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CHAPTER 27

Ethical Considerations: Corporate Social Responsibility and the 21st Century Lawyer

Irma S. Russell & Joan MacLeod Heminway

This chapter provides perspectives on the balance of professional and personal ethical considerations that lawyers must achieve to deal effectively and ethically with the conundrums they face in their representation of business clients. This task requires consideration of both issues that some might regard as isolated (or at least mundane and local) and, at the same time, issues that are global and existential—critical to the survival of our species. Although the focus is on the role of lawyers, the challenges confronted by lawyers and the rules governing their conduct also inform the ethical responsibilities and role of nonlawyers.

The chapter is designed to illuminate both the opportunities and challenges for lawyers practicing in this complex space. For clients committed to CSR, a lawyer's skill and experience in examining the structure, governance, operations, and other activities of business firms and identifying influences on a business firm's legal compliance and risk management can have a profoundly beneficial effect in meeting the goals of CSR. Lawyers are a formidable force, and a potential guiding light, in navigating the legal and ethical constructs that tie businesses, through CSR, to meaningful social and environmental change at a critical juncture in world history.

§27.01 INTRODUCTION

This chapter on the lawyer's ethical and general professional responsibility considerations relating to corporate social responsibility—CSR¹—is a culminating, integrative

1. The term “CSR” implies the existence of a business organized in corporate form. While much of the text of this chapter does reference corporations and corporate law and practice, we most often

chapter of this book, “Corporate Social Responsibility—The Corporate Governance of the 21st Century.” The topic is, however, more than a mere capstone of the book’s subject. Ethical concerns and considerations relating to corporate decisions and actions have always been part of executive decision-making and corporate governance. In a very real sense, the topic of social responsibility is—at its core—a conversation about ethics. Ethical considerations are the foundation and touchstone for law practice and the important place of social responsibility in the corporate context.

In this chapter, we provide our perspectives on the balance of professional and personal ethical considerations business lawyers must achieve to deal effectively and ethically with the conundrums they face in their representation of business clients. This task requires consideration of both issues that some might regard as isolated (or at least mundane and local) and, at the same time, issues that are global and existential—critical to the survival of our species. To accomplish the goals of serving the public interest in the complex space comprising representation of corporate and other business entities, lawyers must develop and clarify their knowledge of professional duties as well as the law itself, corporate structure, and corporate values and culture. A study of the law governing lawyers allows a systematic process for discovering and understanding both the law in its applied context and the rules of professional responsibility that guide and regulate the conduct of lawyers, including interactions with clients, non-clients, and representatives of the justice system.

Our focus on the law governing lawyers in this chapter is not intended to suggest that the ethics or legal issues related to CSR apply to lawyers only or that the rules of professional responsibility governing the conduct of lawyers are the exclusive ethical touchstone for lawyers and others in business or the world of corporate enterprise. The rules of professional conduct do not apply specifically to nonlawyers. Nevertheless, many of the points and principles discussed here will help nonlawyers in framing and understanding issues that arise in CSR. The organization and specificity of ethics rules for lawyers could be seen as implying that nonlawyers may have fewer or less rigorous duties to the corporation. A review of statutory duties such as environmental disclosure laws suggests the dangers of regarding nonlawyers as free from legal or ethical mandates. Likewise, this cautionary note applies to common-law doctrines, such as fraud, concealment, and the duty to warn of unreasonable risks.

The rules of professional conduct, while not directly applicable to nonlawyer corporate officers, have a great deal to say to corporate officers and employees who are not lawyers. The ethical underpinnings and requirements applicable to lawyers in the corporate setting provide an essential tool for testing decision-making in that setting. Many responsible officers and employees of corporations are not lawyers. This chapter speaks to them as well as to lawyers. The application of ethics principles is crucial to the work of both lawyers and nonlawyers who advise or make decisions for corporate entities.

note and intend to imply a broader notion of social responsibility applicable to businesses organized as partnerships, limited liability companies, and other types of entity.

Ramon Mullerat, the editor of the first two editions of this book, studied the relationship of CSR and legal ethics,² emphasizing the voluntary nature of CSR.³ The role of ethics in CSR is central to Mullerat's work. In his introduction to the second edition of this book, Mullerat stated that "legal rules can never wholly replace ethical principles."⁴ Acknowledging the role of lawyers in writing the chapters of the edition, the editor affirmed the usefulness of the book for nonlawyers who work for corporate entities. Mullerat noted that "all the contributors [to the book] have a direct and indirect relationship with the operation of public or private entities."⁵ He noted that most of the authors were lawyers, but he assured the readers, nevertheless, that this fact "does not mean that the book's contents will not be interesting and helpful for businessmen, politicians, journalists and many others interested in business law and ethics. On the contrary, the book contains meaningful and inspiring insights for all those who are preoccupied with the role and duties of business in the modern world."⁶ Consistent with Mullerat's reflections, this chapter is designed to provide those insights in the CSR context from the lawyer's perspective.

CSR is an important and much talked-about concept today. In 0.46 of a second, a Google search for the term "corporate social responsibility" delivered "about 322,000,000" results. In the first scholarly article listed in the search results, Archie B. Carroll of the University of Georgia explains that, while the concept "is largely a product of the 20th century," it has a long and varied history, and "evidences of the business community's concern for society" can be traced back "for centuries."⁷ CSR is in a general sense a motivating philosophy of corporate citizenship and includes the imperative to fulfill the moral obligation to "do the right thing" while achieving business goals, including the goal of maximizing shareholder profit. The rise of CSR may be, in some measure, a response to the dominance of neoclassical law and economics in theoretical conceptions of the corporation that have found their way into aspects of corporate law. Countering a profits-only philosophy, CSR focuses attention on an array of values such as environmental sustainability, transparency, philanthropy, and employer/employee relations. The existential threat of climate disruption is undoubtedly a significant motivating factor in the movement toward voluntary corporate affirmance of sustainable business practices today.

Business lawyers, like all lawyers, must hold in tension the duties of vigorously representing the client while acting for the public good within the bounds of the law.

2. Ramon Mullerat, *The Global Responsibility of Business*, in *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2d ed. 2011).

3. *Id.* at 4 (noting the "voluntary commitment by businesses to manage their roles in society in a responsible way").

4. *Id.*

5. *Id.* at 5.

6. *Id.*

7. Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 *Bus. & Soc'y* 268 (1999), available at https://s3.amazonaws.com/academia.edu.documents/38846469/Revista_Abril_1999_Carrol_Corporate_Social_Responsibility_Evolution_of_a_Definitional_Construct.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1554014962&Signature=nVr3jesyVghpkZvENJw18NhcAFE%3D&response-content-disposition=inline%3B%20filename%3DCorporate_Social_Responsibility_Evolutio.pdf (last visited Mar. 30, 2019).

In exploring the lawyer's responsibility to advise the business client on the law and the client's responsibilities under the law (as related to CSR), this chapter presents the need for proactive and forward-looking legal advice regarding the client's long-term best interests in light of changing legal landscapes and social expectations. The goal of integrating study and considerations of legal representation in this chapter requires consideration of social responsibility from multiple angles and levels.

The core duties a lawyer owes a client are ancient and inhere in the relationship with each client. Lawyers owe the same duty to a client regardless of whether that client is an organization or a human. The lawyer's duties spring from the relationship of agency; the loyalty of the agent to the best interest of the principal—the core fiduciary duty conceptualized under modern interpretations of agency law⁸—is the touchstone for the lawyer's role and for ethics rules. Loyalty is so closely associated with the fiduciary role of an agent that each concept is sometimes referred to as the wellspring for the other, particularly in the corporate setting.⁹ The specific duties the lawyer owes the client include confidentiality, communications, conflict-free representation, and competence. All are captured in the general hallmark of acting to further the best interest of the client and fulfilling the obligation of the lawyer-as-fiduciary to further the legitimate interests of the client-as-principal. The Preamble of the American Bar Association's *Model Rules of Professional Conduct* explains this general duty as “zealously to protect and pursue a client's legitimate interests, within the bounds of the law.” The Preamble's explanation includes two qualifiers related to the client's interests to make clear that the lawyer's actions must protect and be in pursuit of “legitimate interests” and also be “within the bounds of the law.” Although this explanation of the Preamble takes pains to spell out the duty by articulating qualifiers, arguably the qualifications are unnecessary. If illegitimate interests or actions outside the bounds of the law were included as part of the lawyer's duty of loyalty, the net effect would be that the lawyer's clients, including business firms, would be above the law as far as the lawyer is concerned. A system founded on that premise would emasculate the power of law, undermining its force and rendering many statutory mandates, including criminal statutes, symbolic. The lawyer's specific duties are well known and not particularly complicated in and of themselves. Application of these principles—like application of the law to real cases—may be complicated, however. Whether particular conduct is legal or illegal may turn on the framing of the issue, legal rule applied, and questions of fact that may require difficult determinations about knowledge and intent.

As this chapter later explains in greater detail, the corporation raises unique challenges in effectuating CSR. Like the *Model Rules*, the *Principles of Corporate Governance* of the American Law Institute expressly recognize the boundaries of propriety set by law, even if express provisions of state corporate statutory law are

8. See Restatement (Third) of Agency § 8.01 (2006) (“An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.”); see also Christopher M. Bruner, *Is the Corporate Director's Duty of Care A “Fiduciary” Duty? Does It Matter?*, 48 Wake Forest L. Rev. 1027, 1054 (2013).

9. See Norwood P. Beveridge Jr., *The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction*, 41 DePaul L. Rev. 655 (1992).

more limited than one might expect. The *Principles* include a statement that the corporation “[i]s obliged, to the same extent as a natural person, to act within the boundaries set by law”¹⁰ in the conduct of its business. Although corporate statutes, including the General Corporation Law of the State of Delaware, are silent with regard to this specific obligation stated in the *Principles*, corporate law statutes generally permit the organization of corporations only for lawful purposes.¹¹ The relative silence of the Delaware statutory corporate law concerning the principle of compliance with law does not, of course, mean that the law does not apply to corporations. It is clear, after all, that corporations that violate the law can be held to account for illegal conduct. Because corporations act through their agents (officers, employees, and others), the corporation needs guidance and action from its human decision-makers to achieve legal compliance and avoid the sanctions that result from violations of the law.

Likewise, the *Principles of Corporate Governance* indicate that corporate entities “[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business.”¹² Finally, the *Principles* clearly state that a corporate entity “[m]ay devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.”¹³ This statement from the *Principles* on public welfare leaves open the question of what level of resources may be unreasonable for the corporate entity. Nevertheless, the statement and its capaciousness accomplish the goal of allowing corporate entities to allocate some resources to public purposes, thus seemingly rejecting a flat rule of wealth maximization as a sword. Even those who espouse allegiance to a shareholder wealth maximization norm typically recognize the ability of the board to make decisions that do not maximize shareholder wealth in the short or intermediate term.

[T]he corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders. The directors, of course, retain substantial discretion, outside the context of a change of control, to decide how best to achieve that goal and the appropriate time frame for delivering those returns.¹⁴

It is important to recognize that corporate boards of directors are complex decision-making bodies that cannot ignore—as a matter of law or prudence—the financial sustainability of the firm. Yet corporations can and do look beyond mere firm profit and shareholder wealth maximization in making individual decisions. The modern development of CSR seeks to recalibrate the duties and values of corporate entities, explicitly embracing values beyond financial gain.

Compliance with the law is the foundational norm of the legal system. It applies to actors, whether they are organizations or individuals. Thus, from a normative

10. Am. Law Instit., *Principles of Corp. Governance* § 2.01 (1994).

11. See, e.g., Del. Code Ann. tit. 8, § 101(b) (“A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.”).

12. *Id.*

13. *Id.*

14. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That for-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135, 155 (2012).

perspective, the law has real force in society and the marketplace at large. This reality has added logical power for business entities with perpetual lives (e.g., under operative default rules, corporations, limited liability companies, and partnerships), given their potential and expected continued existence beyond the terms of life of their individual human owners and managers. Developing and implementing a profitable business strategy is futile without compliance with the law because the long-term health and productivity of a business entity depend on continued existence of the entity under the law. To the extent that decision-makers use the complexity of the corporate structure to obfuscate violations of the law, they put the corporate entity at risk.

This chapter examines the greater complexity of choices and communication when the lawyer's client is a business entity rather than a human individual. One reason for the heightened complexity of issues in the business context is that, rather than dealing directly with an individual who articulates his own interests, the business lawyer communicates with the client through human intermediaries (sometimes numerous human intermediaries), each of whom has potentially diverse and differing views on the legal duties of the corporation and the best interest of the firm. As an advisor to the entity, the lawyer explains the power, meaning, and implications of the law to the human constituents of the business firm who (alone or as part of a group) make decisions for the organization. As agents to organizational entities (including corporations), business lawyers bear a responsibility to their organizational clients and fulfill the role of helping human decision-makers understand and act in ways that further legitimate interests of the firm.

Turning to another layer of analysis, the lawyer must also include consideration of individual, personal duties and values to protect the long-term best interest of clients and society. A lawyer advising in this context must confront questions about the extent to which law and legal training fully—or even adequately—answer client questions and requests. In each case, the multilevel and scalable nature of the analysis requires thoughtful consideration of legal issues grounded in the interests and expectations of the client, society, and (in certain contexts) our justice system.

In a very meaningful sense, ethics is the foundation of all law. Law is the expression of the public interest in areas of life and business. Law creates or recognizes responsibility as an inherent attribute of relationships and privileges. Indeed, the public good is the touchstone of the common law and legislation alike. The Latin saying “*salus populi suprema lex esto*” (“Let the good (or safety) of the people be the supreme (or highest) law”) indicates the importance of common-sense protections undergirding our legal system. In other words, society (the collective) is justified in imposing a law on individuals only when the interest of the collective is of sufficient significance that overruling the unfettered choice of the individual is justified. When the results and effects of conduct are strong enough, laws and regulations seek to incentivize actions in ways that maximize the good of society or at least to minimize the social and economic harms occasioned by the conduct. In this way, the law expresses the ethics and needs of the community.

CSR flows from the inherent nature of a business entity—the responsibility arising under the law by virtue of the interests and expectations of the individuals affected by the actions of business entities. The direct relationship of ethics to law is

therefore apparent in the law governing business associations. The fictional entity of a corporation exists because government and the law have recognized that the existence of a corporation serves the public good. Historically and typically, this public good is found in the shared benefit of a robust economy and laws that protect public health and safety.

Today, the ethical ramifications of business decision-making and activity seem more pronounced and impactful than ever. Together with government and social institutions, business provides structures and outputs that govern our everyday lives. In this way, businesses are a critical component in the determination of our future—the future of our world. Indeed, as briefly noted above, circumstances today present the existential crisis of global climate disruption, a tragedy that can be avoided only with concerted and organized efforts to address the issue by both government and business acting collaboratively and cooperatively. The lawyer’s knowledge of CSR and professional responsibility is important—indeed essential—to these efforts.

§27.02 THE SUSTAINABILITY IMPERATIVE AND SUSTAINABLE DEVELOPMENT

CSR incorporates notions of sustainability and sustainable development. To understand CSR is to understand these two related values. Each value impacts and is impacted by the business structure and decision-making of a firm. As a result, business lawyers must understand sustainability and sustainable development in order to do their work in a professionally responsible manner. The fact that modern corporations have perpetual existence produces a level of accountability for future consequences of their actions more tailored to the goals of sustainability than the single generation approach of earlier times.

The concept of sustainability is simple. It seeks the protection of future peoples as well as the current generation. Discussion of the goal of sustainable development often appears in conjunction with statements relating to the overall concept of sustainability. Sustainable business objectives often incorporate strategies for food security, energy security, and economic security. Sustainability includes much more, of course. It focuses on species and ecosystems protection, energy conservation and efficiency, industrial development strategies limiting resource depletion, and management of the resources of the Earth. Climate change and other threats posed in today’s world have heightened the difficulties and risks relating to sustainability. At the same time, recognition by government and private firms of the need for sustainability and the commitment to seeking sustainable options has never been higher.

The idea of sustainability—securing the blessings of democracy, as well as social and economic resources, to posterity— is not new. It is part of the goal stated in the United States (U.S.) Constitution. The Preamble to the Constitution states that the U.S. was formed to, among other objectives, “secure the blessings of liberty to ourselves and our posterity.”¹⁵ While the close focus of concern to the drafters of the Constitution

15. The Constitution of the United States of America, Preamble.

was protection against political tyranny, political freedoms mean little if the health and safety of the populace are undermined. Likewise, the international community of nations has studied and endorsed the concept. In 1987 the United Nations Brundtland Report, entitled “Our Common Future,” defined “sustainability” as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁶ Essentially, the sustainability principle expands the idea of the Golden Rule¹⁷ to include future generations within its ambit. It articulates the goal of securing the right to pursue a full life in a livable environment for both current and future generations. The same concept of protection of both future and current generations is found in the Public Trust Principle, which protects the public’s right to the inheritance of natural resources. This principle identifies the government’s duty to manage the public trust properties for the people of the country.¹⁸

As an aside, it seems relevant to note that terms have a range of meanings, often conveying softened or inexact meanings as the terms enter the common vernacular of business, public relations, or the media. In the case of the term “sustainability,” some usages dilute or discard the primary, original meaning: protection of the environment or the planet for future generations. The term now frequently appears in business writing or the popular media with a meaning of “successful” or even “profitable.”¹⁹ These uses of the term are accurate but narrower in scope than the meaning we intend to convey here.

The need for broad sustainability—as the true principle for planning—has been established by history and reason. Sustaining future populations depends on planning and monitoring resource allocation and use. It requires cooperation of governments and private enterprises to preserve and wisely employ resources and minimize threats of harm to the Earth and its resources.

To many, sustainable development is, perhaps, of more particular interest than simple sustainability. The term “sustainable development” refers to the commitment to progress economically while maintaining the ability of future generations to lead their lives productively and safely. For example, it is easy to see that the goals of reliable and viable energy are inherently crucial to supporting the economy, the lives and livelihoods of people, and a livable planet. More generally, reliable and viable business is inextricably linked to the public interest of supporting the economy and having a livable planet. “Corporate justice recognizes the value, even beauty, of capitalism and

16. Our Common Future, Rep. of the World Comm’n on Env’t & Dev., U.N. Doc. A/42/427, ¶ 27 (1987).

17. The Golden Rule is a common sense ethic, which states: “Do unto others as you would have them do unto you.” It is part of moral philosophy and religions. See, e.g., THE BIBLE, Matt. 7:12.

18. See Michael C. Blumm & Mary Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (Carolina Academic Press, 2d ed. 2015).

19. Mike Isaac and Kate Conger, *Uber, Losing \$1.8 Billion a Year, Reveals I.P.O. Filing*, N.Y. TIMES (Apr. 11, 2019), https://www.nytimes.com/2019/04/11/technology/uber-ipo-filing.html?mc=edit_NN_p_20190412&nl=morning-briefing&lid=51086901tion%3DtopNews§ion=topNews&te=1 (Last Visited 4-12-19) (Stating That Uber Is Likely to Be Valued for Its Initial Public Offering at Around \$100 Billion Despite “renewed Questions about How Sustainable Uber’s Business Actually Is”).

free enterprise, as an economic system that when intelligently, effectively, and lightly regulated enables beneficiaries the opportunity to realize their best potential.”²⁰

Development may often come at the sacrifice of sustainability, leading to the assumption that growth is anathema to sustainability and continued expansion puts the carrying capacity of the Earth at risk.²¹ This prospect is sobering. Given that the purpose of government action is protection of the public, the threat of climate change is central to government responsibility. Because the duty of protection includes management of a world that is capable of sustaining human life fundamental to a free and ordered society,²² government regulation cannot escape the ongoing task of balancing safety and economic prosperity, and no one should be surprised at moves to regulate the risks of climate disruption. “[O]ne of the problems of modernity is that social institutions and government regimes are themselves engines of consumerism and the ‘growth imperative’, responding to public dependence on perpetual growth by supporting and facilitating uses of natural resources beyond nature’s carrying capacity.”²³

Despite the potential and actual dissonance between sustainability and progress, however, there is cause for hope. Some scholars and activists envision a possible harmonization of the goals of the present and the future.²⁴ In addition to scientists, individuals and institutions—including business managers and firms—now recognize the interrelated nature of all resources of the physical world and the need for sustainable practices to maintain productivity and life:²⁵

Current efforts can give a sense of the synergies available for resource protection. Collective action for conservation occurs at every level, including international treaties and agreements, state and local government. Likewise, private industry, corporations, and non-governmental organizations collaborate to advance sustainable methods and ideas. In particular, a new approach to corporate operations, called corporate social responsibility (CSR), seeks to create a social benefit rather than solely work to maximize shareholder wealth. Moreover, the corporate culture often now includes the goal of stewardship.²⁶

20. Todd J. Clark & André Douglas Pond Cummings, *Corporate Justice* (Carolina Academic Press 2016).

21. See Craig Anthony Arnold, *Sustainable Webs of Interest: Property in an Interconnected Environment*, 2 J. Animal & Envtl. L. 27, 64 (2011) (identifying the problem of the “growth imperative” taxing nature beyond its “carrying capacity” (citing Robert J. Antonio, *Climate Change, the Resource Crunch, and the Global Growth Imperative*, 26 *Current Persp. Soc. Theory* 3 (2009)).

22. Irma S. Russell, *The Art and Science of the (Survival) Deal: The Role of Administrative Agencies in Protecting the Public Against Unreasonable Risks*, 87 *UMKC L. Rev.* 733, 734 (2019).

23. *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 *Wm. & Mary Envtl. L. & Pol’y Rev.* 785, 813 (2009).

24. See Andrea McArdle, *Lessons for New York: Comparative Urban Governance and the Challenge of Climate Change*, 42 *Fordham Urb. L.J.* 91 (2014) (noting that “large numbers of cities linked in a network committed to policies promoting sustainability and resilience could potentially moderate the force of the growth imperative”).

25. See Irma S. Russell, *The Use and Preservation of Grasslands: The Logic of Hard Lessons*, 26 *KS J. Law & Pub. Pol’y Symp. on Grassland Preserv’n* 359, 360 (2017).

26. *Id.* at 374.

Business and political leaders are recognizing and identifying responses to the threats posed by climate change and other environmental risks. Moreover, entrepreneurs and business leaders have recognized that sustainable development offers an opportunity for business development and economic prosperity.²⁷ “Under even the most optimistic scenarios to redirect the infrastructure of energy use to more sustainable technologies, if one does not begin such redirection in earnest now, our global ‘boat’ cannot be turned in time should global warming predictions prove true.”²⁸

The basic notion of sustainability is easy to understand; it is simply to use the goods of the Earth without using them up. The legal structure of business firms—and in particular the corporation—seems intuitively well suited for a long-term focus. Businesses often live or exist longer than people. Based on this simple fact, one might suppose that the decision-maker and corporate entities would be more likely than the individual to consider the long-term implications of decisions of the corporate entity. Because the continued existence of civilization and the species *Homo sapiens* is a necessary predicate for the continued flourishing of corporate entities, the implicit goal of “sustainable development” serves the public good from a multitude of perspectives, making the concept foundational for people and corporate enterprises.

CSR makes sustainability explicit in decision-making in business enterprises. Part of the lawyer’s role in the CSR entity is to advise on the applicable laws and the larger social and moral context in which the business operates. This obligation of the lawyer is not uniquely tied to the CSR enterprise, however. This duty exists with regard to all clients as a way of serving the best interest of the client and society.²⁹

Lawyers representing businesses must understand all of this—broad and narrow conceptions of sustainability, the tensions that may exist in sustainable development, the relationship of all of that to business law and related legal analyses, and the relevant socio-ethical environment. One example of the lawyer’s role is the need to advise business founders of the range of available business entities and the advisability of different forms of entity for the purpose of achieving the business’ goals consistent with its values, including through CSR. Engagement with and comprehension of these matters are integral components of the professionally responsible practice of business law in the modern era. The central role of business in our lives heightens the importance of the business lawyer’s role not only in serving her clients but also in promoting social and economic progress.

§27.03 THE CORPORATION IN TODAY’S WORLD AND ECONOMY

Although business lawyers focus on various forms of business entity, the corporation—and more particularly, the Delaware corporation—remains the coin of

27. Irma S. Russell, *The Green Economy: Strategic Planning for a Future?*, 86 UMKC L. Rev. 913, 934 (2018).

28. Steven Ferrey, *Why Electricity Matters, Developing Nations Matter, and Asia Matters Most of All*, 15 N.Y.U. Envtl. L.J. 113, 119 (2007).

29. See, e.g., Model Rules of Prof’l Conduct r. 2.1 (Am. Bar Ass’n 2016) (providing that the lawyer, as advisor, “may 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.”).

the realm for publicly held U.S. businesses and multinational business firms. It is also a mechanism for enhancing the social good by ensuring a stable economy. As among business associations' laws, corporate law is the most complex and includes interwoven and evolving statutory and judicial principles. This section suggests the importance and attendant responsibility of the corporation in today's economy as a foundation for consideration of CSR matters.

Most new business entities formed in the U.S. are limited liability companies. Yet, corporations dominate transnational commerce.³⁰ As a general matter, the nature of markets today is attributable in large part to the primacy of corporations. Global markets would be virtually unimaginable without the financial capital, operational size, and organizational structure that corporations deploy for business.

The corporation has become a significant adjunct to political governance—supplying benefits to the populace that government is unwilling or unable to provide.³¹ “In contemporary society, the public responsibilities of government and the private endeavors of business have blurred and blended as government and business frequently act in interchangeable ways.”³² Given its prominence in business activity, the corporation is an important tool in serving the public good. Yet, its structures and governance are neither fixed nor consistently interpreted and applied.

At a basic level, the popularization of the corporate form stems from the aggregation of financial investments from many and the delegation of authority to a collective, centralized decision-making body. The legal existence of corporate actors with the right to contract and do business enables corporate entities to raise larger capital and to conduct its activities and operations through individual managers. Thus, the corporation depends on individuals to act. The state's creation of the corporation as

30. See, e.g., Ahmad A. Alshorbagy, *CSR and the Arab Spring Revolutions: How Is Csr Not Applied in Egypt?*, 34 *Wis. Int'l L.J.* 1, 3 (2016) (referencing “today's globalized world where multinational corporations (MNCs) dominate the world economy.”); Ji Li, *Investing Near the National Security Black Hole*, 14 *Berkeley Bus. L.J.* 1, 2 (2017) (“Multinational corporations reign over the global economy.”); Jae Hyung Ryu, *Deterring Foreign Component Cartels in the Age of Globalized Supply Chains*, 17 *Wake Forest J. Bus. & Intell. Prop. L.* 81, 110 (2016) (noting “the globalization of the world economy in which many corporations act across the borders and jurisdictions.”).

31. Esteemed corporate law scholar Lynn Stout cogently made this point in a 2015 law review article.

[H]istory demonstrates that corporations have great potential to do good for humanity. Without corporations, fewer universities would have been founded and fewer cathedrals built, and fewer still would have survived to delight, inspire, and educate multiple generations. We would have far fewer roads, canals, and railroads, and thus less commerce and exchange. We would probably not enjoy the benefits of the transistor, computer, commercial aviation, readily available antibiotics and antivirals, or the Internet—at least not unless such innovations were developed and provided solely by government entities, an unlikely scenario in a capitalist democracy.

Lynn A. Stout, *The Corporation As Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 *Seattle U. L. Rev.* 685, 722 (2015).

32. Tom C.W. Lin, *Incorporating Social Activism*, 98 *B.U. L. Rev.* 1535, 1559 (2018); see also Lynn Stout & Sergio Gramitto, *Corporate Governance As Privately-Ordered Public Policy: A Proposal*, 41 *Seattle U. L. Rev.* 551, 552 (2018) (“[T]he corporate sector can be analogized to a kind of parallel state or shadow government that touches all our lives on a daily basis.”).

a separate legal actor managed and operated by individuals generates many conceptions of the corporation, all of which have some descriptive force.

Some view the incorporated firm as a quasi-public entity because of the complexity and limited legal accountability of the owners. Others see the corporation as largely a mechanism chosen by business concerns to advance their self-interest. For example, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court succinctly articulated this view. “A corporation is simply a form of organization used by human beings to achieve desired ends.”³³ Applicable law plays a role in determining which view of the corporation is relevant or dominant in particular circumstances and holds corporations or their decision-makers accountable for failures to comply with their corresponding legal obligations.

Delaware law tends to be the touchstone in most analyses and advisory contexts, and with good reason. Corporations organized under the General Corporation Law of the State of Delaware enjoy a disproportionate influence in the global economy. Former Delaware Supreme Court Justice Randy J. Holland aptly characterizes Delaware’s outsized influence:

Delaware is known as the “Corporate Capital of the World.” It is the state of incorporation for more than 60 percent of the Fortune 500 companies and for more than half of all companies whose stock is traded on the New York Stock Exchange and NASDAQ. Delaware’s preeminence in the market for corporation charters has lasted for nearly 100 years and “Delaware shows no sign of relinquishing its dominance.” Today, more than 95 percent of IPOs in the United States are issued through Delaware corporations.³⁴

Former Justice Holland identifies the three branches of Delaware’s system of government and Delaware corporate law practitioners as key factors in the continued relevance of Delaware law in this context.³⁵

Although Delaware corporate law enjoys a place of primacy in the legal order or global business, CSR is relevant to business governance and operations around the world, regardless of the applicable law.³⁶ Researchers generate lists of the world’s most reputable socially responsible firms, and media outlets spread the word.³⁷ Indeed, CSR

33. 573 U.S. 682, 706 (2014); see also June Carbone & Nancy Levit, *The Death of the Firm*, 101 Minn. L. Rev. 963, 964-65 (2017) (analyzing the *Hobby Lobby* decision and finding that it results in an erosion of the status of the corporation as an entity separate from its owners).

34. Randy J. Holland, *Delaware Corporation Law: Judiciary, Executive, Legislature, Practitioners*, 72 Bus. Law. 943, 955-56 (2017) (footnotes omitted).

35. *Id.* at 957. Specifically, he writes: To remain competitive in a global economy, business requires that corporation law be kept current and responsive to the legitimate expectations of corporations and investors. This is accomplished in Delaware through the complementary efforts of all three branches of government—executive, legislative, judicial—and with advice from expert corporation law practitioners. *Id.*

36. See, e.g., Saumitra N. Bhaduri & Ekta Selarka, *Corporate Social Responsibility Around the World—An Overview of Theoretical Framework, and Evolution*, in *Corporate Governance and Corporate Social Responsibility of Indian Companies* (2016).

37. See, e.g., Fundera, *25 of the World’s Most Socially Responsible Companies* (last updated Oct. 8, 2019), <https://www.fundera.com/blog/corporate-social-responsibility>; Vicky Valet, *The World’s Most Reputable Companies For Corporate Responsibility 2018*, *Forbes* (Oct. 11, 2018),

has been described as a global movement.³⁸ Overall, applied corporate law is dominant in CSR debates.

An important corollary of corporate significance in CSR matters, especially given the importance of applicable law: business lawyers play a genuine role in the decision-making process of corporations as they adopt and implement CSR. Advice of lawyers is crucial to compliance with law, and law is critically important in the corporate arena. Corporations must be able to rely with confidence on the advice of corporate counsel. Thus, the practice of consulting lawyers with good judgment and knowledge of the corporation's business and legal needs—as well as its socio-economic and ethical place in systems of governance—is central to responsible corporate decision-making.

Based on the legal nature of the corporation and the presumption of legal compliance by corporate entities, lawyers play an indispensable role in the conduct of corporations. Naturally, a large part of the corporate lawyer's role is counseling and advising corporations on corporate and securities law compliance and lawful competition. Attentiveness to the public good as a determinant of and outcome of law is an essential component of corporate practice. A corporate lawyer's advice on the establishment and interpretation of CSR is offered in that context.

The corporation is critical to applied global socio-economics. Advice on law and compliance with law is therefore critical to the global order and, more particularly as referenced here, the proper engagement of social responsibility in corporate legal analysis. Corporate lawyers are on the front lines in offering that advice. With this focus on the essential need for lawyers, the link between lawyers and CSR is apparent. Without an understanding of what the law requires and permits, corporations would lack the basic principles for decision-making in a democratic capitalist society.

§27.04 CSR AND THE CHOICE OF LEGAL ENTITY

CSR is not law. Nor is it a theory of the corporation or even a policy underlying corporate law. Rather, it is a set of operating principles that are not themselves law. These principles—voluntarily adopted by businesses to guide their conduct—exist to ground a business firm in specific values that support the greater common good. These values may interact with legal compliance and may or may not be consistent with specific legal precepts as applied in context. In fact, in some sense, CSR as implemented and interrogated in connection with business firms organized under U.S. law can be characterized as a reaction or response to certain elements of corporate legal doctrine, theory, and policy.

<https://www.forbes.com/sites/vickyvalet/2018/10/11/the-worlds-most-reputable-companies-for-corporate-responsibility-2018/#723a5d463371>.

38. See, e.g., Sonia K. Katyal, *Trademark Cosmopolitanism*, 47 U.C. Davis L. Rev. 875, 881 (2014) (citing to “the emergence of a corporately-oriented cosmopolitanism that stems from the global corporate social responsibility movement.”); Georg Kell, *The Future Of Corporate Responsibility*, FORBES (Jun. 18, 2018), <https://www.forbes.com/sites/georgkell/2018/06/18/the-future-of-corporate-responsibility/#675209106105>.

As business lawyers (both transactional practitioners and litigators) know well, the U.S. law to which CSR most clearly reacts or responds is corporate law—and more particularly the for-profit corporate law of Delaware. In the U.S., most public and many private corporations are organized and governed under the General Corporation Law of the State of Delaware,³⁹ commonly known as the Delaware General Corporation Law, or DGCL. Scholars and other commentators, as well as judicial pronouncements applying Delaware (and, in some cases, other) corporate law in certain contexts, tout shareholder wealth maximization as a norm. That norm may in certain limited circumstances constitute a legal mandate. For example, Delaware corporate law’s “Revlon Duties” require directors deciding between or among competing bidders in certain contests for corporate control to maximize the corporation’s “value at a sale for the stockholders’ benefit.”⁴⁰ Another well-cited Delaware trial court opinion offers general support for the role of the corporation in enhancing shareholder wealth, noting that: “[h]aving chosen a for-profit corporate form, the Craigslist directors are bound . . . to promote the value of the corporation for the benefit of its stockholders.”⁴¹ Although relatively little statutory or judicial foundation exists for a broad-based shareholder wealth maximization norm or rule (especially outside Delaware), many corporate directors, officers, and legal counsel treat shareholder wealth maximization as established corporate law.⁴² The varied and highly contextual legal interpretations of a shareholder wealth maximization norm or rule have obvious effects on legal compliance analyses.

In short, certain judicial opinions (most prominently—but not exclusively—those rendered under Delaware corporate law and in controversies involving contested, hostile mergers and acquisitions) indicate that the directors of a traditional for-profit corporation organized under Delaware law must prioritize shareholder financial wealth over other factors in their decision-making in order to comply with their fiduciary duties of care and loyalty.⁴³ Prominent Delaware jurists, including a Chief Justice of the Delaware Supreme Court, have affirmed the existence of a shareholder wealth maximization mandate in their public commentary outside the judicial setting.⁴⁴ These contextual articulations of a legal norm or rule may carry weight in jurisdictions outside Delaware and in contexts other than contested, hostile mergers and acquisitions. The influence of Delaware law and jurists can be substantial due to the widespread acceptance of the Delaware corporation in U.S. and multinational

39. 8 Del. Code Ann. §§ 101-398 (2019).

40. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

41. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

42. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 Am. U. Bus. L. Rev. 1, 17 (2012) (footnote omitted) (“Despite all of the academic debate, the *persistent common perception* seems to be that directorial duties require placing shareholder wealth at the forefront.”).

43. See generally Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 Wash. & Lee L. Rev. 939, 950-56 (2017) (describing and analyzing these judicial opinions).

44. See, e.g., *id.* at 960 n.61 and accompanying text; Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 Wake Forest L. Rev. 761, 768-81 (2015).

business. It is important to note in this context that, under the internal affairs doctrine, the law of the jurisdiction of organization of a legal form of business entity governs the structure and internal dealings of constituents in a business firm, regardless of where the firm conducts its business operations. Of course, various additional state, federal, and foreign laws provide the mandatory framework for overall legal compliance.

Accordingly, firms desiring to conduct business through a legal form of entity and operate and govern that business consistent with specific or general social or environmental values (rather than merely financial or economic objectives) must carefully consider both whether to organize as a corporation or another form of entity and, regardless of the chosen form, the jurisdiction in which to legally organize that entity. The choice of entity and jurisdiction of organization may impact the extent to which a business firm can effectuate CSR in particular contexts. A lawyer's professional obligations of competence and diligence play strong roles in a business firm's decision in that regard.⁴⁵ Acting together, "[t]hese rules require that legal counsel . . . understand the continuously developing law governing these entities and its rigorous application in context. They also require persistent, conscientious engagement in the lawyering process."⁴⁶ That lawyering process involves both substantive knowledge and related processes.

Specifically, a lawyer representing a firm that desires to incorporate social or environmental responsibility principles into the fabric of its existence must be familiar with the concept of shareholder wealth maximization, understand its applicability in specific corporate contexts in and outside Delaware, and understand the various alternatives to corporate organization under Delaware law (including non-corporate organization under Delaware law or organization as a corporation or other entity under another jurisdiction's business association law). This is no small task. New forms of business entity have been introduced at a relatively rapid rate over the past 25-30 years and continue to evolve.⁴⁷

In this entity proliferation environment, policy-makers grappling with the shareholder wealth maximization norm have endeavored to create more certain bridges to social enterprises and CSR through the creation of new forms of legal entity that include social and environmental responsibility at their legal core. The most prominent among these mission-driven forms of business association is the benefit corporation. A majority of U.S. states now offer the option of incorporating as a benefit corporation.

Although benefit corporations take different forms in different states, the statutes creating this form explicitly require that firms consider or balance social or environmental considerations and shareholder wealth generation in their decision-making.⁴⁸

45. See Model Rules of Prof'l Conduct rr. 1.1, 1.3 (Am. Bar Ass'n 2016).

46. Joan MacLeod Heminway, *Professional Responsibility in an Age of Alternative Entities, Alternative Finance, And Alternative Facts*, 19 Transactions: Tenn. J. Bus. L. 227, 234 (2017).

47. See *id.* at 232 ("All of these fundamental changes to the laws governing business entities have evolved in major part over the last 25 years.").

48. See, e.g., Del. Code Ann. tit. 8, § 362(a) ("[A] public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.").

For example, a public benefit corporation incorporated in Delaware would include the same overall structure as the garden-variety for-profit corporate entity under Delaware law but must state in its certificate of incorporation that it is a public benefit corporation and identify within its statement of purpose “1 or more specific public benefits to be promoted by the corporation.”⁴⁹ The Delaware statute defines the public benefit broadly as a positive effect—or reduction of negative effects—on the world (not including financial benefits to shareholders in their capacity as company shareholders).⁵⁰ The statute also provides that a public benefit corporation is intended to conduct its operations “in a responsible and sustainable manner.”⁵¹ Under the Delaware statute, all of this is supported by a specific articulation of management fiduciary duties. Delaware public benefit corporation law expressly provides that “[t]he board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances 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 its certificate of incorporation.”⁵² Although benefit corporations have not been formed in the numbers some may have expected and have only just begun to enter the market for public companies, they represent an important alternative for consideration for firms desiring to orient their business on CSR.

Despite the advent of social enterprise forms of entity, there has been continued focus on facilitating CSR and social enterprise—as well as other social reform—through traditional for-profit corporations. In August 2018, Senator Elizabeth Warren introduced the Accountable Capitalism Act,⁵³ legislation designed to (among other things) impose general public benefit duties on large entities (generally, entities with more than \$1,000,000,000 in annual gross receipts) and mandate that each director of a large entity balance shareholder financial interests with interests of other significant stakeholders. A year later, in August 2019, the Business Roundtable, an association of U.S. chief executive officers, released its *Statement on the Purpose of a Corporation*, acknowledging business’ “vital role in the economy” and pledging “a fundamental commitment to all of our stakeholders.”⁵⁴ Both actions generated significant media and political commentary.

The foregoing briefly illustrates the importance of business entity law—and the corollary importance of the business lawyer—in business considerations relating to CSR. However, while knowledge of the law governing business entities is significant, it is not an end in and to itself. Rather, it is a necessary but insufficient component of business lawyering generally and in the context of CSR. Additional and general legal

49. *Id.*; see also David A. Katz & Laura McIntosh, *The Corporate Form for Social Good*, Harvard Law School Forum on Corporate Governance and Financial Regulation (May 24, 2019), <https://corpgov.law.harvard.edu/2019/05/24/the-corporate-form-for-/>.

50. Del. Code Ann. tit. 8, § 362(b).

51. *Id.* § 362(a).

52. *Id.* § 365(a).

53. Accountable Capitalism Act, S.3348, 115th Congress (2017-2018).

54. Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), <https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf>.

mandates, together with financial and economic considerations, play a strong role, as Part V further illuminates. Because the client, not the lawyer, is the ultimate decision-maker as to its activities and affairs,⁵⁵ the business lawyer must consult with the client about its objectives and be able to effectively communicate to the client the options for organizing a business firm as a particular type of legal entity and under a particular state's entity laws.⁵⁶ Moreover, business lawyers must be able to describe for the client the interactions of those decision points—matters of state business associations law—with both other legal and extralegal business objectives (including CSR) and the ultimate challenges and effects of those interactions, including as they relate to legal compliance.

Socially and environmentally sustainable businesses often adopt CSR initiatives. Depending on the way in which the enterprise will be funded, operated, and governed, a socially responsible firm can exist as a sole proprietorship or legally organize as a partnership, limited partnership, or (more commonly) a nonprofit corporation, traditional for-profit corporation, benefit corporation, social purpose corporation, limited liability company, or low-profit limited liability company.⁵⁷ In other words, the full range of statutory business forms is available for the legal organization of a CSR-oriented firm.

In addition, a socially or environmentally conscious business organized as traditional for-profit business corporation or as a limited liability company can apply to B Lab, a nonprofit firm, for certification as a B Corporation.⁵⁸ It is important to note that B Corporation certification—often confused with benefit corporations—is not a separate legal form of organization. Rather, it is a label or branding device that signifies conformity with a set of requirements established by B Lab.

In advising a socially or environmentally mission-driven business firm, legal counsel may be required to make judgments as to the legal form the business should adopt, applicable constraints on management decision-making, and in general, the extent to which CSR principles may play a role in the firm's internal governance. These judgments require the use of doctrinal, theoretical, and policy-oriented knowledge and compliance with the lawyer's professional responsibilities—including the lawyer's

55. See Model Rules of Prof'l Conduct r. 1.2 (Am. Bar Ass'n 2016) (subject to certain exceptions and requirements, "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

56. See Model Rules of Prof'l Conduct r. 1.4(a)(2) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished"); Model Rules of Prof'l Conduct r. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

57. See Joan MacLeod Heminway, *Lawyering for Social Enterprise*, 20 Transactions: Tenn. J. Bus. L. 789, 801 (2019) ("[F]ounders and promoters of social enterprise can remain sole proprietors or, if desired, form unincorporated business associations (i.e., partnerships, limited liability partnerships, limited partnerships, limited liability companies, or where available, low-profit limited liability companies—a specialized form of limited liability company designed for use by social enterprises) or incorporate in one of several forms.").

58. See About B Corporations, Certified B Corporation, <https://bcorporation.net/about-b-corps> (last visited May 12, 2019).

obligations as a client servant and a public citizen.⁵⁹ As the Model Rules of Professional Conduct note, these professional responsibilities may sometimes exist in tension with each other.⁶⁰ Thus, the lawyer representing a CSR-oriented corporation, like members of the management team of such an organization, may be required to grapple with frictions between and among the firm's financial, economic, social, and environmental objectives.

§27.05 BUSINESS FIRMS AND THEIR RESPONSIBILITY IN MEETING TODAY'S CHALLENGES

The chosen legal structure for a business—the type of legal entity through which the business operates and its jurisdiction of organization—has significance in business decisions to adopt or implement CSR as well as in every day corporate decision-making. Assuming a business entity environment in which desired CSR initiatives are not legally proscribed, a business firm's choice of whether and how to engage CSR generally is assumed to be voluntary. That assumption bears scrutiny, however.

Business firms, however structured as a matter of business associations law, may find CSR a compelling response to ongoing concerns for legal, financial, economic, or ethical reasons. Teasing out and evaluating these rationales can be difficult. An important element of the lawyer's role in working with a business firm is to understand the firm's expressed and hidden bases for CSR adoption and implementation and relate them to the lawyer's obligations to serve the client and the public good.

Specific legal mandates often set requirements for a business to operate in a socially or environmentally responsible manner generally or in specific circumstances. Classic examples include laws governing workplace safety and health and environmental protection. Moreover, finance and economics, ethics, or statements made by a corporate entity may further augment the expectations of the public with regard to a particular firm. In today's marketplace, many well-known corporate entities make specific and general promises of corporate responsibility to the community, whether the community is defined as a locale or the global community.⁶¹

Broader legal principles also may dictate a business firm's promotion of CSR. Given the central fulcrum of responsibility that is inherent in every aspect of the law,

59. See Model Rules of Prof'l Conduct, Preamble para. 1 ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

60. See *id.*, Preamble para. 9 ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.").

61. For example, Walmart's website statements include both commitments to "strengthen local community cohesion and resilience," and descriptions of positive global change. See, e.g., <https://corporate.walmart.com/global-responsibility/community>. The website includes among the corporation's goals "zero waste," and operating "with 100% renewable energy." *Id.* It also declares its intention to "sell products that sustain our resources and the environment" and to "help create a more sustainable value chain." *Id.*

the importance of discovering the shared responsibilities of citizens in society is the mandate for a society based on laws rather than bare power. Accordingly, whether the area of law at issue is personal injury, family relations, or corporate process and decision-making, the law metes out obligations and the consequent levels of potential liability for failures to fulfill the obligations it imposes or recognizes. From this perspective, the law exists and functions to determine rights and responsibility, whether through allocation of rights to develop natural resources under a permit or the imposition of costs for the failure to comply with a duty such as the duty of care or non-negligent operation.

Thus, legal compliance intersects with CSR. A baseline for CSR would surely include compliance with environmental laws and laws generally. Surprisingly, state business associations laws do not squarely allocate the responsibility for compliance with the law to any particular officer as a matter of firm governance. This does not mean, of course, that environmental or other laws are not applicable to corporations and other firms. Business entities have been found guilty of criminal wrongdoing, and, in some cases, individuals responsible for corporate decisions that resulted in wrongdoing have faced legal consequences.⁶² As a result, more and more firms—especially those with large, multinational, regulated, or otherwise complex operations—now have compliance units and designate an officer as a chief compliance officer, and federal law mandates the designation of a compliance officer in certain businesses.⁶³

Independent of any legal considerations, business firms may choose to pursue CSR because they believe it is financially or economically advantageous to do so. On the extreme, economist Milton Friedman is widely cited for the proposition that “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”⁶⁴ Profits are, of course, a concern for all businesses as they strive to survive the competitive market tournament. Yet, this does not mean that firms may or should neglect their social or environmental responsibility when or if it is convenient to do so to enhance firm profitability. Firms must carefully avoid “greenwashing” (misrepresenting or creating misleading impressions about the environmental friendliness of their business). Nevertheless, a firm may choose CSR expressly because the firm believes that CSR will improve the firm’s financial condition or results of operations in the short or long term. CSR may enhance a firm’s profitability or market position, for example. Reputational gains attributable to CSR may play a role in the predicate attraction of employees, suppliers, vendors, and customers or clients.

62. See, e.g., Alexei Barrionuevo, *Enron Chiefs Guilty of Fraud and Conspiracy*, U.S. Dep’t of Justice, (May 25, 2006), <https://www.nytimes.com/2006/05/25/business/25cnd-enron.html> (last visited May 29, 2019); Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests, Press Release (Jan. 11, 2017), <https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six> (last visited May 25, 2019).

63. 7 U.S.C. 6s(k)(2) & (3) (2019) (providing for the designation of a chief compliance officer by swap dealers and major swap participants).

64. Milton Friedman, *Capitalism and Freedom* 133 (2d ed. 1982).

While there clearly is a business case for CSR in many firms, the motivation for CSR as a vision of the social role of business firms is larger than any cost-benefit analysis undertaken at the firm or industry level. Ethical, in addition to legal, financial, and economic, considerations relating to CSR go to the heart of the reason for focusing attention on social and environmental responsibility beyond compliance with law and the pure individual business case. The widespread focus on CSR is indicative of both the preeminence of business (especially corporate) entities and the growing commitment of businesses to address social problems and serve the public good.

Considerations of ethics permeate business. Specifically, sustainability and sustainable development are ethical concepts that have become viable parts of business governance and are included in CSR. They implicate virtually every area of business endeavor imaginable, including industries explored in this book (such as energy and natural resource extraction, manufacturing and transportation, agriculture and fisheries, construction and development, and finance). Climate change—and the impact of the climate change crisis on human rights—as well as the new importance of risk management and accountability inform advances in sustainability and sustainable development.

Lawyers representing businesses are best advised to familiarize themselves with the ethical foundations for CSR both generally and as applicable to the business of their clients, as well as the legal, financial, and economic footings for CSR, as a predicate for advising clients. In practical reality, the legal and operational aspects of CSR depend on lawyers representing business entities in the modern world and, more generally, representing the collective good through business-related private (or even government) practice. The direct relationship of ethics to law is apparent in the area of business law as it relates to CSR, and lawyers may find that ethical precepts are relevant, if not dispositive, in rendering business law advice to clients as a matter of professional responsibility. The American Bar Association's Model Rules of Professional Conduct expressly address this possibility by instructing that a lawyer rendering advice "may 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."⁶⁵

In representing clients that incorporate CSR into their business models, legal counsel may understandably walk the high wire in integrating law and ethics in the advisory context. Like all lawyers, they must consider both the duty to vigorously represent the client's interest while complying with the law and the obligation to serve the public good. The lawyer's job in this regard is complicated by the fact that the client's best interests, the law, and the public good are not static concepts; each exists across a continuum. As noted in Part IV (with respect to the business lawyer's role in choice of entity decisions), the Preamble to the Model Rules of Professional Responsibility acknowledges the existence of potential conflict in complying with the lawyer's client-centered and public-focused duties.⁶⁶ Lawyers must develop professional and practical wisdom and a sense of moral judgment in advising clients on matters that present this conflict. The real likelihood that the lawyer may face situations of urgency

65. See, e.g., Model Rules of Prof'l Conduct r. 2.1 (Am. Bar Ass'n 2016).

66. See *supra* note 38 and accompanying text.

(possibly life and death emergencies) means that lawyers should give serious advance thought to the responsibilities they have under applicable law and professional regulations. As the Preamble to the Model Rules notes, the guidance in the rules of ethics and the law help lawyers fulfill the “obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”⁶⁷ Thus, the Model Rules, as well as the law of agency and other applicable laws, provide a framework for lawyers to use in resolving those difficult issues as they advise clients to act responsibly in adopting and implementing CSR.

§27.06 CORPORATE SOCIAL RESPONSIBILITY IN A TIME OF CRISIS

Considering CSR in this time of existential crisis poses ultimate questions regarding the aspects of social responsibility that business firms must address and the related challenges business firms have the capacity to address. CSR, and more particularly sustainability and sustainable development, respond to, among other things, environmental threats. Many environmental concerns that impact and are impacted by business operations and activities constitute crises or may soon attain crisis levels, including the undeniable crisis of our times of global climate disruption.

Significant environmental threats are in abundant supply today. They include deforestation, pollution, loss of biodiversity, melting polar ice caps, rising sea levels, oceanic dead zones, explosive population growth, collapse of insects and other pollinators, and, of course, climate change. Moreover, climate change exacerbates each of these problems and illustrates the interrelated and devastating possibilities of the negative effects of climate change. For example, after the 2011 heat wave in Australia, scientists identified a significant decrease in dolphin births over the next six years. By tracking hundreds of dolphins, scientists found a 12% decline in the survival rate of dolphins and reduced reproductive success.⁶⁸ In *The Uninhabitable Earth: Life After Warming*,⁶⁹ David Wallace-Wells examines the existential threat posed by climate disruption, portraying the daunting challenge of attempting to address such an unprecedented challenge to life on Earth.

Today, the strong scientific consensus is that climate change, also called climate disruption, is a crisis. The U.S. Global Change Research Program Climate Science Special Report (CSSR) findings, published in 2017 presented strong and growing evidence of “rapid, human-caused warming of the global atmosphere and ocean.”⁷⁰ The results of continued study have further enhanced the scientific consensus about climate disruption, including worldwide warming of “about 1.6 degrees Fahrenheit

67. Model Rules of Prof’l Conduct, Preamble para. 9.

68. Doyle Rice, *Warming Seas are Devastating to Survival of Dolphins*, USA Today (Apr. 1, 2019), <https://www.usatoday.com/story/news/nation/2019/04/01/dolphins-and-climate-change-warming-seas-threaten-marine-mammals/3331033002/>. (last visited 4/3/19).

69. David Wallace-Wells, *The Uninhabitable Earth: Life After Warming* (2019).

70. See *Executive Summary*, Global Change Research Program, <https://science2017.globalchange.gov/chapter/executive-summary/> (last visited 4/1/19).

over the past 150 years.”⁷¹ Climate change is a threat of a different magnitude than all other environmental problems. Because we depend on the Earth for our lives and political freedoms, climate change is no ordinary problem. Climate change is a wake-up call that, as Naomi Klein describes, expresses urgency as “a powerful message delivered in the language of fires, floods, storms, and droughts. Confronting it is no longer about changing the light bulbs. It’s about changing the world—before the world changes so drastically that no one is safe.”⁷²

Current legal actions seeking compensation or injunctive relief from the threat of climate change are growing dramatically.⁷³ The databases compiled by Columbia Sabin Center for Climate Change Law made in collaboration with Arnold & Porter Kaye Scholer LLP shows a wide variety of plaintiffs in climate change litigation, including state and local governments, the food industry, fishing interests, youth and young adults, and others.⁷⁴ The website compiles hundreds of climate change cases, which rely on a variety of arguments, including statutory rights, rights under the public trust, constitutional rights, and tort liability.⁷⁵

Litigation on climate change presents important political governance questions. A threshold argument raised by defendants in these legal actions (and, more generally, by opponents of climate litigation) is that courts have no appropriate role in resolving climate change. They argue that the legislative and executive branches are the appropriate avenues to seek resolution. Climate litigation proponents counter that citizens have the right to judicial remedies of claims of harm. Moreover, they argue that courts are the natural and essential decision-makers in cases alleging ongoing dangers to the public caused by climate change. Plaintiffs raise tort claims, relying on common law theories seeking compensation for harms to health, private property, infrastructure, livelihoods, and resources. Additionally, plaintiffs seek injunction against future harms based on claims of public and private nuisance and arguments of the public trust principles.

*Juliana v. United States*⁷⁶ identifies the judiciary’s important role in addressing systemic government infringement of constitutional rights. In that action, plaintiffs seek relief from the judiciary because legislative and executive branches are causing the climate change crisis by direct and affirmative actions of permitting fossil fuel extraction methods and supporting distribution and production despite their knowledge of harm. The plaintiffs in *Juliana* assert that the courts are the last hope for addressing the crisis based on the judiciary’s duty to interpret the law and protect against government infringement of constitutional rights.⁷⁷ Public trust arguments pull

71. See Geoff Brumfiel, U.S. Already Feeling Consequences of Global Warming, Draft Report Finds, NPR (Aug. 8, 2017, 3:27 PM), <http://www.npr.org/sections/thetwo-way/2017/08/08/542223530/us-already-feeling-consequences-of-global-warming-draft-report-finds> (visited 4/1/19).

72. Naomi Klein, *This Changes Everything: Capitalism vs. the Climate* 25 (2014).

73. See, e.g., *State and Federal Cases* linked at Our children’s Trust website: <https://www.ourchildrenstrust.org/> (visited 3/31/19).

74. See *Climate Change Litigation Databases*, <http://climatecasechart.com> (last visited 6/1/19).

75. See *id.*

76. 217 F. Supp. 3d 1224 (D. Or. 2016).

77. See Amended Complaint for Declaratory Judgment & Injunctive Relief at 89, *Juliana v. United States*, 6:15-cv-01517-AA (D. Or. Sep. 10, 2015); see also Brief of Amicus Curiae Zero Hour on

from long-established doctrine of Roman times carried forward in common law jurisprudence for generations, asserting that natural resources are the birthright of the public and the government is responsible for preserving the resources for this and future generations just as a trustee must preserve a trust. Because a livable climate is requisite for survival of human life and other life on Earth, application of the public trust doctrine to atmospheric resources may provide a powerful strategy for climate litigation brought by plaintiffs such as Our Children’s Trust and by States acting as trustees to protect their citizens’ resources.⁷⁸

At its core, *Juliana* asserts that continued permitting and support for the carbon economy violates the constitutional rights to life, liberty, and property. The plaintiffs have alleged that young persons are disproportionately affected by the government’s “affirmative aggregate acts” that perpetuate climate change.⁷⁹ Hand-in-hand with this argument is plaintiffs’ substantive due process claim that the affirmative actions of the U.S government infringe on their life, liberty, and property interests.

Claimants for the adverse effects of climate change include local governments in coastal communities and specific businesses and industries. In *Rhode Island v. Chevron Corp, et al.* the State of Rhode Island sued major fossil fuel companies under the public trust doctrine and, additionally, tort claims for public nuisance, trespass, strict liability for failure to warn, strict liability for design defect, negligent design defect, and negligent failure to warn.⁸⁰ A significant hurdle to these suits is that if the defendants succeed in removing the case to federal court, the cases are often dismissed on the basis that federal statutory law controls and preempts the common law.⁸¹ Food industries are also suing major fossil fuel companies. For example, the Pacific Coast Federation of Fishermen’s Associations filed suit against major fossil fuel companies based on the harms caused by rising oceanic temperatures to the fishing industry. If this lawsuit proves successful, it likely sets the course on how future suits are brought and won.⁸² These legal actions rely on long-standing theories in tort law and the public trust principle. Increasing recognition of the atmosphere as a natural resource within the purview of public trust doctrines in state courts suggests that climate change plaintiffs may persist (as others, such as plaintiffs in cigarette and asbestos litigation, have) despite long odds.

One response to these claims is the adoption of CSR as a matter of firm governance and operations—private policy—in addition to compliance with the law.

Behalf of Approximately 32,340 Children and Young People in Support of Plaintiffs-Appellees at 9-10, *Juliana v. United States*, No. 18-36082, (2019).

78. See Michael C. Blumm & Mary C. Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. U.L. Rev. 1, 21, 70 (2017); see also Nathaniel Eisen, *Why It’s Vital for States to Sue Over Climate Change*, *Governing.com*, Oct. 30, 2018, <https://www.governing.com/gov-institute/voices/col-why-states-should-sue-over-climate-change.html>.

79. See Amended Complaint for Declaratory Judgment & Injunctive Relief at 89, *Juliana v. United States*, No. 18-36082 (D. Or. Sep. 10, 2015).

80. See Complaint at 115-34, *Rhode Island v. Chevron Corp, et al.*, No. PC-2018-4716, (Providence/Bristol County Sup. Ct. Jul. 2, 2018).

81. See Candice Norwood, *Climate Change Has Been a Losing Battle for Governments. Could a New Lawsuit Turn the Tide?* *Governing.com* (Jul. 31, 2018).

82. See Alastair Bland, *Fishermen Sue Big Oil for Its Role in Climate Change*, *NPR.org*, Dec. 4, 2018, <https://www.npr.org/sections/thesalt/2018/12/04/6719963>.

Legal advisors to business firms have an important role to play in this context in helping guide businesses embracing and effectuating CSR to avoid firm liability and, at the same time, address climate change. Additionally, as a result of climate disruption lawsuits, the government, industry, and the public accumulate more knowledge and scientific proof of the role of greenhouse gases in the climate crisis and stimulate additional claimants and others—including political actors—to consider responses through climate policy.⁸³ As public awareness of climate disruption increases, demands for policy changes to address climate change also increase.

These changes in public policy may supplement or complement CSR initiatives implemented in the private business setting. Firms can and should anticipate these developments in the political sphere in the same way that they identify and gauge litigation risk. It is important to note in this context that political change has the potential to impact private business. CSR has a role to play. Lawyers can increase their utility in business practice settings—and simultaneously fulfill their professional obligations—by identifying CSR as a component of both legal compliance and business ethics and effectively communicating the implications of those relationships to their clients and others.

We find ourselves at a critical juncture for businesses as they respond to the short-term and long-term effects of climate disruption. Businesses that are attentive to social and environmental quandaries—including through policies and conduct focused on sustainability and sustainable development—will require legal advice to ensure legal compliance as they engage with CSR. Lawyers must be prepared to help businesses fashion their responses to known and foreseeable challenges, including in the area of CSR. They are an essential component in the crisis response team.

§27.07 CONCLUSION

Business is complex, and legal and ethical questions and challenges exist in the interstices between and among business structures, governance, and practice. The conduct of business through legal forms of entity does not often reduce the complexity of the work of lawyers; work with business entities organized under various legal regimes can be complicated by the overlay of business associations law on other areas of law applicable to business activities. When used ethically, business entities, including corporations, can enhance business benefits and serve the public good. Lawyers representing businesses must therefore understand and be able to fuse the legal rules applicable to business entities, financial and economic considerations, and relevant ethical norms and rules.

Legal representation of businesses offers opportunities for lawyers to contribute to the work of major economic actors and to have input on actions that affect the environment and lives of people everywhere. Representing business clients that seek to fulfill CSR goals brings both challenges and potential gratification for lawyers. Different

83. See Justin Worland, *How the Green New Deal is Forcing Politicians to Finally Address Climate Change*, TIME (Mar. 21, 2019), <http://time.com/5555721/green-new-deal-climate-change/>.

business structures—in particular the corporate form of organization—may impose norms or legal requirements that create legal challenges to the adoption or implementation of CSR. Moreover, lawyers practicing in the business setting may hesitate to provide advice that incorporates ethical principles that underlie legal compliance and risk management. Ultimately, however, it is important for lawyers to assist businesses in fulfilling their responsibility to address current business challenges. Nowhere is a lawyer's assistance more important than in the area of climate change—a crisis in our midst that generates significant business challenges.

A basic knowledge of business associations law (in particular, as to matters of structure and governance), as well as a knowledge of environmental law and other laws essential to social responsibility—is essential to the competent representation of a business entity client on environmental or other matters relevant to CSR, whether the firm is organized as a for-profit or not-for-profit entity. This knowledge is important not only to assist the client in determining the appropriate structure for a particular business firm—given its objectives and values—but also to advise business entities in their operations and activities. But that is only a beginning.

Ethics—both in general and as recognized in rules governing professional responsibility—play a critical role in advising business entities pursuing CSR. Decision-making that incorporates ethics, as well as law, finance, and economics, may compel the adoption and implementation of socially and environmentally responsible business policies and activities. In particular, an emphasis on CSR as a matter of environmental compliance and a response to catastrophic risks in the modern world enhances the lawyer's role as an advisor to organizational clients. Because both legal compliance and risk management must be given due consideration, lawyers have a key role in designing compliance systems and advising on policy and liability.

This chapter focuses attention on the fundamental aspects of the lawyer's role in representing and working with businesses. The goal is to illuminate both the opportunities and challenges for lawyers in practicing in this complex space. For clients committed to CSR, a lawyer's skill and experience in examining the structure, governance, operations, and other activities of business firms and identifying influences on a business firm's legal compliance and risk management can have a profoundly beneficial effect in meeting the goals of CSR. This skill and experience must comprise an ability to provide advice regarding the future (considering possible future circumstances and impacts), as well as the present, in order to have the most profound advisory effect. Attention to regulation of the attorney-client relationship from a legal and ethical perspective is crucial to the successful representation of CSR-oriented businesses and to fulfillment of the foundational desire of the business firm to accomplish its purpose through (among other things) actions undertaken in accordance with its designated values (including CSR objectives).

The prevalence of corporate actors in today's economy means that all lawyers should have a working knowledge of corporate structure and governance and the special ethical considerations at work in the realm of CSR. Legal business forms, including especially corporations, are of primary significance to the national and world economy. Public confidence in national and international markets and in the large business entities—mostly publicly held corporations—that operate in them is a

significant driver of national and international economies. While Congress, state legislatures, and the judiciary will continue to define the scope and applicability of environmental requirements and the role of corporations in our economy, growing recognition of the irreplaceability of the environment is finding its foundational place in sustaining business and the planet.⁸⁴ Lawyers are a formidable force, and a potential guiding light, in navigating the legal and ethical constructs that tie businesses, through CSR, to meaningful social and environmental change at a critical juncture in world history.

84. Gaylord Nelson, *Beyond Earth Day: Fulfilling the Promise* 18 (2002) (“The economy is a wholly owned subsidiary of the environment, not the other way around.”); *id.* at 18 (“All economic activity is dependent upon that environment and its underlying resource base of forests, water, air, soil, and minerals. When the environment is finally forced to file for bankruptcy because its resource base has been polluted, degraded, dissipated, and irretrievably compromised, the economy goes into bankruptcy with it.”).