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Ethical Issues for Business Lawyers Under the United Nations Guiding Principles

STEVEN M. RICHMAN, ESQ.*

I. Introduction

We are all human rights lawyers now. Such concerns are no longer the sole province of public interest lawyers or those who otherwise specialize in human rights issues. Commercial lawyers in private practice representing private companies must be attentive to human rights issues. This article arose from various presentations made during my tenure as Chair of the Section of International Law of the American Bar Association. It does not purport to run down every issue in exhaustive fashion, but rather to highlight a broad range of issues of relevance to those in the practice of private international law and business law. In some instances, I have cited to the work of others that summarizes developments in the area, in the interest of limiting this article and not being redundant. What has become apparent is that corporate social responsibility is of concern to private as well as public lawyers, as well as significant multinational corporate actors.

Corporate social responsibility is no longer simply aspirational. With the advent of the United Nations Guiding Principles on Business and Human Rights (“UNGP”),¹ there has been increased attention as to the impact of such principles in the private sector. It is and should be of concern to the business law practitioner under various rules of professional conduct as part of counseling clients doing business both internationally and domestically. Corporate political and social agendas are being promoted in visible ways by corporate stakeholders.²

One example of a company actively engaged in corporate social responsibility is RELX Group, a self-defined “global provider of

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1. U.N. Guiding Principles [UNGP], *infra*, note 7. There are other United Nations Guiding Principles (e.g., Guiding Principles on Internal Displacement); use of the defined term UNGP in this article refers to those on Business and Human Rights.

2. Sam Walker, *You’re a CEO—Stop Talking Like a Political Activist*, WALL ST. J. (July 27, 2018), <https://www.wsj.com/articles/youre-a-ceostop-talking-like-a-political-activist-1532683844>.

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information and analytics for professional and business customers across industries.”³ It defines corporate responsibility (“CR”) as:

[T]he way we do business and our efforts to increase our positive impact and reduce any negative impact. It ensures good management of risks and opportunities, helps us attract and retain the best people and strengthens our corporate reputation. It means performing to the highest commercial and ethical standards and channeling our knowledge and strengths, as global leaders in our industries, to make a difference to society.⁴

RELX Group’s 2017 report focuses on its objectives and achievements, and provides an example of how corporate social responsibility has become part of the paradigm for doing business.⁵

While the UNGP do not have mandatory strictures, certain other laws do. While some may be limited to reporting requirements, we are nonetheless seeing the codification of what was once merely suggestive. Beyond that, business lawyers as counsellors must understand not just legal obligations, but political and social factors as they may affect legal liability. This article explores the ethical obligations of the contemporary practitioner in this regard.

First, though, we need to understand what we are addressing. How does one define corporate social responsibility? The Australian Centre for Corporate Social Responsibility (“ACCSR”) has noted:

There are hundreds of definitions of corporate social responsibility, or CSR. The one we think says it the best comes from the International Organization for Standardization’s Guidance Standard on Social Responsibility, ISO 26000, published in 2010. It says:

“Social responsibility is the responsibility of an organisation for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that:

- Contributes to sustainable development, including the health and the welfare of society
- Takes into account the expectations of stakeholders
- Is in compliance with applicable law and consistent with international norms of behaviour, and is integrated throughout the organization and practised in its relationships.”⁶

3. RELX GRP., <https://www.relx.com/> (last visited July 29, 2018).

4. RELX GRP., <https://www.relx.com/corporate-responsibility> (last visited July 29, 2018).

5. *Corporate Responsibility Report 2017*, RELX GRP., <https://www.relx.com/~media/Files/R/RELX-Group/documents/responsibility/download-center/relx2017-cr-report.pdf> (last visited July 29, 2018).

6. *Corporate Social Responsibility – It’s Everyone’s Responsibility*, OUTSOURCE INSTITUTE, (Jan. 13, 2016) <http://outsorceinstitute.com.au/news/corporate-social-responsibility/>.

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A. WHAT ARE THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS?

The UNGP were endorsed by United Nations Human Rights Council in June 2011.⁷ Their purpose is to identify standards and principles to be applied by the business community in relation to human rights considerations.⁸ The UNGP contains thirty-one principles, plus commentary, to implement the three fundamental pillars of Protect, Respect, and Remedy.⁹

Under the “Protect” pillar, which generally addresses the obligations of nations, the principles begin with the foundation and proceed to more specifics. The foundational principles (noted here by parenthetical reference) assert that States (1) “must protect against human rights abuse within their territory and/or jurisdiction by third parties, including businesses” and (2) set out clear expectations as to such.¹⁰ Further operational principles mandate that States should (3) enforce relevant laws and policies that respect human rights, provide guidance, and seek business feedback as to compliance; (4) take additional steps regarding State-owned businesses to ensure compliance; (5) “exercise adequate oversight”; and (6) set examples through their own transactions.¹¹ Regarding supporting business respect for human rights in conflict-affected areas, States should (7) engage with business early on to “help [the business] identify, prevent and mitigate human rights-related risks,” provide adequate assistance, and deny public support to abusive companies and ensure efficient enforcement.¹²

To ensure policy coherence, three principles apply. States should (8) ensure awareness through government agencies; (9) “maintain adequate domestic policy space” to meet objectives; and (10) when in multilateral institutions, seek to ensure institutional compliance.¹³

The next set of principles address the second pillar of “Respect,” and this is addressed to non-State actors. Foundational principles under this pillar mandate that businesses (11) “respect human rights”; (12) understand what human rights are fundamental; (13) “avoid causing or contributing to adverse human rights impacts” and “seek to prevent or mitigate same”; (14) recognize the application of these principles regardless of company size, operational context, ownership and structure; and (15) establish procedures

7. U.N. Human Rights Office of the High Comm’r, Guiding Principles on Bus. & Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework [UNGP], U.N. Doc. HR/PUB/11/04 (2011).

8. *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, HR/PUB/11/04 (United Nations 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter *Guiding Principles*].

9. *Id.* at 4.

10. *Id.* at 3.

11. *Id.* at 4-8.

12. *Id.* at 8-10.

13. *Id.* at 10-12.

relevant to those factors to enable implementation. As an operational principle, businesses should (16) issue a statement of policy.¹⁴

As a principle of human rights due diligence, businesses should (17) carry out due diligence assessments regarding current the business's activities; (18) identify actual and potential risks and engage in meaningful consultation; (19) prevent and mitigate abuses by integrating measures across the components of the business enterprise; (20) verify and track effectiveness; and (21) prepare external communiques.¹⁵ By way of remediation, businesses should (22) identify adverse impacts by them.¹⁶ By way of context, businesses should (23) comply with applicable law and respect international human rights and seek ways to honor them; and (24) where necessary, seek prevention and mitigation to prevent irremediable situations.¹⁷

The "Remedy" pillar is addressed to both State and non-State actor obligations. The foundation principle here mandates that States (25) ensure through judicial, administrative, legislative or other means, there is access to remedy.¹⁸ Operational principles mandate that States ensure (26) State-based effective and appropriate domestic judicial mechanisms; (27) State-based effective and appropriate non-judicial grievance mechanisms; (28) "non-State-based grievance mechanisms"; (29) internal business grievance mechanisms; and (30) industry-wide collaborative efforts to implement.¹⁹ Regarding the effectiveness criteria for the Remedy pillar, both State-based and non-State-based non-judicial grievance procedures (31) should have criteria that are legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.²⁰ Operational-level mechanisms should be "based on engagement and dialog."²¹

II. Where Will This Go?

As noted, the UNGP are aspirational, and often considered "soft law." "Soft law" is not generally defined in case law and has been defined by commentators as not formally binding, but having particular weight and influence along a certain spectrum.²² Other international institutions might

14. *Guiding Principles*, *supra* note 8, at 13-17.

15. *Id.* at 17-24.

16. *Id.* at 24-25.

17. *Id.* at 25-26.

18. *Id.* at 27-28.

19. *Id.* at 28-33.

20. *Guiding Principles*, *supra* note 8, at 33-35.

21. *Id.* at 34.

22. "[S]oft law is defined as a residual category [of hard law]: '[t]he realm of "soft law" begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.' [citing Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *Int'l Org.* 421, 422 (2000)]. Thus, if an agreement is not formally binding, it is soft along one dimension. Similarly, if an agreement is formally binding but its content is vague so that the agreement leaves almost complete discretion to the parties as to its implementation, then the agreement is soft along a second dimension. Finally, if an agreement

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require compliance as a condition for financial assistance, turning soft law into hard law. Similarly, businesses might require compliance as a condition in supply chain contracting, meaning that the otherwise aspirational ideas are now enforceable contract provisions.

A. THE ORGANIZED BAR REACTION

Bar associations have been active in promoting the aspirational aspect of the UNGP. For example, in 2016 the International Bar Association (“IBA”) issued the IBA Practical Guide on Business and Human Rights for Business Lawyers.²³ The guide’s purpose is to:

[S]et out in detail the core content of the UNGPs, how they can be relevant to the advice provided to clients by individual lawyers subject to their unique professional standards and rules (whether they are in-house or external counsel acting in their individual capacity or as members of a law firm) and their potential implications for law firms as business enterprises with a responsibility to respect human rights themselves.²⁴

The IBA notes that UNGP 14 addresses the global responsibility of international companies regardless of size, which would include law firms.²⁵ But it further states:

[S]ince law firms are unique professional organisations whose lawyers render legal services, care must be taken not to inhibit the exercise of their professional responsibilities. Whether they work in law firms, corporate law departments, or elsewhere, lawyers have specific and legally binding professional responsibilities and obligations, including the duty of independence. The UNGPs [sic] do not abridge this duty, which includes the duty to decide, within the limits of the law, how to act in their client’s best interests, independently of expectations and pressures that are external to the lawyer–client relationship, subject of

does not delegate any authority to a third party to monitor its implementation or to interpret and enforce it, then the agreement again can be soft (along a third dimension) because there is no third party providing a ‘focal point’ around which parties can reassess their positions, and thus the parties can discursively justify their acts more easily in legalistic terms with less consequence, whether in terms of reputational costs or other sanctions.” Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 715 (2010).

23. *IBA Issues Groundbreaking Practical Guide on Business and Human Rights for Business Lawyers*, INT’L BAR ASS’N, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUId=420dc178-5f9d-48eb-978e-8876feffd8ab> (last visited Feb. 5, 2018).

24. *IBA Practice on Business & Human Rights for Business Lawyers*, INT’L BAR ASS’N, at 7, (May 28, 2016), <https://www.ibanet.org/Document/Default.aspx?DocumentUId=d6306c84-e2f8-4c82-a86f-93940d6736c4>.

25. *Id.* at 27.

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course to adherence by the lawyers with their professional and legal responsibilities.²⁶

Nonetheless, subject to a lawyer's professional and legal responsibilities, the report indicates that nothing in the UNGP or in this Practical Guide should be read to restrict:

- (1) effective access by clients to legal services provided by independent lawyers;
- (2) lawyers' obligation to provide independent services and remain unidentified with the client, its causes, or its activities (notwithstanding Principle 18 (identifying risks));
- (3) representation of unpopular clients;
- (4) clients' right to "robust defense";
- (5) rights of clients to seek, and lawyers to provide, independent legal advice regarding human rights issues; and
- (6) ability of lawyers to utilize all factors necessary to independent judgment and representation of clients.²⁷

The American Bar Association ("ABA") also has active components that address corporate social responsibility, particularly through various sections that either have dedicated committees or otherwise focus on such issues through other relevant committees.²⁸ Regarding law firms, the ABA's Section of Environment, Energy, and Resources ("SEER") has set forth the ABA SEER Sustainability Framework for Law Organizations.²⁹

Note, though, that while there may be overlap between corporate social responsibility and sustainability, they embody certain differences and have different applications.³⁰ Generally, we may focus on corporate social responsibility as more corporate-directed, whereas sustainability

26. *Id.*

27. *Id.* at 29.

28. *E.g.*, The ABA Business Law Section has a Corporate Social Responsibility Committee, which states: "The mission of the Corporate Social Responsibility Law Committee is to advance, support, and facilitate the development of the knowledge, skills, and expertise required to provide informed, insightful, and effective counsel with respect to corporate social responsibility-related legal requirements and business issues." *Section of Business Law: Corporate Social Responsibility Law Committee*, A.B.A., <http://apps.americanbar.org/dch/committee.cfm?com=CL000950> (last updated Apr. 12, 2016).

29. *Law Firm Sustainability Framework, ABA SEER Sustainability Framework for Law Organizations, Revision 17*, A.B.A., (Dec. 2, 2010), https://www.americanbar.org/groups/environment_energy_resources/public_service/model_law.html.

30. *See e.g.*, Ionela Carmen Pirnea & Marieta Olaru, *Relationship Between Corporate Social Responsibility and Social Sustainability*, Vol. XIV Econ. Transdisciplinarity Cognition, 36, 38, <http://www.ugb.ro/etc/etc2011no1/CSR-4-full.pdf> (last visited Feb. 7, 2018).

encompasses broader societal considerations and is more future oriented.³¹ Nonetheless, the terms have been used interchangeably.

The Union of International Associations (“UIA”), another international bar association, established its International Centre for Corporate Social Responsibility (“ICCSR”) in 2002, with an expressed aim to “[e]ngage in teaching and research in the area of corporate social responsibility, drawing the attention of business to community involvement, socially responsible products and processes, and socially responsible employee relations.”³²

B. THE STATUTORY AND REGULATORY RESPONSE

Certain legislation now imposes hard law obligations regarding certain elements of the UNGP, particularly those requiring businesses to self-evaluate and report.

1. *United States*

Two significant legislative regimes address corporate social responsibility. The Dodd-Frank Wall Street Reform and Consumer Protection Act,³³ enacted in 2010, has two reporting provisions that seek to at least have companies identify violations of human rights in two specific areas. Section 1502 of the Act amended Section 13 of the Securities Exchange Act of 1934, to call for regulations requiring annual disclosures as to conflict minerals, to require:

(i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and

(ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free (“DRC conflict free” is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country

31. Dr. Rupert J. Baumgartner & Daniela Ebner, *The Relationship Between Sustainable Development and Corporate Social Responsibility*, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.485.5912&rep=rep1&type=pdf> (last visited Feb. 5, 2018).

32. *International Centre for Corporate Social Responsibility (ICCSR)*, Union of International Associations, <https://uia.org/s/or/en/1100000253>. (last visited Feb. 5, 2018).

33. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §1502-1504, 124 Stat. 1376 (2010).

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of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.³⁴

The statute also requires that those persons required to report “shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A).”³⁵

The final rule establishes a three step analysis, requiring the company to first determine if the statute applies based on whether the conflict minerals were “necessary to the functionality or production of a product manufactured,” and if so, whether the conflict minerals originated in a covered country of origin (noting that it deals with only three particular minerals and the Democratic Republic of the Congo and adjoining countries), and finally, if it determines these are met, or if it is unable to determine if they are met (as opposed to affirmatively determining the conditions are not met), it must furnish a Conflict Minerals Report.³⁶ The D.C. Court of Appeals has held that the disclosure requirements set forth in Sections 78m(p)(A)(ii) and E and the SEC’s final rule 77 Fed. Reg. at 56,326–65, violate the First Amendment.³⁷ Whether this attempt at “hard law” to force attention to potential human rights violations is sufficient is subject to debate.³⁸ As noted in a Brookings report, “[a]s the law currently stands, the most obvious punishment it carries is reputational, although other punitive measures could potentially be specified. Definitively articulated financial consequences for non-compliance will better enforce regulations than a threat to a company’s reputation, and complement threatening non-trivial compliance costs.”³⁹

34. 15 U.S.C. § 78m(p)(1)(A)(i), (ii).

35. *Id.*

36. Conflict Minerals, 17 C.F.R. § 240, 249b (2012); *see also* Requirement of Report Regarding Disclosure of Registrant’s Supply Chain Information Regarding Conflict Materials, 17 C.F.R. § 240.13p-1 (2012).

37. *Nat’l Ass’n of Mfrs. v. SEC*, 800 F. 3d 518, 530 (D.C. Cir. 2015) (“[W]e adhere to our original judgment that 15 U.S.C. § 78m(p)(1)(A)(ii) & (E), and the Commission’s final rule, 77 Fed.Reg. at 56,362–65, violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have “not been found to be “DRC conflict free.””). The history of the case is extensive and involved reconsideration after another D.C. Circuit Court of Appeals decision, *Am. Meat Instit. v. United States Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) overruled the prior circuit decision, *Nat’l Ass’n of Mfrs. v. S.E.C.*, 748 F.3d 359 (D.C. Cir. 2014), based on the *Am. Meat Instit.* interpretation of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), which held “that an advertiser’s [First Amendment] rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”

38. *See e.g.*, Victoria Stork, *Conflict Minerals, Ineffective Regulations: Comparing International Guidelines to Remedy Dodd-Frank’s Inefficiencies*, 61 N.Y.L. SCH. L. REV. 429 (2016/2017).

39. Melvin Ayogu & Zenia Lewis, *Conflict Minerals: An Assessment of the Dodd-Frank Act*, Brookings (Oct. 3, 2011), <https://www.brookings.edu/opinions/conflict-minerals-an-assessment-of-the-dodd-frank-act/>.

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Section 1504 also amended Section 13 to require disclosure of payments by resource extraction issues for foreign governments in an annual report.⁴⁰ A challenge to this provision on First Amendment grounds, and on statutory grounds, was rejected by the D.C. Circuit on its finding that it lacked subject matter jurisdiction in the first instance, interpreting the relevant language of the Dodd-Frank Act.⁴¹ The case exemplifies the procedural issues raised by imprecise or incorrect drafting, providing a distraction from the consideration on the merits of what is being raised.

2. *California*

The State of California has legislation that also purports to require transparency and reporting requirements.⁴² The California Transparency in Supply Chains Act requires reporting of qualifying entities to disclose their efforts to address slavery and human trafficking in their supply chains:

Every retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars (\$100,000,000) shall disclose, as set forth in subdivision (c), its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.⁴³

As with the case of the Dodd-Frank law and regulations, the California statute is only a disclosure statute, which does not address all human rights violations and suffers from ambiguities in classification and application.⁴⁴ The statute has also been held to provide a safe harbor defense to claims under various unfair competition and false advertising statutes in California, because “the California Legislature considered the situation of regulating disclosure by companies with possible forced labor in their supply lines and determined that only the limited disclosure mandated by Section 1714.43 is required.”⁴⁵ In a case involving child labor, as opposed to human trafficking

40. 15 U.S.C. § 78m(p)(1)(A)(i), (ii). *See also* 17 C.F.R. § 240.13q-1 (2016).

41. *Am. Petroleum Inst. v. S.E.C.*, 714 F.3d 1329 (D.C. Cir. 2013). The court noted that a simultaneous suit in the district court had been filed, which did have jurisdiction.

42. Cal. Civ. Code § 1714.43 (West 2012).

43. *Id.*

44. *See e.g., Five Years of the California Transparency in Supply Chains Act, Know The Chain*, (Sept. 30, 2015), https://knowthechain.org/wp-content/uploads/2015/10/KnowTheChain_Insights_Brief_093015.pdf.

45. *Barber v. Nestlé USA*, 154 F. Supp. 3d 954, 961 (C.D. Cal. 2015), *aff'd on other grounds*, *Barber v. Nestlé USA, Inc.*, No. 16-55041, 2018 WL 3358349, at *2 n.3 (9th Cir. July 10, 2018) (“The district court dismissed Plaintiffs’ claims on the ground that the California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43, created a safe harbor that bars Plaintiffs’s [sic] lawsuit. Because we affirm the district court on another ground, we do not reach this issue of whether the safe harbor doctrine applies.”). *See also De Rosa v. Tri-Union Seafoods, LLC*, No. 16-55211, 2018 WL 3358353, at *2 n.3 (9th Cir. July 10, 2018) (“The district court dismissed De Rosa’s claims on the ground that the California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43, created a safe harbor that bars De Rosa’s lawsuit. Because we affirm the district court on another ground, we do not reach this issue of whether

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and slavery, one court in California dismissed a complaint based on that state's Unfair Competition Law ("UCL"), Consumers Legal Remedies Act ("CLRA"), and False Advertising Act ("FAL") on the basis that those statutes "do not require Mars to disclose on labels that its chocolate products may contain cocoa beans harvested by child and or forced labor."⁴⁶

Courts may well recognize the human tragedies at issue, but have also found that the statutes presently in existence do not provide a cause of action where companies do not make certain disclosures they are not otherwise required to make. For example:

"The use of child slave labor in the Ivory Coast is a humanitarian tragedy." The fact that major international corporations source ingredients for their products from supply chains involving slavery and the worst forms of child labor raises significant ethical questions. The issue before this Court, however, is whether California law requires corporations to inform customers of that fact on their product packaging and point of sale advertising. Every court to consider the issue has held that it does not. This Court agrees.⁴⁷

The Ninth Circuit in *Doe I*⁴⁸ engaged in a comprehensive discussion of claims under the Alien Tort Statute⁴⁹ and *Kiobel*⁵⁰ in terms of corporate liability, but that is beyond the scope of this article. What is being addressed here are legislative efforts to impose liability on private actors to address human rights. These do not preclude established claims under other statutes or common law that address, for example, fraudulent statements or false advertising.

the safe harbor doctrine applies."); *Hughes v. Big Heart Pet Brands*, No. 16-55212, 2018 WL 3358235, at *2 (9th Cir. July 10, 2018) ("The district court dismissed Hughes's claims on the ground that the California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43, created a safe harbor that bars Hughes's lawsuit. Because we affirm the district court on another ground, we do not reach this issue of whether the safe harbor doctrine applies."); *Wirth v. Mars*, No. SA CV 15-1470-DOC (KESX), 2016 WL 471234, *8-*9 (C.D. Cal. 2016), *aff'd on other grounds*, *Wirth v. Mars, Inc.*, 730 F. App'x 468, 469 n.3 (9th Cir. 2018) ("The district court also dismissed Plaintiffs' claims on the ground that the California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43, created a safe harbor that bars Plaintiffs's [sic] lawsuit. Because we affirm the district court on another ground, we do not reach this issue of whether the safe harbor doctrine applies.").

46. *Hodsdon v. Mars*, 162 F. Supp. 3d 1016, 1029 (N.D. Cal. 2016), *aff'd*, 891 F. 3d 857, 865 (9th Cir. 2018) ("we hold that in this pure omissions case concerning no physical product defect relating to the central function of the chocolate and no safety defect, Plaintiff has not sufficiently pleaded that Mars had a duty to disclose on its labels the labor issues in its supply chain. Absent a duty to disclose, Plaintiff's CLRA, UCL and FAL claims are foreclosed.").

47. *McCoy v. Nestle USA*, 173 F. Supp. 3d 954, 956 (N.D. Cal. 2016), *aff'd McCoy v. Nestle USA, Inc.*, No. 16-15794, 2018 WL 3358227, at *2 (9th Cir. July 10, 2018) (quoting *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1016 (9th Cir.2014)).

48. *Doe I*, 766 F.3d at 1018.

49. 28 U.S.C. § 1350 (1948).

50. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 1660-63 (2013).

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3. *Europe*

The Commission of the European Union defines corporate social responsibility as “the responsibility of enterprises for their impact on society.”⁵¹ The 2014 EU Non-Financial Reporting Directive requires member States to implement domestic legislation requiring businesses with more than 500 employees to disclose their management of human rights impacts.⁵²

The United Kingdom enacted the Modern Slavery Act 2015⁵³ which criminalizes slavery, servitude, and forced or compulsory labor as defined, as well as human trafficking, and exploitation related to the same. While essentially a criminal statute, it provides for reparation orders issued by the court. In its Part 6, however, it specifically addresses transparency in supply chains, and requires qualifying commercial organizations to prepare a slavery and human trafficking statement each financial year.

On February 21, 2017, France adopted the Law on the Duty of Care of Parent Companies and Ordering Companies.⁵⁴ This statute requires companies employing, directly or indirectly, at least 5,000 employees at the end of two consecutive fiscal years where the head office is in France, or 10,000 such employees with a head office in France or abroad, to prepare and implement a “vigilance plan” that includes:

[D]ue diligence measures to identify risks and to prevent serious violations of human rights and fundamental freedoms, human health

51. *Corporate Social Responsibility (CSR)*, European Commission, https://ec.europa.eu/growth/industry/corporate-social-responsibility_en (last updated Jan. 1, 2018). In an aspect of the report titled “CSR in Practice,” the report specifically notes the importance of the corporate agenda: “In practice, human rights and corporate social responsibility have become an important aspect of business strategies for many companies.” It also notes, and as of this writing provides links, to the national action plans of the United Kingdom, the Netherlands, Italy, Denmark, Finland, Lithuania and Sweden.

52. Council Directive 2013/95/EU, art. 19a, 2013 O.J. (L330) 1 (EU). See also *Non-Financial Reporting*, European Commission, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en (last visited Feb. 5, 2018).

53. Modern Slavery Act 2015, c. 30 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

54. Texte Adopté n° 924, Proposition De Loi [Proposed Law Concerning the Duty of Care of Parent Companies and Ordering Companies] (Feb. 21, 2017) (Fr.), (available at <http://www.assemblee-nationale.fr/14/ta/ta0924.asp>); Entreprises: Devoir de vigilance des entreprises donneuses d’ordre (Mar. 28, 2017) (Fr.) (Explanatory memorandum of Texte Adopté n° 924), available at http://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_entreprises_don_neuses_ordre.asp. See also Edwin Lopez & Jennifer McKeivitt, *France Passes Law Requiring Supply Chain Due Diligence*, SUPPLY CHAIN DIVE (Mar. 2, 2017), <https://www.supplychaindive.com/news/France-supply-chain-human-rights-reporting-audits/437191/>; Code de commerce Article L225-102-3, Legifrance (Dec. 3, 2015) (Fr.), <http://www.assemblee-nationale.fr/14/ta/ta0924.asp>; Juliane Kippenberg, *France Takes Historic Step Toward Reducing Supply Chain Abuses*, HUMAN RIGHTS WATCH (Feb. 27, 2017 1:35pm), <https://www.hrw.org/news/2017/02/27/france-takes-historic-step-toward-reducing-supply-chain-abuses>.

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and safety and the environment, resulting from the activities of society and those companies it controls within the meaning of II of Article L. 233-16, directly or indirectly, and the activities of subcontractors or suppliers with whom is maintained an established commercial relationship, when these activities are related to that relation.⁵⁵

The plan needs to identify the risks, procedures for evaluation, actions to mitigate or prevent serious harm, and provide a warning system.⁵⁶ Failure to comply can result in a fine of up to 10,000,000 Euros, and can be trebled based on the seriousness and the circumstances of the breach and the damage.⁵⁷ One analysis of the law pronounces it “both novel and problematic, as it imposes undefined legal obligations regarding supply chain liability, entailing criminal and civil liability.”⁵⁸

In a letter issued in April 2016 from the Netherlands Ministers of Foreign Affairs and Foreign Trade and Development Cooperation, the government responded to a study by the Utrecht Centre for Accountability and Liability Law. The letter noted that, among other things in response to the study:

The government is preparing a change in the law that will make it possible in certain circumstances to bring a class action for damages. This may be relevant for victims of business-related human rights violations for which Dutch enterprises are liable. In this context too, the government will expressly take into account the findings of the study on the duty of care.⁵⁹

Regarding business law issues, the letter noted:

The government considers that Dutch legislation does not hinder respect for human rights. The general rule is that enterprises and their officials are expected to operate within the limits of the law in the countries where they are active. In carrying on their business activities, enterprises are required to comply with substantive law, for example environmental legislation. The focus of business law is, above all,

55. Texte Adopté n° 924, Proposition De Loi [Proposed Law Concerning the Duty of Care of Parent Companies and Ordering Companies] (Feb. 21, 2017) (Fr.), <http://www.assemblee-nationale.fr/14/ta/ta0924.asp>.

56. *Id.*

57. *Id.*

58. Penelope Bergkamp, *Supply Chain Liability: The French Model*, CORP. FINANCE LAB (Mar. 11, 2017), <https://corporatefinancelab.org/2017/03/11/supply-chain-liability-the-french-model/>.

59. Letter of April 2016 from the Minister of Foreign Affairs, Bert Koenders, and the Minister for Foreign Trade and Development Cooperation, Lilianne Ploumen, in conjunction with the Minister of Security and Justice, to the House of Representatives, presenting the government’s response to the study of the duty of care of Dutch companies in relation to international corporate social responsibility, conducted by the Utrecht Centre for Accountability and Liability Law of the University of Utrecht (Apr. 1, 2016) (on file with BUS. & HUM. RTS. RESOURCE CTR., available at <https://www.business-humanrights.org/sites/default/files/documents/BZ119755.pdf>).

internal. It regulates dealings between the organs and officers of the enterprise . . . As the researchers point out, civil liability law as described above is better suited than business law to addressing CSR violations.⁶⁰

The Swedish government has declared corporate social responsibility to have been “a major issue for Sweden in recent decades,” and considers it “both a trade policy issue as well as a question about the promotion of Sweden.”⁶¹ CSR Sweden is a business network focused on corporate responsibility issues and coordination among public and private sectors.⁶² In Denmark, corporate social responsibility is part of the curriculum for MBA students at the Copenhagen Business School, and refers to the “Scandinavian business culture of sustainable management and ethical business practice.”⁶³ Norway has issued a Guide to Human Rights Due Diligence in Global Supply Chains. It focuses on due diligence practice for companies, noting the three basic functions of identification of actual or potential human rights impacts, prevention and mitigation, and accountability. Notably, the report notes that what has been soft law is on the way to becoming hard law, and states that “[b]ecause of its origins in law, it is likely that due diligence is here to stay as a way to meet the expectations of business’ respect for human rights on the part of regulators, investors and society.”⁶⁴

4. *Australia*

The Australian government issued a National Action Plan to Combat Human Trafficking and Slavery 2015-19 “to [provide] the strategic framework for Australia’s response to human trafficking and slavery over the five years from 2015 to 2019.”⁶⁵ It focuses on human trafficking, slavery,

60. *Id.*

61. *Sweden Abroad*, EMBASSY OF SWEDEN, <https://www.swedenabroad.se/en/about-sweden-non-swedish-citizens/thailand/business-and-trade-with-sweden/sustainable-business—corporate-social-responsibility/> (last visited Sept. 3, 2018).

62. *See generally* CSR SWEDEN, <https://www.csrsweden.se/> (last visited Sept. 3, 2018).

63. Thomas Nugent, *How Corporate Social Responsibility In Denmark Is Driving The Copenhagen MBA*, BUSINESS BECAUSE (Jan. 31, 2018) <https://www.businessbecause.com/news/mba-europe/5025/corporate-social-responsibility-denmark-copenhagen-mba>.

64. *A Guide to Human Rights Due Diligence in Global Supply Chains*, ETHICAL TRADING INITIATIVE NORWAY (IEH), at 4, <http://etiskhandel.no/Artikler/10078.html> (last visited July 29, 2018).

65. *National Action Plan to Combat Human Trafficking and Slavery 2015-2019*, Australian Gov’t Initiative (2014) (Austl.), <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>; *see also Amplifying Our Impact: Australia’s International Strategy to Combat Human Trafficking and Slavery*, Australian Gov’t (2015) (Austl.), <http://dfat.gov.au/about-us/publications/Documents/amplifying-our-impact-australias-international-strategy-to-combat-human-trafficking-and-slavery.pdf>; Isabella Moore, *Human Rights in the Supply Chain*, ACCSR (May 2017), (Austl.), <http://accsr.com.au/human-rights-supply-chain-2/> (“The introduction of a Modern Slavery Act in Australia, inclusive of a transparency in supply chains provision, would represent

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and slavery-like practices, with the latter including servitude, forced labor, deceptive recruiting, debt bondage, and forced marriage. The effectiveness of Australia's efforts at procuring transparency and reporting has also been questioned.⁶⁶

5. *India*

Section 135 of the Indian Companies Act 2013 states:

135. Corporate Social Responsibility.

(1.) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

(2.) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.

(3.) The Corporate Social Responsibility Committee shall,—

(a.) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b.) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c.) monitor the Corporate Social Responsibility Policy of the company from time to time.

(4.) The Board of every company referred to in sub-section (1) shall,—

(a.) after taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(b.) ensure that the activities as are included in Corporate Social Responsibility Policy of the company are undertaken by the company.

a step towards the codification of the UN Guiding Principles on Business and Human Rights by cementing the responsibility of business for the incidence of modern slavery.”)

66. Stephanie Schleimer & John Rice, *Australian Corporate Social Responsibility Report Better Than Window Dressing*, THE CONVERSATION (Oct. 3, 2017), <https://theconversation.com/australian-corporate-social-responsibility-reports-are-little-better-than-window-dressing-66037>; *The 10th Year- Progress and Prospects for CSR in Australia and New Zealand*, ACCSR (2014) (Austl.), http://accsr.com.au/wp-content/uploads/2015/04/ACCSR_State_of_CSR_2014_FI_NAL020614.pdf.

(5.) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent.[sic] of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

Explanation.—For the purposes of this section “average net profit” shall be calculated in accordance with the provisions of section 198.⁶⁷

There is a question as to how effective this law has been.⁶⁸

6. *South Africa*

The Southern African-German Chamber of Commerce and Industry has a published report titled *Corporate Social Responsibility in South Africa as Practiced by South African and German Companies*.⁶⁹ South Africa has an initiative focused on corporate social investment, and a program now known as the Broad-Based Black Economic Empowerment (“BBBEE”), as codified in BBBEE Act No. 53 of 2003 and BBBEE Codes of Good Practice (February 2017).⁷⁰

67. Section 135 of the Indian Companies Act 2013 (India), *translated in* <http://www.mca.gov.in/SearchableActs/Section135.htm>.

68. Sandeep Gopalan, *In India, a Legislative Reform is Needed to Push Corporate Social Responsibility*, THE CONVERSATION (June 20, 2017 1:20am), <https://theconversation.com/in-india-a-legislative-reform-is-needed-to-push-corporate-social-responsibility-80169>; Noreen Ohlrich, *Mandatory Corporate Social Responsibility in India: How Is It Working?*, NONPROFIT QUARTERLY (Feb. 17, 2017) <https://nonprofitquarterly.org/2017/02/17/mandatory-corporate-social-responsibility-india-working/>; *Corporate Social Responsibility under Companies Act*, INDIA FILINGS (Jan. 23, 2017), <https://www.indiafilings.com/learn/corporate-social-responsibility-companies-act/>; Mansuklal Hiralal & Co., *Corporate Social Responsibility- Indian Companies Act of 2013*, MONDAQ (last updated Jan. 14, 2015), <http://www.mondaq.com/india/x/366528/Corporate+Governance/Corporate+Social+Responsibility+Indian+Companies+Act+2013>; Dhammika Dharmapala & Vikramaditya Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013*, UNIV. OF MICH. LAW (Jan. 2017), *available at* <https://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Documents/Paper%202.VKhanna.TheImpactof%20MandatedCorporateSocialResponsibility.pdf>.

69. See generally SOUTHERN AFR. – GERMAN CHAMBER OF COM. AND INDUSTRY, *Corporate Social Responsibility in South Africa as Practiced by South African and German Companies* (Oct. 30, 2010), http://suedafrika.ahk.de/fileadmin/ahk_suedafrika/Dokumente/CSRprintloRES.pdf.

70. Gary Malcolm Mersham & Chris Skinner, *South Africa's Bold and Unique Experiment in CSR Practice*, 11 SOC. & BUS. REV. 110, (2016) https://www.researchgate.net/publication/230770943_Corporate_social_responsibility_in_South_Africa_Emerging_trends.

Certain nations have sought to address the issue in the context of energy, or even more broadly, but generally by way of reporting requirements.⁷¹

While simply the act of reporting may not be deemed effective by some, statements made by a company may be challenged as misrepresentations or fraudulent. Questions of proof of course remain,⁷² but without the reporting requirement, the statements may not be made at all. The possibility of reputational damage cannot be disregarded; in the past, organized boycotts of companies by civil rights groups or others have had an impact.⁷³

7. *Other Countries*

This has not been an attempt to survey every country in the world. Some, like China, have been the focus of attention, particularly in terms of sustainability and corporate social responsibility aspects of its Belt and Road project, a 21st century attempt to restore the trade and investment, literally and by analogy, to the ancient Silk Road. The most casual searches online reveal a plethora of articles and analyses of this, as well as other programs in China, and elsewhere. What has been attempted here has been to focus on countries that have attempted to move from soft law to hard law, or to focus on companies in particular countries that have worked with the government (whether with explicit or implicit acknowledgment of the UNGP) to show tangible impact.

III. The Ethical Implications and Opportunities for Lawyers

Various law firms have established practice groups or departments devoted to or specializing in corporate social responsibility issues.⁷⁴ The Carroll Model for corporate social responsibility identifies four component parts to the corporate social responsibility pyramid: economic, legal, ethical, and

71. *Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges*, HARVARD KENNEDY SCH., http://iri.hks.harvard.edu/files/iri/files/corporate_social_responsibility_disclosure_3-27-15.pdf (last visited Feb. 5, 2018).

72. In Re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig., MDL No. 2672 CRB (JSC), 2017 WL 3058563, at *1 (N.D. Cal. July 19, 2017).

73. See, e.g., *Accord Ends Coke Boycott*, N.Y. TIMES (Aug. 11, 1981), <http://www.nytimes.com/1981/08/11/business/accord-ends-coke-boycott.html>.

74. E.g., *Corporate Social Responsibility*, AKIN GUMP LLP, <https://www.akingump.com/en/experience/practices/international-trade/corporate-social-responsibility.html> (last visited Feb. 5, 2018); *Corporate Social Responsibility*, FOLEY HOAG LLP, <http://www.foleyhoag.com/practices/business/corporate-social-responsibility> (last visited Feb. 5, 2018); *Baker McKenzie and Consortium for Street Children help to Empower Street Children Worldwide*, BAKER MCKENZIE (July 12, 2017), <http://www.bakermckenzie.com/en/aboutus/corporate-social-responsibility/>; *Corporate Social Responsibility*, ARENT FOX LLP, <https://www.arentfox.com/practices-industries/international-trade/corporate-social-responsibility> (last visited Feb. 5, 2018); *About Our Corporate Social Responsibility Practice*, FENWICK & WEST LLP, <https://www.fenwick.com/services/practices/corporate-social-responsibility.aspx>. (last visited Feb. 5, 2018).

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philanthropic.⁷⁵ To the extent that legal compliance is part of the pyramid, lawyers can and should be involved in so advising clients. As indicated at the outset, human rights are not the province of one particular set of lawyers over another. Business lawyers are in a unique position to help clients identify supply chain issues.⁷⁶ The IBA Guide notes particular opportunities for lawyers in this area, including the increased importance of input by in house counsel and the role of outside counsel in identifying risks. Among other considerations noted in the IBA Guide regarding the UNGP expectation of human rights policy commitment, a lawyer should consider the “bigger picture” in giving advice, increase consultative process including across practice groups, and exercise certain pro bono opportunities, among others.⁷⁷ The IBA Guide concludes by noting:

Compliance with the law is a bedrock requirement of the corporate responsibility to respect human rights under the UNGPs, but it applies even where the law is absent, unenforced, or in tension with internationally recognised human rights. Even though the UNGPs themselves do not and cannot impose legal responsibilities on business, the UNGPs are relevant to many legal practice areas. The UNGPs stress that business should respect internationally recognised human rights even when national laws do not adequately protect them.⁷⁸

Balancing this is the commentary of the IBA Guide regarding professional liability stating:

[N]either the UNGPs nor this Practical Guide are intended to alter the legal obligations or liabilities of companies or of the lawyers who advise them. However, providing incorrect legal advice or services to clients may result in claims by clients against their lawyers. This could encompass claims arising from advice or services regarding UNGPs or their implementation. In certain insurance markets, claims arising from advice on such matters may not be covered. Therefore, before advising on the UNGPs, the lawyer should ascertain whether such legal advice –

75. Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, BUSINESS HORIZONS (1991), <http://faculty.wvu.edu/dunnc3/rprnts.pyramidofcsr.pdf>.

76. E. Christopher Johnson Jr., *Business Lawyers Are In a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 THE BUS. LAWYER 1083 (2015), <http://intlsupplychaininitiative.com/docs/The%20Business%20Lawyer%20Article%20by%20Chris%20Johnson.pdf>; see also E. Christopher Johnson, Jr., *The Important Role for Socially Responsible Businesses in the Fight Against Human Trafficking and Child Labor in Supply Chains*, ABA BUS. LAW TODAY (Jan. 2015), https://www.americanbar.org/publications/blt/2015/01/02_johnson.html.

77. *IBA Practice on Bus. & Human Rights for Bus. Lawyers*, INT’L BAR ASS’N, at 34, (May 28, 2016), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=d6306c84-e2f8-4c82-a86f-93940d6736c4>.

78. *Id.* at 39.

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because of their nature as soft law – is covered by the firm’s professional liability insurance.⁷⁹

A. RELEVANT RULES OF PROFESSIONAL RESPONSIBILITY

Beyond “soft law,” I have identified certain “hard law” requirements, and noted as well the impact of contractual obligations. There are several rules of professional conduct that are implicated. In the United States, the ABA Model Rules of Professional Conduct are simply that: model rules. They must be adopted by a regulatory jurisdiction to be applicable.

ABA Model Rule 1.1 addresses competence, and states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁸⁰ Equally important is the obligation of diligence found in ABA Model Rule 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).⁸¹

ABA Model Rule 1.6 addresses confidentiality of information, and prohibits the lawyer from revealing information relating to representation unless to prevent “certain death or substantial bodily harm,” or the client from “committing a crime or fraud” reasonably certain to cause another financial injury, or if disclosure is impliedly authorized to carry out the representation or it is necessary to establish defense, detect conflict, or per court order.⁸² The fundamental principle involved is based on trust, and to encourage a full and frank discussion including embarrassing or legally damaging subjects, and enable the lawyer to effectively represent the client and advise against further wrongful conduct. The privilege does not generally apply to business advice, only to advice for the purposes of obtaining or providing legal assistance.⁸³

While not necessarily privileged as a communication, such communications that relate to issues other than purely legal issues may nonetheless be relevant for the legal advice to be given. In this regard, ABA

^{79.} *Id.* at 38.

^{80.} MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 1983), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html.

^{81.} MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 1983), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence.html.

^{82.} MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 1983), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html.

^{83.} *See*, Restatement (Third) of the Law Governing Lawyers § 68 (Am. Law Inst. 2000) (“Except as provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”); *See also*, *In re Lindsey*, 158 F. 3d 1263 (D.C. Cir. 1998), cert. den. sub nom *Office of the President v. Office of the Independent Counsel*, 119 S. Ct. 466 (1998).

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Model Rule 2.1 is relevant. It expressly notes the role of a lawyer as advisor in order to provide appropriate representation, and states, “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.”⁸⁴ Very little case law authority exists regarding Model Rule 2.1. But Comment 2 makes this point:

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.⁸⁵

Similarly, a lawyer need not be passive, and may act proactively. Comment 5 makes this clear:

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.⁸⁶

Comment 5 references Rule 1.4, which addresses communications. Among other things, a lawyer is obligated to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”⁸⁷ The lawyer also must “explain a matter to the extent

84. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 1983), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html.

85. MODEL RULES OF PROF’L CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS’N 1983), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/comment_on_rule_2_1_advisor.html.

86. MODEL RULES OF PROF’L CONDUCT r. 2.1 cmt. 5 (AM. BAR ASS’N 1983), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/comment_on_rule_2_1_advisor.html.

87. MODEL RULES OF PROF’L CONDUCT r. 1.4(a)(2) (AM. BAR ASS’N 1983), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications.html.

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reasonably necessary to permit the client to make informed decisions regarding the representation.”⁸⁸

A lawyer is not precluded from engaging in certain law reform activities, even if doing so affects a client’s interests. Pursuant to ABA Model Rule 6.4, Law Reform Activities Affecting Client Interests:

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.⁸⁹

Finally, mention must be made of ABA Model Rule 8.4, addressing misconduct as an ethical violation, which states:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with

88. MODEL RULES OF PROF’L CONDUCT r. 1.4(b) (AM. BAR ASS’N 1983), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications.html.

89. MODEL RULES OF PROF’L CONDUCT r. 6.4 (AM. BAR ASS’N 1983), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_4_law_reform_activities_affecting_client_interests.html.

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Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.⁹⁰

Note should also be made of Rule 8.5, addressing choice of law in ethics matters.⁹¹ A lawyer's home disciplinary board is given direction as to which law it should apply in evaluating a charge of professional misconduct against the lawyer. A lawyer from one jurisdiction should be aware, therefore, of any additional obligations imposed by the local jurisdiction's laws regarding corporate social responsibility and any obligations of the lawyer in that regard.

IV. Conclusion

While the UNGP may be non-binding, there are other hard law requirements that have either resulted from them or complement them. Even beyond that, lawyers have an obligation to act as an advisor, and be aware of economic and reputational repercussions to clients in giving advice as to corporate social responsibility. They become hard law when tied to a company's publicly stated policies and communications, as well as its contractual obligations. Shareholder reaction and potential political acts, such as boycotts, may factor into the legal advice offered as part of the social fabric and new business environment. While lawyers' professional rules and obligations remain, particularly those regarding scope of representation and privilege, the impact of UNGP cannot be dismissed.

90. MODEL RULES OF PROF'L CONDUCT r. 8.4 (A AM. BAR ASS'N 1983), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html.

91. MODEL RULES OF PROF'L CONDUCT r. 8.5 (AM. BAR ASS'N 1983), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_5_disciplinary_authority_choice_of_law.html.

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