

Stepping into the Fight:

A Funder's Guide for Understanding
and Supporting Legal Advocacy

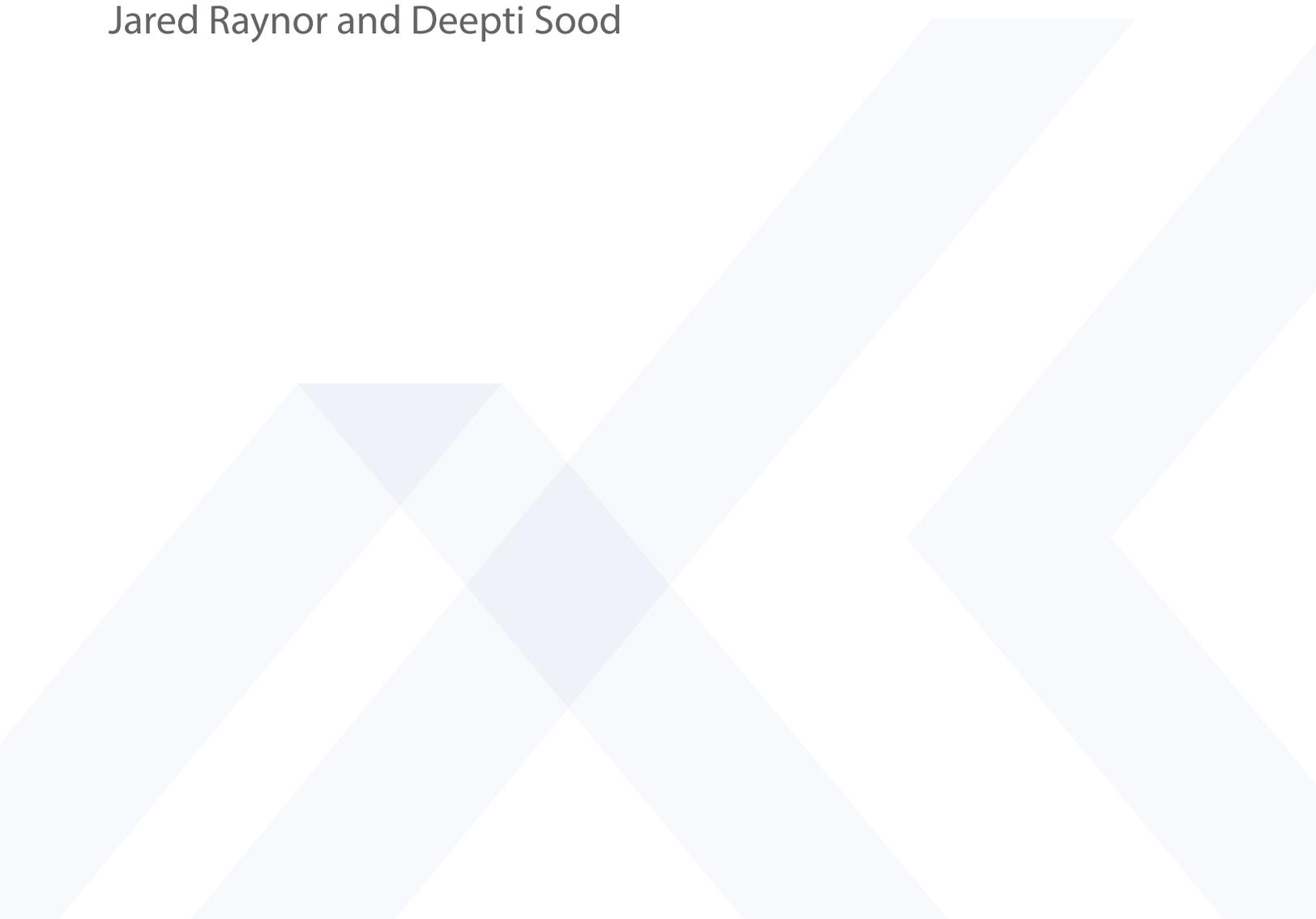
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I. Introduction

In 2011, the New York Police Department made over 684,000 street stops; many without a specific reason. According to data, this represented a 14 percent increase from 2010 and a 603 percent increase from 2002. These stopped individuals were often subjected to body searches; the vast majority of them were people of color. Close to 90 percent of the stops resulted in no arrest or summons whatsoever.¹ This type of activity, now famously known as stop-and-frisk, has dropped significantly since 2013, when a district judge found the practice unconstitutional.^{2,3} For the communities who had been fighting the discriminatory practice for years and the Center for Constitutional Rights that filed and litigated the case starting in 2008, the judgment represented a major legal victory. For Darian, a young African-American man who had been stopped over a hundred times, it was about personal dignity and a validation that his civil rights matter—that he matters.

The legal strategy employed against stop-and-frisk was not used in isolation. When it was combined with other advocacy strategies, it served as a unique and powerful tool to surface information; mobilize a community; and, ultimately, change a harmful practice. It is no secret that the court system has been used to defend the fundamental rights of people and provide relief for wrongs of all sorts. Indeed, it is not a stretch to say that we are all beneficiaries of resolute and courageous plaintiffs and defendants who paved the way for many of the rights, privileges, and liberties that we now enjoy.

Unfortunately, many funders stay away from supporting the use of legal advocacy to advance their issues. Legal advocacy should be something that all funders consider (even if they do not ultimately use it) as part of their overall strategy, regardless of their issue area. As this paper will show, supporting legal advocacy includes many different tactics (not just lawsuits) and is not as complicated as some may think.

As part of the Atlas Learning Project⁴, an effort of The Atlantic Philanthropies, this paper examines the role of legal advocacy as a tool in the social sector for advancing issues of justice and equality. The primary audience for this paper is funders who are interested in enhancing their advocacy or other program work by supporting legal advocacy. The paper will serve partly as orientation to legal advocacy from a funder's perspective and partly as a guide to effective approaches and practices for supporting legal advocacy.

Since its inception, Atlantic has made grants to advance opportunity and promote equity. It has often supported legal advocacy as a part of its social change strategy. As Atlantic makes its final grants in 2016 and prepares to close its doors by 2020, it also is sharing lessons drawn from its work—including how legal advocacy can be used to advance change and how funders can best support these efforts.

¹ Communities United for Police Reform: the issue. <http://changethenypd.org/issue>.

² NYPD Stop-and-Frisk Numbers Questioned, *The Wall Street Journal*, July 9, 2015 8:58 p.m. ET. Retrieved from <http://www.wsj.com/articles/nypd-stop-and-frisk-numbers-questioned-1436489927> on March 24, 2016.

³ There were two other cases that were moving at the same time: *Ligon* by the Bronx Defenders and *Davis* by the Legal Defense Fund (joined by several others as co-counsels).

⁴ The Atlas Learning Project is a three-year effort supported by The Atlantic Philanthropies to synthesize and strategically communicate lessons from the advocacy and policy change efforts that Atlantic and other funders have supported in the U.S. The effort was led by the Center for Evaluation Innovation, which commissioned various researchers to probe into questions about advocacy work and how funders support these efforts.

This paper is one in a three-part series. A separate paper addresses the issue of using legal advocacy from the advocates' perspective, and another is more technical, focused on the status of the U.S. court system as a venue for addressing issues of social justice.⁵

TCC Group has conducted interviews with dozens of lawyers, advocates, and funders, as well as reviewed relevant literature and program files to bring together information on how people think about and use legal advocacy.⁶ Altogether, we interviewed 41 people—20 individuals representing 16 philanthropies and 21 individuals representing 20 legal advocacy organizations, giving us a broad understanding of how different types of organizations involved in different issues consider legal advocacy strategies.⁷

This paper explores:

- How legal advocacy can fit within a grantmaking strategy;
- How funders can structure grants made in support of legal advocacy;
- Effective due diligence; and
- How to measure results.

But first, we must define legal advocacy.

⁵ To access these papers and other resources on legal advocacy, see tccgrp.com/LegalAdvocacy

⁶ One particularly helpful source was the Foundation Center's Foundation Maps tool, a searchable grant database that we used to find organizations that awarded legal advocacy grants and organizations that received legal advocacy grants. Some of the key words used included "legal advocacy," "strategic litigation," "impact litigation," and "advocacy through the courts." The tool is available at <http://maps.foundationcenter.org>.

⁷ This work also builds on an extensive body of literature and analysis related to legal advocacy. The debates on the utility of legal advocacy are far beyond the scope of this paper, and we draw on more recent practice-driven work to undergird the premise of the value of legal advocacy work with a nod to its limitations presented throughout the document. The reader is referred to two works in particular for good overviews of the value of legal advocacy. The first is *Public Interest Litigation and Social Change in South Africa*. While this is internationally focused, it does an excellent job of laying out context and outcome examples. It is available at: <http://www.atlanticphilanthropies.org/sites/default/files/uploads/Public-interest-litigation-and-social-change-in-South-Africa.pdf>. The second is *Legal Change: Lessons from America's Social Movements*, edited by Jennifer Weiss-Wolf and Jeanine Plant-Chirlin and published by the Brennan Center for Justice. This 2015 publication explores a number of issues through concrete examples.



II. Defining Legal Advocacy

Legal advocacy, impact litigation, legal support, strategic litigation, social impact litigation, public interest law, judicial review litigation, or simply litigation, are some of the many names used to describe legal advocacy, and, while there are certainly elements of nuance that distinguish them, at their core they all drive toward the same thing: using the law as a means to effect change. This brief section provides a definition of legal advocacy and its many facets. Funders interviewed for this paper typically used this tool as one of many strategies to advance justice concerns and effect change.

Many people think of only one kind of legal advocacy: the use of strategic litigation or impact litigation. Strategic litigation is the specific use of the courts to advance significant changes in the law or adherence to law for the benefit of groups within society. However, it is by no means the only, or even the most important form of legal advocacy. Funders named several other legal advocacy strategies that they support including:

- Model legislation writing/policy change
- Regulatory advocacy
- Research related to the impact or laws or legal theory
- Government accountability and transparency (e.g., Freedom of Information Act work)
- Direct representation (e.g., public defenders and legal aid)
- Increasing legislative appropriations for legal support

“There are plenty of other kinds of legal advocacy [besides litigation]—for example, the work we do in consulting with election officials who are thinking about policy change... People come to us as experts in the field and to better understand the implications of a policy before a new bill or regulation is introduced. There is a great deal of legal research that we often provide upon request to public officials or our allies working at the state level. They may know their goal, but may not be experts on the issue.”

— Diana Kasdan,
Brennan Center

- Supporting civic participation through election day support/monitoring
- Advising groups of their rights/know-your-rights training and outreach
- Developing broader campaigns
- Ensuring that governments or other entities comply with the law
- Documenting systemic community complaints and identifying unjust laws or those that need changing

Legal advocacy organizations themselves may use legal advocacy as their only strategy, but others use legal advocacy as a complement to other strategies; for example, legislative advocacy, legal aid, or providing services to a specific population. Our research into these organizations found that, in much the same ways that funders support various strategies under the umbrella of legal advocacy, these organizations were engaged in multiple legal advocacy strategies including developing research and publications, writing draft policy, administrative or executive advocacy, legal support, writing *amicus briefs*, and litigation.⁸

⁸ For more on how advocacy organizations can and do use legal advocacy strategies, see TCC Group's associated briefing paper, "Stepping into the Fight: A Guide for Nonprofits to Understand and Engage in Legal Advocacy," available at tccgrp.com/legaladvocacy



III. Legal Advocacy as a Grantmaking Strategy

A director we spoke to at one foundation responded to the question of why the foundation chose to support legal advocacy by saying, “We are looking at having a long-term impact, and, if you can change the laws through litigation, it doesn’t guarantee that you have a long-term impact, but [it] significantly raises the potential.” Given the technical nature of legal advocacy and its associated long time horizons, costs, and risks, identifying the environmental conditions and the right organizations to support doing legal advocacy may seem daunting. This section shares the lessons and insights of experienced funders on developing an effective philanthropic legal advocacy support strategy and doing due diligence related to potential grantees.

A. Strategy Development: When and How to Use Legal Advocacy

Legal advocacy is a powerful tool. When used in the right context, frequently paired with other strategies, it can catalyze impact, remove obstacles, and empower communities. Experienced legal advocacy funders repeatedly noted in interviews that legal advocacy is not scary and that funders should strongly consider it as a part of their advocacy efforts. However, they also cautioned against overuse. Advocate interviewees agreed that litigation should be used thoughtfully and added the nuance that other forms of legal advocacy should be used more frequently.

“The question you have to ask is ‘When you are talking about social change, you are talking about culture change. You have to ask if the litigation strategy is going to be a benefit or detriment toward the issue you are trying to advance. Every time a social justice issue has been settled in the courts, there has also been great pushback from people who feel they have been left out.’”

— Stephen Foster,
Overbrook Foundation

How can funders know the right context for supporting litigation? Unsurprisingly, this is a simple question with a complex answer. According to some people to whom we spoke, legal advocacy generally and litigation specifically should be an option of last resort. Others observed that sometimes you have no other option or that the opposition was likely to be using legal advocacy even if you are not. Still others indicated that a proactive legal advocacy strategy was sometimes better than always playing defense.

There are many theories and practice-based examples that guide legal professionals as they develop strategy and pursue nuanced tactics in legal advocacy. However, in the same way that we do not expect funders supporting infrastructure projects to be experts in materials science, it is both unreasonable and unnecessary for funders supporting legal advocacy to be experts in legal strategy (more on this below).

There are, however, some good guidelines that funders can follow. To begin, let's start with when *not* to support legal advocacy. Knowing when not to pursue a case is as important as when to choose the option.⁹

Eric Ward, formerly at The Atlantic Philanthropies and now at The Ford Foundation, identified three situational characteristics that he has found to reduce the efficacy of a legal advocacy strategy.

1. The primary fight is in the courtroom. The arguments are fought primarily in court and not accompanied by a broader groundswell of support.
2. A compelling narrative is absent. The arguments are overly technical, and there is not a resonant story that can be supported beyond narrow legal arguments.
3. There is no political opposition. If there are not two political sides, then no tension exists to "make cases be moved outside the courts to the streets of public opinion."

From his perspective Stephen Golub, an academic and researcher on legal advocacy, added a couple of other characteristics to this list:

4. Other mechanisms are already making progress. If legislative arenas are already addressing the issue or a tidal wave of public action is likely pushing policymakers to action, work in the courts may be inefficient or even harmful.
5. The jurisdiction of focus is unfriendly. There are some places/times when particular courts or the source of other potential legal remedies are likely to be hostile to the issue.

None of these five characteristics provides a hard and fast rule. For example, The Atlantic Philanthropies supported the Center for Medicare Advocacy to litigate a technical rule—the "improvement standard," which eliminated needed healthcare support for thousands of people with progressive illnesses. There was no overt political opposition to the issue, but there was certainly a system that resisted change. Further, at least some advocates would say that in many situations using litigation, even when the legislative arena is starting to address the issue, can help advance the work.

The conditions above do, however, remind us that legal advocacy is not always the right approach. To aid in making the decision about when to support legal advocacy, interviewees provided guidance that we have framed into four strategic areas. This strategic framework can help both advocates and their funders consider whether or not legal advocacy is an effective strategy, at what point it might most productively be used, and what complementary approaches and investments funders might consider to advance systemic change (such as support for community organizing, strategic communications, policy development and research, and other means).

⁹ Several people, funders and advocates, expressed some concern that social justice advocates have relied too much on the courts to drive social change, neglecting the oft times more cumbersome and slow processes of legislative reform and shifts in the public. While others disagreed that it had been overused, nearly everyone agreed that the courts in the United States have become more restrictive in how they treat issues of social justice, a theme which was explored in depth in a white paper in this series prepared by the Lawyers Committee for Civil Rights. See *Toward a More Just Justice System: How Open are the Courts to Social Justice Litigation*. Available at tccgrp.com/legaladvocacy

Key Strategic Questions for Legal Advocacy



1. Is the Legal Environment Appropriate?



2. Is the Advocacy Environment Ready?



3. What Aspects of the Legal Advocacy are in Need of Support?



4. Does it Fit Funder Strategy?



1. Is the Legal Environment Appropriate?

The complexity and tension frequently inherent in legal work can make funders nervous. The legal environment pertains to the nature of the legal argument, the potential clients or targets of action, and the venue. For many forms of legal advocacy, the venue is usually the court system at some level.¹⁰ Funders should have a solid understanding of the legal environment for their issue, such as what laws or issues are at stake, what harm is being done related to the law, and what other legal activity has occurred (e.g., whether there are existing cases that are similar).

Legal advocates are the experts. Most funders and advocates agree that the assessment of the legal environment (including where and when specifically to use a legal strategy) should be driven largely by advocates. Not only do they have the expertise, they are also frequently closest to the ground and thus can best understand what is happening. Some of the things that advocates are likely to explore related to the legal environment (and about which funders might inquire) include whether

a compelling legal argument exists, whether there is a good potential client, and whether the issue is sufficiently concrete and clear. Appendix B includes additional detail to help in thinking about the legal environment.

As a final note on assessing the appropriateness of the legal environment for a legal advocacy strategy, many people we spoke to cautioned against letting the prospect of winning be the sole driver of decision-making. Implicit in this is that answering the questions in the “strategic questions for legal advocacy” framework need not be done through the lens of whether the legal advocacy will ultimately be successful or not on legal grounds but that it should be done through a broader lens of whether the legal advocacy will be able to advance the issue in an effective way.



2. Is the Advocacy Environment Ready?

All of the experienced legal advocacy funders we spoke to indicated that legal advocacy does not exist in a vacuum. The advocacy environment pertains to the capacity and maturity of both legal advocates and others working on a given issue, be they direct service providers or advocates doing non-legal work. Given that, under most circumstances legal advocacy is more effective when done as part of a larger strategy. It is important to consider the readiness of the entire advocacy system

“What the opposition does is they bring cases even when they know they will lose so [that] they move the needle. What are the cases our side should be filing where we could end up losing, but in the long-term we could end up winning?”

— Lourdes Rivera,
The Ford Foundation

¹⁰ The status of the court system for addressing important social issues is beyond this paper, but the subject of a more technical legal companion piece by the Lawyers Committee for Civil Rights accessible at ccgrp.com/legaladvocacy

Implicit in this is that answering the questions in the “strategic questions for legal advocacy” framework need not be done through the lens of whether the legal advocacy will ultimately be successful or not on legal grounds but that it should be done through a broader lens of whether the legal advocacy will be able to advance the issue in an effective way.

on an issue. Funders are often uniquely positioned to do this assessment because they play a bridging role that gives them insights into multiple aspects of an issue. Some of the questions related to the readiness of the advocacy environment include:

- **Is there legal capacity to move the issue forward?**

There are relatively few organizations that do legal advocacy on any given issue; as a result resources are often stretched. Having the legal capacity to move the issue forward relates to being able to garner sufficient legal expertise to ensure that the work is done well and carried through. This is frequently done in partnership with law firms. Sometimes there is a need to build this capacity; something funders may be particularly well-positioned to do.

- **Is there a clear and pressing issue that is galvanizing communities?**

An issue is whether people actually care—is it an issue that impacts people enough that they are vocal about it? This was the situation with the organization Muslim

“We see that [legal advocacy] can be a very useful and powerful complement to more traditional forms of advocacy where we are supporting issue-oriented groups putting out policy messages and engaging the media and trying to make a more favorable environment for lobbying.”

— Ruth Levine,
The Hewlett Foundation

Advocates in New Jersey. Authorities were trying to gather intelligence and were doing surveillance and intimidation tactics that were harmful for the Muslim community. They did not have the capacity to do the legal work themselves, but their advocacy on the issue led to receiving support, and they were able to partner with the Center for Constitutional Rights to file a lawsuit to stop the practices. Funders can support analysis of legal issues facing communities (with legal support services being particularly well-positioned for this) or support community organizing that gives rise to a distinct community voice.

- **Is there political tension that moves the issue outside of the courtroom?**

If the issue is able to generate political discussion, it has the added advantage of moving the issue forward on multiple tracks.

- **Are there a clear set of potential partners?**

Are there legislative and/or mobilizing actors that can champion the issue outside of the courts? One interviewee indicated that his foundation looks for a well-coordinated and organized field that can maintain the issue for at least 10 years. Funders can serve as conveners and bridge-builders to

bring distinct groups together and can provide needed general operating support when the opportunity is more latent.

- **Do non-legal advocates see an opportunity for legal work to remove specific barriers or increase the visibility of specific arguments?**

Listening to non-legal advocates can provide insights as to where there are opportunities for legal advocacy to advance the issue. Funders can support training of non-legal advocates to help them understand the law or facilitate connections with legal advocates to arrive at a better understanding of opportunities.

- **What is the state of the public narrative on the issue?**

Understanding how an issue is being framed in public discussions can indicate how ripe it is for legal advocacy. While legal advocacy can alter the public narrative as one of its outcomes, understanding the narrative and what needs to happen can influence the type of investment needed. For example, some have argued that the rapid pace of legal change associated with same-sex marriage occurred largely after significant efforts had been put in to change the public narrative on the issue. Understanding of the public narrative will help assess the role of and potential receptivity to legal advocacy. Funders can support strategic communications around both the issue and the legal work to increase their visibility.

One issue for funders to keep in mind related to the interaction between legal advocacy and other advocates is that there are some areas where legal advocates cannot be open partners. There are elements of client confidentiality as well as tactical considerations to consider, including the fact that joint strategy development may be exposed during the discovery stage of a court case. Funders may want to be sensitive to confidentiality issues when encouraging cooperation between groups and allow the groups to lead the way in this regard.

“If your grantmaking capability is small, there is so much that needs to be done. Those small grants build out on the permanent infrastructure to advance a case significantly and it doesn’t trap you in a timeframe. You get to push momentum along.”

— Eric Ward,
The Ford Foundation



3. What Aspects of Legal Advocacy are in Need of Support?

The thought of getting locked into supporting a protracted legal battle is something that can be daunting for funders. There is no question that legal advocacy can be expensive and take years before there is a resolution, but there are many different ways for funders to engage that can address those issues. Support may be needed to get a good start; to get past a particular hurdle; to help advance an issue from one iteration to the next; or, toward the end of the process, to make a statement or ensure follow-through, among other things.

According to advocates and experienced legal advocacy funders, there is a rich diversity of ways that funders can support legal advocacy, each reflecting a different strategy, constituency, or grantmaking mechanism. Funders can choose among different options, landing on a place that aligns with their preferred way of doing business (which might include a long-term and sustained commitment).

The table on pages 11-12 outlines a range of different activities associated with legal advocacy that can be supported all together or in discrete pieces.

Options for Supporting Legal Advocacy

Type of Support	Description
Identifying issues/cases	Supporting analysis of legal aid cases to identify trends, convening community groups and legal advocates, and encouraging other program services or advocacy organizations to pay attention to the places where legal redress may be helpful, can all advance identifying both opportunities and the cases that will serve well for advancing an issue.
Developing and promoting a narrative	Supporting message testing or communications resources.
Building capacity of legal advocacy organizations	Investing in capacity building for legal organizations. Capacity building can be done to help organizations already doing legal advocacy work do it better or on a greater scale.
Building capacity of non-legal advocacy or service organizations to engage in legal advocacy work	Supporting the capacity of non-legal advocacy or service organizations that want to incorporate legal advocacy as a direct part of their work. This support might include building in-house capacity or supporting strategic partnerships between non-legal and legal groups (including pro bono law firms).
Creating an environment for non-legal advocacy organizations to support legal advocacy work	Supporting linkages between legal and non-legal advocates to establish relationships or build up the awareness and basic or advanced skills of non-legal organizations to think about legal advocacy. This can include supporting legal advocacy efforts through field campaigns, messaging, and organizing around the context of legal advocacy work (such as packing a courtroom or generating awareness).
Developing legal theory	Supporting academics or legal professionals to design and test new ways of framing arguments, identifying unique venues or approaches, and similar activities.
Conducting background research	Supporting basic research and investigation on the status and scope of a problem, compiling data, and collecting narrative stories that support the basis for legal advocacy. This is frequently done before a case is even filed or initially developed and may include things such as requests under The Freedom of Information Act, academic research, and other accountability and transparency efforts.

Continuation of Options for Supporting Legal Advocacy

Type of Support	Description
Providing access to counsel/legal aid support	Supporting legal aid organizations or others that provide legal services to disadvantaged people and groups.
Providing legal support to advocacy/movement partners	Covering costs for attorneys to be embedded in movement activities, to provide technical advice, or to serve as general counsel for advocacy work, including efforts such as public actions, communications, or lobbying among other things.
Securing <i>amicus curiae</i> briefs	Supporting organizations not aligned with a particular case which might bring a unique perspective to work with attorneys to file friend-of-the-court briefs to inform judges of issues from multiple vantage points. This can be done with legal and non-legal organizations.
Supporting initial filing of cases	Supporting the initial filing of cases to get an issue into the judicial system.
Conducting discovery activities	Covering costs associated with reviewing and analyzing evidence, paralegals, travel expenses, and other related expenses. This is distinct from conducting the background research that sets the stage for legal activity in that it happens when the legal activity is already underway.
Supporting the ability to procure witnesses such as experts or affected individuals	There are two elements of witness support. First, supporting the acquisition of services of experts or facilitating connections with people in your network who might have relevant expertise. Second, affected individuals who testify must often miss work or experience trauma in recounting their experience, and supporting them throughout their participation in the process can be of value.
Supporting legal staff	Support the costs of lawyers, legal researchers, or other researchers. This includes programs to support law student involvement and engagement.
Supporting litigation and appeals	Support the litigation and appeals process.
Implementing and monitoring legal changes	Provide resources to create or refute backlash, implement and monitor the result, ensure compliance with the law, raise awareness among the population of their rights, and similar activities.



4. Does It Fit Within Funder Strategy?

The final domain of strategy assessment for legal advocacy relates to the fit of the supported activity with the funder's own overall strategic approach. While legal advocacy may not always be the answer, it should be in the toolbox of potential activities for every funder as a way of achieving a mission. Most experienced legal advocacy funders we spoke with did not have complex, stand-alone theories of change or logic models for their legal advocacy; rather, they envisioned how legal advocacy exists in relation to a broader whole. For example, the Ford Foundation's support of legal advocacy drew on, "A moral commitment shared by the Foundation and its grantees to social justice and to rule of law values. It also rests on the pragmatic view that judicially precipitated reform can help to remove discriminatory barriers, to expand opportunities, and to improve conditions for historically underrepresented groups."¹¹ The Atlantic Philanthropies outlined three ways their grant partners could use legal advocacy¹²:

- To clarify, assert, and protect rights of classes of vulnerable individuals through improving laws or improving implementation and enforcement of laws. An example of this is the work led by the NAACP Legal Defense Fund focused on reforming laws on school discipline to disrupt the school-to-prison pipeline;
- To improve legal representation at scale. This includes, for example, work being done by Catholic Legal Immigration Network to provide legal representation to protect the rights of immigrants in the U.S.;
- To spotlight facts on the ground to inform the opinions of the judiciary, legislators, and the general public. The Proteus Action League's work on affecting opinions about the death penalty on a state-by-state basis across the country is an example of this.

Based on The Atlantic Philanthropies' and other funders' experience, four specific strategy questions related to funder-fit emerged:

1. Is the potential legal work clearly and centrally related to an issue on which we are working?
2. How might the legal advocacy work complement or harm other strategies we are supporting to advance the issue?
3. Can we see a clear vision of what it would look like if the strategy is successful and, in that scenario, would the payoff be worth it?
4. Do we see a clear vision for how our support (monetary and otherwise) can be useful to advance the legal advocacy within our funding time horizon?

Much of the guidance in this paper focuses on supporting legal advocacy through funding. However, beyond monetary backing, funders can do other things to support legal advocacy and enable non-legal advocates to benefit from a relationship with legal advocates. Facilitating relationships between legal advocates and non-legal advocates can enable mutually beneficial projects to emerge. For example, Kristen Livingston of the Ford Foundation described how Ford, in collaboration with others, wove together different groups working on immigration issues, including faith-based groups, litigators, and policy-advocates, braiding together the legal, policy, and research work.

Convening planning sessions or similar collective activities can serve to create places for legal advocates to think through legal strategy for issues or provide a space for non-legal advocates to exchange information for coordinating strategy and surfacing symbiotic opportunities. Like other nonprofits, legal advocacy organizations need to build their own capacity, and so their inclusion in capacity-building initiatives can be of value. Simply raising the visibility of legal advocacy work can have a significant impact on leveraging that work, something that can be done through communications or social media.

¹¹ Hershkoff, Helen & Hollander, David, Rights into Action: Public Interest Litigation in the United States, pp 89-90, in *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World*. (Mary McClymont & Stephen Golub eds., 2000).

¹² Internal Atlantic Philanthropies document.

Suggested Questions for Gaining Insights into Grantees/Potential Grantees

- You are pursuing this particular approach to legal advocacy. What other legal advocacy approaches or framing did you consider but choose not to pursue and why?
- With whom are you partnering to do the legal work?
- What are the potential downsides to this work?
- What other movement partners are you working with to complement the legal work?
- With whom are you working in the community?
- Who are your local spokespeople for communications about the legal work?
- Who else is doing good work on this issue?
- How much turnover do you have in your legal staff?
- What would other groups say are the biggest challenges of working with your organization?
- What will be different if you are successful in your work?

Finally, funders can play a facilitative role in actual legal advocacy work. In a 2012 review done by the Center for the Study of Social Policy on the lessons learned from litigation work for children, Steven Cohen of the Annie E. Casey Foundation described how foundations and nonprofits focused on public systems dealing with disadvantaged families and children engaged in litigation as “informed neutrals.” According to Cohen, the Foundation, either directly or through support to grantees, helped facilitate negotiations that led to the settlement of litigation; provided technical assistance to jurisdictions after settlement; and acted as the court’s monitor, “Reporting on the jurisdiction’s progress in implementing provisions of the settlement agreement.”¹³

B. Due Diligence: Looking at Legal Advocacy Capacity

Once it is clear that legal advocacy can help advance an overall funding strategy, identifying the right partners is the next step. Most of the people we spoke with indicated that the due diligence process for legal advocacy was no different than that for any other grant.

The goal is to identify organizations that align with the desired outcomes and to do the due diligence on any potential grantee partner.

In the process of making grants, experienced funders discussed the importance of cultivating strong relationships with individual grantees as well as seeking insights from other field stakeholders. In particular, funders suggested:

“Successful [legal advocacy] forces those with power to make some sort of change, but, if we are not here to offer up and support that change, then the litigation is for naught. Litigation helps back people of power into a corner and we need to help them get out by offering a remedy.”

— Rebecca Rittgers,
Proteus Fund

¹³ Cohen, Steven, “Role of Foundations in Child Welfare Litigation,” p. 20, in *For the Welfare of Children: Lessons Learned from Class Action Litigation*, by the Center for the Study of Social Policy, January 2012.

“[Legal advocacy] is not just a nail that we need to hammer, and the lawsuit is the hammer. It is thinking about how does this help us get a result that we need to achieve in a broader sense, and litigation may or may not be the answer...What are the opportunities and is this the right moment and is this the best context as opposed to a movement strategy goal or something else...And not just winning, but winning when you lose or when you win a case — what does that really do — how does that change things for the better?”

— Lourdes Rivera,
Ford Foundation

- Talking to legal experts in the field who might have a unique perspective;
- Asking non-legal advocates about how effectively legal organizations work with others in the field;
- Asking others in the movement whether they see a strategic value to legal advocacy or whether litigation is appropriate; and
- Talking to other funders of the prospective grantee.

A list of questions that experienced legal advocacy funders reported as particularly useful for evaluating grantees/potential grantees are included in the box on page 14.

In terms of identifying specific capacities of legal advocacy organizations, there were a variety of important characteristics that funders looked for, several of

which are described below. For a perspective on what advocates wish funders would consider, see the box Feedback to Legal Advocacy Funders from their Grantees on page 18.

Organizational Capacities Funders Consider



1. Track record



2. Leadership capacity



3. Strategic alignment



4. Reputation



5. Strategic position



6. Legal capacity



7. Non-legal capacity



1. Track record.

A strong track record was the most commonly identified trait, with the belief that experience and a history of success are good predictors of future performance. Organizations that have a history of successful legal advocacy actions were seen as almost able to bypass other concerns about organizational capacity, because these legal successes are seen as not possible without these other organizational capacities already being in place.

“We always ask grantees who else is doing good work. That tells me two things: who else is doing good work and whether the group we are talking to understands they are part of a community.”

— Ruth Levine,
Hewlett Foundation



2. Leadership capacity.

Leadership should be a focal point for funders. Advocates and funders were clear: leadership matters. Whether they are lawyers actively involved in carrying out the legal work or non-lawyers inspiring and guiding others, the leaders behind organizations doing legal advocacy are fundamental to its success. Our research surfaced leadership traits that are in-line with general leadership principles: vision and the ability to inspire others; humility and ability and parameters of success; and a collaborative disposition.



3. Strategic alignment.

Strategic alignment pertains to how well a legal organization and its vision for legal work align with goals of the funder, funding portfolio, and general vision for success. The specific elements named for strategic alignment funders might consider include:

- *Conveying a clear plan for the work:* There is no doubt that legal work requires a high level of technical and nuanced skills. However, according to experienced funders, legal advocates should be able both to clearly articulate their plan and to make a compelling argument as to why it is a good plan in non-legalese. In the specific instance of litigation work, legal advocates should be able to convey where the case may go—not necessarily the nuanced details, but a clear sense of why now and what trade-offs they are making in their approach and, for at least one interviewee,

asking if they are “white-washing” (deliberately avoiding) any issues that might be important to affected communities.

- *Having a long-term vision of the work:* Funders repeatedly noted that legal advocates should be able to articulate the end-game they are working towards—usually something that requires both legal and non-legal work. It is important to note that several advocates and funders we spoke with indicated a general reluctance on the part of many lawyers to be seen as activists (while others clearly saw their work as activist-oriented). However, this should not excuse the lack of a clear vision. Legal advocates should be able to articulate what will happen post-legal work, both in terms of strategy and outcomes. As one funder noted, “Do they describe a world you want to live in that results from the legal advocacy work?”
- *Connecting to a national landscape:* While we frequently think of legal advocacy in terms of national impact, the strategy can be equally effective in local and regional settings. However, when a local or regional approach is taken, legal advocates should have an understanding of what is happening on a broader scale—within the courts, in other policy venues, and by other advocates.
- *Determining whether the payoff would be worth it:* Having a long-term vision is one thing; considering the trade-offs and costs of getting there is something else. While no one we spoke to specifically referenced “return on investment,” it was clear that the expectations for legal advocacy are very high. For most people, this seems to be about affecting enough people—large classes of marginalized or disadvantaged people—and demonstrating how the resolved issue makes their lives better. Are there enough people who will be impacted directly or indirectly? Will those affected have substantially different life experiences as a result? Legal advocates should be able to provide thoughtful insights to these questions.



4. Reputation.

How others view the legal advocacy organization is an indicator of their success and how well they work with others. While innovative new organizations and organizations that go at it alone can both be very effective, it is useful to consider an organization's reputation and track record. Reputation can be explored as it relates to other legal advocates, to non-legal advocates/activists, and to other funders, each of whom is likely to have a different vantage point.



5. Strategic position.

Strategic position relates to where the legal advocacy organization sits relative to others working on similar or tangential issues. Given that legal advocacy can have broad ripple effects (good and bad), understanding the position of the organization is important for both strategic and relationship reasons. Specific elements identified as part of strategic positioning include:

- *Coordination with other legal organizations:* Legal advocates sometimes need to work with other legal organizations. This happens either directly through serving as co-counsel or through *pro bono* partnerships or indirectly through their separate cases having an impact on each other. Legal advocates should have good relationships with other legal organizations as well as understand the strategic position of their own approach and work. Keesha Gaskings of the Rockefeller Brothers Fund reported that a “discordant and uncoordinated field” is one of the biggest barriers to a legal advocacy grant's success. For example, there needs to be coordination so that someone does not bring a bad case or bring a case in the wrong jurisdiction.
- *Connection to non-legal work:* We have made several references to the importance of positioning legal advocacy work in a broader advocacy context. The ability to connect to non-legal work was frequently mentioned as a core capacity of legal advocates. Beyond the relationships of non-legal work, connection also includes understanding the political context and process of a particular issue.



6. Legal capacity.

Legal capacity may be the most obvious element of due diligence but also among the most difficult for funders—particularly those that are not lawyers—to assess. One of the most obvious capacity indicators is a track record of winning on issues. Good, smart lawyers are another aspect of legal capacity. Experienced funders identified several seemingly obvious examples (e.g., an active license to practice law in the state),¹⁴ but one less obvious thing stood out. Several interviewees referred to how they treat and include their clients as an important capacity indicator. In his reflections on legal change, Gara LaMarche, a former president of The Atlantic Philanthropies and current Executive Director of The Democracy Alliance, included the involvement of “the principal stakeholders in the change you are seeking” as one of five philanthropy lessons learned related to legal advocacy.¹⁵



7. Non-legal capacity.

Organizations doing legal advocacy need to have solid fundamentals and capacity beyond just the technical legal skills. Because legal advocacy gets so focused on attorneys, it can be easy to forget the rest of the organization. A couple of funders offered the reminder that not ignoring fundamental areas such as governance, financial stability and management, organizational stability (particularly in staffing), and communications is crucial.

To round out the issue of legal advocacy capacity, we asked experienced legal advocacy funders to identify where they have found legal advocacy work to be particularly effective and where they experienced some challenges. In this context, funders commended legal advocates for their technical expertise and their ability to delineate clear and specific legal goals. At the same time, they felt that legal advocacy work would be strengthened if advocates were to broaden their frame and see this tool as one lever among many. They also noted that institutional turf and individual egos sometimes got in the way of making progress.

¹⁴ The ability to attract *pro bono* attorneys to the work is something else that was highlighted as a way to leverage resources and broaden capacity, but it was not frequently mentioned as a critical element of capacity (though being able to get good external advice was identified).

¹⁵ LaMarche, Gara (2015) “How Philanthropy Builds Infrastructure,” in *Legal Change: Lessons from America's Social Movements* (Jennifer Weiss-Wolf and Jeanine Plant-Chirlin, eds.). Published by the Brennan Center for Justice.

Where Are the Perceived Strengths and Challenges of Legal Advocacy Organizations

We asked experienced funders in what areas legal advocates were particularly good and what they found challenging when compared to other organizations. These are their perceptions.

Strengths

- Have concrete and specific goals
- Have strong technical expertise
- Are able to quickly pivot in response to environment
- Identify legal cases with compelling narratives
- Are strengthening their capacity to work collaboratively
- Are strengthening their strategic communications capacity
- Have developed stable organizations
- Are mission-aligned

Challenges

- Have overconfident appraisals of their capacity
- Have a fragile funding base
- Are often spread too thin
- Lack diversity
- Insufficiently tap expertise and knowledge base of funding partners
- Focus on litigation at the expense of broader picture or other tactics (i.e., frequently have their heads down)
- Not good at tapping community organizing as a part of the work

Feedback to Legal Advocacy Funders from their Grantees

During our interviews, many advocates gave thanks to their long-term funders and to their funders who were willing to support them either through funding legal advocacy or through funding general operating support. However, advocates also had several requests that would make the relationship more effective. These include:

- *Don't just fund the legal work—fund the follow-up.* Advocates spoke about how some funders were only interested in seeing a win but not interested in the amount of preparation, monitoring, and sustained activism that it takes to enforce effective implementation of a legal win.
- *Be realistic about time frame required to realize change.* Advocates frequently indicated that funders often had unrealistic time frames for when legal advocacy strategies would realize results. One advocate explained, "If funders want to be involved in supporting this work, having a 3-5 year window is ineffective." While grantees understand that funders have to operate in their own institutional time frames, they wish that funders would engage in authentic conversations about time frames and think about creative strategies for addressing them.
- *Partnerships are great—they also require resources and have limitations.* Advocates are big believers in partnerships, but they wish funders better understood how resource intensive they can be. Funder support for collaboration and alliance-building work is critical to enabling these relationships. However, there are some limitations to partnerships. Legal advocates have to be responsive to their clients, which may impede some aspects of collaboration. Additionally, there may be valid differences of opinion on how to advance an issue through the courts, and having the differing strategies run parallel may work to the advantage of the issue.

IV. Making Legal Advocacy Grants

This section focuses primarily on how to structure effective grantmaking processes for legal advocacy support. By most accounts, making grants for legal advocacy is not substantially different from making grants to support any other kind of work. However, there are a few nuances that are worth mentioning. In this section we explore guidance related to three areas of making the grant: grant fundamentals, funder capacity, and securing buy-in from your board.

A. Grant Fundamentals

As with any grantmaking strategy, the basic building blocks of the legal advocacy grant (structure, duration, grant size) vary and are based on need, context, and the funder's customary grantmaking process. Seasoned legal advocacy funders provided information on their particular approaches, but were quick to note that there is not necessarily a single best-practice approach.

Building Blocks of Legal Advocacy Grants



1. Funding structure



2. Funding timeline



3. Grant size



1. Funding structure.

Similar to other kinds of advocacy, legal advocacy funders generally consider general operating support to strong legal advocacy partners as the preferred approach. This allows the organizations maximum flexibility to design and execute a strategy that is not tied to a particular case—one that can be adapted in real time as new opportunities arise. Given that many legal advocacy organizations focus on specific topic areas, it is possible to provide them with general support with confidence

that the funding will be directed to the issue of importance to the funder. According to Annmarie Benedict of The Atlantic Philanthropies, “There is a level of detail when talking about [legal advocacy] that you have to relinquish—you have to allow lawyers to do their job. Use your own judgement about making the grant, but then let them do what they do.”

However, several funders also reported using project grants in their legal advocacy work. Project grants were most useful when the funders worked with an institution that covered a lot of different areas and they wanted to make sure the funding supported a specific issue or when there was a specific opportunity on which to capitalize. For example, the Hewlett Foundation supported Oxfam with a project grant to take advantage of an opportunity to put pressure on the Securities and Exchange Commission to hold extractive industries accountable in the developing world.

Project and general operating support funding were not the only options mentioned. The Rosenberg Foundation, for example, creatively used forgivable loans for some of their legal advocacy work. If the various cases reached settlement, there was a three percent interest payment on the loan principal. However, if the case lost was, the Foundation wrote it off as bad debt.

Finally, several experienced legal advocacy funders emphasized the value of aligned, leveraged, or pooled funding. They advised looking for collaborative funding opportunities (either formal or informal) rather than going it alone when a joint effort is possible. One funder suggested cultivating individual donors who want to be attached to a particular strategy or case.



2. Funding timeline.

The majority of funders we spoke to reported using two-year agreements with most of their legal

We found that less than half of the experienced legal advocacy funders we spoke to were themselves lawyers, and both lawyers and non-lawyers agreed: you do not have to be a lawyer to support legal advocacy.

advocacy work. This was not distinct from other grants at their institutions. Again, following the lead of advocacy grants in general, legal advocates benefit from certainty that comes from multi-year funding arrangements, though they are well-accustomed to working within the parameters of grant funding timelines.

Jim Blew, a former funder on education issues, advised funding in phases. “There is almost always a research phase, and often after a research phase you find your chances are so small so you don’t go ahead. Then you can usually break it into the district, circuit, and Supreme Courts, and you reassess at each state.”



3. Grant size.

Legal advocacy, litigation in particular, has the reputation of being very expensive. However, funders indicated that there was no specific strategy they had around the amount of funding that they provided. This is due primarily to the fact that legal advocacy encompasses a wide range of potential investments. A couple of the funders reported supporting organizations in the range of \$250-\$300k over two years for legal advocacy work, while others described more discrete projects that carried a range of different costs. Jason McGill of the Arcus Foundation recommends, “Writing the budget so that the

organization has some wind at its back.” Whatever the grant size, funders seemed to agree that lawyers are skilled at figuring out costs and so are able to provide realistic cost parameters for the expected work.

One other note on funding amounts has to do with the equivalent of the social services volunteer: *pro bono* support. According to several interviewees, *pro bono* options are seen as a benefit in the addressing of costs. However, *pro bono* services are not without their drawbacks. At their most cynical, one anonymous interviewee reported that, “You get what you pay for.” Others emphasized that the staffing structure of law firms can make negotiating *pro bono* arrangements difficult. Mr. Blew shared the belief that *pro bono* works best with short windows of need. Other advocates reported developing long-term relationships with firms that allow for the building of good rapport.

B. Funder Capacity

Given the comparative lack of funder support for legal advocacy, we wondered whether there were technical skills that might discourage funders from providing support in this area.

While it was clear that understanding the legal environment and legal terms and concepts were helpful (particularly to engage in deeper strategy conversations), they were not necessary. We found that less than half of the experienced legal advocacy funders we spoke to were themselves lawyers, and both lawyers and non-lawyers agreed: you do not have to be a lawyer to support legal advocacy. More important was a willingness to engage with legal advocacy grantees and to explore opportunities with an open mind and maintain a bigger-picture view of how legal advocacy fits within a broader environment. Because the stakes with legal advocacy can sometimes be high, experienced funders advised both lawyers and non-lawyers in foundation roles to consult with non-legal advocates and with other legal experts on the issue as part of their standard due diligence process. For example, Geri Mannion, a program director at the Carnegie Corporation,

has experts in the field review grant proposals and shares the follow-up questions with grantees. Others suggested the value of speaking to peer funders that engage in legal advocacy.

C. Helping Boards Understand Legal Advocacy

Board buy-in is obviously important. Legal advocacy as a concept may sound frightening. It is understandable that some foundation boards may be reluctant to support legal work on those grounds alone. To garner institutional support, program officers advised that boards be educated in the value and importance of supporting legal advocacy work.

It should be noted first off that most legal advocacy activities (particularly those that go through the courts) do not have the same legal funding restrictions that other advocacy activities face (such as legislative lobbying). This means that the primary concern of boards frequently relates more to their understanding of the proposed work and reputational concerns related to using legal approaches, particularly in places where long-term relationships may be affected.

There were two distinct ways that interviewees sought to cultivate buy-in from their boards (note that these are not mutually exclusive). One approach is related to the value of the strategy intellectually, and the other is tied to targeting the personal stories that underscore the potential value. In the first approach, legal advocacy work is presented strategically in the natural context of a broad suite of activities. It links legal advocacy to complementary strategies and makes clear the kinds of outcomes that come from legal advocacy work and how they underscore and/or fuel change.

The other tack takes the more personal approach, helping board members make a connection to the groups affected. For example, Eric Ward, formerly of The Atlantic Philanthropies and now at The Ford Foundation, described an instance at Atlantic when he took a member of the board to an immigrant detention center related to Atlantic’s support of the

Heartland Alliance’s legal advocacy for due process in the detention of mentally disabled immigrants. He recounts, “He was bored to death! I thought he would be so impacted [by seeing the facility]—he was completely bored. But then we took him to the organization for lunch and he got to talk directly with immigrants who had been detained and there was such a powerful story.” It was seeing the personal impact of the legal advocacy work that moved it from the abstract courtroom to the tangible individual.

One other concern that we heard involves supporting legal advocacy in a local context. Boards are understandably concerned about not antagonizing their various community relationships, and legal action might be perceived as an inappropriately aggressive and alienating action. In order to address this issue, our review uncovered two insights. First, several legal advocates we spoke to reported that in many instances officials who might seem likely to be antagonized by legal action actually welcome such efforts. For example, one advocate we spoke with described a prison official who asked that the prison be sued to address overcrowding issues so that policymakers would take notice of the problem. Another described a school official who wanted the district to face legal action regarding services to special needs children so that school administrators and parents could better advocate for needed resources. Helping board members understand potential legal advocacy through this type of lens can allay some relationship concerns.

The other insight offered dealt with relationships that supported activities around legal advocacy such as research, mobilizing, and framing the legal issues of relevance. These activities still employ the legal advocacy strategy, but they may not directly include litigation activities.

Perhaps the main takeaway from experienced legal advocacy funders about how to talk to a foundation board regarding legal advocacy is just to go back to the basics: treat it in the same way as other grants—ensure relevance is clear, get across the value and impact of the work, and provide them with the information they request.



V. Framing Outcomes and Assessing the Results

Here we address how funders can both put potential outcomes in appropriate contexts and establish ways to measure the ultimate results. The Atlantic Philanthropies supported the American Civil Liberties Union (ACLU) in a successful challenge to the criminalization of truancy in Texas. Poor and minority children were accruing large truancy and disciplinary fines and were jailed for non-payment as soon as they reached 17. Through strategic litigation, the civil rights organization was able to eliminate the policy.¹⁶ In describing work around juvenile justice, Allison Brown, formerly of the Open Society Foundations and now Director of Communities for Just Schools, described how parents and caregivers were unaware of the systemic factors that were leading to the regular arrest of their children or that other parents were facing the same thing. She shared that, “The litigation process raised the awareness in the community to then support an organizing strategy. The process of litigation can be successful [even] where the verdict isn’t favorable. There are cases that we didn’t win, but where communities were mobilized, so we see real systemic change.”

This example underscores the need for a broader framework related to understanding the effectiveness of legal advocacy support. In some ways, it is very straightforward: you know whether you win or lose a particular

case or are able to frame a piece of legislation with favorable legal language, such as occurred in the truancy case. The number of players relative to other advocacy actions is relatively concrete and the adversarial set-up might be seen as limiting argumentation to two sides. But that is only part of the story, and, as with other forms of advocacy, advocates cautioned against using win/loss as the only criterion.

Getting to effective assessment beyond the win/loss, however, is more challenging. Many people we interviewed confessed that this is an area that they continue to struggle with. Others embraced the “win”

“Some of the beauty of the legal work is we won or we lost. We are going after ‘X’—real appeal in clarity. The downside is it is like watching a ping-pong match: we won; we lost; it is delayed.”

— Ruth Levine,
The Hewlett Foundation

¹⁶ Parker, Dennis, *A Final Report to The Atlantic Philanthropies from the Racial Justice Program of the American Civil Liberties Union* (New York, NY: American Civil Liberties Union, 2012), 1.

approach, preferring not to assess effectiveness until there was a perceived natural reflection point. But there were some good examples where legal advocates had clearly articulated short-term indicators such as increased media coverage of the issue, increasing the number of organizations or nonprofits working on the issue, or publishing research. For example, Cassie Schwerner of the Schott Foundation described its long-term support for legal advocacy on school finance issues. As she describes it, “It was the right thing to do—important litigation, if successful, would benefit millions of children. The strategy was to address school financing and raise the issue of a topic that is generally not sexy in the news media [school financing] because it is often either boring or too complicated. But the kind of story that you might read around litigation raised the issue with the public in a new and more exciting way.” Ultimately, the effort was picked up by a legislator and other advocates in a complementary strategy to the litigation work. The outcomes the advocates were seeking included the direct litigation win, but they also wanted to raise the visibility of the issue and engage new stakeholders.

It is important to note that many of these also have a negative flip-side. For example, a legal loss might set bad precedent and changes in public understanding may generate public or policy backlash. Appendix A contains a table with each of these outcomes and some ways to measure each outcome that could be gathered as part of evaluation efforts.¹⁷ Finally, assessing the ultimate impact of the results is necessary to understand whether the changes have actually impacted the lives of people for the better.¹⁸

Based on interviews and research, we identified eight overarching types of outcomes that are most prominently related to legal advocacy.¹⁹ These include:

1. Increasing visibility of the issue
2. Changing the media narrative

3. Empowering the affected community
4. Securing a desired legal verdict or result
5. Securing a desired procedural result
6. Securing a desired legislative or executive result (including better written laws)
7. Changing the public perception or understanding of an issue
8. Improving the effectiveness or viability of other advocacy strategies

¹⁷ To access an upcoming paper on evaluating legal advocacy, visit tccgrp.com/legaladvocacy

¹⁸ See the ORS Impact’s recent paper as part of the Atlas Learning project. Beyond the Win: Pathways to Policy Implementation. Available at orsimpact.org and atlaslearning.org, which explores the importance of implementation after a policy win as an important part of making sure advocacy efforts translate into changes.

¹⁹ Others have outlined similar tables of outcomes. For example, CALegalAdvocates.org, a project of the Legal Aid Association of California, has an evaluation toolkit which includes detailed outcome and sample evaluation approaches related to various types of advocacy work, including complex litigation. See: <http://www.calegaladvocates.org/library/attachment.76893> Stephen Golub paper entitled, “Legal Empowerment Evaluation: An Initial Guide to Issues, Methods and Impact” available at <https://namati.org/resources/legal-empowerment-evaluation-an-initial-guide-to-issues-methods-and-impact/>



VI. Conclusion

Whether your mission is to help people like Darian, the young man stopped over one hundred times by the New York Police Department, or people without access to critical life-saving drug treatments, or protecting waterways and endangered habitats, chances are that legal advocacy has and could continue to advance your issue. Funders play a critical role in advancing the strategic priorities and focus of some of society's most pressing issues.

As a result, including legal advocacy in your funding toolkit can help ensure that the sector considers this important lever of change. While directly supporting legal advocacy may not be something that every foundation can or will ultimately do, considering how

legal frameworks impact the issues you are interested in removes a potential blind spot. Moreover, supporting change and consideration of the four strategic questions for legal advocacy may reveal innovative opportunities to enhance your organization's and your grantee's strategy.

As described in Section IV, grantmaking for legal advocacy is within the reach of most foundations. This should give you the confidence that you can support legal advocacy work. The potential benefits are numerous, spanning awareness raising, empowering disenfranchised, holding people accountable for their actions, and changing harmful laws. And so, in conclusion, let us close with this simple statement from Geri Mannion of the Carnegie Corporation, "Come on in! The water's fine."

Some Parting Thoughts on Legal Advocacy from Experienced Funders

“ You don’t always win, but that doesn’t mean you lose. ”

—Lana Dakan, Packard Foundation

“ Honestly, we have to talk about the cynicism around lawyers and where that comes from and how we address it. Community lawyers are driven by community and embedded in community in a way that Thurgood Marshall and others were. They have their fingers on the pulse of the people and are brilliant lawyers, so they are developing legal strategies informed by the community. We have to get at the community lawyers—those that have bucked the ‘Lawyer cynicism’. ”

—Allison Brown, Open Society Foundations

“ I would tell everyone to read Gilbert King’s Devils in the Weeds—the covering of Thurgood Marshall. It shows how [the] NAACP built precedent carefully one step at a time over a very long period of time based on a strong vision of what would be. It didn’t understand legal backlash and how to prepare for that. I would advocate [that] folks start there and build conversations across that with legal experts. ”

—Eric Ward, Ford Foundation

“ If you can’t figure out a way that the legislature is going to implement laws, you don’t have a real case. ”

—Jim Blew, Former Advisor to Walton Family Foundation

Continuation of Some Parting Thoughts on Legal Advocacy from Experienced Funders

“ As we know from the marriage movement, you have to have the risk tolerance to suffer setbacks as well as succeed. ”

—Jason McGill, Arcus Foundation

“ Start with opportunities that present low-hanging fruit. ”

—Adrian Arena, Oak Foundation

“ With impact litigation, funders often focus on winning the big case and then we walk away too soon. One thing I think is really important is to have the pre-litigation strategy, litigation strategy, and implementation strategy for after you win. Litigation wins without the folks on the ground to bring the wins to life are really hollow. ”

—Kristen Livingston, Ford Foundation

“ Come on in! The water’s fine. ”

—Geri Mannion, Carnegie Corporation



Appendix A:

Defining and Measuring Success in Legal Advocacy

What counts as success?

How to measure it?

Increasing visibility of the issue

- Number and type of media hits on the issue
- Coverage of the issue geographically
- Number of leaders talking about the case/issue
- Extent to which the issue is carrying over into policy work
- The bringing of facts to light

Changing the media narrative

- Number of media pieces with a quote from the plaintiff, lawyers, or similarly involved people
- Extent to which key words or phrases from press releases are being picked up
- Media approach to the issue (e.g., framing, sources, positioning [public interest story vs. editorial], and others in the same vein)
- Change in media narrative on the issue over time
- Legal arguments/theories that make it into the public discourse

Empowering the affected community

- Number of media pieces with a quote from the plaintiff or community members
- Extent to which the community's interpretation and language is being brought forward by the legal advocates
- Extent to which community members feel their voices are increasingly heard
- Extent to which more community members are involved in mobilizing or work related to the issue

Securing a desired legal verdict/result

- Breadth of the win (how widely applicable is the ruling)
- Number of people likely to be impacted
- Setting precedent
- Positive settlement
- Changing the legal status of an issue or of rights
- Repeal of bad policy
- Clarification of the law/issue

What counts as success? How to measure it?

Securing desired procedural results

- Defeating efforts to dismiss the case
- Securing good information through discovery
- Judicial relief
- Recovery of fees
- Advancing a new legal theory
- Slowing backsliding on an issue
- Arguments that divide courts

A legislative or executive win

- Number and type of complementary or supportive policies emerging through legislative channels
- Number or type of policies emerging that are against the ideal legal outcome (inverse relationship)
- Policymakers pick-up of the issue/alteration of behavior
- Changes in legislative or executive appropriations (toward or away from an issue)

A court of social norms win

- Change in polling on the issue among different demographic groups
- Changes in public attitudes
- Changes in public conversations or framing of an issue
- Deterrence of similar behavior

Improved strategy

- Strength and quality of partnerships
- Level of integration of the field
- Extent to which advocates are in communication with those in media, are organizing, or pursuing legislative advocacy
- Extent to which legal advocates can cite other community work happening on the issue
- Participation in a relevant coalition, if available
- New partners involved in the work
- Amount of information/research developed on an issue
- Time spent debriefing after wins or losses
- Legal advocates providing leadership for the movement/field
- Training of new lawyers
- Ability to win-the-loss or win-the-win
- Creating openings for other advocacy strategies (e.g., gaining political will to act on an issue)
- Influence or inform the litigation strategy of others
- Securing additional philanthropic funding

Negative outcomes

There are some negative outcomes to look for as well, including the following:

- Losing and setting bad precedent
- Level of public backlash on the issue
- Level of policy backlash on the issue
- Risks to safety of client/marginalized groups
- Unduly burdened clients
- Alternative use considerations (what could have been done with the legal advocacy resources instead)



Appendix B:

Additional Legal Environment Discussion

As described in the text, assessing the legal environment is something that advocates are likely best positioned to do. Some of the things that we heard advocates look for include:

- Is the law reasonably on your side? Is there a compelling rationale that you are in the right as defined by the law (as opposed to values, morals, or perceived fairness)? Have the courts already addressed this issue and, if so, is the precedent in your favor?
- Is there a legal theory or approach that can be used to advance the issue? This might take the form of replicating legal approaches that have proven successful (there is a precedent supporting the approach) or developing new legal theory. For example, one funder we spoke to was supporting organizations developing a new legal theory that would examine how the courts treat implicit biases in a system—biases that do not necessarily pertain to any one particular act of discrimination. Frequently the legal strategy or theory will be grounded in issues of human or civil rights.
- Is there a strong plaintiff who will be able to advance a strong case on targeted issues? Are there people who have standing before the courts or regulatory agencies that have a clear and direct stake in the law?
- Is the targeted law in a state of flux or controversy? Are the things at issue ones that have already been resolved or do they represent new issues? If they have been resolved, is there an element of monitoring the implementation?
- Is the issue sufficiently concrete that it can be tackled? Are the concepts clear and resolvable through a legal lens, and have they been sufficiently defined? If they have not, this may represent an opportunity for supporting new legal theory development.



About TCC Group

At TCC Group, we are committed to addressing complex social problems by heightening our clients' understanding of their collaborative role in society; we help them strengthen strategy, build capacity, and advance assessment and evaluative learning. We envision an effective social sector that addresses society's complex problems through a collaborative approach that harnesses the diverse skills, energy, and visions of its stakeholders.

TCC Group has more than 35 years of experience working in the social impact field with companies, philanthropies, and nonprofit organizations. Our unique strength as a firm lies in our ability to assist clients at all stages of development across the interlocking areas of planning, execution, and evaluation. Our approach is data-driven and outcomes-based, draws from the knowledge of in-house program management and evaluation teams, and ensures that our clients develop actionable and measurable strategic goals to communicate effectively with their stakeholders.



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