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Who is the Client? Rethinking Professional Responsibility for Benefit Corporations

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WHO IS THE CLIENT? RETHINKING PROFESSIONAL RESPONSIBILITY FOR BENEFIT CORPORATIONS

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The proposition that a for-profit company can exist to benefit the public has been debated for decades.[1] Online retailer Etsy famously embraced an ethos of

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1. *See, e.g.*, ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY v (1932).

social responsibility until the pressures of being a publicly traded company proved too much.[2] Thousands of other companies, however, go beyond embracing this ethos and explicitly organize themselves to promote a public benefit.[3] As these companies navigate market pressures and try to balance profit with purpose, they will be sure to retain lawyers. The question of what is ethically required of lawyers representing companies organized to create a public benefit has not confronted the bar for decades.

Rules of professional responsibility are informed by substantive laws governing clients—in the case of corporate clients, by corporate law. Corporate law gives attorneys an ethical framework when representing corporations and helps to interpret obligations in specific situations. If corporate law is focused on elevating shareholder interests above all else, current ethical norms flow from that understanding. And, if benefit corporations change that notion of shareholder primacy, challenges to attorneys' ethical duties should follow.

The benefit corporation is a relatively new corporate form that allows companies to opt into a legal framework in which they can pursue a public benefit alongside profit without running afoul of corporate law.[4] Benefit corporations were created to appeal to founders who want to grow their businesses without losing their companies' sense of mission and investors who seek out investments that will return some social, in addition to financial, return.[5]

Benefit corporations exist somewhere between the traditional for-profit and charitable sectors. The form seeks to create an option that combines the mission-driven work typical of the charitable space and the flexibility and market-driven solutions of for-profit businesses. Attorneys for for-profit corporations and nonprofit organizations operate under norms that developed in the shadow of the law governing their clients' organizations. If benefit corporations represent a hybrid of for-profit and nonprofit entities, legal ethics will need to embrace a hybrid framework as well. The benefit corporation, therefore, poses a question that has not been asked by corporate lawyers in a long time—what does it mean to represent a for-profit entity that exists to promote the public interest?

Lawyers for benefit corporations should integrate the spirit and purpose of the law into their ethical obligations, much as lawyers for other types of

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2. David Gelles, *Inside the Revolution at Etsy*, N.Y. TIMES (Nov. 25, 2017), https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html.

3. Ellen Berrey, *How Many Benefit Corporations Are There?*, SSRN (May 5, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602781 (finding 2,541 benefit corporations ever formed as of 2015); *see also* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 588–89 (2016) (noting 2,636 entities organized as benefit corporations or benefit LLCs as of 2016); *see generally* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 259–75 (2014) (describing Delaware companies incorporating or converting to benefit corporations).

4. Berrey, *supra* note 3.

5. Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 231, 263 (2013).

organizations already do.[6] To do so in the context of benefit corporation legislation enables clients to serve the purpose for which their form was enacted and comports with our understanding of corporate law and transactional attorney ethics in light of this new corporate form. In developing a framework for attorneys representing benefit corporations, prior rules and norms around corporate representation and frameworks for nonprofit and government lawyers are particularly instructive. These attorneys should balance confidentiality obligations against their client's legal purpose. Further, lawyers for benefit corporations should advise their client first on the effect of their actions on the rights of third parties, rather than how to mitigate legal risk.

Of particular concern to attorneys should be benefit corporation clients which fail to create, or even endeavor to create, a public benefit. Companies that deceptively hold themselves out as being mission-driven are said to engage in greenwashing.[7] Greenwashers profit off the promise to conduct business in a way that benefits the environment, create good jobs in struggling neighborhoods, or redirect a portion of profits or goods or services to those unable to afford them, without actually doing so.[8] The benefit corporation form may be attractive to would-be greenwashers. By incorporating as a benefit corporation, nefarious businesses can pursue investors, customers, and general goodwill by falsely purporting to pursue a mission. Other benefit corporations may simply fail to operate in a way that benefits nonshareholder stakeholders or to consider the breadth of the effects of corporate action. Either of these situations may violate benefit corporation legislation and lead to difficult questions for attorneys. What are the attorney's obligations when she has a greenwashing client? How broadly does the attorney define her client? What is the scope of advice that the attorney should give?

The profession is sure to face these questions. Businesses are increasingly opting into this form.[9] Household names like Patagonia[10] and Kickstarter[11] are benefit corporations, and the largest benefit corporation to go public held its initial public offering in February 2017.[12] Concerningly, however, at least one

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6. William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1471 (2006).

7. Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations*, LEWIS & CLARK L. REV. 525, 528 (2017).

8. *See id.* at 558.

9. Murray, *supra* note 3, at 588–89 (finding 2,636 entities organized as benefit corporations or benefit LLCs as of 2016); Plerhoples, *supra* note 3, at 259–75 (analyzing Delaware benefit corporations); Berrey, *supra* note 3 (finding 2,541 benefit corporations as of 2015).

10. *B-Lab & Patagonia – the first California Certified B Corporation*, PATAGONIA, http://www.patagonia.com/b-lab.html (last visited Sept. 22, 2018).

11. Yancey Stricker et al., *Kickstarter is now a Benefit Corporation*, KICKSTARTER (Sept. 21, 2015), https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation.

12. Lauren Gensler, *The World's Biggest For-Profit College Company, Laureate Education, Raises $490 Million In Public Debut*, FORBES (Feb. 1, 2017, 11:29 AM), http://www.forbes.com/sites/laurengensler/2017/02/01/laureate-education-initial-public-offering/.

benefit corporation has come under fire for promising, but ultimately failing to balance the interests of its shareholders and other stakeholders. Rasmussen College, a Delaware public benefit corporation, was the subject of a 2014 report by the U.S. Senate Health, Education, Labor and Pensions Committee finding that it, along with others, failed to provide effective, affordable education to its students despite committing to do so in its corporate charter.[13]

This Article explores the professional and ethical responsibilities of lawyers representing benefit corporations, which have not previously been analyzed. The benefit corporation as proposed or enacted across a number of states is accepted and the Article looks at how attorneys can meet these responsibilities.

Part I examines in detail the connection between corporate law theory and legal ethics. The rules of professional responsibility do not stand alone and are not comprehensive enough to guide attorneys through every imaginable situation; rather, they are dependent on and derive in part from other areas of substantive law. In order to ethically represent an organizational client, the attorney must show fidelity to that client's organizational structure—its decision-making rules, its fiduciary duties, and its property norms.[14] Attorneys must look to synthesize rules of professional conduct, corporate fiduciary law, and the potential of civil liability for malpractice.[15] The changes found in the benefit corporation legislation require a new ethical framework for attorneys representing these organizations. In describing that framework, I draw from ethical rules for attorneys representing charities, government lawyering, and prior eras of legal ethics.

Part II looks at several specific ethical rules and situations to demonstrate the extent to which ethical obligations reflect corporate law as private law generally and shareholder primacy specifically. Who is the client? To whom does client confidentiality extend? What reporting duties does the attorney have in the event of a breach of fiduciary duty? What is the scope of advice that lawyers are required to give clients? Might an attorney be liable if her corporate client engages in greenwashing?

Part III describes benefit corporation legislation. To understand how benefit corporations affect attorneys' ethical duties, it is important to understand which features of traditional corporations they sought to change. Benefit corporations were created as a response to both shareholder primacy specifically and private law generally. In previous decades, corporate social responsibility (CSR),[16]

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13. Plerhoples, *supra* note 7, at 560–62.

14. William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS 489, 494 (2016).

15. George Rutherglen, *Lawyer for the Organization: An Essay on Legal Ethics*, 1 VA. L. & BUS. REV. 141, 151–55 (2006).

16. Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility*, 34 SEATTLE U. L. REV. 1351, 1351–53 (2011).

progressive corporate law,[17] and social enterprise movements[18] emerged that attempted to move corporate law, or at least corporate management practices, toward recognition of the effects of corporate behavior on society at large. Social enterprise boosters believed that traditional corporate forms were not suited to the task of social enterprise and that *new* corporate forms were required to accommodate purpose and profit.[19] The benefit corporation arose out of this movement. This section examines advocacy and legislative history around the adoption of benefit corporation legislation and finds a narrow focus on shareholder interests as a key complaint of the form's boosters.

Part IV reassesses ethical issues in light of benefit corporation legislation to show how, based on current understanding, attorneys' ethical obligations will differ when representing benefit corporations. This section focuses particularly on attorney reporting duties in the case of clients engaged in greenwashing. Benefit corporation legislation necessitates a return to an ethical paradigm similar to that of the eighteenth-century public citizen. Also drawn upon is the law governing government lawyers, who as a general rule are to represent the public interest.[20]

Finally, Part V recommends specific changes, including reporting duties for attorneys who become aware that their clients are engaging in behavior that fails to promote a public benefit, where rules can be brought in line with the framework described. These changes would not only clarify lawyers' ethical duties to these clients and the public they seek to benefit; they would also deputize attorneys in the effort to create a public good through these entities and guard against greenwashing.[21] Also addressed are concerns that a modified view of legal ethics would dissuade entrepreneurs from forming benefit corporations out of fear of being reported by their attorney.

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17. LAWRENCE E. MITCHELL, PROGRESSIVE CORPORATE LAW xiii–xv (1995).

18. *See* Page & Katz, *supra* note 16, at 1353 ("'Social enterprise' is a loose term for businesses that aim to generate profits while advancing social goals."); *see also* Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 IND. L. REV. 621, 631 (2016) ("[S]ocial enterprises are businesses that make profits both for the benefit of the owners' compensation as well as the advancement of a specific social purpose or mission."); Plerhoples, *supra* note 5, at 225 (citations omitted) ("According to Social Enterprise Alliance, Inc., a non-profit organization that promotes the goals of social enterprise, a social enterprise must '*directly* address an intractable social need and serve[ ] the common good, either through its products and services or through the number of disadvantaged people it employs.' For others, social enterprise means 'blended enterprise' or double or triple bottom line businesses—i.e., 'entit[ies] that intend[ ] to pursue profits and social good both in tandem and by making considered choices to pursue one over the other.'").

19. Page & Katz, *supra* note 16, at 1353.

20. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 794–96 (2000).

21. Sarbanes-Oxley Act was similarly passed to respond to a wave of large corporate scandals around the turn of the twenty-first century, the most prominent of which was the Enron scandal. Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers after Sarbanes-Oxley*, 49 VILL. L. REV. 725, 727–28 (2004).

I. SUBSTANTIVE LAW GOVERNING CLIENT ORGANIZATIONS PROVIDES ASSUMPTIONS ABOUT LAWYERS ETHICAL DUTIES

In the case of organizational representation, the law governing client organizations affects lawyers' ethical obligations when representing those organizations. The rules of professional responsibility do not stand alone and are not comprehensive enough to guide attorneys through every imaginable situation; rather, they are dependent on and derive in part from other areas of substantive law.[22] Ethical duties arise from rules of professional conduct adopted by jurisdictions[23] and bar opinions interpreting those rules,[24] other regulations that apply to attorneys practicing before various regulatory agencies,[25] as well as the law of attorney malpractice.[26] As a result, ethical obligations may vary depending on the identity of a client organization. Lawyers for traditional for-profit corporations and nonprofit organizations, for example, should approach lawyering differently, taking into account rules governing the client organization's structure and purpose.

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22. When interpreting specific rules of professional conduct, "[t]he law governing the organization largely determines the ethical obligations of the attorney who represents the organization." Rutherglen, *supra* note 15, at 154.

23. I will mostly discuss the Model Rules of Professional Conduct (Model Rules), which were drafted by the American Bar Association and served as a model for rules of professional conduct in thirty-seven states. *See State Adoption of the ABA Model Rules of Professional Conduct and Comments*, ABA (June 15, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/adoption_mrpc_comments.authcheckdam.pdf. Of course, language and interpretations of rules of professional conduct vary by state and those changes may very well have an impact on the questions posed in this section for attorneys representing traditional corporations and for those advising benefit corporations. *See id.*

24. *See, e.g.*, *Ethics Opinions*, ABA (Nov. 27, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/.

25. Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 AKRON L. REV. 395, 395, 398 (1993).

26. Written rules of professional conduct and malpractice claims are related, but the two do not overlap completely. The Model Rules state that:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached . . . . They are not designed to be a basis for civil liability . . . . Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

MODEL RULES OF PROF'L CONDUCT pmbl. & scope ¶ 20 (AM. BAR ASS'N 2015). It is, therefore, possible that conduct that violates rules of professional conduct does not rise to the level of malpractice. Likewise, attorneys could be liable for criminal or tortious behavior under theories not based on a violation of the rules of professional conduct. *See* Hazard, Jr., *supra* note 25, at 399–400; *see also* Rutherglen, *supra* note 15, at 149 ("Model Rule 1.13(a) thus does not tell a corporate lawyer who is authorized to act on behalf of a corporation or what the extent of his authority is. By the same token, the law governing the organization does not directly address the obligations of its attorney, leaving those issues to be addressed by the Model Rules or perhaps the law of malpractice. The cross-references between each of these sources of law leave both of them with a troubling indeterminacy. Neither one appears to be the fixed point from which the other's content can be filled out.").

Deciphering professional responsibility obligations when representing an organization requires first that the attorney identify her client. In the case of organizational representation, the client is the organization itself.[27] Model Rule 1.13(a) provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[28] Defining the client as the organization is ultimately a fiction, however, as the attorney will necessarily interface with and take direction from individuals within the corporation.[29] For that reason, the Model Rules recognize that attorneys represent organizations through their "duly authorized constituents."[30] The rules lack guidance on identifying an organization's "duly authorized constituents"; since substantive law dictates who is authorized to act on behalf of an organization, it is necessary to look to substantive law to understand who those "duly authorized constituents" are.[31]

Defining the constituents through which a client may act is key for any lawyer representing an organization. One author wrote:

> To responsibly represent a client, a lawyer needs the ability to answer three questions: Who speaks for the client, and can thus instruct the lawyer? Who listens for the client, and thus should receive the information the lawyer is obliged to communicate? Who acts for the client, and can thus take the actions needed to make commitments on behalf of the client?[32]

Once she has answered those questions, the lawyer can begin to understand what standard of care she owes and to whom, as well as available courses of action when the attorney knows or believes that management is engaging in improper behavior.[33]

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27. *See* Rutherglen, *supra* note 15, at 155 ("[E]veryone knows that Model Rule 1.13(a) requires corporate counsel to represent the organization, not the individuals within it; yet no one knows precisely what that requires corporate counsel to do.").

28. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2018). "As applied specifically to Model Rule 1.13(a), no purely moral principle requires a lawyer for an organization always to act as instructed by 'its duly authorized constituents.' Ethics in this sense requires lawyers to look beyond the law governing the organization and beyond legal ethics itself." *See* Rutherglen, *supra* note 15, at 145.

29. Ralph Jonas, *Who is the Client: The Corporate Lawyer's Dilemma.*, 39 HASTINGS L.J. 617, 617 (1988).

30. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2018).

31. Rutherglen, *supra* note 15, at 153–54 ("[Rules] governing representation of an organization, dependent as they are on the interrelated fiduciary obligations of directors, officers, and agents, are more complicated than most ethical rules. Instead of denying the judgment necessary to take account of such complexity, it would be better to use it to frame the analysis of the attorney's obligations."); *see also* Simon, *supra* note 14, at 493. As written, Model Rule 1.13 applies in all cases of organizational representation. Rutherglen, *supra* note 15, at 148.

32. Simon, *supra* note 14, at 492.

33. "In order to act ethically, the lawyer must instead determine what the interests of the organization and its constituents legitimately are and how they legitimately may be pursued." Rutherglen, *supra* note 15, at 148.

The attorney must also understand her client organization's legal purpose; if a client constituent acts contrary to the organization's legal purpose, that person ceases to be a duly authorized constituent of the organization.[34] William Simon has coined the term "Framework of Dealing" to describe this understanding of client identity.[35] Under the "Framework of Dealing," the lawyer owes an obligation to the legal framework in which her client corporation operates, including the organization's legal purpose.[36] Lawyers also have certain ethical obligations when a client constituent is acting contrary to that legal purpose.[37]

Attorneys' duties are further constrained by common law rules of malpractice. Attorneys who fail to satisfy their obligations may find themselves liable to both their clients and to third parties.[38] The standards under which attorneys may be held liable for malpractice depend on ethical rules[39] as well as statutes.[40] Changes in substantive law that affect the duties of client constituents will inevitably require attorneys to take those changes into account and adequately advise their clients. Lawyers must stay apprised of legal developments around, for example, corporate officers' duties in order to provide competent counsel.

Attorneys must, therefore, look to synthesize rules of professional conduct, substantive law, and the potential of civil liability for malpractice.[41] This may not be an easy task. The legal structure, governing law, and the matter at hand may all determine who constitutes the client corporation's "duly authorized constituents." Key to this analysis is an understanding of the client's legal purpose. The following sections discuss the legal purposes of corporations, nonprofit organizations, and government agencies. They also describe the ways in which these legal purposes affect lawyers' professional responsibility obligations. Understanding the ways in which benefit corporation legislation departs from or is similar to legal purposes in other settings will help interpret how to lawyer to the benefit corporation. This Section examines the connection between substantive law and legal ethics in three contexts: lawyers representing corporate clients, lawyers for nonprofit organizations, and government lawyers. Section II below attempts to apply these principles to ethical rules around

34. William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57, 80–81 (2003).

35. *Id.* at 86–103.

36. *Id.* at 86–87.

37. Rutherglen, *supra* note 15, at 164.

38. *See* Hazard, Jr., *supra* note 25, at 400.

39. Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 46 (1998) ("[E]xamination of judicial decisions in a number of areas confirms that courts regularly cite ethical rules to support propositions that augment or modify the civil law.").

40. *Id.* at 69 ("The widely accepted test for applying statutory standards to civil actions is whether the legislature intended to protect the class of persons of whom the plaintiff is a member from the type of harm that occurred.").

41. Rutherglen, *supra* note 15, at 151–55.

confidentiality and reporting, the scope of advice that attorneys give their clients, and the extent to which attorneys can be held liable to third parties.

A. The Traditional Model of Corporation Representation

In the case of corporate representation, the attorney must grasp both the legal nature of her client and the law governing her client in order to understand her duties to that client. Corporate law's implications on ethical duties can be broken down into three categories:

> There are decision rules that allocate presumptive responsibility and specify procedures. There are fiduciary duties that require that decision-making responsibility be exercised in the interests of the organization, rather than in the individual interests of the decision-makers. And, there are property norms that distinguish the organization's assets from the personal assets of the constituents and delineate the relative claims on organizational assets by constituents. The fiduciary norms qualify the decision rules, making authority conditional on its exercise in the interest of the organization. The property norms give definition to fiduciary duties, indicating which constituent interests should be deemed interests of the organization.[42]

When representing a corporation, the attorney's client is the corporation itself and not any individual officer, director, employee, or shareholder constituent.[43] The attorney does not consider merely the group of decision-makers as her client but refers to the rules around the authority structure and purpose of the corporation to interpret her ethical obligations. Decision, fiduciary, and property rules and duties constitute corporate purpose, and a violation of any also constitutes a violation of corporate purpose. Following the dictates of corporate law, the attorney must act in a way that is reasonable with respect to other corporate constituents' interests, including those of shareholders, rather than simply deferring to the direction of management.[44]

This generally accepted model of corporate representation reflects an understanding of corporate law as a private ordering mechanism that serves to protect the interests of shareholders above all else, but the legal purpose of the corporation is and has been the subject of great deliberation.[45] Much of the debate over the proper role of corporate law is a debate over who has a legal right to call herself a constituent or a stakeholder of the corporation.[46] This contrast is between the view that "corporate activity has broad social and political ramifications that justify a body of corporate law that is deliberately

42. Simon, *supra* note 14, at 493.

43. Jonas, *supra* note 29, at 617.

44. Rutherglen, *supra* note 15, at 148.

45. Martin Lipton et al., *The Purpose of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 11, 2018), https://corpgov.law.harvard.edu/2018/04/11/the-purpose-of-the-corporation/.

46. *See* Ved P. Nanda et al., 1 TRANSACTIONAL BUSINESS TRANSACTIONS § 1.7 (2018).

responsive to public interest concerns" and the view that corporate law governs "little more than the private relations between the shareholders of the corporation and management, which acts as their agents or trustees."[47] On one end of the spectrum, the corporation's owners are its only true constituents and it is their interest and no one else's that dictates the corporation's goals.[48] On the other, the corporation's stakeholders extend to a broad constituency, up to and including the public at large.[49]

Ascertaining who falls within the corporation's constituency determines to whom a corporate constituent owes a duty. The next step is to ask what duty, exactly, is owed. In the narrowest formulation of corporate duties, officers and directors owe a duty to the shareholders alone.[50] Those duties are generally defined as fiduciary duties—namely, the duties of care and loyalty—which are enforceable by shareholders.[51] If the corporation owes a duty to a wider group of constituents than merely its shareholders, the definition of that duty gets muddled. The corporation is capable of creating financial benefits beyond profit to shareholders, such as jobs or savings for consumers, and is even able to drive non-financial outcomes, like environmental effects. Of course, the corporation is capable of doing harm as well. Does this mean that corporate directors and officers owe duties to, for example, employees and customers?

This debate could also be described as a contrast between a view of corporations as private property and a conception of corporations as public social institutions.[52] Under the property conception, the corporation is solely the property of its shareholders, and to spend that property on something other than

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47. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201–02 (1990) (calling this dichotomy "abidingly crucial").

48. *See, e.g.*, Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 26 (1991).

49. *See generally* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); *see* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (finding that the court will not question the business judgment of directors who must consider the public and shareholders in determining the long-term interests of a corporation); Linda Kawaguchi, *Introduction to Dodge v. Ford Motor Co.: Primary Source and Commentary Material*, 17 CHAP. L. REV. 493, 493–96 (2014) (discussing *Dodge* through an analysis of the court transcripts).

50. *See Dodge*, 170 N.W. at 684. This is often, though not always, defined as maximizing profit to shareholders. Plerhoples, *supra* note 7, at 535 ("Delaware courts espouse the shareholder wealth maximization norm as the central purpose of a corporation."); William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825 (2012) ("[A] business corporation has as its purpose creating financial gain for its shareholders . . . .").

51. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006); Annotation, *In General*, West's ALR Digest Corporations and Business Organizations k1841 (2018).

52. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

shareholder benefit is morally and normatively wrong.[53] It follows that the creation of wealth should always be the corporation's objective and that corporate law should not pay attention to who benefits from corporate action aside from shareholders.[54] This property concept is private ordering in its narrowest form: corporate law exists to regulate the relationship between the corporation and its shareholders. Under the social institution conception, on the other hand, the corporation must strive to satisfy consumers, provide employment, and contribute to "public life of its communities."[55] Management's job, therefore, is to balance these competing interests.[56] This view hints at a public ordering regime: management discretion is necessary to monitor the corporation's effect on the public and other stakeholders and mitigate negative outcomes as they see fit.[57]

The public versus private nature of corporate law is vital under the "Framework of Dealing." The more constrained the corporate duties are, the more the attorney's obligations are themselves circumscribed. Corporate law has, by and large, embraced shareholder primacy, thereby requiring that directors prioritize the interests of shareholders above all else.[58] Corporate law gives those directors wide latitude when deciding how to do so.[59] Attorneys are also to give their clients latitude, mostly deferring to the wishes of corporate fiduciaries absent evidence of clear harm to the shareholders. Fiduciary laws, however, do place limitations on management's ability to act on the legal positions that attorneys can take.[60] Though attorneys do not take instruction from shareholders, and although attorneys are not in an attorney-client relationship with shareholders, "[t]he attorney must act reasonably to protect the interests of shareholders or other constituents of the organization to whom management owes fiduciary obligations."[61]

We can imagine two public corporations, both incorporated in states that adopted the Model Rules of Professional Conduct, which demonstrate these

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53. *Id.* at 267–69.

54. *Id.* at 264–65. Allen does concede that, in the property conception, a government may have a role to play in addressing issues of wealth distribution and external social cost through taxation and regulation, although such powers should apparently be applied ex-post rather than ex-ante to any corporate action. *Id.* at 269–70.

55. *Id.* at 271.

56. *Id.*

57. *Id.* at 272. Proponents of both views argue that their view is not ultimately about public versus private benefit but rather two views of how to best maximize value to the shareholders and over what timeline; the property view correctly focuses on taking advantage of short-term opportunities, while the entity view ensures that shareholders can extract profit from an enterprise over a longer amount of time. *Id.*

58. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998).

59. Charles Hanson, *The Duty of Care, the Business Judgment Rule, and the American Law Institute Corporate Governance Project*, 48 BUS. LAW. 1355, 1356 (1993).

60. Rutherglen, *supra* note 15, at 151–55.

61. *Id.* at 153.

frameworks. Red Corp. is a traditional corporation that operates under a shareholder primacy regime. Green Corp. is a corporation that has opted out of this regime and explicitly exists to create a general public benefit and with a stated specific public purpose of "conducting operations in a manner causing no unnecessary harm by continually seeking to reduce the environmental footprint" while creating jobs in local, underserved communities.[62] It has designated both a specific director and officer to oversee the creation and reporting of those benefits. Both produce widgets and have similar customer, vendor, and employee bases.

The framework under which attorneys for Red Corp. operate is well understood. Attorneys for corporations are zealous advocates[63] for the corporation's interests, which is defined largely (though not entirely) by the interests of its shareholders. The attorney's duties are explicitly grounded in corporate law as private ordering. "[C]orporations . . . are only formal arrangements of real persons pursuing their real interests" and are therefore deserving of exercising their autonomy as much as individuals who "pursued their interests in simple arrangements and associations[.]"[64] The corporate client's interest in exercising autonomy as a group of persons, therefore, trumps any larger societal obligation the corporate may have, and lawyers do "justice" by furthering that exercise of autonomy.

The upshot of corporate law for lawyers is the duty to guard against risk that could harm the corporation (and therefore harm the value of the shareholders' investment).[65] Among a lawyer's most important and valuable roles, particularly in a transactional context, is identifying and counseling clients on legal risk. Legal risk refers to the risk of legal liability and is distinct from reputational, relational, or other business risk to the client; though lawyers often advise clients on these matters as well.[66] Few lawyers view their obligations as

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62. This language is modeled in part on the language of Patagonia, a California private benefit corporation. This is part of Patagonia's specific public benefit. *Annual Benefit Corporation Report*, PATAGONIA WORKS 8 (2016), http://www.societabenefit.net/wp-content/uploads/2016/11/Patagonia-2016.pdf.

63. Lawyers need to be zealous advocates for their clients while also seeking to advise and understand their clients. William T. Allen, *Corporate Governance and a Business Lawyer's Duty of Independence*, 38 SUFFOLK U. L. REV. 1, 5 (2004).

64. Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060, 1076 (1976). Fried acknowledged that the analysis of who the client is, what that client's interests are, to whom the lawyer owes loyalty, and the substance of that loyalty in the case of a corporate client are complex questions deserving of "complicated though wholly coherent" analysis. *Id.*

65. *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 2018) (requiring a lawyer to report up the chain of command and giving them discretion to report outside the corporation any actions which are "likely to result in substantial injury to the organization").

66. *See generally* Milton C. Regan, Jr. & Kath Hall, *Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights*, 84 FORDHAM L. REV. 2001, 2002 (2016) (providing a discussion of how attorneys evaluate and advise clients on business risk related to international human rights issues).

extending to protecting against harm to non-shareholder third parties absent the identification of some legal or business risk to the client corporation. Indeed, many corporate lawyers believe that the law requires only compliance with the literal letter of the law and that attorneys, therefore, should advise their clients on meeting the law's minimum standards only.[67] The view is not constrained by the public interest if the public interest is not explicitly stated in the law.[68]

This articulation of client identity reflects what I have previously defined as the Unary and Multiary Models.[69] "In the Unary Model, both corporate fiduciaries and attorneys work for a singular purpose."[70] Corporate fiduciaries' "sole concern is that of the corporation's shareholders, and the lawyer's sole concern is that of her client."[71] The opposite of the Unary Model is the Multiary Model, in which "corporate fiduciaries must concern themselves with a wide range of stakeholders . . ." and the attorney owes duties beyond those that she owes her client.[72] So, while Red Corp.'s attorneys guard against legal and other risk, Green Corp.'s attorneys' duties are broader and more amorphous.

Corporate law is key to understanding both attorneys' obligations. In the case of conflict among members of Red Corp.'s control group, for example, the lawyer is to follow the rules governing the relative authority of constituents to know to whom she should defer.[73] And, should the highest authority within the client corporation insist on acting in a way that is counter to the purpose of the corporation—the promotion of shareholder interests—the attorney should resign the representation.[74] The shareholders themselves may fall within the corporation's "duly authorized constituents"[75] if the client's governing documents or governing law require that the shareholders approve a particular matter, particularly in closely held corporations. Corporate law, the client corporation's governing documents, and the nature of the client corporation all determine a corporation's attorney's course of action.

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67. Simon, *supra* note 6, at 1455–57.

68. *See also* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 11 AM. B. FOUND. RES. J. 613, 626 (1986).

> The client's autonomy should be limited by the law, not by the lawyer's morality. And if "the law" is manipulable and without clear limits on client conduct, that aspect of the law should be available to the client. If moral limits are not provided by the law and are not imposed by the lawyer, their source will be where it ought to be: the client.

Id.

69. *See* Joseph Pileri, *Uncharted Waters? Legal Ethics and the Benefit Corporation*, 8 ST. MARY'S J. LEGAL MAL. & ETHICS 180, 183–86 (2017).

70. *Id.* at 183.

71. *Id.*

72. *Id.* at 186.

73. *See* Simon, *supra* note 34, at 75–77.

74. *Id.* at 80.

75. *See* Darian M. Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 ALA. L. REV. 181, 211–12 (2004).

In the case of both Green Corp. and Red Corp., the lawyer will define the client as the organization. Though the identity of the client will not differ between the two, corporate law will affect who speaks for each corporation and set the bounds of the attorney's role. This leads to certain obligations that arise in the event that the client is ignoring or subverting its chosen purpose. The outcome of the obligation to protect these constituents' interests is explored in several specific situations below.

B. Nonprofit Lawyers

Attorneys have a unique set of obligations when representing nonprofit and charitable organizations. Rather than promoting the interests of shareholders, nonprofit charities exist to further a charitable purpose.[76] Nonprofit directors owe a duty of obedience to carry out the organization's stated mission.[77] Unlike corporations, nonprofit organizations are not accountable to their beneficiaries; the state rather than the beneficiaries plays the central role in ensuring that these organizations are complying with their stated purpose.[78] The duty of obedience exists to supplement the duties of care and loyalty and to hold charitable directors to their organizational purpose.[79]

The duty of obedience informs the nonprofit attorney's obligations much in the way fiduciary duties inform the corporate attorney's work. The nonprofit attorney must take the mission of her client as defined by the organization's governing documents into account when defining her duties.[80] The attorney's commitment to their nonprofit clients requires that she work on behalf of that mission.[81] She must also be mindful that the nonprofit organization has no owners and that its beneficiaries have no direct role in monitoring the organization's activities. Because this role is delegated to the state and federal governments, the nonprofit attorney must advise her client in the context of those regulatory schemes.[82] The government defines how the organization may further its purpose and the risk for failing to do so, both of which factor into the attorney's obligations.

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76. RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 1.01 (AM. LAW INST., Tentative Draft No. 1, 2016).

77. David S. Walker, *A Consideration of an LLC for a 501(C)(3) Nonprofit Organization*, 38 WM. MITCHELL L. REV. 627, 660 (2012). *But see* RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 305 (AM. LAW INST., Tentative Draft No. 1, 2018) (allowing directors to amend governing documents and mission statement from time to time).

78. Simon, *supra* note 34, at 112–13.

79. Lumen N. Mulligan, *What's Good for the Goose Is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 MICH. L. REV. 1981, 1985 (2007).

80. Paul R. Tremblay, *The Ethics of Representing Founders*, 8 WM. & MARY BUS. L. REV. 267, 334–35 (2017); Walker, *supra* note 77, at 660.

81. Walker, *supra* note 77, at 660.

82. *See* Simon, *supra* note 34, at 112–13.

C. Government Lawyers

Lawyers for the government similarly draw from the legal framework in which their clients operate. Government lawyers not only have clients who serve the public interest, but these attorneys are to represent the public interest themselves.[83] The role that government attorneys play has often been described as that of "gatekeeper": attorneys use their position "to halt malfeasance by decisionmakers and prevent harm to . . . third parties"[84] and promote the public interest.[85] As gatekeepers, government lawyers should recognize that they have a higher obligation than their colleagues to represent the public interest.[86] Government attorneys, therefore, balance their obligations to their clients against this mandate to not cause harm to the public.

Defining the client's identity is a difficult task for the government lawyer. The government lawyer is usually employed by and reports to individuals within executive agencies, who are under the ultimate control of the executive, but tasked with executing laws passed by the legislature, all of whom are ultimately accountable to the public. The Federal Bar Association has held that the particular agency that employs the attorney is the proper articulation of client identity.[87] However, government lawyers are also said to represent the public interest.[88] The attorney must, therefore, keep in mind the larger structures of government, including checks and balances among the branches and the agency's role within that structure.[89] This requires that the government attorney carry out her work "in a manner that is not clearly inconsistent with lawful requirements[,]" a duty that goes above and beyond those of private attorneys.[90]

Government lawyers face certain obstacles when deciphering their ethical duties—namely, that ethical rules are designed primarily for litigators in the private bar[91] and that the definition of "the public interest" is difficult to define.[92] These attorneys must "identify the public interest in regard to the particular legal problems faced by them in their work as government attorneys."[93]

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83. *See* Berenson, *supra* note 20, at 789.

84. Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1411 (2008).

85. *Id.* at 1412.

86. *See* Berenson, *supra* note 20, at 794.

87. Honorable Charles Fahy, *The Government Client and Confidentiality: Opinion 73-1*, 32 FED. B.J. 71, 72 (1973).

88. *See* Berenson, *supra* note 20, at 789.

89. Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1056–62 (2007).

90. Jeffrey Rosenthal, *Who is the Client of the Government Lawyer?*, *in* ETHICAL STANDARDS IN THE PUBLIC SECTOR 28 (Patricia E. Salkin ed., 2d ed. 2008).

91. Clark, *supra* note 89, at 1038.

92. Berenson, *supra* note 20, at 814.

93. *Id.*

II. INTERPRETATIONS OF SPECIFIC OBLIGATIONS REFLECT LAW GOVERNING CLIENT ORGANIZATIONS

As a result of the interplay between substantive law and legal ethics, attorneys may have different professional responsibility obligations depending on the identity of their client. Substantive law can aid attorneys in answering the following questions: How strong or weak are confidentiality obligations? Are there situations in which an attorney can or may report client activity without violating confidentiality, and to whom? What is the scope of advice that the attorney is required to give? Might the attorney be liable to nonclient third parties for client activity? The following sections attempt to answer those questions for attorneys representing corporations, nonprofit organizations, and government agencies; later sections draw on that analysis to interpret attorneys' obligations when representing benefit corporations.

A. Confidentiality and Reporting

Chief among any lawyer's obligations is the duty to retain client confidentialities.[94] Model Rule 1.6 states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [this rule]."[95] Although all attorneys are bound by confidentiality, attorneys balance their confidentiality obligations against the law governing their client organization. As a result, confidentiality protections may be stronger or weaker depending on the identity of the client.

In the organizational context, any information the attorney receives will come from individuals; it is, therefore, important that both the attorney and the person divulging information understand when those communications are confidential and with whom information relayed can be shared. Those within the client's "circle of confidentiality" may share confidential information with the corporation's attorney themselves, for example, without entering into an attorney-client relationship, and an attorney is then free to share that information within that circle.[96]

Confidentiality concerns are of particular interest for attorneys who identify constituents acting unlawfully or in a way that violates the organization's legal purpose. If a corporate client's purpose is defined as furthering the interests of its shareholders, it is necessary to ask what obligations an attorney has if she

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94. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

95. *Id.*

96. Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 874–76 (1998). Over time, the circle of confidentiality has expanded from communications made under conditions of secrecy to "anyone within the corporate structure whose duties related to the issues upon which the attorney was asked to render legal assistance." *Id.*

knows or believes that one of her client's officers or directors is violating one of their duties to the client's shareholders. Model Rule 1.13 generally provides procedures for an attorney who:

> knows that an officer, employee or other person associated with the organization is engaged in action . . . that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.[97]

The lawyer first *shall* refer the matter to the highest authority in the organization "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so[.]"[98] If that authority fails to act, in certain circumstances, the lawyer *may* reveal the information to a third party even though such revelation would otherwise violate the prohibition against disclosing confidential information.[99]

The Sarbanes-Oxley Act of 2002 (SOX),[100] passed in the wake of the Enron scandal, adds additional reporting requirements for attorneys that come under the SEC's jurisdiction (generally, those representing publicly traded companies).[101] SOX rules add to, rather than preempt, state ethical duties.[102] SOX places two requirements on attorneys who identify certain material violations: (1) disclosing confidential information regarding material violations of law to persons of authority within the client corporation (reporting up); and (2) disclosing such information outside the corporation under certain circumstances (reporting out).[103] The rules promulgated under SOX first require that attorneys who "become[] aware of evidence of a material violation by the

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97. MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 2018).

98. *Id.*

> Rule 1.13 . . . despite its mandatory language, contains a number of important limitations and qualifications (or should we say loopholes) that give lawyers wide discretion, making enforcement difficult. These include: (1) the actual knowledge standard as the trigger for the lawyer's duty; (2) a definitive "violation" rather than evidence of a violation or a potential violation; (3) the requirement that the violation be "related to the representation;" (4) the requirement that the violation "is likely to result in substantial injury" rather than simply being "material;" (5) the requirement that the substantial injury be "to the organization," ignoring the situations in which only third persons are harmed by the illegality; (6) the exception to the reporting up duty if the lawyer "reasonably believes that it is not necessary in the best interests of the organization to do so;" and (7) the limitation that lawyers need to report to the "highest authority" only "if warranted by the seriousness of the matter."

Cramton et al., *supra* note 21, at 739 (citations omitted).

99. MODEL RULES OF PROF'L CONDUCT r. 1.13(c) (AM. BAR ASS'N 2018).

100. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codifed as amended in scattered sections of 15 U.S.C.).

101. *See generally* Cramton et al., *supra* note 21, at 727–28, 740–51 (discussing when an attorney is "'appearing and practicing' before the SEC").

102. *See id.* at 788–92.

103. 15 U.S.C. § 7245 (2006).

issuer . . . report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer."[104] Should the attorney "reasonably believe[] that the chief legal officer . . . has [not] provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to" the client's board's audit committee, another appropriate committee, or the board of directors itself.[105] These constitute the attorney's reporting up duties. The attorney may also reveal evidence of material violations to the SEC without the client's permission should the attorney reasonably believe it necessary to prevent the client from committing a material violation that is likely to cause substantial injury to the financial interest or property of the client or investors, or to rectify the consequences of such a material violation.[106] These constitute the attorney's optional reporting out procedures.

In order to satisfy their ethical obligations in the event of a breach of a duty to a shareholder, attorneys must understand whether fiduciary violations fall within the definition of activities that trigger obligations under either the Model Rules or SOX. But, before getting to that question, the attorney must first make a determination that there is a breach at all. Identifying a breach of fiduciary duty is difficult. It is accepted that the attorney's presumption of deference to corporate management is overcome when the manager is engaging in activity that either is illegal or threatens the corporation with serious harm.[107] However, the business judgment rule provides directors with a significant safe harbor when making corporate decisions.[108] Absent clear ethical guidelines, the lawyer's judgment determines whether breaches of fiduciary do or should trump confidentiality.[109]

The Model Rules provide no such guidelines. Under Model Rule 1.13, the attorney must know of a violation before she has the discretion to report.[110] She must be certain that the behavior in question is a violation of fiduciary duties before bringing that behavior to the board or other appropriate person.[111] The attorney should feel confident that a claim based on these actions will overcome the business judgment rule—a very difficult standard.[112] This is perhaps imaginable in a *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* situation

104. 17 C.F.R. § 205.3(b)(1) (2018).

105. *Id.* § 205.3(b)(3). Alternatively, the lawyer may report this evidence to a qualified legal compliance committee should the client corporation have created such a committee. *Id.* § 205.3(c).

106. Id. § 205.3(d). The attorney may also report evidence of a material violation to the SEC to prevent the client from committing perjury or other fraud. *Id.*

107. Regan, Jr. & Hall, *supra* note 66, at 2021–29.

108. *See* Hanson, *supra* note 59, at 1356.

109. *See* Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 453–54 (2005).

110. MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (AM. BAR ASS'N 2018).

111. *Id.*

112. *See* Hanson, *supra* note 59, at 1356.

in which the board is preparing to reject the highest offer in a competitive bid for the sale of the company.[113] Outside of *Revlon*, however, instances in which an attorney is positive that a fiduciary duty is being breached may be rare.[114]

Assuming that the attorney is confident that a breach of fiduciary duty is occurring, she then must determine whether such a breach constitutes "a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization[.]"[115] Courts and scholars who have considered this question have mostly found that a breach of fiduciary duty is not a violation of law, though this is far from settled. In *Santa Fe Industries, Inc. v. Green*, a majority shareholder forced the buyout of minority shareholders for a price that the minority felt was far below market value.[116] Minority shareholders brought a lawsuit against the majority shareholder alleging that a breach of fiduciary duties to the minority violated federal securities laws.[117] The Supreme Court found that a breach of the duty of fair dealing to minority stockholders by itself did not fall within the definition of "fraud and deceit" and rejected the minority stockholder claim under securities laws outlawing "fraud and deceit."[118] As applied to fiduciaries generally, most states do not permit an attorney to disclose a breach of fiduciary duty to the beneficiary on grounds that to do so would violate attorney-client confidentiality.[119] Breaches of fiduciary duty are therefore outside the traditional understanding of "lawlessness" that

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113. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986) (holding that once a company is in a competitive bidding situation and sale of the company is inevitable, the board is obligated to accept the highest price for the shareholders). Though the ruling in *Revlon* applies only in a narrow set of circumstances, it is often referenced to support the notion that Delaware corporate law requires corporate management to favor the economic interests of its shareholders above all other concerns. *See, e.g.*, Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 133–34 (2016); P.M. Vasudev, *The Stakeholder Principle, Corporate Governance, and Theory: Evidence From the Field and the Path Onward*, 41 HOFSTRA L. REV. 399, 419 (2012).

114. Ethan G. Stone, *Business Strategists and Election Commissioners: How the Meaning of Loyalty Varies with the Board's Distinct Fiduciary Roles*, 31 J. CORP. L. 893, 898–99 (2006) ("It is very difficult to prove that a fiduciary acted for an improper purpose. Courts have, accordingly, identified objective conflicts of interest that cast enough doubt on a fiduciary's motives to establish a 'per se' case for breach without any need to convince the judge of the fiduciary's actual state of mind.").

115. MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (AM. BAR ASS'N 2018).

116. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 465–67 (1977).

117. *Id.*

118. *Id.* at 471–74. Some states have held that a breach of fiduciary duty is itself a form of fraud. *See, e.g.*, Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 487–88 (Ky. 1991).

119. *See* Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469, 489 (2011). Washington does allow attorneys to disclose information about a breach of fiduciary duty to beneficiaries of court-appointed fiduciaries. *Id.* at 492.

trigger reporting duties, and attorneys generally limit those triggers to violations of criminal and regulatory laws.[120]

The general lack of inclusion of a breach of fiduciary within the triggering activities of Model Rule 1.13 is seemingly at odds with the "Framework of Dealing" conceptualization of client identity. Shareholder primacy says that duties to shareholders—the corporation's primary beneficiaries—are supremely important under corporate law.[121] If the attorney ultimately owes a duty to the laws and norms governing her client, a violation of those duties should be of utmost importance. The "Framework of Dealing" would, therefore, require attorneys to interpret Model Rule 1.13 to report up any known fiduciary violations. Is this not a potential injury to the corporation itself, which exists to further the interests of its beneficiaries? Not including violations of fiduciary duties among the activities that lawyers must report up would be to put the interests of individual directors, officers, or whoever else benefits from the volatile act over the interests of the corporation's shareholders.[122]

The attorney's obligations under SOX in the event of a fiduciary violation are clearer. Under the regulations implementing SOX, a "material violation" includes "a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law."[123] This provision was added to specifically address the perception, arising from *Santa Fe Industries*, among others, that state ethical rules did not require attorneys to report breaches of fiduciary duty.[124]

When representing a publicly traded company, the attorney will have to undertake the analysis of whether behavior amounts to a breach discussed above. However, under SOX, the attorney only needs "evidence," rather than knowledge, of such a breach, and once the attorney has such evidence, she is required to report it up the corporate ladder.[125] For attorneys representing public

120. Simon, *supra* note 6, at 1465. On the other hand, Rutherglen argues that attorneys for a closely held corporation are required to act to protect the interests of shareholders, including reporting breaches of fiduciary duties. *See* Rutherglen, *supra* note 15, at 163–64. Model Rule 1.6 permits attorneys to disclose information

> to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services [or] to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services[.]

MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3) (AM. BAR ASS'N 2018).

121. Smith, *supra* note 58, at 278.

122. Simon, *supra* note 14, at 511.

123. 17 C.F.R. § 205.2(i) (2018). "*Breach of fiduciary duty* refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions." *Id.* § 205.2(d).

124. Cramton et al., *supra* note 21, at 806 n.319.

125. 17 C.F.R. § 205.3(b)(1).

corporations or otherwise practicing before the SEC,[126] it appears that the attorney has no choice but to report evidence of breaches of fiduciary duty to the chief legal officer or board of directors, though she has discretion over whether to report such evidence to the SEC.[127] These requirements reflect the seriousness which with Congress and the SEC view violations of fiduciary duty. Under SOX, these violations are on par with other unlawful activities and merit that confidentiality be overridden to protect shareholders.

A final question for attorneys is whether, if the attorney may report a breach of fiduciary duty up the corporate ladder, she may also report that breach to shareholders. Under the Model Rules, again, it is not clear that attorneys have any reporting obligations in the event of a breach of fiduciary duty and, even if they do, the standard for reporting them is high and the attorneys retain discretion to do.[128] Nonetheless, should an attorney feel confident that a breach is happening and feel obligated to report that breach, Model Rule 1.13 allows for disclosure to shareholders in certain situations.[129] In closely held corporations, for example, shareholders are limited to a small, definable class which retains the ability to make decisions within the company.[130] Disclosure of a breach to them, then, comports with Model Rule 1.13's call to report to the "highest authority that can act on behalf of the organization as determined by applicable law."[131] In corporations where the shareholders' ability to direct corporate action is more limited than in a closely held corporation, disclosure beyond the board of directors would likely be prevented by Model Rule 1.6.[132] The attorney must, therefore, evaluate the breach in the context of the structure

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126. *See* Cramton et al., *supra* note 26, at 740–51 (discussing when an attorney is "'appearing and practicing' before the SEC").

127. *Id.* at 751–52, 764, 786–87.

128. MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 2018).

129. *Id.*

130. Rutherglen, *supra* note 15, at 163–64.

131. MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (AM. BAR ASS'N 2018).

132. Miriam P. Hechler, *The Role of the Corporate Attorney within the Takeover Context: Loyalties to Whom?*, 21 DEL. J. CORP. L. 943, 959–60 (1996) .

> Rule 1.13 appears to restrict attorneys from disclosing fiduciary violations to shareholders, arguably the constituency most deserving of protection in takeover situations. The Rule stresses that the attorney should move cautiously 'in the best interest of the organization,' minimize any 'disruption,' and reduce the risk of revealing information to 'persons outside the organization. The text does not clarify whether shareholders are considered persons 'outside the organization.' The Rule goes on to say, however, that the attorney may reveal misconduct to 'the highest authority that can act on behalf of the organization.' As shareholders lack the authority to act on behalf of the corporation, this language would appear to preclude disclosure to shareholders. Thus, under the current framework, 'the strongest action a lawyer may take is to resign, but resignation must be triggered by harm to the corporation, not to third parties.' The Rule fails to state with clarity whether shareholders are to be considered the attorney's 'client' or mere third parties.

Id.

of her client organization and decide whether confidentiality requirements trump her ability to report potential violations of law. Given that confidentiality is not discretionary, while reporting is, and given the difficulties in identifying when a breach of fiduciary duty would be reportable at all, it is unlikely the rules permit, much less require, disclosure of fiduciary violations to shareholders in most situations other than in closely held corporations where there is unity between management and ownership.[133] SOX, on the other hand, limits its reporting obligations and options to certain officers and directors of the client and the SEC.[134] This perhaps makes sense in the context of public companies: shareholder disclosure would be nearly tantamount to public disclosure.[135] Overwhelmingly, confidentiality protections are strict in the traditional corporate context.

When representing a nonprofit organization, attorneys balance confidentiality obligations against their client's charitable mission. Though a failure to further its mission would certainly be a violation of organizational purpose, a failure to further the nonprofit organization's mission is distinct from a breach of fiduciary duty. Unlike corporate law, nonprofit organizations' missions are policed by state attorneys general and the Internal Revenue Service (IRS) rather than owners or beneficiaries of the organization.[136] Breaches of duties, the failure to diligently pursue a charitable mission, and deviations from the nonprofit organization's lawful mission are all subject to enforcement actions by both the IRS and state attorneys general.[137] Corporate law, on the other hand, leaves enforcement of corporate duties to shareholders.[138] Failure to promote the mission should fall within the traditional set of unlawful behaviors that trigger Model Rule 1.13 responsibilities, though there is little case law and few examples of this. Because the failure to further a charitable mission is a violation of state and federal law, there are more onerous reporting requirements on nonprofit and tax-exempt organizations than are required of corporations, particularly those that are privately held.[139] The New York State Attorney General's 2018 lawsuit against the Donald J. Trump Foundation, for example, accused the charity of "persistent violation[s] of state and federal law," including "improper and extensive political activity, repeated and willful self-dealing transactions, and failure to follow basic fiduciary obligations or to implement

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133. *See generally* Paul J. Sigwarth, Note, *It's MY Privilege and I'll Assert It If I Want to: The Attorney-Client Privilege in Closely-Held Corporations*, 23 J. CORP. L. 345 (1998) (discussing closely-held corporations and attorney-client privilege).

134. *See* Rutherglen, *supra* note 15, at 141; Cramton et al., *supra* note 21, at 728, 740.

135. Rutherglen, *supra* note 15, at 160.

136. Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J. L. & PUB. POL'Y 1, 11, 13, 17 (2009).

137. *Id.* at 13, 18.

138. *Id.* at 37.

139. *See, e.g.*, 26 U.S.C. § 6033 (2012); CAL. GOV. CODE §§ 12586, 12587 (Deering 2018); CAL. CODE REGS. tit. 11, §§ 301–307, 311, 312 (2018).

even elementary corporate formalities required by law."[140] The state's role in regulating charities, and the reporting requirements placed on charities, obviate much of the concern that animates attorney reporting duties under SOX, and attorneys are permitted to exercise their reporting authority under the Model Rules on the grounds that violating the mission is a clear violation of law.

Government attorneys similarly balance confidentiality obligations against furthering the public interest. The public nature of government lawyering requires that confidentiality be limited.[141] The ABA explicitly contemplated this when drafting the Model Rules, saying in a comment: "[W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved."[142] The Model Rules contain explicit disclosure requirements for prosecutors.[143] Whistleblowing protections meant to protect government workers from retaliatory firing after reporting unlawful or inappropriate behavior apply to government lawyers.[144] Statutes also create reporting requirements for lawyers who identify misconduct or violations of law within their agency.[145]

Government attorneys struggle separating behavior that is harmful or counter to the public interest from activity with which they disagree. These rules intentionally exclude matters that are not unlawful but which the lawyer nonetheless disagrees with as a matter of policy. In order to eliminate the need for the attorney to use her own moral or political judgment about the public interest to guide her reporting obligations, the rules define reporting obligations in the specific instances mentioned above rather than define what the public interest is.[146] These rules provide that the lawyer can report violations of law,

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140. Petition for the Petitioner at 1, People v. Trump, 88 N.Y.S.3d 830 (N.Y. Cty. 2018) (No. 541130/2018).

141. Clark, *supra* note 89, at 1046–47 (discussing how Freedom of Information Act and other federal statutes require disclosure of government documents unless there is a good reason to prohibit the disclosure).

142. MODEL RULES OF PROF'L CONDUCT r. 1.13 cmt 6 (AM. BAR ASS'N 2018).

143. MODEL RULES OF PROF'L CONDUCT r. 3.8(g) (AM. BAR ASS'N 2018).

144. Robert T. Begg, *Whistleblower Law and Ethics*, *in* ETHICAL STANDARDS IN THE PUBLIC SECTOR 224 (Patricia Salkin ed., 2d ed., 2008). *But see* Jessica Wang, *Protecting Government Attorney Whistleblowers: Why We Need an Exception to Government Attorney-Client Privilege*, 26 GEO. J. LEGAL ETHICS 1063, 1063 (2013) (arguing that clarification is needed when it comes to the roles and responsibilities of government attorneys who must honor the attorney-client privilege and reveal fraudulent activity in the government to further the public interest).

145. Begg, *supra* note 144, at 221–22.

146. Berenson, *supra* note 20, at 805.

> However, it is not necessary for lawyers to be able to identify such a grand, overarching conception of the public interest in order for them to serve the public interest in their role as government attorneys. Rather, lawyers only need to be able to identify the public interest in regard to the particular legal problems faced by them in their work as government attorneys.

Id. at 814.

but the lawyer would be violating confidentiality if she were to report things that she merely thinks are counter to the public interest.[147]

B. Scope of Advice

Ethical rules also govern the scope of advice that an attorney is required to give her client.[148] Attorneys generally advise their clients on "the means by which the client's objectives are to be accomplished."[149] The Model Rules say that the lawyer must provide her client with the information the client (or the decision-makers within the client in the case of organizational representation) requires to act.[150] An attorney's advice must also be aimed at helping the client fulfill its statutorily mandated objective.[151]

While attorneys are not in an attorney-client relationship with a client corporation's shareholders,[152] directors' fiduciary duties require that attorneys advise corporate clients in such a way as to protect shareholder interests.[153] For attorneys to disregard this information would be to deprive directors of necessary information and potentially participate in harming shareholders. Corporate law has traditionally required that management exercise its discretion to manage the corporation on the basis of adequate information and with appropriate deliberation.[154] The attorney, then, works to ensure that her client's decision-makers have adequate information (either from her or from some other source), that the decision-makers duly deliberate, and that the aforementioned review of information and deliberation is adequately documented.

Under the Unary Model, we would expect that attorneys be required to advise corporate decision-makers on the effects of corporate action on shareholders, but the effects on other constituents and stakeholders to be outside the ambit of required legal advice. Model Rule 2.1 seems to agree, stating that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations

147. Begg, *supra* note 144, at 222–23.

148. MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2018).

149. *Id.*

150. MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2018); *see also* Simon, *supra* note 14, at 501 ("[U]nder traditional fiduciary principles, the lawyer's disclosure duties are defined in terms of materiality; the fiduciary should disclose information the client needs or wants to make decisions.").

151. That is not to say that the attorney must ensure that the client meets that objective. Model Rule 1.16 provides that the attorney is to resign the representation if "the representation will result in violation of the Rules of Professional Conduct or other law[.]" MODEL RULES OF PROF'L CONDUCT r. 1.16(a) (AM. BAR ASS'N 2018).

152. Hechler, *supra* note 132, at 958 ("[A]n attorney representing a fiduciary owes a duty of responsibility to his client only, and not to the fiduciary's intended beneficiary.").

153. Rutherglen, *supra* note 15, at 153. "The fiduciary obligations of managers impose constraints on the legal position that the attorney for the organization can reasonably take on their behalf. The attorney must act reasonably to protect the interests of shareholders or other constituents of the organization to whom management owes fiduciary obligations." *Id.*

154. David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 243–44 (1991).

such as moral, economic, social and political factors, that may be relevant to the client's situation."[155] We can imagine a state in which management's only affirmative mandate in a competitive takeover situation is to maximize value to shareholders. What is the scope of advice that the attorney must give to a client in this situation? The attorney should inform her client that the law requires the board to accept the higher offer and the consequences of not doing so. The attorney would be wise to see to it that the board of directors has reviewed information about compensation to shareholders and that that review is well documented. The attorney could also see to it that, in approving and rejecting the various offers, the board cites information about value to shareholders in its decision.[156] Only after having accomplished those tasks has the attorney satisfied her professional obligations, even if the client board violates its fiduciary duties and decides to reject the highest takeover offer.[157] The lawyer may advise the board on the effects of the takeover on other constituents, but the law does not require that decision-makers consider those effects in this narrow situation. The lawyer's advice on those matters would be superfluous to the client's decision.

Ethical rules, again, do not stand alone. Corporate law and other considerations may require, either expressly or by implication, that attorneys advise clients on the effects of corporation actions on nonshareholder stakeholders. To the extent the law requires decision-makers to consider nonshareholder stakeholders, however, the attorney's duties dictate that her advice must encapsulate those stakeholders under the same logic. Constituency director duty statutes are statutes that sought to protect directors who consider stakeholders beyond shareholders in their decision-making without giving guidance on how to do so.[158] Consider the attorney advising the Connecticut client facing a takeover offer before 2010.[159] The board of directors is under no

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155. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

156. These are, to put it mildly, a gross simplification of the role an attorney plays in counseling a client through a takeover. In many transactions, lawyers draft a "fairness opinion" that explains the methods by which a party to a transaction arrived at a valuation and that, based on the assumptions taken into account when making that valuation, the price paid in the transaction is fair. *See, e.g.*, *Amended and Restated Certificate of Incorporation of Laureate Education, Inc., A Public Benefit Corporation*, SEC A-36 § 11 (Jan. 2017), https://www.sec.gov/Archives/edgar/data/912766/000104746917000434/a2230757zex-3_1.htm.

157. In the takeover context, the attorney gives information to corporate decision-makers that allows them to protect themselves from future liability, including liability to shareholders for breaches of fiduciary duty. *See* Hechler, *supra* note 132, at 946. The attorney helps create a process that validates the board's deliberation process. *Id.* Finally, the attorney advises the client on how to strategically meet its objectives—one of which is to maximize value for the shareholders. *Id.* In doing so, the attorney helps to ensure that boards of directors carry out the shareholders' best interests.

158. Millon, *supra* note 154, at 225 n.8.

159. Nathan E. Standley, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 215–16 (2012). In 2010, Connecticut's constituency statute was changed from requiring that "a director of a corporation . . . *shall* consider, in determining what he

obligation to choose the path that maximizes value to the shareholders, provided that the board can document that it reviewed and deliberated on other relevant information.[160] Who, other than lawyers, are tasked with counseling decision-makers on how to satisfy that burden? The attorney should provide the board with that information, or at least document that the board has reviewed such information. Advising clients on issues contemplated by Model Rule 2.1 seems unlikely to be discretionary in these cases. The scope of advice will necessarily expand and encapsulate these considerations.

Outside clear situations like these, attorneys choose to exercise the discretion found in Model Rule 2.1 for a variety of reasons.[161] Of course, to the extent that "moral, economic, social and political factors" could give rise to claims against a client by third parties or government regulators, the attorney should be sure to include that information in her advice. Lawyers who monitor client exposure to tort claims and enforcement actions must educate themselves and counsel clients about the effects of corporate behavior on a large number of stakeholders and others.

Lawyers also increasingly concern themselves with issues that, while they do not present an immediately identifiable legal risk, pose business risk for their clients. Enterprise risk refers to financial, strategic, operational, and other risks.[162] Though not purely a question of legal risk, attorneys are incorporating advising on enterprise risk into their scope of work.[163] Lawyers similarly advise clients on so-called soft norms around issues like international human rights. The United Nations Guiding Principles on Business and Human Rights (Guiding Principles) are a nonbinding statement of suggested policies for states and businesses around the world to integrate respect for and protection of human rights into business practices.[164] The Guiding Principles explicitly call for companies to "[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue."[165] Attorneys should elevate gross violations of human rights to the same level of other identifiable legal risks without first

reasonably believes to be in the best interests of the corporation" a litany of interests to stating that a director "may" consider those interests "in determining what he reasonably believes to be in the best interests of the corporation." *Id.* Before 2010, Connecticut was the only state with a constituency statute that included this mandatory language. *Id.* at 216.

160. *Id.* at 212–16. *See generally Norfolk S. Corp. v. Conrail, Inc.*, No. Civ.A 96-7167, 1997 WL 33463657, at *6 (E.D. Pa. Jan. 09, 1997).

161. *See generally* Regan, Jr. & Hall, *supra* note 66, at 2027–30 (discussing how attorneys conceptualize and advise clients on business risk).

162. Margaret Rouse, *Enterprise Risk Management (ERM)*, SEARCHCIO, http://searchcio.techtarget.com/definition/enterprise-risk-management (last visited Oct. 3, 2018).

163. Regan, Jr. & Hall, *supra* note 66, at 2024, 2030 (discussing how attorneys conceptualize and advise clients on business risk).

164. U.N. Human Rights: Office of the High Commissioner, Guiding Principles on Business and Human Rights 1 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciples BusinessHR_EN.pdf [hereinafter Guiding Principles].

165. *Id.* at 25.

identifying an enforcement mechanism, essentially requiring attorneys to advise their clients on whether they are engaging in and how to prevent violations of human rights norms.[166] The American Bar Association endorsed the Guiding Principles, and in doing so noted that the Guiding Principles' baseline of conduct may touch on the discretionary issues on which Model Rule 2.1 grants attorneys the ability to advise clients.[167]

Lawyers therefore already gather information about the social, economic, and political impact of corporate action.[168] Under the ethical rules, however, absent a requirement that corporate officers and directors must take those factors into consideration, there is no reason flowing from corporate law that the attorney has to counsel a client on these issues when doling out legal advice to client corporations.

Nonprofit lawyers will necessarily refer to moral, economic, social, and political factors, as those are key to a director's ability to satisfy her duty of obedience. Surely a church director must consider the impact of her decisions on her parishioners, or a soup kitchen director the impact of decisions on the community her organization serves. The lawyer, who owes a duty to the organization's mission above any duty to its individual constituents,[169] should see to it that her nonprofit client's decision-makers have sufficient information to determine whether they are in fact fulfilling the organization's mission.

Government attorneys will also refer to the political consequences of client action when advising their government agency clients. Political here refers not just to the electoral implications of government actions but to the client agency's place within the government structure and the impact of government action vis-à-vis other branches of government and within its client's own branch.[170] Government attorneys do not just advise policy makers; they often participate in the creation of policy itself.[171] This blurred status requires that attorneys pay attention to and advise their clients on the implications of their actions on the public and not merely the legality of government action.[172]

C. Attorney Liability

After considering lawyers' obligations under ethical rules, it is next necessary to assess the possibility of attorneys being held liable by beneficiaries of organizational clients and other third parties for claims based in a violation of

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166. *Resolution*, ABA, CTR. FOR HUM. RTS. 13, https://www.americanbar.org/content/dam/aba/administrative/human_rights/hod_midyear_109.authcheckdam.pdf (last visited Dec. 1, 2018).

167. *Id.* at 1, 5 n.16.

168. *See* Regan & Hall, *supra* note 66, at 2024–30 (discussing that legal counsel regarding "business risk" is distinct from the risk of legal liability).

169. Joseph Anthony Valenti, *Know the Mission: A Lawyer's Duty to a Nonprofit Entity during an Internal Investigation*, 22 ST. THOMAS L. REV. 504, 517–20 (2010).

170. Rosenthal, *supra* note 90, at 32.

171. *See* Clark, *supra* note 89, at 1066–69.

172. *Id.* at 1062; Rosenthal, *supra* note 90, at 32.

that organization's legal purpose. Despite not being in an attorney-client relationship with third parties, third parties may bring malpractice actions against lawyers in some situations.[173]

Attorneys' third-party liability for claims based in corporate law in the corporate context is well understood.[174] The Unary Model would suggest that shareholders may be able to sue attorneys for malpractice if the corporation takes actions that go against shareholder interests.[175] Conversely, attorneys should not be liable for claims arising under corporate law to nonshareholder constituents for harms caused to them by corporate action.

Attorneys can in fact be found liable to shareholders under two theories: aiding and abetting a breach of fiduciary duty and negligence.[176] States that have been confronted with the aiding and abetting theory of attorney liability have largely allowed a beneficiary to bring a claim against an attorney.[177] To bring these claims, shareholders need not show that the attorney owes the shareholder a duty arising from the attorney-client relationship.[178] Rather, it is sufficient to show that the attorney "knowingly and actively participates in the breach of fiduciary duties by another."[179] There are four elements of a successful aiding and abetting in a break of fiduciary duty claim against an attorney: (1) that there was a fiduciary duty owed; (2) that the fiduciary duty was breached; (3) that the lawyer was aware of the fiduciary relationship;[180] and (4) that the lawyer substantially assisted in her client's breach of the fiduciary duty.[181]

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173. *See* Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties – At What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 1–2 (1989).

174. Indeed, there is much case law and scholarship around lawyer liability to shareholders and other fiduciary beneficiaries and third parties in the corporate context. *See infra* Section II.C. The law remains undeveloped, and work needs to be done, on the potential of government and nonprofit attorneys being held liable to organizational beneficiaries and other third parties.

175. *See* Pileri, *supra* note 69, at 183–86 (discussing how an attorney owes a duty to shareholders through its duty to the corporation itself).

176. *See* Leonard E. Gross, *What Duties Does Corporate Counsel Owe to Minority Shareholders in a Closely Held Corporation*, 35 OHIO N.U.L. REV. 987, 996–1005 (2009) (discussing ways in which a lawyer can be held liable to a third party).

177. Brinkley Rowe, Note, *See No Fiduciary, Hear No Fiduciary: A Lawyer's Knowledge within Aiding and Abetting Fiduciary Breach Claims*, 85 FORDHAM L. REV. 1389, 1397 (2016) (noting that jurisdictions which have addressed aiding and abetting a breach of a fiduciary duty claims have accepted them as valid).

178. *See id.* at 1396–97 (discussing the four elements that generally must be met to bring a successful aiding and abetting claim, and noting that an attorney client-relationship between the third party and attorney is not required).

179. Katerina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 145 (2008) (quoting Stanley Pietrusiak, Jr., Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213, 241 (1996)).

180. *See* Rowe, *supra* note 177, at 1397–1412 (discussing various knowledge standards courts use in aiding and abetting claims).

181. Lewinbuk, *supra* note 179, at 151–53.

Aiding and abetting liability creates the possibility for lawyers to be held liable for behavior that otherwise complies with rules of professional conduct. If breaching a fiduciary duty to shareholders does not rise to the level of behavior that triggers attorney reporting requirements, as discussed above, the attorney may still find herself being sued by that shareholder for aiding and abetting her client board's action. Attorneys should, therefore, take potential breaches of fiduciary duty up the corporate ladder, even if they are not clearly fraudulent. If none of the persons with authority within a client takes action to remedy the breach, the attorney should consider firing the client to avoid risking liability herself.[182]

Negligence claims, on the other hand, can occur when the attorney breaches a duty to the nonclient third party.[183] According to the Restatement (Third) on the Law Governing Lawyers, lawyers may owe a duty of care to nonclient third parties who "rely on the lawyer's opinion or provision of other legal services," to whom the "client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient[,]" and when "the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient[.]"[184] Many courts have adopted this standard when adjudicating third-party claims against lawyers.[185]

Corporate lawyers risk being successfully sued for negligent representation by shareholders harmed by corporate misconduct.[186] When attorneys prepare legal opinions and other documents that will be read and relied upon by shareholders in making investments in a client company, attorneys may be liable to the extent that those statements contain misrepresentations.[187] Attorneys

182. At least one commentator feels that withholding information about an accounting report from an owner/director who is later the target of a freeze-out based on information in that accounting report will expose the attorney to liability for a breach of fiduciary duty to the owner/director under a joint-representation approach to organizational representation rather than an aiding-and-abetting theory. *See* Simon, *supra* note 34 at 72–73.

183. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (AM. LAW INST. 2000).

184. *Id.*

185. *See, e.g.*, PNC Multifamily Capital Inst'l Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 542–47 (Tenn. Ct. App. 2012); Hesser v. Cent. Nat'l Bank & Tr. Co. of Enid, 956 P.2d 864, 867 (Okla. 1998) ("[A] duty may be created by a contract which is made expressly for the benefit of a third-party non-client beneficiary when harm to the beneficiary is foreseeable." (citing Bradford Sec. Processing Servs., Inc. v. Plaza Bank & Tr., 653 P.2d 188, 190–91 (Okla. 1982))); Noble v. Bruce, 709 A.2d 1264, 1272 (Md. 1998) (stating that a nonclient "must allege and prove that the *intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship*" (quoting Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985))).

186. *See* Gross, *supra* note 176, at 996–1005.

187. *See, e.g.*, Greycas Inc. v. Proud, 826 F.2d 1560, 1564 (7th Cir. 1987) (finding an attorney owed a nonclient creditor a duty not to negligently misrepresent the status of the borrower's collateral); Mehaffy, Rider, Windholz & Wilson v. C. Bank Denver, N.A., 892 P.2d 230, 236 (Colo. 1995) (finding attorneys who issues legal opinion letters with the goal of inducing reliance of a nonclient liable for negligent misrepresentation); Petrillo v. Bachenberg, 655 A.2d 1354, 1361 (N.J.

ought to keep this standard in mind when preparing these documents. Is the attorney describing accurately and in good faith the effect of some action on shareholder value? If not, does that omission rise to the level of misrepresentation?

The law around attorney liability to third parties for claims grounded in corporate law reflects corporate law's acceptance of shareholder primacy. Shareholders, as the primary beneficiary of corporate activity, may sue attorneys when their clients fail to further their interests. Criminal or tortious behavior or regulatory violations can lead to attorney liability to shareholders and other parties.[188] So, while attorneys may find themselves liable to shareholders when corporate fiduciary duties are breached, liability to nonshareholder third parties will not be based in corporate law.[189]

It is now possible to revisit Red Corp.'s attorney's ethical obligations in more detail in two specific contexts: first, in the case that a fiduciary of Red Corp. is breaching a duty to Red Corp.'s shareholders and, second, in the case of a constituent engaging in behavior that is harmful to a nonshareholder stakeholder. In the first, the attorney has the option, though not the obligation, to raise her concerns up the chain of command within her client corporation. Confidentiality protects her from reporting this violation outside of the client corporation. If the company is publicly traded, however, the attorney must go up the ladder within the corporation if the violation is material and may ultimately report her concerns to the SEC.[190] She will advise her client on the legal and, perhaps, business risk of this violation. She may also be liable to shareholders for aiding and abetting the breach and, if she participated in crafting certain representations, liable to those shareholders for negligent misrepresentation as well.

Suppose, however, that Red Corp. is engaging in behavior that is harmful to some nonshareholder constituent—dumping waste in a nearby river, for example. If this activity is unlawful, the attorney's reporting options and obligations may be triggered. If it is not, the attorney is under no obligation to go up the chain of the company and confidentiality prevents her from reporting this activity externally. She will advise her client on the legal and business risks of this activity, to the extent they exist, but is not required to advise her client on the harmful effects of this behavior. If there is no criminal or civil liability associated with the dumping, there is no violation for the attorney to aid and abet. The attorney may find herself liable to third parties if they relied on

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1995) (finding an attorney to a land owner assumed a duty to a nonclient purchaser to provide reliable information regarding the land).

188. *See* Hazard, Jr., *supra* note 25, at 395–97 (discussing government enforcement action brought against a large law firm on the basis of misrepresentation).

189. *See id.* at 400.

190. *See* Kabir Ahmed & Dezso Farkas, *A Proposal to Encourage Up-The-Ladder Reporting By Insulting In-House Corporate Attorneys From Managerial Power*, 39 DEL. J. CORP. L. 861, 863–64 (2015).

statements by Red Corp. that Red Corp. is an environmentally responsible company when transacting with Red Corp., but those claims would not be grounded in corporate law.

The following sections explore these situations for the attorney representing Green Corp., suggesting that a change in corporate purpose should result in different ethical obligations for Green Corp.'s attorneys.

III. THE BENEFIT CORPORATION DEPARTS FROM TRADITIONAL CORPORATE LAW

In order to understand how the benefit corporation will affect a lawyer's ethical duties, it is first necessary to understand what benefit corporations are and what problem they were created to address. The benefit corporation's backers created the benefit corporation in response to the perception that purpose-driven work can be done by nonprofit organizations alone and that traditional corporate forms can conduct profit-driven work only.[191] To these advocates, corporate law, which requires that directors prioritize the interests of shareholders above all else, prevents corporations from pursuing a mission.[192] Benefit corporations are a response to two concepts found in corporate law: shareholder primacy specifically and private law generally. Benefit corporation legislation is designed to give founders and shareholders the ability to opt out of a private law regime and into a public law regime, as well as avoid onerous tax requirements and the prohibition on distributions to owners that limit charities' ability to conduct commercial activity.[193] In this next Section, I describe the motivation behind the benefit corporation and its major features.

A. What Were Benefit Corporations Enacted to Address?

Movements emerged over the last several decades that attempted to move corporate law, or at least corporate management practices, toward recognition of the effects of corporate behavior on society at large. The Corporate Social Responsibility (CSR) movement embraced the general principle that corporations have a responsibility to society at large.[194] Relatedly, progressive corporate law sought to broaden the focus of corporate law and recognize that the corporation is at its heart a "public institution with public obligations."[195] Progressive corporate law came to stand for "a loose term for a collection of proposals aimed at remaking corporate law to encourage processes and

191. *See generally* Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337 (2009) (noting the distinct boundaries between non-profit and for-profit corporations and discussing how this boundary has been rejected by social entrepreneurs in creating hybrid social enterprises).

192. *Id.* at 362; Clark, Jr. & Babson, *supra* note 50, at 825–38.

193. *See* Plerhoples, *supra* note 7, at 542–43 (describing the statutory requirement for public benefit corporations in Delaware).

194. Kelley, *supra* note 191, at 348–49.

195. MITCHELL, *supra* note 17, at xiii.

outcomes more beneficial to the interests of nonshareholders with significant stakes in a corporation's activities (*i.e.*, stakeholders)."[196]

In more recent years, a social enterprise movement also emerged. The social enterprise movement seeks to use commercial methods to solve societal problems traditionally associated with the charitable sector.[197] To backers of social enterprise, neither the traditional for-profit businesses nor charitable sectors were suited to tackling major social issues. On the one hand, the for-profit sector was too focused on maximizing profits over the short-term at the expense of nonshareholder stakeholders.[198] The charitable sector, on the other hand, faced too many regulations that limited the range of activities organizations could undertake to address social issues.[199]

Again, the doctrine of shareholder primacy holds that corporate fiduciaries must prioritize the interests of shareholders above those of all other stakeholders.[200] Shareholder interests are often defined as maximizing return on investment,[201] or at least economic interests.[202] Maximizing return on shareholder investment necessarily entails maximizing corporate profit.[203] These movements argued that corporate law came to be seen as a matter of purely private law that regulates the corporation's relationship with its shareholders, while other areas of law regulated the corporation's relations with stakeholders, such as employees or suppliers.[204] Because corporations represent the interests of their shareholders, founders lack a mechanism through which they can ensure that a business sticks to its mission as it grows. New investors will elect new directors who are not bound by the ideals and goals of the

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196. Page & Katz, *supra* note 16, at 1352.

197. *See id.* at 1353 ("'Social enterprise' is a loose term for businesses that aim to generate profits while advancing social goals."); *see also* Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 IND. L. REV. 621, 631 (2016) ("[S]ocial enterprises are businesses that make profits both for the benefit of the owners' compensation as well as the advancement of a specific social purpose or mission."); Plerhoples, *supra* note 5, at 225 ("According to Social Enterprise Alliance, Inc., a non-profit organization that promotes the goals of social enterprise, a social enterprise must '*directly* address an intractable social need and serve[ ] the common good, either through its products and services or through the number of disadvantaged people it employs.' For others, social enterprise means 'blended enterprise' or double or triple bottom line businesses—i.e., 'entit[ies] that intend[ ] to pursue profits and social good both in tandem and by making considered choices to pursue one over the other.'" (citations omitted)).

198. Page & Katz, *supra* note 16, at 1362.

199. *See id.*

200. Smith, *supra* note 58, at 277–78.

201. David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1018–19 (2013).

202. *Id.* at 1013.

203. *Id.* at 1018–19.

204. KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 42 (2006) (noting how contemporary corporate law doctrine overlooks the wellbeing of the corporation's employees).

corporation's founders.[205] This is precisely what happened with Etsy—following an initial public offering, shareholders replaced the company's board of directors and prevented Etsy from converting into a public benefit corporation.[206]

Tax-exempt organizations, on the other hand, face strict limits on their ability to engage in commercial activities,[207] have limited access to capital, and may not compensate executives and others in a way that competes with the for-profit sector.[208] Further, nonprofit organizations are prohibited from distributing profits to owners—a clear and insurmountable barrier to using profit-making enterprises to address social ills.[209]

As a result of these two doctrines, social enterprise boosters believed that traditional corporate forms were not suited to the task of social enterprise and that *new* corporate forms were required to implement the dual social enterprise mission.[210] These new forms could "reduce transaction costs for aspiring social entrepreneurs, provide them with conspicuous and inexpensive signals to potential supporters who share their social aims, shape preferences by enabling and encouraging prospective entrepreneurs to pursue broader social aims, and nudge controller and employee behavior in more other-regarding directions."[211] New forms would allow social entrepreneurs to embed a social mission into the organization's organizational documents and signal that mission to consumers, investors, and the public. These new entity forms that emerged are often referred to as double- or triple-bottom-line entities because they incorporate social and/or environmental outcomes in addition to financial results into their performance metrics.[212] Among those forms are the benefit corporation,[213] the low-cost limited liability company or L3C, special purpose corporation, and benefit limited liability company.[214]

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205. Kelley, *supra* note 191, at 359–60.

206. *See* Gelles, *supra* note 2.

207. "[C]haritable nonprofit organizations may nonetheless earn profits and engage in some commercial activity, although income earned from business activities that do not contribute importantly to the carrying out of the exempt purpose of the charity is subject to federal income tax." RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. § 1.01 cmt. f (AM. LAW INST., Tentative Draft No. 1, 2016).

208. Page & Katz, *supra* note 16, at 1362.

209. Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 685–86 (2013).

210. Page & Katz, *supra* note 16, at 1353.

211. *Id.* at 1373.

212. Roxanne Thorelli, Note, *Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit Note*, 101 MINN. L. REV. 1749, 1750 (2017).

213. This is referred to as the Public Benefit Corporation in Delaware, Colorado, and Minnesota. COLO. REV. STAT. §§ 7-101-501–7-101-509 (2018); DEL. CODE ANN. tit. 8, § 362(a) (2018); MINN. STAT. § 304A (2018).

214. *See* Tu, *supra* note 113, at 142.

In order to understand how benefit corporations affect attorneys' ethical duties, it is important to understand exactly which features of traditional corporations they sought to change. An analysis of the advocacy around the adoption of benefit corporation legislation and the legislative history of these statutes finds corporate law's narrow focus on shareholder interests as a key complaint of the form's initial boosters. To the form's founders, shareholder primacy affected who has the ability to act on behalf of the corporation, what duties those decision-makers owed, and what stakeholders other than shareholders decisions makers were to take into account.[215]

The benefit corporation form was first proposed by William Clark of Drinker Biddle & Reath LLP. Clark wrote that "[i]t is against the paradigm of shareholder primacy that directors and their advisors analyze corporate decision making."[216] This paradigm, according to Clark, makes it difficult for for-profit entities to incorporate a mission into their corporate purpose.[217] Directors are elected by shareholders, and so there is no one with decision-making authority in the company who is accountable to or responsible for the interests of any constituents aside from shareholders.[218] Fiduciary duty law holds that directors owe duties to shareholders alone and that it is, therefore, "difficult for the directors of mission-driven companies to feel they are legally protected in considering the interests of constituencies other than the shareholders who have elected them."[219] Absent guidance and protections for directors contained in the benefit corporation legislation, Clark reasoned that directors will not take nonshareholder stakeholders into account and pursue a mission in addition to profit.[220]

State legislatures similarly pointed to shareholder primacy and the shareholder value maximization norm as the reason that states needed to create benefit corporations.[221] The New York Senate, for example, stated that "socially-minded companies are often left with the catch-22 of either not being able to earn a profit or opening their directors up to possible personal liability for decisions that do not maximize shareholder value, or increasingly going to states other than New York that are pursuing this corporate form" when passing their statute.[222] Likewise California legislators found that "[i]n a traditional

215. *See* William H. Clark et al., *The Need And Rationale For The Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs Of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFITCORP.NET 14 (Jan. 13, 2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf (discussing the benefit corporation and the legal uncertaintites faced by directors of for-profit mission-driven entities when making decisions for their companies).

216. *Id.* at 8.

217. *Id.* at 7.

218. *Id.* at 8.

219. *Id.* at 10.

220. *Id.*

221. *Id.* at 1, 8, 14.

222. S.B. 79, 234th Leg., Reg. Sess. (N.Y. 2011).

corporation directors are required to utilize good faith in taking actions for the best interests of the corporation and the shareholders. A main goal is to maximize shareholder value. Directors are liable to shareholders in cases where shareholders disagree with not-for-profit activities."[223] Clearly, state legislators believe that corporate law elevates the interests of shareholders above all others and embraces a private ordering regime and that a new corporate form was required to allow mission-driven companies to pursue a public benefit in addition to profit.[224]

The following sections describe features common to most benefit corporation statutes. It is noteworthy that drafters of the benefit corporation statutes elected the structure they did instead of other options that could result in more direct nonshareholder influence on corporate governance. One such option would be to set aside seats on the board of directors for representatives of nonshareholder groups themselves, rather than a benefit director who is not required to be a member of any particular stakeholder constituency.[225] Drafters could also have delegated responsibility for certain decisions away from corporate management to stakeholders themselves, or perhaps made management accountable to someone other than the board of directors and, therefore, the shareholders.[226] By rejecting these ideas, architects of the benefit corporation have embraced the notion that the structure of corporate governance as currently practiced—a board of directors elected by shareholders—is not an insurmountable impediment to creating a public benefit. To these advocates, pursuing a public benefit is a

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223. *Flexible Purpose Corporations: Corporate Mergers*, ASSEMBLY COMM. ON BANKING & FIN. 5 (June 20, 2011), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_201_cfa_20110617_111833_asm_comm.html.

224. *See also Final Bill Report SHB 2239*, HOUSE COMM. ON JUDICIARY (June 7, 2012), http://lawfilesext.leg.wa.gov/biennium/2011-12/Pdf/Bill%20Reports/House/2239-S%20HBR%20FBR%2012.pdf (stating that "[u]nder the WBCA, a corporation's directors and officers have a fiduciary duty to the corporation – an obligation to act in its best interests. This duty has been interpreted as a responsibility to maximize financial returns for shareholders. The risk of liability can arise for directors and officers if they make decisions on the basis of some mission, at the expense of maximizing shareholder value. Such decisions could be interpreted as a breach of the duty to act solely in the corporation's best interests").

225. Millon, *supra* note 154, at 147. The idea of incorporating stakeholder governance into corporate law has been expressed by many scholars. *See, e.g.*, Lynne L. Dallas, *Working Toward a New Paradigm*, *in* PROGRESSIVE CORPORATE LAW 49 (Lawrence E. Mitchell ed., 1995) (noting how giving stakeholders enforcement power could be accomplished by granting stakeholders board representation); J. Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L.J. 61, 64 (2017) (advocating for the creation of "stakeholder advisory boards" to promote the representation of "employees, creditors, customers, vendors, the community, and the environment"); Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 311 (2011) (suggesting corporate law reforms that "integrate[] stakeholders in corporate decision-making"). Many European countries required that workers actually be represented on company boards of directors. *See* Jackson, *supra* 225, at 310–11.

226. Millon, *supra* note 201, at 1019.

question of management focus and to whom officers and directors owe a duty rather than a structural issue.[227]

B. Benefit Corporations

Compared to other new corporate forms, the benefit corporation has been adopted by the largest number of states[228] and is the preferred corporate form of choice for thousands of corporations,[229] including double- or triple-bottom-line entity corporations publicly traded.[230] Many state statutes are based on the Model Benefit Corporation Legislation (the "Model Legislation"),[231] drafted by the nonprofit organization B Lab.[232] The Model Legislation has several features that both represent a departure from the traditional corporate form and have implications for lawyers representing these entities. A brief summary of these changes follows.

Public Benefit: The Model Legislation provides that benefit corporations are to have the purpose, enshrined in the company's charter, of "creating a general public benefit."[233] "General public benefit" is defined as "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard."[234] Comments to the Model Legislation note that this requires "consideration of all of the effects of the business on society and the environment."[235] The benefit corporation also has the option to adopt a specific public benefit purpose in addition to the general public benefit purpose.[236]

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227. *See* Millon, *supra* note 154, at 225 (discussing how these new corporate benefit statutes impose new duties on management to consider the interests of communities and employees when making decisions).

228. *Social Enterprise Law Tracker*, SOC. ENTER. L. TRACKER, http://socentlawtracker.org/ (last visited Sept. 22, 2018).

229. Murray, *supra* note 3, at 589 (finding 2,636 entities organized as benefit corporations or benefit LLCs as of 2015).

230. Gensler, *supra* note 12; *see generally* J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes*, BELMONT U. (2015) (comparing different corporate forms in various states).

231. Murray, *supra* note 225, at 86–87.

232. Mystica M. Alexander, *Benefit Corporations – The Latest Development in the Evolution of Social Enterprise: Are They Worthy of a Taxpayer Subsidy?*, 38 SETON HALL LEGIS. J. 219, 245 (2014).

233. *Model Benefit Corporation Legislation*, BENEFIT CORP. § 201(a), at 10 (Sept. 16, 2016), http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_9_16.pdf.

234. *Id.* § 102, at 3.

235. *Id.* § 102 cmt., at 6.

236. *Id.* § 201(b), at 10. The Model Legislation provides a suggested list of specific public benefit purposes:

> (1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) protecting or restoring

Consideration of Stakeholder Interests: The Model Legislation requires directors to consider the impact of corporate action on non-shareholder stakeholders and the public.[237] The Model Legislation gives no guidance to how the board of directors shall weigh the interests of these stakeholders;[238] rather, the Model Legislation states that directors need not give one group priority over another unless doing so is specifically called for.[239]

Public Reporting and Third-Party Standard: Benefit corporations are to prepare and make public annual benefit reports that describe, among others, "[t]he ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created" and "[a]n assessment of the overall social and environmental performance of the benefit corporation . . . against a third-party standard[.]"[240] These third-party standards, which report "overall social and environmental performance of a

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> the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and (7) conferring any other particular benefit on society or the environment.

Id. § 102, at 4–5.

237. Dana Brakman Reiser, *Benefit Corporations – A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 598–99 (2011). Boards of directors should consider their actions on a variety of parties, including:

> (i) the shareholders of the benefit corporation; (ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers; (iii) the interests of customers as beneficiaries of the general public benefit or a specific public benefit purpose of the benefit corporation; (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located; (v) the local and global environment; (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose[,]

in addition to any additional groups listed in the benefit corporation's charter. *Model Benefit Corporation Legislation*, *supra* note 233, § 301(a)(1), at 12.

238. *See id.* § 301, at 12–13 (listing the factors the board of directors should consider when making decisions); *see also* Reiser, *supra* note 237, at 610 (suggesting "[i]deally, a hybrid organization would offer a solution to this dual mission dilemma. To solve it, a hybrid form of organization should provide guidance on which goal, profit maximization or social good production, has priority and in what situations this priority must be given. This does not necessarily mean that either profit maximization or social good production must be prioritized every time the two come into conflict. In order to ease the tension inherent in a dual mission organization, some structure is needed for balancing these goals. This structure must work predictably and relatively transparently, and there must be some method for enforcing it").

239. *Model Benefit Corporation Legislation*, *supra* note 233, § 301(a)(3), at 12.

240. *Id.* § 401(a)(1)(i), (a)(2), at 20.

business[,]" are created not by legislatures but by organizations like B Lab[241] that evaluate corporate activity and its social and environmental effects.[242]

Director Liability: The Model Legislation grants immunity to directors who take the interests of nonshareholder stakeholders into account when making decisions,[243] or for their failure to pursue or create general public benefit.[244] Further, directors have no duty to individual beneficiaries of the corporation's general or specific public benefit, and such individuals may not bring suit against directors unless specifically authorized to do so in the corporation's charter.[245]

Benefit Enforcement Proceedings: Although directors are not liable to corporate beneficiaries themselves, directors, shareholders holding five percent or more of the corporation's stock, persons designated in the company's charter, or the benefit corporation itself may bring a "benefit enforcement proceeding" against the company and its directors and officers for "failure . . . to pursue or create a general public benefit" or other failure to comply with the requirements of the Model Legislation.[246] Parties who file "benefit enforcement proceedings" may request injunctive relief only.[247] There is no other claim that can be brought against a benefit corporation or its directors for failure to follow the provisions of the Model Legislation.[248]

Benefit Director and Officer: Benefit corporations may have a designated benefit director, who is tasked with preparing the benefit report mentioned above and overseeing the creation of a public benefit generally.[249] Benefit Corporations may also designate a benefit officer, who assists the benefit director in the preparation of the benefit report.[250]

Though many states have based their benefit corporation statutes off of the Model Legislation, the Delaware Public Benefit Corporation Act, which became effective in 2013,[251] differs in several major respects. These differences are important for attorneys representing Delaware public benefit corporations to understand as they consider their ethical duties. For one, while Delaware public benefit corporations do have to prepare written benefit reports for their

241. *Id.* § 102, at 5; *see* J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 31 (2015).

242. *Model Benefit Corporation Legislation*, *supra* note 233, § 102, at 5.

243. *Id.* § 301(c), at 13; Reiser, *supra* note 237, at 598–99.

244. *Model Benefit Corporation Legislation*, *supra* note 233, § 301(c), at 13.

245. *Id.* § 301(c)–(d), at 13.

246. *Id.* § 102, at 3, § 301 (c)–(d), at 13, § 301 cmt., at 14, § 305, at 18–19.

247. Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1805 (2018).

248. *Model Benefit Corporation Legislation*, *supra* note 233, § 102 cmt. Failure to create a promised public benefit may, however, rise to the level of fraud, and the existence of the benefit enforcement proceeding should not preclude a claim of fraud against benefit corporations. *See infra* Section III.C (discussing fraud in the context of greenwashing).

249. *Model Benefit Corporation Legislation*, *supra* note 233, § 302(a), at 14, § 302(c), at 15.

250. *Id.* § 304.

251. DEL. CODE ANN. tit. 8, § 362(a) (2018).

stockholders, they do not have to make those reports public and they do not have to judge their efforts against a third-party standard unless so stated in the certificate of incorporation.[252] Rather than considering the interests of nonshareholder stakeholders, directors of Delaware public benefit corporations are to "balance[] the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in [the corporation's] certificate of incorporation."[253] Delaware also does not provide for benefit enforcement proceedings,[254] though stockholders holding at least two percent of the company's stock can bring derivative suits for failure to abide by the statute's duties.[255]

A prominent example of a Delaware public benefit corporation is Laureate Education, the first company organized as a benefit corporation in any state to go public in the United States.[256] Laureate Education defines its specific public purpose in its certificate of incorporation as:

> to produce a positive effect (or a reduction of negative effects) for society and persons by offering diverse education programs delivered online and on premises operated in the communities that we serve, as the board of directors may from time to time determine to be appropriate and within the Corporation's overall education mission.[257]

No benefit director or officer is named to oversee this mission, and no group or individual is granted the right to bring a derivate suit or any kind of enforcement proceeding against the company.[258] Further, the certificate of incorporation does not require the company to judge its efforts against a third-party standard. Laureate Education is also a Certified B Corp., and so, while it does not have to utilize a third-party standard under Delaware law, it does strive to comply with B Corp. standards.[259]

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252. *Id.* § 366.

253. *Id.* § 365(a).

254. Murray, *supra* 230.

255. J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 362–63 (2014) (comparing the Delaware and Model Legislation to predict that neither will result in directors being held liable for failing to pursue a public benefit and neither provides for substantial non-shareholder stakeholder governance).

256. Ashley A. Smith, *Laureate Becomes Largest College to Become a Benefit Corporation*, INSIDE HIGHER ED (Feb. 2, 2017), https://www.insidehighered.com/print/news/2017/02/02/laureate-beco...ollege-become-benefit-corporation?width=775&height=500&iframe=true.

257. *Amended and Restated Certificate of Incorporation of Laureate Education, Inc., a Public Benefit Corporation*, SEC.GOV art. II, at 1 (Jan. 2017), https://www.sec.gov/Archives/edgar/data/912766/000104746917000434/a2230757zex-3_1.htm.

258. *See id.* art. VIII, at 12–14 (discussing the rights afforded to the board of directors and shareholders, which do not mention derivative suits).

259. *Laureate Education, Inc. Announces Renewal of Certified B Corporation® Status*, LAUREATE INT'L UNIVS' (Jan. 1, 2018), https://www.laureate.net/newsroom/pressreleases/2018/01/laureate-announces-renewal-of-b-corp-status.

C. Greenwashing

The drafters of the Model Legislation were particularly concerned with guarding against greenwashing, which they defined as "the phenomenon of businesses seeking to portray themselves as being more environmentally and socially responsible than they actually are."[260] There are two ways that greenwashing could be a violation of the Model Legislation—one based on process and the other on outcome.[261] A process-related claim of greenwashing would entail the failure to abide by the reporting requirements of the Model Legislation[262] or the failure to consider the impact of corporate action on non-shareholder stakeholders and the public.[263] An outcome-related claim, on the other hand, would involve the failure to further a general or specific public benefit, as measured against a third-party standard.[264] Both should give rise to benefit enforcement proceedings under the Model Legislation.[265] Status as a benefit corporation is a strong representation that a business is environmentally and socially responsible; failing to create (or attempt to create) a general or specific public benefit, therefore, constitutes greenwashing.[266]

Regardless of its basis, any greenwashing claim brought as a benefit enforcement proceeding will need to overcome the business judgment rule.[267] Like traditional corporate directors, benefit corporation directors are protected

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260. *Model Benefit Corporation Legislation*, *supra* note 233, § 102 cmt., at 7. The term "greenwashing" originally referred to organizations that falsely held themselves out as being environmentally responsible, but it has expanded over time. *See* Jacob Vos, Note, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 673–74 (2009).

261. J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 109–11 (2012).

262. *Model Benefit Corporation Legislation*, *supra* note 233, § 401, at 20–21, § 102 cmt., at 7 (discussing how the purpose of the public benefit report is to keep the corporation accountable by demonstrating it actually created a benefit for the public).

263. *Id.* § 301(a)(1)(i), (iii), at 12.

264. *Id.* § 102, at 3.

265. *Id.* § 102 cmt., at 6–7. A similar distinction between product and process has been discussed in relation to international trade law, with "product" referring to information about the product itself and "process" referring to how the product is produced, including "the labor conditions of workers who produce a consumer good, the environmental effects of a good's production, the use of controversial engineering techniques such as genetic modification to create a good, or any number of other social, economic, or environmental circumstances that are related causally to a consumer product." Dougalas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 528–29 (2004).

266. Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 589–90 (2012). In that way, Rasmussen College, in failing to benefit its students as required by its corporate charter, was likely engaging in greenwashing. *See* Plerhoples, *supra* note 7, at 561–62.

267. *See* Cummings, *supra* note 266, at 591–93.

by the business judgment rule.[268] Corporate law generally provides that if directors exercise due care and reasonably believe that actions are in the best interests of the shareholders and the corporation they will not be liable for breaches of fiduciary duty.[269] The business judgment rule exists to give management a safe harbor for most decisions.[270] The business judgment rule is a broad defense and overcoming the business judgment rule in suits against traditional corporations is difficult.[271] Likewise, greenwashing claims brought as benefit enforcement proceedings will need to show that directors failed to be "informed with respect to the subject of the business judgment to the extent the director reasonably believes to be appropriate" and "rationally believes that the business judgment is in the best interests of the benefit corporation."[272]

IV. REPRESENTING THE BENEFIT CORPORATION

Benefit corporation legislation will necessarily impact legal ethics. The "Framework of Dealing" embraces the Multiary Model for attorneys representing benefit corporations.[273] Nonshareholder stakeholders who are intended beneficiaries of corporate actions come within the "Framework of Dealing" insofar as the corporation is mandated to create a benefit for, or at least consider its effects on, these shareholders.[274] That is not to say, however, that these nonshareholder stakeholders are the attorney's client and that any duties flow to them on account of being in an attorney-client relationship with the lawyer. The nonshareholder stakeholder instead is in the position vis-à-vis the attorney of the beneficiary of a trust or other fiduciary relationship; their interests place bounds around actions that corporations can take and therefore also around advice that attorneys can dispense, and the attorney must act to protect their interests over the interests of individual directors and officers.[275]

The "Framework of Dealing" requires the attorney for the benefit corporation to take into account both the changes to corporate structure brought about by benefit corporation legislation and the altered corporate purpose. As discussed above, the attorney must identify when a benefit director, benefit officer, or shareholder has special authority within the corporation on matters of public

268. *Model Benefit Corporation Legislation*, *supra* note 233, § 301(e), at 13.

269. S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 111–12 (1979).

270. *See* Johnson, *supra* note 108, at 448.

271. *See id.* at 440.

272. *Model Benefit Corporation Legislation*, *supra* note 233, § 301(e)(2)–(3), at 13.

273. *See* Simon, *supra* note 34, at 89 (discussing how the Framework of Dealing embraces the idea that the corporation does not have interests of its own but is only concerned with the interests of its constituents); *see also* Pileri, *supra* note 69, at 186–87 (describing how the Benefit Corporation embraces the Multiary Model, where an attorney, in owing a duty to the corporation that must concern itself with a wide range of stakeholders and constituents beyond its shareholders, also owes a duty to the public at large).

274. *See* Simon, *supra* note 34, at 98–103.

275. Rutherglen, *supra* note 15, at 155.

benefit. Second, the lawyer must guide her client toward taking into account or furthering the purpose of the corporation as contained in the corporation's governing documents and corporate statute. In this Section, I attempt to analyze those obligations in more detail under existing rules. In Section V below, I propose several changes or clarification to existing rules and regulations.

A. The Citizen Lawyer

Representing benefit corporations requires a new framework that moves norms for these attorneys away from the model of traditional corporate representation. The current model of corporate representation is ill-suited to representing clients like Green Corp. whose purpose is to further the public interest. As explained above, these frameworks necessarily disregard the impact of legal advice and client activity on nonclient third parties absent the identification of legal risk arising from regulatory or legal requirements. Benefit corporation legislation does not just impose an external requirement on corporations that they produce a public benefit; rather, it attempts to embed that purpose within the structure and duties that bind the corporation and its decision-makers.[276] Attorneys for benefit corporations should draw on other contexts, such as those of nonprofit and government lawyers described above, in defining this framework.

A historical perspective is also illustrative for benefit corporation lawyers. In the nineteenth and early twentieth centuries, corporate law was seen as a public ordering regime and it was accepted that attorneys also owed responsibilities to the public.[277] American corporations were viewed as public entities created by the government rather than entities formed by contract.[278] Early corporate charters narrowly defined the scope of corporate authority.[279] They also acknowledged that corporations were created by the state and were public entities serving a public purpose or public benefit.[280] At that time, it was also accepted that attorneys owed responsibilities to the public.[281] Some describe a "citizen lawyer," who is tasked in the non-litigation context with "guiding the client to comply with the underlying spirit or purpose as well as the letter of laws and regulations to desist from unlawful conduct, and if needed, to do so with strong advice backed by the threat of withdrawal, and in extreme cases, of disclosure."[282] These earlier notions of the role of the attorney provide guidance

276. *See* Page & Katz, *supra* note 16, at 1366.

277. GREENFIELD, *supra* note 204, at 30.

278. *Id.* at 35.

279. *Id.*

280. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1304 (2001).

281. *See* GREENFIELD, *supra* note 204, at 35.

282. Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1174 (2009) (citations omitted). However, the

on how attorneys for benefit corporations should practice. Like lawyers of old, lawyers for benefit corporations should incorporate as part of their counsel guiding corporate decision-makers toward furthering public benefit and against "socially destructive activity"[283] since benefit corporations were designed to prevent such activity.[284]

Rather than focus primarily on risks to their client, legal or otherwise, citizen lawyers question the impact of client action on the rights of others and on the legal system itself. The paradigm of the citizen lawyer plays out in the transactional context as follows:

> In advising clients outside litigation, the citizen lawyer is the "wise counselor," who sees her job as guiding the client to comply with the underlying spirit or purpose as well as the letter of laws and regulations to desist from unlawful conduct, and if needed, to do so with strong advice backed by the threat of withdrawal, and in extreme cases, of disclosure. If the client needs her help to resist or change unfavorable law, she makes the challenge public and transparent, to facilitate its authoritative resolution. Her private-minded counterpart is of course the hired gun, whose sole concern is with minimizing adverse effects of law on his client's plans and profits. The neutral version of the lawyer-agent simply identifies legal constraints and advises clients on risks of detection and costs of noncompliance. The aggressive or hardball lawyer-agent enthusiastically undertakes to bend; stretch; punch loopholes in; and nullify by obstruction, concealment, and delay the legal and regulatory constraints in the path of a client's desires and interests.[285]

The view of the lawyer as public citizen was explicitly adopted by the profession around the turn of the twentieth century.[286] Canon 32 of the original 1908 Canons of Ethics of the American Bar Association admonished lawyers not to provide any service or advice involving "deception or betrayal of the

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notion of the citizen lawyer is by no means universally accepted. *See, e.g.*, Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1399 (2003).

283. Allen, *supra* note 63, at 4. Louis Brandeis similarly argued in 1914 that a lawyer ought to include legal reform in the daily practice of law. LOUIS D. BRANDEIS, BUSINESS: A PROFESSION 316–17 (1914).

284. *See Model Benefit Corporation Legislation*, *supra* note 233, § 102, at 6. A similar professional duty counter to the zealous advocate is the duty of independent judgment owed to the legal system itself and the substantive values that it incorporates. Allen, *supra* note 63, at 5. This duty is especially relevant for transactional attorneys advising corporate clients as zealous advocacy taken to its extreme in a transitional context would likely result in unacceptably negative external social costs. *See id.*

285. Gordon, *supra* note 282, at 1174–75 (citations omitted).

286. *See* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2452–64 (discussing how the 1908 Ethics Canon expanded conscientious lawyering by holding lawyers morally accountable).

public."[287] The lawyer's highest honor, according to these original rules, was to be found in the fidelity to both "private trust" and "public duty."[288]

The citizen lawyer was rendered archaic by the middle of the last century but drew new attention after attorneys involved in the Enron scandal grounded their defense of their role in the scandal in compliance with their professional responsibility obligations.[289] The turn of the twenty-first century, of course, saw a series of corporate scandals, the largest of which was the Enron scandal.[290] These scandals, and Enron in particular, caused scholars and practitioners to question the wisdom of a profession that had no duty to the legal system itself or the spirit of the law.[291] In the Enron example, Enron's attorneys implied that, although they identified fraudulent accounting measures, they were not required to report the use of such measures.[292] The notion that purposeful concealment of information used in fraud violates neither the law nor professional norms undermined the respect of the legal profession in the eyes of the public.[293]

Following this wave of scandals, Chancellor Allen proposed a reinvigoration of the norm of professional independence in which attorneys seek to further client interests while at the same time "satisfying the underlying goals of the *law*."[294] By doing so, lawyers would both further the purpose of regulatory schemes and gain a competitive advantage by attracting clients interested in furthering the goals of laws or regulations themselves.[295] This paradigm, according to Allen, would assist in the successful legal regimes and improve the profession for its practitioners.[296]

Adherence to norms and clear understanding of the aims of regulation are therefore essential to a functioning regulatory scheme—lawyers and clients must be flexible when trying to achieve regulatory ends and, when such achievement is impossible, transparent in their shortcomings for regulators to see and respond to.[297] Clients and attorneys who fail in this regard will find themselves at odds with regulators and constantly striving to stay ahead of regulatory reform aimed at curbing the very behavior in which they are engaged.[298] Ethical norms aimed at preventing corporate misconduct and bolstering the regulatory state both make

287. ABA Canon of Prof'l Ethics, Formal Op. 32 (1908).

288. *Id.*

289. Simon, *supra* note 6, at 1464.

290. *Id.* at 1453.

291. Allen, *supra* note 63, at 10–11.

292. Simon, *supra* note 6, at 1456.

293. *See* Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 74–75 (discussing how the federal government responded to the Enron scandal with direct federal regulation through the Sarbanes-Oxley Act).

294. Allen, *supra* note 63, at 11–12.

295. *Id.* at 12.

296. *Id.* at 14–15.

297. Simon, *supra* note 6, at 1462–63.

298. *Id.* at 1463.

sense if we view the benefit corporation as a public ordering scheme. If benefit corporations are accountable through corporate law to or for their effects on nonshareholder stakeholders, attorneys should be mindful of those effects and counsel their clients thusly. Further, if a benefit corporation is more than an organization operating merely for the benefit of its owners,[299] attorneys should represent corporate clients with that regulatory state in mind.

Attorneys for benefit corporations should draw on the ideas of the citizen lawyer. They should recognize that they owe a duty not just to their client but also the public their client purports to benefit. They should seek to practice in a way that furthers the mission of benefit corporation legislation, rather than ensuring that their client complies with the letter of the Model Legislation only. Finally, they should guard against the clients engaging in harmful behavior that runs counter to the spirit of the Model Legislation.

B. *Confidentiality and Reporting*

Attorneys for benefit corporations should balance the duty to protect the interests of nonshareholder stakeholders and the public against their confidentiality obligations. This balance first affects how broad the circle of confidently extends. The nature of benefit corporation legislation may bring certain shareholders within that circle of confidentiality, at least with respect to matters of public benefit and compliance with the authorizing statute. Further, as with fiduciary breaches in traditional corporate law, certain reporting obligations or options under the Model Rules and SOX may be triggered by a client constituent engaging in greenwashing.

Again, the Model Legislation grants rights of action to certain shareholder groups in the event of violation of benefit corporation legislation.[300] Those rights of action should bring those shareholders within the circle of confidentiality. Since these shareholders can only bring suits for injunctive relief in most states and are prevented from extracting any money from the corporation, these shareholders have a form of internal control right. In exercising that control right, these shareholders take the role of the "highest authority that can act on behalf of the organization as determined by applicable law."[301] The Model Legislation also allows benefit corporations to designate to other parties the right to bring suit against the company for similar violations.[302] Absent any ownership interest in the company, the third party's connection with the entity would be limited to being granted a right to sue.[303] This position is more comparable to a counterparty to a contract: the third party's right to control

299. Or an agglomeration of contractual arrangements. *See* Millon, *supra* note 47, at 229–31; Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 822–23 (1999) (describing the nexus-of-contracts).

300. *Model Benefit Corporation Legislation*, *supra* note 233, § 102, at 3, § 305(c), at 19.

301. MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (AM. BAR ASS'N 2018).

302. *Model Benefit Corporation Legislation*, *supra* note 233, § 305(c), at 19.

303. *Id.*

corporate action is completely outside the corporate structure. These entities should remain outside the circle of confidentially.

Doubtless, there will be benefit corporations that refuse or are otherwise unwilling to make decisions that further the public good enshrined in their governing documents. Some may ignore the effects of corporate action on employees or customers or the environment before making a decision; others may refuse to change course from a direction shown to be detrimental. Still others will fail to satisfy some third-party standard for creating a public benefit. Each is greenwashing by violating the benefit corporation purpose, analogous to fiduciary breaches in the traditional corporate context.

For benefit corporations, greenwashing prompts many of the same questions that traditional corporations' attorneys face with breaches of fiduciary duties. Greenwashing, again, refers to organizations that market themselves as being environmentally sustainable or otherwise beneficial to the public, often taking advantage of third-party certifications or corporate forms like the benefit corporation, without actually creating the benefit they claim to promote.[304] As discussed above, whistleblowing or reporting obligations under the Model Rules in the case of a breach of corporate purpose are weak.[305] The rules offer little guidance on when a violation of corporate purpose exists and, even if one is identified, reporting is left to the attorney's discretion. If breaches of fiduciary duties to shareholders do not generally fall under the umbrella of reportable activity under the Model Rules, then greenwashing should not either.

For publicly traded benefit corporations, SOX should include greenwashing when committed by benefit corporations among the activities that trigger reporting obligations.[306] Under SOX, a "*material violation*" includes "a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law."[307] Greenwashing is a failure to create a "material positive impact on society and the environment," which is a requirement of creating a public benefit under the Model Legislation.[308] Harm to nonshareholder constituents that does not rise to the level of fraud should nonetheless qualify as a "similar material violation" under state law.[309]

Assuming that reporting options or obligations exist, identifying greenwashing can be difficult. Acts that fail to further a public interest contravene the purpose of benefit corporation legislation. Absent a clear

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304. *See* Cummings, *supra* note 266, at 589–90.

305. *See supra* Section II.A.

306. Cummings, *supra* note 266, at 596–97.

307. 17 C.F.R. § 205.2(h)(i) (2018). "*Breach of fiduciary duty* refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions." *Id.* § 205.2(d).

308. *Model Benefit Corporation Legislation*, *supra* note 233, § 102, at 3.

309. 17 C.F.R. § 205.2(h)(i).

showing of avoidable social or environmental harm, however, it may be difficult for an attorney to ascertain what, exactly, constitutes behavior that is detrimental to the public interest. The benefit corporation may identify stakeholders in its governing documents whose interests the corporation seeks to further; harm to those stakeholders should be seen a failure to further a public interest. We can identify other parties harmed by greenwashing: shareholders who believe they are investing in a socially and environmentally supportive corporation; taxpayers and municipalities whose funds are being surreptitiously directed to the greenwasher; competing benefit corporations competitively disadvantaged by not greenwashing; and others. The purpose of the benefit corporation legislation risks being undermined if the form is adopted only as a marketing ploy.

Even if it can be determined that behavior harms the public interest, the attorney then has to consider whether those actions are a "violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization."[310] For example, take the case of a difficult labor negotiation for Green Corp. Corporate management may prefer a deal that pays its workers lower wages or that cuts more jobs than another option. In looking at the two options in isolation, it may appear clear that management chose the less beneficial outcome based on its statement of purpose—creating jobs in local and underserved communities. But, management could reasonably argue that it chose the option it did because it felt that the other option would put the company in such a fiscally and competitively disadvantaged position that the higher-paying jobs would be jeopardized entirely. Is the attorney to make the decision that this decision was harmful to the public interest? Situations like these muddy the water on both the goals and possibilities of benefit corporation legislation; any whistleblower-type activity should focus on the corporate decision-making process rather than the outcomes of those decisions.

As described in Section III.C above, greenwashing claims brought as benefit enforcement proceedings can be based in process—failure to abide by the requirements of the Model Legislation and consider stakeholder interests—or in outcome—failure to create a general or specific public benefit. Failures of process should be easier for lawyers to identify than failures of outcome. For one, though outcomes are measured against third-party standards, it may be hard for the attorney to determine whether a standard is truly met or how a benefit corporation is affecting a particular stakeholder or set of stakeholders. This is particularly true when a benefit corporation has stated more than one specific public benefit. Suppose that Green Corp. cancels a contract with a heavily polluting plant that happens to employ members of the community. Green Corp. is acting to lower its environmental footprint, but in doing so goes against its purpose to create jobs. Should the lawyer consider this a violation of its

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310. MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (AM. BAR. ASS'N 2018).

purpose? The Model Legislation provides little guidance on these questions. Failures of process, however, may be easier to identify. In the above example of the labor negotiations, the attorney should ask whether Green Corp.'s management and directors considered the effects of a new labor contract on employment in the local community rather than the outcome. In both examples, if the attorney knows that Green Corp.'s management and directors are not reporting their effects on employment, or failing to consider the employment effects of their decision, the attorney's reporting obligations may be triggered.

It is possible, however, that a benefit corporation may comply with the procedural requirements of the Model Legislation in a pro forma manner only.[311] By hewing to the form of the benefit corporation without following the spirit of the benefit corporation statutes described in Section III.A above, greenwashing is analogous to Simon's "Agribusiness Welfare" example.[312] "Agribusiness Welfare" involves an agricultural company that divides its assets into a number of smaller entities in order to take advantage of government subsidies intended to benefit small farm owners.[313] Each farm is the maximum size permitted to receive funding under the federal program, though all farms are ultimately owned by the same person.[314] This division is clearly within the bounds of the law, yet at odds with the intent of the statute's drafters. This is similar to a benefit corporation complying with the pro forma reporting requirements but otherwise failing to further its public benefit. Under this sort of compliance, Green Corp. would report that it had considered the interests of its employees and the community without having truly internalized processes or making decisions for their benefit.

Some schools of thought hold that there is no problem for the lawyer structuring this transaction; the government will notice the defect in the program and make the appropriate fix.[315] The lawyer's decision whether to advise the client hinges on her own personal comfort with the scheme weighed against the potential for lost income to the client. There is no greater ethical imperative for the lawyer to caution against this course of action.[316] This argument, however, rests on the assumption that proper enforcement will lead to a statutory revision outlawing the behavior in question. Should proper enforcement be lacking, the benefit corporation attorney should counsel her client to not go forward with transactions that fly in the face of a statutory objective that the government is

311. Callison, *supra* note 261, at 111.

312. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 4 (1998).

313. *Id.* at 4–5.

314. *See id.* at 5.

315. Many lawyers embrace a formalist view of the law—that the letter and not the spirit of the law governs. Simon, *supra* note 6, at 1454. Those formalists believe that the law requires only compliance with the letter of the law and that attorneys, therefore, should advise their clients on meeting the letter of the law only. *Id.* at 1455.

316. *See* SIMON, *supra* note 312, at 165–66.

unable or unwilling to enforce.[317] The citizen lawyer advises against this behavior because it runs counter to the spirit and purpose of the legislation.

Greenwashing flies in the face of legislation aimed at allowing the corporation to pursue a public benefit and may also be counter to investor expectations.[318] So-called "impact investors" explicitly seek out companies that produce some public benefit to invest in, often with an expectation of less-than-market-rate returns.[319] Benefit corporation legislation contains no external enforcement mechanism but rather leaves enforcement to public reporting and claims by shareholders and other designated third parties.[320] Should an attorney come to the conclusion that this enforcement is inadequate, how should she proceed?

The attorney should endeavor to measure the client's activities against a third-party standard to demonstrate a violation; even in states like Delaware where no third-party standard is required, such a standard would bolster the attorney's defense to having violated her duty of confidentiality. If a client has designated a specific beneficiary in its corporate documents, the failure to benefit that beneficiary may be more readily measurable.[321] For greenwashing activities grounded in process, the attorney should see that weight was given to the benefit corporation's designated stakeholders or the public.

An attorney for a greenwashing client should not only advise her client against engaging in this kind of behavior; she should consider reporting greenwashing as provided under the Model Rules.[322] Some greenwashing may rise to the level of criminal or fraudulent activity, which clearly would trigger attorneys' discretionary reporting obligations under the Model Rules in order to prevent the illegal activity.[323] Greenwashing can give rise to actions for fraud, violation of state and federal fair trade practices laws, and violations of securities laws.[324] If this activity is fraudulent or otherwise unlawful and has not yet occurred, the attorney will be protected by Model Rule 1.6 and need not concern herself with

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317. *See id.* at 164–66.

318. *See* Cadesby B. Cooper, *Rule 10b-5 at the Intersection of Greenwash and Green Investment: The Problem of Economic Loss*, 42 B.C. ENVTL. AFF. L. REV. 405, 414 (2015).

319. Deborah Burand, *Contracting for Impact: Embedding Social and Environmental Impact Goals into Loan Agreements*, 13 N.Y.U. J.L. & BUS. 775, 776–81 (2017).

320. *Model Benefit Corporation Legislation*, *supra* note 233, § 301 cmt., at 14, § 305(c), at 19.

321. *Id.* § 301 cmt., at 14. The attorney may investigate the effect on the beneficiary, but should be careful not to breach client confidentiality by speaking with the beneficiary about matters related to her representation before making a determination that a material violation exists. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR. ASS'N 2018).

322. *Model Benefit Corporation Legislation*, *supra* note 233, § 102 cmt., at 7.

323. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR. ASS'N 2018).

324. Cooper, *supra* note 318, at 406–07; Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 289 (2014); Joseph W. Price II et al., *Even Courts Are Going Green: How to Protect Yourself from Greenwashing Litigation*, 48 WTR ARK. LAW. 22, 22 (2013); *see generally* Mary Ann Mullin & Daniel J. Deeb, *Policing of Green Claims*, 26 SPG NAT. RESOURCES & ENV'T 28 (2012).

limiting disclosure to entities within the circle of confidentiality.[325] A Texas court, for example, relying on a rule similar to the Model Rule, allowed a lawsuit to proceed against Enron's lawyers for failure to disclose evidence of fraud leading up to the scandal because their duty to would-be harmed parties, including shareholders, trumped the duty of confidentiality.[326] Ethical rules will include this kind of activity in determine reporting obligations; the question of duties in the event of activities that fall short of criminal activity is in question in light of benefit corporation legislation.

In other situations, the attorney must determine to whom she can or must report greenwashing. Since some shareholders of a benefit corporation are in a similar position as that of shareholders in a closely held corporation, they may, by virtue of their position, fall within the circle of confidentiality. Reporting greenwashing to these shareholders should not violate the attorney's duties of confidentiality in the way that reporting breaches of fiduciary duties to shareholders in a publicly traded or widely held corporation would. Attorneys will have broader leeway when representing benefit corporations to report greenwashing up the corporation chain of command all the way to shareholders, provided that the attorneys are mindful to report only to those shareholders who are explicitly granted a right to control corporate behavior by bringing a benefit enforcement proceeding. Many benefit corporations also have directors and officers specifically designated to oversee benefit creation.[327] These positions should similarly constitute "the higher authority in the organization" and, should they fail to act, shareholders with a right to bring benefit enforcement proceedings would make up the highest level of authority.[328] Attorneys who report greenwashing should report first to benefit officers and directors and, finally, shareholders allowed to bring a benefit-related right of action against the corporation and its directors. Under SOX, after going to the highest authorities within the corporation (the board and shareholders), the attorney would have the discretion to report greenwashing to the SEC.[329]

C. Scope of Advice

When representing a benefit corporation, the "moral, economic, social and political factors" that Model Rule 2.1 leaves to attorneys' discretion are integral to an attorney's advice.[330] Three factors give rise to attorneys' obligations to advise her benefit corporation client on these issues. First, as guardians of the

325. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2) (AM. BAR. ASS'N 2018).

326. *See* Catharine E. Stark, *Regulating Corporate Governance: Amended Rules of Professional Conduct Allow Lawyers to Make the World a More Ethical Place*, 53 CATH. U. L. REV. 1195, 1210 (2004).

327. *See* Plerhoples, *supra* note 3, at 252.

328. MODEL RULES OF PROF'L CONDUCT r. 1.13(b)(3) (AM. BAR. ASS'N 2018); Callison, *supra* note 261, at 96; *see generally* Newby v. Enron Corp., 302 F.3d 295 (5th Cir. 2002).

329. *See* discussion *supra* Section II.A.

330. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR. ASS'N 2018).

public interest in addition to shareholder interests, directors and officers of benefit corporations must be informed on how their actions will affect the public in the same way that directors and officers must know how corporate action affects shareholders.[331] Second, the attorney must inform her client of new legal risks that may arise as a result of failing to promote the public good.[332] Third, the attorney risks being liable to third parties herself if the client engages in greenwashing or other nonbeneficial behavior and corporate decision-makers are not informed of the full effects of that behavior.[333]

As guardians of not just shareholder but also public interest, benefit corporation directors and officers must be informed on how their actions will affect the public in the same way that corporate directors and officers must know how corporate action affects shareholders, and government workers and nonprofit executives need to know the effect of their actions on the public and their mission, respectively. Decision-makers simply cannot do their job without that information. Attorneys are not the only source of information about these issues, nor are they are on price per share in competitive takeover situations. That said, officers and directors look to attorneys for guidance on these issues nonetheless, and attorneys should expect and be able to dispense this advice.

Benefit corporations also face potential new legal and business risks on account of their commitment to furthering a public benefit. The greenwashing example illustrates this well. Benefit corporations that purport to, but do not actually create a public or specific benefit, as required by each corporation's governing documents, face the potential of lawsuits from stakeholders and designated third parties. Social and political issues could give rise to benefit enforcement actions. They could also have potential effects on tax deductibility of certain payments[334] and municipal and state funding sources.[335] Failure to further a public benefit also could pose enterprise risk to a client. Should Green Corp. operate in a way that pollutes a nearby river, for example, a benefit enforcement proceeding could be brought for failing to lower its environmental footprint. Any government contracts it won on the basis of its benefit corporation status could be in jeopardy. Investors and customers may respond negatively, refusing to invest in or purchase products from the company. This is all in addition to any regulatory risk that could arise. All of these

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331. Plerhoples, *supra* note 3, at 255–257.

332. *See* Pileri, *supra* note 69, at 186.

333. Gross, *supra* note 176, at 996; Lewinbuk, *supra* note 179, at 145–46; *Model Benefit Corporation Legislation*, *supra* note 233, § 102 cmt., at 7.

334. Letter from Karin G. Gross, Senior Technical Reviewer, Internal Revenue Serv. (June 2, 2016), https://www.irs.gov/pub/irs-wd/16-0063.pdf. "[A] nonstock benefit corporation making an expenditure for institutional or goodwill advertising to keep the corporation's name before the public is generally treated as [a deductible] expense." *Id.*

335. Several states and municipalities have granted benefit corporations bidding preference for government contracts. Michelle Baker, *Socially Responsible Businesses Get a Boost from Local Governments*, NONPROFIT L. BLOG (May 8, 2013), http://www.nonprofitlawblog.com/socially-responsible-businesses-get-a-boost-from-local-governments/.

considerations expand the universe of risk on which attorneys are accustomed to advising clients.

With respect to claims brought against directors and benefit corporations under authorizing legislation, ensuring that the corporate client has reviewed information regarding the benefit to nonshareholder stakeholders, the environment, and others assures that directors will help retain the protection of the business judgment rule. Much as the business judgment rule now protects directors who adequately inform themselves before making corporate decisions,[336] a showing that benefit corporation directors looked at the effects of a decision on employees, community members, the environment, and others should help to keep them within the safe harbor provided by the business judgment rule. This is particularly true when moral, social, economic, political, or environmental issues have a direct effect on one of the client corporation's stakeholders. Even if the result of corporate action is negative on the environment or a particular constituency, directors should have a clear record that they reviewed information relevant to the effect on those groups to protect themselves and their clients. This is particularly true given the lack of guidance about how benefit corporations should prioritize the interests of various stakeholders.[337] Procedural considerations, therefore, should be a priority for attorneys.

Although benefit enforcement proceedings have yet to materialize and the jurisprudence around them is nonexistent, courts are instructed to apply the business judgment rule to questions of public benefit.[338] Legislatures recognize that it is no more possible to legislate beneficial outcomes than it is to legislate profitability.[339] In the *Revlon* line of cases, litigants will likely need to make a showing that the board of directors either had inadequate information regarding public benefit or that they did have such information for two or more potential outcomes and purposefully chose an outcome that they knew to be detrimental to the public benefit to be successful in their claims.[340] The dutiful attorney will have counseled her client to review this information before making a decision and, by doing so, will have satisfied her pre-decision ethical duties.

Third, lawyers risk liability to third parties if their clients fail to produce their promised benefit.[341] Self-preservation will necessitate an expansion of the scope of advice that lawyers for benefit corporations give. Documented evidence of advice on broad impacts of corporation action, particularly on key stakeholders,

336. Millon, *supra* note 201, at 1035.

337. *See* Reiser, *supra* note 237, at 607–10.

338. *Model Benefit Corporation Legislation*, supra note 233, § 301(e), at 13.

339. *See* Cummings, *supra* note 266, at 602.

340. *See generally* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183–85 (Del. 1986) (holding that directors were not protected by the business judgment rule when they breached their duty of care in allowing interests aside from maximizing shareholder profits to influence their decision to sell the corporation).

341. *See* Gross, *supra* note 176, at 996.

has the potential to create a safe harbor of accepted practices in which attorneys can protect themselves from outside claims. The advice falling within this safe harbor is sure to look very similar to the advice left to the lawyer's discretion under the Model Rules. For a more in-depth discussion of attorney liability, see Section IV.D below.

As stated in Section IV.A, the passage of benefit corporation legislation necessitates a return to the citizen lawyer. The inclusion of moral, social, economic, political, and environmental issues within the scope of advice that attorneys dispense harkens back to the citizen lawyer. The interests of others will no longer be something distinct from and in competition with the interests of her client; benefit corporation legislation requires that client interests and the interest of others be fused.[342] To advise on these other subjects is not to insert the lawyer's political or moral judgment ahead of that of her client's. Rather, doing so complies with her obligation under the Model Rules to assess the array of legal and, increasingly, business effects of corporate action.[343]

Citizen lawyers do not ignore issues of legal risk; rather, they see them as a floor. Advising clients on how to comply with those requirements is a baseline for good lawyers; attorneys should strive to counsel clients to go above those rules and benefit the public. Citizen lawyers, particularly, do not limit their counsel to complying with statutory minimums or mitigating risks alone.[344] These lawyers look to the effect of client activity on various stakeholders, on the public, and on the legal system in which they operate and advise their clients thusly.[345] In Section V below, I suggest an amendment to the Model Legislation that should bring attorney behavior in line with this expectation of ethical lawyering.

D. Attorney Liability

Again, attorneys can be found liable to a client's shareholders under two theories: aiding and abetting a breach of fiduciary duty and negligence.[346] To bring a successful aiding and abetting claim, would-be plaintiffs will need to show that a fiduciary relationship existed.[347] Shareholders could bring a claim against a greenwashing benefit corporation on the theory that failure to promote a public benefit contradicts a consideration under which the shareholders purchased shares. Under such a theory, greenwashing would need to so grossly controvert the benefit that the shareholder intended as to overcome the business judgment rule and violate the duty of care. Benefit corporation legislation does not leave enforcement of benefit to claims for breach of fiduciary duty, of course.

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342. *Model Benefit Corporation Legislation*, *supra* note 233, § 301, at 12.
343. Rutherglen, *supra* note 15, at 160.
344. Gordon, *supra* note 282, at 1169.
345. *Id.*
346. *See* Gross, *supra* note 176, at 996–1005.
347. *Id.*

The statutes (with the notable exception of Delaware) create a new and distinct benefit enforcement proceeding.[348] And, because those actions may only seek injunctive relief, it is unlikely that aiding and abetting liability could attach to them; the purpose of the legislation was to provide shareholders with a control mechanism rather than a mechanism by which they could extract money from the company or its directors.[349] Attorneys representing benefit corporations may be liable under a negligence standard to both shareholders and nonshareholder third parties if their client corporation engages in greenwashing or otherwise fails to promote a public or specific benefit, but probably not under an aiding and abetting standard.

For third parties to bring an aiding and abetting claim against counsel, those parties would have to show that corporate fiduciaries owed to them and breached a fiduciary duty.[350] This may be more than is possible under benefit corporation legislation. Directors must consider the impact of their actions on third parties, but nothing in the Model Legislation grants those parties a right to enforce that benefit absent a specific delegation of that right.[351] The same is true under SOX.[352] SOX leaves room for "similar material violations" that trigger attorney reporting obligations,[353] but SOX does not create a private right of action for this type of violation. Absent an underlying violation, there is nothing for the attorneys to aid and abet.

Negligence provides a clearer possibility of attorney liability to third parties when representing benefit corporations. Again, shareholders will rely on a variety of statements and documents when investing in a client company. In the case of a benefit corporation, many investors will look to governing documents, impact-related reports and disclosures, and perhaps the fact that the company is incorporated as a benefit corporation when making an investment. Lawyers will doubtlessly be involved in both the creation of these documents and the evaluation of the company's impact. Third parties like customers, vendors, employees, and others may also rely on that information when entering into transactions with benefit corporations. These third parties could be seen as the party whom the benefit corporation "intends as one of the primary objectives of the representation that the lawyer's services benefit[,]"[354] particularly if that party is named in the client's governing documents or impact reporting.

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348. *Model Benefit Corporation Legislation*, *supra* note 233, § 101 cmt., at 2.

349. *See id.* § 302 cmt., at 15.

350. Lewinbuk, *supra* note 179, at 145–46.

351. Reiser, *supra* note 237, at 598–99.

352. *See* 17 C.F.R. §§ 205.2(d), (h)(i)–205.3 (2018).

353. *Id.* § 205.2(d). "*Breach of fiduciary duty* refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions." *Id.*

354. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (AM. LAW INST. 2018).

Litigation that followed the savings and loans scandals of the 1980s hints at how nonshareholder stakeholders could hold attorneys liable for harmful activities of benefit corporation clients. In those cases, receivers and bankruptcy trustees sued debtors' attorneys following the collapse of the savings and loan institutions alleging, among other things, professional negligence, negligent misrepresentation, and breach of fiduciary duty for behavior that primarily harmed creditors.[355] In these cases, creditors harmed by corporate action sued lawyers alleging that the lawyers breached their duty to their client corporation.[356] In allowing claims against the attorneys to go forward on the basis of the lawyers having violated a duty to the corporation,[357] courts implied that creditors ought to be included in the group to whom the attorney owes a duty. The courts allowed these claims even though the acts in question were approved by management and intended to benefit shareholders.[358] Observers noted that this suggested, though did not outright hold, that the corporation has some duty to creditors in situations approaching bankruptcy and that lawyers are required to act in the best interests of those creditors in those situations.[359] Extending this logic to benefit corporations, lawyers should have a similar duty vis-à-vis nonshareholder constituents, and attorneys may be liable to those constituents for harm caused them by corporate action.

V. SUGGESTED REFORMS

I have attempted to interpret lawyers' ethical obligations flowing from the Model Legislation, but it is likely that attorneys' obligations when representing benefit corporations will remain unclear. This is a common complaint of non-litigators operating under rules designed for litigation.[360] This will be doubly true here, given that ethical rules and malpractice law developed out of a private law-ordering understanding of corporate law. Greenwashing is an especially difficult situation for the reasons discussed above. This Article, therefore, suggests reforms that seek to clarify attorneys' ethical duties in these situations. First, this Article recommends expanding the scope of advice that attorneys must give their benefit corporation clients to include the social, political, environmental, and other effects of corporate action on the corporation's many stakeholders and the public at large. Second, this Article proposes reporting obligations for attorneys who become aware that their benefit corporation clients are engaging in behavior that negatively affects nonshareholder stakeholders or committing greenwashing.

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355. O'Melveny & Myers v. FDIC, 512 U.S. 79, 82 (1994); FDIC v. Nathan, 804 F. Supp. 888, 891 (S.D. Tex. 1992).

356. *O'Melveny*, 512 U.S. at 82; *Nathan*, 804 F. Supp. at 891.

357. *O'Melveny*, 512 U.S. at 79, 83, 89; *Nathan*, 804 F. Supp. at 898.

358. *O'Melveny*, 512 U.S. at 82; *Nathan*, 804 F. Supp. at 896.

359. Simon, *supra* note 34, at 101–03.

360. *See, e.g.*, Regan, Jr. & Hall, *supra* note 66, at 2002.

These reforms have the added benefit of bolstering benefit corporation legislation. The government may deputize attorneys in the effort to create public good through these entities and guard against greenwashing.[361] Unlike nonprofit and tax-exempt organizations, government agencies like state attorneys general and the IRS do not normally have a direct role in enforcing public benefit and guiding against greenwashing. The Model Legislation purposely grants that responsibility to shareholders; placing attorneys in that enforcement scheme would not run counter to the goals of the legislation or create conflict between private and public enforcement.

These reforms also hold potential benefits for lawyers. They should serve to clarify standards of care, helping lawyers avoid liability, and give attorneys tools to increase their value for social entrepreneurs and benefit corporation clients. Rules of professional conduct do not necessarily create standards of care when determining liability, leaving confusion for courts and attorneys attempting to decipher lawyers' obligations. Clarifications such as these can help to resolve that confusion.[362] These standards should also make lawyers more marketable to business clients who are serious about pursuing the public benefit set forth in their organization's governing documents. Business clients already expect lawyers to guide them through complex regulatory apparatuses and lower transactions costs when guiding clients in various transactions.[363] As a result, lawyers already play an outsized role in structuring transactions for business clients.[364] When benefit corporations enter into transactions, their governing law will require that they look to create a public benefit through their dealings or be mindful that stakeholders and the environment are not harmed.[365] Since lawyers are already deeply involved in the structuring of business deals, lawyers who can show they are able to advise clients on mission in addition to the work they traditionally do will be very desirable to the client. By embedding those duties in legislation and ethical codes, prospective clients will be able to anticipate that lawyers are already in the business of dispensing advice on mission and public benefit.

Any reform poses the question of which authority is best suited to make the reform. For attorneys representing benefit corporations, two options are state bar associations that promulgate rules of professional conduct and state legislatures or state agencies that oversee the registration and regulation of corporate entities.

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361. SOX was similarly passed to respond to a wave of large corporate scandals around the turn of the twenty-first century, the most prominent of which was the Enron scandal. Cramton et al., *supra* note 21, at 727–28, 735–36.

362. *See* Munneke & Davis, *supra* note 39, at 34.

363. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 246 (1984).

364. *See id.* at 241–42.

365. *See* discussion *supra* Section III.B.

Bar associations promulgate rules of professional ethics and issue opinions and other statements interpreting and applying those rules.[366] As self-regulating bodies, bar associations may have different priorities than legislatures and therefore different reasons for changing rules. The relationship between rules of professional conduct and attorney liability is a complicated one, as violations of rules do not always give rise to liability and behavior that complies with the rules could still be negligent. Bar associations may attempt to clarify their member's obligations but are not in a position to create practices and procedures that, if followed, will completely exonerate their members from any liability. Their motivations for changing rules, however, differ from the motivations of legislatures passing benefit corporation legislation.

State legislatures or regulatory agencies exercising rule-making authority are better positioned to adopt these suggestions. Legislatures already passed benefit corporation legislation and delegated certain authority under that legislation to state agencies.[367] Legislatures could make determinations about how and why attorneys should work to create public good and, along with relevant agencies, how attorneys should be marshaled in service of that goal. As discussed, the IRS[368] and SEC,[369] for example, already have rules that apply specifically to attorneys practicing before them or representing companies governed by their regulations that add additional obligations to those contained in state rules of professional responsibility. These rules would also create a clear legal standard of care, a violation of which may create a basis for a negligence per se claim against attorneys.[370] Doing so may help attorneys avoid liability by granting them the chance to show that they complied with their statutory obligations. Finally, by adding these suggestions to the laws and regulations governing benefit corporations in a given state, these obligations would become part of the system into which founders and investor opt. This avoids complicated questions of extra-jurisdictional application: might clients choose lawyers based on the rules governing their practice rather than the law governing the entity?

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366. *See, e.g.*, *Resolution*, *supra* note 166, at 1.

367. *See, e.g.*, MINN STAT. § 304A (2018).

368. *See, e.g.*, 31 C.F.R. § 10.37 (2018).

369. 17 C.F.R. §§ 205.1–205.7 (2018).

370. The relationship between violations of law and ethical violations for attorneys and between violations and attorney malpractice is far from settled. In the words of a South Carolina court:

> A majority of courts permit discussion of [legal] violation[s] at trial as some evidence of the common law duty of care . . . . These courts generally rule that the expert must address his or her testimony to the breach of a legal duty of care and not simply to breach of disciplinary rule . . . . Other Courts have held that ethical standards conclusively establish the duty of care and that any violation is negligence *per se* . . . . A minority find that violation of an ethical rule establishes a rebuttable presumption of legal malpractice. And, finally, a few courts hold that ethical standards are inadmissible in a legal malpractice action.

Smith v. Haynsworth, 472 S.E.2d 612, 613–14 (S.C. 1996) (citations omitted).

A. Scope of Advice

Benefit corporation legislation will also affect the scope of advice that attorneys give benefit corporation clients, though this too would benefit from clarity. While many attorneys advise clients on enterprise risk and soft legal norms,[371] that advice still focuses primarily on risk to the client rather than on the rights of third parties. Lawyering to a benefit corporation, however, should require that attorneys place the effects of their clients' behavior on nonshareholder stakeholders foremost when giving counsel. To facilitate this, states should clarify that attorneys representing benefit corporations must advise corporations on the social, political, environmental, and other impacts of corporate action on the corporation's many stakeholders and the public at large. The following language should be added to the Model Legislation:

> Benefit Corporations shall treat the risk of failing to create a general public benefit or specific public benefit, or to consider the effects of any action or action upon the parties listed in Section 301(a)(1) of the Model Legislation, as a legal compliance issue wherever they operate.[372]

The United Nations did something similar when they approved the Guiding Principles in 2011.[373] Following the enactment of the Guiding Principles, the American Bar Association affirmed that advising clients on human rights norms aligned with the requirement in Model 2.1 to provide candid advice.[374] Accordingly, the effects of corporation action on intended beneficiaries and other nonshareholder stakeholders should qualify as "other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."[375] As is the case with violations of international human rights norms, this change requires that benefit corporations and their attorneys evaluate

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371. *See* Regan, Jr. & Hall, *supra* note 66, at 2002 (discussing how attorneys evaluate and advise clients on business risk related to international human rights issues).

372. The terms "general public benefit" and "specific public benefit" shall have the same definitions as in the Model Act.

373. *See generally* Guiding Principles, *supra* note 164, at 1 (suggesting policies for states and businesses around the world to integrate a respect for and protection of human rights into business practices).

374. Specifically,

> It bears noting here that ABA Model Rule of Professional Conduct 2.1 may well apply in this context. It requires lawyers to exercise "independent professional judgment and render candid advice" and permits them to "refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation". This imperative logically would include applicable international standards in the conduct of a client's affairs, including the Framework and Guiding Principles where corporate clients are concerned.

Resolution, *supra* note 166, at 5 n.16 (citation omitted).

375. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR. ASS'N 2018).

the effects of corporation action on the same level of other identifiable legal risks without first identifying an enforcement mechanism.[376]

The IRS has taken the approach of limiting the scope of advice that attorneys may give when dispensing written legal advice.[377] For example, 31 C.F.R. § 10.37 states that attorneys may not "take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit" in written advice.[378] This accomplishes similar ends to what I propose. One, it ensures that the IRS's capacity to bring an enforcement claim is not the sole determinant of whether individuals and entities comply with (or attempt to comply with) tax law. Second, it requires lawyers to evaluate client behavior in a way that is distinct from legal risk alone but rather focuses on the effects and legality of client actions. That said, applying to written advice only leaves space for attorneys to orally advise of the odds of enforcement. Altering the scope of advice that attorneys may give is therefore not an entirely novel concept, and states should look to this approach to strengthen and clarify their benefit corporation laws.

B. Reporting

Second, states should create a reporting requirement and process for attorneys who are aware that their benefit corporation clients are failing to promote a public benefit. This proposal attempts to close the gap between discretionary and ambiguous obligations found in the Model Rules to report violations of law and obligatory requirements under SOX to report "similar violations" to violations of fiduciary obligations.[379] Under this proposal, the same sort of activities that give rise to benefit enforcement proceedings under the Model Legislation will give rise to lawyers' reporting duties.

This proposal draws heavily from the rules promulgated by the SEC under SOX. Should the attorney "become aware of" a triggering activity by a client constituent, she is first to report to the benefit officer, should one exist.[380] If that person fails to act, she then goes to the benefit director, the board of directors, and ultimately shareholders or other parties granted a right to bring benefit enforcement proceedings against the company. Unlike SOX, she does not have the option to report to the state agency, as the state agencies have few enforcement powers over the benefit corporation.[381] Her final resort in the face of inaction by her client's officers and directors is to resign from the representation.

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376. *Resolution*, *supra* note 166, at 5.

377. 31 C.F.R. § 10.37 (2018).

378. *Id.* at § 10.37(2)(vi).

379. 17 C.F.R. § 205.2(d) (2018).

380. *Id.* § 205.3.

381. Should a state's benefit corporation legislation contain this kind of enforcement, the state agency charged with carrying out that enforcement may also be an appropriate party to whom the attorney may report greenwashing.

This formulation presents several positive aspects for both attorneys and backers of the benefit corporation movement. First, the obligations are clear, or as clear as they can be under this new scheme. The standards for "become aware of" are hotly debated,[382] but this language at least tracks with SOX language, allowing ample opportunity for courts to give definition to this term. Second, while it is not yet clear what kind of behavior will be found to violate benefit corporation legislation, rules around reporting can develop in tandem with benefit enforcement proceedings as they are brought and adjudicated.

Reporting to third-party beneficiaries, as proposed here under limited circumstances, has not been widely recognized.[383] For that reason, the proposed rule will state that the attorney may disclose only upon making a good faith determination that disclosing a triggering behavior to third parties is in the interest of the client corporation and that the third party is granted a right to sue or other control right.

C. General Considerations

As with proposed SOX rules and the amendments to the Model Rules[384] that followed the Enron scandal, any proposed change to attorneys' ethical duties is sure to encounter pushback. It is likely in this case that pushback would focus not only on the effect of changes on the attorney's relationship with her client but also on the nature of benefit corporations themselves. Many feel that the protections for directors in the Model Legislation are not required because corporate law does not actually expose directors and officers to liability should they consider the effects of corporate action on nonshareholder stakeholders.[385] If benefit corporations do not actually change corporate law in any meaningful way, it should follow that attorneys' professional responsibility obligations should not change either. That said, even if traditional corporations are not precluded from pursuing a mission if doing so comes at the expense of profit to the shareholders, are lawyers' duties totally unaffected? The attorney must still

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382. Cramton et al., *supra* note 21, at 756–59.

383. *But see* HAW. PROB. R. § 42(b). Hawaii Probate Rules state that a lawyer representing a trust owes a duty to notify beneficiaries of certain issues. *Id.*

> An attorney for an estate, guardianship, or trust does not have an attorney-client relationship with the beneficiaries of the estate or trust or the ward of the guardianship, but shall owe a duty to notify such beneficiaries or ward of activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the assets under administration or the interests of the beneficiaries.

Id.

384. Cramton et al., *supra* note 21, at 727–33.

385. *See* Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 659 (2013) (disputing the benefit corporation's ability to promote the idea of corporate social responsibility, alleging its structure creates a false dichotomy between benefit corporations and business corporations and is practically unworkable); *see generally* Callison, *supra* note 261, at 105 (claiming the benefit corporation form is based on a flawed premise of shareholder primacy).

understand the law governing the client's organization and how to ascertain the identity of the client's duly authorized constituents. That analysis will surely be affected by the client's stated legal purpose, and the exercise undertaken in Section IV will be valuable.

These reforms may also disincentive some founders from opting into the benefit corporation form. Even without the suggested rules, an interpretation of lawyerly obligations that has lawyers serving the public interest over individual constituents and reporting failure to create a public benefit could be unappealing for founders who are accustomed to having both freedom to run a business and access to trusted counsel. What manager would want to work in an environment where the attorney is more watchdog than counselor? After all, companies can seek third-party certifications or take other steps to signal to the market and investors that they are pursuing a mission alongside to profit.

In important ways, these arguments miss the purpose of the benefit corporation form. Benefit corporations were not created to replace traditional corporations; they were created to provide an option for founders and investors that is somewhere between the traditional charity and for-profit models.[386] From that vantage point, benefit corporations are less corporations with additional requirements than organizations that can pursue a mission without the limitations of nonprofit and tax-exempt entities. Founders and investors concerned with mission are actively seeking out ways to combine for-profit flexibility with the mission-driven work of charity.[387] The duties and suggested reforms described herein should appeal to rather than repel those individuals; they commit to the benefit corporation's purpose and help create a predictable monitoring and enforcement environment. Serious social entrepreneurs who want to use the benefit corporation to create a public benefit will look to lawyers to structure businesses and transactions in a way that furthers their mission. Embedding those obligations in lawyers' ethical duties helps attorneys create value for those clients.

Finally, should these requirements result in pro forma compliance with the authorizing legislation, the citizen lawyer's task is to exercise her rights as a citizen to speak out against this kind of behavior and advocate for changes to the legislation. When representing a client whose purpose is to further the public, it may be that no constituent is willing or able to comply with this mandate. The lawyer need not whistleblow on her client if she does not deem it in the client's best interest, but she is not precluded from working to better the legal regime governing her client organization.[388]

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386. *See* discussion *supra* Section III.A.

387. *See* Plerhoples, *supra* note 7, 525–26, 542.

388. For example,

> The implications of this idea are particularly important for the so-called Washington lawyer (wherever he might be) who is hired to represent his client before agencies and legislatures contemplating new law. This may put us on one of the borderlines I do not pretend to resolve definitively, yet I think we can get an idea of how to think about these

VI. CONCLUSION

If benefit corporations are successful, questions will arise about the nature of corporate law itself and of the role of the legal profession. Attorneys' ethical duties flow in part from the law governing organizational clients. In the case of corporate representation, obligations reflect the dominant understanding of corporate law. Many interpretations of ethical rules in the corporate context reflect a private law conceptualization of corporate law. Benefit corporation statutes, however, attempt to create a corporate form that embraces corporate law as a public ordering mechanism. Ethical obligations will have to be reinterpreted to reflect this change. To the extent that ethical rules lack clarity, or where ethics rules do not work to further the purpose of benefit corporation statutes, there is an opportunity for states to reform ethics codes for lawyers representing benefit corporations.

The ethics of representing corporations developed around an acceptance of corporate law as a private ordering mechanism that embraces shareholder primacy. On the one hand, the benefit corporation could be seen as an exception to the rule that corporate law plays a purely private function in society. Benefit corporations will be those who opt out of this rule and into a public ordering scheme. A generation of attorneys advising these clients will embrace as an essential part of their professional obligations dispensing with the sort of advice currently reserved to discretion.[389] On the other hand, the public purpose enshrined in benefit corporation legislation may open the door to viewing corporate law generally as a public ordering tool and corporate attorneys, therefore, as stewards of the public interest.

Representing the benefit corporation requires a different kind of lawyering than does representing a traditional corporation. The legal profession will need to take steps to embrace the citizen lawyer model for attorneys representing benefit corporations. These proposed reforms aid in that movement, but educating lawyers, law students, and clients about these new corporate forms and lawyers' responsibilities thereunder will also be necessary for these attorneys to comply with their ethical and legal obligations.[390]

> cases too. To the extent that such representation involves participation in a formal proceeding in which laws or regulations are drafted and technical competence is required, the task is *closer* to the traditional task of the lawyer as I have sketched it, and the legal friend concept is more appropriate. To the extent that the representation involves (wholly lawful) deployment of political pressures, inducements, and considerations, it is closer to being political action, and thus to requiring the kind of overriding concern for the common good that should motivate all political actors. Certainly it is absurd that a man should seek to be insulated from moral judgment of his accomplishments as a political string-puller or publicist by the defense that he was only doing it for money.

Fried, *supra* note 64, at 1087 n.39.

389. And may indeed be forced to.

390. The Shift Project, for example, trains businesses on implementing the Guiding Principles into their operations. *Shift is the Leading Center of Expertise on the UN Guiding Principles on Business and Human Rights.*, SHIFT, https://www.shiftproject.org/ (last visited Oct. 6, 2018).