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## Uncharted Waters? Legal Ethics and the Benefit Corporation

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# ESSAY

*Joseph Pileri*

## Uncharted Waters? Legal Ethics and the Benefit Corporation

**Abstract.** Corporate law norms are reflected in lawyers' ethical duties. The enactment of benefit corporation legislation across the country signals a legislative acknowledgment that corporate law can serve as a public, rather than a merely private, ordering mechanism. Benefit corporations expressly adopt a public benefit as a legal purpose of the enterprise. While many have written about this important development with respect to corporate fiduciary law, this essay is the first to explore the professional and ethical responsibility of lawyers representing benefit corporations. In the last century, as scholars and courts drove an understanding of corporate law that elevated the interests of shareholders above all other corporate constituents, the legal profession moved away from a model of public professionalism and embraced the ideal of the zealous advocate as a response. As a result of benefit corporation legislation, I suggest a return to an ethical model in which attorneys representing these entities explicitly acknowledge that they owe duties that extend to non-shareholder stakeholders and the public.

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As a distinct corporate form, the benefit corporation is now seven years old.<sup>1</sup> Since the passage of the first authorizing statute in Maryland,<sup>2</sup> thirty-one states have enacted benefit corporation legislation.<sup>3</sup> Despite a fair bit of pessimism,<sup>4</sup> businesses are increasingly opting into this form.<sup>5</sup> Household names, like Patagonia<sup>6</sup> and Kickstarter,<sup>7</sup> have incorporated as

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1. See, e.g., Jennifer Dasari et al., *Recognizing Social Entrepreneurship: Minnesota Embraces the Public Benefit Corporation*, BENCH & B. MINN., Sept. 2014, at 19, 19 (indicating the country's first benefit corporation statute passed in Maryland in 2010).

2. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2017) (defining benefit corporations with an effective date of October 1, 2010); see also Gene Tagaki, *Maryland's Benefit Corporation*, NONPROFIT L. BLOG (May 26, 2010), <http://www.nonprofitlawblog.com/marylands-benefit-corporation/> [<https://perma.cc/5KDV-KVBM>] (announcing Maryland was the first state to recognize the benefit corporation on April 13, 2010).

3. See, e.g., Carol Liao, *A Critical Canadian Perspective on the Benefit Corporation*, 40 SEATTLE U. L. REV. 683, 689 (2017) (noting Maryland and Vermont have both established benefit corporations and that "[t]wenty-nine states have since followed suit with various forms of the benefit corporation . . .").

4. See Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593, 610–14 (2011) (arguing benefit corporations lack accountability measures to enforce a for-profit agenda and pursue a general public benefit at the same time, otherwise known as the dual mission); Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 659 (2013) (disputing the benefit corporation's ability to promote the idea of corporate social responsibility and alleging its structure creates a false dichotomy between benefit corporations and business corporations that is practically unworkable); J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 105 (2012) (claiming the benefit corporation form is based on a flawed premise of shareholder primacy); Kennan Khatib, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 188–89 (2015) (disapproving of benefit corporation legislation, and arguing the benefit corporation form is subject to abuse under ineffective enforcement and compliance regimes).

5. Ellen Berrey, *How Many Benefit Corporations Are There?* (May 5, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2602781](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602781) [<https://perma.cc/Q9KH-SU6G>] (finding 2,541 benefit corporations as of 2015); see also J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 588 (2016) (noting 2,636 entities organized as benefit corporations or benefit LLCs as of 2016). See generally Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 259–75 (2014) (describing Delaware companies incorporating or converting to benefit corporations).

6. PATAGONIA WORKS, ANNUAL BENEFIT CORPORATION REPORT 5 (2013), [http://www.patagonia.com/on/demandware.static/Sites-patagonia-us-Site/Library-Sites-PatagoniaShared/en\\_US/PDF-US/bcorp\\_annual\\_report\\_2014.pdf](http://www.patagonia.com/on/demandware.static/Sites-patagonia-us-Site/Library-Sites-PatagoniaShared/en_US/PDF-US/bcorp_annual_report_2014.pdf) [<https://perma.cc/5CJ8-Q2H9>] ("Patagonia Works . . . and its sister companies . . . became benefit corporations on January 3, 2012, the first day we could legally do so in our home state of California.").

7. Yancey Strickler et al., *Kickstarter Is Now a Benefit Corporation*, KICKSTARTER: KICKSTARTER BLOG (Sept. 21, 2015), <https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation> [<https://perma.cc/23PQ-3XFG>] ("We're now Kickstarter PBC—a Public Benefit Corporation.").

benefit corporations. The first benefit corporation to go public held an initial public offering in February 2017.<sup>8</sup> Many speak of a growing social enterprise movement, aided in part by dual bottom line entities like the benefit corporation that seeks to marry profit-seeking activities with a public good.<sup>9</sup> While its ultimate success is by no means guaranteed, the benefit corporation is here to stay. As a profession, attorneys should be questioning how to represent these entities.

One major aspect of the benefit corporation form is a change to the obligations and protections of corporate fiduciaries, relative to traditional notions of the duties directors of a corporation owe and to whom.<sup>10</sup> Authorizing statutes require directors to consider the impact of corporate action on stakeholders other than shareholders, including the public, and they provide immunity to directors who consider all interested parties when making decisions.<sup>11</sup> Though there has not been any caselaw interpreting director duties under these statutes, much has been written about the implications of this change in fiduciary law from traditional

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8. See, e.g., Lauren Gensler, *The World's Biggest For-Profit College Company, Laureate Education, Raises \$490 Million in Public Debut*, FORBES (Feb. 1, 2017, 11:29 AM), <http://www.forbes.com/sites/laurengensler/2017/02/01/laureate-education-initial-public-offering/> [<https://perma.cc/E9MG-QEY5>] (reporting big earnings for the first for-profit company to go public on February 1, 2017).

9. Alicia E. Plerhoples, *Social Enterprise As Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 90 (2015) (noting the benefit corporation has "particular appeal to social entrepreneurs precisely because they eschew many of the regulatory constraints of public charities and secure a social mission within a single for-profit entity"); see also Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 366–70 (2009) (acknowledging the "momentum and legitimacy" acquired by the "social enterprise movement" by, among other things, incorporating as a benefit corporation); Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1362, 1365–70 (2011) (listing the benefit corporation as one of the new legal forms utilized to embrace the idea of social enterprise); Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 303 (2012) ("[T]he Benefit Corporation accommodates the second characteristic of a social enterprise—allowing for sophisticated business models that are typically associated with traditional for-profit enterprise."); Reiser, *supra* note 4, at 591 ("Founders of social enterprises believe profits and social good can be produced in tandem and wish to form organizations that will pursue these dual missions.").

10. BENEFIT CORP., MODEL BENEFIT CORPORATION LEGISLATION 11–20 (2016), [http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation\\_9\\_16.pdf](http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_9_16.pdf) [<https://perma.cc/383C-ZKSG>] (proposing obligations and standards of conduct directors and officers of a benefit corporation should follow).

11. See, e.g., Reiser, *supra* note 4, at 598–99 (listing persons who directors must consider, including "shareholders, employees of the corporation, subsidiaries and suppliers, 'customers [to the extent they are] beneficiaries of the general or specific public benefit purposes of the benefit corporation,' the community, society, and the local and global environment" (quoting VT. STAT. ANN. tit. 11A, § 21.09(a)(1)(C) (2011))).

corporate law.<sup>12</sup> However, the effects of these statutes on attorneys representing benefit-corporation clients has yet to be explored. As lawyers add these entities to their clientele, interpretation of existing ethical rules may change, and new rules and regulatory schemes may be required to clarify the ethical duties of attorneys representing benefit corporations.

It should be anticipated that changes to attorneys' ethical obligations will follow from benefit-corporation legislation. Corporate law theory and legal ethics are necessarily, if not obviously, linked.<sup>13</sup> The greater the number of stakeholders whose relationships with corporations corporate law governs, the broader the universe of people to whom the corporation's attorney owes some obligation. This relationship is best demonstrated through what I call the Unary Model.<sup>14</sup> In the Unary Model, both corporate fiduciaries and attorneys work for a singular purpose. A corporate fiduciary's sole concern is that of the corporation's shareholders,<sup>15</sup> and the lawyer's sole concern is that of her client. If the law governing the client organization is inserted—particularly the duties

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12. See generally Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919 (2016) (arguing benefit reporting requirements provide a system that encourages and maintains good social enterprise governance, which is lacking in the traditional corporate governance regime); Callison, *supra* note 4, at 85 (asserting benefit corporations are inflexible and, consequently, will discourage the development of other benefit corporations and outside investment); William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817 (2012) [hereinafter Clark & Babson] (concluding benefit corporations, in rewriting the business purpose of business entities, are developed counter to the established legal framework of a business entity); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012) (claiming social entrepreneurs are provided with the desired flexibility via the traditional legal framework, but recognizing that social enterprise statutes are better equipped to tackle the for-profit corporate law concept that focuses on shareholder wealth maximization); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269 (2013) (arguing benefit corporations, and their resemblance to early American corporations, represent a return to early customs); Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999 (2013) (describing multiple grounds for the development of benefit corporations, and noting that this new form of corporate governance creates challenges for the courts).

13. See, e.g., William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS 489, 491 (2016) ("Professional responsibility doctrine depends in important ways on the laws that constitute the organizational client.").

14. In a unary operation, the calculation involves a single input. See, e.g., Adrien L. Hess, *Unary Operations*, 67 MATHEMATICS TCHR. 281, 281 (1974) ("For a unary operation only one element [often a number] need be given to determine a second element.").

15. See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (finding corporate directors are restrained by the fiduciary duties and standards, including "acting to promote the value of the corporation for the benefit of its stockholders").

that the client organization's constituents owe—the attorney's ethical obligations are the output.

The Unary Model arises out of two separate but related legal norms—shareholder primacy in corporate law and the ethical notion of the zealous advocate.<sup>16</sup> Both shareholder primacy and zealous advocate norms gained recognition in legal scholarship,<sup>17</sup> caselaw,<sup>18</sup> and ethical rules<sup>19</sup> in the last century. Under shareholder primacy, corporations operate primarily for shareholder interest.<sup>20</sup> Directors in a shareholder primacy scheme serve as trustees for shareholders, and must act only to further shareholder interests.<sup>21</sup> In a common formulation of shareholder primacy, “corporate purpose” is defined as the pursuit, or even maximization, of profit to the

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16. Compare Stephen M. Bainbridge, *The Board of Directors As Nexus of Contracts*, 88 IOWA L. REV. 1, 5–6 (2002) (recognizing most scholars view corporate fiduciaries as agents of shareholders, “with fiduciary obligations to maximize shareholder wealth” despite there being a traditional and more recent “contractarian” theory to explain the concept of shareholder primacy), with Lawrence J. Vilaro & Vincent E. Doyle III, *Where Did the Zeal Go?*, LITIG., Fall 2011, at 53, 53, 57 (specifying the duty of zealous advocacy requires lawyers to devote themselves to doing everything ethically possible to obtain the best result for their client, rather than pursuing the greater good, justice, or doing what is best for the system).

17. See, e.g., ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 354 (reprint ed. 1933) [hereinafter *THE MODERN CORPORATION*] (acknowledging the traditional concept that “a corporation ‘belongs’ to its shareholders”). See generally MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 9–26 (1975) (discussing the essential function of the zealous advocate in the legal profession).

18. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 185 (Del. 1986) (concluding directors breach their duty of care to a corporation when they take into consideration factors other than the maximization of shareholder profit to their shareholder’s detriment); see also *eBay*, 16 A.3d at 31 (“Delaware courts have guarded against overt risk of entrenchment and the less visible, yet more pernicious risk that incumbents acting in subjective good faith might nevertheless deprive stockholders of value-maximizing opportunities.”).

19. See, e.g., CODE OF PROF’L ETHICS Canon 15 (AM. BAR. ASS’N 1908) (requiring lawyers to devote themselves to the interest of their client within the bounds of the law). See generally Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 691 (1991) (arguing ethical rules do not prescribe a clear definition of zealous advocacy).

20. See *THE MODERN CORPORATION*, *supra* note 17, at 354 (indicating controlling parties of a corporation operate for the “sole benefit of the security owners” under the traditional concept that the corporation belongs to its shareholders).

21. See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 223 (1990) (interpreting the court’s holding in *Dodge v. Ford Motor Co.* to mean that managers are trustees that should act only to advance the financial interests of its shareholders because doing otherwise would result in the embezzlement of shareholder property); *THE MODERN CORPORATION*, *supra* note 17, at 354 (“By the application of [the shareholder primacy] doctrine, the group in control of a corporation would be placed in a position of trusteeship . . .”).

shareholders.<sup>22</sup> Delaware has adopted the idea of shareholder primacy as the driving motivation behind corporate law.<sup>23</sup>

Although the subject of much debate,<sup>24</sup> under the ethical model of the zealous advocate, an attorney is generally obliged to advocate fiercely for his or her client and owes a duty of loyalty to the client alone (within legal bounds).<sup>25</sup> This formulation of lawyerly duties was not designed for transactional attorneys, but, absent specific guidance,<sup>26</sup> is applied to the professional generally.<sup>27</sup>

Shareholder primacy demands that lawyers for corporations act as zealous advocates for the corporation's interests,<sup>28</sup> which are heavily

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22. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919) (finding a corporation organizes primarily to increase shareholder wealth (emphasis added)); see also Clark & Babson, *supra* note 12, at 825 (“[A] business corporation has as its purpose creating financial gain for its shareholders[.]”); Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations*, GEO. U. L. CTR., 1, 17 (2016), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2796&context=facpub> [https://perma.cc/F5E6-HW3F] (“Delaware corporate law espouses shareholder wealth maximization norm as the central corporate purpose.”).

23. See, e.g., Clark & Babson, *supra* note 12, at 828 (noting Delaware law forbids directors from enforcing a policy that deliberately avoids shareholder maximization because a for-profit corporation is required “to promote the value of the corporation for the benefit of its stockholders” (quoting *eBay*, 16 A.3d at 34)).

24. See Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1061–62 (1976) (indicating the concept of the zealous advocate creates a misallocation of resources that does not always lead to the greatest good for the largest number of people, and that a lawyer's duty to its client, under such concept, allows strategies that may prejudice the opposing party).

25. See, e.g., Greta Fails, *The Boundary Between Zealous Advocacy and Obstruction of Justice After Sarbanes-Oxley*, 68 N.Y.U. ANN. SURV. AM. L. 397, 400 n.11 (2012) (“The concept of ‘zealous’ advocacy in this context is used more as a rhetorical device to represent the general ethical duties to advocate competently, loyally, and diligently in a client's best interests within the bounds of the law.”).

26. See Thomas B. Mason, *Ethics: Conflicts of Interests for Transactional Attorneys*, ABA COM. L. NEWSL. (Am. Bar Ass'n, Washington, D.C.), Oct. 2007, at \*1 (discussing complaints regarding the lack of direction for transactional lawyers from the ethics rules); see also William T. Allen, *Corporate Governance and a Business Lawyer's Duty of Independence*, 38 SUFFOLK U. L. REV. 1, 3–4 (2004) (analyzing the negative effects of applying the concept of zealous advocacy—meant for the lawyer in a litigation setting—to lawyers in a transactional setting); Stanley Sporkin, Commentary, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149–50 (1993) (arguing ethics codes lack rules directly applicable to lawyers practicing in the corporate sphere and other specialties).

27. See, e.g., MODEL RULES OF PROF'L CONDUCT Preamble and Scope (AM. BAR ASS'N 2017) [hereinafter MODEL RULES] (referring to lawyers as representatives, advocates, negotiators, and evaluators).

28. See *id.* (requiring lawyers to zealously advocate for their client); see also *id.* r. 1.13 (“A lawyer employed or retained by an organization represents the organization . . .”).

intertwined with those of its shareholders.<sup>29</sup> If an attorney's mission in counseling clients is to guide the client in furthering its interests, whatever duty the attorney owes the corporation must take into account the interests of the shareholders—the people for whose interests the corporation operates.<sup>30</sup> This dynamic also affects the scope of the attorney's advice. Attorneys for corporations must advise clients with shareholder interests in mind. Concerns for the effects of corporate action on the world at large are left to the attorney's discretion.<sup>31</sup> Absent a connection to shareholder values, or the identification of a risk to the corporation, those concerns would be beyond the scope of the corporate fiduciary mandate and, ultimately, the attorney's ethical mandate.<sup>32</sup>

We can also do a thought experiment and imagine a Multiary Model<sup>33</sup> in which corporate law regulates a broader set of relationships than merely the one between corporations and their shareholders. In the Multiary Model, corporate fiduciaries must concern themselves with a wide range of stakeholders—parties with whom the corporation contracts, employees, customers, or the public at large. Also in the Multiary Model, the attorney owes a duty beyond those that he or she owes its client. In order to counsel corporate management in satisfying its responsibility and fulfilling the corporation's lawful obligation towards stakeholders, attorneys must represent clients with these other stakeholders in mind. The attorney will ultimately owe a duty, through its corporate client, to the public at large.

With the benefit corporation, we do not have to imagine the Multiary Model—this framework is now a reality for such businesses. Benefit corporation legislation is clear: corporate fiduciaries are to take other

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29. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders.”).

30. See Simon, *supra* note 13, at 499 (arguing the corporate interests are made up of “the constituent interests incorporated into the corporation’s legal structure”).

31. See MODEL RULES, *supra* note 27, at r. 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment 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.”).

32. See Milton C. Regan, Jr. & Kath Hall, *Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights*, 84 FORDHAM L. REV. 2001, 2023–24 (2016) (noting lawyers are crafting and modifying methods by which to advise clients regarding human rights violations provided they are able to identify some risk to the client).

33. In mathematics, a multiary or  $n$ -ary operation is a calculation involving any number of inputs. See ERIC SCHECHTER, HANDBOOK OF ANALYSIS AND ITS FOUNDATIONS 25 (1997) (“When  $A$  is a finite set, with  $n$  elements, then [the] operation is also called an  $n$ -ary operation . . . . We may consider it to be a function with  $n$  arguments . . .”).



stakeholders, including the public at large, into account when making corporate decisions.<sup>34</sup> The Model Benefit Corporation Legislation states that the board of directors of a benefit corporation “shall consider the effects of any action or inaction upon” various constituencies, including shareholders, employees, customers, the environment, and “community and societal factors.”<sup>35</sup> Additionally, directors’ failure to “pursue or create general public benefit[.]” or violations of the benefit corporation statute, entitles directors, shareholders, or other stakeholders set forth in the corporation’s articles of incorporation, to bring a “benefit enforcement proceeding” seeking injunctive relief.<sup>36</sup>

Does this development in corporate law demand a new way of lawyering for benefit corporation clients? How does an attorney counsel a client whose mission is to further the public interest? To whom does the attorney owe a duty? What is the scope of advice that the attorney should give? The private bar has not grappled with how to lawyer for a corporate client while also benefiting the public since before World War II.<sup>37</sup> Robert Gordon of Yale Law School describes the antiquated ideal of the “citizen lawyer,” who is tasked in the non-litigation context with “guiding the client to comply with the underlying spirit or purpose as well as the letter of laws and regulations to desist from unlawful conduct, and if needed, to do so with strong advice backed by the threat of withdrawal, and in extreme cases, of disclosure.”<sup>38</sup> Notions of the lawyer as a public-citizen, once embodied in ethical rules,<sup>39</sup> were largely replaced by the image of the zealous advocate in the second half of the last century.<sup>40</sup>

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34. See Reiser, *supra* note 4, at 598–99 (listing the various constituents that lawyers for benefit corporations may take into consideration when making decisions for the entity).

35. Compare BENEFIT CORP., *supra* note 10, at 12, with DEL. CODE ANN. tit. 8, § 365(a) (2015) (requiring directors to balance the pecuniary interest of stakeholders and the public interest).

36. Compare BENEFIT CORP., *supra* note 10, at 6, with tit. 8, § 367 (limiting enforcement proceeding standing to shareholders that meet ownership thresholds).

37. See, e.g., CODE OF PROF'L ETHICS Canon 32 (AM. BAR ASS'N 1908) (advising lawyers to act “as a patriotic and loyal citizen” while representing their clients).

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

39. See CODE OF PROF'L ETHICS Canon 32 (AM. BAR ASS'N 1908) (“But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.”).

40. See, e.g., Gordon, *supra* note 38, at 1194 (reporting studies of Chicago corporate lawyers in the late eighties and early nineties that showed no trace of the citizen lawyer (first citing ROBERT NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW

Courts and scholars have considered the questions now facing attorneys for public benefit corporations in the context of government lawyering.<sup>41</sup> As a general rule, government lawyers are to represent the public interest.<sup>42</sup> That said, the rules and body of law surrounding government ethics are underdeveloped and details on what it means to represent the public interest are scarce. Government lawyers have been called the orphans of the legal profession due to their unique ethical obligations.<sup>43</sup> Often, government lawyers are forced to adapt ethical duties designed for the private bar.<sup>44</sup>

However, in the case of lawyers representing benefit corporations, the private bar may look to incorporate concepts from government lawyering into prospective rules for lawyers representing benefit corporations. Similar to government lawyers, the profession should explicitly acknowledge that attorneys for benefit corporations owe duties that extend to the public itself and, therefore, have a higher obligation to represent the public interest than do their colleagues.<sup>45</sup> In doing so, attorneys for

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FIRM 247–59 (1988); and then citing JOHN P. HEINTZ ET AL., THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICYMAKING 186–89 (1993))).

41. See, e.g., *In re Grand Jury Subpoena*, 828 F.3d 1083, 1093 (9th Cir. 2016) (“[G]overnment lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients . . . government lawyers have a higher, competing duty to act in the public interest.” (quoting *In re Special Grand Jury*, 288 F.3d 289, 293 (7th Cir. 2007))). See generally Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000) (defending the concept that government lawyers have a role as public interest defenders). Some states have passed statutes requiring that the board of directors look to the effects on non-shareholder stakeholders, including employees, customers, and the public at large, when making corporate decision. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 276 (1992) (requiring boards to consider the interests of all “corporate ‘stakeholders’”). This may appear to create an analogous situation for attorneys representing these corporations; however, the impact of these statutes has been negligible. See Nathan E. Standley, Note, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 209 (2012) (arguing constituency statutes have been largely overlooked).

42. See, e.g., Berenson, *supra* note 41, at 792 (noting government lawyers, both in the criminal and civil context, are perceived as owing a duty to the public interest).

43. Allan C. Hutchinson, *In the Public Interest: The Responsibilities and Rights of Government Lawyers*, 46 OSGOOD HALL L.J. 105, 106 (2008) (“Government lawyers are the orphans of legal ethics.”).

44. See, e.g., Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1035 (2007) (observing government lawyers tend to be bound by rules designed for private sector lawyers).

45. See, e.g., Berenson, *supra* note 41, at 794 (noting at least one court in D.C. agrees with the view that government lawyers owe a higher duty to the public at large due to their position (first quoting *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983); and then quoting *Douglas v. Donovan*, 704 F.2d 1276, 1279 (D.C. Cir. 1983))).

benefit corporations ought to embrace the role assigned to government attorneys—that of gatekeeper.<sup>46</sup> As gatekeepers, government attorneys use their position “to halt malfeasance by decision[-]makers . . . prevent harm to . . . third parties[,]”<sup>47</sup> and promote the public interest.<sup>48</sup>

However, as with government representation, lawyers may be reluctant or unable to define the public interest.<sup>49</sup> One way of eliminating a lawyer’s need to define what the public interest entails is to clarify the obligations of attorneys in specific situations.<sup>50</sup> Two areas present the potential for clarification as applied to benefit corporations. First, benefit corporation lawyers’ ability to withhold certain information from the intended beneficiaries of their corporate clients—in some cases, the public itself—may require reexamination. Might reporting requirements apply to lawyers whose clients fail to promote the public interest or take non-shareholder stakeholders into account?<sup>51</sup> Second, ought the scope of

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46. See Major Dustin B. Kouba, *Company Man: Thirty Years of Controversy and Crisis in the CIA*, ARMY LAW., Nov. 2016, at 37 (stating the general view that government lawyers are gatekeepers); see also Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 997 (1991) (acknowledging there are commentators who view the government lawyer as a gatekeeper with the duty to assist the courts); James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1600 (1996) (“The courts prefer the public interest model because it empowers government attorneys to act as gatekeepers . . .”). But see *United States v. Wilson*, 973 F. Supp. 1031, 1033 (W.D. Okla. 1997) (“No attorney for the government needs to, or should, act as a clearinghouse, a filter, or a gatekeeper with respect to that decision.”).

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

48. See, e.g., Harvey III, *supra* note 46, at 1600 (placing a duty on government lawyers to serve the public good under the public interest model).

49. See, e.g., Berenson, *supra* note 41, at 802–05 (presenting arguments from a multitude of commentators who allege that government lawyers have no identifiable norm to understand their duty to serve the public interest).

50. Scholars have argued that:

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

*Id.* at 814.

51. See *Morales v. Field, DeGoff, Huppert & MacGowan*, 160 Cal. Rptr. 239, 243 (Ct. App. 1979) (citations omitted) (“It is clear that the attorney for a trustee may be held liable to the beneficiary of the trust when he actively participates in a breach of trust.”); see also William H. Simon, *Whom (Or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 79 (2003) (“If management is engaging in a clear breach of duty, the lawyer should not be permitted to wait for a derivative suit to challenge it before taking responsive action.”). See generally Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469,

subject matter about which these attorneys advise their clients expand to incorporate the effects of corporate decision-making on various stakeholders in a way that is divorced from a risk analysis?

The effects of benefit corporation legislation on legal ethics in transactional practice have yet to be explored and, in many ways, remain to be seen. Issues like those mentioned above will require attention. Lawyering to this new corporate form may require that attorneys representing public benefit corporations practice law much in the same way that Gordon described citizen lawyers practicing in a bygone era.

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477–85 (2011) (discussing the join-client theory, which allows lawyers to disclose pertinent information to beneficiaries of the client, using as an example the representation of a trustee to whose beneficiaries the lawyer would owe a duty to); Jessica Wang, *Protecting Government Attorney Whistleblowers: Why We Need an Exception to Government Attorney-Client Privilege*, 26 *GEO. J. LEGAL ETHICS* 1063 (2013) (arguing government lawyers need protection from ethics rules requiring them to keep information incriminating their client confidential in order to protect the public interest).

