makes a big difference. And that's something that we spend time speaking with our students about. Another thing I wanted to raise is that some organizations go far left in trying to make things accessible. There are some organizations that make Comics-style LLC

Operating Agreements,<sup>1</sup> and I think our stance is that that's a little too far removed from, I think, perhaps standard interpretation. And so that's not our approach. We do try to write training agreements with the groups that we work with, so that there's a lot of time for people to (A) read it in advance and (B) for people to process while the whole group is present, not just some subcommittee that's maybe been point on the drafting of it.

And then some groups choose to make supplemental documents that are like guides to their governance documents, which I think sometimes really works, and sometimes make things complicated. For instance, when you're going to update the governance documents, you have to make sure you're updating both, because then you can have conflicting information which can certainly be worse than having no guide at all. So, you have to be really mindful about that. But many groups we've worked with have decided to do that, especially groups that have really large memberships with a lot of people coming in regularly versus a more standard membership that then occasionally invites new members in. To that last point I think that trying to help the group come up with some kind of institutionalized approach to training new members, you know, in the governance system, whether that involves us or not. We try to help them determine who can introduce and explain the governance document in a meaningful way, and not just hand members this written document, which I would love to think is so excessively written that they would all understand every bit of it but I don't think that's the case. And so, trying to help them develop a plan to try to nip that in the bud, for new members that are coming in especially.

Maybe one more to that point. There are, for provisions like tax provisions and whatnot, which we try not to emphasize, there are no magical words, but there's some things that if you're talking to an accountant or somebody else that they're going to expect to see certain things or not expect to see certain things. It might be harder to communicate what the intention is if those people don't see certain phrases.

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<sup>1</sup>*Cartoon Operating Agreement for a Coop LLC*, CO-OP LAW (Oct. 4, 2016), <https://cooplaw.org/knowledge-base/cartoon-operating-agreement-coop-llc/> [<https://perma.cc/EH3M-3YE3>].

Thank you.