

# NATURAL RESOURCES & ENVIRONMENT

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## FOOD LAW

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# Nurturing a More Just and Sustainable Food System: The First Year of Pace Law's Food and Beverage Law Clinic

Jonathan Brown

**A** small grass-fed beef farm seeks assistance in drafting and negotiating a lease. A nonprofit developing a shared use community kitchen requests guidance on licensing, food safety laws, and contracts. An urban food hub wishes to establish community-based ownership and programming on a small upstate farm. And a start-up, social enterprise craft brewery seeks assistance on labeling and other beverage laws.

These are just a few of the client matters that students encountered on the first day of class in the Food and Beverage Law Clinic (the Clinic) at the Elisabeth Haub School of Law at Pace University in White Plains, New York. The Clinic launched in January 2017 with the support of the school's alum Robert Sands and Constellation Brands, following a surge of interest in food law and policy at law schools over the past decade. The Clinic, however, is the first law school program dedicated entirely to providing direct, transactional legal services to food and beverage clients. Students in the Clinic represent small farm, food, and beverage businesses and nonprofits on matters that range from entity formation and contract negotiation to advice on regulatory matters including land use, food safety, labeling, marketing, and government procurement. As the first clinic adopting such a model, it serves as a test case for the hypothesis that not only is legal assistance critical to support equitable and sustainable local food systems but that such assistance can be effectively provided by public interest law school clinics.

This article looks back at the Clinic's first year and explores lessons learned in putting the theory behind the Clinic's model into practice. Launching the Clinic required a leap of faith. Was there in fact a client demand for its services? Was there sufficient interest from law students in the intersection of transactional law and food systems? Was the scope of legal matters too broad? Was the client focus too narrow? The early returns from the first year have given us valuable insights and experience from which to draw. First, this article discusses the unmet legal need the Clinic seeks to address and the choices that went into the Clinic's approach to client selection. Second, it discusses student interest in food law practice and describes the Clinic's pedagogical approach. Third, it assesses the value of direct transactional legal services for food and beverage businesses as an organizing principle for a law school clinic and a legal practice.

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## Creative Solutions for a Unique Legal Need

The idea for the Clinic grew out of encounters that Pace Law faculty and Natural Resources Defense Council (NRDC) attorneys had with farms, food businesses, and nonprofits doing critical work on the ground to build a more just and sustainable food system. Pace's environmental law program has expanded in recent years to include food law and policy, and Pace has hired two full-time faculty who teach and write in the area. Meanwhile, NRDC has been working to rebuild strong, equitable, and sustainable food systems, including through regional policy advocacy in New York State. When speaking with a variety of "food revolutionaries"—farmers employing regenerative practices and distributing directly to consumers, community-based nonprofits expanding access to local, healthy food in underserved communities, and mission-driven food and beverage entrepreneurs employing innovative models and practices—Pace and NRDC learned that transactional legal representation was frequently a critical area of need. To achieve their goals, these groups required legal assistance in structuring business entities, negotiating contracts, navigating regulations, and more. Many of them, however, could not afford market rate legal services, but at the same time did not have access to pro bono legal services that could meet their needs.

Recognizing that legal support is a necessary complement to broader policy advocacy for food system reform, Pace and NRDC launched the Pace-NRDC Food Law Initiative to expand the legal community's capacity to provide direct services to these groups. Laurie Ristino, director of Vermont Law School's Center for Agriculture and Food Systems, has observed that "[t]o date, the focus of local government, nonprofits, and others has occurred around policy infrastructure for the sustainable food movement. . . . The policy work done to date is a fine start, but without the legal infrastructure to undergird policy, it will have limited traction in our rule of law society." Laurie Ristino, *Back to the New: Millennial and the Sustainable Food Movement*, 15 *Vt. J. Envtl. L.* 1, 22 (2013). Consistent with that theory, the Pace-NRDC Food Law Initiative's goal is to build critical legal infrastructure in New York's regional food system. The approach is multipronged, including training programming for food, beverage, and farm businesses to help them navigate a complex legal landscape, training programming for lawyers and law students to expand the capacity of the legal community to serve potential clients, and the provision of direct legal services. The Clinic was conceived as the centerpiece of the Initiative, serving as the vehicle for direct client representation and as a base for training students and building critical legal institutional knowledge.

The Clinic quickly confirmed its working assumption that there existed a large unmet need for its legal services. Before the start of the Clinic's first semester, Pace and NRDC received several requests and referrals for representation and more potential clients than the Clinic had capacity to take on, all without any concerted client outreach effort. In its first year the Clinic represented 12 clients, and to date the demand for its services continues to exceed its capacity.

While there is likely a large unmet need for legal services for small businesses and nonprofits generally, our experience has shown the need to be particularly acute in the areas of farming, food, and beverage. Most farms operate in rural areas. Pro bono transactional legal resources for small businesses are limited even in urban areas, but in rural areas, they are often nonexistent. Further, the most pressing legal matters affecting these businesses often require specialized knowledge and familiarity with the industry. Traditional transactional pro bono services may be limited to broadly applicable matters like corporate formation and trademark registration not covering food- and beverage-specific issues including licensing, food safety, and labeling. Even a lawyer familiar with commercial leases, for example, will find that farmland leases have many provisions and considerations that are entirely unique to agriculture. The client population the Clinic seeks to serve often needs specialized legal assistance from practitioners who understand their business.

### *Strategically Targeting Local Food and Beverage Producers*

Compounding this need are the challenges of what can be characterized as the "new food movement" or the "local food movement." All farmers and food and beverage businesses operate in a complex legal and regulatory space and an economically challenging industry. But their legal needs are even greater when they employ the innovative business models that are increasingly integral to thriving local food systems. For instance, a small farm shifting from wholesale production to marketing directly to local consumers may encounter new issues relating to food safety, labeling, contractual arrangements with consumers, protection of a brand identity, and land use and other regulatory issues associated with on-farm sales, agritourism, or the processing of value-added products.

Facing this client demand, an initial challenge in structuring the Clinic was determining the appropriate client selection method, knowing that these choices would play a significant part in shaping the Clinic's overall mission and identity. Should clients be subject to an income-level cutoff for eligibility, or should selection be based on softer, more subjective factors? Should clients be limited to expressly "mission"-oriented businesses, encompassing nonprofits and social enterprises with triple bottom lines of "people, planet, profits," or should the scope cover any food or beverage business that needs legal help? Should there be precise geographic boundaries, and/or prioritization of urban or rural clients?

Ultimately the Clinic developed client selection criteria that mixed hard requirements and softer, more subjective considerations. First, given the high demand demonstrated by early client requests, the Clinic adopted income eligibility criteria so that its limited resources could be allocated to those who most need pro bono services. The Clinic now requires that, for for-profit business clients, the household

income of the business's principals may not exceed 400 percent of the Federal Poverty Level, and, for nonprofit organization clients, the organization and project are required to satisfy the Association of Pro Bono Counsel's "mission-matter-means" criteria. As for a client's mission, the Clinic decided not to adopt any express criteria, recognizing that supporting any small farm, food, or beverage entrepreneur who faces barriers to entry in competing with larger corporate actors helps contribute to a more equitable and just food system. However, the Clinic takes a potential client's mission and business practices into consideration when making selection decisions, particularly when client demand exceeds student capacity. Finally, the Clinic did not adopt any specific geographic boundaries but chose to work with clients who can easily be reached by car in a day trip, given the importance of live client interaction and the experience of seeing a client's operations firsthand. The Clinic has strived for a mix of urban and rural clients but to date has found the demand for services greater in rural areas, where options for legal representation are more limited.

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Recognizing that a client need exists, an equally important component to the Clinic's design was matching student interest and providing a valuable pedagogical experience. Food law and policy have in recent years generated a great deal of visible student interest at both the national level and at Pace Law specifically. Law schools across the country now boast food law and policy coursework, clinics, academic centers, and student societies. See Baylen J. Linnekin & Emily M. Broad Leib, *Food Law & Policy: The Fertile Field's Origins and First Decade*, 2014 Wis. L. Rev. 557 (2014). At Pace, doctrinal course offerings in the school's environmental law program now include agricultural law and the environment, food systems law, and animal law, and in recent years, students have formed a Food and Agriculture Law Society. In launching the Clinic, however, the question remained as to whether its focus on *transactional*, business-oriented legal matters arising in the context of food systems, rather than policy-focused work, would sufficiently appeal to students.

As it turned out, student interest in the Clinic in its first year came from a variety of different sources. About half of the students who enrolled were pursuing an advanced certificate in environmental law. Of those, many had already taken one

of the food systems-related classes described above and were primarily drawn to the Clinic out of an interest in the intersection of food systems and the environment. For the other half, most were interested primarily in gaining hands-on experience practicing transactional law for small businesses. For many in both groups, there was also a unique “story” that drew them to the Clinic’s work. Examples include: a student with celiac disease with an interest in the legal side of nutritional labeling, a student pursuing a career in the beer industry, a student pursuing a career in marijuana law who saw parallels in food and beverage regulation, and students with farming backgrounds.

### Balancing Client Service with Pedagogy

With students bringing a wide range of interests and goals, one of the challenges in designing the Clinic was providing a learning experience that would be valuable to all of them. The Clinic’s pedagogical mission is to teach students fundamental transactional lawyering skills, aid students in the development of a professional identity, and help students think analytically and critically about the law and the role of lawyers in food systems. To achieve that goal, as with most clinics, the Clinic is structured as a combination of coursework and fieldwork: a one-semester, six-credit class comprised of a weekly two-hour seminar accounting for two credits, paired with fieldwork representing clients accounting for four credits. For both the seminar and fieldwork, developing legal skills is the primary learning objective, but in both cases the Clinic also seeks to create opportunities for students to learn about and reflect on broader food systems issues.

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The weekly seminar classes focus primarily on teaching the legal practice skills and substantive law that is most useful to students in their client work. A small number of classes are devoted primarily to policy-based issues, including food justice and sustainability. To take advantage of limited class time, the seminar integrates relevant practice skills, substantive areas of law, and related policy issues as much as possible. For example, a class on agricultural land tenure covers key terms and considerations in negotiating farmland leases, the interrelationship of lease terms and sustainable farming practices and

land stewardship, and broader policy approaches for promoting sustainable practices and farmland conservation. Students later participate in a negotiation simulation based on a fact pattern involving a farmland lease embedded with sustainability issues. Then, after a class on contract drafting skills, students draft leases based on the outcomes they reached in their negotiations.

The core of the Clinic is the fieldwork itself. Central to the objective of helping students develop as professionals, and consistent with clinical pedagogy methodology, students take the lead role in all client representation under the supervision of the Clinic’s faculty. An essential part of the fieldwork experience is actually getting into the field. As much as possible, students visit clients at their place of work, which provides both the invaluable experience of face-to-face client interaction and the benefit of seeing a client’s operations with their own eyes. For example, in connection with drafting a membership agreement for a farm client’s community-supported agriculture (CSA) program, students visited the farm to observe its weekly on-site CSA pickup and spent a day walking the farm, eating with the crew, and participating in harvest. This experience not only proved critical for successfully performing the legal work but also gave the students an opportunity to understand the dynamics of small, direct-to-consumer farming in a way that would not be possible in the classroom.

The client need and student interest the Clinic encountered as it launched were promising signs that both the supply and demand were in place for its model to succeed. A remaining question was whether organizing the clinic around transactional legal support for food and beverage law clients was in fact an effective approach for a clinic or, more broadly, for a legal practice. Liza Heinzerling, in *U.S. Food Law*, 2 (2014), observed that the study of a topic as broad as “food law” has elements of the old adage of “the Law of the Horse.” In the words of Judge Frank Easterbrook,

Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on “the Law of the Horse” is doomed to be shallow and to miss unifying principles.

Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207 (1996).

In designing the Clinic, the question loomed as to whether the combination of an industry-specific client focus with a broad scope of transactional subject areas was the clinical equivalent of “the Law of the Horse.”

In the first year, we found unifying themes and issues that indicated our approach of organizing multiple strands of legal topics around a particular industry in fact does serve as an effective organizing principle for a clinic. Permutations of similar legal questions often arose in different projects, and the Clinic developed a sizable amount of institutional knowledge that has already been applied to new clients. For instance, student research on food safety laws for one direct-to-consumer farm overlapped with advice to other clients regarding

farm-to-school procurement, commercial kitchens, and cider production. Research on tax exemption-related issues for nonprofit farms applied to several clients in various permutations, as did research on the taxation and structure of farming cooperatives. Further, a deep focus on the food and beverage sector has allowed the Clinic and its students to understand our clients' businesses and take a more holistic approach to our legal representation that is not bounded by narrow legal subject areas. For example, advice to a farm on land tenure issues can touch upon deeply intertwined legal topics relating to real estate, tax, business entity choice, estate planning, and conservation law. It has been enormously helpful for students to draw from the experience of other Clinic students and the networks the Clinic developed in tackling such issues. Finally, including beverages in addition to just food-related projects has proved valuable given the close connection between the two industries and their attendant legal issues. In particular, farm-based beverage production is an emerging economic opportunity for small farms, and the ability to address both beverage- and farm-specific legal issues together is a significant advantage.

Almost all of our work has proved to be closely intertwined with larger food policy issues. Our experience reinforces the hypothesis that the success of broader policy initiatives to reform the food system requires a strong legal infrastructure built on direct legal assistance. At the same time, it indicates that the experience of working directly with clients on nitty-gritty transactional matters helps to inform larger policy initiatives. In recent years, significant state and federal policy initiatives have promoted farm-to-school procurement as an opportunity to provide schoolchildren with nutritious food while supporting local farm communities. Representing a nonprofit farm building out a farm-to-school relationship and facilitating such arrangements for other small farms, we learned that many small farms interested in participating in such programs require assistance in understanding procurement bidding procedures, handling insurance and risk management, and potentially collaborating with other farms to compete with larger suppliers on bids. Overcoming these barriers requires competent legal services, and providing these services on the ground in turn informs how to improve farm-to-school policies. Similar dynamics have emerged in client projects that touch on land access for young farmers, labor law issues relating to volunteer farm apprentices, slaughter and processing regulations for small direct-to-consumer livestock operations, and regulation of small cideries. The Clinic's model of combining industry focus with a broad scope of subject areas made it possible to find numerous policy connections in the students' fieldwork.

Finally, the Clinic's approach has provided students with diverse, challenging, and satisfying legal practice experiences. Law professor Jay Mitchell, the director of the Organizations and Transactions Clinic of the Mills Legal Clinic at Stanford Law School, has noted that the food system is an unusually attractive source of projects for transactional clinics. The Stanford clinic represents established nonprofit organizations, a substantial portion of which are involved in food system-related matters. As observed by Mitchell,

The system's diversity of activities, actors, and legal issues, and its commercial nature, means experiential programs of diverse design and purpose can find relevant

transactional, policy, and other non-litigation projects. . . . Food is understandable to students, a subject of considerable public debate, and an area deeply appropriate for deployment of pro bono resources. The sector provides rich soil for the growth of new lawyers.

Jay A. Mitchell, *Getting into the Field*, 7 *J. Food L. & Pol'y* 69, 84–85 (2011).

The success of broader policy initiatives to reform the food system requires a strong legal infrastructure built on direct legal assistance, and the experience of working directly with clients on nitty-gritty transactional matters helps to inform larger policy initiatives.

The student experiences in the Clinic's first year have been consistent with Mitchell's observations. Students with a range of interests have had the opportunity to engage with clients and projects that genuinely excite them. None of the client matters could be considered "cookie cutter": in almost every case, students' clients are employing innovative practices or business models that require creative legal approaches. The Clinic's broad scope of services gives students the opportunity to take not only deep dives into new areas of law, but to understand the intersection of different legal strands and how the pieces fit together. The following are brief descriptions of two clients represented by the Clinic in its first year that illustrate the rich nature of the transactional legal work in which students had the opportunity to engage.

### **Compelling Early Client Engagement Experiences**

Students represented a small organic vegetable farm that wished to transition to a not-for-profit model. The farm had been selling its produce through a farm stand and CSA program with largely a wealthy clientele but saw that there was a large community segment who could not afford locally grown organic produce. It sought to serve this community by donating produce to food pantries and operating its farm stand on a "pay what you can" basis, as well as providing educational programming on its farm. This activity would be funded in part by donations from the farm's wealthier clientele in exchange for CSA shares. The Clinic was retained to assist the client in structuring a new nonprofit organization for this purpose, drafting organizational documents and related contracts, and

obtaining tax exemption under Internal Revenue Code section 501(c)(3). The students' work involved a challenging combination of more broadly applicable corporate and tax matters with issues particular to farming and the client's unique model. Complicating matters, a small segment of the original farm was to be split off to continue as a for-profit operation. In addition to advising the nonprofit on its corporate governance structure and drafting its bylaws, the students advised on dividing the farm operations into separate entities and on the nature of their ongoing relationship. This included drafting contracts regarding seed and seedling sales, farm equipment licensing, and subleasing of farmland between the two entities. Finally, the students prepared the nonprofit's tax exemption application, which required a careful legal analysis due to the client's unique organizational and funding model. Ultimately, the application was successful, and the Internal Revenue Service awarded the organization tax-exempt status.

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As an example of a for-profit client, students represented a small start-up oyster business with a mission of supporting small oyster farmers, positively impacting their local ecosystem, and making their region a premier oyster destination.

The client farms its own oysters and partners with other small oyster farmers to collectively market their products under a single name. The client wished to enter into contracts by which it would sublease certain of its leased subtidal grounds to partner farmers and purchase and provide marketing channels for the oysters farmed on those grounds. After performing research and outreach to other oyster farming resources, the students found that there was no exact precedent for the contract and that it would need to be truly bespoke, combining issues associated with state permits to farm subtidal areas with the client's unique relationship with its partner farmers. Drafting the contract required the students to analogize to other business arrangements, creatively incorporate terms from precedent documents, and draft some provisions out of whole cloth. Doing so required keenly understanding the client's operations, which the students experienced firsthand—touring the oyster farming grounds by boat and wading into the water to help move bags of oysters. In addition, the client sought advice on trademarking of certain oyster varieties. Working with another attorney who volunteered pro bono services, the Clinic advised on trademark matters that included complex issues around geographically descriptive names.

The Food and Beverage Law Clinic's early returns from the first year indicate that there is indeed something to the approach of transactional food and beverage law practice. In one sense, our experience shows that the necessary ingredients are in place for this to be a successful model for a law school clinic: client need, student interest, and a clinic structure that effectively matches the two. Our hope is that this is a model that can be adopted in other law schools across the country. But our experience also shows that there is value to transactional food and beverage law practice more broadly. While law school clinics can play an important role, they alone cannot meet the enormous client need. We hope that our approach is one that is taken up by practitioners providing both pro bono and affordable legal representation to a wide spectrum of clients who currently have limited access to legal services, helping to build the legal infrastructure that is essential to support a more equitable and sustainable food systems. 

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