

BAD AGENT, GOOD CITIZEN?

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INTRODUCTION

Lawyers are agents for their principals—their clients.¹ The Restatement (Third) of Agency sets forth an agent’s duty: “[A]n agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”² A good agent is a loyal agent.

The Restatement also sets forth several important components of the duty: “An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent’s use of the agent’s position.”³ Further, “[a]n agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship.”⁴ A lawyer who violates these duties is a bad agent, in breach of her fiduciary duty of loyalty to her principal.⁵

Lawyers also have professional obligations to the broader society. Notably, they cannot help their clients commit crimes, nor can they be party to their client’s concealment of crimes.⁶ Even consistent with those obligations, and certainly in gray areas (such as avoiding inconvenient knowledge),⁷ whether they are being good agents or bad agents for their clients, lawyers can help—or harm—the broader society.⁸

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1. See generally Deborah A Demott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301 (1998).

2. RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2005).

3. *Id.* § 8.02.

4. *Id.* § 8.03.

5. That being said, if an agent gets consent from her principal after full disclosure, she is not violating her fiduciary duties. *Id.* § 8.06. The examples we discuss in this Article are generally of agents not seeking or obtaining consent for the behavior at issue. The exception involves plaintiffs who partner with lawyers to bring meritless claims. See *infra* Part I.

6. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 (AM. LAW INST. 1998).

7. See *id.* § 94 cmt. g.

8. Of course, this construction vastly oversimplifies: effects on broader society may be neutral, unknown, or amenable to different interpretations. Significantly, reasonable people may disagree as to what makes something helpful or harmful to society. Still, there is

This raises the possibility that an agent, such as a lawyer working for a client, may not just face a choice between what is best for her and her client but also between what is best for her client and society. Analyses of agents' behavior normally focus on whether an agent is a good agent or a bad agent—whether or not an agent is faithfully pursuing the interests of her principal. But we should also consider whether a lawyer acting as a good agent is also promoting the public interest (i.e., a good citizen) or not (i.e., a bad citizen). Similarly, we should ask whether lawyers acting as bad agents are also harming society, or whether they may actually be promoting the public interest even though they are not promoting their clients' interests.

It is important to note that “agent” has two meanings in this context—the “legal” meaning and the “economic” meaning. These two meanings have considerable, but not complete, overlap, especially in areas relevant to this Article.

The legal meaning largely focuses on the legal relationships between the principal and agent, the principal and a third party with whom the agent dealt, and, to a lesser degree, the agent and the third party. The legal meaning addresses when a principal-agent relationship is created,⁹ when the principal is bound or liable to a third party for the agent's actions,¹⁰ and, most importantly for purposes of this Article, the duties owed by an agent to a principal.¹¹ But nothing in this context could, or would, encourage illegal behavior. It might, however, encourage behavior in a gray area, or behavior that is close to the line.

By contrast, the economics meaning could, in principle, allow, if not encourage, illegal behavior, behavior in a gray area, or behavior that is close to the line. The major focus in the literature on agents in corporate law and corporate governance is on “agency costs”—the respects in which agents can be bad agents, acting for themselves rather than their principal.¹² Consider lawbreaking that has a positive expected value, such as obtaining a valuable business opportunity by bribing a foreign official, where the business opportunity's expected value exceeds its expected cost—that is, the expected probability of detection multiplied by the expected fine or penalty.

The legal concept of agency owes much to the economics concept. Indeed, the received wisdom on corporate law fiduciary duties is that their function is largely to reduce agency costs.¹³ But someone who breaks the law on his principal's behalf or encourages his principal to do so would not be considered under the legal concept to be a good agent who is fulfilling his

sufficient consensus in theory and, to a lesser extent, in application that we think exploring the four different permutations is worthwhile. *See infra* note 15 and accompanying text.

9. RESTATEMENT (THIRD) OF AGENCY § 1.01.

10. *Id.* §§ 2.01–2.03.

11. *Id.* §§ 8.01–8.05.

12. *See* Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); *see also* Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134 (1973).

13. For a summary of the arguments, *see generally* Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769 (2007).

fiduciary duties.¹⁴ For purposes of this Article, and especially insofar as our focus is on lawyers as agents, we will do the same: we rule out lawbreaking or encouraging others to break the law as being an act of a good agent, no matter what the actor's or principal's motivation is.

By definition, bad agents are acting for themselves when they *should* be acting for their principals. But “acting for themselves” is a capacious category and may include behavior that is almost completely self-serving or is self-serving while also serving the public interest. Thus, as Table 1 below illustrates, there are four possibilities: bad agent/bad citizen; good agent/bad citizen, good agent/good citizen, and bad agent/good citizen.¹⁵ In this Article, we explore those four possibilities, using four specific examples.

Table 1: Agent Behavior

	Bad Agent	Good Agent
Bad Citizen	The lawyer bringing frivolous derivative or class action suits	The boundary-pushing financial engineer
Good Citizen	The lawyer advising overcompliance, to client's detriment	The law advising overcompliance, to client's benefit

The easiest case is probably that of the bad agent who is also a bad citizen. The paradigmatic case is the oft-discussed (and oft-bemoaned) one of the lawyer who solicits clients to bring near-meritless suits for settlement value, such as shareholders suing derivatively for disclosure violations or governance reforms.¹⁶ The lawyers benefit by getting paid a fee, but their clients are hurt, insofar as they indirectly pay the fee (since the fee is paid from corporate coffers) and get something of almost no value—the disclosure or governance reforms. The clients may also lose something potentially of considerable value—claims against the officers and directors if the officers and directors get a release from liability. The waste of judicial resources (and other resources that could have been used in productive activity rather than pursuing or defending against the suit) is a cost to the broader society. This

14. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (“[A]n agent’s fiduciary relationship to the principal does not privilege conduct by the agent that is otherwise tortious or criminal although done with actual authority nor does their fiduciary relationship privilege a principal who demands such conduct.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. LAW INST. 1998) (“[A] lawyer must . . . proceed in a manner reasonably calculated to advance a client’s *lawful* objectives . . .” (emphasis added)); *see also* DEL. CODE ANN. tit. 8, § 102(b)(7)(ii) (2020) (providing that a certificate of incorporation may not exculpate directors from liability for “a knowing violation of law”).

15. We present these as four categories in a table, but agency and citizenship are, of course, on a continuum—from good to bad.

16. *See infra* Part I.

example is the poster child for abuse; some defenses of the practice exist, but not many.¹⁷

An example of a good agent/bad citizen is a lawyer who helps clients do end runs around rules, regulations, or contractual provisions. Such end runs can take the form of, for instance, techniques that enable companies to conceal the extent of their indebtedness or exaggerate the amount of their revenue.¹⁸

Two final examples involve lawyer advice on compliance or fiduciary duties where the advice is to go beyond what the law requires.¹⁹ Perhaps this ultimately serves the client's interests, taking into account the value of regulatory favor and reputation and the lessened likelihood of lawsuits being brought against the client. But perhaps the client would have been better served with less conservative advice.

This Article discusses each of the four possibilities, concluding that the condemnation of bad agents is far more satisfactory in the pure bad agent/bad citizen case and that perhaps we should revisit how we regard bad citizen cases, even when the agents are being good agents.

I. BAD AGENT/BAD CITIZEN

Protection rackets occur when businesses pay another party, oftentimes mob-affiliated, for “protection” against threats from a third party or even the ostensible “protector.”²⁰ In effect, the protection racket is an unsanctioned tax on doing business. The behavior of the bad agent/bad citizen lawyer is analogous: these lawyers offer contrived services to the clients they solicit, in the form of various disclosures or other concessions of limited efficacy from the corporate defendants, but effectively impose the same type of unsanctioned tax on the corporate world. Such lawyers are arguably agents in name only, obtaining fees through pro forma relationships with their “clients” without benefitting the clients. However, unlike protection rackets, which operate beyond the confines of the law, the bad agent/bad citizen lawyers use the law as their scourge.

The technique of the bad agent/bad citizen lawyer is simple: find or solicit²¹ clients to bring low-merit suits against corporations or their directors and then quickly settle or otherwise terminate the suits in exchange for minimal, nonmonetary concessions for their client, attorney's fees paid by

17. See, e.g., Adam Badawi, *Fighting Frivolous Litigation in a Multijurisdictional World*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 110 (Sean Griffith et al. eds., 2018).

18. See *infra* Part II.

19. See *infra* Part III.

20. See generally David Anzola et al., *National Mafia-Type Organisations: Local Threat, Global Reach*, in SOCIAL DIMENSIONS OF ORGANISED CRIME: MODELLING THE DYNAMICS OF EXTORTION RACKETS 9 (Corinna Elsenbroich et al. eds., 2016).

21. See, e.g., *Family Dollar Stores, Inc. (FDO)*, FARUQI & FARUQI LLP, <http://www.faruqilaw.com/FDO> [<http://perma.cc/SV6T-PPQL>] (last visited Mar. 17, 2020) (soliciting clients for a class action challenging the sale of Family Dollar for breaches of fiduciary duties).

the corporation, and an expansive release given to the corporation's officers and directors. Once the suit is terminated and the attorney's fees paid, the lawyer rinses and repeats.

The paradigmatic example of this pattern arises in the context of merger litigation. In the early 2010s, over 90 percent of large mergers (with transaction sizes of over \$100 million) of public companies were challenged in court.²² Many of these suits alleged breaches of fiduciary duty under state corporate laws²³ or federal law in the form of Securities and Exchange Commission (SEC) Rule 14a-9²⁴ (governing misstatements or omissions in the proxy statements of public companies),²⁵ arguing that the boards of directors engaged in flawed sale processes or failed to adequately disclose information necessary for shareholders to vote on the transaction.²⁶ In essence, lawyers find shareholders either through press releases²⁷ or extensive existing relationships,²⁸ sue for an injunction on the transaction, and then collect their fees.

From 2009 to 2016, these lawyers “earned” their fees primarily through disclosure-only settlements.²⁹ Class action suits—often with only a single named shareholder—alleging inadequate disclosures followed virtually every large merger or acquisition, with most settling for additional disclosures by the defendant directors (often details of negotiations or the compensation of involved bankers)³⁰ without any monetary recovery for the plaintiff class, in exchange for a broad release of liability preventing further suits on the same facts.³¹ Despite the absence of evidence of any statistically significant reaction by shareholders to these disclosures,³² the plaintiffs' attorneys would receive fees averaging in the six-figure range, paid by the corporation, for suits that could be conducted with relatively little effort and

22. See, e.g., Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2014*, at 2 (Feb. 22, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567902&download=yes [<https://perma.cc/46NV-78UU>].

23. See, e.g., DEL. CODE ANN. tit. 8, § 251 (2020).

24. 17 C.F.R. § 240.14a-9 (2019).

25. Sean J. Griffith, *Class Action Nuisance Suits: Evidence from Frequent Filer Shareholder Plaintiffs*, in *CAMBRIDGE INTERNATIONAL HANDBOOK OF CLASS ACTIONS* (Brian Fitzpatrick & Randall Thomas eds., forthcoming 2020) (manuscript at 9–11).

26. Sean J. Griffith, *Innovation in Disclosure-Based Shareholder Suits*, 69 CASE W. RES. L. REV. 927, 928 (2019).

27. See *id.* at 929.

28. See Griffith, *supra* note 25 (manuscript at 3–4) (noting that between 2004 and 2018, seven different frequent-filer plaintiffs filed a total of 281 suits, the majority of which were merger suits; the plaintiffs mostly had consistent and enduring relationships with their lawyers).

29. See *id.* (manuscript at 5).

30. Nonmonetary recovery occasionally includes amendments to the merger agreement or deal-protection provisions. Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 566 (2015).

31. Dan Awrey et al., *Resolving the Crisis in U.S. Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine*, 35 YALE J. ON REG. 1, 13–14 (2018).

32. See Fisch et al., *supra* note 30, at 586.

filed en masse.³³ While they were still subject to approval by courts in a fairness hearing, settlements (and fees) were nevertheless routinely approved, even when they involved low-value disclosures.³⁴

In 2016, Delaware limited the efficacy of the disclosure-only settlement as a vehicle for attorney's fees. In *In re Trulia, Inc. Stockholder Litigation*,³⁵ the Court of Chancery denied a disclosure-only settlement, requiring disclosures to address a material misrepresentation or omission for the disclosure-only settlement to be approved.³⁶ The plaintiffs' bar adapted, filing similar suits in other states or federal court³⁷ or seeking mootness fees (fees paid by the corporation to the plaintiffs' attorneys) if the defendants, without formally settling, voluntarily made the demanded disclosures in response to the suit.³⁸

Similarly frivolous suits aimed primarily at generating attorney's fees also arise in other contexts.³⁹ Derivative suits for breaches of fiduciary duties outside of the merger context filed quickly on the heels of corporate crises, often settling for weak corporate governance reforms and attorney's fees, are one example.⁴⁰ Others include proxy suits outside of the merger context challenging the adequacy of disclosures under Rule 14a-9, and traditional securities law claims.⁴¹ Ultimately, all of these feature frequent-filer firms and plaintiffs, rapid filings with little legal and investigative effort, and the payment of attorney's fees by the defendants despite little benefit to the plaintiff.⁴²

Corporations settle in these situations because it is cheaper, easier, and less risky to simply accept the effective tax than to vigorously contest the suit, especially in the context of merger litigation. Merger participants want to proceed quickly while avoiding the risk of an injunction or further discovery, motivating quick settlement or other resolution of the lawsuit in which the plaintiffs' lawyers still get paid.⁴³

33. Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 625 (2018); see also Fisch et al., *supra* note 30, at 568–69.

34. See Griffith, *supra* note 26, at 932–33.

35. 129 A.3d 884 (Del. Ch. 2016).

36. *Id.* at 894, 898.

37. See Griffith, *supra* note 26, at 935, 939; see also Griffith, *supra* note 25 (manuscript at 10) (noting a spike in shareholder suits filed in federal court following *Trulia* and a corresponding decrease in similar state court suits).

38. See generally Jack B. Jacobs et al., 'Mootness Fees' in *Deal Litigation: An Argument for a Different Approach*, BLOOMBERG L.: CORP. L. & ACCOUNTABILITY REP. (Mar. 28, 2017) (available at https://www.sidley.com/-/media/publications/bloomberg-bna-corporate-counsel-weekly_mootness-fees-final.pdf [<https://perma.cc/6UYQ-L3F7>]).

39. Griffith, *supra* note 25 (manuscript at 2, 5).

40. See Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 9–10 (2015); see also Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1799–800 (2010).

41. See generally Griffith, *supra* note 40.

42. See *id.* at 9–10. See generally Griffith, *supra* note 25.

43. See Adam B. Badawi & David H. Webber, *Does the Quality of the Plaintiffs' Law Firm Matter in Deal Litigation?*, 41 J. CORP. L. 102, 103–07 (2015); Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes*

Beyond their technical similarities, these suits share a pivotal common thread: the “benefits” that these lawyers obtain for their clients are of little value to the plaintiffs themselves and, indeed, may even be harmful insofar as attorney’s fees are paid by the corporation—thereby reducing its value—and claims that potentially have real value are released. Even in the context of mootness dismissals, which only release the claims of the plaintiffs that brought the suit rather than barring future suits by an entire class of shareholders, the supplemental disclosures are often made mere days before the transaction is completed, effectively precluding the ability of other shareholders to react and bring their own claims.⁴⁴ Regardless, the attorneys are still paid, suggesting that many of these cases are brought for the benefit of the attorney rather than the client.

These abuses negatively affect society. First, like the protection racket, these suits increase the cost of doing business without providing corresponding benefits to society: corporations and their shareholders are forced to pay off the lawyers and sacrifice the use of capital that could spur significant growth or achieve other desirable social ends. Second, the large number of filings bogs down an already backlogged judiciary. Third, these suits serve important roles in curbing managerial misconduct, even if their efficacy is sometimes questioned.⁴⁵ Abuses of these suits force the legal system to react by raising the bar for successful claims. Although this may help weed out frivolous claims, it also reduces the likelihood that weaker, but nevertheless meritorious, claims can succeed. Finally, increasing the obstacles to litigation potentially reduces the efficacy of the specter of litigation as a check on corporate managers.⁴⁶ Indeed, in the sense that these suits may, generally speaking, help maximize shareholder value, raising the bar that even meritorious suits must clear as a deterrent to frivolous suits may be more costly to shareholders in the aggregate than the costs of the frivolous suits themselves.⁴⁷

This picture is, admittedly, deliberately one-sided. First, even if these cases become more difficult, the plaintiffs’ bar can adapt, preserving the specter of litigation’s ability to constrain managerial bad behavior.⁴⁸ Second,

Shareholder Class Actions, 57 VAND. L. REV. 1797, 1801–04 (2004); Griffith, *supra* note 25 (manuscript at 11). Similarly, in more prototypical derivative litigation, settlement is driven by the timing of the underlying regulatory action. Awrey et al., *supra* note 31, at 15; *see also In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 945 n.4 (Del. Ch. 2010) (citing empirical evidence that frequent-filers settle particularly quickly).

44. *See* Griffith, *supra* note 26, at 941–42.

45. *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 134–35 (2004).

46. *See, e.g.*, Kevin M. LaCroix, *Should Shareholder Derivative Litigation Be Eliminated?*, D&O DIARY (Oct. 4, 2017), <https://www.dandodiary.com/2017/10/articles/shareholders-derivative-litigation/shareholder-derivative-litigation-eliminated/> [<https://perma.cc/793Y-2CSM>].

47. *See generally* Giuseppe Dari-Mattiacci & Eric Talley, *Being True to Trulia: Do Disclosure-Only Settlements in Merger Objection Lawsuits Harm Shareholders?* (Mar. 7, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347327 [<https://perma.cc/H8P8-5A2D>].

48. Griffith, *supra* note 25 (manuscript at 14).

the development of the law through these cases is a public good. Third, at least in the case of ongoing relationships between frequent-filer plaintiffs and frequent-filer plaintiffs' firms, there is a cognizable chicken-and-egg argument: it is unclear whether it is the lawyer or the client that is driving the filing of suits.⁴⁹ If frequent-filer shareholders are indeed the driving force behind the mass filing of nuisance suits and frequent-filer law firms are simply following their clients' wishes, the firms are more similar to the good agent/bad citizen lawyer than they are to the bad agent/bad citizen lawyer. Finally, in the real world, many cases will fall into a gray area, with the extremes—clearly meritorious suits and suits clearly lacking in merit—at the ends of a continuum, more important as theoretical markers and quite rare in practice. Still, exaggerated though it may be, we maintain that what we describe is a real phenomenon—an example of a bad agent who is also a bad citizen.

II. GOOD AGENT/BAD CITIZEN: THE EXAMPLE OF FINANCIAL MANEUVERING

Lawyers help their clients structure financial instruments and transactions that comply with the law. But sometimes, what the client wants, or what the lawyers advise, is a financial instrument or transaction that complies with the letter of the law while violating its spirit.⁵⁰ There may be ways, too, of complying “literally” with contractual restrictions that also violate those restrictions' spirits. And there may be ways to structure financial instruments and transactions to game differences among different regulatory or other regimes. For instance, a financial instrument could be structured so that it would count as debt for tax purposes, allowing the interest to be deductible, but equity for other purposes, so it could be part of the company's “capital” and thus, among other consequences, potentially help the company to qualify for a higher credit rating.⁵¹

Some techniques of this sort start off being legal but are subsequently made illegal; some are legal and stay legal, and some stay in a gray area.

49. *See id.*

50. One of us, individually and with coauthors, has written extensively on this subject. *See generally* CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT (2015); Philip A. Curry, Claire Hill & Francesco Parisi, *Creating Failures in the Market for Tax Planning*, 26 VA. TAX REV. 943 (2007); Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151 (2010); Claire A. Hill, *Tax Lawyers Are People Too*, 26 VA. TAX REV. 1065 (2007) [hereinafter Hill, *Tax Lawyers*]; Claire A. Hill, *Why Financial Appearances Might Matter: An Explanation for 'Dirty Pooling' and Some Other Financial Cosmetics*, 22 DEL. J. CORP. L. 141 (1997) [hereinafter Hill, *Financial Appearances*]. Two other noteworthy articles on the subject are Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010) and Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233 (2002).

51. *See generally* THOMAS A. HUMPHREYS, TAX DEDUCTIBLE EQUITY AND OTHER HYBRIDS IN THE US—A BRIEF HISTORY AND CURRENT DEVELOPMENTS (2018), <https://media2.mofo.com/documents/taxdeductiblehybrid.pdf> [https://perma.cc/R55T-S4JW].

New techniques are continually being developed, especially in response to what regulators would characterize as “plugging a loophole.” The loophole is plugged, only for another to be discovered and exploited. The back-and-forth with regulators can be quite lucrative for the lawyers engaged in loophole discovery and exploitation.

Sometimes, the regulators give in, such that the techniques stop being useful. For instance, techniques to structure unincorporated business organizations to avoid entity-level tax became unnecessary when regulators decided to allow business organizations to choose whether or not they would be subject to entity-level tax by simply “checking a box.”⁵² And the transaction structure to reincorporate a U.S. company in a foreign jurisdiction to minimize taxes (“inversions”) became unnecessary when tax rates were changed so that inversions no longer offered an advantage.⁵³ Companies (and their lawyers) used to spend significant effort (and money) structuring business combination transactions to qualify for “pooling” accounting treatment.⁵⁴ If two companies’ financial statements were combined—pooled—rather than one company being deemed to have purchased the other, there was no line item for “goodwill,” the difference between the purchase price and the fair value of the assets. Since accounting rules then required goodwill to be “amortized”—that is, treated as wearing out or being used up over time—the effect was to reduce (accounting) earnings. Thus, pooling treatment was much preferred, since the transaction did not create amortizable goodwill. The earnings of two “pooled” companies would be higher than the earnings of those two companies if combined via one company’s purchase of the other. The rules were changed to limit amortization of goodwill,⁵⁵ rendering the techniques used to obtain pooling treatment unnecessary.

A recent example of financial maneuvering involves Donald Trump, whose Bedminster golf club has eight goats on the premises, qualifying the club as a “farm” and saving it close to \$90,000 per year in taxes.⁵⁶ In a testament to how common financial maneuvering is, the use of this

52. The change, allowing entities to “check the box” and thereby choose whether or not to be subject to entity-level taxation, was made in 1996. See Simplification of Entity Classification Rules, 61 Fed. Reg. 66,584 (Dec. 18, 1996) (to be codified at 26 C.F.R. pts. 1, 301, 602).

53. JANE G. GRAVELLE & DONALD J. MARPLES, CONG. RESEARCH SERV., R45736, THE ECONOMIC EFFECTS OF THE 2017 TAX REVISION: PRELIMINARY OBSERVATIONS 14–16 (2019), <https://fas.org/sgp/crs/misc/R45736.pdf> [<https://perma.cc/U4DV-YFFD>].

54. See generally Richard Y. Roberts, Comm’r, U.S. Sec. & Exch. Comm’n, Remarks at the Second Annual Conference on Financial Reporting: Time for Review of Pooling Criteria (Nov. 1, 1991), <https://www.sec.gov/news/speech/1991/110191roberts.pdf> [<https://perma.cc/7857-898H>]; Sujeet Indap, *The Pool Is Closed, Part 2—a History*, FIN. TIMES: ALPHAVILLE (Mar. 11, 2014), <https://ftalphaville.ft.com/2014/03/11/1794812/the-pool-is-closed-part-2-a-history/> [<https://perma.cc/HR54-Q6L4>].

55. *Summary of Statement No. 142*, FIN. ACCT. STANDARDS BOARD, <https://www.fasb.org/summary/stsum142.shtml> [<https://perma.cc/5UNZ-XS7Z>] (last visited Mar. 17, 2020).

56. S. V. Date, *The Golfer in Chief Is Also the Goatherd in Chief, Saving Him Tens of Thousands*, HUFFPOST (Aug. 15, 2019, 5:30 AM), https://www.huffpost.com/entry/trump-golf-goats_n_5d546ebce4b08385506719f1 [<https://perma.cc/E5E4-A4MU>].

“loophole” is apparently quite common; people who own plausibly sized plots of land in the relevant area expect to use it, and routinely do.⁵⁷ Do we regard the “entrepreneur” who discovered, or even pushed for, the loophole to be a worse citizen than the later users, especially when the use has become the norm and has even been priced into the property? The answer would appear to be yes, for two reasons. First, the entrepreneur who discovers the loophole does more harm by creating a maneuver that many others will use than those others do individually. Second, once a loophole becomes widespread and common, its societal harm may seem to be, or actually be, smaller than was the case at the time it was initially found.

In all of these examples of financial maneuvering, the lawyer helps enrich her client, but society is impoverished. The law of fiduciary duty, for agents in general and lawyers in particular, already addresses this possibility where society has made the underlying behavior illegal: lawyers are certainly not required, nor are they even allowed, to break the law even when doing so helps their clients.⁵⁸ But what should we say about lawyers who enable (or even invent) such financial shenanigans when they are not illegal?

III. GOOD CITIZEN: GOOD AGENT/BAD AGENT

The third and fourth cases involve the lawyer acting as a good citizen. Consider a lawyer advising a company’s directors and officers on their fiduciary duties regarding compliance with environmental laws in an industry where those laws strongly affect the company. Similar to other areas with complex, ambiguous, and sometimes contestable laws, the company may decide to aggressively test the limits of what is allowed, or follow the spirit and letter of the law, getting away with much less. For instance, consider auto companies that chose to comply with California’s emission standards even though they could have tried to fight California and side with the Trump administration’s weaker Environmental Protection Agency (EPA) standards.⁵⁹ Or, consider an energy company deciding how much to protect against methane leakage when engaging in hydraulic fracking. There is a complicated and evolving mix of federal and state regulations on fracking; the Trump EPA is in the process of weakening Obama-era regulations, but

57. Discussion with Sean Griffith, T. J. Maloney Chair in Bus. Law, Fordham Univ. Sch. of Law, at the Fordham Law Review and the Stein Center for Law and Ethics Colloquium: Colloquium on Corporate Lawyers (Oct. 11, 2019). Not surprisingly, these types of loopholes exist and are taken advantage of in many places. *See, e.g.*, Katherine Gustafson, *Goat Herd! The Secret Tax Trick of Trump and Hollywood A-Listers*, FORBES (Sept. 26, 2016, 9:00 PM), <https://www.forbes.com/sites/katherinegustafson/2016/09/26/one-thing-trumps-tax-returns-hide-his-herd-of-goats-yes-goats> [<https://perma.cc/QHK5-HQX7>]; *see also* Eric Kiefer, *Trump’s N.J. ‘Goat Farmer’ Tax Break: Do You Qualify?*, PATCH (Aug. 17, 2017, 9:00 AM), <https://patch.com/new-jersey/westorange/trump-s-n-j-goat-farmer-tax-break-do-you-qualify> [<https://perma.cc/D9RX-CL2H>].

58. *See supra* note 14 and accompanying text.

59. Catherine Powell, *We the People: These United Divided States*, 40 CARDOZO L. REV. 2685, 2734 (2019).

the deregulation is being legally contested.⁶⁰ Enforcement of existing rules is weak.⁶¹

In both cases, taking actions that lead to lower carbon emissions would *generally* be seen as acting as a good citizen, given the role that carbon emissions play in climate change. Of course, that itself is contested, to a significant extent because of differing views as to the facts surrounding climate change, but competing values and visions of the world are also involved. We consider in more depth the contestability of what counts as being a good or bad citizen later.⁶² For present purposes, assume that actions to reduce a company's carbon emissions help society.

Lawyers advising a company may have a variety of motivations that incline them to advocate for aggressive carbon emission reductions. Some align with the interests of the company,⁶³ but some do not. The lawyer may care deeply about the effect climate change is having on the world and may want to be part of the solution, not part of the problem. Indeed, the lawyer may have gotten the job to advise companies on these matters precisely to advance her own personal agenda. If so, perhaps she is an even better citizen, and a worse agent, if she is deliberately pursuing a career in advising on compliance to help the world respond to climate change rather than to help her advance her clients' interests. She may believe that having a reputation as being environmentally responsible will attract the company's potential employees, customers, and some types of investors, increasing the company's long-run profitability.⁶⁴ She may want to improve her own reputation for providing responsible advice, thinking that will attract potential clients or ease her future interactions with regulators. She may like more aggressive compliance because it involves more time spent advising the client, leading to higher legal fees.

Sometimes, the aggressive emission reductions will be in the company's interest, perhaps because the company pursues and benefits from positive reputation. That then becomes a case of good agent/good citizen. Much of the contemporary focus on corporate social responsibility (CSR) and environmental, social, and governance (ESG) activism in corporate governance asserts a strong convergence between shareholders' long-term

60. See Blake A. Watson, *Nullify, Postpone, Suspend, Stay, and Replace: The Trump Administration and the Methane Waste Prevention Rule*, 44 U. DAYTON L. REV. 363, 365–66 (2019).

61. *Fracking: Regulatory Failures and Delays*, GREENPEACE, <https://www.greenpeace.org/usa/global-warming/issues/fracking/regulatory-failures-and-delays/> [<https://perma.cc/R2ZA-TFVF>] (last visited Mar. 17, 2020).

62. See *infra* Part V.

63. Consider Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct: "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." MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

64. See *generally* Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681 (2018) [hereinafter Hill, *Caremark*]; Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. REV. 1193 (2019) [hereinafter Hill, *Marshalling Reputation*].

interests and action that benefits various corporate stakeholders and the public interest due to positive reputational effects.⁶⁵ Presumably, this is true at least some of the time. But some of the time it is not, which presents the interesting case where the lawyer is a bad agent but a good citizen. The aggressive compliance benefits society, but it is costly for the company in both the long and short run. Positive reputational benefits do not outweigh the costs. The prevailing optimism, assuming as it does the convergence of shareholder and stakeholder interests, is not always warranted. Perhaps it is frequently not warranted. Some companies may have intrinsically environmentally unsound products that simply cannot support a clean reputation. Their employees may have skills wedded to that product, and their customers may be intermediate, rather than final, consumers who do not much care about environmental “wokeness.” A company devoted purely to mining coal is an example. The business model is inherently dirty. The company’s attempts to clean up its product and operations beyond the minimum legal requirements may be good for the environment and humanity, but it will just mean lower profits or higher losses.

IV. WHAT DOES IT MEAN TO BE A BAD AGENT?

A bad agent pursues her own interests rather than those of her principal, often at the principal’s expense. This Article has demonstrated that one can be a bad agent while being a good citizen or, conversely, a good agent while being a bad citizen⁶⁶: what is best for the client is not always best for society. We argue below, in this Part and the next Part, that what is best for society is complicated; here, we argue that what is best for the client can be complicated too, notably in the important context of clients that are business corporations.⁶⁷

Some commentators argue that corporations should pursue the interests of their major stakeholders (shareholders, employees, customers, creditors,

65. A typical and influential expression of this view is found in recent letters to shareholders from Larry Fink, CEO of BlackRock, the largest shareholder of many American public corporations. See Letter from Larry Fink, Chairman & Chief Executive Officer, BlackRock, to Shareholders (Mar. 2019), <https://www.blackrock.com/corporate/investor-relations/larry-fink-chairmans-letter> [<https://perma.cc/CMJ4-6PAL>]. The academic literature on the relationship between corporate responsibility and financial performance is extensive but conflicted. For some literature reviews and meta-analyses suggesting a positive relationship, see generally Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-analysis*, 24 *ORG. STUD.* 403 (2003); Pieter van Beurden & Tobias Gössling, *The Worth of Values: A Literature Review on the Relation Between Corporate Social and Financial Performance*, 82 *J. BUS. ETHICS* 407 (2008); and Joshua D. Margolis et al., *Does It Pay to Be Good . . . and Does It Matter?: A Meta-analysis of the Relationship Between Corporate Social and Financial Performance* (Mar. 1, 2009) (unpublished manuscript), <https://ssrn.com/abstract=1866371> [<https://perma.cc/YW5G-NB2Q>].

66. See *supra* Parts II–III.

67. See generally Brett McDonnell, *The Corrosion Critique of Benefit Corporations*, (Sept. 9, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450747 [<https://perma.cc/J4U8-G8WW>].

suppliers, communities, the environment),⁶⁸ and with the rise of the benefit corporation, some companies have committed to such a purpose, or at least something close to it.⁶⁹ If this view of what corporations should do was the general understanding, at least in principle, a good agent for such corporations would necessarily be a good citizen as well.⁷⁰ But the prevailing understanding, at least in the United States, has been that corporations should be run in the best interests of their shareholders, and that shareholders' interests are understood in terms of maximizing their long-term financial return.⁷¹ With such an understanding, a split between good agent and good citizen becomes possible, and this understanding is implicit in our discussion above.

Even on that prevailing understanding, it is possible for the shareholders of a particular corporation to choose a different goal, focusing on achieving some specific social good as well as achieving a financial return for shareholders. And nonprofit corporations' focus on just a specific charitable goal, foregoing financial return for shareholders. But even in such companies that pursue specific social goals, there can be a gap between being a good agent and a good citizen. A charitable enterprise may do a good job at pursuing its charitable goal while causing other sorts of harms, or vice versa. Consider, for instance, a hospital that provides excellent care for its patients but has lousy pay and unduly stressful conditions for its nurses that may violate employment law standards, pursues borderline illegal schemes to increase payments from the government, and dumps toxic waste carelessly in possible violation of environmental regulations.

68. See generally KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2010); LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* (2001); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48 (1932); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334 (2008); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013).

69. See generally FREDERICK H. ALEXANDER, *BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE* (2018).

70. As we shall discuss shortly, different public goods may conflict with each other. But benefit corporations are supposed to pursue the “general public benefit.” See *Model Benefit Corporation Legislation*, BENEFIT CORP. § 201(a) (Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/6CXM-X6VZ]. Thus, they are charged with considering all relevant affected interests and balancing them as they see best—they cannot simply focus on one or two.

71. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 35–39 (1991); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 549–50 (2003); A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2031 (1993); Roberta Romano & Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 833 (2005); Milton Friedman, *A Friedman Doctrine—the Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [https://perma.cc/DD7Z-F4EA].

A concern for reputation may narrow the gap between the client's and society's goals; a good agent to a client concerned with having a "good" reputation would presumably be a good citizen as well. If certain valued groups of shareholders, employees, or customers prefer to associate with companies that they see as socially responsible, then doing good may be in the company's best interest.⁷² But there are limits to the "kumbaya" prospects suggested by such reputational concerns. Not all companies have shareholders, employees, or customers who are so socially minded. And even where they are socially minded, outside shareholders, customers, and potential employees may not have much information about how well a company is really behaving. This raises the possibility of greenwashing, where a company holds itself out as socially responsible to attract groups who care about, say, the environment but does not actually behave socially responsibly.⁷³ Greenwashing reopens the gap between corporate and social goals.

Reputational effects are also complicated by the existence of different constituencies. Employees, investors, customers, and regulators, as well as other constituencies, may have differing ideas as to what social goals and values should be pursued.⁷⁴ This mirrors the question discussed in the next Part as to the ambiguity and contestability of social goals.⁷⁵

The bad agent/good citizen case also complicates the standard story of the motivations of bad agents. In the standard bad agent story, the agent is simply enriching herself at the expense of her principal, where "enriching" is understood in terms of narrow self-interested goals.⁷⁶ The agent gets money or other valuable items (land, confidential information, etc.) that belong to the principal. Slightly more subtly, she may give less time, effort, and attention to her principal than she should.

But some of the motivations that lead to the bad agent/good citizen case look less morally dubious. Consider the lawyer advising an oil company to take more costly precautions to avoid methane leakage in fracking than current regulations probably require. She probably cares deeply about the threat posed by climate change and does not want to be implicated in abetting a client in actions that will worsen that threat, even though those actions are likely legal and profit-maximizing. That motivation is not selfish in any obvious sense. Perhaps the motivation can be seen as suspect in an argument used by some defenders of the shareholder wealth maximization norm, who argue that such agents are imposing their own values in using others' (i.e., shareholders) money where those others may not agree with the agent's

72. See *supra* note 64.

73. Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77, 90 (2018).

74. See Hill, *Marshalling Reputation*, *supra* note 64.

75. See *supra* Part V.

76. Claire A. Hill & Brett H. McDonnell, *The Agency Cost Paradigm: The Good, the Bad, and the Ugly*, 38 SEATTLE U. L. REV. 561, 569–70 (2015).

priorities regarding how to spend it.⁷⁷ Here again, the contestability of what the public good entails raises its ugly head.

V. BAD CITIZENS, GOOD CITIZENS

In the bad agent/bad citizen cases—at least in the paradigmatic one discussed above—what makes the lawyer a bad agent is having a business model or practice that seeks to generate money without generating a needed or desired service. The lawyer develops a cheap *modus operandi*—“cookie cutter” complaints to be filed in cases “brought” by clients generated by a cheap but effective advertising campaign. The lawyer is positioning himself as a tax assessor and collector; once the tax is paid, the lawyer goes elsewhere to assess and collect another tax. The tax is used for the lawyer’s personal purposes, not those of the greater society. Any societally beneficial effect would be accidental—the incremental incentive to improve disclosure and governance is trivial and is outweighed by the associated costs—and the general tax is presumably harmful to society insofar as it makes business more costly than it “should” be. Thus, the lawyer is a bad agent and bad citizen.

In the good citizen cases, the analysis is far more complex, insofar as what it means to be a good and bad citizen is itself more complex. Commentators can and do disagree as to whether parties have a duty to comply maximally, or more minimally, with regulations.⁷⁸ To what extent is attempting to minimize one’s regulatory obligations permissible or even desirable?

Tax provides an excellent example to illustrate the divergent views. What attitude towards tax planning does a good citizen have? Some people think that people in government are generally smart and well-intentioned. They may also think that the enterprise of government is a good one: it raises money to redistribute and limits profits by requiring caution and financial cushions. Such people are apt to think good citizenship requires a more maximal approach to tax compliance and a limited use of tax planning.

Others may think far less highly of the government. They may think people in government are apt to be incompetent, corrupt, or both and that people can and should be more self-reliant. Such people may favor far more limited government. They may also think people generally will engage in minimalist compliance: why be the one sap who pays up when nobody else is doing so and the money is going to people who lounge around on the couch eating bonbons when they should and could be productive? Stated differently, depending on one’s views as to government, taxes, and related matters, one will have a different view as to what good citizenship requires. Consider a person who does nothing to minimize her tax burden. Some might consider this person to be a good citizen in this respect; some might consider the behavior neutral; and some might consider it bad, on grounds that government spends money on harmful things (like bureaucrats who make and

77. See Friedman, *supra* note 71.

78. See generally Hickman & Hill, *supra* note 50.

enforce intrusive regulations) or that people can do a better job with their own money, saving or driving demand through consumption.

There is no principled way to resolve the disagreement, insofar as it turns on first principles and unresolvable empirical inquiries. To what extent is government apt to “get it right”? What are the motives and aptitudes of those who make and enforce the rules at issue? Additionally, to what extent is respecting rules and rule-enforcers a good thing? And to what extent is “pushing the envelope” good to either remedy government’s use of a too-blunt instrument or simply to push back, for principled reasons, against maximal compliance? So, a lawyer pushing for maximal compliance might or might not be a good citizen; what might make a lawyer a bad agent in these cases is, perhaps, concern for her own reputation (or even her own values) when her client would take a more instrumental or minimalist view of compliance. Consider a company polluting as much as the law allows; the lawyer might want the company to pollute less and give advice accordingly, even if doing so was not profit-maximizing for the company.⁷⁹ There are many other complexities in making this determination. Returning to financial maneuvering, consider who is affected by the maneuvering and how they are affected. Markets and others are affected when a company uses techniques that make it appear to have less debt, or more revenue, than it actually has. Enron provides a dramatic example of a company’s collapse after doing both of these things.⁸⁰ Another example is some uses of cross-currency swaps, such as the cross-currency swap that allowed Greece to join the eurozone. There were significant negative effects on the world economy as information about Greece’s true financial situation became clear.⁸¹ But, sometimes, it is not clear who is fooled and to what extent. There is considerable evidence that certain sorts of “balance sheet management” techniques are largely taken into account by the markets.⁸²

79. In a recent article, Professor Don Langevoort discusses the phenomenon of lawyers who are good agents and good citizens, but whose dealings with their clients are through the clients’ officers and directors, who may have an incentive to be bad agents, preferring their leisure over the firm’s legal vulnerability given their minimal risk of legal liability. Donald C. Langevoort, *Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 729 (2018).

Whatever its causality, *Caremark* [the case that first established that boards had duties to oversee their company’s compliance, but that imposes liability only if directors consciously or intentionally disregarded their monitoring duties] no doubt did in its time focus the attention of elite corporate lawyers, who used their considerable influence inside the boardroom to grab the attention of directors and insist on more rigorous internal procedures. As has happened with other seminal “message” opinions, the lawyers probably trumpeted the dicta and subtly downplayed how tiny the remaining liability risk was in order to upgrade compliance (a legal function) as a corporate priority.

Id. Then, and even now to an extent, it was frustratingly hard to get officers and directors to devote the time, resources, and attention necessary to manage legal risks. *See id.* at 729–30.

80. *See, e.g.*, Claire Hill, *Why Did Rating Agencies Do Such a Bad Job Rating Subprime Securities?*, 71 U. PITT. L. REV. 585, 598 (2010).

81. *See* HILL & PAINTER, *supra* note 50, at 54–56.

82. *See generally* Hill, *Financial Appearances*, *supra* note 50.

For purposes of this analysis, we assume a middle-ground view of compliance: being a good citizen should not require being maximalist about compliance, but it does require some distance from the absolute end of the minimalist line, including, presumptively, not having a business model, the point of which is to get “away with” as much as one can.⁸³

CONCLUSION

Lawyers are supposed to promote their clients’ interests. Especially in the litigation context, the possibility that doing so might be counter to society’s interests is acknowledged. But lawyers, as zealous advocates, are supposed to be facing other equally zealous advocates; society is thereby supposed to be protected. Similarly, in the classic economics worldview, ideally, A’s self-interest dukes it out with B’s; government intervention is called for when there is some sort of market imperfection that impedes a fair and vigorous fight. Of course, the existence of imperfections—in all spheres—is generally acknowledged. The problem, though, is that analyses and salient examples of bad agents—such as the paradigmatic plaintiffs’ lawyer filing “cookie-cutter” complaints that they intend to, and do, settle quickly with money for themselves and very little, if anything, for their clients—also involve bad (or at least neutral) citizens. These agents’ principal aim is to benefit themselves, whatever the effect on their clients (or, often, third parties). We have argued, though, that there are “bad” agents, not fully serving their principals, who are doing good for society, and that criticism of such agents is misplaced. Nobody would, we presume, use as a paradigmatic case of a bad agent a lawyer who counseled against her clients’ lawbreaking even though an irrefutable cost-benefit analysis indicated that the expected benefit to the client of doing so was enormously high. This suggests that the concept of good agent embeds at least some consideration of societal interest.

As already noted, both the general law of agency and the particular law governing the duty of lawyers to their clients acknowledge that agents/lawyers do not fulfill their duty to their principal/client—indeed, they violate that duty—when they help them break the law.⁸⁴ This rightly goes some ways towards recognizing the importance of good citizenship as well as good agency. But what of circumstances where the behavior in question is not clearly illegal and, indeed, may even be clearly legal? What, if any, scope do and should lawyers have to counsel action that will help, or at least not harm, society even if doing so will hurt their client? In terms of our four categories, does the fiduciary duty of lawyers require that, so long as the behavior is legal, a lawyer acting as a good agent but bad citizen is fulfilling her duty while one acting as a bad agent but good citizen is not?

The ethical rules governing lawyers seem to leave some room for the values of good citizenship. Rule 2.1 of the Model Rules of Professional

83. It also requires not making a simple cost-benefit assessment as to the expected benefit of financial maneuvering given the ability to limit the probability of detection and the amount of any sanction.

84. *See supra* note 14 and accompanying text.

Conduct provides that in a lawyer's representation of a client, the 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."⁸⁵ The comments to this rule further provide that "[i]t 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."⁸⁶

The rule and comments leave some ambiguity as to the proper scope of moral, ethical, and similar considerations. Are those considerations relevant only insofar as they may affect the best interests of the client? Are they relevant only insofar as the client is willing to accept their relevance? As we have seen, even with for-profit corporations, a broad understanding of what may affect long-term profitability can go a long way to reconciling being a good agent with being a good citizen, but it cannot go all the way.

We believe that Rule 2.1 should be interpreted to allow lawyers to render advice to clients in favor of actions that may promote the public interest while hurting the interest of their client, even understanding the latter interest broadly. After all, the point of law and the legal system ultimately is to promote the public interest. Lawyers have a special relationship to the legal system and, hence, to the public interest. The first line of the preamble to the Model Rules of Professional Conduct is: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."⁸⁷

But perhaps one key word in Rule 2.1 gives a limiting principle to how far lawyers can and should go in rendering such advice. That word is "candid."⁸⁸ A lawyer must render candid advice. If a lawyer believes that her advice would advance the public good but may hurt her client's personal interests, she should explain that to her client. Let the client make the final choice between public and private interest. If the lawyer is upset with how a client chooses, she can always choose to cease representing that client.

85. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

86. *Id.* r. 2.1 cmt. 2. For an argument that a proper and important role of transactional lawyers is to act as "gatekeepers" who help protect third parties, as opposed to "loophole engineers" who help their clients get around regulatory limitations, see Richard W. Painter, *Transaction Cost Engineers, Loophole Engineers or Gatekeepers: The Role of Business Lawyers After the Financial Meltdown*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 255, 258–70 (Claire A. Hill & Brett H. McDonnell eds., 2012).

87. MODEL RULES OF PROF'L CONDUCT pmb1.

88. *Id.* r. 2.1.