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Joan MacLeod Heminway
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Joan MacLeod Heminway, Lawyering for Social Enterprise, 20 Transactions: TENN. J. Bus. L. 797 (2019).

ALWD 7th ed.
Joan MacLeod Heminway, Lawyering for Social Enterprise, 20 Transactions: Tenn. J. Bus. L. 797 (2019).

APA 7th ed.
Heminway, J. (2019). Lawyering for social enterprise. Transactions: The Tennessee Journal of Business Law, 20(2), 797-814.

Chicago 17th ed.
Joan MacLeod Heminway, "Lawyering for Social Enterprise," Transactions: The Tennessee Journal of Business Law 20, no. 2 (Spring 2019): 797-814

McGill Guide 9th ed.
Joan MacLeod Heminway, "Lawyering for Social Enterprise" (2019) 20:2 Transactions: Tenn J Bus L 797.

AGLC 4th ed.
Joan MacLeod Heminway, 'Lawyering for Social Enterprise' (2019) 20(2) Transactions: The Tennessee Journal of Business Law 797

MLA 9th ed.
Heminway, Joan MacLeod. "Lawyering for Social Enterprise." Transactions: The Tennessee Journal of Business Law, vol. 20, no. 2, Spring 2019, pp. 797-814. HeinOnline.

OSCOLA 4th ed.
Joan MacLeod Heminway, 'Lawyering for Social Enterprise' (2019) 20 Transactions: Tenn J Bus L 797

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LAWYERING FOR SOCIAL ENTERPRISE

Joan MacLeod Heminway*

Social enterprises—businesses that exist to generate financial and social or environmental benefits—have received significant positive public attention in recent years. However, social enterprise and the related concepts of social entrepreneurship and impact investing are neither well defined nor well understood.[1] As a result, entrepreneurs, investors, intermediaries, and agents, as well as their respective advisors, may be operating under different impressions or assumptions about what social enterprise is and have different ideas about how to best build and manage a sustainable social enterprise business.

Indeed, the law governing social enterprises also is unclear and unpredictable in respects. In particular, the application of business associations law to specific questions involving social enterprises is somewhat unseetled. This essay identifies two principal areas of uncertainty and how they have the capacity to generate lawyering challenges and related transaction costs around both entity formation and ongoing internal governance questions in social enterprises. Core to the professionalism issues are the professional responsibilities implicated in an attorney's representation of social enterprise businesses.

To illuminate legal and professional responsibility issues relevant to representing social enterprises, this essay proceeds in four parts. First, using as its touchstone a publicly available categorization system, the essay defines and describes types of social enterprises, outlining three distinct business models. Then, in its following two parts, the essay focuses in on two different aspects of the legal representation of social enterprise businesses: choice of entity and management decision making.

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[1] *See*, *e.g.,* Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 926 (2016) ("The term 'social enterprise' does not have a precise definition and as such, while often used, it is also commonly misunderstood."); Justin Blount & Patricia Nunley, *What Is A "Social" Business and Why Does the Answer Matter?*, 8 BROOK. J. CORP. FIN. & COM. L. 278, 278–79 (2014) ("Many proponents of the social enterprise movement have attempted to provide more precise definitions of 'social entrepreneur' or 'social enterprise.' However, definitions in this area remain hopelessly fractured, often conflicting, and almost always tautologically utilize the term 'social.'"); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 223 (2013) ("[A]dvocates and actors in the social enterprise sector have not agreed upon a single definition of 'social enterprise' and . . . many terms are used to describe the various organizational models on the value creation spectrum, including social enterprise, triple-bottom line business, and social entrepreneurship." (footnotes omitted)).

Finally, reflecting on these two aspects of representing social enterprises, the essay concludes with some general observations about lawyering in this specialized business context.

I. THE NATURE OF SOCIAL ENTERPRISES

As businesses that "do well by doing good,"[2] social enterprises can come in many forms. A useful taxonomy is provided by the Social Enterprise Alliance,[3] which defines social enterprises as "[o]rganizations that address a basic unmet need or solve a social or environmental problem through a market-driven approach"[4] and categorizes social enterprises into three general types based on the nature of their engagement with social or environmental betterment. These three social enterprise models are labeled: "Opportunity Employment," "Transformative Products or Services," and "Donate Back."[5] Social enterprises of these kinds may be either nonprofit or for-profit firms from a state business associations law or federal income tax law perspective.

Opportunity employment social enterprises "employ people who have significant barriers to mainstream employment."[6] Borderland Tees is a business in Knoxville, Tennessee that exemplifies this type of social enterprise. It is a t-shirt print shop that employs those needing some

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[2] *See, e.g.*, Shinu Abhi, *"Can Social Entrepreneurs Do Well by Doing Good? Blending Social and Economic Value Creation"- An Investigation*, 23 ACAD. ENTREPRENEURSHIP J. Aug. 2017, at 1 (defining for-profit social entrepreneurial ventures as "those ventures that blend social goals with business goals and referred as 'double bottom lines organisations' or 'bottom of the pyramid ventures.'"); Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 21 (2014) [hereinafter McDonnell, *Committing*] (defining social enterprises as "businesses that have dual goals of making a profit for their investors while also pursuing social goods, sometimes narrowly and sometimes broadly defined."). Other commentators have defined businesses in this space in similar terms. For example, Professor Dana Brakman Reiser uses the term "blended enterprise" to mean an "entity that intends to pursue profits and social good both in tandem and by making considered choices to pursue one over the other." Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105, 105 (2010).

[3] See *What is Social Enterprise?*, SOC. ENTER. ALL.,https://socialenterprise.us/about/social-enterprise/ (last visited Jan. 11, 2019).

[4] *Id.*; *see also* Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77, 123 (2018) [hereinafter McDonnell, *From Duty and Disclosure*] ("Social enterprises pursue a dual mission, founded to both generate profits for their founders and investors while also independently pursuing other social goals."); J. Haskell Murray, *Social Enterprise and Investment Professionals: Sacrificing Financial Interests?,* 40 SEATTLE U. L. REV. 765, 767 (2017) (describing social enterprises as "organizations that use commercial means to reach social ends").

[5] *See* SOC. ENTER. ALL., *supra* note 4.

[6] *Id.*

social and financial help. This business model evolved from positive outcomes observed in the employment of a mentally ill homeless man. The rest is, as they say, history.

> [W]e realized the power of this workplace model for transformative ministry. So Bob and I decided to open a separate print shop specifically for cultivating these relationships. We called it Borderland Tees – "Borderland" because we wanted to include people on the borders or margins of our society, people who suffer from what Mother Teresa called "a poverty of relationship." . . . We call it "Capitalism for the Common Good." We are not a job-training program, but sometimes people find work. We are not a housing ministry, but sometimes people find a place to live. We are a ministry of individual relationships, not a program. As Bob says, "God is in the retail business, not the wholesale business."[7]

Another prominent example mentioned on the Social Enterprise Alliance website is Goodwill Industries, which states on its website that its local organizations "meet the needs of all job seekers, including programs for youth, seniors, veterans, and people with disabilities, criminal backgrounds and other specialized needs."[8]

Social enterprises engaged in providing transformative products or services "create social or environmental impact through innovative products and services."[9] Knoxville, Tennessee's Love Kitchen is a classic example of this type of social enterprise.

> The Love Kitchen provides meals, clothing and emergency food packages to homebound, homeless and unemployed persons. We work with local agencies to provide meals, secure used clothing, and donate services in the hope of promoting the self-sufficiency of those we serve. The organization has no paid staff; all donations go to those who need it most. Our ultimate goal is to provide nourishment for anyone who is hungry

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[7] Rev.Jenny Arthur, *The Borderland Story*, BORDERLAND TEES, https://

www.borderlandtees.com/our-story.html (last visited Jan. 11, 2019).Borderland Tees, *Our Story*, https://www.borderlandtees.com/our-story.html (last visited Jan. 11, 2019).

[8] *About Us*, GOODWILL INDUSTRIES INT'L, INC., https://www.goodwill.org/about-us/ (last visited Jan. 11, 2019).

[9] SOC. ENTER. ALL., *supra* note 4.

> and to establish a community center to serve as a safe haven supporting area children and their families.[10]

Other social enterprises supplying transformative products or services include: Nashville, Tennessee's Soles4Souls, which (among other things) takes donations of new and used shoes and distributes them to those who need them;[11] Jared Allen's Homes for Wounded Warriors, which raises funds and in-kind contributions "to build and remodel handicap accessible homes to suit the individual needs of our injured United States military veterans returning from Iraq and Afghanistan";[12] and New York's Safe Passage Project, which provides free legal services to immigrant children.[13]

Social enterprises organized to donate back "contribute a portion of their profits to nonprofits that address basic unmet needs."[14] These include Nashville Tennessee's Songs Against Slavery, which "empowers and inspires communities to join the fight against sex trafficking in the United States . . . [by raising] awareness and funds through benefit concerts and musician partnerships."[15] A longstanding example of a firm that donates back is Newman's Own, a food and beverage firm founded by actor Paul Newman that donates all of its profits to charitable causes.[16]

Businesses of this kind are complex. They engage commercial enterprise to serve social or environmental aims. They do exist to make

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[10] *Welcome to the Love Kitchen*, THE LOVE KITCHEN, INC., https://www.thelovekitchen.org (last visited Jan. 11, 2019).

[11] See *About Us,* SOLES4SOULS, https://soles4souls.org/about-us/ (last visited Jan. 11, 2019) ("Soles4Souls creates sustainable jobs and provides relief through the distribution of shoes and clothing around the world."). Souls4Souls also works with micro-enterprise firms in developing countries to support entrepreneurs interested in starting shoe businesses—meaning that it also is an employment opportunity social enterprise. See *FAQ: What do you do with the shoes you receive?*, SOLES4SOULS, https://soles4souls.org/faq/. Other social enterprises also operate in more than one type of social enterprise.

[12] *Mission and History: Foundation Mission*, JARED ALLEN'S HOMES FOR WOUNDED WARRIORS, https://www.homesforwoundedwarriors.com/mission-history/ (last visited Jan. 11, 2019).

[13] See *About Us: Who We Are*, SAFE PASSAGE PROJECT, https://www.safepassageproject.org/about-us/ (last visited Jan. 11, 2019) ("We provide free lawyers to refugee and immigrant children in the NYC-area who face deportation back to life-threatening situations, despite their strong legal claim to stay in the US.").

[14] SOC. ENTER. ALL., *supra* note 4

[15] *Our Mission,* SONGS AGAINST SLAVERY, https://songsagainstslavery.org/about-us/ (last visited Jan. 11, 2019).

[16] See *100% Profits to Charity*, NO LIMIT, LLC, https://www.newmansown.com/100-percent-profits-to-charity/ (last visited Jan. 11, 2019).

profit, and part of any profit enures to the advantage of the firm's intended social or environmental beneficiaries. The extent to which other internal and external constotuents may also derive banafit from those profits may depend on the legal form in which the social enterprise is organized.

As a result of this complexity, lawyers who advise social enterprises are best counseled, consistent with that advisory role, to understand the nature of social enterprise in more than just a legal sense. The American Bar Association's *Model Rules of Professional Conduct* provide in relevant part that "[i]n rendering advice, a lawyer 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."[17] The same rules require the legal advisor to "exercise independent professional judgment and render candid advice."[18] Given the relative complexity of advising business principals and businesses generally–and the additional levels of decision-making required to represent social enterprises–a broad comprehension of social enterprise and the environment in which it operates–drawn from legal and non-legal traditions–seems wise, if not essential.

II. CHOOSING THE RIGHT BUSINESS ENTITY FOR SOCIAL ENTERPRISES

How do social enterprises organize themselves, from a legal standpoint? There are many options. Each has its advantages and disadvantages. In the current social enterprise environment, specific areas of tension in corporate law compound this general complexity. Having said that, it seems wise to start with the general issues in entity selection and work our way toward the specific, contentious corporate law issues. Social enterprise entity formation issues test a lawyer's duty of competence—"legal knowledge, skill, thoroughness and preparation"[19]—in multiple ways.

Of course, founders 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. New corporate forms have proliferated in the past ten

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[17] MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016).

[18] *Id.*

[19] *Id.* at r. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

years, making corporate choices more textured (and, for some, more confusing or contentious). In essence, the traditional choice of incorporating as a non-profit corporation or a for-profit corporation has expanded to include, in a majority of states, a third (and sometimes a fourth) option to incorporate as one of several different types of for-profit social enterprise corporation. Accordingly, while the spectrum of organizational choices still extends from sole proprietorships through unincorporated business associations to nonprofit and for-profit corporations, the range of options in that spectrum has increased.

This wider variety of choices makes the lawyer's task in assisting the client more demanding. In an earlier essay, I noted the challenges that alternative entities bring to choice of entity decisions in general.[20] I stated there that "[t]he substantial change and complexity presented to legal counsel by the introduction of alternative forms of business entity over the past quarter century test a business lawyer's ability to exercise ethical professional judgment at multiple junctures and in myriad ways."[21] Add to the evolution and intricacy of legal rules that I noted in that essay both the new corporate law options for organizing social enterprise firms and the multi-faceted social enterprise business models described in Part I, and the professional stresses mount.

Although various state laws offer a number of distinctive, specialized social enterprise corporate forms,[22] most states offer three principal options for the incorporation of a social enterprise: a conventional non-profit corporation and a traditional for-profit corporation, as well as a benefit corporation, a for-profit corporation that operates under tailored, narrow management and governance constraints geared to a public purpose.[23] Under Tennessee law, for example, a social enterprise desiring to incorporate may choose to

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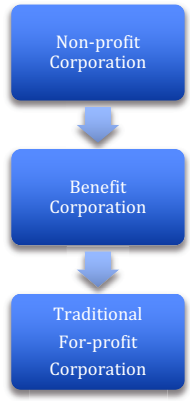
[20] Joan MacLeod Heminway, *Professional Responsibility in an Age of Alternative Entities, Alternative Finance, and Alternative Facts*, 19 TRANSACTIONS: TENN. J. BUS. L. 227 (2017).

[21] *Id.* at 234; *see also* Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573, 575 (2016) (noting the existence of "an increasingly complex array of business entity options for potential business owners").

[22] *See* J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 27–28 (2015) [hereinafter Murray, *An Early Report*] (noting "the formation of benefit corporations, . . . flexible purpose corporations, general benefit corporations, public benefit corporations, social purpose corporations, specific benefit corporations, and sustainable business corporations.").

[23] *See*, *e.g.*, McDonnell, *Committing*, *supra* note 2, at 21 ("Lawyers and legislators have begun to invent hybrid legal forms to meet the needs of these hybrid businesses. The most important of these new forms is the benefit corporation."); Murray, *An Early Report*, *supra* note 23, at 28 (avowing, after listing forms of social enterprise entity, that "[t]he benefit corporation form has emerged as the most popular social enterprise statute type,").

organize as a non-profit corporation,[24] a traditional for-profit corporation,[25] or a for-profit benefit corporation.[26] Some commentators contextualize the benefit corporation (among other social enterprise forms of entity) as a hybrid form of corporation, inhabiting a place somewhere between the customary non-profit and for-profit corporate forms.[27]



This relative positioning of the benefit corporation form between the non-profit and traditional for-profit corporate forms is accurate but incomplete. Indeed, benefit corporations are for-profit corporations under both federal tax law and state corporate law (enabling them to offer pecuniary gain—a private benefit—to funders through the ownership of an equity interest in the business) with public-facing aims like that of a non-profit corporation. But it is not quite that simple.

The core distinctive legal rules governing benefit corporation law are novel and unique to the benefit corporation form. Professor Brett

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[24] *See* TENN. CODE ANN. §§ 48-51-101 – 48-68-211 (2019).

[25] *See* TENN. CODE ANN. §§ 48-28-101 – 48-28-109 (2019).

[26] *See* TENN. CODE ANN. §§ 48-11-101 – 48-27-103 (2019).

[27] *See, e.g.*, Franklin, *supra* note 22, at 582 (observing that "[t]he organizations in the hybrid category have experienced remarkable growth in recent years, and include such legal forms as benefit corporations . . . ."); John Tyler et al., *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINNIPIAC L. REV. 235, 237 (2015) (noting the proliferation of the benefit corporation and other social enterprise forms and explaining that "[t]he term 'hybrid' refers to rules in enabling statutes that blend aspects of traditional for-profit ventures (such as private investors) with characteristics normally associated with traditional non-profit entities (such as charitable or other social benefit purposes)."); Katherine R. Lofft et al., *Are Hybrids Really More Efficient? A 'Drive-by' Analysis of Alternative Company Structures*, BUS. L. TODAY, Sept. 2012, at 1 (referencing "an increasing variety of new models or forms of so-called 'hybrid' business organization, which are intended to provide more flexibility, and a measure of legal protection, to organizations that want to 'do well by doing good.'").

McDonnell succinctly explains the characteristic governance norms in benefit corporation law in a recently published article:

> [B]enefit corporations . . . impose fiduciary duty . . . requirements. The directors and officers of a benefit corporation must consider the effects of their actions on a variety of specified interests, including employees, customers, the community, the environment, and the ability of the company to generate a general public benefit. Shareholders may sue if they believe a company's directors and officers have violated this duty, although their remedies are limited. Nonshareholder constituencies (e.g. employees or customers) do not have the right to sue to enforce the duty to consider their interests, although companies may grant standing by agreement.[28]

In most states, benefit corporations also have a state-law filing requirement additional to the required filing of an annual report. They must file a "benefit report." "In these reports, companies must say what they have done to pursue general public benefit, along with any specific public purpose they may have. This must be measured against an independent third-party standard . . . ."[29] Lawyers offering advice on business entity choice must be conversant with and competent in advising on these innovative benefit corporation rules as well as the formation, structure, governance, financing, and third-party liability rules of conventional non-profit corporations and traditional for-profit corporations.

That general depiction of a benefit corporation also may understate the level of knowledge required to engage in capable representation of a social enterprise or its constituents. Of course, not all state non-profit or traditional for-profit corporation laws are the same.[30] Perhaps it is not surprising, then, that within the benefit corporation form, there also are a number of different state statutory models.[31] In other words, different states have adopted different forms

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[28] McDonnell, *From Duty and Disclosure*, *supra* note 4, at 94–95 (footnotes omitted).

[29] *Id.* at 95.

[30] *See* Kelli A. Alces, *Legal Diversification*, 113 COLUM. L. REV. 1977, 2022-23 (2013) ("Corporate law presents . . . a law market . . . . States can choose different corporate governance laws and firms can then choose where they want to incorporate."); Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2131 (2018) "Each state assembles and offers a corporate-law package consisting of a corporation law, a method for amending it, a judicial system, and an administrative agency.").

[31] *See* Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 616-25 (2017) (offering examples, in the text and referenced appendices, of different state benefit corporation laws) [hereinafter Heminway, *Corporate Purpose*]; McDonnell, *Committing*, *supra* note 2, at 30–31 (describing

of benefit corporation, magnifying further the number of options a social entrepreneur or business promoter has for legally organizing a social enterprise business. A business lawyer must understand the individual state law similarities and differences in all three types of corporation, as well as the similarities and differences in all applicable unincorporated business forms in order to offer professionally responsible legal advice on entity formation in a social enterprise context. And the lawyer must then be able to use this knowledge in context to advise the principals of the social enterprise in the selection of a business form based on the then available facts.

Assuming formation and maintenance costs can be managed, the lawyer's contextual analysis typically focuses on three key potential points of difference that may distinguish the reasonable expectations of principals of one social enterprise from those of another in a way that is determinative of the lawyer's recommendation on choice of entity:

- Entity-level federal and state income tax obligations and benefits (which may depend on, e.g., whether the social enterprise is anticipated to operate exclusively for religious, charitable, scientific, or educational purposes, whether the activities of the social enterprise are expected to include influencing legislation or participating or intervening in any political campaign for or against any candidate for public office, and whether the business model proposed for the social enterprise incorporates the possibility of paying federal or state taxes on business income—all of which help distinguish a non-profit social enterprise exempt from federal and state income taxation from an income-tax-paying for-profit corporate social enterprise);[32]

different benefit corporation statute models: B Lab, Delaware, and Minnesota); J. Haskell Murray, *Examining Tennessee's For-Profit Benefit Corporation Law*, 19 TRANSACTIONS: TENN. J. BUS. L. 325, 328-30 (2017) (outlining two principal statutory models and presenting Tennessee's statute as a third model—and an outlier).

[32] *See generally* 26 U.S.C. § 501 (2018) (exempting certain specified corporations from federal income taxation). A number of subsidiary issues are embedded in the federal income tax status of the firm that may affect founder and promoter decisions on the choice of an appropriate legal entity. *See generally* Yaniv Heled et. al., *Why Healthcare Companies Should Be(Come) Benefit Corporations*, 60 B.C. L. REV. 73, 120–21 (2019) (describing generally attributes of nonprofit and for-profit corporations that affect decisions on a choice of entity). For example, the limitations on salaries for executives and other employees of tax-exempt entities, as well as the general restrictions on distributions of corporate assets to employees in tax-exempt firms, may be important—or even dispositive.

- Benefits available to presumed funders (including whether prospective funders may want a tax deduction, credit, or other tax benefit or whether they may desire to share in the profits of the venture, which would promote or preclude organization of the social enterprise as a tax-exempt non-profit corporation);[33] and
- Management governance obligations, including fiduciary duties (for instance, whether corporate directors and officers will expect or require flexibility in determining the nature and objectives of their decision making, which provides insights into whether the structured decision making and management duties of a benefit corporation may make that for-profit corporate form a beneficial choice in organizing under an individual state's corporate law).[34]

A significant level of diligence is required to obtain the relevant facts—information sufficient to perform the required analysis. "A lawyer shall act with reasonable diligence . . . in representing a client."[35]

Yet, even a lawyer who can effectively access and acquire accurate and complete information from social enterprise entrepreneurs, founders, or promoters relating to these three matters may find it difficult to offer definitive advice to social enterprise venturers. The three areas of inquiry may point in different directions, and while the first two areas of inquiry may offer relatively clear solutions, the vagaries of the law on social enterprise decision-making in the corporate form raise particularly thorny choice-of-entity issues. These legal challenges are described in Part III.

III. ADVISING SOCIAL ENTERPRISE MANAGEMENT ON DECISION-MAKING

The business law advisor's challenge in working with social enterprises does not end once the selection of an appropriate entity has been made and the organization of the firm has been accomplished. Lawyers advising social enterprise management on ongoing decision making also confront difficult issues, especially when management perceives or knows that it must make a relatively stark choice (in an

[33] *See*, *e.g.*, *id.* §§ 170 & 501 (establishing tax deductions for charitable and other contributions and gifts and restricting the conferral of more than incidental private benefits on private shareholders or individuals).

[34] *See infra* Part III.

[35] MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2016).

individual circumstance or a series of circumstances) between generating short-term or long-term profit for financial interest holders and serving the firm's social or environmental purpose. This choice may be especially tough for management of a social enterprise organized as a for-profit corporation. In the for-profit corporate form, legal pressure may exist at the intersection of shareholder wealth maximization and the pursuit of the social enterprise firm's public social or environmental benefit.

In making decisions involving trade-offs between maximizing the financial wealth of the venture for equity owners and serving the firm's mission, corporate officers and directors in a for-profit social enterprise may risk transgressing statutory management mandates or breaching their fiduciary duties.[36] Even when the law provides some clarity, lawyers often must exercise reasoned discretion in helping clients choose from among multiple possible approaches or actions. Thus, in a business management decision-making context (as in a choice-of-entity context), rational legal analyses may not result in clear choices; a lawyer's professional responsibility and professionalism are both tested. Lawyers working with social enterprises in that decision-making context—perhaps especially those representing social enterprises organized as benefit corporations, given theor novel and untested nature—must be fully conversant with the evolving applicable law and lore.[37] Even a lawyer competent in corporate governance must exercise diligence in keeping up with current statutory and decisional law, as well as practice norms.[38]

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[36] *See generally* Joan MacLeod Heminway, *Let's Not Give Up on Traditional for-Profit Corporations for Sustainable Social Enterprise*, 86 UMKC L. REV. 779, 787 (2018) [hereinafter Heminway, *Let's Not Give Up*] ("The outcome of any controversy regarding the application of the shareholder wealth maximization norm to management decision-making for a sustainable social enterprise firm organized as a for-profit corporation is likely to be dependent on many factors . . . .").

[37] The first comment to Rule 1.1 of the American Bar Association's *Model Rules of Professional Conduct* readily comes to mind.

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Id. r. 1.1 cmt. 1.

[38] *Id.*; *see also id.* r. 1.3 cmt. 1 ("A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

The major battleground in the corporate law governing social enterprises is the for-profit corporate law regarding the objectives of the decision-making of the board of directors and the corporate constituents that decision making must and may serve. Legal consternation created by a few judicial opinions (from courts in different states issued in a variety of corporate contextst over a period spanning more than 100 years) challenges the nature and focus of board decision-making in the traditional for-profit corporation.[39] Those opinions may be read to require corporate directors to maximize shareholder wealth in every decision they make or to impose an overall decision-making norm to that effect—a shareholder wealth maximization norm—in all board proceedings.[40] Numerous books, articles and other papers, and later judicial decisions have identified, described, and parsed these opinions and various versions of an ostensible shareholder wealth maximization rule or norm. Despite this extensive commentary, there is not academic or practical agreement on the extent to which corporate directors must act to maximize shareholder wealth in each decision they make. It may nevertheless be clear, however, that directors must not disregard the effects of their decision-making on shareholder wealth.

The benefit corporation arose in major part from a desire to offer a for-profit corporate form of entity in which management would not be required to maximize shareholder wealth in every decision made.[41] As a result, benefit corporation statutes govern, among other things, what a benefit corporation board of directors must consider or balance in its decision making, as well as the nature and objective of the directors' fiduciary duties.[42] While this black-letter codification of management process and duties is designed to be helpful to benefit corporation directors and to the legal advisors counseling benefit corporation directors on the exercise of their decision-making responsibilities, the benefit is somewhat illusory. The application of the statutory standards in specific contexts may not be straightforward, and the constraints on board decision-making may result in attorneys recommending processes that do not improve—and may harm—the substantive quality of the board's decisions in promoting the mission of the social enterprise, exposing the directors to potential liability in shareholder litigation.

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[39] *See*, *e.g.*, 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) (identifying and summarizing these court opinions).

[40] *See*, *e.g.*, Franklin, *supra* note 22, at 612–15.

[41] *See* Heminway, *Corporate Purpose*, *supra* note 31, at 617 n.24 (2017)

[42] For a more detailed discussion of these aspects of benefit corporations, see *id.* at 621–25

Although the exact standards vary from statute to statute, state benefit corporation statutes typically require directors to "consider" or "balance" the interests of specific constituencies and the firm's public benefit in making decisions.[43] They also clarify, among other things, the lack of a shareholder wealth maximization norm (or even shareholder interest primacy) [44] or that an informed, disinterested director's

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[43] New Jersey's law provides an example of a statute mandating consideration of interests:

> The board of directors . . . shall consider the effects of any action upon: (1) the shareholders of the benefit corporation; (2) the employees and workforce of the benefit corporation and its subsidiaries and suppliers; (3) the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation; (4) community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers are located; (5) the local and global environment; and (6) 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 . . . .

N.J. STAT. ANN. § 14A:18-6(a) (2011). The Tennessee statute offers another type of consideration requirement:

> In discharging the duties of the position of director of a for-profit benefit corporation, a director shall consider the effects of any contemplated, proposed, or actual transaction or other conduct on the interests of those materially affected by the corporation's conduct, including the pecuniary interests of shareholders, and the public benefit or public benefits identified in its charter . . . .

TENN. CODE ANN. § 48-28-106(a) (2018); *see also* TENN. CODE ANN. § 48-28-104(d) (2018) ("A for-profit benefit corporation shall be managed in a manner that considers the best interests of those materially affected by the corporation's conduct, including the pecuniary interests of shareholders, and the public benefit or public benefits identified in its charter."). The New Jersey statute also permits the consideration of other matters and factors. N.J. STAT. ANN. § 14A:18-6(b) (2018). The Delaware statute requires a balancing of interests. DEL. CODE ANN. tit. 8, § 365(a) (2019) ("The 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."); *see also* COLO. REV. STAT. ANN. § 7-101-506(a) (2018). In New Jersey's 2018 legislative session, a bill was introduced to require both a consideration and balancing of interests by directors in their decision-making. S. 2260, 218th Legis., § 2 (N.J. 2018), *available at* https://www.njleg.state.nj.us/2018/Bills/S2500/2260_I1.HTM.

[44] *E.g.*, N.J. STAT. ANN. § 14A:18-6(c) (2003 & Supp. 2018) ("The board of directors . . . shall not be required to give priority to the interests of any particular person or group referred to in subsection a. or subsection b. of this section over the interests of any other person or group unless the benefit corporation has stated its intention to give priority to interests related to a specific public benefit purpose identified in its

compliance with the required decision-making standard satisfies the director's applicable fiduciary duties.[45] However, the articulation of management duties—including fiduciary duties—in the various state benefit corporation statutes is far from clear when applied in specific decision-making contexts.[46]

> The statutory duties provide no real guidance as to how to measure and balance the effects on different interests—they merely list the interests that directors and officers must consider. Even if the legal advisors force boards to put in the record that they have considered each of these interests before making a decision, those records could easily become pro forma checklists. Case law could ultimately provide more detailed and nuanced guidance, but so far, there are no cases, and the limited chances of success may mean that the case law never develops (as has been the case, for instance, with constituency statutes).[47]

Unless and until the law further develops, these uncertainties will complicate the legal advisory context for lawyers representing social enterprises organized as benefit corporaitons.

For some, the more pointed expression of management duties in benefit corporation statutes represents an undesirable constraint on board processes that may impair or impede quality decision-making, taken alone or viewed in the overall context of the statutory scheme. Management may rely on facial compliance with the statutory rules as both a liability shield and,perhaps mistakenly, a validation of the substantive effect of their actions.

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certificate of incorporation."); TENN. CODE ANN. § 48-28-106(a) (2012 & Supp. 2018) ("[A] director . . . shall not give regular, presumptive, or permanent priority to the interests of any individual constituency or limited group of constituencies materially affected by the corporation's conduct, including the pecuniary interests of shareholders.").

[45] *E.g.*, DEL. CODE ANN. tit. 8, § 365(b) (2011 & Supp. 2018) ("[W]ith respect to a decision implicating the balance requirement in subsection (a) of this section, [a director of a public benefit corporation] will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve."); *see also* COLO. REV. STAT. ANN. § 7-101-506(b) (West 2017).

[46] *See* McDonnell, *From Duty and Disclosure*, *supra* note 4, at 96 ("[T]he duty . . . requirements leave it quite vague regarding how to measure the impact on the various interests, and even more vague as to how companies should balance the impacts on differing, and sometimes competing, interests.").

[47] *Id.* at 97 (footnote omitted).

Directors and officers who want to paint a pretty, green picture of how they are benefiting the planet will probably be able to evade legal liability for either violating their duties or for securities fraud in their misleading disclosures. More subtly, directors and officers of benefit corporations are likely to strongly believe that they are doing good, and the vague standards of the statutes will not provide a strong reality check against the power of self-belief.[48]

Indeed, slavish adherence to statutory decision-making and liability standards may enable benefit corporation directors to ultimately avoid liability for their actions. However, that statutory obedience may unduly restrict the field of vision and focus of the board and, as a result, also may limit director judgment and discretion in ways that could handicap the board's ability to make optimal decisions—decisions that benefit shareholders as well as other firm stakeholders.[49] The business judgment rule was introduced to the judicial review of management decision-making at least in part to allow open-textured decision-making—risk-taking through the free exercise of a director's experienced judgment and discretion.[50] Professor Steve Bainbridge reinforces this notion when he offers that, "[g]iven the significant virtues of discretion, . . . one must not lightly interfere with management or the board's decision-making authority in the name of accountability. Preservation of managerial discretion should always be the null hypothesis."[51]

Even if benefit corporation directors and officers endeavor to strictly observe the statutory constraints on their decision-making, they still may be subjected to shareholder claims based on their actions. This litigation may be a lengthy, complex, expensive process. In a legal action for breach of fiduciary duty, for example, plaintiffs will face many

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[48] *Id.* at 97 (footnotes omitted).

[49] *See* Heminway, *Corporate Purpose*, *supra* note 31, at 634 ("Under applicable rules in some state benefit corporation statutes, the board must consider the effects of its conduct on specific constituencies as well as the corporation's charter-based public benefit or public benefits. This statutory requirement decreases the discretion afforded to corporate management (by specifically defining what management must consider) and limits the need for and reliance on

management expertise." (footnote omitted)).

[50] *See*, *e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (*overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009) ("The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors."); Sandra K. Miller, *What Standards of Conduct Should Apply to Members and Managers of Limited Liability Companies?*, 68 ST. JOHN'S L. REV. 21, 41 (1994) ("The policy underlying the rule encourages risk taking, innovation, and creative entrepreneurial activities.").

[51] Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 109 (2004).

hurdles in successfully pleading and proving their claims. The substantive law is new and experimental. Charter-based exculpation, statutory limitations on liability, indemnification, or insurance may be available, as well as the protections of the business judgment rule.[52] With this type of litigation in mind, I observed in my prior work that

> [t]he immutable rules specific to benefit corporations create additional costs—costs associated with, e.g., . . . untested structural and governance rules—that may not provide a net benefit to shareholders and other investors. These costs and attendant litigation risks also cast doubt on the aggregate advantages of benefit corporations to other stakeholders. None may feel well protected when taking into account the overall effects of the benefit corporation's unique immutable rules.[53]

The costs may be particularly acute for publicly traded social enterprises organized as benefit corporations.[54]

In light of the unclear statutory mandates governing benefit corporation management decision-making and the possible impact of their application in contexts where more open-textured decision-making may be more desirable, lawyers representing social enterprises and their principals should be aware of the possibility of and prospects for both litigation and liability that result from benefit corporation director decision-making. Moreover, these lawyers must be able to describe the related risks to the directors as accurately and plainly as possible. In the absence of decisional law, the lawyer must rely on experiential wisdom from other contexts to provide the necessary advice.

This counseling context challenges the lawyer's advisory and communication skills and duties as a matter of professional responsibility. Legal counsel to social enterprises cannot offer unequivocal, wooden legal advice. In this context, "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are

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[52] *See* Heminway, *Corporate Purpose*, *supra* note 42, at 634.

As a general matter, assuming a viable fiduciary duty claim, the liability or financial responsibility of corporate directors for breaches of fiduciary duty may be narrowed through the application of up to four mandatory or permissive aspects of corporate law. These include exculpation for breaches of the duty of care, indemnification (statutory and privately ordered), director and officer liability insurance, and the possible application of the business judgment rule in the judicial review process. *Id.* (footnote omitted).

[53] Heminway, *Let's Not Give Up*, *supra* note 37, at 798.

[54] *See generally* Heminway, *supra* note 41, at 625–45 (2017) (outlining key litigation risks for publicly held U.S. benefit corporations).

predominant. Purely technical legal advice, therefore, can sometimes be inadequate."[55] Consultation, mutuality, and patience are all required to ensure effective communication and compliance with the lawyer's applicable professional responsibilities in service to the client.[56]

IV. CONCLUSION

Advising entrepreneurs, founders, promoters, and management of social enterprises can be both satisfying and frustrating. The satisfaction most often comes from helping these businesses achieve financial success while also serving the public good. The frustration comes from the difficulty of the task in providing the necessary counsel—both in selecting the optimal legal form for the firm and in advising management as the business operates and decisions are made over time. These legal advisory contexts involving social enterprises are richly textured and immerse legal counsel in multilevel decision-making that impacts both internal and external business constituencies. The overall advisory environment implicates, among other things, hortatory text in the Preamble to the Model Rules of Professional Conduct providing that "[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."[57] In lawyering for social enterprise, the legal advisor's skill and public service responsibilities interact meaningfully.

Said another way, the complex decision-making involved in lawyering for social enterprise presents obvious challenges for business venturers and their legal counsel that involve not only baseline professional responsibility matters of competence (comprising doctrinal knowledge and solid, rational legal analysis), diligence (by offering patient and perceptive insights in helping the client to choose from among available alternatives), and communication (with the goal of ensuring informed client decision-making), but also the exercise of appropriate discretion and professionalism that requires the savvy built from doctrinal, theoretical, and practical experience and leadership capabilities. As Professor Jeff Lipshaw has written in his intriguing and engaging book *Beyond Legal Reasoning: A Critique of Pure Lawyering*, "I am firmly convinced that great lawyers . . . bring something more than keen analytical skills to the table. They bring some kind of wisdom—a metaphorical creativity—that transcends disciplinary boundaries, both

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[55] MODEL RULES OF PROF'L CONDUCT r.2.1 cmt. 2 (AM. BAR ASS'N 2016).

[56] *See id.* r. 1.4(a)(2), (b) (requiring reasonable consultation "with the client about the means by which the client's objectives are to be accomplished" and explanation of "a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

[57] MODEL RULES OF PROF'L CONDUCT Preamble ¶7 (AM. BAR ASS'N 2016).

within the law and without."[58] That brand of wisdom is especially important in the kinds of questions that arise in lawyering for social enterprise.

Accordingly, as lawyers representing social enterprises, we need to develop a sensitivity to the various business models and related facts, knowledge of a complex and novel set of laws, and well-practiced, contextual legal reasoning skills. But that, while necessary, is insufficient to the task. We also must impose judgment borne of a deep understanding of the nature of social enterprise and of our clients and their representatives working in that space. Only then can we fulfill our professional promise as legal advisors: to provide clients with both "an informed understanding of . . . legal rights and obligations" and an explanation of "their practical implications."[59]

[58] JEFFREY LIPSHAW, BEYOND LEGAL REASONING: A CRITIQUE OF PURE LAWYERING 163 (2017). Profesor Alicia Plerhoples makes a similar point in the social enterprise representation context when she observes that "[l]awyers encounter unstructured legal problems throughout their careers; the competent or expert lawyer is able to apply their knowledge, skills, practice judgment, and method of practice to resolve their clients' unstructured problems." Alicia E. Plerhoples, *supra* note 1, at 255.

[59] MODEL RULES OF PROF'L CONDUCT Preamble ¶2 (AM. BAR ASS'N 2016).