

## **NLG FEDERAL REPRESSION TASKFORCE STATEMENT IN RESPONSE TO DAPHNE SILVERMAN'S ATTACKS ON MOVEMENT LAWYERING**

On August 26, NLG member Daphne Silverman filed a motion in federal court that attacks some of the Guild's foundational principles and practices around movement lawyering and argues that lawyers with leadership positions in organizations that "support" social movements have an inherent conflict of interest with any individual movement participant that they represent.

We wrote this statement to respond to Daphne's attacks on movement lawyering, and to assert that Daphne should resign from Guild membership because her professed values do not align with the Guild in crucial respects. If Daphne does not resign, we believe the Guild has a responsibility to expel her from Guild membership.

As detailed in Section III of this statement, Daphne attacked critical principles of movement lawyering in a [Motion to Withdraw Plea of Guilty](#) on behalf of her client Ruby Montoya. The guilty plea in question stemmed from a [nine-count federal indictment](#) alleging that between 2016 and 2017 Ruby and co-defendant Jessica Reznicek engaged in [acts of sabotage](#) against the Dakota Access Pipeline (DAPL) by using fires and blowtorches to damage equipment and materials being used in the construction of the pipeline.

The motion accuses one of Ruby's prior lawyers, Lauren Regan, of coercing Ruby into the guilty plea, allegedly due to a conflict of interest arising from Lauren's position as director of the Civil Liberties Defense Center (CLDC). The motion also accuses Lauren and appointed CJA panel attorney Angela Campbell of ineffective assistance of counsel on various grounds and asserts a variety of factual and legal defenses to the offenses charged in the indictment. However, this statement is not intended to address these allegations, about which we have no personal knowledge. This statement is intended to address Daphne's attack on the principles of movement lawyering which make clear that Daphne does not share core NLG values.

Section I broadly discusses the principles of movement lawyering compared to more traditional models of lawyering, and the ways in which these principles are supported by lawyers' ethical obligations. Section II examines some of the ways that the Guild has adopted and enacted the principles of movement lawyering as foundational to its work. Section III examines how Daphne's motion and other statements attack and impede the values and practices of movement lawyering. Section IV discusses the Guild's responsibility to affirm and support movement lawyering and those who practice it, and calls for Daphne's resignation or expulsion from the Guild because her stated values do not align with those of the Guild.

### **I. MOVEMENT LAWYERING PRINCIPLES AND PRACTICES**

All prosecutions are political. Some are more explicitly so than others. Some clients, particularly those arrested as a consequence of politically-motivated actions, perceive themselves as part of a social movement and define their legal strategy goals in terms of what is likely to protect or advance the welfare of their co-defendants or larger collective movement, rather than what is most likely to shelter them from individual legal risk or liability. The National Lawyers Guild has made explicit commitments to support such people and social movements, and it is on that basis that NLG members often identify as "movement lawyers."

There are many values and practices that are encompassed by movement lawyering, but some of the principles most relevant here include:

- Breaking down the isolation of defendants and individualism promoted by traditional models of lawyering;
- Fostering mutually educational, horizontal, and participatory, relationships between lawyers and clients so that all involved have a voice and agency;
- Facilitating collective action and collective power in fighting a legal case;
- Integrating legal teams into movements so that they are knowledgeable about and competent in the values, goals, strategies, and cultures of the movements they work with and are accountable to those movements.[1]

Movement lawyering is consistent with and supported by the ABA Model Rules of Professional Conduct. Model Rule 1.2 is very clear that, with few exceptions, “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”

All attorneys have a duty to empower every client to define their own goals and the Model Rules acknowledge that a client’s goals may not be limited to legal goals. In a practical sense, this means working to both acknowledge and diminish the power imbalance between lawyers and clients. Because clients who identify with social movements often value collective welfare over their own individual comfort, acting as a movement lawyer requires being able to support the self-determination of clients who choose to engage in a collective legal defense strategy for any reason, including in the pursuit of purely political goals. Importantly, while collective defense is often the best political and social strategy for supporting movements, it is also very often the best legal strategy for individual movement clients.

Movement lawyers should not pressure anyone to engage in a collective defense strategy, but it is a dereliction of their responsibility not to openly share information relevant to an individual’s defense. Attorneys have a duty to give their clients the best possible advice, and every client is at liberty to reject that advice. But those who seek to minimize their individual legal liability at the expense of their comrades by directly cooperating in the prosecution of others, or denouncing comrades in the hopes of seeking a mitigated sentence, are not engaging in movement defense strategy. Their lawyers, at least for the purposes of those cases, are not movement attorneys.

Non-cooperating joint defense agreements are one of the primary ways in which movement lawyers can support defendants who aim to minimize legal liability for both themselves and their cohort. Such agreements, grounded in the common interest privilege, enable defendants to share information without violating or waiving the attorney-client privilege, and bind the parties to an agreement that they will not disclose any of that privileged information to anyone who is not a party to the agreement.

These agreements can provide the group greater bargaining power for pretrial resolution, and limit the number of late-added charges and targets. They can also improve morale and help clients to refocus on their movement work, rather than focusing attention on the supposed criminality of political movements. These agreements require clear and thorough counseling on conflict and waiver of conflict.

But the idea that an unwaivable conflict arises from joint defense strategies is contrary to both the ethical rules and the principles of the NLG. To categorically counsel against such strategies is condescending and paternalistic to clients who want and deserve to pursue their political

goals. Furthermore, such a position presumes in the face of countervailing evidence that political and legal goals are mutually incompatible, and that the goals of one client are necessarily inimical to those of another.

Pursuing collective defense and not understanding our own legal outcomes as necessarily at the expense of others' is the best way to avoid worse and more legal consequences for more people. We know that when clients cooperate with the state, the damage done to individuals — including, in many cases, the cooperating client — as well as to movements is increased. A policy of noncooperation bolsters morale, solidarity, and often better individual legal outcomes.

To claim that joint or collective movement defense is intrinsically unethical is hostile to the fundamental animating spirit of the NLG and is unsupported by the ABA Rules of Professional Conduct. Such claims do active harm to individual clients, movements and their lawyers and undermine the credibility of movement lawyering and the trustworthiness of the NLG.

## II. NLG EMBODIMENT OF MOVEMENT LAWYERING

The values, principles, and practices of movement lawyering are found throughout Guild materials and Guild history. A [2020 Resolution Supporting the Abolition of Policing](#), passed in the wake of the George Floyd uprisings, explicitly states that “the National Lawyers Guild is an organization committed to Movement Lawyering.”

The NLG's [Mass Defense Program](#) describes itself as “a network of lawyers, legal workers, law students, organizers, activists, and community members providing legal support for protests and movements fighting for progressive social change.” Even the existence and name of a “Mass Defense” program starkly contrasts with the more traditional ideas of individual defense, and points to the principles and strategies at work in mass defense that transcend traditional individual defense models.

The Preamble to the NLG Constitution envisions collective actions and collective interests that might properly be characterized as movements.

The National Lawyers Guild is an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers, and jailhouse lawyers of America in an organization which shall function as an effective political and social force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests.

One of the Guild's stated objectives is to “improve the ethical standards which must guide the lawyer in the performance of his or her professional and **social** duties.” [2] This point speaks to the narrow vision of traditional legal ethics, and the larger social concerns that are at play, especially in situations of movement defense.

The Guild's [2020 Resolution on Non-Collaboration with Grand Juries](#) underscores these points. It discusses how grand jury investigations are used to “intimidate and destabilize popular movements for social justice and transformation,” and to “destabilize people's radical organizing and movements.” The resolution then discusses the Guild's long history of support for people and movements who refuse to cooperate with grand juries and the “right and responsibility” of the Guild “to help build a culture of noncooperation and resistance in opposition to the State.” In adopting and implementing a “principle of non-collaboration with Grand Juries,” and

encouraging and supporting “all those who choose this form of resistance,” the Guild commits to working at the behest of and in consultation with movement allies.

These principles are not just words on paper; they have long been at the core of Guild activity. No example is more instructive than famed Guild lawyer William Kunstler routinely balancing his representation of organizations, collective bodies, and individuals. Much of this work Kunstler undertook while running the Law Center for Constitutional Rights (now the Center for Constitutional Rights or CCR), an organization he co-founded as a movement support organization whose current mission is to “stand[] with social justice movements and communities under threat—fusing litigation, advocacy, and narrative shifting to dismantle systems of oppression regardless of the risk.”

In one of the most well-known political group trials in US history, the “Chicago 8” defendants, along with their two trial lawyers, Kunstler and fellow Guild member and CCR cofounder Leonard Weinglass, used the spectacle of a months-long conspiracy trial as an opportunity to advance the movement against the Vietnam War and shine a light on the legal system itself. In 1971, Kunstler traveled to Attica prison to represent the prisoners in their negotiations during the uprising; he later represented prisoner John Boncore who was charged with murdering a guard during the uprising. In 1973, Kunstler went to Pine Ridge to help the American Indian Movement (AIM) draw up demands during their occupation of Wounded Knee; he subsequently represented two AIM leaders, Russell Means and Dennis Banks, in their federal criminal cases stemming from the occupation. Countless other examples of movement lawyering pervade Guild history and continue to be fundamental to the character and vision of the NLG.

### III. DAPHNE SILVERMAN'S ATTACK ON MOVEMENT LAWYERING

Our objection to Daphne's motion here is limited to her attacks on the principles and history of movement lawyering, which she repeatedly impugns.

The use of scare quotes [3] in Daphne's motion around the words “solidarity,” “movement,” and “comrade,” for example, denigrates the legitimacy and importance of movement lawyering. Regardless of her intent, the motion implies that solidarity with co-defendants and concern for the impact to social movements are not legitimate client concerns. To the contrary, many activist-clients choose to center goals that extend beyond the direct legal outcome of their cases. Most often this involves using legal strategies and tactics that will not aid the government in the investigation or prosecution of other activists, such as non-cooperating plea agreements, or pursuing trial strategies that don't identify or blame other activists for illegal activity. It can also take the form of collective bargaining, in which activist-clients work together to negotiate plea agreements that are beneficial to everyone, or in which activist-clients facing less serious charges refuse plea agreements until activist-defendants facing more serious charges are offered favorable resolutions. Other times, activist-clients may seek to use their legal case primarily to raise publicity about movement issues.

These are all common and legitimate goals and strategies that activist-clients pursue, and which movement lawyers have a responsibility to discuss with their activist-clients. Just as some clients might be more concerned about the collateral immigration or employment consequences of their case than the actual sentence, activist-clients may often be more concerned about how the handling of their case might impact their fellow activists or the movement at large. Daphne's use of scare quotes trivializes and ridicules the legitimate goals and strategies of many movement defendants.

Daphne also argues that Lauren Regan's position as Director of the CLDC creates a conflict of interest with any individual activist. Notably, Daphne supports this motion by quoting a portion of the CLDC mission--that it "supports movements that seek to dismantle the political and economic structures at the root of social inequality and environmental destruction. We provide litigation, education, legal and strategic resources to strengthen and embolden their success." Daphne also points to a t-shirt CLDC sells, showing a bear being lifted up by a group of birds with the word SOLIDARITY on it.

By comparison, the mission of NLG's [Mass Defense Program](#) has similar language—"a network...providing legal support for protests and movements fighting for progressive social change." The [mission of the Center for Constitutional Rights](#), founded by Guild members, includes "stand[ing] with social justice movements and communities under threat—fusing litigation, advocacy, and narrative shifting to dismantle systems of oppression regardless of the risk." And, Guild ally [Law for Black Lives](#) is made up of "lawyers and legal workers committed to transformation and building the power of community led movements." The list goes on.

Daphne's argument suggests that anyone holding a leadership position in—and possibly anyone who is a member of, employed by, or affiliated with—any of these or similar organizations has a conflict of interest any time they represent an individual activist. This, quite plainly, has potential to bolster prosecution arguments to deny activists their chosen counsel. If the argument were to gain traction, it would undermine competent movement legal defense. The movement lawyers who are most in tune with the movement and have the best understanding of its principles, goals, and strategies--and therefore are most trusted by activists--would suddenly be barred from representing any of the activists arrested for participating in the movement.

Regardless of the legal success of this argument, simply making the argument, especially from someone within the Guild, can have an enormous chilling effect on lawyers seeking to represent movement participants. Activists often complain about the difficulty of getting their lawyers on board with collective defense strategies, joint representation agreements, working with legal collectives and other supporters, and more. Attacking common movement lawyering practices and principles as unethical will only compound this problem. Already we have heard of an activist whose lawyer denigrated movement lawyering practices and "radical lawyers" and referred to Daphne's motion as support for that rejection.

Daphne's larger claim here is that a lawyer cannot ethically represent both the movement and an individual activist from the movement. By comparing social movements to corporations, at least implicitly, Daphne creates a straw man argument around the ethics of representing both a corporation and an officer or employee of the corporation. But movements are not corporations and those ethical considerations do not perfectly align with a social movement context. [4]

The vision Daphne articulates is one in which activist legal representation is wholly separate from the movement, a cadre of potentially sympathetic but ultimately outside experts to call upon in times of need. Ultimately this serves the mystification and inaccessibility of the law and legal assistance, upholding a status quo in which legal technicians hold power over the communities and movements they profess to support.

Daphne also attacks basic principles of non-cooperation in the course of movement lawyering. In the same paragraph that she rails against the very real and insidious practice of government surveillance and infiltration of movements and provocation and entrapment of individual activists, Daphne goes on to suggest that it can be an appropriate defense strategy for those very activists to cooperate with the government and assist in providing information to prosecute

other cases. There is debate as to whether defendants turning evidence in exchange for leniency typically provides significant benefit to the defendant. But it is undoubted that aiding and cooperating with the government that seeks to neutralize and destroy movements is antithetical to support of or being part of those movements.

Of course, some defendants formerly aligned with a social movement may cooperate with the government against their codefendant(s), and movement lawyers, despite their best precautions, may sometimes get stuck representing someone who at first aligned with a movement and later chose to cooperate with the government against it. If the government requests cooperation, the lawyer has a duty to convey the request to their client. The lawyer also has a duty, though, to advise their client of the direct and collateral consequences of the choice to cooperate, such as how it might impact their time in prison or their standing in their community. Providing advice about noncooperation is a foundational principle of movement lawyering.

That the motion seems lacking in credible and material legal arguments concerning Ruby's possible defenses and the elemental defects of the indictment adds insult to injury. We don't want to aid the government by discussing these areas in detail. However, we feel it's necessary to mention it because if, as we believe, the "actual innocence" claims asserted are unlikely to prevail, then the motion appears primarily aimed at attacking the legitimate principles and practices of movement lawyering. Hanging in the balance of Daphne's tenuous legal arguments about, for example, the commerce clause or whether the actions Ruby publicly admitted were committed "knowingly" is a mandatory minimum federal prison sentence of 45 years. [5] The plea Ruby seeks to withdraw, on Daphne's advice, would likely involve a sentence of fewer than eight years.[6]

Of one thing we are certain, though—Ruby, like most who find themselves ensnared in the federal criminal legal machine, faces an array of impossible non-choices between the frying pan and the fire.

#### IV. THE GUILD'S RESPONSIBILITY

The Guild has a responsibility to uphold and defend its long-held values and practices of movement lawyering. When a member's words or actions—whether in the course of representing a client or otherwise—denigrate and attack these values and practices, the Guild has a responsibility to its many other members who practice movement lawyering, as well as to the movements and communities the Guild claims to support, to respond appropriately. This responsibility is particularly sharp when, as here, the person making the attacks is in a position of leadership in the Guild and holds herself out publicly as being part of the Guild.

Daphne is currently Treasurer of the NLG's Texoma region and frequently mentions this position and her past position as Texoma Regional Vice President in her email signature. She also mentions it on her [website](#). Yet, Daphne's words and actions display a fundamental opposition to the values and practices of movement lawyering that the NLG and its Mass Defense Program seek to embody and uphold. At minimum, she should not be allowed to continue in or seek out any position of leadership in the NLG or its regions, chapters, committees, or programs. Given that there is such a sharp divergence of values between Daphne and the Guild, we encourage her resignation from membership. Absent that, we believe her expulsion is necessary.

The question of expulsion is always a difficult one because it raises issues about the value of dissent, debate, and diversity of opinion and perspective within the Guild. However, we believe

that Daphne’s actions here have crossed the line from internal dissent and debate among members within the organization to a public attack on some of the foundational values and practices of the organization and its membership. In light of this, in the event that Daphne refuses to acknowledge the irretrievable incompatibility of her values with those of the Guild, expulsion is both an appropriate and necessary action.

*The NLG’s Federal Repression Taskforce was formed by experienced lawyers and legal workers in the summer of 2020 to track and help respond to instances of federal law enforcement questioning, harassment, grand jury subpoenas, and other repression against social movements. If you would like to co-sign this statement, provide feedback, or ask questions, please email us at [fed.repression.taskforce@protonmail.com](mailto:fed.repression.taskforce@protonmail.com).*

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[1] This section was inspired by the [Law for Black Lives statement of values](#), the [Center for Constitutional Rights mission and vision statement](#), and the short articles [“What is Movement Lawyering?”](#) and [“Movement Lawyering in Moments of Crisis.”](#)

[2] National Lawyers Guild Constitution, Art. 1.2 (emphasis added).

[3] “Quotation marks used to express especially skepticism or derision concerning the use of the enclosed word or phrase.” “Scare quotes,” Merriam-Webster (<https://www.merriam-webster.com/dictionary/scare%20quotes>).

[4] Not to mention that organizational representation is actually much more nuanced and complicated than what Daphne suggests, that concurrent representation of an organization and some of its constituents is quite common, and that ethical rules often permit such representation. See N.Y. R. Prof. Conduct 1.13(d) (“A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [Conflict of Interest: Current Clients].”).

[5] One count of Conspiracy to Damage an Energy Facility – 18 USC 1366(a): 0-20 years; four counts of Use of Fire in a Felony – 18 USC 844(h): mandatory 10 years (each one consecutive with “any other term of imprisonment,” including that imposed for the underlying felony); four counts of Malicious Use of Fire – 18 USC 844(i): mandatory 5-20 years. “The express language of § 844(h) ... categorically prohibits concurrent sentences for ‘any other term of imprisonment,’” including multiple counts of arson. [United States v. Ihmoud](#), 454 F.3d 887, 895 (8th Cir. 2006) (upholding sentence of 457 months).

[6] While the statutory maximum and the likely U.S. Sentencing Guidelines range with the “terrorism” enhancement applied provide for a sentence up to 20 years, in the case of co-defendant Jessica Reznicek (who has more criminal history than Ruby) the government only asked for a sentence of 15 years and the judge sentenced her to 8 years.