

Innovative Use of the Law for Small-Scale Producers[†]

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The philosophy of a law office providing services to small-scale farmers should be to support the sustainable production of healthy food. This means developing a practice that is as holistic as a small-scale farming enterprise, able to resolve legal issues from inception up to the time of transfer to the next generation. Although agricultural law has become a concept of exemptions and special status, agricultural law covers much more ground than this. The law relates to farming in many ways, just as it relates in many ways to any other industry. Unique characteristics certainly separate farms from the rest, but not in a way that simplifies their relationship to the law. A law office tailored

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to meet the legal needs of small-scale farmers must be versatile to correspond to the complexity of these needs. Diversity of applicable laws and ability to pay or travel to meet at a law office combine to make agricultural law more of an approach than an area of law.

Legal services for small-scale farms need to be made accessible, affordable, up to date, and relevant. This Essay presents three ways in which a law practice can adapt to meet the complexity of needs of small-scale farmers. These include, first, offering services in a manner both accessible and affordable to farmers; second, developing agreements with terms that match the realistic needs of farmers—specifically, farm lease agreements; and, third, developing financing arrangements that strike a balance between debt and equity financing.

I

A SHORT HISTORY OF THE LOSS OF SMALL FARMS AND THEIR RECENT RETURN

American society underwent a profound change last century, as it transformed from a nation of farmers to one where it is difficult to imagine the existence of such agrarian roots. We generally order our food rather than grow it. It has become cliché but nonetheless true that our food travels great distances to get to our plate. The mythology generated by the dynamic between clever marketing and collective ignorance obscured the reality of America's food system. The nature of our food system has been revealed as inhumane, unnatural, and inherently unsafe.¹ Furthermore, it is now well established and understood that our food system became what it is today after years of vertical integration, corporate acquisition, consolidation of farmland previously owned by bankrupted small-scale farms, and apathy toward the origins of our food and the plight of rural America. This is finally all beginning to change. Writers and documentarians have finally spurred us as a society to question our agricultural and food law system and policies.²

For the first time in decades, small farms are on the rise. One thing the Great Recession seems to have conveyed is that remote investments in the national or global economy do not necessarily pay off. We are better off, sometimes, investing our time and circulating

¹ *Estimates of Foodborne Illness in the United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/foodborneburden/index.html> (last updated Mar. 7, 2011).

² *Id.* at 963.

our resources locally. Small farms are on the rise, a trend that corresponds with the growing recognition of the myriad benefits of fresh, locally produced food. Maintaining this resurgence of small farms and food production requires us to not just buy local products, we must also devote expertise to keeping these farmers on the land and enabling beginning farmers to gain access to farmland. We all have a role we can play. As lawyers, we can help to obtain these goals by devoting our legal education and tools to meet their legal needs.

II

FUNDAMENTAL AND FLEXIBLE LEGAL SERVICES FOR FARMERS

Lawyers can help small-scale farmers and food producers stay on the land, and in business, by offering fundamental legal services in a flexible manner. This flexibility reflects the realities and pressures that the client faces, enabling lawyers to adapt their practice to better suit the needs of clients. This type of legal service will have four basic components: first, providing services at rates the client can afford—for example, by using a sliding fee scale, fixed-fee services, and spending extra time apprising clients of costly developments in the legal work; second, tailoring availability to the client’s schedule, remaining open to the necessity of house visits and other travel expectations, and being patient with the client’s tendency to “go to ground” when faced with an adverse legal reality; third, offering specific remedies to ongoing issues, such as long-term lease agreements with farmer-favored terms to resolve the issue of lacking land access; and finally, developing financing arrangements for agriculture that enable farmers to strike the needed balance between debt and equity.

Farming is a capital-intensive enterprise. An attorney’s fees cannot compete with more immediately necessary expenses. For example, equipment repairs and maintenance to keep the operation running will usually take priority over compensating a lawyer. One issue is that your clients are generally cash strapped, and you have to figure out how to offer your services in a way that makes compensation feasible. Alternative pay schedules, finding available sources of public support through State Farm Viability programs,³ grants, and loans are nearly as important as the legal services offered. After all, services for farmers will not accomplish much if farmers cannot afford them in the first place.

³ See, e.g., *Vermont Farm Viability Enhancement Program*, VT. HOUSING & CONSERVATION BOARD, <http://www.vhcb.org/viability.html> (last visited Apr. 12, 2011).

In New England and elsewhere in the United States, services and public support for small-scale farming has eroded considerably. The Farm Services Agency (FSA) has illustrated this all too well by its decline in lending support to small-scale farmers. Originally conceived to provide agricultural credit and credit guarantees—and the latest agency in a long line of incarnations from the Resettlement Administration, the Farm Security Administration, the Farmer's Home Administration, to its form today—the FSA's leadership role in direct farm lending has all but disappeared.⁴ Today's beginning and small-scale farmers enjoy less opportunity and support than earlier farmers.

One of the many challenges that attorneys must address when offering services to farmers is keeping those services affordable. Faced with highly controlled prices set by consolidated buyers, rising real estate taxes and other hard expenses, and a business literally built on a deeply illiquid asset, small agricultural business owners often have little money left over to pay legal professionals for their counsel. "Farmers are the only American businessmen who are forced to buy retail, sell wholesale, and pay the freight both ways."⁵ Due to these conditions, farmers are not likely to seek out legal counsel until they are forced to do so by a crisis. As in medicine, crisis-reactive legal advocacy is often more costly and more time consuming, and often yields worse outcomes, than proactive counsel retained prior to a crisis.

Recent developments in the larger economic picture, while not necessarily welcomed by lawyers, are changing the ways lawyers practice and are compensated for their work. The economic downturn has shaken the assumptions of large-firm economics. The expansion of legal education, which shows no signs of stopping, has created a supply of lawyers that may already be in excess of demand. Bar associations and clients are encouraging firms to move to a flat-fee billing model.⁶ These developments have many lawyers worried, as they reflect downward pressure on the market-clearing prices of legal services. Your authors are not immune to this concern, but believe that the medium-to-long-term conditions that are likely to emerge out

⁴ See generally JOHN NWOHA ET AL., DEP'T OF AGRIC. ECON. & AGRIBUSINESS, UNIV. OF ARK., FARM SERVICE AGENCY, DIRECT FARM LOAN PROGRAM EFFECTIVENESS STUDY (2005), available at http://bumperscollege.uark.edu/977_pdf.pdf.

⁵ FREDERICK L. KIRSCHENMANN, CULTIVATING AN ECOLOGICAL CONSCIENCE: ESSAYS FROM A FARMER PHILOSOPHER 23 (Constance L. Falk ed., 2010).

⁶ David Gialanella, *The Skinny on Flat Fees: 'Value' Pricing Requires Managing a New Way*, A.B.A. J., July 2008, at 26.

of these developments will work to the benefit of farmers and other small businesses seeking representation.

The Cravath model, which calls for recruiting the best students from the best schools and investing heavily in their training and retention, is not well suited to the realities of an innovative practice supporting small farmers and food businesses.⁷ These agricultural businesses are unlikely to be able to support the administrative costs and profit-sharing expectations of the legal practice, let alone expenses such as billable travel time or expensed meals. This will not be news to solo practitioners and attorneys at small firms, for whom such amenities are already mostly theoretical. The attorney supporting small farmers and food businesses will have to take austerity to new levels when supporting these clients, often undercutting the fees that rural, small-practice attorneys charge their ordinary clients.

The support of small farmers and food producers, like farming itself, must be approached as a labor of love, even though small farmers and producers conduct business for profit. Unfortunately, the realities of student loan payments and modern life do not give lawyers the luxury of being able to eschew a cash income entirely. Obtaining fees from financially insecure clients has always been a balancing act for many attorneys who specialize in family law, criminal defense, consumer protection, bankruptcy, and other practices areas. The lawyer representing farmers and food businesses faces the same challenge in a small business practice.

Flat fees represent one way that lawyers can support farmers and food producers. A flat fee provides clients with certainty about the costs they will pay for the lawyer to handle their matter. Clients are able to make a decision about whether the legal services they are buying will be worth the cost. Under a fixed-fee arrangement, the attorney should venture to show, within the constraints of professional ethics, the value of their services.

The practice of supporting small farmers and food businesses requires flexibility in other ways as well. Farming and food production are labor-intensive undertakings, demanding long hours of their proprietors. An attorney supporting these businesses should be prepared to meet clients at late or early hours, to make house calls, and to conduct client intake and fact gathering on the client's property

⁷ Deborah L. Cohen, *End of the Road for the Cravath Model?*, A.B.A. J., Nov. 2008, at 36.

instead of the attorney's office. Travel to rural locations should be expected, and as noted above, is probably not billable.

The successful attorney in a rural, farm-supporting practice can benefit from adopting a practice centered on a mobile office. In this regard, younger attorneys can benefit from their comfort level with technologies such as laptops, smart-phones, and the internet. The attorney supporting farmers and food businesses will want to become comfortable with a somewhat nomadic, self-contained practice that even traditional solo practitioners are unused to.

The practice of law, like many of the white-collar professions, is undergoing certain changes. Lawyers supporting small agricultural businesses will have to be entrepreneurial, mobile, and self-contained. On top of this, they must give effective counsel and responsive customer service to their clients, while often eschewing the salary and other comforts of even a traditional small firm practice. The resolve to face these realities on a daily basis is a necessary precursor to crafting legal solutions in support of this vital part of our economy and environment.

III

PRACTICAL LEGAL SERVICES, LEASE AGREEMENTS, AND COMMUNITY-SUPPORTED FINANCING

The needs of small-scale farmers boil down to land access. Meeting these needs requires farmers, advocates, service providers, and legislators to address the hurdles. Land access has become difficult because of rising land values, lack of capital on behalf of small farmers, and the decline in farm profitability.⁸ We need to develop new ways or revisit those ways of the past to repair ailing farm service infrastructure. Long-term lease arrangements may help to resolve the short supply of land as compared to the volume of demand, especially for development purposes.

Fewer next generation farmers acquire good farmland, and a growing percentage of productive agricultural capacity is owned by those who do not farm it. Young farmers are becoming and have been a minority for some time. Twice as many farmers are over the age of

⁸ Kendra Johnson, *Conserving Farmland in California: For What and for Whom? How Agricultural Conservation Easements Can Keep Farmland Farmed*, 9 SUSTAINABLE DEV. L. & POL'Y 45, 47 (2008).

sixty-five as under the age of thirty-five.⁹ Non-farmer-owned productive farmland, cropland, pasture, orchard, and woodland is estimated at 10.2 million acres.

Access to land is problematic for most small-scale and beginning farmers. Land, an obviously integral part to the business of farming, is scarce and hence expensive. Connecting prospective farmers to farmland and keeping farmers on the land are more than mere moral claims or values. They are necessary for the health and safety of America's farm and food system. Loss of farming and farmland means loss of economic opportunity, not just for farmers, but also for their communities, whose members lose access to fresh food alternatives to the mainstream fare. Loss of small-scale farming in particular also means the loss of non-market goods such as open space, wildlife habitat, recreation, scenic amenity, and cultural richness. The decline in these alongside the collapse of once vital local economies is already well documented throughout the country.¹⁰

Remedies to this reality include discovering and sometimes creating solutions in the form of alternatives to traditional outright ownership, in addition to the traditional purchase and sale model. These alternatives to traditional ownership can, and often do, take many forms. However, if such alternatives are to be useful and successful over the years, not to mention to be accepted in the first place, they must offer secure tenure for those otherwise unable or unwilling to purchase farmland. These models need to share certain features and goals. For example, protecting the land from development represents a primary reason people support small-scale sustainable farming in the first place. Farming and conservation easements and other tenure models that achieve similar goals share provisions that need to be replicated in the alternative models.

Outright purchase of land is not an option for a large segment of the farming population. Scarcity of farmland presents a major roadblock because as a result, the price tag of land puts it far out of the reach of many beginning farmers. Some borrow in order to

⁹ Rich Allen & Ginger Harris, *2002 Census Publications: Demographics of U.S. Farm Operations*, http://www.agcensus.usda.gov/Publications/2002/Other_Analysis/index.asp (last modified 2/11/08); John R. Baker, *Why the Obsession with Succession*, IOWA ST. UNIV. EXTENSION, <http://www.extension.iastate.edu/bfc/pubs/obsession.pdf> (last visited May 10, 2011); *Beginning Farming Center: Resources for the Family Farm Business*, IOWA ST. UNIV. EXTENSION, <http://www.law.drake.edu/academics/aglaw/docs/forumRoundUp-ResourcesForFamilyFarmBusiness.pdf> (last visited May 10, 2011).

¹⁰ *Id.*

purchase land, burying their businesses from the very beginning in debt. Then, lack of profitability, or the struggle of farmers to reach that goal, prevents timely repayment of debt. Inability to match farmers with farmland, a prerequisite of the vocation, derives from a lack of imagination. As lawyers, we need to use our legal expertise to establish a legal foundation for unconventional tenure arrangements in order to put more farmers on the land and keep those already there farming successfully.

Alternatives to outright ownership include conservation easements, cooperative ownership, land trusts, and long- and short-term lease agreements. Specifically, stewardship standards in long-term lease agreements and conservation easements present particularly valuable alternatives, as do the use of nontraditional partners, such as land trusts, and Community Supported Agriculture shareholders. The survival of small-scale farming may very well depend on the creative use of these and other land tenure options.

IV LONG-TERM LEASES

Long-term lease agreements¹¹ may include terms specifically drafted to enable new and existing farmers to access farmland. These provisions can be written to ensure that the farmer and his family's needs and long-term welfare are met, while also ensuring those of the landowners are met. Long-term leases can be drafted to require certain stewardship principles and practices, improving the health of the environment and local community. Long-term lease agreements can also include provisions designed to ensure the farmland remains affordable for future generations of farmers, as well as the landowner. Finally, the long-term nature of such lease agreements ensures the farmer takes into account the long-term health of the land.

Long-term leases must be well crafted and remain affordable over the years, and they must require that farming practices maintain healthy soil, water quality, and environment protections. By reflecting these values, such leases will benefit the land and the whole community, as they give rise to economic opportunity, increase local food production, and contribute to regional self-sufficiency. Landowners and tenants benefit, as does their land and the entire local community. Access via long-term lease mimics outright ownership,

¹¹ A long-term lease may endure anywhere between six and ninety-nine years. (Some states limit the term by statute.)

sharing certain important characteristics, such as benefits from building soils, in the form of long-term control over resources. Long-term security of tenure benefits tenant farmers and the environment because it lengthens the horizon for both business and resource planning, and it allows the farmer to capture the benefits of good stewardship.

Private landowners increase access opportunities by leasing their land to new farmers. They play a significant role in the creation of successful new farmers. There are advantages and disadvantages to such arrangements. On the one hand, long-term lease agreements can effectively eliminate down payment requirements and reduce often enormous levels of debt that must be incurred to acquire land in the first place. On the other hand, generally, the tenant does not enjoy the benefit of the long-term accumulation of wealth in the property.

Secure tenure for all parties involved is essential to protect the rights and benefits of future generations. Long-term tenure arrangements—especially long-term leaseholds—foster long-term stewardship of the natural resource base in the form of farm property. The natural resources of farmland include the soil, water, vegetation, and the natural features of the farmland—i.e., the wildlife habitat.

It is a lawyer's task and duty to draft an agreement that spells out the particulars of the arrangement, determine how to divide the rights and responsibilities in a way that meet the needs of both parties to the agreement, and include provisions to protect those silent parties who are no less important and affected—future generations and the environment. The needs of the productive resource must be met for a sustainably successful operation capable of profitability to be passed on as a treasured inheritance. These models need to encourage and reward stewardship on all farmlands regardless of tenure. Lawyers also need to provide services to help negotiate such agreements. Saving agriculture and fostering farming in their region is a new ethic that fosters farmland access, security of tenure, affordability, and investment.

A. Stewardship Tenure: Practical Provisions

Long-term lease agreements are only as good as the provisions they contain. One needs to understand the unique and special needs of each and every farm, whether the farm has cropland, pasture, or orchard. Tenant farmers should make sure the property is the right kind of farmland for their farming operation. A farm with a lot of pasture will do little good for a livestock business. Tenant farmers should ask themselves: Does this particular farm really fit my needs? They should

also check out the potential for profit—i.e., the land's yield potential—and how efficiently the use of equipment and labor can be allocated. Tenants should look for the following traits in a landlord: reasonableness, willingness to communicate, an understanding of farming, honesty, sufficient capital or credit to make needed farm improvements, good judgment, open mindedness to new or less conventional farming practices, and respect for a tenant's privacy.

Goals of any lease arrangement should include fair division of income and expenses between landlord and tenant. Tenants should aim at making a farming operation successful in the long term and profitable for both the tenant and the landlord. Fertility and conservation practices and maintenance and repairs are important details that need to be spelled out. Assurances from the landowner to the tenant of a continued or renewed lease spelled out in the lease can sometimes encourage favorable practices and a strong relationship.

To be a sustainable farming operation, a necessary provision of any lease agreement is that the tenant farmer live on or very near the farm. This is critical for farmland viability, as is available housing and affordability of housing and farm structure. There needs to be an agreement on goals, a shared vision of the property. Lease terms need to be reflective of mutually agreed upon expectations about how the operation will be run. Important considerations for landowners include whether they intend to transfer title now, at some point in the future, or never; whether they need income from the property; whether they will put in place restrictions on the use of the property; and how much involvement they will want to have in the operation.

The Natural Resource Conservation Service's conservation plan sets baseline stewardship standards, such as keeping nutrients or livestock from contaminating streams and groundwater, or keeping fields open for wildlife, and qualifies the land for voluntary government cost-sharing programs.

Lack of conservation practices are at least partly the landlord's responsibility. The landlord should require farming practices that do not lower the farm's value, such as prohibiting building deterioration and keeping facilities in working order.

V

ACCESS TO CREDIT AND COMMUNITY-SUPPORTED FINANCING

Farms are not the only small businesses that have struggled to find credit or financing during the new economy. Indeed, farms have struggled to find financing on favorable terms for decades before the

economic downturn, and perhaps the rest of the small business world is merely getting a taste of what small farmers have already faced. If so, this would be terrible news for small business.

Innovation in investment has a bad name these days, and perhaps rightly so. Nevertheless, investment—access to capital—is necessary for the functioning of an economy, to say nothing about its growth. Where traditional investment sources—banks and institutional investors—are unwilling or ill suited to support farmers and other small businesses, these businesses will look elsewhere for these essential services. This means innovative financing arrangements, and it means smart lawyers able to come up with financing agreements that meet both the law and the needs of the parties.

In traditional investing, investors protect their investment by retaining certain rights from the business in return for the money they have invested. These rights can be described according to the categories of “debt” and “equity.” Debt investments, such as bonds and secured loans, are used when the investor is looking for a lower-risk investment or when the business owner is not willing to relinquish an ownership interest in the business. Equity, typically attractive to less risk-tolerant investors, is available when an owner is looking for investors to become more involved in the business.

Community-supported financing (CSF) is a popular financing arrangement whereby a business raises operating capital for a project or growth cycle in advance from a broad section of the community, whose members are likely to use the business’ goods or services. These investors are then repaid in an agreed-upon amount of goods and services. The archetypal community-supported financing project is the CSA, in which a limited number of “members” purchase “shares” that entitle them to a portion of the goods the farmer is able to produce during the growing season. This model has been adapted to other businesses such as restaurants and retailers.¹²

It is worthwhile to think of alternative financing in debt and equity terms: Some CSF arrangements, particularly CSAs, will more resemble limited-term equity financing, in which the CSA member (the investor) bears some or all of the risk that they will get little or nothing for their investment should the harvest fail despite the farmer’s reasonable efforts. The arrangement is limited in duration

¹² CSAs: *Community Supported Agriculture*, NE. ORGANIC FARMING ASSOC. OF VT., <http://nofavt.org/market-organic-food/community-supported-agriculture> (last visited Apr. 12, 2011).

because the CSA share only gives the member a right to produce for a limited time. Other CSF arrangements will resemble debt financing, such as where an investor is able to redeem her investment for goods or services.

Both CSAs and CSF businesses benefit from being able to raise cash up front. This is a tremendous advantage to small businesses at the start-up phase, and to farmers who have traditionally had to live on credit or savings until the harvest. Both CSAs and CSF arrangements contain a certain amount of built-in demand for their products. For farm businesses, the CSA has the advantage of allowing the farmer to get the majority of marketing and sales work out of the way before the typically busy harvest season.

CSAs provide an ecological benefit as well, because they are not well suited to agricultural monoculture. A well-run CSA provides a share to each member on a regular basis (typically once a week), which requires the farmer to plant a variety of crops to come in throughout the spring and summer, rather than a single crop that will be sold as a commodity to an institutional buyer. CSAs therefore benefit farmers as well as the soil itself.

In other food businesses, such as restaurants or retailers, the CSF model can be operated as a gift card or as a food-of-the-month club. Restaurants and retailers will want to be careful to limit how much the investor may redeem an investment over a given time period.

Businesses also benefit from the debt-style CSF arrangement in direct financial ways. Many CSF agreements specify that the repayment amount will be calculated by reference to the retail price, which of course includes a profit margin. This means that the repayment amount is automatically discounted by the profit on the items redeemed. For example, a CSF-funded restaurant operates its kitchen with a thirty percent average food cost, a forty percent labor cost, and a twenty percent overhead cost, leaving ten percent for profit. The CSF agreement allows investors to redeem their investment in increments of one hundred dollars worth of food per month. The cost to the restaurant for providing that one hundred dollars to the investor is approximately ninety dollars.¹³ Therefore, the restaurant, by controlling costs effectively, is able to save money while repaying its investors. Of course, savvy investors may be aware

¹³ If the time value of the money for the business is the same as the interest rate owed to the investor, the cost to the restaurant is exactly ninety dollars.

that the CSF model affords the business this advantage and seek favorable terms.

In all cases, the farmer or food business would be well advised to treat its investors as though they were customers and its investment vehicles as though they were clients. The CSF/CSA model provides a business with frequent opportunities to build lasting relationships with investors, who by their very nature are already interested supporters of what the business is trying to do. A CSA farm or CSF business should go the extra mile in terms of customer service to keep their investors happy.

Legal counsel can facilitate CSF agreements by ensuring that these financing arrangements do not run afoul of state or federal laws. As lawyers know, a seemingly simple agreement can implicate many areas of law in its details. In particular, consumer protection, gift card fees and expiration dates, securities regulation, taxation, and contract expertise will be of service to the CSF business at this stage.

Many CSFs will operate essentially as gift cards, enabling an investor to consume a particular amount of goods or services per month in lieu of debt repayment. In order to protect the cash flow of the business, the business owner may wish to limit her investors' ability to stockpile these redemption rights so that she does not experience a run of investors redeeming high-dollar-value obligations and interrupting the ordinary operation of the business. The business owner may be tempted to issue monthly coupons, which expire on a particular date—in some states, however, gift card expirations are highly regulated or even prohibited by law.

At the present time we are not aware of any enforcement actions, but we would not be surprised if, as these arrangements become more common, the CSA model comes under regulatory scrutiny as a form of equity subject to state or federal securities regulation. In order to protect CSA clients, attorneys should be mindful of this potential regulation and advise clients to ensure that their CSAs fall into exemptions from securities regulation to the extent possible.

In many states, and under federal law, a promise to repay currency—i.e., a bond or other debt instrument—that is redeemed by goods is considered a deferred sale for purposes of taxation. This means that a business that could write off some of its repayment in currency must instead account for the original loan as income from a later sale. Businesses should be advised that their tax planning can be affected by the way that this difference plays out over time.

Ongoing creditor-debtor relationships are, of course, always potentially fraught with hazard and conflict. A business's relationship with investors who may not understand its day-to-day operation—particularly with a business such as farming—is likewise at risk. For this reason, attorneys who draft CSA or CSF agreements must exercise great skill in making clear the parameters of the relationship between the lender or investor and the business. Contracts that set forth these arrangements must be clear enough that the lender or investor understands the agreement, and must be short enough that the lender or investor is not scared away. At the same time, the agreement must ultimately protect the business. The attorney writing these agreements must successfully navigate all of these concerns. CSF financing is only one mode of alternative financing available to farmers and food businesses. It is, at present, very popular with businesses and consumers alike, and in the hands of a skilled attorney, it can be a tremendous asset to building a farm or food business.

Attorneys can further support farmers and food businesses by helping to establish distribution channels for locally produced food and goods. Demand has grown for locally produced foods, and local farmers are able to meet some of this demand through farmers' markets, farm stands, and CSAs. But these sales options can be remote from population centers, keep irregular hours, or otherwise be—or seem—inconvenient, even to shoppers who would otherwise be interested in developing the local food economy.

While direct sales can represent an important source of farmer revenue, they also require the farmer to get into the retail business. This can add a burden to farmers, who often already wear many labor-intensive hats. Moreover, the virtues and characteristics of a successful farmer may not be congruous with those of a successful retailer. To ameliorate both of these obstacles, farmers can hire employees to operate the retail aspect of their businesses, but, as discussed above, the costs of hiring employees will cut significantly into whatever additional revenue the farm business can realize from direct retail sales. For these reasons, many farmers are looking for other ways to get their produce—as directly as possible—into the hands of the public. These distribution channels can include existing retail outlets such as supermarkets and restaurants, as well as the wholesalers who supply these businesses.

Existing distribution businesses have, over the decades, undergone a great deal of consolidation. Highly consolidated distribution businesses are often unable to carry locally produced foods from

small-batch producers for commercial reasons. Even where these distributors—for instance, wholesalers—are open to carrying local foods, the realities of risk management for these large businesses require them to impose significant restrictions on local producers. For instance, some smaller regional supermarket chains allow small vendors to deliver their produce directly to the loading dock of a local supermarket. While this represents a step in the right direction, the vendors are required to file a Hazard Analysis Critical Control Program plan and meet with other recordkeeping requirements that can still prove onerous to small producers. Even restaurants, which remain the least consolidated segment of the food distribution economy, often source the lion's share of their products from a few highly consolidated wholesalers; therefore, they have not had much access to locally produced foods.

These conditions represent an opportunity for creative and committed lawyers to facilitate the negotiations between farmers and distributors, who face very different incentives, realities, and goals. In addition, to the extent that vendor contracts with larger distributors will require farmers to adapt their growing or recordkeeping practices, attorneys can help them to meet these requirements in a cost-effective way. Particularly in this latter task, lawyers will find themselves challenged to adapt for small producers plans designed for large-scale farming in order to comply with the requirements of the vendor contract.

In response to the difficulties of selling produce through large-scale distributors, small-farm-friendly distribution businesses are springing up in New England—including home delivery services, farm-to-table restaurants, and farm-friendly food trucks. In most cases, these distributors are, like the farmers they buy from, smaller and younger companies. These businesses require a great deal of legal counsel on small business issues, including the following: business formation, trademark and unfair competition, employment and labor, food regulations, and financing. Of these issues, food regulation is perhaps the most restrictive, and therefore requires the most creativity on the part of the advising attorney.

Despite the obstacles that farmers face selling produce directly, direct sales often contain one considerable advantage over distribution by others. In many states, food regulations contain exemptions for direct sales, and only take effect once a person other than the producer has taken possession of the food. This means that

distribution businesses face a heightened regulatory burden compared to direct on-farm sales.

To make matters worse, the food regulations that distribution businesses must comply with are often a combination of food safety, consumer protection, transportation, and other rules, promulgated and enforced by federal, state, and local agencies in often disharmonious ways. Even where regulations are straightforward, they often impose restrictions that complicate the operation of a local food distribution business. For instance, federal regulation may prohibit the interstate sale of particular potentially hazardous products, even though the product may be perfectly legal in two adjoining states. For distributors operating across state lines, such prohibitions can create both legal and logistical problems that require competent legal counsel and an understanding of the realities of operating a business.

VI

CONCLUSION

Creating a just, safe, local food economy requires that counsel exercise the virtues of a lawyer at all levels of the economy, from the field to the table. Lawyers involved in creating and supporting these businesses must pay close attention to the details of food regulations on the local, state, and federal levels, and must craft creative solutions that enable distributors to comply with these rules while supporting a local food system which is in many ways foreign to them.