


A Field Guide to
CORPORATE SOCIAL RESPONSIBILITY



for IN-HOUSE COUNSEL

By Michael Irwin Meltzer



Seen through the lens of our frenetic world, 1953—the year Dwight Eisenhower became President—may seem like less an exciting time. Nonetheless, there were a few memorable moments. In world affairs, the Korean War ended and Joseph Stalin died; on the social scene, Kinsey's report on female sexual behavior was published and the first Corvette came off the assembly line (an interesting confluence of events!). In the legal world, Earl Warren was named Chief Justice of the Supreme Court, and a New Jersey court handed down a decision in the AP Smith case—authorizing corporations to make charitable contributions.

Ordinarily, a state court decision settling a \$1,500 controversy would probably not warrant placement with Korea, Kinsey, and Corvettes. But in fact, *A.P. Smith Manufacturing Co. v. Barlow et al.* was a watershed decision in a field that has since become a matter of serious concern for companies worldwide—and for their legal counsels: corporate social responsibility.

By today's standards, the controversy seems rather prosaic. *AP Smith*, incorporated in 1896, was engaged in the manufacture and sale of valves, fire hydrants, and special equipment, mainly for water and gas industries. The company flourished in postwar baby boom America, and had begun to contribute small amounts to local community funds and colleges. On July 24, 1951, the company directors adopted a resolution donating \$1,500 to Princeton University. A group of shareholders objected to this gift as being ultra vires and the legal controversy was framed.

Lawyers today probably would not stop to consider it, but at the time, the idea of a corporation giving charitable contributions was not entirely well accepted. And legal questions abounded: Were the powers of a corporation not strictly limited by statute to those acts that were in furtherance of its stated purpose? And was not the "fiduciary responsibility" of its directors and officers to return profits to their shareholders? This was the debate that the New Jersey legislature had attempted to resolve years earlier by enacting legislation that expressly permitted contributions by corporations to private institutions of higher education. Nonetheless, stockholders of *AP Smith* objected, claiming that because the company's charter predated the legislation, *AP Smith* could not make the donations. To resolve the issue, the company instituted an action for declaratory judgment, urging the NJ Chancery Division to rule that the donation was not an ultra vires act as a matter of law.

The controversy became a test case.¹ And the court used the opportunity to reach a much broader philosophical question: beyond obedience to "positive law" (i.e., the regulation of conduct and creation of status proscribed by rule making bodies). What, if any, responsibilities do business organizations have to the communities in which they do business?

The company's president had claimed in his testimony that the contributions were sound investments necessary to assure the free flow of properly trained personnel. He also claimed that the public-at-large expected corporations to be philanthropic and that companies obtained good will in the community by doing so, which created a favorable environment for business operations.² And the company was well supported in these contentions. Frank W. Abrams, then chairman of the board of Standard Oil of New Jersey, testified that corporations are expected to acknowledge their public responsibilities in support of the essential elements of our free enterprise system.³ Irving S. Olds, former chairman of the board of United States Steel Corporation, suggested that corporations have a legitimate self-interest in supporting liberal education as the "bulwark of good government." And Dr. Harold W. Dodd, president of Princeton University,



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darkly suggested that democratic society would not survive if not "nourish[ed] by strong centers of "non-governmental fountains of knowledge."

The shareholders' argument was a bit more mundane: They complained that the company simply didn't have the authority to make the donations because the certificate of incorporation did not expressly authorize the corporation to do so, the company had no implied or incidental power to make the gift, and the New Jersey statute could not constitutionally be applied retroactively since *AP Smith's* certificate predated the statute. When the Chancery Division ruled that the donation did not violate law, the shareholders appealed. In a somewhat unusual move, the Supreme Court certified the appeal directly to itself and the stage was set.

The Court gave an interesting and insightful opinion. However, for the most part neither the question itself nor the answer has been something that we lawyers have been overly concerned with.

Now, something is different. Our CEOs and boards no longer talk in terms of occasional philanthropy; now they want to be seen as purposefully acting in what is broadly, and perhaps confusingly, referred to as a "socially responsible" fashion.

So what then is the obligation of a business entity to the communities, near and far, in which they do business, beyond simply not violating the law (as if that were simple)? And whatever the obligation may be, and whatever it is based upon, why are so many companies pursuing a corporate social responsibility (CSR) agenda now? Moreover, is there a paradigm against which CSR activities can be assessed? And what is the role of in-house counsel vis-à-vis CSR?

Before beginning, let's be clear on what is not being addressed. First and foremost, this is not a law review article; there is no extensive *law* on the subject of CSR. Nor does it offer an extensive literature review on the subject. There is, in fact, a surprisingly large body of work on corporate citizenship, some of which are excellent and in-depth explorations of the subject.⁴ Similarly, this article will not do an item-by-item analysis of specific CSR activities, nor does it engage in an analysis of the connection, or lack thereof, between CSR activities and business success: Worthy research has been done on each of those topics.⁵

What I do hope this article accomplishes is to show how key legal doctrines shape the debate and enable in-house counsel to recognize CSR for what it is and why it is important, and to understand the dynamics of how it works; and suggest ways to deal with it in your role as corporate attorney.

In other words, the in-house counsel's *field guide* to CSR.

Does Business Have a Social Responsibility?

In our training as lawyers, we don't typically frame the issue in this way, so let's restate the question from the lawyer's perspective: What, if anything, is the fiduciary obligation of officers and directors with respect to corporate citizenship? We all know the general rule set forth in *Kavanaugh v. Kavanaugh Knitting Co.*, 226 NY 185 (1919): Directors are bound by all of the rules of conscientious fairness, morality, and honesty in purpose, which the law imposes as the guides of those who are under fiduciary obligations and responsibilities. This often cited and generally misunderstood dictum from the New York State Court of Appeals is usually quoted for the proposition that directors have a dual fiduciary obligation to their companies and shareholders. There is nothing wrong with that. But, and perhaps only by implication, it is likewise often suggested that this obligation ends with the company and its shareholders. That is, the obligation is seen as primarily economic.

In fact, in a *New York Times* article published September 13, 1970, the noted economist, Milton Friedman, famously did more than imply this. He stated bluntly that the obligation of corporate directors was limited to the financial interests of the shareholders, saying that, "the social responsibility of business is to increase its profits." Friedman declared:

In a free enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.

What does it mean to say that the corporate executive has a "social responsibility" in his capacity as businessman? If this statement is not pure rhetoric, it must mean that he is to act in some way that is not in the interest of his employers.

But even Friedman admits that on occasion there can be good reasons for engaging in some activities that do not immediately produce income:

Of course, in practice the doctrine of social responsibility is frequently a cloak for actions that are justified on other grounds ... to illustrate, it may well be in the long run interest of a corporation that is a major employer in a small community to devote resources to providing amenities to that community or to improving its government. That may make it easier to attract desirable employees, it may reduce the wage bill or lessen losses from pilferage and sabotage or have other worthwhile effects.

While some of his reasoning is quaint (if a corporation donates a park bench, maybe they'll stop stealing from our stores), the point is worth making: To Friedman, the business of business is business. If there is a valid business reason to do something, then fine, and if it is seen as socially responsible, then that's nice, but irrelevant. The fiduciary obligation, Friedman suggests, is to serve the interests of shareholders, whom he assures us are best served by putting money in their hands.

Friedman's position is that the only responsibility of management is to increase shareholder return, and whatever does that is good. Social responsibility is a neutral consideration at best. This view is reminiscent of another often-cited

proposition, from the writings of Richard Posner. Posner, a well-respected lawyer, former Federal Circuit Court judge, and professor at the Chicago School of Law, is well known for the concept of the “efficient breach of contract” in which he suggests that if the economic utility of breaching a contract is greater than performing it, then one should breach it.⁶ This is an economic model of the universe in which contractual obligations—voluntarily undertaken between parties, and perhaps by implication one’s obligation to a community or to society in general—have no moral or ethical content. The legal element of an obligation can be expressed as a financial equation; the moral side is irrelevant.

So, if the Friedman/Posner economic model is accepted, the answer to our first question (what is the fiduciary obligation of directors and officers vis-à-vis CSR) would be: If the CSR activity can be directly (or at least in some clear causal way) connected to the profitability of the business, then it is

no different than any other profit-making endeavor and such conduct will not violate a fiduciary undertaking. However, there would be no affirmative obligation to pursue CSR activities, or even to consider how profit-making commerce might be accommodated to corporate citizenship.

A slight, but important, variation on this theme goes like this: CSR is, in fact, a good thing (that is to say, it is generally desirable that business organizations take into account the impact of their actions on society in general and communities in particular). Business leaders should therefore endeavor to find socially desirable, profit-making activities. Lynne Sharpe Paine, in her excellent book on the subject, characterizes this as merging social and financial imperatives. GE’s “eco-imagination” business is an example of this. Eco-Imagination is not a form of philanthropy, to be sure it is the reverse. It stands for the proposition that GE will make a profit by producing products and services

ACC Extras on... Corporate Social Responsibility

Articles

- *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility* (Harvard Business Review 2008). In this article, the relationship between business and society is examined, and a framework companies use to identify all of the effects that they have on society is introduced. www.acc.com/resource/v9280
- *Is Green the New Black?* (ACC Docket 2007) Corporate social responsibility has become more than an afterthought, with companies everywhere “going green.” But is it just in style to be eco-friendly? This article explores how important protecting the environment has become in the corporate world, and details how companies like yours are doing their part. www.acc.com/resource/v8688
- *Corporate Social Responsibility: Back to Basics* (ACC Docket 2003). Read this archived *Docket* article that focuses on the subject of corporate social responsibility. www.acc.com/resource/v4708

Program Materials

Corporate Social Responsibility, Environmental Risk Management, and Sustainability: What Your Board Should Know and How to Tell Them (Annual Meeting 2007). Read the transcript of this program, which focused on what you need to know to help make your board more socially responsible, as well as help yourself be more aware of risk management issues. www.acc.com/resource/v9034

Sample Forms

- *Corporate Social Responsibility Policy* (2007). This is the corporate social responsibility policy of General Mills, which is excerpted from program 112 at the 2007 ACC Annual Meeting. www.acc.com/resource/v9027
- *Tomkins Corporate Social Responsibility Report* (2006). This report is Tompkins’ first standalone corporate social responsibility report. It covers their progress in 2006 and discusses their commitment to continuous improvement. Their CSR reporting is classified in three areas according to their main stakeholder groups and issues: workplace, global footprint, and marketplace. www.acc.com/resource/v9279

Webcasts

Benchmarking Compliance, Risk, and Anticorruption Efforts—How Does Your Company Compare? (2008) Every company has its own approach to ethics, compliance, risk, and anticorruption. How does your company compare? During this one-hour webcast, the presenters discussed and compared companies both within their industries as well as by company size, governance structure, and where they operate. This webcast focuses on the role of in-house counsel in the increasingly common corporate social responsibility efforts that an organization may undertake. <http://webcasts.acc.com/detail.php?id=169022&go=1>

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that have environmental utility. There is, of course, nothing wrong with that, although it probably does not bring us any closer to answering the question of fiduciary responsibilities.

There is another position that has found much support in recent years: Doing good pays! Notice the difference. It is not the call to make money responsibly. It is the reverse: Being responsible *leads* to profitable results. It is the construct turned on its head. We are asked to accept the proposition that companies that do socially responsible things will generally be more successful in the long-term because people will:

- want to do business with them; and
- see them as trustworthy and will therefore be prepared to accept and forgive missteps (a nice euphemism for the occasional violation of law).

One example of this is Starbucks. Starbucks has become well known for its focus on such things as fair trade and the creation of schools in coffee growing regions—nice connections to its core business. However, it should be noted that Starbucks may very well be seen as socially responsible internally as well. For example, the company is famous for being among a very small minority of large companies that provide health insurance for even part-time workers. Interestingly, a competitor, Green Mountain Coffee, is likewise a CSR-focused business, using recycled paper goods and the like. This is a more controversial position because—at least until now—causation between CSR and profitability has not been scientifically established.⁷

But professor Paul Godfrey urges us to look beyond profitability as the foundation for CSR activity and think instead in terms of corporate citizenship as creating a sort of intangible, relationship-based asset. He expressly challenges the Friedman doctrine by suggesting that CSR spending (he writes specifically about corporate philanthropy) is as appropriate as purchasing property insurance. His thesis is that philanthropy builds a store of reputational assets which, when seen as an intangible assets, are a valuable, in fact critical, asset for any business. In an interview with author Brian Ambel in 2005, Godfrey states:

Bad things happen to every company, even the best companies. When bad news or scandal strike a company, customers and industry regulators often question if managers are looking out for anyone but themselves.

And just like a business with fire insurance is more valuable than one without it, businesses that have earned a reputation for being generous through acts of philanthropy are given the benefit of the doubt when negative events occur.

The stock price will rebound more quickly, management won't be viewed as harshly, fines will be less, and boycotts may be shorter. And to a shareholder, that's valuable.

Intangible relationship-based assets, which can be worth millions to a company and its shareholders, are often the very assets that receive the most benefit from philanthropic efforts in the event of misfortune.

Part of the reason that people have had such a hard time seeing the justification for corporate giving is that they don't see any extra revenue being generated from the expense; what I argue in my paper is that they should look at it more like reputation insurance.⁸

Another example of CSR as representative of intangible assets can be seen in how some money managers have begun to approach the field. For them, it is not about avoiding “sin stocks”; rather these investment managers and analysts “are developing formulas that take into account such issues as executive pay, carbon emissions and workplace gender diversity, along with traditional financial fundamentals. The logic: Companies that think creatively about how these issues affect the bottom line are likely to have an edge over rivals that don’t.”⁹

There is one last common theme in the CSR literature that might be described as corporate citizenship. This position is simply that, like other citizens, organizations have a responsibility to society in general that transcends their particular interests or that of their shareholders. And so, it is not relevant or necessary that the activity produce revenue, create assets, or even assure reputation protection. Even if seen as a cost of doing business, it is a price that society requires to engage in commerce.¹⁰

These are very common threads in the discourse on CSR, and each has a number of adherents. Even the Friedman viewpoint (CSR is essentially beyond the scope of what executives ought to be doing)—which on its face seems to suffer from short-term thinking—has its supporters.¹¹ For those interested in another, and more scholarly analysis of the main CSR underpinnings, see Paul Godfrey and Nile Hatch’s excellent summary in which they categorize what they see as five essential CSR positions:

- shareholder capitalism (Friedman),
- cause-related marketing (GE),
- strategic philanthropy (Starbucks),
- stakeholder management (Godfrey), and
- business citizenship (cost of doing business), addressing the legal and moral underpinnings, and the strengths and weaknesses of each.¹²

It is business citizenship that brings us back to the *A.P. Smith* decision. Because the court, in its unanimous decision, chose to look past the limited argument of whether CSR benefited organizations in some way and spoke squarely to the issue of the responsibility of business entities to act for the betterment of the communities in which they do business.

The court started its review of the subject by citing no less an authority than the venerable Professor Williston. Quoting a 1702 publication,¹³ Williston stated that, “the general intent and end of all civil incorporations is for better government.”¹⁴ The court noted further that early corporate charters support the notion that businesses were seen to have two objects—the private one of profits for its members, but also the public one, i.e., “managing and ordering of trade.”¹⁵ Quoting from an 1809 Virginia State Supreme Court opinion,¹⁶ the NJ

court continued, that acts of incorporation ought never to be passed “but in consideration of services to be rendered to the public.” The court went on to observe that later economic and social development had turned business more to private profit, to the point that managers could no longer lawfully disburse any corporate funds for philanthropic or other worthy public causes unless the expenditure would benefit the entity. The court then states, insightfully:

...when corporations were relatively few and small and did not dominate the country’s wealth, the common-law rule [no expenditure’s unless clearly in furtherance of profit] did not significantly interfere with the public interest. But the 20th Century has presented a different climate (citations omitted). Control of economic wealth has passed largely from individual entrepreneurs to dominating corporations, and calls upon the corporations for reasonable philanthropic donations have to be made with increased public support.¹⁷

And then, after further reviewing the views of other state courts, and the contributions of businesses to the general good during World Wars and the Depression, the unanimous NJ Supreme Court pointedly stated that looking at the ability of enterprise to sustain itself:

More and more they [referring to corporations, and business generally, by implication] have come to recognize that their salvation rests upon [a] sound economic and social environment ... just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, *modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate.*¹⁸ (Emphasis added).

This, stated plainly, is a call to corporate citizenship.

So, there is substantial historical and modern legal support for the notion that, whether seen as the narrow fiduciary obligation of officers and directors, or perhaps more broadly stated as the obligation of business generally, it is a fundamental notion that beyond the immediate boundaries of regulation and the demands of ethics, business has a role to play in addressing the social needs of the communities in which they operate. And in this era of global business, that community may in fact be the world.

It seems, then, that the first question I posed has been answered: It is very likely that officers and directors of businesses in the 21st century will be seen as having a responsibility that goes beyond returning profits to owners

and shareholders. That it will be seen as a responsibility is well grounded in precedent and stands at the very philosophical core of corporate existence. This perception of corporate responsibility goes well beyond the pure economic theories of some writers and in-house counsel would be well advised to treat such views with great suspicion.

Is Now Really the Time?

But why are so many companies pursuing a CSR agenda now? One thing that will undoubtedly come to mind is globalization itself, which is both beneficial in some respects, but which also results in social upheaval. Much of this has been well documented, first by Thomas Friedman in his groundbreaking book.¹⁹ For our purposes, it is sufficient to recognize the significant social implications of globalization from the CSR point of view. Companies are engaging in commerce worldwide, in multiple communities simultaneously. They manufacture in one community, sell in another, and provide support and service in still other places. In fact, globalization has been ruefully described as a process in which more and more complex goods are made by people who cannot afford to buy them and by people who cannot figure out who to use them without the help of people who cannot communicate well in the language used by either. In other words, globalization has brought social upheaval.

And suddenly, the social and environmental problems of one part of the world present themselves as our (business) problems, partly because our businesses are at least partially causing them. It is going to be increasingly difficult to sustain a furniture business, for example, without trees. And if we despoil the environment to the point that it affects our life span, let alone our lifestyles, the stock market “may” be affected. The felt need for more sustainable development is a significant part of the CSR movement. This is often referred to as the “triple bottom line”—the idea that organizations should consider social and environmental outcomes along with the traditional single outcome of financial performance.

Still another factor has been the repeated business scandals of recent decades, resulting in a trend toward viewing conduct through ethical, rather than purely legal, standards. This has caused us in the United States to rethink the very meaning of lawfulness and “corporate compliance” and has resulted in laws requiring that organizations create a *culture of ethical conduct*. This standard seems a far sight closer to the *AP Smith* doctrine of responsible leadership than Milton Friedman’s market-driven leadership.

An interesting factor to consider is the effect of web-based communications. We are, as the commercial goes, all connected. And that has implications beyond commerce. It means that when something happens *there*, we know it *here* almost immediately. We know how other people are experiencing it beyond what the political and even traditional news organizations want us to know about it (despite the attempts in some parts of the world to censor the internet; the fact is that communication is now viral in nature, spreading purposefully but creatively). And, more and more, corporate stakeholders actively seek to impact business outcomes. A relatively small, disgruntled group, for example, can drive an enormous business out of its largest market.²⁰ Political leaders find it increasingly difficult to find shelter from the information onslaught. So too do business leaders; however, the difference is that CEOs can trip over career-ending events much more easily than presidents and potentates.

Another point that is particularly relevant in the United States and other developed areas is the merging of interest groups. Corporate constituencies more than ever have blurred and overlapped—employees are investors in the

company through pension plans; investors are customers; customers are community members; and community members form interest groups. Business organizations can no longer safely or even quietly befriend customers, for example, and shun community leaders or cut jobs solely to deliver profits to shareholders, because they are affecting overlapping interest groups that communicate and organize (to return to the previous theme) quickly through the internet.

Lastly, but by no means least, a phenomenon has occurred since the end of the World War II that has significantly and perhaps permanently changed the landscape of business, and with it the *need* (that is beyond the sense of

moral obligation) for business leaders to look at the broader social consequences of their decisions: many companies are now bigger than many countries.

This trend has resulted in some staggering realities, according to author Bruce Piasecki.²¹

For example:

- Fifty-one of the 100 largest economies in the world are now corporations, not nations.
- Three hundred multi-national corporations now account for 25 percent of the world's total assets.
- Only 21 nations have gross domestic products (GDPs) larger than the annual sales of each of the 6 largest multinationals.²²

Ethics at Los Alamos National Bank

By Heather Travis Boone

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It is an accepted premise that ethics begins with the "Tone at the Top." At Los Alamos National Bank (LANB), it is no different. LANB is a New Mexico community bank with \$1.4 billion in assets with approximately 280 employees and 4 offices in northern New Mexico. The tone at the top at LANB began with the founding fathers of our organization and their influence is still felt today.

LANB was started in 1963 by a group of scientists and businessmen seeking to ensure the survival of Los Alamos as a viable community by making available services to attract scientists and their families to the Los Alamos National Laboratory. The gentlemen were so dedicated to this idea that they contributed their own funds as capital. At the time, one of LANB's founding directors informed his wife that although the money they were contributing would be lost, it was the right thing to do for the future of Los Alamos. I relate this history because this simple statement became the basis for the ethics system at LANB. Almost four and a half decades later, decisions are made because it is "the right thing to do" for our customers, our employees, our shareholders, and our community.

Training our employees on how to decide what is the "right thing" starts with each employee's first days of work. Every new employee attends an initial orientation. As with most companies, they are provided with the Employee Handbook, which incorporates our Code of Business Conduct and Business Ethics (the "Code"), they are expected to read the Handbook and sign a commitment to abide by the contents. Where we differ from many companies is that in the first two days of employ-

ment, the president or CEO addresses the employees in a small group to discuss the importance of "doing the right thing" as it relates to our customers, our employees and our investors, and the company's expectations for the conduct of all employees as well as how we expect each employee to make decisions. Employees, from hourly workers to supervisors to officers, are given considerable latitude to make decisions relating to their jobs. In order to provide that latitude, management must feel comfortable with how those decisions are made.

Employees are trained to understand that LANB's corporate culture values our customers, our employees, our shareholders, and community *equally*; that all decisions should be made by balancing the interests of these groups. This principle is incorporated into our mission, our vision, our values, and our key high-performance measures. This principle is continually reinforced and communicated throughout the organization.

All employees attend a second orientation training after one month of employment. A session is conducted by the general counsel, during which the participants discuss why corporate governance is important and what is expected of employees. LANB conducts HUDDLE, 15-minute department meetings held each morning with a topic of company-wide importance discussed over a week or more. At least once a year, LANB's HUDDLE discusses the Code and several times a year it discusses specific provisions within the Code. Real-life examples are used and discussion is encouraged on how to handle these issues when they arise. Legal counsel and senior manage-

I am not suggesting here that business is more efficient or better equipped than is government to deal with social issues, although that may often be the case. However, neither can we ignore the fact that business in the 21st century already materially affects more people through the payment of wages, the providing of social benefits through employment, and the delivery of goods and services than many of the world's governmental organs. As their span of control (to adopt a useful management term) has extended, business leaders are beginning to understand that their social obligations are likewise increasing.²³

Wal-Mart has become an interesting case in point. Having been vilified in the press for its adversarial man-

agement style toward employees, the company recently announced environmental and health care initiatives that, according to a February 1, 2008, article in the *New York Times*, make the company sound as if it were running for public office! As quoted in the article, Wal-Mart CEO H. Lee Scott Jr. stated: "We live in a time when people are losing confidence in the ability of government to solve problems ... [Wal-Mart] does not wait for someone else to solve problems."

The world is changing in ways that now compels business to deal with the social and environmental consequences of their conduct. Globalization, the emerging culture of ethical conduct, the interconnectedness of the web

ment actively participate in these discussions. LANB also holds company-wide employee meetings as well as "food forums," meetings between senior management and non-supervisory employees (e.g., Breakfast with Bill (CEO) and Snack with Steve (President)), during which any topic or question can be raised. Senior management, including the CEO and president, routinely inquire as to any areas of concern or any ideas for improvement during these meetings.

While the trend for many companies is toward the use of internet-based learning to train employees on their legal and ethical duties, LANB is committed to maintaining in-person training. The reason is simple: There is no substitute for the CEO, president, or general counsel sitting face-to-face with all new employees to discuss what is expected of each employee and what is important and valued by the company. It demonstrates in a tangible way to employees that the most senior management of the company values these ideals enough to take time out of a busy schedule to address them and help them to adapt to their new environment. It is further reinforced with these values routinely being addressed in discussions between senior management and employees at all levels. The other very important effect of such face-to-face interaction is establishing a relationship of trust and reinforcing the idea of an open-door culture, where any employee is comfortable raising concerns to the CEO or any other senior leader. This relationship can mean the difference between employees reporting items required for disclosures questionable, illegal or unethical behavior and other issues or such concerns festering taking their toll on employee morale and turnover or, worse, hitting critical mass and becoming a full-blown corporate (or criminal) crisis without warning. One of the best parts about these practices is that it is a small investment, a few hours of time each month, which quickly pays for itself in spades by the benefits to the company.

However, it is also clear that the tone at the top must be accompanied by decisions that exhibit the commitment of senior

management—that force management and the company to "put their money where their mouth is." The ethics system and devotion of LANB to the principle of "doing the right thing" for customers, employees, shareholders, and community is demonstrated clearly by senior management. Whether it is donations made in both time and money to local charities and nonprofits, LANB's EcoSmart campaign providing incentives for sustainable products and building, or provision of interest-free loans to all residents during a wildfire in 2000 that destroyed over 400 homes, regardless of whether these residents were LANB customers, it is clear that LANB is committed to supporting our customers, our employees, our community, and our investors.

The result of this commitment to our principles is the unprecedented success of the organization. Despite our small size, LANB enjoys state and national recognition, including Best of Santa Fe (2006 and 2007) and Best of Los Alamos (2006 and 2007) awards, Best Places to Work in New Mexico Awards (2006 and 2007), the Quality New Mexico Zia Award (1999), and the Malcolm Baldrige National Quality Award (2000). However, the award of which our CEO is most proud is the 2007 New Mexico Ethics in Business Award (NMEBA). As in tribute to the legacy of our founders, D.F. "Duffy" Swan, the chairman of the selection committee for the NMEBA, observed that LANB doesn't see ethics as "a Post-It note stuck on" as a reminder to be ethical, but that ethics are "integrated into the heart of the [] organization."ⁱ

At LANB, "doing the right thing" is used not entirely as a call to arms for completing our tasks accurately, legally, and ethically, but also as a reminder of the history of our company, influencing every decision we make and the manner in which we treat our customers, our staff, and our investors.

NOTE

- i. Winthrop Quigley, "Quality of the Candidates for Ethics Awards Was Special, Says Panel Chair," *Albuquerque Journal*, February 8, 2007.

coupled with the merging of corporate constituencies into a complex and active “organism,” and the sheer magnitude of economic control of large organizations are what corporate leaders see as they look at the business landscape.

There are a lot of concerns, then, to be addressed in formulating an approach to CSR activities. And so we come to the next issue: Is there then a paradigm against which CSR activities can be assessed?

Do Metrics Matter?

Looking at how companies generally report their CSR activities, at least at the present time, there is not a lot to be learned. Often, companies publish extensive (and glossy) reports detailing how much money they’ve spent on philanthropic causes, or how many hours their employees have volunteered in various communities, or similar “how much” and “how many” measures. But this mostly misses the point. After all, what makes spending money on “X” any more responsible than spending it on “Y”?

CSR is not about turning companies into engines of philanthropy, nor is it about doing well by doing good. The point is not to be seen as charitable, or generous, or perhaps just benignly nice to the communities in which you are doing business. Those all are perfectly good goals—and may even result in some, albeit hard to measure, reputational gain. Rather, CSR is really a way of aligning the policies and practices of an organization with the needs and interests of the key stakeholders of that organization. And when that alignment occurs, the natural and necessary outcome is that the organization will be (and will be seen as) acting responsibly. In essence, it is figuring out how the organization can pursue its business in a responsible way.

Professors Werther and Chandler consider stakeholder alignment to be the “rational argument” for CSR:

CSR is a rational argument for businesses seeking to maximize their performance by minimizing restrictions on operations. In today’s globalizing

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world, where individuals and activist organizations feel empowered to enact change, CSR represents a means of anticipating and reflecting societal concerns to minimize operational and financial limitations on businesses.²⁴

Industrial organizational psychologists occasionally refer to this alignment as entering into a psychological partnership. In legal terms, of course, a partnership is a consensual relationship between two or more competent parties who intend to carry out a business for profit. But in psychological terms, it is less about the intention of the parties and more about the productiveness of their relationship. So, for a psychological partnership to occur there needs to be a sense of shared goal, mutual influence, communication, transparency, respect, recognition, and long-term view.²⁵ For example, a furniture manufacturer may think it is naturally adversarial to an environmental group seeking to stop de-forestation. But are they really? In fact, the company must know that if it does not husband the environment properly, it will eventually run out of natural resources (or more probably, the cost of goods will sharply increase as materials become harder to find and harvest). To an extent they have shared goals—and if they focus on the goals they share to create a relationship in which they influence each other, increase communication and transparency, take a longer term view, and engage respectfully, their relationship will likely be significantly more productive. That relationship will be mutually beneficial and, of course, socially responsible.

Obviously, this is easy to state and not at all easy to do. And organizations can easily fall into the trap of wanting to appear to be engaging in such activities when they are not in fact genuinely doing so. This practice has even garnered a term: “greenwashing”—and the reaction to it is significantly negative. It would be better to do nothing than to do anything disingenuously.²⁶ But you knew that.

Creating a Partnership that Passes the Litmus Test

But the benefits of a partnership culture are significant and go to the essence of the CSR model. Organizations that are in partnership with their stakeholders enjoy significant benefits, among them resilience, reciprocity, and trust.

If “partnership” is the paradigm, how does an organization go about creating it? Here are a number of suggestions:

- Recognize the need for a single moral compass. An organization cannot have one set of morals for employees and another for investors. Business organizations can no longer safely befriend customers and shun community leaders, or cut jobs solely to deliver profits to investors, without being seen as irresponsible. This is the alignment principle.

- Any alignment is good; more is better. Consider starting internally. Your organization has critically important internal stakeholders—its workers—and the relationship created with them, and their perceptions of the company, will have significant implications (good or ill).
- Partnership is about relationship, and that requires engagement. In today’s parlance, engagement is often thought of as an “outcome measure” (if you do certain things, the result is an engaged work force, for example). But in fact, engagement is a process, not an outcome. Organizations need to engage with their key stakeholders to identify areas of concern so that shared goals can be developed, trust can be established, mutual influence can actually occur, and so on.
- Your organization doesn’t know—can’t know—what its stakeholders really want. It’s complicated, multidimensional, and often obtuse. You don’t even know what your spouse wants for his or her birthday. Don’t imagine that you can form a committee of smart executives to figure out where the company’s CSR agenda should be directed. Ask your stakeholders.
- Remember, at all times, that alignment is a two-way street. Be aware of how your organization’s CSR agenda impacts the company’s mission. If that is out of alignment, you are in danger.

The idea that CSR is an outcome of stakeholder relationships is one that is finding increasing acceptance and relevance in the field. Business leaders, in the coming years, will look to align strategy and mission around each of their corporate constituencies—employees, customers, communities, environment, interest groups, regulators, and so on. And they will want your help in navigating the right course.

The Role of In-house Counsel

Let me start this important discussion with my personal favorite aphorism from law school: *don’t drop your briefcase and run!* I know—and you know—that we lawyers have not spent a lot of time in these waters. We are generally more comfortable parsing the language of regulations than we are considering organizational culture, the historic predicates of organizational responsibility, and the sweep of global economic and environmental forces. But we are nonetheless well equipped to participate in the discussion and to add value to our corporate clients. After all, law is a *social* science. And while we may need to go back to our books on jurisprudence and philosophy, we are well equipped to discuss issues of public policy balancing rights and responsibilities.

Remember, the intersection of self-interest and public good is where commerce lives.

First, let me suggest a few steps for each of us to take

in order to engage comfortably and productively with our business leaders in the CSR area:

- Step away from the statute and cases. They are not going to help all that much. True, you may yet need to consider your organization's filed charter and the specific statute of the jurisdictions in which corporate governance occurs to make sure that there is no stepping over the *ultra vires* line, but that debate seems to have been put to bed, particularly since the advent of omnibus "purpose" clauses.
- Take a fresh look at the maxims of equity. These wonderful, historic examples of a commonsense approach to solving problems as an alternative to more rigid requirements of statute and precedent can inform the CSR dialogue. Just think of the "clean hands," "not by halves," and "laches" doctrines!
- Think about the stakeholders of your company: Who are they, where are they, and what is the current state of your client's relationship with them? How do you know? Insist on dealing in facts and data, not surmise and hypothesis.
- Get help defining the culture of your organization. Has any assessment work been done by the organization? Is there data that already exists about how your internal (employees) stakeholders perceive the organization? What about external stakeholders?
- Recognize your role in helping to craft policy that speaks to the legitimate needs of your corporate client and its need to align those needs with that of the organization's stakeholders.

The world has indeed changed since the *AP Smith* case was decided in 1953, and our need to apply the wisdom of that court is greater now. To use the court's words, it is our job as in-house counsel to help our client organizations "insure and strengthen the society which gives them existence ... [for those organizations have an obligation] ... in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure." ■

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NOTES

1. In fact, Morrell Heald, in his book *The Social Responsibility of Business* (referenced in the bibliography), claims, based on his interviews with a number of the individuals involved, that the litigation was engineered as a test case and funded by the Ford Foundation and the Standard Oil Company of New Jersey. I have no independent verification of this, however the fact that "luminaries" as noted were attracted to provide testimony in such an otherwise minor matter is suggestive.
2. 13 N. J. 145, at 146.
3. This and the following testimony quoted at 13 N.J. 145, at 147.
4. Excellent examples of this are, Lynn Sharpe Paine's *Value Shift*

(Ms. Paine is herself an attorney) and Werther and Chandler's *Strategic Corporate Social Responsibility* (this work was actually intended for use as a textbook). A selected bibliography, including these works, and others mentioned throughout this article, are included at the end of this article.

5. One of the best works in this genre is the meta-analysis done by Orlitzky, Schmidt, and Rynes; another is Professor Paul Godfrey's article on the relationship between corporate philanthropy and shareholder wealth published in the *Academy of Management Review* in 2005.
6. See, generally: Kronman, Anthony T. and Posner, Richard A.: *The Economics of Contract Law* (Little, Brown and Company, 1979).
7. See Barnett, Michael L.: "Stakeholder Influence Capacity and the Variability of Financial Returns to Corporate Social Responsibility" (*Academy of Management Review*, vol. 32 (no. 3) pp. 794-816).
8. "Doing Good Boosts Corporate Karma," October 31 2005, *Management-issues.com*; See also, Martin, Roger L.; "The Virtue Matrix: Calculating the Return on Corporate Responsibility" (*Harvard Business Review*, March, 2002).
9. Cui, Carolyn: "For Money Managers, A Smarter Approach to Social Responsibility" (*Wall Street Journal*, November 5, 2007, R1).
10. See, Handy, Charles: "What's a Business for?" (*Harvard Business Review*, December, 2002); c.f. in terms of philosophic underpinning, the works of Jeremy Bentham, John Stuart Mills, and in legal philosophy, John Rawls.
11. For the argument that CSR distorts markets by deflecting business from the primary role of profit generation, see Martin Wolf's "Sleeping with the Enemy" *Financial Times*, May 2001.
12. Godfrey, Paul C. and Hatch, Nile W.: "Researching Corporate Social Responsibility: An Agenda for the 21st Century" (*Journal of Business Ethics* 70:87-98, 2007).
13. *Select Essays on Anglo-American Legal History*, V. 3, p 201 (1909).
14. 13 N.J. at 148.
15. *Ibid.*
16. *Currie's Administrators v. The Mutual Assurance Society*, 4 Hen. & M. 315, 347 (1809).
17. 13 N.J. 145, 148.
18. 13 N.J. 145, 153-154.
19. Friedman, Thomas L.: *The World is Flat*, (Farrar, Straus and Giroux; expanded and updated edition, 2006).
20. Wal-Mart is one of the best examples of this. After Wal-Mart planned to open a store in NYC, the company came under intense union opposition. According to the *New York Times* "(Wal-Mart Chief Writes Off New York," *Business Day*, March 28, 2007), Ed Ott, Exec. Dir. NY Central Labor Council, stated "We just don't like the way they do business."
21. World Inc. (2007, Sourcebooks).
22. *Ibid*, at p. 4.
23. *Ibid*, at p. 10.
24. Werther and Chandler, *Strategic Corporate Social Responsibility* (Supra), p. 18.
25. Sirota, Mischkind, and Meltzer: *The Enthusiastic Employee* (Wharton, 2005).
26. Karliner, Joshua: *A Brief History of Greenwash* (www.corp-watch.org).
27. One of the many gems of advice offered for those who considered a life in the law by Professor Joseph Crea of the Brooklyn Law School. I wish I had followed more of them.
28. 13 N.J., at 161.