



Advising the Organizational Client To Support Legal, Ethical, and Socially Responsible Decision-Making



● A Disclaimer

1. THIS IS NOT LEGAL ADVICE – CONSULT WITH AN ATTORNEY FOR LEGAL ADVICE
2. RULES OF ETHICS DIFFER BY STATE

D.C. Rule 1.13: Organization as Client

A lawyer represents the organization through its duly authorized constituents

If a lawyer knows

- An officer, employee, or other person associated with the organization
- Engaged in action, intends to act, or refuses to act that violates a “legal obligation”
- It is reasonable the act or omission may be imputed to the organization
- Is likely to result in substantial injury to the organization

The lawyer shall proceed as is reasonably necessary in the best interest of the organization to include going to highest authority in organization

● D.C. Rule 2.1: Attorney Advisor

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.**

● D.C. Rule 2.1: Attorney Advisor

The Inside Counsel Revolution, Resolving the Partner-Guardian Tension,
Ben W. Heineman, Jr.:

A lawyer-statesman assesses all corporate action through the screens of:

- Performance,
- Integrity
- Risk

“[T]he first question is: “Is it legal?”
“But the ultimate question is: “Is it right?”

● D.C. Rule 2.1: Attorney Advisor, Comment 2

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

● D.C. Rule 2.1: Attorney Advisor, Comment 3

- A client may expressly or impliedly ask the lawyer for purely technical advice.
- When **such a request is made by a client experienced in legal matters**, the lawyer may accept it at face value.
- When **such a request is made by a client inexperienced in legal matters**, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

● D.C. Rule 2.1: Attorney Advisor, Comment 5

- In general, a lawyer is not expected to give advice until asked by the client.
- However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation.
- A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.
- Rule 1.4: A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

● D.C. Rule 2.1: Attorney Advisor, Comment 1

- A client is entitled to straightforward advice expressing the lawyer's honest assessment.
- **Legal advice often involves unpleasant facts** and alternatives that a client may be disinclined to confront.
- In presenting advice, **a lawyer endeavors to sustain the client's morale and may** put advice in as acceptable a form as honesty permits.
- However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advising on Corporate Social Responsibility

- Being a “good corporate citizen”
- Corporations are responsible for responding to stakeholders:
 - Increasing shareholder value: investors
 - Following the law: regulators and prosecutors, communities, business partners
 - Safe, healthy, respectful, engaging workplace: employees
 - Fair business practices: Business partners
 - Responsible citizen: communities
- Lawyers through education, training and experience uniquely situated to advise organizational clients on making value-based decisions, socially responsible decisions

Imperatives for Social Responsibility

- Moral and ethical imperatives to meet obligations to stakeholders
- Sustainability, environmental imperatives
- Society has given the organization its license to operate
- Value and reputational imperatives
- CSR is the evolution of being a legally compliant and ethical corporate – as an organization need honor the fact that you are citizen in the communities where you exist and you benefit from that citizenship so you should give back to that community

See e.g.:

- Porter, Michael E. and Kramer, Mark R., *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, Harvard Business Review (Dec. 2006).
- Cassidy, Margaret M.; Gutterman, Alan; Miller, Travis; Walter, Ashley, *The Lawyer's Corporate Social Responsibility Deskbook, Practical Guidance for Corporate Counsel and Law Firms*, American Bar Association (Sept. 2019).

Advising on an Ethics & Compliance Program

- Ongoing, documented ethics and compliance program
 - Informed and committed leadership – a culture of ethics
 - Assess and mitigate risks of non-compliance
 - Written code of conduct, policies and procedures
 - Consistent and comprehensive training
 - Regular communications
 - Encouraging disclosing concerns and asking questions
 - Prohibit retaliation for raising concerns
 - Disciplinary response to transgressions
 - Evaluate program effectiveness
 - Monitor to detect and prevent non-compliant conduct
 - Due diligence and oversight of business partners
- See e.g.: US Federal Sentencing Guidelines, §8B2.1, Comments

THANK YOU