

2018

Fostering Client Altruism and the Common Good in the Practice of Law: Learning from Emerging Movements in Business and Economics

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Recommended Citation

Juergens, Ann and Galatowitsch, Diane (2018) "Fostering Client Altruism and the Common Good in the Practice of Law: Learning from Emerging Movements in Business and Economics," *Mitchell Hamline Law Review*: Vol. 44 : Iss. 1 , Article 2.

Available at: <https://open.mitchellhamline.edu/mhlr/vol44/iss1/2>

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**FOSTERING CLIENT ALTRUISM AND THE COMMON
GOOD IN THE PRACTICE OF LAW: LEARNING FROM
EMERGING MOVEMENTS IN BUSINESS AND
ECONOMICS**

Ann Juergens[†] & Diane Galatowitsch^{††}

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I. INTRODUCTION

Lawyers have a special role in the United States. When the drafters of the U. S. Constitution began with the idea that its purpose was “to form a more perfect union [and] establish justice,”¹ lawyers were inserted at the center of the American project. According to their own code of conduct, Lawyers have a “special responsibility for the quality of justice.”² As of 2018, it is timely for the legal profession to remember its historic mission and its part in the promise of the Constitution to continue making this union better.³

1. U.S. CONST. pmbl.

2. MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 2016).

3. This idea has been the theme of several important Presidential speeches over the centuries. See President Abraham Lincoln, *Inaugural Address*, AM. PRESIDENCY PROJECT (Mar. 4, 1861), <http://www.presidency.ucsb.edu/ws/index.php?pid=25818>; *Barack Obama’s Race Speech at the Constitution Center*, NAT’L CONST. CTR. (Mar. 18, 2008), https://constitutioncenter.org/amoreperfectunion/docs/Race_Speech_Transcript.pdf; see also Ralph Ketcham, *Toward a More Perfect Union, from Madison to Lincoln to Obama*, SYRACUSE.COM (Jan. 27, 2013, 1:27 P.M.), http://blog.syracuse.com/opinion/2013/01/toward_a_more_perfect_union_fr.html (discussing presidential speeches that reference “a more perfect union”). While it is a plain fact that the Constitution was written by men who believed in the superiority of white men, the Constitution has over time supported our evolving national consciousness that equality under the law is of paramount importance and is not consistent with white supremacy. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1743 (2007) (“Although Americans may worship the text [of the Constitution], they have not allowed it to stand in the way of their rising national consciousness.”). As this Article was being finalized for publication in September 2017, the country is engaged in a more public debate about the white supremacist origins of our country and how we may best overcome this history. Cf. David Waldstreicher, *How the Constitution Was Indeed Pro-Slavery*, ATLANTIC (Sept. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288/> (discussing the protections of slavery contained in the language of the United States Constitution). It is the authors’ intention that the notion of “the common good” never be construed as synonymous with whiteness. See, e.g., Derrick Bell & Preeta Bansal, *The Republican Revival and*

This Article intends to remind lawyers that they are not alone in the effort to make a more perfect union: their clients are vessels of altruism as well as of self-interest.⁴ It seeks to move the profession to adopt a habit of considering the common good⁵ in dialogue with their clients.⁶ Considering the common good in practice is as much method and means as an end.⁷ This Article is prompted by signs that the private practice of lawyers in America has become bipolar⁸—it swerves between an approach that values profit above all and another that frames justice as charity work, i.e., as service for no fee.⁹ This

Racial Politics, 97 YALE L.J. 1609, 1610–11 (1988) (recognizing the term “common good” was historically used by whites to suppress black Americans).

4. See generally George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 274 (1998). As this Article was being finalized, a book was released by Muhammad Yunus titled *A WORLD OF THREE ZEROES: THE NEW ECONOMICS OF ZERO POVERTY, ZERO UNEMPLOYMENT, AND ZERO NET CARBON EMISSIONS* (2017). Yunus is from Bangladesh and invented the Grameen Bank, which pioneered the use of microloans in the developing world. See *The Nobel Prize 2006*, GRAMEEN BANK, <http://www.grameen.com/the-nobel-peace-prize-2006/> (last visited Nov. 3, 2017). Yunus is a winner of the 2006 Nobel Peace Prize for his work alleviating poverty. *Id.* He argues in his new book “that in its current form [capitalism] inevitably leads to rampant inequality, massive unemployment, and environmental destruction. . . . [W]e need a new economic system . . . that recognizes altruism and generosity as driving forces that are just as fundamental and powerful as self-interest.” *Muhammad Yunus to Release New Book “A World of Three Zeros,”* GRAMEEN AM. (July 10, 2017, 2:18 PM), <http://www.grameenamerica.org/blog/muhammad-yunus-release-new-book-world-three-zeros>.

5. *Common Good*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/common%20good?utm_campaign=sd&utm_medium=serp&utm_source=js onld (last visited Nov. 18, 2017) (defining common good as “the public good” or “the advantage of everyone”).

6. See generally Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer’s Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 918 n.91 (1995) (“Indeed, lawyers chip away at negative images more effectively by demonstrating morality in their client counseling than through involvement in public affairs activities of bar associations.”).

7. See generally David Thunder, *Can a Good Person Be a Lawyer*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 313, 323 (2014) (“Legal practice only makes sense as a human activity that contributes towards justice and the common good according to its own special function and methods.”).

8. *Bipolar*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bipolar> (last visited Oct. 26, 2017) (defining bipolar as “having or marked by two mutually repellant forces or diametrically opposed natures or views,” not “being, characteristic of, or affected with a bipolar disorder”).

9. See generally Kathryn A. Sabbeth, *What’s Money Got to Do with It? Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 492–93 (concluding the dichotomized

divide leads lawyers away from conversations with paying clients about the clients' non-monetary interests, their relational interests, and the common good.¹⁰ If lawyers and clients in private practice are not accountable to any higher value than client self-interest, lawyers may swing between an amoral pursuit of clients' self-interests and then salve their consciences by helping—for free!—a small number of those seeking to avoid being crushed by injustice.¹¹

This approach is a pale shadow of potential for justice work that considers the common good, which should pervade lawyers' work.¹² The professional model of lawyering suggests that lawyers are neutral partisans whose only allegiance is to serve their paying clients' self-centered interests.¹³ The model compensates for the potential imbalance with a duty to perform pro bono service.¹⁴ This is akin to the historic notion that landowner noblemen are above work for wages and have an obligation in their trade to take care of laborers with less wealth.¹⁵ In the twenty-first century, the previous era's business' profit-focused habits have been absorbed into and reinforced by the legal profession.¹⁶

view of for-profit lawyering and charity work without pecuniary gain threatens public interest lawyering).

10. See generally Jonathan R. Cohen, *The Path Between Sebastian's Hospitals: Fostering Reconciliation After a Tragedy*, 17 BARRY L. REV. 89, 114 n.70 (2011) ("The failure of lawyers to adequately think about clients' non-monetary interests may stem in part from their litigation-oriented training and mindset."). Relational interests can also be overlooked because "many lawyers see their clients' essential interests as monetary." See *id.* at 115.

11. Cf., Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 100 n.87 (1997) (discussing an experiment conducted by the authors "in which lawyers who were advised that they were representing their clients free of charge preferred trial to settlement, on average").

12. See generally Christopher Neff, *Those Cunning Spiders, the Lawyers: In Search of an Antebellum Legal Ethos*, 33 J. LEGAL PROF. 317, 340 (2009) (arguing lawyers have often acted in self-interest for financial or social reasons at the expense of the common good).

13. See generally MODEL RULES OF PROF'L CONDUCT pmb1. (AM. BAR ASS'N 2016).

14. *Id.* r. 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay.").

15. See Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 96–98 (2002) (providing a history of *noblesse oblige* in legal practice).

16. See *infra* Part II; Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 608–12 (2016) (discussing how atomistic self-interest evolved into a norm in the legal industry).

A re-envisioned model of private law practice could learn from international movements that seek to curb the excesses of modern business practices and reframe definitions of economic success. In the face of global climate change and rising inequality, business ethicists and economists are articulating standards for corporate social responsibility and markets for the common good.¹⁷ Lawyers in private practice should adopt these movements to address social responsibility issues unique to their field.

Markets for the common good and corporate social responsibility standards mitigate habits that value profit and atomized self-interest¹⁸ and promote practices that embrace mutual benefit and responsibility toward others.¹⁹ The Economy for the Common Good movement argues that the goal of the economy should not be mere money; rather it should be the interests of all humankind.²⁰ It asserts that humankind's higher values include responsibility to one another and to society as a whole.²¹ Theorists of the Economy for the Common Good point out that these higher human values are revealed repeatedly in essential texts such as constitutions and treaties.²² In sum, the theorists assert that profit seeking must take account of the common good as well as self-interest if civilization is truly to be served by markets.²³

17. See *infra* Part II; see also CHRISTIAN FELBER, CHANGE EVERYTHING: CREATING AN ECONOMY FOR THE COMMON GOOD 23 (2015); *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNITED NATIONS OFF. HIGH COMM'R (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *Guiding Principles on Business and Human Rights*].

18. Wald & Pearce, *supra* note 16, at 612 (describing "atomized self-interest").

19. See Christian Felber & Gus Hagelberg, *The Economy for the Common Good: A Workable, Transformative Ethics-Based Alternative*, NEXT SYS. PROJECT 2, 4 (2017), <https://thenextsystem.org/sites/default/files/2017-08/FelberHagelberg.pdf>.

20. See *id.* at 5.

21. For a twenty-two-minute overview of his ideas about the Economy for the Common Good, see Christian Felber, *What if the Common Good was the Goal of the Economy?*, TEDx Talks, YOUTUBE (Dec. 1, 2015), https://www.youtube.com/watch?v=dsO-b0_r-5Y.

22. See Christian Felber, *Economy for the Common Good: An Economic Model for the Future*, EUROSCIENTIST (Nov. 25, 2015), http://21ax0w3am0j23cz0qd1q1n3u-wpengine.netdna-ssl.com/wp-content/uploads/2015/11/Economy-for-the-Common-Good_Christian-Felber-FINAL.pdf ("The move would only put the economy in coherence with existing democratic constitutions.").

23. See Felber & Hagelberg, *supra* note 19, at 2. See generally ECON. FOR COMMON

Relying on their faith that people are altruistic and self-centered in equal measure, and looking to the exemplar of the Economics for the Common Good, the authors argue that now is the time to push the paradigm of law practice out of the ditch of atomized client self-interest and onto the open road of mutual interests, generosity, and the common good.

This Article builds on ideas articulated in the authors' earlier piece, *A Call to Cultivate the Public Interest: Beyond Pro Bono*.²⁴ That article traces the growth of today's pro bono culture and examines one consequence of success: "public interest" work is now defined quite narrowly.²⁵ It further analyzes the methods used to develop pro bono representation among members of the bar, including the evolution of Rule 6.1 of the Model Rules of Professional Conduct, which was intended to expand access to lawyers for those of low wealth.²⁶ Finally, that article examines some of the tools used to create pro bono culture and proposes we adapt them now to foster a culture of taking the common good into account throughout the work of private practice.²⁷ Here, we explore further what it might take to accomplish this goal.

Lawyers for paying clients should aspire to a standard that taps into their clients' altruism reserves to affect their clients' communities and the common good.²⁸ Those lawyers who serve human rights, environmental protection, and social justice directly in their representation of non-paying clients deserve recognition and honor; they are not the focus of this piece because the common good is already explicit in workplace goals that allow them to claim non-profit status or work in a position that is paid by the public.²⁹

GOOD, <https://www.ecogood.org/en/> (last visited Nov. 18, 2017).

24. Ann Juergens & Diane Galatowitsch, *A Call to Cultivate the Public Interest: Beyond Pro Bono*, 51 WASH. U. J.L. & POL'Y 95, 95 (2016).

25. *Id.* at 96.

26. *Id.* at 105–07.

27. *Id.* at 106–11.

28. See generally Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and ReImagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383, 431 (1996) (stating the client can adopt an altruistic perspective, while "the lawyer has limited power to do so"); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1268 (arguing that "[l]ike other businesspersons, lawyers place a significant emphasis on maximizing their own financial and other self-interests" but are also capable of acting altruistically).

29. See generally Maute, *supra* note 15, at 155 ('[T]he bar should strive to more

What are the aims of legal work for paying clients that takes the common good into account? For one thing, this work seeks to magnify generosity and diminish the tension between the values of society in general and the pursuit of self-interests and profit maximization.³⁰ The most important values of constitutional democracies include justice, human dignity, democracy, rule of law, cooperation, and sustainability—*not* profit-making.³¹ The challenge is to understand how lawyers might structure their practices and their relationships with clients to nurture these qualities that lift the common good.³²

Many countries have constitutions that elevate the common good in spirit and practice.³³ For example, the Italian Constitution states, “Private economic enterprise . . . may not be carried out against the common good or in such a manner that could damage safety, liberty or human dignity.”³⁴ This echoes the United States Constitution that was ordained “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.”³⁵

clearly articulate what is expected of all lawyers as their fair contributions to the common good.”).

30. See generally Amelia J. Uelmen, *Can a Religious Person Be a Big Firm Litigator?*, 26 *FORDHAM URB. L.J.* 1069, 1095 (1999) (“If ‘good’ and ‘harm’ are measured beyond the scale of quarterly profits, can it really be that the morally ‘right’ thing to do ‘harms’ the client? The joy of moral lawyering is to discover the extent to which and the ways in which there is ‘no ultimate split’ between a corporation’s self interest and the greater public good.”).

31. See *What is the Common Good Balance Sheet*, ECON. COMMON GOOD, <https://old.ecogood.org/en/ecg-balance-sheet/what-common-good-balance-sheet> (last visited Nov. 18, 2017) (explaining the balance sheet measures how a company “fulfills the five most important constitutional values of democratic states”). These values are not always universally lived by in society, but the fact that these values are stated and repeated is important. Even recognizing an undercurrent of greed in a society does not change the fact that most people understand that money is not an end goal in itself. Money is necessary to sustain life, but it is not the ultimate goal—life is.

32. Juergens & Galatowitsch, *supra* note 24, at 99.

33. See Felber & Hagelberg, *supra* note 19, at 5.

34. COSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION] Dec. 22, 1947, art. 41 (It.); *see id.*

35. U.S. CONST. pmbl.; *see* Felber & Hagelberg, *supra* note 19, at 5.

Further, just as some proponents argue that economic success should be measured by a business's contribution to the common good rather than by its profits or growth, we propose that lawyers' work success should include a measure for services to private clients that accounts for the clients' interests in healthy relationships and a healthy society.³⁶ Success can be weighed not only by the dollar amount of a judgment, but also by whether the legal strategy caused harmful practices to be changed or good practices to be created and sustained.³⁷ Lawyers could be lauded not only for the closing of a financially beneficial deal, but also by whether consideration of the deal's impact on others was incorporated into its terms.³⁸

This Article considers several tools to encourage methods that assist lawyers in serving the common good. The intent is to nurture a legal culture where the client is recognized as a social being with webs of relationships affected by the client's actions, and the lawyer and client take the effects on those relationships into account during the representation.³⁹

Legislation is one obvious tool to encourage the culture of law practice to bend toward the common good.⁴⁰ After pointing out one way the legislature has explicitly mandated that lawyers consider the needs of others while representing individual clients, and another way legislatures have incentivized lawyers to benefit the public while engaging in individual representation, this Article considers the potential of the public benefit corporation. The infrastructure of public benefit corporations could be embraced to broadcast law firms' intentions with respect to justice and the common good. This structure keeps the corporate form, but includes goals that serve the common good as part of the firm's core identity. As businesses

36. See generally *Hotchkiss v. CSK Auto, Inc.*, 949 F. Supp. 2d 1040, 1049 (E.D. Wash. 2013) (recognizing that one consideration for attorney's fees is the benefit to society).

37. See generally John R. Nolan, *Land Use and Climate Change: Lawyers Negotiating Above Regulation*, 78 BROOKLYN L. REV. 521, 548 (2013) (discussing how legal strategies are evaluated based on the ability to change environmental practices).

38. See generally Sheila Driscoll, *Consumer Bankruptcy and Gender*, 83 GEO. L.J. 525, 555 (1994) (noting that lawyers who discuss the impact on others may discover more options for helping the client).

39. See Angela McCaffrey, *Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 HAMLIN J. PUB. L. & POL'Y 1, 64 (2002) (teaching how to understand the client's relationships and empower the client).

40. See *infra* Part III.A.

ranging from banks⁴¹ to bars⁴² adopt the public benefit corporation model,⁴³ lawyers should explore it as well.

Another tool that helps amplify the role of the common good in legal work is the Model Rules of Professional Conduct, which guides the behavior of lawyers in the United States.⁴⁴ The Rules exert a normative influence over lawyers in law school when a course is mandated by the American Bar Association (“ABA”).⁴⁵ The Rules hint that a lawyer is a servant to the client in relation to the larger public.⁴⁶ Indeed, one entire chapter of Rules is titled “Public Service.”⁴⁷ Nonetheless, the concept of representation embedded in the Rules, including the section on public service, mostly omits

41. See, e.g., *Socially Responsible Affiliations*, SUNRISE BANKS, <https://sunrisebanks.com/social-responsibility/socially-responsible-affiliations/> (last visited Nov. 18, 2017) (stating that Sunrise is a certified B Corp and a public benefit corporation under Minnesota law).

42. See, e.g., *About Can Can*, CAN CAN WONDERLAND, <https://www.cancanwonderland.com/about/> (last visited Nov. 18, 2017) (“Can Can Wonderland is proud to be the first arts-based public benefit corporation in Minnesota. That means with every putt, boozy milkshake, polka dance, ping pong battle, and delicious mini donut devoured, Can Can Wonderland is able to give back and economically support the Minneapolis-St. Paul artist community we love.”).

43. See also Clare Kennedy, *Minnesota’s First Public Corporations Include Peace Coffee and Finnegans*, MINNEAPOLIS/ST. PAUL BUS. J. (Jan. 6, 2015, 2:43 PM), <https://www.bizjournals.com/twincities/news/2015/01/06/minnesotas-first-public-benefit-corporations.html> (listing Minnesota companies that became public benefit corporations).

44. See *infra* Section III.B; MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 2016).

45. Am. Bar. Ass’n, *ABA Standards and Rules of Procedure for Approval of Law Schools 2017-2018*, 2017 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR 16, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/20172018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf (“A law school shall offer a curriculum that requires each student to satisfactorily complete at least . . . one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members . . .”).

46. See, e.g., MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 2016) (“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.”).

47. *Id.* r. 6.1–.5 (2016).

lawyers who represent private clients for payment when it imagines lawyers who serve the public good.⁴⁸

The final section of this Article gives examples of ways that justice-oriented lawyers are already able to use their ethical discretion to incorporate the common good into their practice with clients.⁴⁹ And, it also supports a more nuanced and robust conception of lawyers' roles with respect to the common good and justice.⁵⁰ Although the Article refrains from proposing specific changes, it recognizes that rule change flows more easily once the culture of practice has been positively influenced.

II. AS LAW HAS BECOME MORE LIKE BUSINESS, IT SHOULD LEARN FROM MODERN DEVELOPMENTS IN BUSINESS ETHICS

A. *The Evolution of Lawyers' Idea of Themselves*

Lawyers and judges have clung to traditional ideas of their work as that of a "profession."⁵¹ This culture of professionalism was influenced by many ideas, including the old notions that commercial activity was reserved for the low born;⁵² Puritan-derived ideas about the base nature of money;⁵³ and the practical matter that it was a way

48. Juergens & Galatowitsch, *supra* note 24, at 111. *See generally id.* (consisting of the rules governing lawyers' service to the greater public).

49. *See infra* Section III.B.

50. *See infra* Section III.B; *see* Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 121 (2006) (describing the competition of ideas between justice-centered and client-centered legal ethicists and suggesting an approach that factors the power of the client in relation to the other interests at stake into the lawyer's exercise of ethical discretion). The authors agree with Carle's analysis that a lawyer's exercise of discretion may and should vary depending upon context and the clients' relative power. Yet even—perhaps especially—the powerless have deep wells of altruism and may be eager to engage the common good in their legal matters.

51. *See* Maute, *supra* note 15, at 126; Ann Juergens readily admits that she steadfastly resisted the notion that her lifelong work has been business, even if she remembers how uncomfortable most of the norms of "professionalism" felt to her when she first learned them. Professional dress (no pants for women!), professional ways of donating time (while a female did caregiving and personal work for the lawyer), and professional norms of fraternizing (such as golf playing and belonging to clubs that historically had excluded women, Jews, and people of color) were parts of professionalism that did not fit well at all.

52. *See id.* at 96–98.

53. *See* James W. Jones and Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, MINN. L.

to keep those who were ready to compete vigorously, such as immigrants and African Americans, out of the guilds.⁵⁴

The modern conception of professionalism in the practice of law did not develop until the late nineteenth century.⁵⁵ The new professional paradigm was developed by the organized bar to assuage the growing concerns that the practice of law was devolving into a business.⁵⁶ Bar association leaders believed lawyers were becoming servile to business⁵⁷ by departing from their role as protectors of the larger society.⁵⁸

The ABA, at the forefront of the movement, claimed that the bar's reputation was being hurt by entrepreneurs and sought to counteract trends toward business ideas in law practice.⁵⁹ For example, "in 1897, the ABA Committee on Legal Education asked that law schools and practitioners 'inculcate proper sentiments and . . . counteract[] the evil effects of the introduction of modern business methods.'"⁶⁰ Moreover, the ABA passed the Canons of Professional Ethics in 1908 to prohibit advertising and solicitation by lawyers, two business practices the ABA targeted as threats to the public reputation of lawyers.⁶¹

The professionalism movement, as analyzed by scholar Russell G. Pearce, created a "business-profession dichotomy" that pitted self-interested business practices against an altruistic law

REV. 1159, 1163 (2000) (noting that Puritan ideals resulted in hostility towards lawyers who "plead for money or reward").

54. See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 99–100 (1976) (recognizing conceptions of professionalism that obstructed Jewish immigrants from practicing law).

55. See Pearce, *The Professionalism Paradigm Shift*, *supra* note 28, at 1241.

56. *Id.* ("[T]he Professionalism Paradigm emerged in the late nineteenth century in response to 'the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal—bar association and law school commencement addresses, memorial speeches on colleagues, articles and books—on the theme of the profession's 'decline from a profession to a business.'").

57. *Id.* at 1244 (quoting Louis Brandeis) ("[L]awyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.").

58. *Id.* at 1244 n.74 (citation omitted) ("[I]n 1934, Harlan Fiske Stone . . . called on the profession to return to its role as 'guardian of public interests' and to consider 'the way in which our professional activities affect the welfare of society as a whole.'").

59. *Id.* at 1231.

60. *Id.* at 1244.

61. *Id.* at 1244–45.

profession.⁶² Roscoe Pound, former Harvard Law School Dean, described professionalism's view of legal work as the "[p]ursuit of the learned art in the spirit of a public service."⁶³ Pound noted that "gaining a livelihood [in the law profession] is incidental, whereas in a business or trade it is the entire purpose."⁶⁴ Unlike business where people focused on making a profit, professionals "possessed inaccessible expertise and primarily pursued the public good, not self-interest, entitling them to autonomy as individuals and as a group."⁶⁵ As a result of this dichotomy in characterization, the paradigm of professionalism dominated the public's understanding of the lawyers' role in American society through the 1960s.⁶⁶

Professionalism's ideals were relatively short lived.⁶⁷ Law practice again began to be considered a business as larger cultural trends shifted away from community and the common good to self-centered ends.⁶⁸ The rise of individualistic culture in society led to a predicament for professionalism.⁶⁹ The notion of the hired gun emerged, and this placed the short-term interest of clients above the "concerns for others."⁷⁰

In 1977, the United States Supreme Court's decision in *Bates v. State Bar of Arizona*⁷¹ helped move the perspective of law as a business from the margin to the center of the legal community's discourse.⁷² The Court held that attorneys could advertise and noted that it did "not belittle the person who earns his living by the strength of his arm or the force of his mind."⁷³ The Court articulated that there was little value in attorneys pretending they did not need to make a living

62. *Id.* at 1231–32.

63. Wald & Pearce, *supra* note 16, at 609 (citing ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953)).

64. *Id.*

65. *Id.* at 606.

66. *Id.* at 606–08.

67. See Pearce, *The Professionalism Paradigm Shift*, *supra* note 28, at 1237–40; Robert W. Gordon, "The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910," in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 61 (Gerard W. Gawalt ed., 1984) (noting the widespread perception that the legal profession had become a business).

68. See Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-As-Business Paradigm*, 27 FLA. ST. U. L. REV. 9, 19–21 (1999).

69. See Wald & Pearce, *supra* note 16, at 612–16.

70. *Id.* at 603–04.

71. 433 U.S. 350, 371 (1977).

72. See Pearce, *The Professionalism Paradigm Shift*, *supra* note 28, at 1249–50.

73. *Bates*, 433 U.S. at 371.

at their work.⁷⁴ Able to advertise their services, lawyers began to look even more like other businesses in the marketplace.⁷⁵

By the 1990s, law firms started to behave more like businesses.⁷⁶ Attorneys learned to market their work and organize their workplaces by using methods adapted from other businesses.⁷⁷ In 1980, marketing directors did not exist at law firms, but by 1989 there were marketing directors in almost 200 firms.⁷⁸ Moreover, law became a “big business” with tens of billions of dollars in revenue.⁷⁹ The starting salary of associates in New York City rose from \$10,000 in the 1960s to \$80,000 in the 1990s and to \$160,000 in 2015.⁸⁰

Moving forward, lawyers and bar leaders also began to accept law practice as a business.⁸¹ Despite the efforts of bar association leaders and scholars to preserve the ethic and idea of professionalism,⁸² “most lawyers—like most of the public—rejected the view that lawyers were above self-interest, and, consequently, they

74. *See id.* at 371–72.

75. Wald & Pearce, *supra* note 16, at 609.

76. *See* Pearce, *The Professionalism Paradigm Shift*, *supra* note 28, at 1251–54, 1266; *see also* Claudia H. Deutsch, *Corporate Lawyers, Too, Turn to the Hard Sell*, N.Y. TIMES, Apr. 21, 1995, at B20 (noting that in 1990, the National Law Firm Marketing Association had a registered membership of 386, but just four years later, membership had increased by more than 188.6 percent).

77. *See* Pearce, *The Professionalism Paradigm Shift*, *supra* note 28, at 1251–54 (“[Firms] added managers, business plans, marketing directors, and financially driven strategies to maximize efficiency in making profits.”)

78. *See* MARK GALANTER & THOMAS PALAY, TOURNAMENTS OF LAWYERS, THE TRANSFORMATION OF THE BIG LAW FIRM 53 (1991); *New Partner in the Firm: The Marketing Director*, N.Y. TIMES (June 2, 1989), <http://www.nytimes.com/1989/06/02/us/the-law-new-partner-in-the-firm-the-marketing-director.html>. (citing Marilyn Astin Tarlton for the growth in law firm marketing).

79. *See* Pearce, *The Professionalism Paradigm Shift*, *supra* note 28, at 1251.

80. *Id.*; *First-Year Associate Salaries at Large Law Firms Have Become Less Homogenous, though \$160,000 Continues to Define the Top of the Market*, NALP (Apr. 15, 2015), http://www.nalp.org/2015_assoc_salaries. Even using inflation-adjusted dollars, an associate in 2015 earned roughly 197% as much as an associate earned in 1960. THE INFLATION CALCULATOR, <https://westegg.com/inflation/infl.cgi> (last visited Oct. 28, 2017).

81. *See* Pearce, *Law Day 2050*, *supra* note 68, at 17–18.

82. *See* Wald & Pearce, *supra* note 16, at 609 (noting how Chief Justice Burger, prestigious law school deans, state bar officials, and other high judges bemoaned the departure from a professionalism paradigm and the movement toward a more commercial mindset).

viewed appeals based on professionalism to be hypocritical, silly, or irrelevant to their increasingly business-like work lives.”⁸³

The transition of law practice from profession toward business has been fraught with angst.⁸⁴ Business in modern times has been seen as the kind of institution that Donald J. Trump projects: i.e., self-focused, oblivious or hostile to concerns outside its own immediate self, deceitful, exploitive of those with less wealth and power, and ruthlessly focused on profit for executives and shareholders.⁸⁵ Yet recently, society and international business leaders are beginning to insist that stakeholders include the community where the business is operating, the layers of suppliers, and the environment that sustains life (and markets) on earth.⁸⁶

Business ethics require a consistent focus on the common good while serving the owners’ interests as a networked entity as well as those interests that are more self-centered.⁸⁷ If law today concedes that it has adopted more of the characteristics of business, then those who work in law would be wise to develop their understanding of the ethics that govern business.⁸⁸ Legal work viewed through a business lens could expand lawyers’ views on the behaviors and habits of thought that are important to success.⁸⁹

83. See Pearce, *Law Day 2050*, *supra* note 68, at 18.

84. See Pearce, *The Professionalism Paradigm Shift*, *supra* note 28, at 1230 (describing “the crisis in professionalism” and stating that “many commentators describe the current crisis as cause for despair”).

85. Cf. Larry Alton, *How Much Do A Company’s Ethics Matter In The Modern Professional Climate?*, FORBES (Sept. 12, 2017, 1:30 PM), <https://www.forbes.com/sites/larryalton/2017/09/12/how-much-do-a-companys-ethics-matter-in-the-modern-professional-climate/#1125f461c790> (discussing what “ethics” means in today’s professional climate but not directly linking Donald Trump to that behavior).

86. See *Corporate Social Responsibility Committee*, AM. BAR. ASS’N, <http://apps.americanbar.org/dch/committee.cfm?com=IC634100> (last modified July 7, 2015) (placing compliance requirements on the business community); *Guiding Principles on Business and Human Rights*, *supra* note 20, at 19 (providing the principles that have become the leading standards for corporate social responsibility). See generally Timothy F. Slaper & Tanya J. Hall, *The Triple Bottom Line: What Is It and How Does It Work?*, 86 IND. BUS. REV. 4, 4–8 (2011), <http://www.ibrc.indiana.edu/ibr/2011/spring/article2.html> (discussing the “Triple Bottom Line,” a business scorecard model that accounts for economic, environmental, and social considerations).

87. See Felber & Hagelberg, *supra* note 19, at 1–4.

88. See generally Pearce, *The Professionalism Paradigm Shift*, *supra* note 28, at 1266–67 (“[A]n acknowledgement that law practice has the characteristics of a business, suggest[s] a new understanding of the framework for the delivery of legal services.”).

89. See Mary Swanton, *Survival Skills: A Guide to Boosting Your Business Savvy*,

B. Brief Overview of the Field of Business Ethics

Ethical law practice is regulated by codes of professional conduct that lawyers must follow to maintain their bar licenses, but business practice does not have a single professional code of ethics.⁹⁰ Rather, “business ethics” is guided by different theories.⁹¹ John Paul Rollert, a professor at the University of Chicago Booth School of Business, noted that “[i]f you survey syllabi from MBA Programs across the country, you will soon discover that there is no agreement, broad or otherwise, on what passes for ‘business ethics.’”⁹² It is a vast field without the bounds of a single ethical code.⁹³ Business ethics grew out of moral and political philosophy research in the 1970s and 1980s, and “[b]usiness ethicists seek to understand the ethical contours of, and devise principles of right action for, business activity.”⁹⁴

This Article does not seek to be authoritative on the philosophy of business ethics. Rather, it considers dominant theories of business ethics to understand how their emerging models can inform lawyering for the common good. Russell Pearce and Brendan Wilson divide “business ethics into three categories: profit maximization, social duty, and ordinary ethics.”⁹⁵ This Article considers the profit maximization and social duty categories to provide a starting point for understanding how theories of business ethics can inform the practice of law.⁹⁶

LAW.COM (Jan. 1, 2010), <https://www.law.com/almID/4dcafb48160ba0ad57001b59/> (citing Mark Weiss, assistant general counsel for Staples, for the proposition that in-house counsel need to be able to view “advice through a business lens” to be successful).

90. John Paul Rollert, *Going Beyond Business Ethics-as-Castor Oil*, HARV. BUS. REV. (Oct. 14, 2010), <https://hbr.org/2010/10/going-beyond-business-ethics-a>.

91. *Id.*

92. *Id.*

93. *See Business Ethics*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/ethics-business/#PopuFramForBusiEthi> (last visited Nov. 18, 2017).

94. *Id.*

95. Russell G. Pearce & Brendan M. Wilson, *Business Ethics*, in HANDBOOK ON THE ECONOMICS OF RECIPROCITY AND SOCIAL ENTERPRISE 49, 49 (2013).

96. *Id.* at 52 (discussing how ordinary ethics refers to another theory of business ethics, in which ethicists argue that a separate, new field of business ethics is not necessary because business “need only rely on ordinary ethics”). According to ethicist Peter Drucker, for instance, “[T]here is only one ethics, one set of rules of morality, one code, that of individual behavior in which the same rules apply to

First, Pearce and Wilson define the primary view of business ethics to be that of profit maximization.⁹⁷ Under the profit maximization model, businesses must only seek to maximize profits while complying with the law.⁹⁸ The model asserts that it is the sole ethical strategy that ensures efficient markets, which “represent the highest social good.”⁹⁹ Milton Friedman described the profit maximization ethic by asserting, “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.”¹⁰⁰ According to Friedman and the profit maximization ethic, businesses have a duty to maximize profits and look out for the common good unless the focus on gaining the most profit undercuts the efficiency of markets and thereby hurts society.¹⁰¹

Second, Pearce and Wilson describe social duty theories of ethics, which include the “stakeholder theory, contractarian theory, and corporate social responsibility,” all variations of the same approach.¹⁰² The stakeholder theory asserts that businesses must balance duties owed to “the businesses’ range of stakeholders, including colleagues, creditors, suppliers, employees, investors, and communities.”¹⁰³ The contractarian theory is a transactional version of the stakeholder theory, where communities “authorize the existence of businesses” only if the community members benefit as “consumers, as employees, and as members of society.”¹⁰⁴ Corporate social responsibility (“CSR”) is another variation of stakeholder theory that uses voluntary social accounting to put boundaries on corporate behavior to prevent the exploitation of workers, natural resources, and weak governments.¹⁰⁵ CSR is a growing international

everyone alike.” *Id.* (citation omitted). Theories of “ordinary ethics” range from religiously grounded ethics to moral philosophy and Confucian ethics. *Id.*

97. *Id.* at 49.

98. *See id.* at 50.

99. *Id.* at 49.

100. *Id.*

101. *Id.* at 49–50.

102. *Id.* at 50.

103. *Id.* (emphasis added).

104. *Id.* at 51.

105. *Id.*

movement that is placing pressure on business to consider the common good in addition to profits in business practice.¹⁰⁶

These social duty ethical theories propose that businesses have duties to society that go well beyond making the most profits.¹⁰⁷ Contrary to Friedman and the idea that market efficiency is the greatest good, these theories posit that profits may be a means to an end but are not an end in themselves.¹⁰⁸ Law that seeks to evoke client altruism and consider the common good draws on this branch of business ethics theory.¹⁰⁹

The social duty strands of business ethics are grounded in the bedrock reality that creating and sustaining a business requires a web of functioning relationships.¹¹⁰ To survive, business depends upon ongoing exchanges among people and institutions, upon serving mutual interests as well as the owners' interest in profit.¹¹¹ What other interests are involved? The stakeholders include workers, managers, suppliers, consumers, neighbors, distributors, and government entities. These entities provide infrastructure such as roads, bridges, clean air and water, security, and means for enforcement of contracts and redress of grievances, i.e., the court system.

The professionalism concept that lawyers are inherently selfless and that lawyers' work is public service especially (or only?) when done on a charitable or public basis should be phased out.¹¹² Instead, as lawyers work with private clients to make a living *and* to form a more perfect union, lawyers are similar to their clients, whether businesses or individuals.¹¹³ One of the lessons of social duty business ethics is that all must consciously evoke consideration of the needs and interests of others in their work.¹¹⁴ And when lawyers represent clients there should be some mutual consideration of each entity's altruism and how the representation may affect the common good.

106. *Id.* at 52.

107. *Id.* at 50.

108. *Id.*

109. *Id.* at 51.

110. *Id.* at 50.

111. *Id.*

112. *See* Sabbeth, *supra* note 9, at 492.

113. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 371 (1977) (recognizing that lawyers must make a living).

114. *See* Pearce & Wilson, *supra* note 95, at 50.

C. *Growing Movements Pressure Businesses to Consider the Common Good*

Social duty theories of business ethics reflect or grew out of the growing demand that businesses consider the common good in business practice.¹¹⁵ Activity in the global arena has been increasing as societies seek both to inspire consideration of the common good and to hold businesses accountable for their impacts on society.¹¹⁶ Three examples of movements that honor values of the common good by asking businesses to do more than maximize profits are Corporate Social Responsibility, the Economy for the Common Good, and the Charter for Compassion.

1. *Corporate Social Responsibility*

In general, CSR is a voluntary initiative by businesses to hold each other accountable for socially responsible practices.¹¹⁷ It is not based on enforceable legal rules but on business group “recognition that ethical behavior is good for society and in turn good for business.”¹¹⁸ CSR uses non-binding pledges, guidelines, and standards to shape corporate actions.¹¹⁹ This soft-law system is a coalition of business and non-governmental organizations who “codify, monitor, and in some cases certify firms’ . . . compliance with labor, environmental, human rights or other standards of accountability.”¹²⁰ CSR has helped to control corporate behavior at the international level where there is no formal regulatory scheme.¹²¹

The CSR movement emerged in the 1970s as a means of private regulation imposed by social accounting.¹²² The movement sought to use social accounting—accounting for corporate practices on workers, the environment, and communities—to enable

115. See Jesus Barrena Martinez et al., *Corporate Social Responsibility: Evolution Through Institutional and Stakeholder Perspectives*, EUROPEAN J. OF MGMT. & BUS. ECON. 8, 9 (2015).

116. *Id.* at 9.

117. See Pearce & Wilson, *supra* note 95, at 51.

118. *Id.*

119. Christopher J. Whelan & Neta Ziv, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, 26 GEO. J. LEGAL ETHICS 153, 156 (2013).

120. *Id.*

121. See *id.*

122. Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 611 (2001).

corporations to decide and tell their stakeholders what their values were in addition to profit maximization.¹²³ Although the movement was previously seen as “little more than a ‘marketing opportunity’” that was motivated by social considerations, CSR has “become a true business imperative” with economic benefits.¹²⁴ Laws have started to codify mandatory reporting requirements and standards,¹²⁵ such as the Global Reporting Initiative,¹²⁶ which establishes voluntary standards for sustainability reporting for “economic, environmental, and social impacts.”¹²⁷

The rise of CSR marks an international movement that considers alternative economic models that prioritize interests in sustainability, community, expansion, and profit.¹²⁸ The impetus has come from around the globe as governments of poorer nations and activists seek to reduce the degradation of workers, the local populace, and the environment that often accompanies international corporate activities—from Bangladesh to North Dakota.¹²⁹

123. *Id.* at 614.

124. *Corporate Social Responsibility Committee*, *supra* note 86. *See generally* Matteo Tonello, *The Business Case for Corporate Social Responsibility*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 26, 2011), <https://corpgov.law.harvard.edu/2011/06/26/the-business-case-for-corporate-social-responsibility/> (“This report documents some of the potential bottom-line benefits: reducing cost and risk, gaining competitive advantage, developing and maintaining legitimacy and reputational capital, and achieving win-win outcomes through synergistic value creation.”).

125. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1502, 124 Stat. 1376, 2213–18 (2010). The Dodd-Frank Act requires companies to “disclose their use of conflict minerals if those minerals are ‘necessary to the functionality or production of a product’ manufactured by those companies.” *Fact Sheet: Disclosing the Use of Conflict Minerals*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/opa/Article/2012-2012-163htm—related-materials.html> (last visited Nov. 18, 2017).

126. *GRI Standards*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/standards> (last visited Nov. 18, 2017).

127. *See id.*

128. *See* Pearce & Wilson, *supra* note 95, at 52; Georg Kell, *Five Trends that Show Corporate Responsibility is Here to Stay*, GUARDIAN (Aug. 13, 2014, 12:35 PM) <https://www.theguardian.com/sustainable-business/blog/five-trends-corporate-social-responsibility-global-movement> (“What began as ad-hoc damage-control responses by business to environmental accidents, corruption scandals or accusations of child labour in supply chains, has evolved into a proactive, coherent global movement.”).

129. *See generally* Christine Bader, *The Bangladesh Factory Collapse: Why CSR is More*

2. *Economics for the Common Good*

In addition to the growing global CSR model governing corporate conduct, Economics for the Common Good is a new economic system “in which the wellbeing of people and the environment become the ultimate goal of business.”¹³⁰ The Economy for the Common Good seeks to counter the consequences of capitalism’s ideals of profit maximization and competition, which include “the concentration and misuse of power,” “inefficient pricing,” declining trust and growing fear in society, ecological destruction, and the “shutdown of democracy.”¹³¹ The new economic model asserts the following three major focuses:

- (1) Building the connection between the “values held by business and those held by society” by rewarding businesses for promoting values, such as “trust, mutual appreciation, cooperation, connectedness with nature, solidarity and sharing;”
- (2) Implementing the “values and goals laid down in our constitutions” into business practices; and
- (3) Measuring economic success by assessing business *goals* “on the premise that the purpose of all business is not to maximize profit, but rather to promote the common good.”¹³²

Important than Ever, GUARDIAN (May 7, 2013, 10:50 AM), <https://www.theguardian.com/sustainable-business/blog/bangladesh-factory-collapse-csr-important> (discussing the effects of a factory collapse in Bangladesh, and what CSR practitioners need to do so succeed); Sari Horwitz, *Dark Side of the Boom*, WASH. POST (Sept. 28, 2014), http://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/?utm_term=.c680267e6296 (discussing the negative effects of North Dakota’s oil rush and its creation of drug-fueled crime). CSR should be used to help address this issue. By creating an alternative economic model, the well-being of the people would take precedent, allowing methods to be created and used to end the crime associated with oil production. *Id.*

130. See ECON. FOR COMMON GOOD, *supra* note 23.

131. FELBER, *supra* note 17, 10–14; see Felber & Hagelberg, *supra* note 19, at 5 (“A central concern of the Economy for the Common Good (ECG) is to end the confusion between means and ends in our economic system. Money and capital should no longer be the end or the goal of economic activity, but rather the means to reach a higher goal, namely to improve the common good. This is by no means a new concept.”).

132. See FELBER, *supra* note 17 at xvii; see also Felber & Hagelberg, *supra* note 19, at 1–2 (stating the five underlying goals of the Economy for the Common Good “represents an alternative [model] to both capitalism and communism”).

The Economy for the Common Good does not claim to be the only model.¹³³ But it insists that certain elements must be included in the assessment of any economic model for the future.¹³⁴ The economic model uses the “Common Good Balance Sheet” to measure economic success of a business, and it awards enterprises that are “more socially responsible, ecologically friendly, democratic and solidarity-minded.”¹³⁵

3. *Charter for Compassion*

The Charter for Compassion is a multi-organizational compact that argues society should begin to treat compassion as a commodity that every business must recognize and maximize.¹³⁶ The success of a business, therefore, would include a measure of its compassion practices.¹³⁷ The Charter movement uses compassion for each other and recognition of our responsibility for the natural world as an organizing principle for businesses, governments, faith groups, and

133. See generally FELBER, *supra* note 17, at xviii–xix (discussing various other models that are “friends” of the Economy for the Common Good).

134. See *id.* at 191 (“The only political demand made by the Economy for the Common Good movement is that democratic discussions take place and decisions regarding key elements of the economic order be made in keeping with the needs, values and priorities of the sovereign people.”).

135. *Id.* at 216–17; see *Common Good Balance Sheet*, ECON. COMMON GOOD, <https://www.ecogood.org/en/common-good-balance-sheet/> (last visited Nov. 18, 2017) (providing the Common Good Matrix to focus on the key essentials of the common good, including quality of life, human dignity, social justice, and cooperative business goal obtainment).

136. CHARTER FOR COMPASSION, <https://charterforcompassion.org/> (last visited Nov. 18, 2017) (“We believe that a compassionate world is a peaceful world. We believe that a compassionate world is possible when every man, woman and child treats others as they wish to be treated—with dignity, equity and respect.”). See generally KAREN ARMSTRONG, *TWELVE STEPS TO A COMPASSIONATE LIFE 3 (2010)* (asserting that our task as a society is to build a global community of mutual respect and arguing that religion is often an obstacle to mutual respect).

137. See *What Role Does Business Play in Supporting the Global Movement for Compassion?*, CHARTER FOR COMPASSION, <https://charterforcompassion.org/partners/business> (last visited Nov. 18, 2017).

arts and culture organizations.¹³⁸ Unveiled in 2009, the Charter movement has over two million signatories internationally.¹³⁹

CSR, Economics for the Common Good, and the Charter for Compassion are three examples of growing movements that are creating pressure and processes for businesses to consider the common good in business practice. These groups honor values beyond atomistic self-interest to maximize profits. They lobby and organize to take better care of the relationships between communities, businesses, and the environment. These movements also seek to hold businesses accountable for their practices that impact the broader community, including the natural world.

These movements provide both theoretical and organizational frameworks for lawyers who wish to apply similar standards to their own work with clients. Lawyers should anticipate that some of their clients will have an interest in complying with the standards set out by these global action groups as well.

III. TOOLS FOR THE BAR, BENCH, AND LEGISLATURES TO MOTIVATE CONSIDERATION OF THE COMMON GOOD IN THE BUSINESS OF LAW

A. *Legislation that Encourages Altruistic Behavior*

It is not new for lawyers to take the interests of third parties into account during representation. Below are several examples of legislation that require or encourage lawyers to serve the public. These might be replicated in other areas or be utilized to better serve the clients' ideas of the common good alongside their individualistic interests.

138. See *Hidden Miracles of the Natural World*, CHARTER COMPASSION, <https://charterforcompassion.org/compassion-environment-reader/the-story-of-solutions/hidden-miracles-of-the-natural-world> (last visited Nov. 18, 2017).

139. See *Who Has Signed the Charter?*, CHARTER COMPASSION, <https://charterforcompassion.org/charter/who-has-signed-the-charter-for-compassion> (last visited Nov. 18, 2017); *Business Partners*, CHARTER COMPASSION, <https://charterforcompassion.org/omnes?id=1747> (last visited Nov. 18, 2017).

1. *Mandating Consideration of Others: The Best Interests of the Child Statute*

Courts have long decided child custody contests between parents in ways that expressly take the best interests of the child into account.¹⁴⁰ The history of those decisions at common law reveals the incorporation of social stereotypes and gender-related preferences.¹⁴¹ Custody factors that the courts assessed were succinct and gender-based, evolving with doctrines that saw children first as chattel of the father and then as requiring the care of a mother during their tender years.¹⁴² For example, it was not until the 1970s that the legislature in Minnesota passed a statute that enumerated specific facts that the court and parent attorneys were to consider in deciding the best interests of the children.¹⁴³

Without recounting this evolution, lawyers, legislatures, courts, parent interest groups, and social scientists have worked together to construct a framework that takes the distinct interests of children into account.¹⁴⁴ Of course, most parents are concerned with their children's best interests, but the statute mandates that outsiders also take the children's interests into account.¹⁴⁵ These standards created a structural safeguard to ensure that the children's interests were weighed in reaching decisions that governed the parties, such as divorcing parents, but that also had a great impact on their offspring.¹⁴⁶

This is an example of how law can become more explicit about the need for lawyers and clients to take the interests of other affected persons and organizations into account in certain contexts. The best interests of the child factors are created by state legislatures and thus vary based on state cultural understandings of child rearing and

140. See, e.g., MINN. STAT. § 518.17 (2017) (providing a list of twelve factors to consider when deciding the best interests of the child); Michael P. Boulette, *A Practitioner's Guide to Minnesota New Best Interest Factors*, 9 MITCHELL HAMLINE J.L. & PRAC. 1, 2 (2016), <http://open.mitchellhamline.edu/lawandpractice/vol9/iss1/3>.

141. See Boulette, *supra* note 140.

142. See *id.*

143. *Id.* at 2–3 (recognizing the passage of Act of Mar. 28, 1974, ch. 330, § 1, 1974 Minn. Laws 555).

144. See *id.* at 2–7 (showing the evolution of the statute when choosing factors to consider in deciding the best interests of the child).

145. *Id.*

146. See *id.* at 10 (arguing the new statute will be “guided by core values of safety, stability, and nurturance for the child”).

well-being.¹⁴⁷ These laws evolve over time: Minnesota's best interests of the child statute has been amended at least eleven times from 1969 to 2015.¹⁴⁸ The latest changes were influenced by a coalition of stakeholders, including "the Minnesota State Bar Association's Family Law Section, the Minnesota Coalition for Battered Women, the Minnesota Chapter of the American Academy of Matrimonial Lawyers, and the Center for Parental Responsibility."¹⁴⁹ Working together with an outside facilitator over six years, the informal alliance succeeded in passing the most recent overhaul in 2015.¹⁵⁰ The statute will undoubtedly be changed in the future as our understanding and these rules evolve.

The interests of the child considered in family law is an exemplar of the development of factors that are local, flexible, and evolutionary—it can be applied to the unique circumstances of each child and family.¹⁵¹ These statutes serve as a backdrop to the discussion ahead as the Article calls for lawyers to expand their efforts to evoke the generosity of clients and to learn to engage with the interests of others in the course of representing a clients' individual interests.¹⁵² Environmental law is another area where legislation has mandated clients and attorneys to take the impact on others into account.¹⁵³ Are there other collaborative legislative efforts that would be fruitful in mandating the consideration of broader interests?

147. See, e.g., MINN. STAT. § 518.17 (2017).

148. See Boulette, *supra* note 140, at 2–11 (listing all relevant amendments).

149. *Id.* at 9–10.

150. *Id.* (recognizing the passage of Act of May 11, 2015, ch. 30, art. 1, § 3, 2015 Minn. Laws 1, 2). The success of the alliance provides a primer on the effort it can take to create and refine good legislation. See *id.*

151. See Tally Kritzman-Amir, *Iterations of the Family: Parents, Children and Mixed-Status Families*, 24 MINN. J. INT'L L. 245, 277 (2015) (recognizing that the best interests of the child statutes are flexible).

152. *Infra* Part III.B.

153. See, e.g., *Environmental Assessment Worksheets and Environmental Impact Statements*, MINN. POLLUTION CONTROL AGENCY, <https://www.pca.state.mn.us/quick-links/environmental-assessment-worksheets-and-environmental-impact-statements> (last visited Nov. 18, 2017) ("Environmental Assessment Worksheets (EAW) and Environmental Impact Statements (EIS) are part of MPCA's environmental review process. This review process is a standardized public process designed to disclose information about the potential negative environmental effects of a proposed development and ways to avoid or minimize them before the project is permitted and built.").

2. *Incentivizing Consideration of the Common Good: Private Attorney General Statute*

Another example of legislation that enables attorneys to take the public interest into account when representing clients are those that allow the award of attorney's fees for private enforcement of consumer protection, civil rights, and fair business practices laws.¹⁵⁴ Legislatures understood that the state's attorneys could not deploy enforcement actions sufficient to stop fraud and abuse by businesses and other enterprises.¹⁵⁵ Encouraging individuals to enforce these laws by providing a means for them to hire attorneys was a method implemented largely in the 1970s.¹⁵⁶ The Minnesota attorney general prosecutes "unfair, discriminatory, and other unlawful practices in business, commerce, or trade," including

the Nonprofit Corporation Act, the Act Against Unfair Discrimination and Competition, the Unlawful Trade Practices Act, the Antitrust Act, laws against false or fraudulent advertising, the antidiscrimination acts, the act against monopolization of food products, the act regulating telephone advertising services, the Prevention of Consumer Fraud Act, and chapter 53A regulating currency exchanges¹⁵⁷

A subdivision was added to this statute in 1973.¹⁵⁸ The subdivision incorporates private remedies and the right to attorney's fees for private enforcement actions.¹⁵⁹ This addition was intended

154. See, e.g., MINN. STAT. § 8.31, subdiv. 1 (2017).

155. See Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws*, 33 WM. MITCHELL L. REV. 163, 166 (2006).

156. See James D. Jeffries, *Protection for Consumers Against Unfair and Deceptive Business*, 57 MARQ. L. REV. 559, 568 (1974) (discussing the implementation of these laws in Wisconsin); Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 31 (2006) ("The widely acknowledged purpose of fee-shifting statutes is to encourage skilled private attorneys to take public interest cases by guaranteeing them competitive compensation.").

157. MINN. STAT. § 8.31, subdiv. 1 (2017).

158. Act of May 3, 1973, ch. 156, § 4, 1973 Minn. Laws 297 (codified as amended at MINN. STAT. § 325.907, subdiv. 3(a) (1973)) (current version at MINN. STAT. § 8.31, subdiv. 1 (2017)) ("In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws specified in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including reasonable fees, and receive other equitable relief as determined by the court.").

159. *Id.*

to increase compliance with the listed regulations in order to provide for the common good.¹⁶⁰

How far this kind of law might go to allow private enforcement of other regulatory laws beyond those specifically named has not been sufficiently tested.¹⁶¹ This area is ripe for lawyer and legislative action to push for more opportunities for injunctive relief and attorneys' fees, all toward the end of enforcing fair business practices, including civil rights for the common good as well as the good of individual clients.¹⁶²

3. *Allowing Attorneys to Declare Intent to Consider the Common Good: Incorporating as a Public Benefit Entity*

Benefit Corporations are a new legal tool to enable businesses to serve the common good while also making a profit.¹⁶³ Starting in June 2007, B Lab, a non-profit organization, started to privately certify companies as "certified B corporations."¹⁶⁴ B Lab became a major proponent in helping states pass benefit corporation statutes.¹⁶⁵ Maryland passed the first benefit corporation statute in

160. See *Church of Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 10 (Minn. 1992).

161. Cf. *Ly v. Nystrom*, 615 N.W.2d 302, 313 (2000) (restricting the use of this statute to matters where there has been a real benefit to the public from the private lawsuit).

162. Many attorney's fees statutes are not well known and are under-utilized. Ralph Nader, *Leadership and the Law*, 19 HOFSTRA L. REV. 543, 562 (1991); see MARY MULLEN, MINN. H.R. RESEARCH DEP'T, ATTORNEY FEE AWARDS IN MINNESOTA STATUTES (2015), <http://www.house.leg.state.mn.us/hrd/pubs/attyfee.pdf>. But see WISC. STAT. § 814.045 (2011) (limiting attorney's fee awards); David D. Dudley & Francis Reynolds Colbert, *Determining Reasonable Attorney Fees*, WIS. LAW., <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=85&Issue=10&ArticleID=10217> (last visited Nov. 18, 2017) (explaining the genesis of the Wisconsin statute); Pamela S. Karlan, *Disarming the Private Attorney General*, U. ILL. L. REV. 183, 183 (2003).

163. A benefit corporation is a "new legal tool to create a solid foundation for long term mission alignment and value creation. It protects mission through capital raises and leadership changes, creates more flexibility when evaluating potential sale and liquidity options, and prepares businesses to lead a mission-driven life post-IPO." *What is a Benefit Corporation?*, BENEFIT CORP., <http://benefitcorp.net/> (last visited Nov. 18, 2017).

164. *Our History*, B LAB, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history> (last visited Nov. 18, 2017); J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 547 (2016).

165. Murray, *supra* note 164.

2010.¹⁶⁶ Proponents of benefit corporation laws claim that consumers, investors, and social entrepreneurs are “demanding a society-focused, for-profit entity form” that care about more than profit maximization.¹⁶⁷

In 2015, Minnesota’s Public Benefit Corporation Act¹⁶⁸ was adopted to provide businesses with an alternative structure to serve the common good beyond profit maximization.¹⁶⁹ Senator John Marty explained the new business entity sought to allow persons who wanted to “look out for the public interest,” but are “concerned that under traditional corporate law, their fiduciary responsibility to stockholders precludes them from paying better wages or protecting the environment if profit margins are affected.”¹⁷⁰ Under Minnesota’s law, benefit corporations commit to either a general benefit through which the corporate mission seeks to serve the broader community,¹⁷¹ or a specific social purpose “that elects to pursue a specific public benefit purpose as stated in its articles.”¹⁷²

Benefit corporation status could help law firms incorporate social duty theories of business ethics into the business of law.¹⁷³ More businesses have started to embrace the new entity status but relatively few law firms have done the same.¹⁷⁴ Given the growth of

166. *Id.* at 546 (citing an Act effective October 1, 2010, 2010 Md. Laws Ch. 97, § 1 (S.B. 690) (current version at Md. Code Ann., Corps. & Ass’ns § 5-6C-01 (West 2014))).

167. *See id.* at 547.

168. Act of Jan. 1, 2015, ch. 172, 2014 Minn. Laws 1, 1–7 (codified as amended at MINN. STAT. §§ 304A.001–.301 (2016)).

169. Sen. John Marty, *New for Minnesota in 2015: Public Benefit Corporations*, MINNPOST (Jan. 16, 2015), <https://www.minnpost.com/community-voices/2015/01/new-minnesota-2015-public-benefit-corporations>.

170. *Id.*

171. *Id.*

172. MINN. STAT. § 304A.101, subdiv. 1(3) (2017); *see also* Murray, *supra* note 166, at 554 (describing Minnesota’s Public Benefit Corporation law and its similarities to the Model act and other state benefit corporation laws).

173. *See generally* Julianne Hill, *For More Good: Law Firms Find Other Ways to Provide Service to Society*, A.B.A. J. (Feb. 2017), http://www.abajournal.com/magazine/article/law_firm_pro_bono_alternatives (recognizing “the benefit corporation . . . must have as its purpose the creation of a direct public benefit”).

174. *See, e.g., Find a B Corps*, B LAB, http://www.bcorporation.net/community/find-abcorp?search=&field_industry=&field_city=&field_state=&field_country=United+States (last visited Nov. 17, 2017) (finding that a search by legal industry on benefitcorp.net shows that there are only twenty-two B Corps law firms in the United States, whereas there are 1037 total B Corps listed for all industries).

corporate social responsibility norms in business, benefit corporation status could provide law firms with a means to improve their social accountability and amplify their impact on their environment and the broader society.¹⁷⁵

For example, a community-based law firm could adopt benefit corporation status and market its community-based mission in order to build trust and partnerships with the community.¹⁷⁶ These private law firms would not be bound by the funding restrictions faced by non-profit firms, including public interest law firms.¹⁷⁷ In addition, benefit corporation or LLC status lets potential clients know a firm's values before approaching the firm for representation.¹⁷⁸ Transparency in law firm values empowers clients to choose a firm that operates in ways consistent with the clients' goals.¹⁷⁹ Knowing firm values from inception also avoids surprises if the lawyers' values surface during the course of the representation.¹⁸⁰ Benefit corporations can assist in expanding the options for performing

175. See John Montgomery, *How Being a Benefit Corporation or B Corp May Help Land the Right Clients*, L. J. NEWSLETTERS (Sept. 2017), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/09/01/media-communications-how-being-a-benefit-corporation-or-b-corp-may-help-land-the-right-clients/>.

176. Cf. Jena McGregor, *What Etsy, Patagonia and Warby Parker Have in Common*, WASH. POST. (Apr. 20, 2015), https://www.washingtonpost.com/news/on-leadership/wp/2015/04/20/what-etsy-patagonia-and-warby-parker-have-in-common/?utm_term=.bcb9cada9dcd (recognizing that organizations elect benefit corporation status to market a socially-conscious message to consumers); Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 1001, 1010 (2013) (arguing the benefit corporation was created to help investors and consumers "to differentiate between corporations that are accountable for their claims of good-doing and those that simply have good marketing").

177. See INTERNAL REVENUE SERV., U.S. DEP'T OF TREAS., PUB. NO. 557, TAX-EXEMPT STATUS FOR YOUR ORGANIZATION 1, 28 (Jan. 2017), <https://www.irs.gov/pub/irs-pdf/p557.pdf> (explaining the limitations on "[a] nonprofit public-interest law firm can accept attorneys' fees in public-interest cases" and limiting "[t]he total amount of all attorneys' fees (court awarded and those received from clients) mustn't be more than 50% of the total cost of operations of the organization's legal functions, calculated over a 5-year period").

178. See Westaway & Sampselle, *supra* note 176.

179. See *id.* at 1012; *Benefits Corps.—A New Structure for the New Economy*, LAW 360 (Feb. 8, 2012), <https://www.law360.com/articles/303700/benefit-corps-a-new-structure-for-the-new-economy>.

180. See *infra* Section III.B.

legal work for paying clients who also want to consider the common good.¹⁸¹

Benefit corporation status may also be a step toward making loan repayment assistance programs (LRAP) available to those working in such a firm.¹⁸² Current LRAP—if they still exist at the time this is published—are restricted to lawyers who work for a governmental or non-profit public interest entity.¹⁸³ Social benefit professional corporations that include service to the public good in their goals may assist efforts to extend LRAP benefits to those in private practice.¹⁸⁴

B. The Model Rules of Professional Conduct Permit Lawyers to Engage the Idea of the Common Good in the Course of Representing Clients

As noted above, the Preamble of the Model Rules of Professional Conduct—in its first sentence—asserts that “[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.”¹⁸⁵ The Rules that govern lawyers’ responsibilities fail to further specify what the third role—a public citizen with special responsibility for the quality of justice—might look like in the course of client representation.¹⁸⁶ Rather than

181. See Roxanne Thorelli, *Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit*, 101 MINN. L. REV. 1749, 1755 (2017) (arguing a benefit corporation helps an entity use “commercial activity to drive revenue with the common good as its primary purpose”).

182. See *State Loan Repayment Assistance Programs*, AM. B. ASS’N, https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/loan_repayment_assistance_programs/state_loan_repayment_assistance_programs.html (last visited Nov. 18, 2017) (noting that twenty-six states, including Minnesota, have adopted LRAP programs, which “range in size and scope” and, for the most part, all “require participants to be working in public interest law”).

183. *Id.*

184. Since President Trump’s first budget proposed to eliminate federal Legal Services funding, efforts to expand the reach of LRAP loan assistance have receded, and the battle has shifted to maintaining the existence of the program. See Zack Friedman, *Trump May End Public Service Student Loan Forgiveness*, FORBES (May 18, 2017, 8:02 AM), <https://www.forbes.com/sites/zackfriedman/2017/05/18/trump-public-service-student-loan-forgiveness/#3c3d5ce11eb8> (stating that the Public Service Loan Forgiveness program could be eliminated).

185. MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 2016).

186. See *id.* However, the Preamble does state, “A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are

imagining that a lawyer is a public citizen even in the course of representing an individual client, the phrase “lawyer as public citizen” is defined in terms of seeking improvements in the law and of ensuring access to the legal system and quality of service.¹⁸⁷ Caring for the common good is considered to be a duty of the profession only in lawyers’ time away from client representation, with the minor exception of any time spent on pro bono representation.¹⁸⁸

The legal profession and most of legal education focus on the lawyer’s first two roles—a representative of clients and an officer of the legal system.¹⁸⁹ The public citizen role encompasses activity apart from those primary activities.¹⁹⁰

usually harmonious.” *Id.*

187. *Id.* at 6. In full, section six of the preamble explains:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Id.

188. See John M. Finnis, *What is the Common Good, and Why Does It Concern the Client’s Lawyer*, 40 S. TEX. L. REV. 41, 52 (1999) (stating that lawyers “have such a duty” to promote the common good).

189. See Eli Wald, *Where are the Lawyers*, LEGAL PROF.: JOTWELL (Aug. 10, 2016), <https://legalpro.jotwell.com/where-are-the-lawyers/> (“[I]n contrast with the many rules that define the role of lawyers as representatives of clients and the handful of rules that deal with lawyers as officers of the legal system, the rules have little to say about the role of lawyers as public citizens.”).

190. *Id.*; cf. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2016) (“In representing a client, a lawyer shall exercise independent professional judgement and render *candid* advice. In 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.” (emphasis added)).

The Rules do anticipate that lawyers may reference factors outside their clients' individual articulated interests.¹⁹¹ But it is not mandated that lawyers consider outside factors such as social, community, and environmental interests.¹⁹² Such a mandate would create conflicts with a lawyers' other duties, for example, the duty to keep client confidences that conflict with the larger public interest. There is a hot debate between legal ethics scholars who espouse a more justice-centered approach to the lawyers' role and those who say lawyers must be client-centered and serve only the clients' needs.¹⁹³ While it is unclear whether a deep substantive difference exists between the sides of the debate, Susan Carle's advocacy for the exercise of ethical discretion that weighs relative power of the client and is context specific would go a long way in resolving the apparent conflict.¹⁹⁴

Reframing the Model Rules of Professional Conduct to better incorporate the principles of social duty, business ethics, and movements is unnecessary if done just to encourage lawyers to discuss clients' non-monetary interests. For the purposes of this Article, lawyers already have most of the discretion needed to engage with their clients' altruism or consider the common good under the Rules.¹⁹⁵ Every suggestion made in the examples outlined below is attainable without any change in the Rules.

What if more lawyers presumed that clients had a rich web of relational interests beyond just self-interest? How would this change the private practice of law? Arguably, so long as the clients' goals were served by the representation, some aspects of life in society would improve. Generosity would be more common. Client satisfaction and connection to their communities would increase. Human dignity would be nurtured, and the natural world would begin to be restored.

For now, this Article encourages lawyers to use their positions to imagine, ask, and propose that clients have altruistic ideas as well as

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

192. *Id.*

193. For a thorough overview of the respective positions in this debate over the Rules, see Carle, *supra* note 52, at 138–48.

194. *Id.* at 148–49.

195. See generally William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083–90 (1988) (arguing that lawyers should have broad discretion to pursue legal claims and ethical rules should be less categorical so as not to diminish a lawyer's discretion).

self-interested ones—and then use their legal skills and judgment to realize this full array of ideals.

1. Example: Goal Setting in Client Representation

At the outset of any representation, a lawyer and client will discuss and decide upon the initial goals.¹⁹⁶ This is an obvious and critical time to explore the impact of the matter on other relationships and to think through what justice and success look like as a result of the representation.¹⁹⁷ Clients may take some time to clarify what they really want, depending on the situation.¹⁹⁸

Lawyers often have tremendous influence over the goals of representation through their knowledge of what is legally possible, what is likely, what efforts each goal might require, and what the outcome might feel like. Through their experience representing others, lawyers can assist clients in imagining the purpose of the lawyer-client relationship.¹⁹⁹ Frequently, clients have an advantage of not knowing the limitations of the legal system, or have only a partial understanding of the greater possibilities offered through the law.

A lawyer should not lean on a client to adopt the lawyer's ideas as the goals of the representation.²⁰⁰ Clients are the first ones to live with the results, and what a lawyer would do in a client's shoes is rarely helpful.²⁰¹ Rather, a lawyer asking open-ended questions about the desired outcomes allows clients to expand (or contract) their view of what is possible and make their own decisions about the direction and goals.²⁰² These objectives must inform the means of representation.²⁰³

196. See 4B ROBERT E. CROTTY, *NEW YORK PRACTICE SERIES—COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* § 67:3 (2017); ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 55 (2001).

197. See CROTTY, *supra* note 196.

198. See COCHRAN, *supra* note 196.

199. See *id.*

200. See MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016) (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation.”).

201. See David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485, 486 (1989) (discussing the importance of professionalism in the legal profession and distinguishing being a legal mechanic from standing in a client's shoes).

202. See COCHRAN, *supra* note 196, at 50.

203. See MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016).

The following example is based on a client representation that author Ann Juergens' law office undertook in California during the 1980s. It involved a group of thirty-two tenants who experienced the catastrophic loss of their homes and most of their worldly possessions when their apartment building burned down in a fire. One of their neighbors died in the incident. The landlord had received a series of letters from the City's inspection department warning of "serious and life-threatening fire code violations." The survivors were traumatized. They gathered together and began to interview lawyers to represent them against the building owners who ignored the repeated repair warnings. Big law firms competed to represent the group with promises of maximizing the tenants' financial recovery. The lawyers promised to minimize the stress of litigation and to front all its costs.

Former tenants indicated the attorneys failed to ask whether the tenants wanted to engage with the City to alter fire code enforcement policies. When a community-based small firm attorney finally did ask whether this might be one of their goals, for example preventing this kind of blatant disregard of safety code enforcement in the future, the group signed on to try it. The tenants had to pool their returned security deposits as part of the litigation fund, and they accepted that adding the City as a defendant would evoke governmental immunity defenses that might preclude their suit. But the tenants wanted to try.

Over the next two years, the City made changes to its fire code enforcement policies in exchange for a dismissal of the case, and the tenants received a favorable settlement from the owners. Most importantly, the clients felt that some justice was achieved for the neighbor who died in the fire. Further, their suffering as a community was acknowledged, and this would not happen as readily with the next scofflaw landlord.

These tenants did not know how to engage the City's enforcement apparatus until a lawyer positioned it as a possibility. When asked and shown a means to the end, the clients chose to seek the common good—along with remuneration for their deep-felt losses. Lawyers must be trained to have these conversations with clients from the outset, to explore goals and frame processes that include the common good as well as the client's self-focused interests, and to be creative in pursuing both.

Humans are social beings, and it is rare that injured people do not care about preventing injuries to others.²⁰⁴ Yet legal culture has evolved to operate on a norm that the client is only motivated by personal gain.²⁰⁵ There are a myriads of examples of litigants in the news who care about many things before money.²⁰⁶ Even if one is cynical (which these authors are not), lawyers should take notice of these public statements. How can we *not* talk about the public's interest in the outcomes of our representations with injury victim clients? With any clients?

2. *Example: Conditioning the Representation Agreement with the Attorney's Idea of the Common Good*

After learning a client's initial goals, the lawyer and client generally shape a representation agreement. The role of the common good can be anticipated and memorialized into this document.²⁰⁷ Lawyers must foresee the practical challenges of

204. See JOEL M. CHARON, TEN QUESTIONS: A SOCIOLOGICAL PERSPECTIVE 30 (2009).

205. See POLITICS OF LAW: A PROGRESSIVE CRITIQUE 143 (2010).

206. Pop star Taylor Swift recently brought a counterclaim for \$1 against a promoter who sued her for defamation. See Andrew Flanagan, *Taylor Swift Wins Sexual Assault Lawsuit Against Former Radio Host*, NPR MUSIC (Apr. 14, 2017), <http://www.npr.org/sections/therecord/2017/08/14/543473684/taylor-swift-wins-sexual-assault-lawsuit-against-former-radio-host>. Her goal was vindication, not money. See *id.* Even among plaintiffs who are of low wealth, it is remarkable to note how many consistently speak of the larger common good. In a recent spate of cases brought against police departments for racially motivated brutality, the plaintiffs explained that they engaged in these cases primarily to prevent this kind of pain from visiting other families, not for money. For example, see statements by the mothers of Sandra Bland, Trayvon Martin, and Philando Castile on recovering multi-million dollar settlements, yet invoking prevention of future brutality as their goal. See, e.g., Christine Hauser, *Sandra Bland's Family Settles \$1.9 Million Civil Suit, Lawyer Says*, N.Y. TIMES (Sept. 15, 2016) (stating that the settlement included "making changes in jail procedures and providing damages for the family"); Amy Forliti, *Philando Castile's Family Reaches \$3M Settlement in Death*, STAR. TRIB. (June 26, 2017), <http://www.startribune.com/philando-castile-family-reaches-3m-settlement-in-death/430840813/> ("[T]he city of St. Anthony has a commitment to make positive changes to their police department."). Another example is James Blake who sued over his wrongful beating to change police practice—his suit did not ask for a monetary judgment but rather a change in how police beatings were handled. *The Daily Show with Trevor Noah*, COMEDY CENT. (Aug. 30, 2017), <http://www.cc.com/episodes/a5eg6q/the-daily-show-with-trevor-noah-extended-august-30-2017-james-blake-season-22-ep-22148>

207. See, e.g., Richard C. Reed, *Effective Legal Representation Agreements*, PA. LAW.

seeking both individual and public-spirited outcomes, and that clients have the final say on settling a matter.²⁰⁸ What boundaries, then, can be incorporated into the representation agreement to serve the common good?

As one example, some lawyers who represent abuse victims of the Catholic Church have placed boundaries in the representation to hold the Church accountable and to change practices with respect to pedophilic priests.²⁰⁹ One law office has concluded that secret settlements contribute to impunity for abusers and their continued employment in positions that provide contact with children.²¹⁰ These lawyers hold careful discussions with potential clients before agreeing to represent a survivor.²¹¹ The conversation includes the larger implications of the case against the abuser and an explanation that the lawyers will not represent an abuse survivor in a secret settlement.²¹²

The challenge is to prevent surprise at settlement time for a vulnerable victim-survivor who is seeking redress through an attorney's services. In this situation, social benefit entity status for the law office could ensure potential clients know there will be no secrets in the outcome. This may help prevent potential client coercion at the signing stage. Clarifying that the law firm has its own goals for the common good provides transparency. Still, the lawyer must continue to ensure that the client's individual goals are served throughout the litigation, not just the larger social goal of stopping abuse.²¹³ One of the overarching goals of the representation is to expose the secret of the pedophile and his employer, and hewing to that goal is one of the conditions of ongoing representation.²¹⁴ This is a permitted limitation on representation because is reasonable under the circumstances, and the client has given informed

32, 32 (1999).

208. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016).

209. See Sacha Pfeiffer, *Critical Eye Cast on Sex Abuse Lawyers: Confidentiality, Large Settlements are Questioned*, BOS. GLOBE (June 3, 2002), http://archive.boston.com/globe/spotlight/abuse/stories2/060302_lawyers.htm.

210. *Id.*; THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH* 36, 44 (2002).

211. See *id.*

212. See *id.*

213. This lawyer's approach has contributed to a great uncovering of mismanagement by the Catholic Church of pedophilia by priests that arguably would not have been accomplished via secret settlements.

214. See Pfeiffer, *supra* note 209.

consent.²¹⁵ There is no conflict with the lawyers' own interest in this condition; in fact, the lawyer may be able to settle for more money with the transparency.²¹⁶

In sum, the mutual interests of the client and the public to change the practices that led to abuse were served by the lawyer anticipating the secret settlement offer. No ethical dilemma was created when the client was prepared for this proposal and agreed in advance that the mutual interest was to bring to light the practices of the pedophile or his employer. The client still had the final say as to whether to settle, as mandated by the Rules of Professional Conduct.²¹⁷

3. *Example: Advising Clients in Negotiations and Social Disclosures*

When a lawyer negotiates a transaction, an examination of the interests of non-parties in the deal is common.²¹⁸ It should be considered essential. A good lawyer in dialogue with a client will be able to identify and understand the many stakeholders in a deal, whether they are parties to it or not.²¹⁹ This is especially true for transactions where permits and permissions are needed, as in land, construction, stadium, and mining projects.²²⁰ It also applies to mundane transactions, including expansion plans at a small business. For example, lawyers advise clients how to work effectively with government decision-makers and community groups in land use, zoning, and development matters. Thinking expansively about impacts of the deal on non-parties is key to crafting creative deals and reaching resolutions of contentious points along the way.²²¹

215. See MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2016).

216. But see Pfeiffer, *supra* note 209 (providing that one attorney has "has never agreed to a confidentiality clause, even if it's meant walking away from a potentially lucrative case").

217. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016).

218. Jim Hilbert, *Collaborative Lawyering: A Process for Interest-Based Negotiation*, 38 HOFSTRA L. REV. 1083, 1093–95, 1093 n.70–71 (2010).

219. See *id.* at 1095–97.

220. See, e.g., Kristen Leigh Painter, *City, Companies Pledge \$7 Million to Make Commons More Than a Plot of Grass*, Star. Trib. (Aug. 14, 2015 12:00AM), <http://www.startribune.com/city-companies-pledge-7-million-to-build-commons-park-in-down-town-minneapolis/321792171/>; Josephine Marcotty, *State Releases Long-awaited Impact Statement for PolyMet Mine, Opens Public Comment Period* (Dec. 18, 2013 6:28AM), <http://www.startribune.com/report-adds-fresh-fuel-to-polarizing-copper-mine-debate/234755311/>.

221. Hilbert, *supra* note 218 at 1093–99.

Additionally, as laws and market forces put pressure on corporations, particularly multi-national corporations, to increase transparency regarding environmental and social impacts from corporate practices,²²² lawyers can help corporations navigate state and federal laws²²³ and voluntary CSR standards.²²⁴ Corporate attorneys may be asked by their clients what they should disclose to stakeholders and consumers regarding the corporation's impacts on the environment, communities, and its governance.²²⁵ "The number and variety of information requests about environmental, social, and governance (ESG) activities is a significant burden for many companies," so companies "must balance how and to whom they respond."²²⁶

As of 2015, over fifty percent of the Standard & Poor's 500 Index ("S&P 500") companies disclosed information regarding ESG activities, which means "if a company is in the S&P 500 and is not publishing a Sustainability report, it is now in the *minority*, and most likely their peers and competitors are already reporting and enjoying certain benefits and advantages."²²⁷ Attorneys can assist corporations

222. See *supra* Section B.3 (discussing the growth of the CSR movement); Ciarán O'Kelly, *Corporate Governance as a School of Social Reform*, 36 SEATTLE U. L. REV. 973, 984 (2013) ("For most people, the corporation mediates more or less all interaction with market forces today.").

223. See *International Trade, Corporate Social Responsibility*, AKIN GUMP STRAUSS HAUER & FELD LLP, <https://www.akingump.com/en/experience/practices/international-trade/corporate-social-responsibility.html> (last visited Nov. 18, 2017) (describing mandatory disclosure requirements by the Securities and Exchange Commission for conflict minerals, climate change, extractive industry payments and cybersecurity, as well as the "anti-human trafficking-related reporting required by the California Transparency in Supply Chains Act of 2010 and the U.K. Modern Slavery Act," which target human trafficking).

224. See *Corporate Social Responsibility and the Role of the Legal Profession: A Guide for European Lawyers Advising on Corporate Social Responsibility Issues*, CONSEIL DES BARREAUX DE L'UNION EUROPÉENNE 1, 8, 10 (2003), http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CSR/CSR_Guides__recommendations/EN_CSR_20030930_CSR-and-the-role-of-the-legal-profession-a-guide-for-European-lawyers-advising-on-corporate-social-responsibility-issues.pdf (describing the hundreds of different CSR codes of conduct and outlining the "five basic types of codes" for CSR: company codes, trade association codes, multi-stakeholder codes, intergovernmental codes, and world codes).

225. Nancy S. Cleveland et al., *Sustainability Reporting: The Lawyer's Response*, AM. BAR. ASS'N (Jan. 2015), https://www.americanbar.org/publications/blt/2015/01/04_pike.html.

226. *Id.*

227. See LINDSEY CLARK & DAVID MASTER, GOVERNANCE & ACCOUNTABILITY

in determining the appropriate required and voluntary disclosures.²²⁸

Large multinational corporate law firms, such as Foley Hoag LLP²²⁹ and Akin Gump²³⁰ have specialist CSR policy attorneys and advisors. Foley Hoag, for instance, has clients operating in “countries around the globe” and its attorneys advise corporate clients “on issues ranging from indigenous peoples’ rights to freedom of expression.”²³¹ The firm’s attorneys help “clients meet their social and environmental performance objectives” by counseling clients on legal requirements and emerging standards, including standards in the United Nations Guiding Principles on Business and Human Rights,²³² which the ABA formally endorsed in 2012.²³³ The lawyers also advise corporate clients and help develop policies²³⁴ to

INSTITUTE, INC., 2012 CORPORATE ESG/SUSTAINABILITY/RESPONSIBILITY REPORTING: DOES IT MATTER? 1, 3 (2012), http://www.ga-institute.com/fileadmin/user_upload/Reports/SP500_-_Final_12-15-12.pdf.

228. See Cleveland, *supra* note 225.

229. See *Overview*, FOLEY HOAG LLP, <http://www.foleyhoag.com/our-firm/offices/boston/overview> (last visited Nov. 18, 2017).

230. See *Corporate Social Responsibility*, AKIN GUMP, <https://www.akingump.com/en/experience/practices/international-trade/corporate-social-responsibility.html> (last visited Nov. 18, 2017) (“This increased focus on CSR and sustainable business operations presents unique challenges and opportunities to businesses and investors. Which business attributes and impacts are relevant and material? Which stakeholders should have a say in, or otherwise inform, these materiality and relevancy determinations? How should material and relevant impacts be defined, measured, monitored and managed? How can companies balance their interests in being transparent to stakeholders with their need to protect intellectual property, maximize brand value and goodwill, and manage enforcement and litigation risks?”).

231. *Practices: Corporate Social Responsibility and the Law*, FOLEY HOAG LLP, http://www.foleyhoag.com/practices/business/corporate-socialresponsibility?fh_lang=es-ES (last visited Nov. 18, 2017).

232. *Id.*

233. See Debra Cassens Weiss, *ABA House Considers Human Rights Responsibilities of Corporations*, A.B.A. J. (Feb. 6, 2012), http://www.abajournal.com/news/article/aba_house_considers_human_rights_responsibilities_of_corporations/ (“The ABA House of Delegates has supported a set of guiding principles for business and human rights after their adoption by the United Nations Human Rights Council.”).

234. See, e.g., *2016 Corporate Responsibility Report*, INTEL, <https://www.intel.com/content/www/us/en/corporate-responsibility/corporate-responsibility.html> (last visited Nov. 18, 2017).

incorporate CSR standards into a corporation's "strategic planning, crisis response strategies, and relationships with stakeholders."²³⁵

John F. Sherman III, General Counsel, Senior Advisor, and Secretary to Shift, an organization seeking to "equip business leaders to implement the United Nations Guiding Principles,"²³⁶ has stated that legal counseling on CSR standards must be "creative," and "more than a determination of the letter of law; the advice should encompass potential impacts on human rights and the full range of other legal and business consequences that may likely result, and should suggest how to achieve the client's goals in a way that respects human rights."²³⁷

Advising corporate clients to utilize voluntary CSR standards promotes the common good and improves relationships with stakeholders, local communities, customers, governments, regulators, and its own employees.²³⁸ At the same time, CSR standards decrease threats to corporate reputation and enhance the company's brand image.²³⁹

III. CONCLUSION

Scholars occasionally propose a complete overhaul of the legal ethical code, which is in its fourth generation of development since its first writing in 1908.²⁴⁰ This Article is less ambitious with respect to the Rules, as culture change is a battle with many fronts. The examples above are intended to bend law practice toward the common good, even as clients remain in the lead of their law-related projects. Taking one step out of the paradigm ditch, which presents

235. *Corporate Social Responsibility and the Law: Services*, FOLEY HOAG LLP, <http://www.csrandthelaw.com/services/> (last visited Oct. 21, 2017).

236. See *The Shift Approach*, SHIFT, <https://www.shiftproject.org/what-we-do/> (last visited Oct. 16, 2017) [hereinafter *Shift*].

237. John F. Sherman III, *Professional Responsibility of Lawyers under the Guiding Principles*, SHIFT (Apr. 2012), <https://www.shiftproject.org/resources/viewpoints/professional-responsibility-lawyers-guiding-principles/> (discussing how lawyers can advise their corporate clients concerning compliance with the UN Guiding Principles); *id.* (stating that "Guiding Principle 19 and ABA Model Rule 2.1 should be read in harmony" when attorneys advise corporate clients regarding the potential impacts of corporate policies on human rights).

238. See, e.g., *Shift*, *supra* note 236 (describing the positive impacts on global human rights when businesses and governments are educated on the same).

239. *Id.*

240. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1435 (2004).

clients and lawyers as autonomously self-interested, could lead lawyers and their clients to a new commitment to the common good.

The current legal culture defines public service as providing free legal assistance to those without adequate resources. Meanwhile, lawyers make the real money in traditional legal work. This essay asks—can't we do more? Can't we be more mindful and creative and, by tapping into clients' altruism, find ways to include regard for the common good in more or even most of our work collaborations with them?

Taking a lesson from social duty business ethics, legal professionals should seek to make a living while fostering their clients' generosity toward all those impacted by legal matters. Ultimately, instead of assuming that most clients and lawyers are selfish and greedy, we should recognize that engaging client altruism for the common good is vital to client satisfaction and success.²⁴¹

²⁴¹ In news that broke just as this volume was going to print, the leader of the largest investment firm in the world, BlackRock, told the CEOs of the businesses in which it invests that they must serve the common good if they are to be eligible for further BlackRock support: "Society is demanding that companies, both public and private, serve a social purpose,' he wrote . . . '[O]ver time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.' It may be a watershed moment on Wall Street . . ." Andrew Ross Sorkin, *A Demand for Change Backed up by \$6 Trillion*, N.Y. TIMES, Jan. 16, 2018, at B1.

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