

AMERICAN BAR ASSOCIATION

**TASK FORCE ON INTERNATIONAL RULE OF LAW SYMPOSIA
RULE OF LAW INITIATIVE**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association encourages corporations, lawyers, law
2 firms and other professionals to promote corporate citizenship by supporting: compliant
3 and ethical corporate behavior globally; global pro bono services; promotion of the rule
4 of law; encouraging governments to pursue policies that support corporate citizenship
5 and the rule of law; and sharing of best practices in corporate citizenship.

REPORT

Background

The important relationship between the rule of law and corporate social responsibility (CSR) was one of the topics discussed at the Rule of Law Symposium held in September 2006 by the American Bar Association (ABA) and the International Bar Association. This Recommendation and Report is the product of a working group that was commissioned by ABA President Karen Mathis following the Symposium to address potential policies or activities for consideration that would enable the ABA or other national bar associations to make further contributions to support CSR and the rule of law globally.

Corporate Social Responsibility and Global Corporate Citizenship

In recent years, there have been attempts to define socially responsible corporate behavior and to describe a societal mission for business enterprises that goes beyond traditional notions of economic gain. The working group chose to adopt a broad definition of corporate social responsibility that emphasizes concepts of corporate citizenship. In this context corporate citizenship refers to voluntary corporate programs and practices that promote fairness, transparency, accountability and ethical behavior across global business, legal and social institutions. There are three fundamental tenets of good corporate citizenship. First, good corporate citizens provide strong sustained economic performance, which benefits the corporation's shareholders as well as its employees, communities and other stakeholders over time. Second, corporate citizenship requires compliance with the law, including compliance with all legal and financial rules, a strong culture of integrity, and robust systems and processes for the detection, evaluation, resolution and prevention of illegal corporate conduct. Third, good corporate citizenship includes voluntary action beyond legal requirements to promote basic human rights and labor standards, support anti-corruption efforts, responsible environmental practices and advance important values such as candor, fair dealing, sustainability and achieving a balance between private and public interests. All three of these tenets intersect with the rule of law. The working group's broad definition of corporation includes corporations, law firms and other businesses and corporate enterprises.

The high-profile corporate scandals of recent years, the challenges of globalization and widespread concerns about global warming, among other things, have led to increased focus on corporate accountability and efforts to mold corporate behavior to certain norms through regulation. The parties interested in promoting responsible corporate behavior include government and regulatory bodies, consumers, shareholders, analysts, activists, labor unions, employees, non-government organizations (NGOs), community organizations and the news media.

The response to this heightened attention has been the creation of a rapidly evolving universe of voluntary reporting measures, codes and guidelines that include United Nations initiatives such as the Global Compact, ILO conventions on labor practices,

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OECD Guidelines for Multinational Enterprises, voluntary standards such as the Global Sullivan Principles, trade association and industry initiatives. Corporations have also adopted internally developed corporate codes of conduct and social responsibility and citizenship principles out of enlightened self-interest in an effort to shift attention to the social benefit and utility of corporations and their contributions to society at large.

A common thread across these efforts is the recognition that corporate citizenship and the rule of law are interdependent. To succeed, corporate citizenship efforts require reliable, equitable and independent judicial and legal institutions and systems. If legal systems do not sanction corruption, anti-competitive behavior, harmful environmental practices and the abuse of human rights, then it is more difficult (although not impossible) for corporations to require and enforce non-corrupt, fair and transparent practices of their employees on a worldwide basis. Conversely those legal systems that adhere to the rule of law will encourage activities and investment by compliant, non-corrupt corporations that maintain responsible labor, environmental and other corporate practices and advance private interests in a manner that benefits the broader society. Corporate citizenship obligations intended to promote extra-legal social or political objectives should not be legally imposed. Voluntary corporate citizenship complements legal systems that are based on the rule of law.

Corporate citizenship programs encompass all or many of the following elements:

- corporate legal compliance
- corporate governance and business ethics
- employee health and safety
- environmental stewardship and sustainability
- sustainability of products and services
- human rights (including labor rights)
- community development
- corporate philanthropy and employee volunteering
- principles of fair competition
- anti-bribery and anti-corruption measures
- supplier conduct and supply chain management

Corporate citizenship programs help define and drive ethical standards and responsible behavior in these important areas. Often these programs also include extra-legal commitments, particularly regarding social and environmental sustainability issues. This reflects the influential role that large multinational corporations can play as good corporate citizens, particularly in countries where legal and regulatory systems are still developing. In these countries, corporate citizenship programs help foster the rule of law by emphasizing systems characterized by fairness, transparency, accountability and ethical behavior. They also help establish standards and drive enforcement of those standards.

Adherence to the rule of law should be viewed as essential to sustainable economic and social development. Corporations prefer to invest in countries that have fair, transparent and accountable legal systems, with laws that are public, not retroactive and uniformly applied through a system that comports with notions of due process. These countries have an independent bar and a judiciary with jurisdiction to review both governmental and private action, and recognize fundamental human rights.

By encouraging legal compliance, good governance, anti-corruption, environmental stewardship, promotion of human rights, responsible supplier conduct and other measures that support fairness, transparency, accountability and ethical behavior, global corporate citizenship programs provide valuable support for the development and enforcement of the rule of law. Corporate citizenship programs can spur corporations to engage with governments to raise the legal standards and expectations for all corporations, creating a fair and level playing field.

Corporations' (including Law Firms as Corporate Entities) Role in Supporting Corporate Citizenship and the Rule of Law.

Corporations and the lawyers who serve them benefit when they actively engage in corporate citizenship programs and seek to further the rule of law. Aside from helping highlight the social benefit and utility of corporations through their economic contributions, corporate citizenship programs can spur corporations to work with governments on broader policy issues. This kind of private/public collaboration can help to raise the legal standards and expectations for all corporations to create a fair and level playing field, thereby fostering the rule of law. Corporations should:

- undertake voluntary corporate citizenship programs that are based on three fundamental tenets of being a good corporate citizen – first, strong, sustained economic performance benefits all stakeholders; second, strict compliance with the law is required; and third, good corporate citizens undertake voluntary action beyond legal requirements to promote social and economic development. Corporate citizenship programs often integrate corporate compliance, corporate governance, business ethics and social and environmental citizenship in areas such as employee health and safety, environmental stewardship, sustainability of products or services, human rights (including labor rights), community development, corporate philanthropy and employee volunteering, principles of fair competition, anti-bribery and anti-corruption measures and supplier conduct and supply chain management.
- support other enterprises in their citizenship efforts by exchanging best practices, raising awareness of and highlighting the values for good corporate citizenship and promoting adoption of these values by enterprises of all sizes and their stakeholders.
- support global pro bono services and promotion of the rule of law as an integral part of good corporate citizenship because of the benefits that will come to the corporations when there is greater fairness, transparency, accountability and ethical behavior across business, legal and social institutions.

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- engage with governments to promote government policy that recognizes and supports compliance and the rule of law.

A separate issue is how to define appropriate norms for corporate responsibility in situations where government policy is inconsistent with socially responsible behavior or inimical to the promotion of the rule of law. It is worth noting that the original Sullivan Principles were conceived in an effort to find a way for General Motors to continue its productive business activities in South Africa, while not furthering apartheid, rather than divesting and visiting a significant loss on the South African economy. There are important questions that require reflection and further study, such as whether corporate agents should be required to exercise their influence with government and press for changes in policy or whether corporations should be expected to support political or reform movements external to the incumbent government that seek to change existing policies or even restructure governmental institutions to further the rule of law.

The resolution of these and other issues will pit some measure of economic self-interest against aspirational goals for corporate behavior. It is not realistic to expect corporations to incur significant economic losses or abandon valuable properties or opportunities in circumstances where the character of governmental policy is controversial and perhaps even ambiguous. Public policy on corporate citizenship should be flexible and take account of the fact that corporate decision-making is neither monolithic nor uniform in response to particular circumstances. Policymakers, NGOs and the public must be able to distinguish between organizations with a record of good faith adherence to established socially responsible policies and practices and those which do not have a record of good global corporate citizenship.

The evolution of international conventions on corporate business practices and voluntary frameworks such as the Global Sullivan Principles of Social Responsibility, the United Nations Global Compact, or corporations' own citizenship or social responsibility principles will provide some guidance on these difficult questions. Consideration of the adoption of these types of voluntary standards can be the starting point for the conversation about whether, for example, it is better for corporations to engage such governments and encourage policy change by example or dialogue.

Lawyers' Role in Supporting Corporate Citizenship and the Rule of Law.

Lawyers should embrace corporate citizenship programs as an important means of promoting fairness, transparency, accountability and ethical behavior, which are long-held values of the legal profession. In 1992, the ABA Task Force on Law Schools and the Profession, sometimes referred to as the MacCrate Commission after its chairperson, Robert MacCrate, prepared a comprehensive Statement of Fundamental Lawyering Skills and Professional Values, including Value 2, "Striving to Promote Justice, Fairness and Morality," which includes a commitment to justice, fairness and morality in a lawyer's daily practice and dealings with clients, adversaries and the community to which the lawyer belongs, but also embraces the lawyer's contribution to ensure adequate legal services for those unable to pay, and the lawyer's participation in fulfillment of the

profession's responsibility to enhance the capacity of law and legal institutions to do justice. Similarly, ABA Model Rule 2.1 provides that "[i]n 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." Among other things, the MacCrate Commission and the ABA Model Rules provide the foundation on which to build this policy recommendation for lawyers to support corporate citizenship and the rule of law. It is within this framework of a dedication to the fundamental professional values that define the legal profession that the working group examines the impact of corporate citizenship as an opportunity for individual lawyers to support global pro bono services and the rule of law.

Lawyers have the tools, skills and experiences to help corporations and law firms comply with existing laws and apply principles of good governance, while also supporting the development and implementation of extra-legal social and environmental sustainability commitments that often are part of global corporate citizenship programs. In particular, lawyers should:

- Support corporate (including law firm) integrity, compliance and good governance.
- Participate actively in defining standards for good citizenship for their corporations/law firms, including helping to define and implement positions regarding anti-corruption, environmental sustainability, human rights, supplier conduct and other corporate policy areas beyond what is legally-required.
- Help ensure that their corporations/firms "walk the talk" with respect to their corporate social responsibility commitments.
- Promulgate the view that part of a corporation's or law firm's corporate citizenship should encompass promoting the rule of law through supporting or engaging in pro-bono services globally, encouraging lawyers to support the rule of law globally.

Lawyers have played, and continue to play, an important role in developing and implementing corporate citizenship programs as tools in advancing the rule of law. Lawyers should be the guardians of their corporations' reputations and are well-positioned to ensure zero tolerance within a corporation for non-compliance with laws, in a manner consistent with their professional obligations. By counseling integrity and compliance with law while insisting on transparency and legitimacy in governmental institutions, lawyers can promote constructive engagement between corporate citizens and government to resolve difficult problems.

Lawyers can, and should help develop creative ways of reconciling corporate goals of economic productivity with the benefit to corporate reputation from advancing the conditions of local populations and environments. Lawyers are also best situated to think about the risks and reputation of their clients, which is often what drives corporate citizenship endeavors beyond what is legally required, and to help their clients best

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implement these higher goals. In doing so, lawyers can help develop more robust corporate citizenship concepts. Among other things, lawyers should counsel clients that:

- Corporate citizenship includes engagement with government and social institutions on broader policy issues that impact social and economic development.
- Corporate citizenship is not separate from business strategy and operations; it is about the integration of broader societal concerns into business strategy and business operations in ways that enhance reputation and sustainable business prospects.
- The value of corporate citizenship policies is worth the devotion of resources, both financial and human.
- Interactions with internal and external stakeholders (such as employees, shareholders, customers, neighbors, public authorities, NGOs and suppliers) regarding corporate citizenship can benefit the corporate client.
- Corporate citizenship must involve more than symbolism; corporations must “walk the talk.”

Lawyers have a duty to evaluate the local legal regime and provide advice on the legal implications of socially responsible behavior, but mere analysis of legal issues is only the starting point. Lawyers must help their corporate clients balance legal considerations against economic and other legitimate interests in determining a course of corporate investment or action. Lawyers are well-equipped to play a leading role in this decision-making process, and they should serve as active participants in determining the appropriate balance of legal, business and other considerations.

Lawyers are members of a profession that bears special responsibilities for the quality of justice everywhere and, hence, contributing to improve people’s standard of living. The core of the legal professional identity is commitment to promoting fairness, transparency, accountability and ethical behavior in our communities. As part of this duty to the global communities in which their corporations and law firms operate, lawyers should be encouraged to participate in global pro bono activities that promote the rule of law, provide equal access to legal systems, and improve the standard of living of those often most in need. Lawyers are in a unique position to encourage corporations and law firms to consider pro bono service globally and support for the rule of law globally to be an essential part of an effective corporate citizenship program because of the reputation and other benefits that will accrue to their corporations from these endeavors. Lawyers should be encouraged to support the development of the rule of law everywhere in the global communities where clients operate - from supporting a system of self-government to supporting transparent, fair laws, and the development of a strong legal framework to supporting competent, independent judiciary and equal access to justice. The goal should be lawyers without borders.

Governments' Role in Supporting Global Corporate Citizenship.

Corporations do not engage in responsible conduct and business practices in a vacuum; rather they will likely respond to governmental policies and incentives, both positive and negative, in making business decisions and determining the level of their engagement with local institutions. As a consequence, the degree to which corporate citizenship and social responsibility efforts will gain momentum is inextricably tied to governmental policies that promote the rule of law and stable legal institutions, as well as ethical governance and corporate compliance.

Corporations should enforce responsible practices even when such practices are not required by local economic conditions or actions of local government. Some corporations have adopted policies under which they voluntarily adhere to consistent standards, without regard to less demanding local laws or regulations of countries in which they conduct business. Some corporations have adopted policies under which they voluntarily adhere to consistent standards, without regard to the local laws or regulations of countries in which they conduct business. The Global Sullivan Principles of Social Responsibility are an example of a voluntary framework of standards for fair labor practices, environmental conservation, employment non-discrimination, and community engagement, based on the Sullivan Principles developed for businesses in South Africa during the apartheid regime. Corporations can be encouraged to adhere to other similar international conventions and many have incorporated recommended practices into their own developed social responsibility or corporate citizenship principles for their international business operations.

However, it is not productive to encourage governments, particularly in developing nations, to abdicate their responsibilities in these areas, and rely on multinational corporations to become effectively supranational governmental agents. Rather, the government has an important role and obligation in reinforcing voluntary corporate citizenship activities and ensuring that those enterprises that voluntarily adopt socially responsible practices are not disadvantaged or penalized relative to those organizations, whether local or foreign, which fail to observe similar practices and policies.

Governmental policy to advance the rule of law and support corporate citizenship must have, at its foundation, a legal regime that is transparent, ethical, fair and accountable. This can include (i) enactment and enforcement of laws against corruption, (ii) evenhanded enforcement of environmental, workers rights and wage laws, and (iii) preservation of an independent and unbiased judicial system. The ABA is on record in support of international conventions against corruption, (Resolution 05A110, Resolution 01M105A, Resolution 98A302, as well as Board of Governors actions in 2/95 and 8/97). In addition, proposed policies to be developed in connection with the rule of law endeavors of the ABA and other national bar associations should be directed at supporting and reinforcing responsible corporate behavior.

Another area in which government can play a supportive role for enlightened corporate conduct is through recognition of the value of attorney-client privilege as an important

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element in internal compliance and audit activities, which in turn promote lawful behavior and self-correction. Local laws which provide unduly broad investigative authority or do not recognize the concept of privilege may discourage corporations from engaging in beneficial audit and review of their actions and diminish the role of lawyers as agents for the advancement of responsible conduct.

Yet governmental mandates of specific measures, or the creation of disincentives to pursue economic gain from investment activities, ostensibly in the name of promoting responsible corporate behavior, are productive to furthering the rule of law. While a core principal of corporate citizenship is that corporations must respect and observe local laws, and indeed pursue ethical objectives beyond minimum legal requirements, local laws should not regulate corporate social behavior or impose exactions or taxes to enforce policies rooted more in political considerations and pet economic theories, than in the protection of social welfare and individual rights. Difficult issues will arise for all parties in navigating the straits between the legitimate role of government in advancing the interests of its citizens and economy, and the role of multinational enterprises in creating economic opportunity and making needed capital investment. A critical role will be reserved to the judiciary, as an arbiter of these conflicts, and judicial fostering of rule of law principles will be essential to defining the proper roles for government and business and permitting rational decisions to be made by business enterprises as they operate globally.

Summary of Reasons for the House of Delegates to Approve the Recommendation.

Global corporations (including law firms as corporate entities), lawyers, other professionals and governments have an interest in mutually reinforcing efforts to promote sustainable social and economic development and to further the rule of law, including supporting voluntary corporate social responsibility or corporate citizenship programs. While their primary interests will differ, each must recognize the legitimate objectives and needs of the others and seek to reconcile conflicts and form alliances with others who are similarly committed to socially responsible behavior and share best practices so that all corporations of all sizes and their stakeholders will increasingly promote fairness, transparency, accountability and ethical behavior. This recommendation will help to enhance the rule of law, encourage helpful behavior by corporations, lawyers, other professionals and governments to support corporate citizenship and the rule of law, and bring attention to the need for corporations, lawyers, governments and other professionals so to act. The ABA should play a leading role in the broader effort to develop and promote corporate citizenship, compliance and the rule of law.

Respectfully submitted,

Robert Stein, Co-chair
Dianna Kempe, Co-Chair
Task Force on International Rule of Law
Symposia

August 2007

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Task Force on International Rule of Law Symposia

Submitted By: Robert Stein, Co-chair, Task Force on International Rule of Law Symposia
Dianna Kempe, Co-chair, Task Force on International Rule of Law Symposia

1. Summary of Recommendation(s).

The American Bar Association encourages corporations, lawyers, law firms and other professionals to promote and encourage corporate citizenship and ethical corporate behavior in multinational business to support the rule of law and encourage governments to pursue policies that support corporate citizenship.

2. Approval by Submitting Entity.

In May 2007 the Task Force on International Rule of Law Symposia voted by email to approve this recommendation and report.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

There has been no similar recommendation previously submitted to the House or Board.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Existing ABA policies are consistent with this recommendation on issues such as suppression of corruption and advancement of the rule of law, but no existing policy is directly relevant to this recommendation.

5. What urgency exists which requires action at this meeting of the House?

The ongoing Rule of Law efforts of the ABA and the planned ABA World Justice Forum Project in 2008 will be enhanced by adoption of this recommendation.

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6. Status of Legislation. (If applicable.) N/A
7. Cost to the Association. (Both direct and indirect costs.)
Adoption of the recommendation would not result in any additional direct or indirect cost to the association.
8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.
9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

Rule of Law Initiative (May 4, 2007)
Section of Business Law (May 4, 2007)
Section of International Law (May 4, 2007). The section has reviewed the proposal and provided helpful suggestions that have been incorporated into the final version. While expressing general support, it has not yet been submitted to the council for formal adoption..

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

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EXECUTIVE SUMMARY1. Summary of the Recommendation

The recommendation would establish an American Bar Association policy encouraging global corporations to adopt voluntary corporate citizenship policies and practices to advance the rule of law. The recommendation would also encourage law firms, lawyers, other professionals and governments to promote and support corporate citizenship and share best practices.

2. Summary of the Issue that the Resolution Addresses

The ABA is promoting the advancement of the rule of law through its Rule of Law Initiative, its International Rule of Law Symposia, the upcoming World Justice Forum and other projects, but these efforts require the development of enlightened corporate policies and sharing of best practices on issues such as the role of corporations as global citizens in promoting the rule of law.

3. Please Explain How the Proposed Policy Position will Address the Issue

The recommendation states a framework for encouraging ethical and compliant corporate behavior and encouraging law firms, lawyers, other professionals and governments to support corporate citizenship activities in order to enhance the rule of law and support fairness, transparency, accountability and ethical behavior.

4. Summary of Minority Views

None expressed to date.