

BUSINESS LAW TODAY

Leadership Competencies for Business Lawyers: Using a Framework that Links Strategy, Law, and Ethics

By [George Siedel](#)

In 2017, *The Business Lawyer* published a landmark report titled “[Defining Key Competencies for Business Lawyers](#),” which was prepared by a task force that the ABA Business Law Section’s Business Law Education Committee created in 2013. The task force, drawing on the framework of the [MacCrate Report](#), but with a focus on business lawyer competencies, directed the report toward faculty and students in law schools and business law practitioners. Barbara Wagner deserves special praise for serving as the primary author of this report, which provides valuable guidance for law school curriculum committees and for practitioners tasked with creating training and development opportunities.

The task force, recognizing that the list of competencies might be modified in the future, invited comments on the report. One aspect of the report that the task force might want to address is the minimal discussion of competencies relating to the leadership role played by business lawyers. The report does include specific skills relating to leadership that are inherent in a business lawyer’s work, such as problem solving, critical thinking, and communica-

tion, and in a section that extends beyond the MacCrate framework, the report lists people skills and other behavioral competencies of business lawyers.

However, the report is quiescent when discussing broader leadership competencies. These competencies include thinking strategically about how a lawyer’s risk-management skills relate to the value-creation focus of business strategy, motivating others in an organization, leading change management, developing a leadership vision, building social capital, and building a team.

When covering the business knowledge that a lawyer should possess, the report discusses topics such as finance, accounting, supply chain, marketing, and a “facility with numbers.” Although this business knowledge certainly is useful, there is little mention of broader leadership competencies. In its over 26,000 words, the report (according to my keyboard’s “Find” function) includes the word “strategy” in only four sentences—two dealing with transactional strategy and two dealing with factual investigations. The word “team” is mentioned only once, and the words “leader,” “leadership,” and “vi-

sion” do not appear in the report. Concepts relating to motivating others within an organization, change management, and social capital are also missing. Although the report does discuss the important competency of adding value to a deal, it ignores the lawyer’s broader role in developing value-creating business strategies.

These omissions are unfortunate from both practitioner and academic perspectives. From a practitioner perspective, the percentage of lawyers in CEO positions has declined over the past century. A 2016 article titled “[Who Let the Lawyers Out](#)” in the *University of Pennsylvania Journal of Business Law* notes that, prior to 1930, over 75 percent of American CEOs had a legal education; by 2012 this figure had dropped to nine percent according to *U.S. News & World Report*.

The tide might be turning. A [2013 ACC/Georgetown study](#) concludes that the value of strategic input from general counsel will increase in the future. This is an important shift from the traditional management assumption that law is merely a cost center. When the Directors Roundtable honored Lori Schechter in 2016 for her work as

general counsel of McKesson Corporation, her remarks reflect this new direction. In her words, the way to “get a seat at the table” is “a combination of not just being the naysayer or the person looking at the risk issues, but also being the person that’s helping to create the value.”

From an academic perspective, the opening lines of an article in the Winter 2017 issue of the *Journal of Law, Business & Ethics* note the lack of leadership education in law schools: “In the recent experience of this recent law school graduate, I observe a lack of appreciation that leadership, in legal education or the profession, is vital to wellbeing. There is utility in educating law students about leadership as an essential or core competency for ethical engagement and success as a lawyer.”

Law schools have abundant opportunities to include leadership education and strategic thinking in the curriculum. For example, the required course on contracts could cover strategies to increase the value-creating function of a contract as a business tool as well as a legal document. The required course on torts could explore value-creating aspects of tort law, such as the use of product liability prevention processes to identify new product opportunities. In addition, a third-year capstone course on, say, “law and leadership” could aggregate learning from the required law school courses using the lens of value-creating legal strategies, just as final-semester capstone business strategy courses in business schools combine elements from business school core courses on finance, marketing, operations, and management.

This article focuses on a key aspect of a business lawyer’s leadership role—the ability to provide strategic input into management decisions. The Harvard Business School’s required course on leadership provides a useful framework for academics and practitioners interested in this element of leadership. The course utilizes a three-part model—based on the intersection of economics, law, and ethics—that can be used to conceptualize a lawyer’s leadership role in the development and implementation of business strategy.

The following sections, adapted from Chapter 1 of *The Three Pillar Model for Business Decisions: Strategy, Law & Ethics* (Van Rye Publishing, 2016), apply the Harvard model to the work of a business lawyer. The first section covers the triadic framework used in the course. The second section recommends an expansion of the model by replacing economics with strategy. The third section identifies a key challenge in using the model—the gap between the value-creation orientation of strategy and the risk-management focus of law. The fourth section suggests an approach for closing the gap. The article concludes with practical examples that illustrate the important role that law can play in value creation.

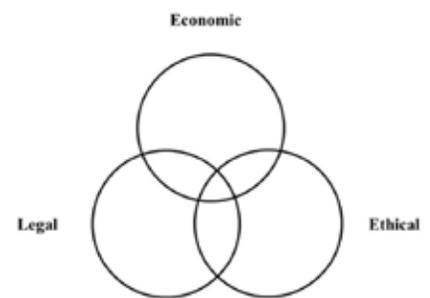
The Harvard Leadership Course

Academics Timothy Fort of Indiana University, Archie Carroll of the University of Georgia, and Mark Schwartz of York University have developed theoretical models of business decision making based on economics, law, and ethics. The clearest practical application of these models originated at Harvard Business School (HBS). I first encountered this application in 1998 when I was a visiting professor of business administration at Harvard and served on the teaching committee for a module called “Leadership, Values and Decision Making” that was taught to all MBA students. This module later morphed into the current required HBS leadership course, “Leadership and Corporate Accountability” (LCA). Professor Lynn Sharp Paine, former senior associate dean at HBS, described the practical nature of the course in Datar et al., *Rethinking the MBA*: “We are training future practitioners. . . . We focus not on rare events or abstract issues in moral philosophy, but on decisions that students will have to make in their careers.”

LCA focuses on the three key elements that form the foundation for decision-making in business—economics, law, and ethics. The 2011 online version of the course syllabus describes the three categories of a business leader’s responsibilities as: “. . . economic, legal, and ethical. Economic responsibilities relate to resource allocation

and wealth creation; legal responsibilities flow from formal laws and regulations; and ethical responsibilities have to do with basic principles and standards of conduct.”

The course is especially challenging and important because it takes future leaders into what the syllabus calls the “grey areas” of business. The analytical perspectives of the economics, law, and ethics triad, a staple of everyday business decision making, shape these real-world challenges. The following diagram from a course overview that students receive at the beginning of LCA depicts the overlap of the three perspectives. As the course overview notes, “The basic idea is that outstanding managers develop plans of action that fall in the ‘sweet spot’ at the intersection of their economic, legal, and ethical responsibilities.”

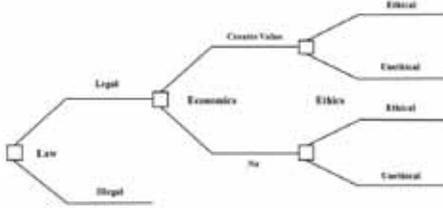


The course guide for instructors elaborates on this sweet spot, which is also described as the “zone of sustainability”:

Actions and strategies that fall inside this zone tend to be acceptable to the firm’s constituencies and thus repeatable over time, while those that lie outside typically invite negative repercussions from injured, wronged, or otherwise disappointed parties. Actions outside the zone may even lead to the firm’s failure, especially if pursued at length.

The three dimensions of the Harvard model are also depicted in the form of the following decision tree, adapted from a diagram developed by Constance Bagley (a senior research scholar at Yale Law School). The original diagram appeared in a 2003

Harvard Business Review article titled [“The Ethical Leader’s Decision Tree.”](#)



The ideal decision-making path would follow the “Legal,” “Creates Value,” and “Ethical” branches, although in some cases another path might be justified. For example, business leaders might decide to take an action that benefits society even if it does not create economic value for shareholders.

Expanding the Harvard Model

The Harvard model provides a practical framework for making business decisions. However, expanding the economics perspective makes the model even more useful in business and other settings.

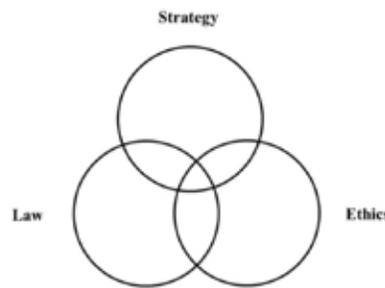
Candidates for this expansion include the seven core functions that are critical to business success: accounting, finance, legal, marketing, operations, human resources, and strategy. Of these functions, strategy is the most likely replacement for economics. Defined broadly, strategy involves establishing and achieving goals. In a business setting, strategy focuses on the goal of value creation for shareholders, which brings into play all functions and disciplines, including economics.

Strategy is also an attractive candidate because it is important in all organizations (including nonprofits that are not concerned with creating shareholder value) and in the political realm. On a personal level, the strategic ability to establish and achieve goals is also key to success. By replacing economics with strategy, the three dimensions of decision-making—the “three pillars” that are described in *The Three Pillar Model for Business Decisions: Strategy, Law & Ethics*—provide a framework that is appropriate for all forms of business, leadership, and personal decision-making.

In a business setting the key questions that decision makers should address are:

- Strategy Pillar: What is our value-creation goal and how do we intend to achieve it?
- Law Pillar: How can we manage the legal risks associated with our strategy?
- Ethics Pillar: Is our proposed strategic decision ethical?

The following diagram depicts the expanded version of the Harvard model in which economics is replaced by strategy:



The Gap between the Strategy Pillar and the Law Pillar

This revised model—with its sweet spot in the middle illustrating an overlap among the three pillars—might be more aspirational than descriptive. True, the overlap between the strategy pillar and the ethics pillar has increased in recent years, especially as more companies embrace corporate social responsibility. For example, the previously mentioned “Who Let the Lawyers Out” article notes that former Johnson & Johnson CEO Ralph Larson was asked whether he wanted the company “to maximize shareholder value or be a good corporate citizen.” He answered, “Yes.”

Law and ethics are even more intertwined than strategy and ethics. Legal doctrines such as fraud, unconscionability, good faith, and fiduciary duty provide solid guidelines for ethical conduct. Furthermore, company “codes of conduct” frequently blend law and ethics. Of course, when lawyers provide ethical leadership, their advice might extend beyond the law.

In a talk at the Directors Roundtable, former Senior Vice President and General Counsel of General Electric Company Ben W. Heineman discussed the role of a lawyer-statesman:

It’s pretty simple. The first question is, “Is it legal?” And the last question [is], “Is it right?” Your job inside the corporation is to ask that “Is it right?” question insistently and to move way beyond legal issues to all the political, economic, and social impacts of what the corporation is doing. There are basically three roles for a lawyer: expert, counselor and leader. In basically asking that “Is it right?” question as a lawyer-statesman, you are acting in all three roles.

Although there is overlap between the other pillars, a gap often exists between the strategy pillar and the law pillar. For example, with the exception of a PESTLE analysis (that examines Political, Economic, Social, Technological, Legal, and Environmental factors), the multitude of strategy concepts and frameworks that have developed over the years generally overlook the importance of law. As a result, in reality the model looks more like this.



The gap between strategy and law results in large part from the key role business lawyers play in managing risk, a role that often bridles a business decision-maker’s enthusiasm for certain value-creation strategies. As the task force report explains, lawyers

analyzing a proposed transaction must put themselves “in the shoes of someone attacking the plan.” Business lawyers often need what the ACC/Georgetown study calls “managerial courage” when providing the independent professional advice this risk-management role requires: “Managerial courage is about the willingness and ability to speak up and represent the organization and act in its best interest, even when it feels uncomfortable or may reflect poorly on colleagues.”

This risk-management role is increasingly important, given that surveys indicate that law has emerged as the most important category of business risk. For example, the 2015 Travelers Business Risk Index was developed from a survey of more than 1,200 business risk managers representing 10 industries. The survey questioned managers about their greatest risk concerns among several categories, including financial, operational, and legal risk. Only two categories—“Legal Liability” and “Medical Cost Inflation”—were included in the top ten risks for every industry. The top ten lists for nine of the 10 industries included another category of legal risk, “Complying with Laws.”

Closing the Gap between Strategy and Law

The gap between the strategy pillar and the law pillar is reminiscent of the “mind the gap” recording that warns travelers boarding London trains to be careful of the gap between the train and the platform. Although minding the gap—that is, understanding that the gap exists—is important, deciding what action to take after recognizing the gap is essential.

Companies that are successful in closing the gap have an opportunity to create competitive advantage over their rivals. Robert Bird, writing in the *Connecticut Law Review* (November 2011), notes that, when this happens, the competitive advantage can be sustainable. In other words, the sweet spot in decision-making that Harvard calls the zone of sustainability might more accurately be called the zone of sustainable competitive advantage.

Bird based his conclusion on a legal analysis using a resource-attribute framework that strategy professor Jay Barney developed. One takeaway from this analysis is that law’s complexity can create resources that, in Barney’s terminology, are imperfectly imitable by competitors. In other words, managers who are able to work with legal counsel to penetrate the veil of complexity that surrounds the law have an opportunity to create a sustainable competitive advantage.

Bird and coauthor David Orozco describe various pathways of corporate legal strategy in an article in the *MIT Sloan Management Review* (Fall 2014). They emphasize the need for “a fundamental change from managing risk to creating business opportunities” that requires business leaders to “regard the law as a key enabler of value creation.” The challenge for business leaders and their legal advisors in achieving this fundamental change is that the strategy pillar and the law pillar often operate as separate silos where key business questions are framed in terms of either shareholder value or risk management, either reward or risk.

At best, this parallel play is unfortunate as businesses miss opportunities to create value through synergies between strategy and law. At worst, the silo mentality is destructive when it creates a conflict between the strategy pillar and the law pillar—e.g., when a risk-averse approach results in an overly legalistic contract that hinders a business opportunity. In the previously-mentioned “Who Let the Lawyers Out” article, PepsiCo CEO Indra Nooyi commented on the combination of a perfect contract with a flawed business deal: “We cannot afford this separation of church and state.”

This silo mentality might result in what decision researchers call frame blindness. Mental frames often are useful because they enable us to simplify the complexity in our lives so that we can make rational decisions. However, simplification can come at a cost. When we view the world through a particular window (from the perspective of either the strategy pillar or the law pillar, for example), we see only part of the landscape. As noted in the 1990 book

Decision Traps, narrowing the scope of our vision causes us to become susceptible to frame blindness—much like the blind spot on the side-view mirrors of a car. By failing to consider the big picture, we might miss the best options when making decisions.

For example, I assign an exercise in which graduate students and executives (including lawyers) play the role of a C-suite executive considering the advice of legal counsel in deciding whether to accept a settlement offer from the opposing side in a lawsuit. Almost everyone exhibits frame blindness by concentrating on the legal issues raised in the case. In so doing, they overlook fundamental financial and strategic concerns, such as the net present value of a victory in court, opportunity costs, and the possibility of creating a joint venture with the other side.

To close the gap between strategy and law, business leaders and legal counsel should attempt to reduce frame blindness by reframing the shareholder value orientation that characterizes the strategy pillar of decision making and the risk-management orientation that dominates the law pillar. A big-picture mindset can be useful in the reframing process. In his 1993 negotiation book, *Getting Past No*, William Ury uses the phrase “going to the balcony” as a metaphor to describe the mental detachment that often is necessary to create this mindset. From their balcony vantage point, business leaders and legal counsel have an opportunity to gain a broad perspective that allows them to see the entire playing field without the blind spots that hinder sound decision making when they operate within their separate silos.

When observing the playing field, they should take special note of the key stakeholders (in addition to shareholders) who impact business success. Which stakeholders have the greatest effect on a company’s economic value? A 2011 McKinsey survey that posed this question produced responses from 1,396 executives worldwide. Respondents were allowed to select multiple responses from a list of stakeholders. Three-quarters of the executives felt that customers had the greatest effect on economic value.

The other main categories were government/regulators (53 percent), employees (49 percent), and investors (28 percent).

Just as the most successful negotiators have the ability to look at deals from the opposing side's perspective, business leaders and legal counsel should take into account the interests of all stakeholders affected by their decisions, not just shareholder interests. What are these stakeholder interests? How can these interests be linked to company interests to create mutual gains that benefit all parties?

By addressing these questions, decision makers can move beyond the frame blindness of the strategy and law silos toward a joint stakeholder interest mindset. This new mindset can create an intersection between the strategy pillar and the law pillar that has the potential to create competitive advantage while also benefitting stakeholders, as illustrated by the examples below.

Moving beyond frame blindness is consistent with the Proactive Law Movement in Europe. Under the leadership of Helena Haapio, an international contract counsel for Lexpert, Ltd., this movement focuses on using the law not only to manage risk, but also to create value and strengthen relationships. The Proactive Law Movement emphasizes collaboration between lawyers and various business functions.

Michael Porter and Mark Kramer, in [“Creating Shared Value”](#) published in the *Harvard Business Review* in 2011, also advocate, in part, a management philosophy similar to a stakeholder interest mindset. They redefine the purpose of the corporation as “creating shared value, not just profit per se.” However, their shared-value philosophy focuses primarily on one stakeholder—society. In their words, the principle of shared value “involves creating economic value in a way that also creates value for society by addressing its needs and challenges.” A stakeholder interest

mindset of the type advocated here, in contrast, searches for value-creating opportunities for all stakeholders identified in the McKinsey survey—customers, the government, employees, and investors.

Conclusion

To summarize, the three pillars provide a framework for making business decisions. The gap between the strategy pillar and the law pillar represents a major challenge in using this framework. By closing this gap, business decision makers can create a sweet spot at the intersection of the three pillars—a zone of sustainable competitive advantage.

Business leaders and legal counsel should ascend the balcony to reframe decisions relating to creating shareholder value (the strategy pillar) and managing risk (the law pillar). During the reframing process, they should identify and consider all stakeholder interests when developing opportunities for value creation.

[The Three Pillar Model for Business Decisions: Strategy, Law & Ethics](#) provides many practical illustrations of the benefits that arise from closing the gap between the strategy pillar and the law pillar. Here are some examples relating to specific stakeholders:

- Customers: Use product liability prevention processes as a source of new product development to meet customer needs.
- Employees: Use employment law to attract and retain the best business talent.
- Government: Use government regulation to develop new business models through disruptive innovation and a regulatory gap strategy.
- Investors: Use an intellectual property management plan to create shareholder value.
- A variety of stakeholders: Use lean contracting and contract visualization to develop contracts that are useful business

tools and use dispute-resolution processes for value creation.

Closing the gap also enables lawyers to meet their ethical leadership responsibilities. Through the stakeholder-interest mindset, they can encourage management to make decisions that are aligned with the codex developed by Professor Paine and others—a list of eight, key ethical principles based on legal requirements and codes of conduct used by the world's largest companies.

A legal director at Royal Dutch Shell told this story during a Law Society speech in London:

Two young fish swim along and happen to meet an older fish swimming the other way, who nods at them and says, “Morning, boys. How's the water?” The two young fish swim on for a bit until, eventually, one of them looks over at the other and [says], “What the hell is water?” Like water, law is around us—everywhere. It affects everything a company does. But somehow you can't see it, at least not on the surface.

Business leaders often do not understand how and why law, like the water that surrounds a fish, touches all company activities. By closing the gap between the strategy pillar and the law pillar, lawyers can show these leaders that, in addition to its traditional risk-management function, law is an important factor in the creation of value that will result in sustainable competitive advantage.

George Siedel is the Williamson Family Professor of Business Administration and the Thurnau Professor of Business Law at the University of Michigan.