You Help Me, He Helps You: Dispute Systems Design in the Sharing Economy[†]

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Imagine the life of Dave, who owns a small computer programming business you represent. Every morning, Dave makes

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† This Article was presented at the scholarship roundtable on *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution* at the Washington University School of Law in the Fall of 2014 and benefitted greatly from the feedback of the roundtable's participants. The authors also wish to thank Robert Bordone, Sara del Nido, Alonzo Emery, and Rachel Viscomi for reviewing and providing helpful comments on prior drafts of this Article. Of course, this Article could not exist without the sharing economy participants who spoke with us about their experiences. Thank you.

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his family omelets using the organic vegetables and eggs he receives through his weekly farm share.[1] *On this morning, while his three children eat, Dave uses a cell phone app to summon a person just down the street who is willing, for a fee, to drive Dave and his children*[2] *to a home across town where the children will receive free childcare as a result of Dave's "banking" eight hours of time in the local TimeBank.*[3] *After the kids are settled in with the childcare provider, Dave finds a nearby bike-sharing station*[4] *and rides a bicycle to his co-working space*[5] *where five independent technology*

1. A "farm share," or community-supported agriculture (CSA), involves a consumer giving money to a farmer in the spring, providing the necessary influx of capital for the farmer to purchase supplies and prepare the crops. In exchange, the consumer receives a share of whatever the farm produces throughout the summer and fall. Some CSAs take this quite literally; they will give the consumer a portion of what is produced (which could be more or less than the week before) rather than give the consumer a full box. However, as CSAs have surged in popularity over the last decade and consumer expectations of CSAs increasingly mirror consumer demands for food items more generally, most CSAs reduce the consumer's actual investment risk by, for example, purchasing from other farms when necessary so that the consumer still receives a consistent amount and diversity of produce. *See* U.S. DEPT. AGRIC., ALTERNATIVE FARMING SYSTEMS INFORMATION CENTER, COMMUNITY SUPPORTED AGRICULTURE, http://www.nal.usda.gov/afsic/pubs/csa/csa.shtml (last visited Oct. 23, 2014).

2. Uber, along with competitors Lyft and Sidecar, link individuals who own cars to individuals who wish to be driven from one location to another for a fee. The company treats the drivers as independent contractors; allows them to set their own hours; and maintains a mobile application through which a rider can request a pick-up at a particular location, a driver can accept the request, and the rider can pay for the service. Riders and drivers also leave reviews of one another through the mobile application. Uber then pays the driver regularly, based on the number, length, and type of rides provided. UBER, http://www.uber.com (last visited Oct. 23, 2014).

3. Time banks are informal groups of people who offer skills by the hour. Every hour is equal to the next, whether someone offers dental services, home repair, massage therapy, guitar lessons, or other services. When a user "banks" time by giving another user an hour (or more) of service, the user can then "spend" that banked time on services rendered by another user. The primary example of this is TimeBanks USA. *See* TIMEBANKS, http://timebanks.org (last visited Jan. 20, 2015).

4. Bikesharing companies install multi-bicycle stations in public spaces and charge an annual membership fee or a per-use fee to users, who can ride the bicycles one way or roundtrip. *See, e.g.*, *Cities*, BIKESHARE, http://bikeshare.com/map (last visited Oct. 23, 2014).

5. Co-working spaces exist in many major cities and offer users a work environment, often with meeting space, conference phones, printing services, wireless internet, and other amenities for a fee. Co-working spaces may also offer users business development or networking events. Though many co-working spaces are owned by an entity or a few individuals, some co-working spaces are owned by a collective. Kerry Miller, *Where the Coffeeshop Meets the Cubicle*, BLOOMBERG (Feb. 26, 2007), http://www.bloomberg.com/bw/stories/2007-02-26/where-the-coffee-shop-meets-the-cubiclebusinessweek-business-news-stock-market-and-financial-advice.

firms share space and office resources. In the refreshments room, Dave makes a pot of coffee and grabs a granola bar, the latter of which is made by a small-batch baker who works out of a commissary kitchen down the street.[6] *During his lunch break, Dave rents a designer tuxedo online at a significant discount for an upcoming fundraising event*[7] *and receives an email from a friend asking him to contribute money to her thirty-day online campaign to fund her latest documentary.*[8] *On his way home from work, Dave stops at the food co-op, where he picks up his annual return check and a few things for dinner.*[9] *That evening, Dave and his husband book a guest room in someone's home a few hours' north of town for a weekend away from the kids.*[10]

Sound like an issue-spotting law school exam? Welcome to the so-called "sharing economy."[11] The sharing economy[12] exists at the

6. Commissary kitchens are commercial kitchens that meet local health and food safety codes and offer users commercial-grade kitchen equipment, often including short-term food storage and packaging facilities. Users, mostly small-scale food entrepreneurs who cannot afford or do not need a commercial kitchen of their own, usually sign up to use the space during certain periods each week, and overlapping use of the space (e.g., one food entrepreneur is baking while another is prepping food for a catering event) is common. COMMUNITY ENTERPRISE PROJECT OF THE HARVARD TRANSACTIONAL LAW CLINICS, FOOD TRUCK LEGAL TOOLKIT 12 (Fall 2013), http://www.cityofboston.gov/images_documents/Food%20Truck%20Legal%20Toolkit%20PDF%2012.18.13_tcm3-43273.PDF [hereinafter COMMUNITY ENTERPRISE PROJECT].

7. *See How It Works*, RENT THE RUNWAY, https://www.renttherunway.com/how_it_works (last visited Oct. 23, 2014). The company allows users to rent high-end fashion for a fraction of the cost of ownership. *Id.*

8. *See* KICKSTARTER, http://www.kickstarter.com (last visited Oct. 23, 2014).

9. *See* COOP DIRECTORY SERVICE, http://www.coopdirectory.org/ (last visited Oct. 23, 2014).

10. *See* AIRBNB, http://www.airbnb.com (last visited Jan. 20, 2015); HOMEAWAY, http://www.homeaway.com (last visited Jan. 20, 2015).

11. The "sharing economy" is known by many other names, including the "new economy," "collaborative consumption," "access economy," "peer-to-peer (or P2P) economy," "cooperative economy," and "relationship economy," among others. *See* Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, CO.EXIST (Nov. 21, 2013), http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition#4; Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 2, 5 (2012) [hereinafter Kassan & Orsi, *Legal Landscape*].

12. Because of some of the challenges sharing economy models face in defining relationships between owners and/or participants, sharing economy entity types vary considerably more than more traditional consumer economic structures. Thus, throughout this Article, we use "models" rather than "entities" intentionally, as we intend to include the myriad of business structures or unincorporated groups of people that make up the sharing economy,

intersection of rapidly-developing technology that connects people to a plethora of previously inaccessible resources and a growing call for less global, more localized, consumption.[13] Broadly speaking, models at this intersection help individuals and entities maximize the benefits of ownership by leveraging a valuable good or service into an ongoing resource generator (or at least not a resource waster) while also providing a benefit—typically, easy access to a good or service at a lower-than-market rate for use, often as an alternative to ownership[14]—to the non-owner.[15]

There are myriad benefits to the emergence of the sharing economy, or collaborative consumption models (CCMs), in society. Broadly speaking, CCMs help society think more creatively about "expanding the pie," or finding ways to generate value, whether monetary or otherwise,[16] from a seemingly finite object or service.[17]

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including but not limited to for-profit companies, not-for-profit organizations, hybrid organizations such as benefit corporations and L3Cs, and cooperatives.

13. JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY (2012) [hereinafter ORSI, PRACTICING LAW]; *see* Kassan & Orsi, *Legal Landscape*, *supra* note 11, at 4 ("The reality is that we have already used the planet's resources faster than they can be replenished, and we have built our current economic system by creating an ever-widening gap between the rich and the poor. That means that the new economy that we build must not just be *sustainable*, it must now *regenerate* the economic and ecological abundance necessary for everyone to thrive again."). Kassan & Orsi, *Legal Landscape*, *supra* note 11, at 4.

14. We intentionally use non-monetary terms like "resource" and "rate," as some SEMs do not use money as the currency in the relationship.

15. Kassan & Orsi, *Legal Landscape*, *supra* note 11, at 3–5; ORSI, PRACTICING LAW, *supra* note 13, at 4–10. *See also* Yoachi Benkler, *Sharing Nicely: On Shareable Good and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 275 (2004) (stating that "social sharing" joins traditional marketplaces and the state as a third mode of organizing economic production).

16. At least one commentator argues that traditional consumer companies should follow this example and measure value in units used rather than units sold. Alexandra Samuel, *Established Companies, Get Ready for the Collaborative Economy*, HARVARD BUS. REV. (Mar. 4, 2014), http://blogs.hbr.org/2014/03/established-companies-get-ready-for-the-collaborative-economy.

17. Creating value, or "inventing options for mutual gains," is also a key concept in interest-based negotiation, our approach to conflict management that will form the basis of many of our dispute systems design recommendations. *See generally* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES 58–81 (3d ed. 2011).

As a result of these newfound opportunities for value creation, local communities can thrive, even in the midst of recessions.[18]

On an individual level, CCMs give many people access to goods they could not otherwise afford to own outright, thus redefining "capital" and expanding the availability of capital in societies facing increasing economic disparity.[19] At times, the mere availability of these marketplaces encourages potential participants to leverage their own skills or possessions—or access the skills or possessions of others—in ways they might not have otherwise considered. Linda, a TimeBank[20] member in Louisville, Kentucky, uses her banked time to "pay" for chiropractic services and states, "I don't have money to go to a chiropractor . . . [but] I feel wealthy since I've been in the TimeBank, [even though] I don't have cash."[21] When access is more highly valued than ownership, class distinctions and hierarchical organizational structures become less powerful means to achieve ends.

CCMs can benefit the environment as well, as a shift away from exclusive ownership reduces the number of resource-intensive consumer items in production and use.[22] Overall, CCMs can help individuals and communities build lifestyles in which their possessions, methods of work, and sources of income are more aligned with their values.[23] These types of paradigm shifts provoke headlines as dramatic as "The Sharing Economy: A Whole New Way

18. *Diane Sawyer's Hometown in Kentucky Saves Money by Helping Each Other Out*, (ABCNews television broadcast Jan. 16, 2014), *available at* http://abcnews.go.com/WNT/video/diane-sawyers-hometown-kentucky-saves-money-helping-21550025.

19. Kassan & Orsi, *Legal Landscape*, *supra* note 11, at 4; ORSI, PRACTICING LAW, *supra* note 13, at 6, 9–10.

20. *See supra* note 3.

21. *See supra* note 18.

22. Laurie Ristrino, *Back to the New: Millenials and the Sustainable Food Movement*, 15 VT. J. ENVTL. L. 1, 24 (2013) (discussing how sharing economies have impacted agriculture, and particularly the sustainable food movement).

23. *See generally* Kassan & Orsi, *Legal Landscape*, *supra* note 11; ORSI, PRACTICING LAW, *supra* note 13, at 2–4.

of Living"[24] and "Why the Collaborative Economy is Changing Everything."[25]

A skeptic may assume that CCMs are short-lived consumer over-reactions in a post-recession economy. If so, the horror story disputes we increasingly associate with some of these models—deaths,[26] prostitution,[27] illegal hotels,[28] mass labor strikes[29]—will prompt a pendulum swing back to a preference for top-down, highly regulated, corporate-seller-meets-individual-buyer ways of doing business. However, economists and others who have studied this rapid shift contend that these new, post-recession economic models are here to stay.[30] As a result, while some traditional businesses[31] and governments[32] are fighting against the rise of CCMs, other corporations and even some government entities[33] are choosing to

24. James Silver, *The Sharing Economy: A Whole New Way of Living*, GUARDIAN (Aug. 4, 2013), http://www.theguardian.com/technology/2013/aug/04/internet-technology-fon-taskrabbit-blablacar.

25. Jacob Morgan, *Why the Collaborative Economy is Changing Everything*, FORBES (Oct. 16, 2014), http://www.forbes.com/sites/jacobmorgan/2014/10/16/why-the-collaborative-economy-is-changing-everything/.

26. Jessica Kwong, *Uber Driver in Fatal Collision Told Police he was Waiting for Fare*, S. F. EXAM'R (Jan. 2, 2014), http://www.sfexaminer.com/sanfrancisco/uber-driver-arrested-for-vehicular-manslaughter-in-girls-death/Content?oid=2664123.

27. JP Mangalindan, *Is Airbnb's Latest Set Back Bad for the Sharing Economy?* FORTUNE (Apr. 21, 2014), http://fortune.com/2014/04/21/is-airbnbs-latest-setback-bad-for-the-sharing-economy/.

28. *See, e.g.*, N.Y. ATT'Y GENERAL, AIRBNB IN THE CITY 2 (Oct. 2014), *available at* http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf [hereinafter NYAG].

29. Mark Tran, *Taxi Cabs in European Cities Strike Over Uber—As It Happened*, GUARDIAN (June 11, 2014), http://www.theguardian.com/politics/2014/jun/11/taxi-drivers-strike-uber-london-live-updates.

30. Noted economist and author Jeremy Rifkin was recently quoted as saying, "[The sharing economy] is the first new economic system to emerge since the advent of socialism and capitalism in the 19th century. It's already transforming economic life, and it's going to change every aspect of our lives dramatically for the next few years." Kim Lyons, *The "Share" Economy is Here to Stay*, PITTSBURGH POST-GAZETTE (July 5, 2014), http://www.post-gazette.com/business/2014/07/06/The-share-economy-is-here-to-stay/stories/201407060181.

31. *Id.*

32. NYAG, *supra* note 28.

33. For example, Hawaii's House of Representatives recently passed a resolution requesting that the State's Executive Office of Aging complete a study considering timebanking as a potential solution to the challenge of providing respite for long-term elder caregivers. H.R. 60, 2013 Leg., 27th Sess. (Haw. 2013).

incorporate aspects of the models' innovative structures or to invest in the models outright rather than fight against them.[34]

Even with all the good that is generated from these alternative *economic* structures, sharing economy models (SEMs) often lack *dispute resolution* structures for managing disputes themselves. As CCMs, or at least the disputes arising from them, seem to have staying power, attorneys intending to represent CCMs must become competent in strategies and tools—both on the pre-dispute side (transactional practice) and the post-dispute side (litigation practice)—to manage CCM disputes. Most laws that apply to businesses were drafted based on traditional economic relationships (e.g., buyer/seller, employer/employee); traditional dispute systems like courts and legislative action stemmed from these laws. Yet, only some CCMs follow these traditional economic relationship structures. We will discuss these CCMs in the first section of this Article.

In contrast, many CCMs, especially smaller, more localized CCMs, are based on nuanced, collaborative relationships that do not fit traditional, binary, buyer/seller or employer/employee relationships. For the purposes of this Article and as described *infra*, we deem these models that do not have clear corollaries in the traditional consumer marketplace to be true SEMs. Current laws and regulations do not, in the words of dispute resolution pioneer Frank Sander, "fit" many innovative SEMs' operations, let alone their "fusses."[35] Thus, we endeavor in this Article to distinguish between CCMs and SEMs and choose to focus our dispute systems design recommendations on SEMs.

Without laws that appropriately address SEMs' structures and relationships, traditional dispute resolution systems (e.g., court, regulatory, or legislative advocacy) and traditional dispute system orchestrators (e.g., lawyers) may not be effective means to manage the myriad conflicts that arise within SEMs. For example, conflicts that arise within SEMs are often hyper-personal and the conflicts may

34. *Timeline: Corporations in the Collaborative Economy*, CROWDCOMPANIES, http://crowdcompanies.com/blog (last visited Oct. 23, 2014).

35. Frank Sander & Stephen Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994) [hereinafter Sander & Goldberg, *Fitting a Forum to the Fuss*].

stem from an informal or nonhierarchical arrangement, which render these types of conflicts poor candidates for formal means of resolution. Such informal relationships may lack a contract, for a few reasons. Perhaps the participants did not think they needed a contract, or a contract seemed counter to the relationship in question. Perhaps the participants believed the types of commitments made among participants did not rise to the level of necessitating a legally enforceable contract.[36] Moreover, disputes within SEMs are sometimes of relatively low, or no, economic value.[37] This lack of financial incentive to litigate may leave attorneys less inclined to become involved with a SEM once a dispute has arisen, let alone prior to a dispute. Yet, SEMs' qualities—relational, access-rather-than-ownership-driven, value-creating—render SEMs good candidates to benefit from attorneys who can help them build innovative, tailored, interest-based conflict management systems.[38]

This Article explores how attorneys can best assist SEMs in managing conflicts.[39] We argue that though the standard practice tools on which attorneys already rely to address disputes, including standard contract terms and litigation, will still apply to many CCMs,[40] attorneys helping SEMs manage conflict often will need to

36. *See generally* Matthew Jennejohn, *Collaboration, Innovation, and Contract Design*, 14 STAN. J.L. BUS. & FIN. 83 (2008–2009) (discussing self-enforcing contracts).

37. We acknowledge that some disputes within SEMs, and especially between SEMs and regulatory bodies, can be quite costly in both relative and objective terms. *See, e.g.*, *Logan Square Kitchen Closing: Chicago Business Shuttered after Feud with City*, HUFF. POST (May 17, 2012), http://www.huffingtonpost.com/2012/05/16/logan-square-kitchen-clos_n_1522458.html. Our point here is that most laws and dispute systems designed to resolve disputes within the construct of the law are not well-suited to manage the innovative, complex, and sometimes low-value (economically), high-value (relationally, psychologically, or otherwise) conflicts that may turn into larger disputes.

38. *See generally* NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES 49–68 (2013) [hereinafter ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES] (discussing how a designer can take initiative and clarify roles when designing dispute systems).

39. As law school clinicians and attorneys that support social enterprises ourselves, we sense that the core of this Article's audience is comprised of community-based attorneys who are likely to represent community-based SEMs rather than larger, geographically dispersed CCMs, and so we will focus our efforts on exploring dispute systems design for those models. However, we hope that this Article will be valuable to lawyers who work with CCMs more generally, as well.

40. The Sustainable Economies Law Center offers many types of "agreements" and guidelines for drafting them that parties in a SEM may adopt. JANELLE ORSI & EMILY

prepare themselves to build client relationships in new ways; take on both familiar (pre-dispute transactional advice) and perhaps not-so-familiar (pre-dispute systems design) roles within those relationships; and use lawyering skills that include, but go far beyond, drafting a contract or litigating a case.[41] Thus, our recommendations advocate for attorneys to jump into, rather than shy away from, the innovative lawyering that SEMs need to manage conflicts effectively.[42]

This Article[43] is comprised of two main sections. In Section I, we catalog the various types of CCMs and extricate the commonalities and differences that are integral to the development of a body of dispute systems design recommendations for SEMs. In doing so, we explore current models and draw comparisons between those models and traditional marketplace corollaries. By doing so, we can carve out from the broader CCM category those models—SEMs—that comport with our more narrow understanding of the "true" sharing economy.

DOSKOW, THE SHARING SOLUTION 117–34 (2009) [hereinafter ORSI & DOSKOW, THE SHARING SOLUTION].

41. Lawyers who represent CCMs must grapple with a body of laws that were designed to govern relationships in a competitive economy rather than a collaborative one and thereby provoking litigation rather than collaborative problem-solving. Kassan & Orsi, *supra* note 11, at 13–14, 19. Thus, attorneys for CCMs must be willing to employ approaches to resolving traditional conflicts that are not part of their traditional training. *Id.* at 17–20 (defining nine primary areas in which lawyers who represent sharing economy clients work: drafting agreements, entity structure, advising on legalities and taxation of transactions, navigating securities laws, navigating employment laws, navigating regulations related to the specific production or commerce of the business, managing relationships with real property, managing relationships with intellectual property, and managing risk).

42. Some readers may contend that some of these models do not sound new at all, but rather like a variation on classic capitalism: find a need in the market and create a service or good that is more enticing than what currently exists, usually for a cheaper price or for greater value. Later in this Article, we will argue that many so-called "sharing economy" models are actually market-based solutions that fill gaps in consumer satisfaction, leaving little distinction between the sharing economy model and a traditional consumer model. *See infra* p. 23. *Because* of these similarities, we prefer, and will use throughout this Article, the umbrella term "collaborative consumption models" (CCMs) as opposed to "sharing economy models" (SEMs) to define the large constellation of businesses in this space.

43. We recognize that there are many novel legal issues associated with CCMs, as well as many types of disputes that result from CCMs' existence, including issues related to consumer protection, taxation, insurance, and licensing and permitting, among others. For an overview of these issues, *see* Molly Cohen & Corey Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. BAR J. 34 (2014). However, we will be limiting our consideration to those disputes resulting from the relationships among participants in SEMs, and will therefore not be addressing these other important issues.

By distinguishing between CCMs broadly and SEMs in particular, and then narrowing our efforts to those disputes that arise within SEMs, we can focus our dispute systems design recommendations in those areas in which traditional dispute systems are least applicable. We conclude Part I by exploring the reasons why these SEMs are particularly in need of well-informed and thorough dispute systems design.

In Part II, we share two stories to highlight typical disputes that arise within SEMs and how SEMs might address them in the absence of dispute systems design. We then explore the common themes of these disputes in order to tease out what dispute systems design recommendations might be most effective to manage them. Based on the disputes and themes therein, we provide practice-based dispute systems design recommendations to attorneys who may be tasked with mitigating or managing SEM disputes. Note that we do not prescribe one type of process, such as mediation, to resolve all disputes; we do not believe simply replicating what another SEM has done constitutes appropriate dispute systems design. Rather, we suggest ways in which attorneys may take design initiative[44] to assist SEMs in creating a system or systems appropriate for the SEMs' particular culture and structure. Specifically, we challenge attorneys to think more broadly about the skills they can use—facilitation, consensus-building, drafting—to help SEMs develop better conflict management systems.

I. THE UNIVERSE OF COLLABORATIVE CONSUMPTION

A. Cataloging the Sharing Economy

It is difficult to adequately compartmentalize the various models of collaborative consumption and their multi-participant, consumerism-bending ways. Crowd Companies, a self-described brand council for companies wishing to engage the collaborative economy, organizes the models based on the good or service being leveraged—space, money, tangible goods, food, services, and

44. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 49.

transportation—with "empowered people" in the middle.[45] Rachel Botsman, an author and prominent figure in the modern sharing economy movement, categorizes CCMs into three buckets: product service systems (systems in which companies or individuals offer goods as a service to be used when needed rather than as a product to be sold), redistribution markets (markets in which pre-owned goods are permanently transferred from somewhere they are not needed or wanted to somewhere where they are), and collaborative lifestyles (systems in which people with similar needs or interests band together to share and exchange assets such as time, space, skills, and money).[46] While these categorizations are useful, it is worth noting that both methods of categorization differentiate between the various models based on the utility and treatment of the *product* involved.

For the purpose of this Article, we have chosen instead to categorize CCMs based on the *relationships* shared between participants. These relationships are often foundational to the way disputes in CCMs arise and are subsequently resolved. Through this lens, we see three main categories of collaborative consumption: two-sided marketplaces, investment projects, and borrowing enterprises, with the last category containing three sub-types of relationships, two of which comprise what we consider true SEMs and form the basis for our dispute systems design recommendations.[47]

1. Two-Sided Marketplaces

Two-sided marketplaces facilitate a connection, often via an online platform, between product providers and consumers. Sometimes, the product provider actually sells the item to the consumer outright, meaning that ownership of the product changes hands. Etsy,[48] an online marketplace for creators and consumers to

45. *Collaborative Economy Honeycomb*, CROWD COMPANIES (May 2014), http://www.web-strategist.com/blog/wp-content/uploads/2014/05/honeycomb_collab_econ.jpg (last visited Oct. 23, 2014).

46. Tomio Geron, *How Sharing and Renting is Creating a New Economy in the West*, FORBES INDIA (Feb. 16, 2013), http://forbesindia.com/printcontent/34711.

47. Of course, there are likely "sharing economy" models that will not fit into these categories.

48. ETSY, http://www.etsy.com (last visited Oct. 23, 2014).

connect to buy and sell goods, and Listia,[49] an online marketplace in which owners of unwanted goods connect and trade goods with one another for points that can be redeemed for other goods on the site, are two examples. In other two-sided marketplaces, however, the product or service provider retains ownership and merely licenses the product to the consumer. Uber and AirBnb are examples of such two-sided marketplaces for goods, and TaskRabbit,[50] a website for task-oriented service providers and consumers to connect, is such a marketplace for services.

2. Investment Projects

Investment projects involve individuals or small businesses with an idea and many investors who "buy in" to the idea. This type of CCM sounds similar to a typical start-up business seeking venture capital or other traditional financing, but key features distinguish it as a CCM. First, the person or entity seeking investment is often (though not always) operating at a small scale.[51] Second, the idea for which funding is sought may not be financially promising or lucrative enough to attract sufficient investment from accredited investors,[52] and the person or entity seeking investment may not have sufficient income, credit, revenue potential, or collateral for a traditional loan.[53] The investment project model allows for many people to contribute

49. LISTIA, http://www.listia.com (last visited Oct. 23, 2014).

50. TASKRABBIT, http://www.taskrabbit.com (last visited Oct. 23, 2014).

51. Chuck Klosterman, *Was it Ethical for Zach Braff to Take to Kickstarter?*, N.Y. TIMES (May 24, 2013), http://www.nytimes.com/2013/05/26/magazine/was-it-ethical-for-zach-braff-to-take-to-kickstarter.html?_r=0.

52. *Investor Bulletin: Accredited Investors*, U.S. SEC. & EXCH. COMM'N (Sept. 23, 2013), http://www.investor.gov/news-alerts/investor-bulletins/investor-bulletin-accredited-investors#.VE2Nmsmh0ok.

53. For example, a young singer-songwriter may work part-time and live with her parents to financially support her desire to spend time each week writing and playing music. When the singer-songwriter decides to record an album, the costs associated with renting a recording studio, as well as hiring a sound engineer, side musicians, and someone to mix and master the tracks could reach ten thousand dollars or more. A traditional investor may not consider this to be a worthwhile investment, both due to the relatively small amount of money involved (and therefore the relatively small amount of profit to be earned) and the lack of financial value inherent in the activity; likewise, a bank or other lender may look to the short credit history, part-time job, and lack of existing financial and physical assets of the singer-songwriter to determine that a business or personal loan would not be worth the risk involved to the lender.

relatively small amounts of money to the idea to help bring it to fruition. Third, though investors often receive something in return for the investment, it is not always money; and unlike traditional investment mechanisms, it is almost never equity in the recipient-business.[54] An example of an investment project facilitator is Kickstarter, a website for investment projects whereby the investor, for example, may contribute $20 to a musician who wants to raise enough money to rent studio time to record an album.[55] In return for her contribution, the investor may receive .mp3 files of the resulting new album from the artist. Another investment project model is community-supported agriculture (CSA), in which many people buy "shares" of a farm's crops for a growing season. In return, the investors receive portions of whatever the farm produces during that season, whether it is a bumper crop or a drought year, in regular (e.g., weekly) installments.[56]

3. Borrowing Enterprises

Borrowing enterprises are CCMs that are in some ways similar to two-sided marketplaces, as both categories involve a party with a good or service that they are willing to let others use. However, we view borrowing enterprises to be those models in which a product or service "owned"[57] by one person or group of people is used by many people, sometimes including the owner. This multi-directional (rather than bi-directional) arrangement results in a lower market rate for both use and ownership of those goods or services as compared to

54. This may soon change: Title III of the Jumpstart Our Business Startups (JOBS) Act permits the offer and sale of securities through crowdfunded private offerings. The Financial Industry Regulatory Authority (FINRA) has since published proposed rules to govern "funding portals," which would connect small businesses with individual investors, though those rules have not yet been adopted. Noam Noked, *JOBS Act Title III Crowdfunding Moves Closer to Reality*, HARV. L. SCHOOL FORUM ON CORP. GOVERN. & FIN. REG. (Dec. 6, 2013), http://blogs.law.harvard.edu/corpgov/2013/12/06/jobs-act-title-iii-crowdfunding-moves-closer-to-reality/.

55. *What is Kickstarter?*, https://www.kickstarter.com/hello?ref=footer (last visited Oct. 23, 2014).

56. *See* U.S. DEPT. AGRIC., *supra* note 1.

57. Though services are not tangible goods capable of being owned, they are in the possession of the service provider and therefore "owned" by the provider in this context.

exclusive ownership of those goods and services by each user. Borrowing enterprises can be further categorized into three sub-categories of borrowing arrangements: circular borrowing, simultaneous borrowing, and piecemeal borrowing.

Circular borrowing occurs when the participants are borrowing and lending goods or services to and from the other participants on an as-needed basis. Three examples of circular borrowing CCMs are tool lending libraries,[58] media lending libraries,[59] and time banks or time trade circles.[60]

In contrast, simultaneous borrowing occurs when all of the CCM participants are using the same good concurrently, if not simultaneously. Co-working spaces and commissary kitchens are two examples of simultaneous borrowing CCMs.

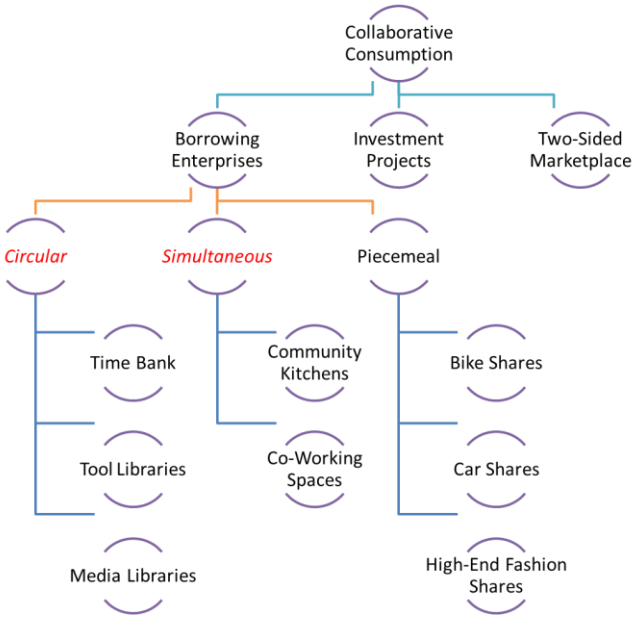
In the third sub-category of borrowing enterprises, piecemeal borrowing enterprises, a person or entity owns a product or service and permits other individuals to "borrow" that product or service, one at a time. In one sense, piecemeal borrowing enterprises like ZipCar[61] are similar to two-sided marketplaces like Etsy: the model consists of one-time interactions between a buyer/renter and a seller/owner.

58. *See, e.g.*, LOCAL TOOLS, http://localtools.org/find/ (last visited Oct. 23, 2014).

59. Chegg was the first company to allow students to rent textbooks instead of purchase them outright. *See* CHEGG, http://www.chegg.com (last visited Oct. 23, 2014).

60. *See* TIMEBANKS, *supra* note 3.

61. ZIPCAR, http://www.zipcar.com (last visited June 10, 2015).



The preceding graphic is not meant to be inclusive of all types of CCMs, but rather to outline a general framework for how these businesses are structured and to characterize the relationships between participants in them. Based on our analysis and for the purposes of our recommendations, we consider those CCMs that we sub-categorize as circular borrowing enterprises and simultaneous borrowing enterprises to be SEMs.[62] Our reasons for this segmentation between CCMs and SEMs are further outlined below.

62. We acknowledge that our attempts to categorize the universe of collaborative consumption are not incontrovertible; simultaneous borrowing enterprises such as co-working spaces and commissary kitchens sometimes (though not always) contain clear party distinctions between the owners/operators of the space and the participants who rent the space. One example is CropCircle Kitchen, Inc., a commissary kitchen and culinary incubator in Boston, Massachusetts. As a result, disputes that arise between parties on either side of these relational boundaries may be similar to traditional disputes in traditional business relationships, including the existence of parties with seemingly unequal bargaining power and the availability of clear contractual or precedential remedies to resolve them. However, when considering the close working relationships typical of the participants in such SEMs (whether owner/participants or otherwise) and the disputes that arise therefrom, simultaneous borrowing enterprises should be categorized as SEMs.

B. Not All Collaborative Consumption Models Are Shared Economy Models

1. Many CCMs Have Traditional Marketplace Corollaries

Companies such as Uber, Airbnb, and Task Rabbit have willingly and vocally served as poster children of the sharing economy's "quiet revolution."[63] Yet from the user's perspective, these companies merely offer improved services in otherwise well-established consumer categories. For instance, car sharing companies such as Uber, Lyft, and Sidecar look and feel like traditional taxi services, with an added layer of technology to streamline the transaction.[64] Similar distinctions (or lack thereof) can be drawn between Airbnb and traditional business models for temporary lodging. Airbnb may offer a more stream-lined, personalized user experience than a traditional hotel, encouraging "hosts" to invite guests to dinner, teach them something local, or introduce them to their friends.[65] Yet increasingly hotels themselves also offer creative amenities.[66] These "new" models fill a market gap or shortcoming with a slightly modified version of an existing traditional consumer model.[67] On the part of the providers of the service or good, the primary motivation for providing the service is to make money, while the purchaser of that service or good is primarily motivated by the value associated

63. Sara Horowitz, *Occupy Big Business: The Sharing Economy's Quiet Revolution*, ATLANTIC (Dec. 6, 2011), http://www.theatlantic.com/business/archive/2011/12/occupy-big-business-the-sharing-economys-quiet-revolution/249582/.

64. This surprisingly minor distinction is not hidden by the companies themselves. On Uber's website, the company answers the question, "How is Uber different from a standard taxi?" by responding, "With Uber, there's no need to call a dispatcher or hail on the street. You can request a ride with the push of a button and track your driver's progress to your location." *How is Uber Different from a Standard Taxi?*, UBER, https://support.uber.com/hc/en-us/articles/201968463-How-is-Uber-different-from-a-standard-taxi- (last visited Oct. 23, 2014).

65. *Hospitality Standards*, AIRBNB, https://www.airbnb.com/hospitality (last visited Apr. 15, 2015).

66. *See, e.g.*, *Best New Hotel Amenities*, FODOR'S TRAVEL, http://www.fodors.com/news/story_4603.html (last visited Apr. 15, 2015).

67. Similar parallels between CCMs being moderate improvements on traditional models can be drawn between Zipcar and car rental agencies, Task Rabbit and temporary hiring agencies, and Etsy and other online shopping sites.

with the service or good relative to its cost.[68] While two-sided marketplaces, investment projects, and piecemeal borrowing enterprises are models of collaborative consumption, they are not examples of sharing, at least not in the traditional sense of the word.[69]

By pointing out this mismatch between advertised principles and demonstrated principles, we do not intend to disparage these companies for offering improved services. Rather, our point is that some CCMs claim to promote values like community-building and sharing to consumers *for the sake of avoiding traditional dispute resolution processes*. For instance, in framing itself as a sharing economy business that merely provides an online platform for car owners to use their existing possessions to earn revenue, Uber claims it "does not and does not intend to provide transportation services or act in any way as a transportation carrier, and has no responsibility or liability for any transportation services provided to [the rider]"[70] and therefore, should not be encumbered by the city regulations—background checks, licenses, penalties, and monitoring—by which traditional taxi companies must abide.[71] Similarly, Nick Ganju, co-founder of Airbnb, claims that the company simply wants to help people "share" their homes with others and thus should not be subject to some of cities' housing authority regulations.[72]

Yet the faults in these CCMs' conflict-avoidance-by-label approach are coming to the forefront. Recently, Portland, Oregon, ordered Uber to cease operations in the city, claiming Uber violated

68. Jessica Pressler, *The Dumbest Person in Your Building is Passing Out Your Keys*, N.Y. MAG. (Sept. 22, 2014), http://nymag.com/news/features/airbnb-in-new-york-debate-2014-9/.

69. *See contra* VISION CRITICAL & CROWD COMPANIES, SHARING IS THE NEW BUYING: HOW TO WIN IN THE COLLABORATIVE ECONOMY 3 (2014), *available at* http://www.vision critical. com/sites/default/files/pdf/sharing-new-buying-collaborative-economy-report.pdf (describing the sharing economy as a "crowd that has become a company unto itself" and proudly touting that the "company" has already begun "acting like . . . hotels, taxis, [and] farms.").

70. *Terms and Conditions*, UBER, https://www.uber.com/legal/usa/terms (last visited Oct. 23, 2014).

71. *See, e.g.*, Meir Rinde, *Uber Tries to Steer Clear of New Rules and Regulations in Garden State*, NJ SPOTLIGHT (Apr. 7, 2015), http://www.njspotlight.com/stories/ 5/04/06/uber-tries-to-steer-clear-of-new-rules-and-regulations-in-garden-state/.

72. David Streitfeld, *Airbnb Listings Mostly Illegal, Report Contends*, N.Y. TIMES, Oct. 15, 2014, at A1, *available at* http://www.nytimes.com/2014/10/16/business/airbnb-listings-mostly-illegal-state-contends.html.

Portland City Code 16.40, which requires "Private for-hire Transportation" operating in Portland to, among other requirements, obtain appropriate insurance and a license to operate.[73] Though it has tried to distance itself from the acts of drivers who use "Uber Technologies, Inc." to coordinate driving services, Uber has been subject to lawsuits claiming Uber is liable for violations of the Americans with Disabilities Act,[74] background check regulations (after a series of Uber drivers were accused of crimes ranging from battery to sexual assault and kidnapping),[75] and even wrongful death.[76] Similarly, the New York Attorney General[77] and other officials,[78] contend that Airbnb hides behind its declaration that those who list space for rent are simply "sharing" (rather than renting) their homes.[79] Indeed, the relationship between an Airbnb home owner and their guest often looks more like a temporary rental than a friend crashing on the couch; only a small percentage (less than 28 percent) of Airbnb's revenue in New York City comes from legal, temporary

73. Letter from Leah Treat, Director, Portland Bureau of Transportation, to Brook Steger, General Manager, Uber Inc. (Dec. 8, 2014), *available at* https://www.portlandoregon.gov/transportation/article/511927.

74. One case alleged that some Uber drivers refuse to pick up visually-impaired riders with assistance dogs. In response, Uber proclaimed that "any driver partner who refuses to transport a service animal will be removed from the service," yet the complaint states that "Uber has failed to notify most of [the people with visual impairments] whether Uber has thoroughly investigated their complaints, disciplined the relevant UberX drivers, or taken any other meaningful steps to ensure that these drivers do not continue to unlawfully discriminate against them or other individuals with service animals. Instead, Uber representatives often respond to these complaints by denying responsibility for the discrimination. Meanwhile, many of these blind individuals experience ongoing denials from multiple drivers." Nat'l. Fed. Blind v. Uber, No. 3:14-CV-4086 (N.D. Ca. Sept. 9, 2014).

75. Keith Wagstaff, *Uber's Wild 2014: Can Protests and Lawsuits Bring it Down?*, NBC NEWS (Dec. 15, 2014), http://www.nbcnews.com/tech/innovation/ubers-wild-2014-can-lawsuits-protests-bring-it-down-n265536.

76. Kale Williams & Kurtis Alexander, *Uber Sued in Girl's Death in S.F.*, S.F. EXAMINER (Jan. 28, 2014), http://www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php.

77. *Id.*

78. Craig Garmin, *Airbnb to New York Mayor: Tax Our Hosts*, WALL ST. J. (Mar. 27, 2014), http://online.wsj.com/articles/SB10001424052702303779504579465532885246114.

79. NYAG, *supra* note 28, at 2. *Indeed*, New York Attorney General Eric Schneiderman's recent report on Airbnb found that 72 percent of rentals on Airbnb violated state law or the New York City municipal code. *Id.*

rental arrangements, in which a visitor to a city stays with a host.[80] In contrast, 38 percent of Airbnb's revenue for 2013 came from units that were rented out without the host present for a total of six or more months during the year.[81] By claiming not to be something that it is (and by claiming to be something that it is not), Airbnb facilitates tax evasion and health and fire code violations.[82]

For the sharing economy to maximize the benefits it can provide to consumers and shift the way consumers currently think about goods and services, CCMs should not—and cannot—avoid conflicts resulting from their services.[83] The sharing economy has reached a sort of "headache" phase, wherein regulatory crackdowns and competition between rival companies spawn dispute-related headlines.[84] Many CCMs have existing dispute systems at their disposal that could—and in some cases should—handle disputes that arise from doing business. This is not to say that these CCMs currently possess fail-safe dispute resolution systems. We acknowledge that attorneys who choose to represent CCMs face an uncertain legal landscape, especially as CCMs continue to develop novel methods of doing business[85] and face increasing scrutiny by government entities.[86] But at least for now, two-sided marketplaces

80. *Id.* at 8.

81. *Id.* at 13.

82. *Id.* at 9, 14, App. A, B. A recent unpublished working paper claims Airbnb's structure perpetuates discriminatory housing practices. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harv. Bus. School Working Paper, Working Paper No. 14-054, 2014), *available at* http://www.hbs.edu/faculty/Publication%20Files/14-054_e3c04a43-c0cf-4ed8-91bf-cb0ea4ba59c6.pdf.

83. Joe Mathews, *The Sharing Economy Boom is About to Bust*, TIME (June 27, 2014), http://time.com/2924778/airbnb-uber-sharing-economy/

84. Wingham Rowan, *A Sharing Economy Cliffhanger: What Will Governments Do?* STAN. SOC. INNOV. REV. (Mar. 27, 2014), http://www.ssireview.org/blog/entry/a_sharing_economy_cliffhanger_what_will_governments._DO.

85. *See* Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 256 (2013-2014) (stating that the myriad areas of law that apply to social enterprises must often be applied to novel situations, citing the application of tax law to the business model of Panera Cares, which allows customers to pay a donation price for meals and results in some free meals for those customers who are unable to pay).

86. The Sustainable Economies Law Center facilitates proactive advocacy on behalf of the sharing economy by creating model city policies and highlighting laws and regulations that may impact sharing economies. *Advocacy*, SUSTAINABLE ECONOMIES L. CENTER, http://www.theselc.org/advocacy (last visited Oct. 23, 2014). This is a good model for CCMs to follow; if

and the attorneys who represent them have pre-existing, even if non-ideal,[87] avenues—traditional dispute resolution systems like arbitration and litigation triggered in standard insurance policies and other contracts—to manage their disputes.[88]

C. True Sharing Economy Models, and Why the Distinction Matters for Dispute Resolution Purposes

For SEMs, though, there is little precedent for (and few models of) dispute systems that fit the forum to the fuss.[89] Thus, we hope to create a framework that will assist SEMs in designing appropriate, effective, and just[90] dispute systems to address conflict that arises in such entities. If SEMs lead the way, a secondary benefit to their efforts may be that other CCMs will learn from the SEMs' example and thereby be more intentional in their own dispute systems design.

1. What Was Once Old is New Again

To us, true SEMs enact "sharing" in the kindergarten sense of the word: I may own a toy, but I will let you use it primarily because we are in a mutually-beneficial relationship[91] with one another and not because you can give me money for it. As one SEM participant said, "We don't think of [our SEM] like Uber. With them, money is just a replacement for community."[92] Moreover, if I am not using a

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they do not prefer these methods, CCMs should intentionally participate in the design, or improvement, of dispute systems appropriate tailored to their actual operations.

87. Julie Bort, *Airbnb Host: A Guest is Squatting in my Condo and I Can't get Him to Leave*, BUS. INSIDER (July 21, 2014), http://www.businessinsider.com/airbnb-host-cant-get-squatter-to-leave-2014-7.

88. For instance, Uber states that its "rideshare" drivers are required to carry personal insurance (implying, from the company's perspective, that at least some accidents that occur while "ridesharing" would be covered under a personal insurance policy. *In the US, what Insurance is Available if there's an Accident*?, UBER, https://support.uber.com/hc/en-us/articles/202347808-In-the-US-what-insurance-is-available-if-there-s-an-accident- (last visited Oct. 23, 2014).

89. Sander & Goldberg, *Fitting a Forum to the Fuss*, *supra* note 35.

90. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 201–06.

91. ROBERT G. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 52–56 (1991) (stating that members of tight-knit groups develop norms designed to maximize the aggregate welfare of the group).

92. Interview with Anonymous TimeBank User, in Cambridge, Mass. (Nov. 13, 2014).

particular object at any given time, letting you use it will provide great value to you at a low cost to me, and perhaps open the door to you sharing the "excess capacity" of one of your own objects at some point in the future.[93]

Ironically, the true sharing economy and the methods for resolving conflicts within it reflect ways of doing business that have existed for centuries. The notion of sharing resources as a way to increase the value of those resources for everyone has long served as the backbone of local economies. I might have "borrowed" a cup of sugar from you (never intending to return it); later, I will likely grant your request to borrow my lawn mower to finish the job when yours runs out of gas. If I have a barn to raise and you are willing to help me raise it, I will make sure that you are well fed as we work and I will help you raise your barn next year. No written contract is needed to ensure these arrangements will be honored, as generosity is understood as imposing a debt.[94] Any disputes that occur around the future promise of lawnmower borrowing or barn-raising are handled within the community through customs, norms, and social pressure.[95] Reputation and trust precipitate sharing and were once—and still are in some communities—integral components of survival and cornerstones of doing business.[96]

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93. Though we find his economic efficiency and transactional cost arguments too simplistic to fully describe why people participate in sharing economies, we find persuasive Benkler's argument that people choose to share for a variety of self-motivated reasons. Yoachi Benkler, *supra* note 15, at 273, 306–10, 313 (citing the world's fastest supercomputer at the time, SETI@home, and the second-largest commuter transportation system in the United States, carpooling, as examples of socio-economic systems that rely on sharing rather than a price system to distribute resources and categorizing motives for people's participation in such systems, including when the social "return" is higher than the social selective "cost").

94. *Id.* at 316.

95. For an analysis of these types of "social selective exclusions" and the social economic considerations in such transactions, *see id.* at 310, 312–13, 315–16.

96. *See* Jennejohn, *supra* note 36, at 98 (citing two types of pressure for parties to self-enforcing agreements to conform: risk of damage to the reputation of a party who intends to continue exchanging with others and the incentive to build trust and therefore reduce transaction costs involved in the exchange).

2. How Today's Sharing Economy Is Different

Despite the similarities mentioned above, there are notable differences between the sharing economies of yesterday and those that are emerging today. First, modern cultures tend to be more mobile and transient, leading to evolving definitions of family and community. Thus, though reputation is still an integral component of doing business,[97] we often interact with, and rely on, business owners and consumers who are not closely-related persons for whom we have historical knowledge of their reputation.[98] As a result, the way in which we view and handle preservation and analysis of reputation[99] in sharing economy models should be different.

Second, there were (and still are) many downsides to relying upon informal community norms to dictate the resolution of disputes.[100] Community norms often lack the "crispness" of precise terms and clearly delineated pathways for resolution. To enforce norms, communities often rely on social cues, observation, and storytelling about past conflicts rather than written regulations.[101] While this informalism has benefits, it also makes new members' transitions into the community more confusing and can result in ad hoc

97. *See* Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2335 (2004) (exploring the enforcement of private ordering relationships through reputation, and hypothesizing that private ordering arises in relationships in which agreements are publicly unenforceable, market incentives are important, and legal barriers to entry into the relationship are low).

98. Benkler, *supra* note 15, at 281–88, 287 (describing a precursor to Uber—dynamic carpooling—an "entirely impersonal, ad hoc practice with no perceptible socially stable set of participants" in which strangers in major US cities share rides based on "loose" group norms).

99. Richman, *supra* note 97 ("Parties benefit from ongoing transactions with their colleagues; in each transaction, parties have an opportunity to cheat their counterparts; if a party cheats any other party, that party's misconduct becomes known throughout the community; and no one will transact with any individual known to have cheated in the past. Thus, a party's good reputation ensures the opportunity to benefit from future transactions, and inversely, the prospect of future beneficial transactions induces cooperative behavior.").

100. Edgardo Buscaglia & Paul B. Stephan, *An Empirical Assessment of the Impact of Formal Versus Informal Dispute Resolution on Poverty: A Governance-based Approach*, 25:1 INT'L R. LAW ECON. 89, 102–03 (2005). *See also* Richman, *supra* note 97, at 2346–47 (stating that reputation-based enforcement of community norms results in barriers to entry for newcomers into the community and creates the potential for collusive behavior).

101. *See* Benkler, *supra* note 15, at 318.

determinations regarding punishments for violating norms.[102] For instance, who decides what the punishment should be for breaking a norm? If left up to the crowd, a mob mentality may result in overwrought or even violent consequences. But if left up to only the most powerful in the community, the power imbalance may result in unjust outcomes.[103] We observe that today's SEMs often value inclusion of diverse participant perspectives, self-determination,[104] and due process more so than previous generations,[105] and thus SEMs' dispute resolution mechanisms should reflect these values.

Third, in contrast to eras when sharing economies were always local economies, today's SEMs may benefit from having a global reach. Even if the SEM's activities are purely local, the SEM likely presents a public face through a website or social media presence. If the SEM does not, its members likely do, and will use their social media channels as platforms to air both praise and grievances.[106] Any conflicts that spill into public view risk drawing the attention of lawmakers and adding fuel to the argument that these businesses need stricter regulation.[107] SEMs may avoid some regulatory burden if they can determine how to anticipate and effectively manage internal disputes before they arise.

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102. *See* Benkler, *supra* note 15, at 315–17.

103. *See* Buscaglia & Stephan, *supra* note 100, at 92–93.

104. *See* Richman, *supra* note 97, at 2339 (stating that relationships governed through private ordering, as opposed to public courts and other sources of law, require voluntary cooperation by participants in the relationship).

105. CATHY A COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS 41–48 (1996) (outlining the values inherent in power-based, rights-based, and interest-based dispute resolution systems and highlighting what values may not be preserved in each).

106. A media storm was created when grocery co-op members in Park Slope were interviewed for a New York Times story about the practice of co-op members sending their nannies to work shifts for them. Michael Crewdson, *Praise from Afar for the Park Slop Food Co-Op*, N.Y. TIMES (Mar. 7, 2011), http://cityroom.blogs.nytimes.com/2011/03/07/praise-from-afar-for-the-park-slope-food-co-op/.

107. Dominic Balsuto, *The Sharing Economy: How Do You Stop Something You Can't Keep Up With?*, WASH. POST (May 24, 2013), http://www.washingtonpost.com/blogs/innovations/wp/2013/05/24/the-sharing-economy-how-do-you-stop-something-you-cant-keep-up-with/.

3. Why SEMs Need Attorneys with Dispute Systems Design Skills

Today's SEMs need clear and constructive dispute resolution norms, designated and qualified conflict resolvers, and a systematic way to ensure that those norms are communicated to new members.[108] As one participant in a shared workspace articulated, a SEM "needs to be somewhere where you give away power and control and trust that people will take it and do something great with it."[109] A lack of a framework for healthfully and internally resolving disputes threatens to damage relationships among participants and, in turn, damage the societal development SEMs promote.

Though non-attorneys may possess skills useful to this endeavor, we choose to direct our recommendations to attorneys for two reasons.[110] First, attorneys possess knowledge of the law and can surmise how the law relates to and impacts SEMs, the people within them, and the benefits the SEMs seek to provide to their participants and communities. SEMs often grapple with the many roles participants may play within the SEM. For example, while we may characterize the Uber driver/consumer relationship with respect to the ways it parallels the taxi driver/consumer relationship, the roles of participants in a cooperative housing arrangement, in which a person may be both a joint owner and a current user of a common space, are more amorphous. Likewise, a tool library may have multiple users who each own different tools, but all of the users have access to the entire library.

In addition to the fluid distinctions between the parties involved, other traditional contractual constructs, such as offer and acceptance, are not as intuitively applied to SEMs. For example, a TimeBank may offer you the opportunity to benefit from a member's plumbing

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108. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 233–39 (discussing ways in which a designer can encourage more constructive interactions among stakeholders through creating and ensuring communication of shared goals and norms).

109. Telephone Interview with Anonymous Co-Working Space User (Sept. 28, 2014).

110. *See* ROBERT MNOOKIN, SCOTT R. PEPPET & ANDREW TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 184, Part I (2004). A tertiary, but not insignificant, reason is that the bulk of this Article's readership will likely be attorneys.

skills while you may choose to reciprocate by giving an hour of pie-baking services to a different member. Moreover, the currency used for consideration within SEMs is often not financial, creating a world in which "equality" of goods and services is much more challenging to evaluate. Another challenge is that legal liability may exist without anyone identifying it as such. One co-working space member mentioned that the space was often used in the evening for non-work-related events. Though none of the members anticipated problems with this after-hours usage, the members were taking on liability for what occurred in the evenings.[111] Non-attorneys may have a more difficult time determining the rights, responsibilities, and remedies that touch each of these circumstances unique to SEMs.

Second, we believe the role of attorneys in society is to help resolve disputes in the way that best serves their clients. Unfortunately, many SEM participants to whom we spoke believed that attorneys were best kept out of situations, because when the attorneys showed up, conflict became even messier.[112] It seems like the attorneys involved did not understand the impact their approach had on their actual ability to assist SEMs. By exploring innovative ways of supporting SEMs, attorneys can match their intention to assist with a method that has a helpful impact. In turn, clients may be able to see the value an attorney can add *before* a lawsuit occurs.

II. DISPUTES IN THE SHARING ECONOMY

A. Common Disputes and Existing Solutions

1. Scenario #1: Circular Borrowing

"It's not just about money," one TimeBank user in Louisville claimed, "It's about real friendships": friendships that develop as a result of the services shared among community members.[113] Real friendships may be a value-add for some TimeBank users, but

111. Interview with Anonymous Co-Working Space User, *supra* note 109.
112. *Id.*
113. Based on an ABCNews story on timebanking in Louisville, Kentucky. *See supra* note 18.

friendship is not sufficient to resolve all conflicts. Consider Dave taking his children to a fellow TimeBank user (though not a person who was previously familiar to him), Cindy, who provides childcare for the day. Imagine that Dave receives a call from his eldest child in the middle of the day: "Daddy, Cindy says we deserve three cookies today for being such good kids. I thought you told us we could only have one cookie a day. Jack already had three. Can I, too?" Obviously, Cindy has a different standard for children and sweets than Dave does, which may in itself create conflict. But what if Cindy fed the kids peanut butter cookies and Jack, who had not been evaluated for allergies, had an allergic reaction to the peanuts? Or what if Cindy refused to feed Jack any cookies because she thought he was overweight?

Perhaps the provider has particular credentials that certify her as qualified to care for the ages and number of children Dave has. If so, Dave may be able to respond to certain disputes by reporting her through a channel of authorities. But the likelihood of Cindy being credentialed is seemingly small. Moreover, Dave did not pay Cindy money to care for his children, and he cannot take back the hours he "banked" to cover the care. Likewise, unless Jack suffered a significant medical emergency due to the peanut allergy, both civil and criminal litigation are unlikely courses of action. So if Dave consented to having Cindy watch his children for the day, and if Cindy conducted the service with goodwill, what can Dave do if he does not like how she cared for his children? What if he feels like the hours he "banked" doing computer programming for other TimeBank users were far more valuable than the hours Cindy spent with his children?

TimeBank urges people to understand that "[t]he number of decisions to make, the need for planning, and the necessity of record-keeping can take people by surprise when they start up a TimeBank. Best to expect it and be ready for it going in."[114] While this statement is intended to helpfully alert a user that they should be prepared to take additional steps to ensure they get the most benefit

114. *More About Timebanking*, TIMEBANKS, http://timebanks.org/more-about-timebanking/ (last visited Oct. 23, 2014).

from their TimeBank experience, this statement does not tell them *how* to prepare. Likewise, the TimeBank website reminds users that local TimeBanks "have policies and information they need to share with members," including policies about "disputes between members." Yet the same policy states that some individual TimeBanks may choose to have a policy that says, "[W]e will have no policies."[115] So while TimeBank asserts that Dave should be prepared to handle the above situations, TimeBank also states that the local TimeBank may give Dave no assistance in how to prepare or handle the situations. Indeed, though many TimeBanks share group norms, guidelines, or core values they expect members to uphold,[116] most do not provide guidelines for *how* users—or even TimeBank managers—should address, let alone resolve, disputes arising from the norms or values.[117]

2. Scenario #2: Simultaneous Borrowing

Granola Grit, the small-batch granola bar company from which Dave's shared workspace buys its snacks, operates out of a commissary kitchen.[118] The kitchen is licensed as a commercial kitchen and a kitchen manager ensures that users know about health codes and other safety regulations. Granola Grit's owner, Tiffany, joined the kitchen two years ago after complaining to a friend, vegan chocolate maker and Choco-Love founder Luis, that she could not keep up with demand for her granola bars—or with health department

115. *Id.*

116. *About Time Banking*, TIME TRADE CIRCLE, http://www.timetradecircle.org/timebank.php#corevalues (last visited Oct. 23, 2014).

117. In the extensive review of TimeBank guidelines, the authors found only one instance of a specific dispute resolution process outlined. *See* ROYAL OAK TIMEBANK, MEMBER HANDBOOK 12 (Oct. 2014), *available at* http://www.royaloaktimebank.org/Docs/ROTB MembershipHandbookfull.pdf. There were a number of instances in which a TimeBank recommends negotiation or mediation, but does not provide sufficient specificity for a member to actually employ such processes. *See, e.g.*, the TimeBank in Australia requires that TimeBank members attempt to resolve the dispute on their own. If they do not resolve the dispute, the dispute "may" be referred to an "Administrator" for mediation. No process for doing so, or identification of who should do so, is outlined for members. Timebanking, Terms and Conditions 17.1, *available at* http://www.timebanking.com.au/legal.

118. This scenario is based on an interview conducted with a commissary kitchen manager. Telephone Interview with Anonymous Commissary Kitchen Manager (Aug. 16, 2014).

regulations—in her own kitchen. Luis mentioned that he made his chocolates at a commissary kitchen in the old warehouse district. He invited her to help him make his chocolates so she could see the space. Walk-in refrigerators, commercial ovens, tons of equipment, and even a labeling machine! She could never afford all of this on her own. She put in an application and was accepted to become a member of the commissary kitchen.

Tiffany pays to use the kitchen between 10 p.m. and 2 a.m., when she slow roasts the granola and lets it set before cutting and packaging it. She is allowed to use whatever equipment she needs, as long as someone else hasn't reserved the equipment first. Sometimes, other users will be in the space at the same time, working on a different surface or in a different part of the kitchen. She attends the quarterly community meetings and has made good friends with many of the twenty or so other food entrepreneurs that use the space. She has even collaborated with a few, using Choco-Love's chocolate and roasted nuts from The Nutty Bar in her granola bars.

Another user of the community kitchen, Ralph, operates a specialty sausage business. Often, Ralph will bring in unusual cuts of meat, grind the meat, and leave the unusable portions in the garbage can without emptying it in the dumpster out back. A few users have politely asked Ralph to remove his garbage before he leaves. This week, Tiffany came into the kitchen at her scheduled time to find the counter unclean, the food sink full of soiled plastic wrap, and the garbage can full of meat scraps. She spent two of her four hours of paid kitchen time cleaning the space before she could begin her work. She asked Luis to help her both clean up the mess and confront Ralph, but Luis quickly exited, stating that he did not want to get in the middle of it. Because of the delay, Tiffany could only make half of the bars she normally makes in a week. As a result, Tiffany is so angry that she is considering leaving the commissary kitchen community altogether, but she desperately needs these commercial tools until she can rent or buy a space of her own.

Problems like the one described above are not out of the ordinary in this commissary kitchen. In fact, the kitchen has so many conflicts during the warmer months, when kitchen use—and the literal heat in the kitchen—are at their highest that the kitchen manager, Maureen, has dubbed the last month of summer "Angry August." Still, there are

no formal dispute resolution guidelines for kitchen users, nor a system outlined for how and when users should raise issues with the community members. Though Maureen eventually hears about most conflicts, she is rarely the first to hear about them and by the time she is made aware, the conflicts have often escalated to the point where users are threatening to leave rather than face potential health code violations or further economic loss because of other users. Maureen has had to dismiss one user because the user's behavior was jeopardizing the kitchen's health code status, but other than that, she finds most conflicts ultimately resolve (whether amicably or otherwise) without her involvement.

B. Common Themes of Sharing Economy Disputes

We can draw out a few common themes from these disputes that will help us frame dispute systems design recommendations to address the interests of SEMs.

1. Reliance on Trust in a Variety of Relationships

As discussed earlier, participants' roles in traditional businesses are often dichotomous.[119] In contrast, relationships in SEMs are typically much more complex; roles are often overlapping and fluid. Sometimes, especially in smaller SEMs, participants have a personal relationship with one another prior to entering into a "business" relationship together. As in the case of Luis and Tiffany, these participants must navigate both a personal and a professional relationship, which can be particularly difficult when the lines between those relationships begin to blur.[120] One co-working space user explained that the intertwined relationship status of many participants in SEMs is what makes conflicts involving the SEM so hard: he was afraid to raise the ire of the person who invited him to

119. Kassan & Orsi, *Legal Landscape*, *supra* note 11, at 13–14 (claiming that existing laws assume dichotomous and clearly defined relationships as opposed to fluid, collaborative ones).

120. ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 86–95 (discussing the need for communication to facilitate effective group sharing and how to communicate effectively in different situations).

be part of this "cool, new thing," but the person who invited him is now the one preventing it from being a cool, new thing.[121]

As previously mentioned, relationships between SEM participants as well as the participants' roles within the SEM are difficult to define. Someone may own the land on which a community garden (a circular borrowing enterprise) grows, but who owns the vegetables? Are they owned by the person who planted them? How about the person who watered the plants every day, all summer? Does the person who discovers a particular ripe vegetable and picks it, own it? And if anyone can pick the vegetables, who is responsible for watering them? What incentive does the person tasked with watering have to care for something that will not benefit her? Is it the person who reaps the reward of these assets that also bears the risk if something goes awry? In SEMs, it can be hard to determine which existing laws and contractual arrangements govern these relationships when the parties do not inhabit traditional, power-based roles.[122]

Moreover, the success of a SEM sometimes depends on users' trust of each other *without* a previously existing relationship. In part because of the explosion of online communication means like Facebook and Twitter, the average consumer has become much more comfortable self-disclosing to strangers, trusting that the consumer will still be relatively safe after self-disclosure.[123] Similarly, SEMs rely on this willingness to trust others with whom we have little or no previous relationship.[124] For example, Dave relies on Cindy to provide quality childcare, though their only relationship with one another is that they are both members of a TimeBank. This requires a high amount of trust based on relatively limited data.

Similar to the way that drivers trust one another to stay in their lanes because doing so benefits everyone, SEMs rely on common norms, standards of behavior, and principles to form expectations for

121. Interview with Anonymous Co-Working Space User, *supra* note 109.

122. ORSI, PRACTICING LAW, *supra* note 13, at 13–14.

123. Derek Carey et al., Working Paper, *Self-disclosure on Social Networking Sites*, Worcester Polytechnical Institute 16 (2011), *available at* http://www.wpi.edu/Pubs/E-project/Available/E-project-030112-142437/unrestricted/Self_Disclosure_IQP_Paper_Redacted.pdf.

124. Benkler, *supra* note 15, at 333–34.

one another's behavior.[125] Yet there are no "SEM police" to enforce these group norms. Moreover, tensions may arise within a SEM because the norms are not explicit, whether as a part of a written agreement or otherwise, but rather implicit in people's interactions. Unlike a community barn-raising norm, which people in the community would have likely learned in childhood, participants in SEMs come and go frequently enough that implicit norms may not be sufficient to regulate behavior.

2. Extensive Impact of Conflicts

Another common thread in these borrowing conflicts is that the joint ownership/usership model inherent in many SEMs results in many participants feeling the impact of a conflict rather than only those participants directly involved. When Tiffany rents space in a commissary kitchen, her relationships with other renters are impacted, positively or negatively, by each renters' concurrent, even if asynchronous, use. Thus, the success of each of these otherwise independent food businesses is somewhat dependent upon the other renters following group norms, getting out of the kitchen on time, and cleaning up after themselves. Consider this relationship in contrast to renting an apartment in a multi-unit building: it is not just about a neighbor leaving garbage in the common hallway while you make your granola in your own kitchen, but it is about another user leaving garbage in *the only space* where you can make your granola.

Even if a dispute is confined to two participants in a SEM, everyone in the SEM has greater incentive to find resolution than they would be in a traditional rental business.[126] If you rent a carpet cleaner from your local hardware store and discover that the person who rented it before you broke the machine, you likely spend little time crafting your approach to the prior renter who broke the carpet cleaner. Instead, you probably take your concern to the hardware store, as the hardware store (or perhaps the company that supplies the

125. *See generally* Richard H. Adams, *The Origin, Development, & Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

126. *See* Benkler, *supra* note 15, at 333 (claiming that community sharing spaces are incubators for a group of people "enforcing against antisocial behavior").

machines to the hardware store) has plenty of carpet cleaners. If not, perhaps the store will buy more carpet cleaners once the prior renter pays for the one he broke, and in the meantime, you will visit another business in town that rents carpet cleaners.

However, in a small appliance library, you *will* care if a fellow library user breaks the community vacuum, whether or not you own the vacuum either in part or outright. A friend (and fellow library user) might want to use the library's vacuum tonight and talks to you about how frustrated she is. Her purpose in being part of this library was that she could not afford to own and has no means to rent nice appliances like the high-end vacuum that is now inoperable. On your mind is the fact that this is the fourth time the vacuum-breaker has broken an appliance. In response, you engage in gossip with your friend about the vacuum-breaker; as a result, what began as a two-person dispute could cycle out into the wider circle, impacting the collective goodwill and future willingness to share. Clearly, a community of participants in a close-knit model can more tangibly and powerfully feel the impacts of dyadic disputes than parties in a traditional, hierarchical context.[127] Thus, participants are also invested in other participants' efficient and effective resolution of disputes. Like when everyone in an office catches the same cold, everyone in a sharing economy can "catch" the symptoms of conflict.

3. The Low Cost, High Value Nature of Disputes

Due to the interpersonal nature of SEMs, disputes in SEMs are likely to arise over relatively low-dollar items or other matters of little financial consequence. The difficulty in attaching a meaningful financial valuation to these disputes may encourage many attorneys to dismiss the conflicts as silly or irrelevant. But to SEM participants, a low-dollar value does not necessarily equate to a low-value conflict. In interviews of SEM participants for the purposes of this Article, many participants stated that it was often the "little" things (like

127. Indeed, researchers have found that the attractiveness of sharing is correlated not only to the perceived cost and benefit to the individual, but to the individual's perception of other users' usage of the shared good or service. Cait Lamberton & Randall Rose, *When is Ours Better than Mine? A Framework for Understanding and Altering Participation in Commercial Sharing Systems*, J. MARKETING 109, 112 (2012).

someone feeding their child an extra cookie) that irked them the most.[128] In a society where the egregiousness of one's actions is often measured by the financial worth of the aggrieved party's case, resolving these types of conflicts with traditional legal devices is a challenging, if not impossible, endeavor. In the case of the cookie, untangling the interests behind, "Why did you feed my child three cookies?" and helping parties resolve such a dispute will not a warrant court filings or even a formal arbitration or mediation procedure. In fact, many attorneys will not involve themselves in these type of disputes at all, coding the "emotional" nature of the disputes as "irrational" and therefore not worthy of an attorney's attention. But not understanding, appreciating, and addressing these conflicts may sour relationships within the SEM and lead to larger conflicts in the future.[129]

C. Beyond the Contract: Dispute Systems Design Recommendations

In light of these characteristics shared by many SEMs and the impracticality of litigating individual disputes, we propose that attorneys who hope to assist SEMs to better manage and resolve their disputes should consider one of their roles to be that of a dispute systems designer.[130] In doing so, the attorney can add greater value to the SEM than would otherwise be derived in a traditional lawyer-client relationship and the attorney can better prepare the SEM to self-manage conflicts by creating a clear, systematic, and transparent process for the stakeholders to follow when future conflicts arise.[131]

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128. *See* Joanna Gray, *Toward a More Resilient Financial System*, 36 SEATTLE U.L. REV. 799, 815–16 (2012–2013) (citing collaborative consumption's potential to "threaten the centrality of money in peoples' lives as a means of constituting identity and connection").

129. *See generally* ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON 3–10 (2005).

130. We acknowledge that attorneys who engage with SEMs will need to be mindful of the ethical rules to which attorneys are bound. To that end, attorneys working with SEMs will need to carefully identify any attorney-client relationships present, manage those relationships accordingly, and be mindful of potential conflicts of interest that may arise during the representation. Because the scope and nature of an attorney's involvement with SEMs will vary greatly depending on many factors—including but not limited to the legal business structure of the SEM, the legal and non-legal services the attorney is providing to the SEM and its participants, and the relationship between the participants and the SEM—we will not address all of the implications of the ethical rules within this Article.

131. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 6–7.

This reduces the cost of conflict overall and builds the SEM's capacity for self-determination,[132] including self-determination in the design of dispute systems themselves, that will serve the SEM's participants and mission well.

Of course, attorneys cannot be all things to all people. When their expertise does not extend to a certain skill set (e.g., facilitating a consensus-building process), or when an ethical conflict may prevent the attorney from assuming certain roles (e.g., if the attorney is asked to mediate an internal dispute of her existing organizational client),[133] the attorney should refer clients to other professionals. Yet many attorneys unnecessarily limit their roles when working with clients, and in so doing, they do not maximize the good they can do for their clients.[134]

Our recommendations are rooted in dispute systems design best practices, taking into account the ethical rules for attorneys and the myriad of skills attorneys can (or could, with further professional training) employ. The recommendations are not meant to be prescriptive for every SEM, in every circumstance. Rather, these recommendations are intended to shape the contours of processes and, perhaps as importantly, attorneys' roles, in SEM dispute resolution.

1. Meaningfully Engage Affected Stakeholders in Design Process

Ethical dispute systems design seeks to incorporate the values and interests of stakeholders—including users, decision-makers, implementers, and interested third parties—when creating a

132. Self-determination is a core value of mediation, a practice often categorized under the dispute resolution umbrella. In mediation, the value of self-determination is defined as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." AAA, ABA& ACR, *Model Standard of Conduct for Mediators*, STANDARD 1 (2005), *available at* https://adr.org/aaa/ShowDF?doc=ADRSTG_010409.

133. This would implicate the Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT, R. 1.12 (2005).

134. Janelle Orsi, *Cooperation Law for a Sharing Economy*, YES MAG. (Sept. 23, 2010), http://www.yesmagazine.org/new-economy/cooperation-law-for-a-sharing-economy [hereinafter Orsi, *Cooperation Law*] (discussing how lawyers are often hesitant to facilitate or collaborate at the same time they represent a client, but naming ways in which they may do so within ethical bounds).

system.[135] We recommend that a SEM attorney incorporate these values and interests in two ways: first, by thoroughly gathering stakeholder input before designing a dispute system; and second, by involving stakeholders in the design of the dispute system itself.

a. Attorney As Conflict Assessor

Consistent with dispute systems design best practices, the initial step in designing a system is to identify the purpose(s) for the dispute system.[136] To achieve this goal for traditional business models, an attorney typically communicates with the client and drafts a contract based on both the client's wishes and the attorney's legal knowledge. In a SEM dispute system, it is essential to gather stakeholder input for the system's design, especially as SEMs tend to be "flatter" organizationally than traditional business models. Asking an infrequent user of a commissary kitchen to contribute their thoughts may seem unnecessary or even antithetical to an attorney's standard process for legal drafting. But in order to create a dispute system that effectively addresses disputes that occur and honors the values of a SEM, an attorney must also engage participants other than the direct client contact.[137]

To engage these participants, an attorney ought to conduct a stakeholder assessment, which is a data-gathering process that allows the attorney to understand, from the stakeholders' perspectives, what conflicts typically occur in the SEM and how those conflicts are currently addressed.[138] A stakeholder assessment also helps the attorney understand the goals and values that comprise the foundation of the SEM, which should be taken into account in any system design.

This stakeholder assessment process could take many forms. Often, it will involve interviewing, surveying, or leading focus groups of stakeholders and mapping their interests in a dispute

135. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 69–98.

136. *Id.* at 74; ROGER FISHER & ALAN SHARP, GETTING IT DONE: HOW TO LEAD WHEN YOU'RE NOT IN CHARGE 43–59 (1999) [hereinafter FISHER & SHARP, GETTING IT DONE].

137. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 70–73.

138. COSTANTINO & MERCHANT, *supra* note 105, at 96–97.

system.[139] An attorney's role is to pose helpful (not cross-examination or only closed-ended) questions, listen deeply, and capture people's interests.[140] Some examples include:

> "Describe a dispute you have had with other users in the commissary kitchen."
>
> "How was the dispute handled?"
>
> "What do you think was effective about how the dispute was handled? What could have been better?"
>
> "Did you feel prepared to handle it?"
>
> "How have you been impacted, if at all, by disputes beyond your own?"
>
> "How would you prefer disputes be handled? Why?"

After asking these questions, the attorney can assess the conflicts and how they are managed, identifying shared, non-competing, and competing interests.

The attorney can then share his findings with the stakeholders. By showing stakeholders the many common interests within the community—for instance, that the kitchen users all want to create a community that leads to more collaboration among users and within which they can develop their own business skills—attorneys will help the stakeholders begin the design phase on a positive footing.[141] Managing any competing interests discovered during the stakeholder assessment—for instance, if some kitchen users want Maureen to deal with all conflicts, whereas other users want her to intervene only if users cannot resolve conflict among themselves—is more challenging. We recommend the attorney acting as facilitator be transparent about the competing interests and clearly articulates how those competing interests will be addressed during the design phase.

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139. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 91.
140. *Id.* at 360–63.
141. *Id.* at 74–79.

b. Attorney as Facilitator

The next phase of creating a dispute system is to generate options for design features that meet the stakeholders' interests. Attorneys may consider serving in a facilitative role to assist SEMs in addressing the different interests of their participants.[142] This role offers SEMs a few benefits. First, one SEM participant suggested that an attorney employing facilitative, rather than directive, skills could deliver valuable assistance without the threat many SEM participants perceive that attorneys typically pose to a group's self-determination and culture.[143] Second, the facilitative attorney can help the SEM participants avoid the belief that all "opposing" parties' interests are in direct opposition to the participants' interests. In one study, this bias showed up in 68 percent of negotiations, even though the negotiators' interests were aligned.[144] The attorney can tease out for the SEM participants which interests are shared, non-competing, and competing, then direct their focus to finding ways to create value from these interests.

To engage in a facilitative role, the attorney can facilitate a brainstorming session or sessions with stakeholder groups around how a system might address the competing interests. Rather than an across-the-table, two-party negotiation, this facilitative platform can encourage creativity among the stakeholders. The attorney must design and conduct interest-based negotiations so that participants feel heard, are prepared to listen to one another, and in the end, can exercise self-determination.[145] For instance, the attorney may send out an agenda before a community meeting that includes time for users to talk about why they are part of the kitchen, time for users to talk about successful conflict resolution experiences they have had outside the kitchen context, and time to discuss among each other

142. Orsi, *Cooperation Law*, *supra* note 134; ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 370–75.

143. Interview with Anonymous TimeBank User, *supra* note 92.

144. *See* LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 74 (2011).

145. SAM KANER, FACILITATOR'S GUIDE TO PARTICIPATORY DECISION-MAKING xxii (2014).

what they have learned about the other users as a result of the discussion.[146]

A facilitative role poses challenges, though not insurmountable ones, for attorneys who are used to the traditional advocacy role.[147] Certainly, the attorney may have questions:[148] What is your professional obligation when facilitating a discussion among many client constituents? How should you guide the conversation if it proceeds in a direction that you know is not legally feasible? These questions are important to keep in mind, and smart design of the facilitated process will help the attorney stay within the attorney's ethical obligations. Though the nuances of the ethical rules are outside the scope of this Article, generally speaking, attorneys are permitted to serve as facilitators: the Model Rules of Professional Conduct permit an attorney to take on the role of a "third-party neutral," so long as the attorney receives written permission from the client to do so[149] and makes clear her role as neutral to those who participate in a discussion in which she facilitates.[150]

Attorneys who serve as facilitators may add value for their clients in many ways. The facilitated conversation may directly serve the best interests of the client, especially if the interests include having

146. *See, e.g.*, ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 363–65.

147. *See generally* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997).

148. Orsi raises these questions and proposes that CCM attorneys look to collaborative law as a model for how to embrace multiple roles, including a facilitative role, as an attorney. Orsi, *Cooperation Law*, *supra* note 134. Collaborative law allows attorneys to represent individual clients while also working with the "other side" and the "other side's" attorney to come to a mutually agreeable and value-creating resolution. Some states have adopted the Uniform Collaborative Law Act to ease concerns that attorneys may be abdicating their duty to zealously advocate for their clients' best interests by working with, instead of against, the other side. *See* UNI. COLLAB. LAW ACT 1 (2010), http://www.uniformlaws.org/Act.aspx?title= Collaborative+ Law+Act. Techniques and skills used include interest-based negotiation and mediation. *Id.* at 2–4. If the case results in a court trial, the collaborative law attorneys end representation and the parties hire litigation attorneys. *Id.* at 57–58.

149. MODEL R. PROF'L. CONDUCT, R. 1.12(a) (2013); *see* ORSI, PRACTICING LAW, *supra* note 13, at 80-89 (discussing how to obtain informed consent for non-traditional attorney roles).

150. MODEL R. PROF'L. CONDUCT, R. 2.4(b) (2013); *see* ORSI, PRACTICING LAW, *supra* note 13, at 89–93 (distinguishing between the role of a mediator [which is likely not permitted by the Rules] and the role of a facilitator [which is permitted by the Rules]).

SEM participants vested in the SEMs' dispute resolution mechanisms. The attorney can also call on his knowledge of past conflicts to ask good questions of the group, perhaps avoiding the types of conflicts that result in litigation due to a lack of thoughtful discussion at the genesis of a contract.

In addition, many of the skills attorneys employ—clear communication, integration of ideas, understanding how humans' diverse needs and emotions impact a group challenge—are part of the skill set of good facilitators.[151] Of course, not all attorneys can facilitate well; their tendency to advocate may prevail. Unfortunately, if this reversion occurred during the facilitative process, it would only confirm some of the fears SEM participants have expressed about involving attorneys in SEM business: "Once attorneys get involved, there's a fear they'll run the show."[152] For that reason, the attorney would be wise to refer the SEM to someone else for this role if she has not been trained in facilitation.

Another advantage to the attorney facilitating a norms discussion is that if she has spent time developing relationships with the members of the community through the assessment phase, she can be seen as both a trusted insider and an unbiased party. With the appropriate facilitation, the participants can view themselves as the experts on the SEMs' cultures and the attorney as the expert on process.[153] The attorney can use trust to encourage participants to share their opinions and test ideas; question values; and play the devils' advocate, if needed.[154] For instance, the attorney may pose, "So I'm hearing a lot about not having time to deal with conflicts as they occur. I'm wondering: how much time does it take to deal with conflict later? What options might there be for addressing conflict that would not take much time at the outset?"

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151. Orsi, *Cooperation Law*, *supra* note 134. Indeed, HNMCP has created a course to help new attorneys further develop these skills. HARVARD NEGOTIATION AND MEDIATION CLINICAL PROGRAM, *The Lawyer as Facilitator Workshop*, http://blogs.law.harvard.edu/hnmcp/the-lawyer-as-facilitator-workshop/ (last visited Oct. 23, 2014).

152. Interview with Anonymous TimeBank User, *supra* note 92.

153. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 86–89.

154. FISHER & SHARP, GETTING IT DONE, *supra* note 136, at 83–85.

c. Attorney as Distinguisher and Drafter

Still another advantage to the attorney facilitating a stakeholder discussion about a dispute resolution mechanism is that the attorney will hear first-hand the concerns underlying the community members' interests, can reframe so that everyone hears the concerns,[155] and can draft norms and a contract with those concerns in mind. After the stakeholder discussion, the attorney can parse what she heard into two (or more) categories: for example, what belongs in a commissary kitchen user contract and what is better articulated in norms or guidelines that will be posted and shared among users and regularly referenced in community meetings.[156] The attorney can later return drafts of any contracts and norms to the group for comment and revision.

Under the right circumstances, and after the group has identified the decision-makers, the group can then undertake a consensus-building[157] or other type of collaborative process[158] to approve the contract and group norms. These processes—from stakeholder assessment through final commitment documents—may take longer than the traditional path from client interview to final documents, but the documents created will better reflect the specific community's needs and values and will therefore be more likely to be used. Participatory processes lead to greater buy-in to the systems thereby created.[159]

2. Build In Conflict Engagement as Regular Part of SEM Culture

One of the purposes of having an attorney facilitate the overall stakeholder engagement process could be to set an example of how skilled, inclusive facilitation could be utilized for future SEM meetings at which conflict is addressed. The attorney can encourage

155. ORSI, PRACTICING LAW, *supra* note 13, at 93.

156. *See infra* Recommendation 4–5.

157. *See, e.g.*, ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 87–100; *see generally* LAWRENCE SUSSKIND ET AL., THE CONSENSUS-BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (1999).

158. ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 114.

159. *See generally* COSTANTINO & MERCHANT, *supra* note 105, at 49–66.

participants to make addressing issues a regular part of community meetings by helping the community create practices and norms for those meetings. For instance, the attorney for Dave's TimeBank could create a template agenda for each community meeting that covers the following issues:

1. Review of Agenda and Member Additions
2. Words of Gratitude from the Last Month of TimeBanking
3. Focus on a Group Norm: Timely Communication When Giving/Receiving Time
4. Challenges Related to the Group Norm
5. Potential Ways to Manage Challenges
6. Member Additions
7. Announcements
8. Closing

A standard agenda, like the one above, serves a few purposes.[160] First, it helps members like Dave know what to expect at each meeting and anticipate a time when he can address his issue with the lack of childcare standards. Having a standing agenda for community meetings that includes time to talk about grievances as a community signals to the group that conflict management is a normal part of how a community lives together. If participants hear the message that the SEM wants participants to raise issues early and often, conflict management will become part of institutional culture and make conflict harder to avoid.[161]

Second, once members know what to expect at a meeting, they may find it easier to rotate meeting facilitation duties, thus distributing more broadly the role of setting the table to discuss, and

160. For a general guide to creating agendas that reflect group purpose and have a clear process, *see* KANER, *supra* note 145, at 145–96. *See also* ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 111–13.

161. Interview with an Anonymous Co-Working Space User, *supra* note 99.

generate ideas for solving, problems.[162] It may take some time for the community to engage in regular conflict discussions. Until then, the early adopters may be seen as tattle-tales because they are taking the risk of naming dynamics or problems that no one has yet named.[163] No one should be punished in a community for raising issues, and the attorney can help the community decide how to systematically process complaints so that no complaint goes unaddressed simply because it comes from a "complainer."[164]

Third, a standard agenda that includes time to discuss conflicts gives people space to remind each other about group norms, offer coaching to one another, and help each other resolve user-user conflicts. Dave may raise the childcare issue in the meeting, and Cindy may be surprised and react strongly. In a context in which the two were alone, this may become a heated argument. But in a community context, the fellow users may be able to ask questions, share perspectives, acknowledge what is happening for each of them, and mediate the user-user conflict to some degree. Raising issues in person, together, may make the community stronger than it would be if issues were never raised.[165]

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162. LAWRENCE SUSSKIND, BREAKING ROBERTS' RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS 84–85 (2006). Before instituting rotating facilitation duties, the attorney should help the SEM think through the collateral effects of members raising issues in institutional settings, e.g., whether the SEM is prepared to be "on notice" about particular issues, whether the SEM has an obligation to respond to all issues that might be raised, etc. This concern was aptly raised by participants at the scholarship roundtable on Social Entrepreneurship, Community Lawyering & Dispute Resolution at the Washington University School of Law in the Fall of 2014. *See also* ROGER SCHWARTZ, THE SKILLED FACILITATOR 320–22 (2002) (discussing the potential for conflicts when an interested party performs the role of a facilitator and how to manage those conflicts).

163. Macolm Gladwell explores the concept of Early Adopters, risk-taking, and negative perceptions the majority of a community has about Early Adopters in his book, THE TIPPING POINT 197–99 (2000).

164. In this way, the attorney can serve the function of what Gladwell calls a Salesman, one who simplifies and translates a new or challenging concept in a way that makes sense to the hearer, so the majority is more likely to adopt the concept or practice. *Id.* at 199–200.

165. Schwartz, *supra* note 162, at 24.

3. Increase Capacity Among Members to Manage Conflict Themselves

Beyond building institutional norms around ongoing conflict management, an attorney can help SEM stakeholders increase their capacity to manage conflict among themselves.[166] Especially when ongoing relationships are in play, the incentive to deflect, avoid, or tolerate conflict is high.[167] Yet, unaddressed conflicts that underlie relationships and communities tend to flare up in other ways: passive aggressive behavior among users,[168] gossip, users departing without saying why,[169] and failure of the common purpose. A key to creating a culture of conflict engagement is helping individual users skillfully navigate the tension between empathy and assertiveness so that conflict can be both acknowledged and worked through.[170]

To help community members feel more prepared to raise issues as they occur, the SEM can arrange for the members to be trained in interest-based negotiation,[171] including how to have difficult conversations.[172] For instance, when Tiffany joined the commissary kitchen, she could have received a certificate to attend a local conflict resolution center's training as a welcome gift. In these trainings, members could practice addressing conflicts similar to those they will face in the SEM. For instance, Tiffany could have practiced having a difficult conversation with a neighbor who parks in her yard or a former co-worker who left loose papers all over the copy room. An alternative would be to "train the trainers," so that when Luis, Ralph, or Tiffany leave the commissary kitchen community, there is still a core group of participants who can continue upholding the norm that community members should raise issues and resolve disputes among members as soon as they arise.

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166. *See* ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 107.

167. *See* DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, DIFFICULT CONVERSATIONS xxvii-xxix (2010).

168. Interview with an Anonymous Commissary Kitchen Manager, *supra* note 106.

169. Interview with an Anonymous Co-Working Space User, *supra* note 99.

170. MNOOKIN, PEPPET & TULUMELLO, *supra* note 100, at 44–50.

171. *See generally* FISHER, WILLIAM & PATTON, GETTING TO YES, *supra* note 17, at 58–65.

172. *See generally* STONE, PATTON, & HEEN, DIFFICULT CONVERSATIONS, *supra* note 167.

Having community-wide competency in conflict resolution skills keeps the cost of conflict low, as people who feel prepared to address conflict are more likely to manage it themselves before escalating issues to a manager or third party. Regular training also gives people a common language with which to manage group process and difficult conversations in the future.[173] For instance, after training at a local conflict regulation center, Tiffany may better understand the negative impact resulting from going to Luis about her problem instead of directly addressing the problem with Ralph and therefore choose a different course of action. Training also builds problem-solving capacity within the membership that will serve the SEM well in other situations that require initiative and creativity. For example, if Maureen, in her role as the commissary kitchen manager, has a conflict with the City Council over zoning for commissary kitchens, she may feel more comfortable bringing the issue to her conflict-competent users and asking for them to brainstorm approaches she may take to negotiating in the commissary kitchen's best interests.

4. Help SEMs Distinguish Between Legal Obligations and Norms

In the TimeBank example, the TimeBank had a set of user guidelines and core values it expected members to follow. Clearly articulating these core values (the foundational beliefs on which the SEM is based) and guidelines (the process for being part of the SEM) are essential to creating substantive community standards by which behavior can be evaluated. But general core values such as, "Good will, respect for self and others, and the desire to build a network of support, care and trust will make us strong,"[174] do not articulate a *process* for evaluating behavior or enforcing community values.

Attorneys are uniquely skilled to be able to distinguish between what might work best as a "law," an administrative rule, and a generally less-enforceable principle or norm.[175] What attorneys

173. Schwartz, *supra* note 162, at 165.

174. *Guide to Trading*, TIME TRADE CIRCLE, http://www.timetradecircle.org/members.php (last visited Oct. 23, 2014).

175. Orsi, *Cooperation Law*, *supra* note 134. For a discussion of SEMs' use of these various forms of regulation, *see* ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 121–22.

sometimes do not understand is how valuable group norms can be, even if legally unenforceable, especially for mitigating the effects of disputes that could eventually rise to the level of legal enforceability.[176] Attorneys can provide a valuable service to SEMs by helping them distinguish what fits in each of these buckets: overarching community *values*, *standards* of behavior, *instructions* for being a user, legal *obligations*, and dispute management *processes*. After the stakeholder engagement process, the attorney can do some behind-the-table work categorizing interests based on the purpose of each of these buckets. Values can go into the TimeBank's mission or vision statement. Standards of behavior can be included in a group expectation list to which all TimeBank participants must assent. Participants should be encouraged to discuss any additional standards related to a particular exchange (e.g., for Dave's children's care) when the participants arrange to exchange goods or services with each other. General instructions for TimeBank users can go in the instruction manual, perhaps in conjunction with the standards of behavior. Legal obligations can be included in a brief contract between users signed at the time of joining or, if each circumstance is sufficiently different, for each separate service they give or receive.[177] And dispute management processes can be clearly articulated, using the same language, in the general instructions, at the end of the standards of behavior, and in other member fora.[178]

The distinctions between laws, administrative rules, and enforceable principles or norms are critical to creating appropriate dispute resolution processes. Not everything needs to be part of a community contract or set of norms, but merely mentioning values and standards as a way of orienting the user to the SEM is not sufficient for a user to understand how the standards are enforced.

176. LAWRENCE SUSSKIND, BREAKING ROBERTS' RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS 83, App. B (2006).

177. Because some norms, rules, or other terms of operation important to a SEM may not be legally enforceable, it is important to apportion these concepts appropriately between legal and non-legal documents. *See* Erin O'Hara O'Connor & Christopher R. Drahozal, *The Essential Role of Courts for Supporting Innovation*, 92 TEX. L. REV. 2177, 2178–79 (2013–2014) (many terms that are negotiated among participants in innovative businesses are not enforceable in a court of law).

178. *See infra* Recommendation 5.

Once the community interests are captured and categorized, the attorney can set out to identify those behaviors that must or should be captured in a legally-binding contract between users and the SEM, or among users. Then, the attorney can ask how the group would like to enforce other norms. Though the norms may not be legally binding, the attorney can provide a helpful service in facilitating the group's discussions about how to enforce them, asking questions about fairness and consistency of the processes the group proposes, and scribing the system upon which the group decides. The attorney can ensure the group has thought about various pieces of a system: communication routes for conflicts to enter the system, what information is needed to begin a conflict resolution process, what happens once a conflict has entered the system, whether and how consent to participate is determined, who oversees the system, and what happens with the results once a conflict is resolved.[179]

5. Communicate Norms and Processes in Variety of Ways

SEM participants should know about group norms and understand the processes by which the community enforces those norms. This is important not only while a person is a participant in the SEM, but also before a person becomes a participant. As one participant in a shared working space articulated to us, technology can assist a SEM to make norms a regular part of the community, whether on the website, in an online internal wiki,[180] in a moving display in a shared space, or on people's individual tech devices. Tiffany would have benefitted enormously from having an easily-accessible tool, perhaps a phone app or clearly-displayed artistic rendering of the norms, to help her navigate her conflict with Ralph, rather than calling a friend to complain.

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179. *See generally* WILLIAM URY, JEANNE BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED (1993) (outlining these practical considerations for any dispute system).

180. A "wiki" is a generic term for "server software that allows users to freely create and edit Web page content using any Web browser." The most famous wiki is Wikipedia, the "online encyclopedia" that allows users to create and edit entries. Wikis can be used internally in organizations to communicate and update important information. Ward Cunningham, *What is Wiki?* (June 27, 2002), http://www.wiki.org/wiki.cgi?WhatIsWiki.

The attorney can also help the community create an orientation process that involves a discussion of community norms rather than simply distributing norms on a piece of paper or in an email. Ralph, as well as all the other users, could have provided input or perspective on the norms and would have been more likely to remember them because of it.[181] If the SEM is amenable and well-humored, the attorney may consider creating a role playing exercise, short examples, or catchy phrases for how the community norms work in practice. This makes the norms a living, and often fun, part of the community.

The attorney can also work with the SEM to establish a regular norm review process. The commissary kitchen, for example, will change with every new participant, so though a regular review takes time, it is worth it for Maureen and the users to check in with one another periodically to determine whether the norms, which are the foundation of this system, still fit the community.[182] Norms that are set in stone through a contract, bylaws, or other more formal codification may be difficult to change. In contrast, a consensus-building and attorney drafting process could be used every month, year, or two years to review the norms, depending on how rapidly the community shifts.

6. Identify Person or Persons Responsible for Community Engagement and Dispute Resolution

One of the challenges faced by SEMs in which all members are considered equals is that the community rarely designates one person, or even a defined subset of people, to manage disputes. All members being equal in value within the SEM does not mean that every member must be equal in role.[183] Though Dave, Cindy, and other users want to be treated with the same amount of respect (their hours count equally, after all), reliance on all users to be a part of resolving all complaints does not honor people's unique skills. Neither is such a

181. FISHER & SHARP, GETTING IT DONE, *supra* note 136, at 148.

182. *See* Benkler, *supra* note 15, at 310 & n.91.

183. FISHER & SHARP, GETTING IT DONE, *supra* note 136, at 143–52; ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 61–64.

system efficient; no one wants to be forced to be a community mediator or investigator, and involving everyone in every conflict would drag out conflict for far too long. A point person for internal conflict would help the situation in which "no one is there to set forth rules in confident manner, because everyone [is] heads down with their work."[184]

This designated person need not be solely dedicated to conflict resolution; in fact, that would not make sense in smaller communities. Rather, the designated person (or persons) could be in charge of community engagement, as a Workbar co-working space in Boston did recently with a shift from a receptionist to a "Space and Community Manager."[185] The person in this role can be in charge of educating new participants about the group norms, helping participants build skills to manage issues themselves (whether as a trainer[186] or coach[187]), organizing events and setting agendas for community meetings, and, if needed, managing disputes that arise.[188] By designating such a person—thereby moving beyond a SEM simply proclaiming on its website that it cares about building a sense of community among the participants—the SEM demonstrates its seriousness about creating and maintaining a healthy community.[189]

Beyond appointing a designated person to manage community engagement, a SEM must be conscientious about who is designated to manage escalating conflicts. For instance, if the group decides that mediation is one of the steps in the dispute resolution system,[190] the designated mediator should be trained in mediation and have experience mediating actual conflicts before doing so in the SEM. A

184. Telephone Interview with Co-Working Space User, *supra* note 109.

185. *Locations*, WORKBAR, http://workbar.com/locations/ (last visited Oct. 22, 2014).

186. Any person who seeks to train others in dispute resolution skills should have first received extensive training themselves. Dispute resolution—and teaching dispute resolution—is a professional field with a particular set of skills and it should not be assumed that someone who has taken one training is prepared to then train others.

187. *See, e.g.*, *Conflict Management Coaching Model*, AIRFORCE, http://www.adr.af.mil/services/cmc/index.asp.

188. This role is similar to, though not exactly like, an ombudsperson in the corporate or university context.

189. Interview with Co-Working Space User, *supra* note 109.

190. ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 108 (expressing a preference for mediation as the best way to resolve SEM disputes).

facilitative mediation style[191] would likely best preserve self-determination within the group and empower the people involved in the conflict to discuss the important aspects of the conflict.[192]

The chosen mediator must be trusted by most, if not all, members. This need for trust may dictate that a rotating group of community members, rather than one person, is responsible for filling the role. A rotating appointment alleviates individual members from having to take on substantial roles other than that for which they initially agreed to fill and ensures a variety of opinions inform the community's conflict resolution processes.

7. Consider Implications of Confidentiality and Transparency

Though confidentiality and transparency are often seen in tension with one another, a dispute systems designer sees them as two ways of meeting community interests related to openness.[193] While calls for a decision-making process to be "totally transparent" often come from stakeholders (either internal or external) who want to ensure such processes (and more often, the outcomes) are thorough and fair, one of the roles of an attorney is to help a SEM understand the advantages and disadvantages to having all information about community norms and processes be available to the public, or even to all community members.[194]

On one hand, publicly available community norms and processes for conflict management help those seeking to join the SEM evaluate whether—and if so, how—they want to participate in the SEM. With respect to the actual substance of conflicts and their resolution, however, attorneys may add some legal wisdom to discussions about whether—and if so, how—to share the actual substance of conflicts and their resolution. In some cases, confidential processes and outcomes help parties be more candid, save face with the public or

191. For more information on the variety of types of mediation, see Leonard L. Riskin, *Understanding Mediator Orientations, Strategies, and Techniques: A Guide for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996).

192. *Contra* ORSI & DOSKOW, THE SHARING SOLUTION, *supra* note 40, at 109.

193. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 179–83.

194. *Id.* at 183–86.

other constituencies outside the primary decision-making process,[195] brainstorm more creative options, include diverse perspectives that may not be publicly popular, engage in self-determination, and ultimately more efficiently and thoroughly resolve a dispute.[196] On the other hand, transparency creates precedent, respects the self-determination and autonomy of group members, provokes ongoing and sometimes helpful conversation about conflict, and provides a check against misuse of the system.[197] The attorney can help create rules around confidentiality and transparency that reflect the SEM's stakeholders' interests. The attorney can also help the SEM decide what discussions or decisions should be shared with all participants, which should be shared only with those in the conflict, and which should be reserved for only the ultimate decision-makers in an organization.

8. Be Thoughtful About Purpose of a Contract

Due to the intimacy typically inherent in the relationship between participants in a SEM, parties may not readily refer to a contract when negotiating the terms of their involvement with one another or navigating disputes.[198] This is not to say that contracts are not important to SEMs; to the contrary, contracts are especially important to SEMs, as the small and less formal nature of their activities means that no applicable statutes may exist, and case law may not be easily applied to the facts at hand.[199] Moreover, a well-written contract can serve as a last-resort safeguard against unwelcome outcomes in

195. WILLIAM URY, GETTING PAST NO 105–129 (1993).
196. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES, *supra* note 38, at 180–83.
197. *Id.*
198. Interview with Co-Working Space User, *supra* note 109.
199. Erin O'Hara O'Connor & Christopher R. Drahozal, *The Essential Role of Courts for Supporting Innovation*, 92 TEX. L. REV. 2177, 2178–80 (2013–2014) (reasoning that lack of existing business norms, a commitment to avoiding litigation, and the existence of agreements that would be unenforceable in the courts are why studies have shown that innovative businesses tend to rely on lawyers and contracts more so than their traditional counterparts.). *See also* Matthew C. Jennejohn, *Contract Adjudication in a Collaborative Economy*, 5 VA. L. & BUS. REV. 173, 201 (2010–2011) (noting that courts' interest in the customs of the parties to the contract and industry norms, both of which are often inapplicable to innovative, collaborative relationships, lead many collaborators to eschew the court system in favor of contractual dispute escalation procedures that end in arbitration).

court.[200] If existing standard contracts or certain well-worn provisions can be applied readily to a SEM and the terms are understood by the participants, the attorney need not draft a contract from scratch. The attorney may trust that, should the arrangement ever need to be litigated, the language will be familiar to adjudicators.

However, due to the intentionally flexible roles that exist within SEMs, participants may eventually adjust their relationship and performance in ways that are not specifically contemplated by the contract, which can result in conflicts for which few legal rights and no resolution has been contemplated.[201] To account for such evolution in relationship, it is important to memorialize intent, purpose, and agreement to negotiate in good faith over finer details as they arise in such an agreement.[202] The attorney can also articulate, both to the participants as well as within the documents themselves, a clear relationship between the contract and the other documents, such as the community norms, which may contain more complex dispute resolution procedures.[203] Attorneys for SEMs must be creative, thorough, and well-informed of the needs and potential conflicts of the SEM when drafting a contract for its use, since the contract itself may provide the only suitable dispute resolution mechanism for resolving conflicts that arise under the contract.

As our analysis of collaborative consumption demonstrates, more research and practice-based advice must emerge in response to the emergence of CCMs. Attempts to categorize, explain, and probe these models will continue, and we hope we have added value in our own attempt.

When we deconstruct some of today's most innovative businesses—Uber, Airbnb, and the like—and the very public disputes

200. O'Hara O'Connor & Drahozal, *supra* note 202, at 2179.

201. *See* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1977–1978) (addressing the need for flexibility to be built into contracts to accommodate potential changes in parties' relationships and performance in the future).

202. *Id.*

203. *See generally* ORSI, PRACTICING LAW, *supra* note 13, at 95–114 (discussing how to shape agreements governed by both "social expectation" and important "legal" terms that leave "windows for negotiation" among community members).

in which these businesses are involved, we see that many CCMs are re-packaged market-based solutions and can thus often turn to existing laws and legal strategies as a starting point to resolving their disputes. Though attorneys who serve these businesses will do well to learn more about CCMs and anticipate the disputes the businesses will face (specifically around regulatory issues), we believe the real innovation in attorney-led dispute systems design for CCMs will happen in those innovative models that truly evidence a "sharing" mindset among their participants.

The *true* sharing economy requires a new kind of lawyer, one who is willing to embrace the role of dispute systems designer and wear multiple hats as that role dictates: stakeholder assessor, consensus builder, drafter, facilitator, process architect, and group advisor, as well as others yet to be identified. As the sharing economy grows, attorneys and clinical instructors who teach future attorneys must be willing to learn and grow, adopting new skills and practicing modified roles in the service of these innovative clients.