

Contracting for the Public Good

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Patience A. Crowder, [*Impact Transaction: Lawyering for the Public Good through Collective Impact Agreements*](#), 49 *Ind. L. Rev.* 621 (2016).

Although contracts may not immediately come to mind when one considers measures by which to effectuate social change, Professor Patience Crowder effectively advocates for their usage in her recent article *Impact Transaction: Lawyering for the Public Good through Collective Impact Agreements*. Bringing to bear her considerable experience and knowledge of community economic development and nonprofit organizations, Professor Crowder argues that the utilization of written contracts, particularly collective impact agreements, can be a more effective strategy for achieving comprehensive social change than traditional efforts such as impact litigation, memorandums of understanding, and community benefits agreements. In so doing, she introduces “impact transaction” as a new theory for employing transactional advocacy to achieve large-scale social change.

Professor Crowder’s article begins with a detailed critique of traditional strategies used in social change lawyering and public interest arenas. With respect to impact litigation through which advocates seek to reform agencies and institutions by judicial adjudication, Professor Crowder identifies “narrowly defined scopes of applicability,” high monetary and nonmonetary costs, and the adversarial nature of litigation as disadvantages of this approach for achieving widespread social change. (P. 625.) In light of these and other shortcomings, she advocates for a transactional approach grounded in a collaborative collective agreement process “to address a particular social ill.” Such impact transaction, Professor Crowder argues, “can promote the public good in ways that transcend impact litigation.” (P. 629.)

Central to Professor Crowder’s concept of impact transaction is the role of contracts and collective impact agreements. Although nonprofit organizations, businesses, community groups, and social service providers have previously utilized agreements such as memorandums of understanding (MOUs) and community benefits agreements (CBAs) in their efforts to facilitate social change, Professor Crowder details the limitations of such agreements ranging from the nonbinding nature of MOUs to the often localized rather than large-scale impact of CBAs. In describing the process by which collective impact initiatives are formed, she highlights both the positive and negative risks associated with operating in the absence of a written contract. She argues that collective impact agreements through which a diverse group of participants memorialize their expectations as they seek to address important social problems are “the most effective way to actualize the value and minimize the risks of collective impact.” (P. 654.)

Professor Crowder skillfully employs relational contract theory to explain the utility of collective impact agreements in facilitating impact transaction. She argues that the contextual nature of relational contracts is well-suited for collective impact efforts due to the importance of creating and maintaining successful relationships between multiple parties who are engaged in long-term collaborative work. Given that relational contract theory acknowledges the ongoing rather than static relationship between contracting parties, Professor Crowder makes a convincing argument that the theory provides a useful prism through which to view the formation, performance, and interpretation of collective impact agreements, particularly those that are memorialized in a writing.

Although entering into written agreements is not the current norm for collective impact initiatives, Professor Crowder urges those engaged in this transformative work to begin doing so for several important reasons ranging from reflecting and protecting individual and collective interests to clearly specifying parties’ expectations and responsibilities throughout long-term projects. The overarching reason, however, is to improve “the effectiveness of collective impact

to be a replicable model for systemic social change as an impact transaction strategy.” (P. 666.)

To assist the collective impact community in this endeavor, Professor Crowder offers useful drafting principles that “support a shared agenda for social change while providing for accountability and respecting the collective impact mindset.” (P. 669.) She identifies collective impact agreements as multilateral contracts that call for the delivery of coordinated services over a long period of time. She encourages parties involved in these transactions to consider the contractual implications of such including, but not limited to, privity, performance standards, risk allocation, and dispute resolution. While these issues can and do exist for many types of contracts, Professor Crowder urges those creating and interpreting collective impact agreements to do so with an awareness of the shared intent, trust, and loyalty upon which such agreements are premised.

Given the complexity of collective impact initiatives, Professor Crowder correctly acknowledges that creating effective, well-structured multilateral agreements will likely be an arduous task, particularly for less-resourced collective impact participants. To address this concern, she suggests creating collective impact term sheets and form contracts that can be used as models for future initiatives. If collective impact is to reach its potential as an impact transaction strategy, it “needs a contractual infrastructure” according to Professor Crowder—one that she hopes to help develop in this and future articles.

Professor Crowder’s thought-provoking article serves as an important and necessary conversation starter regarding the role of contracts in helping to bring about large-scale social change. Considering the myriad number of problems currently plaguing our society, I am very glad that Professor Crowder is engaged in this conversation, and I very much look forward to reading her future contributions.

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