

# The Legal Intelligencer

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## The Role of Lawyers in a Time of Unrest

I've spent a lot of time ruminating on my role as an attorney in light of all that I am observing—the disparate impact of COVID-19, the political unrest over elections, the rising up of oppressed people all over the nation.

By **Heather J. Hulit** | December 17, 2020



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I have spent a great amount of time during the pandemic comfortably working from home to the sounds of sirens and helicopters. Maybe if you live in an urban area, you can relate. I've spent a lot of time ruminating on my role as an attorney in light of all that I am observing—the disparate impact of COVID-19, the political unrest over elections, the rising up of oppressed people all over the nation. In this season of social unrest—where more people than ever are mobilized around issues like housing, police violence, livable wages, health care, etc., where the consequences of not addressing those issues are more obvious than ever—what is our role as lawyers?

- **Lawyers should aspire to use their skills for the public good.**

First, we must begin with the premise that we have a role. Nowhere does it say that doctors ought to provide free medical services, or accountants should do taxes for free. But *lawyers* are told that they have a professional duty to just that—practice their craft for free. Rule 6.1 of the Model Rules of Professional Conduct

([https://www.americanbar.org/groups/probono\\_public\\_service/policy/aba\\_model\\_rule\\_6\\_1/](https://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1/)) states, in part, that “A lawyer should aspire to render at least (50) hours of pro bono public legal services per year.” Pro bono, short for the Latin phrase pro bono publico, literally translates as “for the public good.” Lawyers

should aspire to offer their free services toward the public good. Why? Law has such a fundamental place in our society because it establishes the rules that everyone is supposed to play by. The legal system is supposed to be the means by which we ensure that everyone adheres to those rules and that when rules are broken, the harm is redressed. Justice Joseph Story once said (<https://books.google.com/books?id=S6MrAQAAMAAJ&pg=PA353&lpg=PA353&dq=justice+story+%E2%80%9C%5Bwithout+justice+being+freely+administered,+neither+our+persons,+nor+our+rights,+nor+our+property,+can+be+protected.+And+if+these,+or+either+of+them,+are+regulated+by+no+certain+laws,+and+are+subject+to+no+certain+principles,+and+are+held+by+no+certain+tenure,+and+are+redressed,+when+violated,+by+no+certain+remedies,+society+fails+of+all+its+value.%E2%80%9D>)

Besides having special access to the courts, lawyers have played a preeminent role in the formation of our nation (<https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=3939&context=ndlr>). Consider that just under half of the signers of the Declaration of Independence were lawyers. It was lawyers who, after the Revolutionary War, developed the common law still in use today. And most of our presidents have been lawyers. Inherent in these facts is the reality that lawyers and the legal system have historically not represented the interests of all Americans. Many whose lives are profoundly impacted by the legal system—women, people of color and poor people—were traditionally excluded from the legal profession and played little to no role in the system’s development until the mid-20th century. By the time these groups were able to wield any influence in the system, many of its rules, practices and presumptions were stacked against them.

- **Lawyers must do pro-bono because the adversarial process only produces justice when both sides are evenly matched.**

The basic assumption behind our legal system is that justice is produced by the adversarial process. However, the *reality* of our justice system is that adversaries do not have equal resources. So the outcome of a dispute is often less a reflection of justice and more a reflection of which side had greater access to attorneys, resources, and experts. Pro bono representation provides a Band-Aid level response to this problem by providing *some* individuals with representation who would otherwise be going to court alone. Public interest firms and organizations facilitating or providing pro-bono representation are not able to provide representation to every individual in need of it due to limited resources and those with flawed cases tend to be denied.

Pro bono representation is a Band-Aid level response because, while it helps individuals, it cannot help *all* the individuals who need legal representation. Nor can it address the underlying problem—that the justice dispensed by our court system often turns on the financial and social resources of the parties and that there are whole classes of people who do not have the resources to access justice from our legal system. Nonetheless, Band-Aids are crucial and the importance of pro-bono representation cannot be overstated. Helping people draft wills, defend themselves against eviction, correct tangled titles, file expungements, protect themselves from deportation—these legal services provide real life-changing benefits to individuals who, without pro-bono representation, would not be able to access legal help.

- **Participating in impact lawyering.**

There are many public interest law firms that, rather than assisting individual clients with their legal needs, focus representation on cases where a whole class of people will be impacted by the outcome. There are many great firms doing this work—firms that work tirelessly to make school funding fair, to improve equity in juvenile and criminal court, to protect our right to vote, and to protect the rights of vulnerable populations like those with disabilities, immigrants and others. This is incredibly important and necessary work. Consider *Roper v. Simmons* (<https://www.law.cornell.edu/supct/html/03-633.ZS.html>) and *Miller v. Alabama* (<https://www.oyez.org/cases/2011/10-9646>), two Juvenile Law Center cases which, respectfully, banned the death penalty for juvenile offenders and banned mandatory life without parole sentences for youth convicted of homicide. Or the pending suit filed by Education Law Center and the Public Interest Law Center, *William Penn SD v. Pennsylvania Department of Education* (<https://www.elc-pa.org/cases/william-penn-sd-et-al-v-pa-dept-of-education-et-al-pa-commonwealth-court-2018/>) challenging the equity and adequacy of public school funding. Or the broad impact of *Mapp v. Ohio* (<https://www.oyez.org/cases/1960/236>), the ACLU case which first held that illegally seized evidence cannot be admitted in criminal trials. One clear way we can contribute to the public good is to financially support these organizations and provide free legal support.

As necessary as impact lawyering is, it too suffers from drawbacks. One of the critical drawbacks is that a favorable court decision does not always translate to favorable change “on the ground.” For example, 66 years ago *Brown v. Board of Education* held that it was unconstitutional to segregate students in schools—but when we examine the actual change this decision produced, its impact on the ground is arguably limited. Much has been written about how a majority of white students attend schools that are mostly white (<https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/>) while a majority of students of color attend schools that are mostly made up of students of color. In a 2017 Fordham Law Review article, “Rethinking the Foundational Critiques of Lawyers in Social Movements (<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5353&context=flr>),” Scott Cummings suggests that courts only *announce* law, they do not enforce it. So, legal “changes” through court victories alone may have little impact on social norms—unless they are preceded by a shift in social norms. Here too, lawyers have a role to play.

- **Supporting and participating in community organizing.**

In 2020 we witnessed people organizing and demanding change in a way not seen since the Civil Rights Era. In his critique of the nonprofit sector ([http://www.pitzer.edu/cec/wp-content/uploads/sites/54/2014/09/Revolution\\_will\\_not\\_be\\_funded.pdf](http://www.pitzer.edu/cec/wp-content/uploads/sites/54/2014/09/Revolution_will_not_be_funded.pdf)), Paul Kivel said “historically, change happens when people get together. In fact, we have a long history of people getting together for social change, such as the civil rights and women’s movements. Both of these efforts involved people identifying common goals, figuring out how to work together and support one another, and coming up with strategies for forcing organizational and institutional change.” Kivel goes on to argue that we cannot “stay true” to social justice values if we only work within nonprofit organizations and do not take direction from, and maintain accountability to, those impacted by our work.

Strategizing, researching, defining and framing issues, and articulating solutions or demands— these are the skills we were taught in law school. They are also some of the key skills needed for effective organizing ([//scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1965&context=facpubs](https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1965&context=facpubs)). Jim Freeman, in a 2015 law review article ([//www.brown.edu/campus-life/support/careerlab/sites/brown.edu/campus-life.support.careerlab/files/uploads/SUPPORTING%20SOCIAL%20MOVEMENTS-%20A%20BRIEF%20GUIDE%20FOR%20LAWYERS%20AND%20LAW%20STUDENTS%20%281%29.pdf](https://www.brown.edu/campus-life/support/careerlab/sites/brown.edu/campus-life.support.careerlab/files/uploads/SUPPORTING%20SOCIAL%20MOVEMENTS-%20A%20BRIEF%20GUIDE%20FOR%20LAWYERS%20AND%20LAW%20STUDENTS%20%281%29.pdf)) notes that as it has become more and more clear that advocacy within the legal system cannot answer all of the problems facing vulnerable communities, “more lawyers are coming to the conclusion that rather than seeking to drive the change themselves, they should be helping oppressed communities become the leaders of large-scale, systemic change.” Historically, lawyers have had difficulty being effective allies ([//www.brown.edu/campus-life/support/careerlab/sites/brown.edu/campus-life.support.careerlab/files/uploads/SUPPORTING%20SOCIAL%20MOVEMENTS-%20A%20BRIEF%20GUIDE%20FOR%20LAWYERS%20AND%20LAW%20STUDENTS%20%281%29.pdf](https://www.brown.edu/campus-life/support/careerlab/sites/brown.edu/campus-life.support.careerlab/files/uploads/SUPPORTING%20SOCIAL%20MOVEMENTS-%20A%20BRIEF%20GUIDE%20FOR%20LAWYERS%20AND%20LAW%20STUDENTS%20%281%29.pdf)) to organizers and social movements, struggling to set aside their vision of a successful outcome for that of the client’s or—in their zeal to win court victories—settling for short-term positive outcomes that do not advance the long-term goals of a movement. For example, imagine an attorney working with a group aimed at changing rental ordinances—the attorney must subject what she feels is legally best for the individuals (settling to preserve tenancy) vs. the more risky legal outcome that the individual wants for the group (injunctive relief).

Nonetheless, lawyers can be incredibly effective allies to social movements when they build meaningful relationships with community-led movements, work to increase their power and voice, acknowledge the inequities and limitations of the legal system, and learn and engage in some non-traditional advocacy strategies. For example, lawyers should consider their role in more socially disruptive tactics such as marches, blocking access to courts, boycotts, and sit-ins vs. more traditional legal strategies such as setting up a “test case” and litigating. Consider the ways in which lawyers worked on behalf of United Farm Workers (UFC) ([//www.law.nyu.edu/sites/default/files/upload\\_documents/Brian%20Glick%20--%20Progressive%20Activist%20Orgs.pdf](https://www.law.nyu.edu/sites/default/files/upload_documents/Brian%20Glick%20--%20Progressive%20Activist%20Orgs.pdf))—they built relationships directly with the affected farm workers so they fully understood their circumstances and goals, they participated with the group in determining strategies and tactics, they cleared legal obstacles to a boycott of stores selling nonunion fruit, and they investigated the practices of growers which helped expose abuses, ultimately helping to craft new labor law in California.

## Conclusion

Each of these means of contributing to the social good has its limitations and each is also necessary. It means there is space for every attorney—no matter their concentration, no matter their experience, no matter their political view—to play their part. We should each find a way to serve the public good in this time of critical need.

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