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CASE STUDY 1: MOVEMENT GROUPS WITH FLAT, INNOVATIVE GOVERNANCE STRUCTURES

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I. ISSUE # 1: LEGAL WORKING GROUPS

Black Lives Matter, Occupy Wall Street, the global justice/anti-globalization movement, the radical environmental movement of the 1990s, and other organizations have moved away from traditional hierarchical models of leadership within their movements in favor of more horizontal, “leader-full” structures or network models. More horizontal or network models have been used even when a group of people is engaged in what might ordinarily be considered “service” work, like disaster recovery (i.e. Occupy Sandy,¹ Common Ground Collective,² and Mutual Aid Disaster Relief³) and feeding the hungry (the scores of Food Not Bombs⁴ groups around the country). Relatedly, organizers of mass mobilizations may engage the support of lawyers even before these actions crystallize into a movement or formally structured organization—as informal governance structures exist in the planning and execution of these mobilizations. One example is the Ferguson Legal Defense Network, which formed under the direction of trusted lawyer contacts amidst the mass mobilizations in Ferguson in the aftermath of the police killing of Michael Brown Jr.⁵

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1. *Home*, OCCUPY SANDY RECOVERY, <http://occupysandy.net> (last visited Nov. 10, 2018).

2. *About*, COMMON GROUND COLLECTIVE, <https://www.commongroundcollective.com> (last visited Nov. 10, 2018).

3. *About*, MUTUAL AID DISASTER RELIEF, <https://mutualaiddisasterrelief.org> (last visited Nov. 10, 2018).

4. *Home*, FOOD NOT BOMBS, http://foodnotbombs.net/new_site/index.php (last visited Nov. 10, 2018).

5. FERGUSON LEGAL DEF. COMMITTEE CHAIR CIRCA 2015, <http://www.fergusonlegal>

When groups of people involved in these actions—whether organized mass mobilizations that mature into movements, “service” work done in a movement framework, or in the context of rapid response to more organic mobilizations such as in the immediate period following a police killing—engage with lawyers, they may solicit legal advice through one or a few trusted lawyer connections, which may form a legal committee to set up a local infrastructure to respond to needs as they arise. This presents professional responsibility challenges for lawyers. In some instances, it may be that the movement group is philosophically opposed to entry due to barriers to participation in working groups (such as a requirement to be a lawyer), and work may instead be routed through other kinds of committees that include lawyers with some degree of expertise and local knowledge.⁶ In other instances, trust must be established before a formal attorney-client relationship (with retainer agreements) can be recognized, something that might not always be possible in the midst of rapid response. Another context that presents challenges is when a movement group or mobilization has not yet crystallized into a formal organization with a membership structure or designated representatives with the capacity to enter into contracts with lawyers on behalf of the larger group. A more concerning issue arises when membership of the group is quickly shifting through participation in organic mobilizations that occur over time, as in Ferguson. In such instances, it is difficult to maintain confidentiality and ensure that communications or meeting minutes can be kept privileged. Other challenges arise for lawyers when the mobilizations are organized by a loose coalition of groups/organizations and a conflict arises between them during the course of representation.

When the Occupy Movement sought to develop a communication apparatus to facilitate conversations between the groups in New York and the hundreds of other cities with Occupy encampments, a team of web experts built InterOccupy,⁷ navigated security questions, and responded to other potential obstacles. That might work for a website, but network and collective governance regimes raise significant

defense.com (last visited Nov. 10, 2018) (explaining that this was the official site for the Ferguson Legal Defense Committee formed to support the movement following the killing of Michael Brown, Jr.); FUNDERS FOR JUSTICE, <http://fundersforjustice.org> (last visited Nov. 10, 2018) (illustrating the current site for the Ferguson Legal Defense Committee).

6. For instance, during Occupy Sandy, people who had been in the field since the first day after the storm had become adept at answering questions about which local government or non-profit agency should be contacted on particular issues. See Adam Greenfield, *A Diagram of Occupy Sandy*, URBAN OMNIBUS (Feb. 6, 2013), <https://urbanomnibus.net/2013/02/a-diagram-of-occupy-sandy>.

7. About, INTEROCCUPY, <http://interoccupy.net> (last visited Nov. 10, 2018).

professional responsibility issues for lawyers that—although not insurmountable—require thought. The following are among the relevant legal ethics questions that arise in these contexts:

- *Who is the client? Who is authorized to speak on the client's behalf?*
- *How can confidentiality be preserved when membership is fluid, i.e., when participants in movement groups come in and out?*
- *How can lawyers participate in a legal working group if some of the members of the group are non-lawyers? What if those non-lawyers are holding themselves out to the public as part of the legal working group and giving "quasi-legal" advice?*
- *How to account for differing levels of understanding of movement lawyering practice in the rapid response context among legal professionals—especially when it comes to preserving trust with the leaders of the movement group/organization/mobilization?*
- *Who is responsible if we give a flawed legal opinion? Do we bear any potential responsibility if some stranger in this working group gives advice on some subject—say, insurance law—that is outside of our area of expertise, and that opinion ends up being wrong?*
- *How to approach the question of securing a retainer agreement when more trust needs to be built before a movement group would be open to discussing this question?*

A. Ethical and Strategic Assessment of Issue # 1

In this scenario, lawyers and non-lawyers form a legal working group (collectively, legal workers) to support a movement organization with a flat governance structure. The purpose of the legal working group is to advance the movement in its activism and service work. In this context, legal advice may be given to individuals within the organization, individuals within networked organizations, and individuals outside of the organization and network, as well as to the organization itself or to other organizational entities within a network.⁸

8. We care when any kind of legal advice is given because of the rules governing the lawyer-client relationship, particularly with regard to confidentiality and conflicts of interest and the personal and administrative responsibility placed on lawyers to comply with those rules. When those rules attach can be less than clear. See MODEL RULES OF PROF'L CONDUCT scope para. 17 (AM. BAR ASS'N 2018) ("Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.").

Members of the working group may also provide non-legal advice (arguably, the scenario referred to above),⁹ and this would not have legal ethical implications, though it may still be that the movement organization aspires to provide accurate information in a responsible manner for the sake of its sustenance, growth, and accountability to communities served.

1. Potential Legal Ethical Implications

This factual scenario presents the following types of legal ethical challenges:

a. Unauthorized Practice of Law (“UPL”)

Non-lawyers and lawyers not admitted to the bar in a particular jurisdiction are engaged in the unauthorized practice of law, clearly prohibited under Rule 5.5 of the ABA’s Model Rules of Professional Conduct.¹⁰ UPL rules ostensibly protect consumers from being defrauded by unqualified people hawking legal services.¹¹ They also keep non-lawyer third parties from influencing the conduct of a legal matter, pursuant to Rule 5.4.¹² These rules are of obvious importance in analyzing the conduct of non-lawyers in legal working groups potentially providing (or even simply conveying) legal advice to individuals and entities.

b. Confidentiality

Confidentiality rules (under Rule 1.6) apply to the lawyer-client relationship even if such a relationship has not been formally created through a retainer agreement.¹³ Lawyers (and non-lawyers working at the behest of lawyers) must abide by those rules when in possession of specific facts pertaining to individuals receiving counsel.¹⁴ They may not share that information with anyone outside of the lawyer-client relationship, including their friends and family.¹⁵ Further, clients must understand that the attorney-client privilege—a rule of evidence distinct from the confidentiality rule—may not attach if a court orders the

9. See *supra* note 6.

10. MODEL RULES OF PROF’L CONDUCT r. 5.5(a), (b) (AM. BAR ASS’N 2018); see *id.* r. 5.5 cmt. 1.

11. *Id.* r. 5.5 cmt. 2.

12. *Id.* r. 5.4.

13. *Id.* scope para. 17; *id.* r. 1.6.

14. *Id.* r. 1.6 & cmt. 3.

15. *Id.* 1.6. cmt. 3, 4.

disclosure of notes, emails, and/or depositions of those involved in the legal working group but outside of the lawyer-client relationship.¹⁶ This legal ethical challenge is heightened by the fact that there are times when the membership of a working group is fluid: people come in and out of meeting spaces and are seemingly approved to be there by leaders (but there is no overt expression that people coming in or out are actually considered to be members of the group). Both the intentional sharing of the facts from a movement participant's case within a legal working group, as well as the inadvertent sharing of confidential information because of the open nature of movement spaces, pose legal ethical challenges.

c. Imputed Conflicts—Concurrent and Successive

Under Rules 1.7 through 1.9, there are situations in which a lawyer in the working group may have current or prior relationships with individuals or agencies or other entities that may be adversarial to individuals being advised.¹⁷ This conflict may be imputed to all of the members of the legal working group, so that every other lawyer carries their colleague's conflict into their (formal or informal) relationships with new clients, pursuant to Rule 1.10.¹⁸ Non-lawyers working in the group at the behest of lawyers carry those lawyers' conflicts (as well as their own) into their interactions with actual or putative clients. Accordingly, the legal working group would need to ensure that people provided with legal advice have been informed as to potentially relevant former and current lawyer-client relationships of lawyers within the working group. Also, as new individuals come forward to seek legal advice, there would be a need to constantly check with everyone in the legal working group to ensure that they do not have relationships with other individuals or entities that may pose a conflict in their dealings with the new client (lawyers call this "clearing conflicts").¹⁹

All of these implications assume that the legal working group is analogous to a legal firm. However, the working group could be intentionally structured so that it looks less like a firm and more like a

16. *Id.* 1.6 cmt. 3.

17. *Id.* r. 1.7-1.9.

18. *Id.* r. 1.10. If non-lawyers are providing legal advice outside of the purview of a lawyer, then they are engaged in the unauthorized practice of law. Although they may still be carrying their own conflicts into the relationship with clients, it is technically not a legal ethical violation since they are not lawyers and thus not bound by the rules of professional conduct that are applicable in the jurisdiction in which they are working. *Id.* 1.10 cmt. 1.

19. Robert D. Aicher & Victoria Vuletic, *Ethics and the Internet: The Online Legal Marketplace*, 94 MICH. BAR J. 50, 50 (2015).

loose affiliation of lawyers and non-lawyers without the capacity to carry each other's conflicts into their relationships with prospective, actual, and putative clients. Such prophylactic measures require a degree of intentionality and the execution of agreements as to what the legal working group is and is not. This is possible, though such intentionality may run counter to the spontaneous formation of such groups in response to urgent situations requiring rapid response.

B. Goals

Before formulating strategies with which to respond to potential legal ethical implications, it is important to set out the goals of collaborations between lawyers and movement actors. We do so here briefly:

Minimize power differentials and promote equality. Lawyers are often ascribed too much power in settings where organizing strategy is being discussed. Lawyers must be conscious of this dynamic and avoid taking up too much space in movement organizing spaces. Organizers and participants must have the ability to make tactical decisions that are central to the development and growth of movements. Even if the lawyer may not agree with the tactic chosen, the lawyer's role is not to unduly influence the choice of tactics but to aid in the assessment of risks related to a given tactic.

Respect and nurture creative organizing and organizational and network structures. Business lawyers will understand the imperative of respecting and nurturing the agency of individual and organizational clients, as failure to do so might result in the client choosing to go elsewhere. Movement lawyers use these common intuitions to center the agency of groups of people directly impacted by social injustice seeking to transform the systems that produce and perpetuate the conditions of their oppression. Movement lawyers cannot take for granted that these organized groups will want to continue to seek their advice; they have to continuously reaffirm their trustworthiness and willingness to put their services at the service of the organized group's objectives.

Understand the decision-making processes and aims of the movement formations. Again, this is a basic insight of business lawyers. When seeking to advance a client's interests, it is essential that a lawyer engages in an ongoing dialogic process with the leaders of the movement formation by which they come to understand the decision-making structure of their client and the underlying goals and motivations of their organizing work. In this sense, it is important for the movement

lawyer to develop a nuanced understanding of organizing and activism to contextualize the lawyer's role in movement building.

Provide services that may facilitate organizing and advance the movement. The work of movement activism is to grow and to seriously engage prospective participants. Successful movements engage in direct action and popular mobilization with the aim of drawing new participants into longer-term organizing and base-building projects. Organizing activities and services that lawyers may help provide are not an end in and of themselves but instead a means by which the movement may grow and flourish.

Protect individuals, entities, and networks from liability for legal or ethical violations. Movement formations are engaged in oppositional work against better-funded and more formally organized political actors. Those opponents use all available legal regimes to undermine the activities and aims of movement formations, including state bar disciplinary mechanisms.²⁰ Although this type of campaign tactic occurs in both directions, progressive movements face a basic asymmetry of power and money. While not ultimately deterministic as to the success of social change campaigns, legal and disciplinary violations can be used to hobble and slow movements. Lawyers supporting movement formations must balance vigilance with respect for the underlying aims and creative tactics of their clients. This is difficult, but it can be done.

Protect third parties who may be involved in movement activities. Lawyers supporting movement formations have a degree of responsibility for those who may be served by such formation, either as prospective or putative clients or because lawyers have responsibilities to the public that extend beyond their service to clients.²¹ Less idealistically and more instrumentally, lawyers supporting movements disserve them by ignoring instances in which prospective participants may be mistreated or misled. A strong relationship of trust with leaders of the movement formation will allow a lawyer the space to provide counsel on any potential harmful impact of movement activities or messaging.

20. See generally David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209 (2003) (discussing laws and doctrines which undermine the ability of progressive public-interest lawyers to bring cases).

21. See Robert W. Gordon, *Independence of Lawyers*, 68 B.U. L. REV. 1, 11-13, 15-19 (1988). See generally DAVID J. LUBAN, *The Ethics of Wrongful Obedience*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION (Deborah L. Rhode ed., Oxford U. Press, 2003); DEBORAH L. RHODE, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION (Deborah L. Rhode ed., Oxford U. Press, 2003).

Avoid demobilizing moves. Again, lawyers have to balance their protective instincts and responsibilities against the needs of movement formations to be spontaneous and creative. For example, though a retainer agreement is a normal part of lawyering with most clients, putting a legal contract in front of movement participants (and sometimes even movement leadership) at an early stage in the relationship may erode trust and deter participation. Lawyers have to unlearn assumptions about how best to build relationships with clients and carefully balance between their responsibilities and the aims of their movement clients.

Democratize legal information. Lawyers supporting movements have an interest in sharing legal knowledge broadly, so as to leverage scarce legal resources and avoid dependence on professionals. In the rapid response context, this includes the dissemination of fact sheets, tip sheets, and other training materials for movement actors involved in mass mobilization.

Build relationships. A central focus of the modern legal profession is the development of long-term relationships between lawyers, firms, and clients. Although that focus on relationships has been eroded by competition between firms and by external factors, such as automation and outsourcing, the core purposes of representation—zealous advocacy and effective counseling—rely on sustained dialogic processes between lawyers and clients. Much like traditional business lawyers, lawyers for movement formations seek to build trust and deepen mutual understanding over time. The guideposts are accountability and trust.

C. Strategies

With these goals in mind, we can begin to analyze ways in which lawyers might counsel movement organizations with flat, innovative governance structures on legal ethical challenges and ways in which lawyers might structure their own work so as to comport with the ethical rules governing the profession. Three possible strategic directions occur to us for the kind of movement organization described in the facts: models of provision of legal services, stable structures for legal working groups, and the development of accountability mechanisms for such groups.²² We will take each one in turn and briefly describe what we mean.

There are already functioning models of legal services provision that may be adopted and spread within movement networks. These

22. See *infra* notes 23-27 and accompanying text.

models are already present in many movement contexts, but perhaps not seen as a means by which to ensure compliance with legal ethics rules. For example, courts and hard-pressed legal services offices have devised *pro se advising programs* or brief service.²³ In these programs, lawyers and administrators refrain from providing legal advice while sharing legal information.²⁴ Such entities may have individuals sign non-representation agreements, which puts them on notice as to the scope of assistance. Programs may also offer written materials that are reviewed by lawyers and include caveats and qualifications, both to protect the individuals receiving the information, as well as the providers.

A second model used in legal services contexts, as well as in particular sectors of the market for legal services for middle class consumers, is *limited representation and unbundled service provision*. As in the *pro se advising* model, lawyers seek to clarify the bounds of their relationship with a prospective client, usually in writing, by establishing what matters and types of work are and are not provided. In fact, just about all retainers include a scope of representation clause, however, in limited representation or unbundled service contexts, that scope is defined very narrowly.

Another model for advice-giving in movement contexts is to limit that advice to *non-legal information and counseling*. Movement participants would need to be trained as to where the line lies between legal and non-legal advice and then could freely dispense the latter. For example, in the scenario described in footnote six in which Occupy volunteers helped Superstorm Sandy survivors navigate government bureaucracies, the advice appears (at least superficially) to be non-legal.²⁵ It could be that residents develop legal claims against government agencies, but the front-end advice on navigation does not require the Occupy volunteers—whether or not they are lawyers—to collect individual client facts and integrate those facts with knowledge of the law. As Jerry Lopez has noted, there are many experts in local communities, nearly all of them without formal legal training, but deeply experienced in the ways in which local institutions work (or do not work).²⁶ Liberal legalism may have an inherent tendency to expand and

23. *Guidelines for Best Practices in Pro Se Assistance*, AM. BAR ASS'N 26, 28-32 (Oct. 1, 2004), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/laproseguidelines.authcheckdam.pdf.

24. Although definitions of the “practice of law” vary from state to state, MODEL RULES OF PROF'L CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2018), it is generally understood that transmitting legal information without solicitation and integration of a client's specific facts into legal advice is not considered the practice of law.

25. See *supra* note 6 and accompanying text.

26. See GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF*

envelop human affairs; movements are especially adept at countering this tendency and centering the political work of leaders and organizers with local knowledge.

A second strategic area inviting creative approaches is in the establishment of legal working groups, like a jail support group. Participants could establish a common understanding with regard to the values being advanced through an innovative structure, in the shadow of legal ethical rules. The group should understand the *unauthorized practice of law* rules in the jurisdiction in which they are working and adjust to those rules. They can democratize law by transmitting information about it, as well as about the institutions charged with enforcing it, as long such information does not evolve into legal advice. The group should have an understanding of the *confidentiality* rules and build in flexibility and adaptability so that lawyer-members may comport with those rules while advancing the underlying purpose of the movement organization. So if a lawyer needs to be left alone with a prospective, putative, or actual client, it should not be a cause for strife or ill-will. At the same time, the lawyer needs to be careful to assure that anything that can be discussed outside of the cone of confidentiality should be discussed with other movement actors present. In other words, the lawyer should not allow legalism to swallow up an entire conversation with a potential movement participant. The group should have an understanding of the *conflicts* rules and how they may apply. In legal practice, effective identification of potential conflicts is a matter of consciousness. Specifically tasked professionals, now relying on automated case management systems, spur that consciousness by collecting information from lawyers or paralegals about prospective clients and then flagging and pushing out notifications about potential conflicts. The legal working group can at least possess a degree of consciousness about conflicts, even in the absence of a paid administrator or an online case management system. Finally, the group should consider the development of a lawyer caucus, so that if lawyers wish to consult with others about the specific facts of a case, they may do so with a shared understanding of the rules that apply, as well as an equally shared sense of disciplinary jeopardy were they to run afoul of those rules.

A third strategic path that ought to be followed by legal working groups is in contemplating and creating means by which to remain accountable. It is foundational for the legal working group to define the relevant entities to which they may be providing advice. Is the local node

PROGRESSIVE LAW PRACTICE 26-28 (Westview Press 1992).

of the movement network their primary client? Are they in-house to that organizational node? How does the group relate to other nodes in the movement network? Are there lawyers or a legal working group on the ground in those places with whom they may interact?²⁷ Lawyers and legal work can benefit from networks, just as movement organizers and political work benefits from regional and national linkages. These networks need to be created with a degree of consciousness about the shadow cast by the legal ethical rules. Once the clients are defined, the working group ought to consider how it aims to remain accountable. There are many parties involved, in relationships of varying degrees of formality; these uncertainties demand attention to questions of accountability early and often, which would very much be in keeping with how movement leadership may seek to tether themselves and ensure input from the communities for which they claim to advocate.

II. ISSUE # 2: MOVEMENT ORGANIZATION AS A PARTNER IN LITIGATION

*What is the best way to make the client a partner
in litigation advocacy and create awareness about
the decision-making process?*

Ethical and Strategic Assessment of Issue # 2

In a true partnership, the client group would approach a lawyer either with clear ideas about why they want to pursue litigation in the context of a campaign or the choice to pursue litigation would be formed after an evaluation of the objectives of the group's campaign and mutual agreement that litigation is the right tactic to choose. In these conversations between lawyers and movement organizers, the lawyer should present the pros and cons of pursuing litigation (e.g., consideration of the timeline, costs, the type of remedy possible, the difficulty of achieving desired outcome). The movement organization will then weigh the advantages of litigation in advancing a broader organizing campaign, as compared to other tactics the group could take that would not involve litigation. The lawyer does not approach partnership with movement formations with the assumption that litigation is the primary tool by which the movement will advance its goals. Instead, movement lawyers understand that litigation is but one of

27. Because of territorial protectionism within the legal profession, lawyers licensed in one state are engaged in the unauthorized practice of law in another jurisdiction in which they are not licensed. MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 2018).

many tools that can be employed to advance the underlying objectives of the group and will seek to understand these to determine if there are legal interventions of any type (e.g., policy formulation, litigation, research) that may contribute to the development of community power.

The legal ethical rules contemplate a compartmentalization of decision-making about the conduct of a legal matter, with lawyers responsible for legal strategic choices and clients responsible for defining their objectives and for key decisions about the disposition of the matter.²⁸ Lawyers have an affirmative duty to communicate with clients about the course of a legal matter and the means by which a client's interests are being advanced in the legal process.²⁹ Many lawyers in varied practice areas act in ways that are not client-centered, at times withholding even the basic information that they are required to share. In this context, the legal ethical rules may offer a degree of protection for movement formations trying to ensure communication and accountability (either with an organizational client or individual movement actors who are formally clients in the legal matter). Lawyers can be made to educate stakeholders in the legal matter as to both the process and substance governing the case, short of sharing confidential information that could only be shared with formal clients.

On the movement side, organizers are responsible for creating decision-making structures that facilitate full consideration of issues, raise conflicts within the group to the surface, and work to resolve them. Organizers must pay particular attention to the tension between pecuniary and non-pecuniary interests, which often animates conflicts within a group of clients or between individuals and organizations. Organizers must also pay special attention to the fault lines created by tension between short and long term interests in a legal matter. Movement organizers are responsible for the political education of movement participants that will prevent or resolve conflicts that may arise. It is only through political education that collectives solidify and co-construct common interests that are essential in any kind of legal tactical initiative in which lawyers must have a degree of clarity about client interests. Overall, movement organizers are responsible for attending to the needs of individual members, communicating with them, and engaging in member-centeredness (analogous to client-centeredness) to ensure that individuals are not picked off by opponents in the midst of legal struggle. Ultimately, lawyers should not panic when

28. *Id.* r. 1.2.

29. *Id.* r. 1.4.

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conflicts arise in movement contexts. Lawyers can help organizers resolve conflicts and co-reconstruct client/member interests. Trust and accountability lie at the core of it all.
