

# LAWYERS JOURNAL

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## A lawyer's obligations when advising an organization about conduct that may create legal risks for the organization's constituents

By Linda Michler

Formal Opinion 25-514 issued Jan. 8, 2025, by the American Bar Association (ABA) addresses the lawyer's professional obligations when engaging with nonclient constituents of a client organization. It builds upon the principles outlined in an Upjohn Warning and ABA Formal Opinion 491 (2020), emphasizing the importance of clarifying the lawyer's role in representing the organization rather than its individual constituents. The new Opinion underscores the need for attorneys to take reasonable steps to prevent or address any misunderstandings these constituents may have regarding the lawyer's representation.

The Opinion is particularly relevant in the context of complex transactions that carry significant regulatory implications. These transactions often involve not just the organization but also the business executives and board members who negotiate, approve, and implement them. Crucially, the guidance also applies to in-house counsel, who may face the daily challenge of constituents perceiving them as their personal legal advisors.

The central professional responsibility highlighted in the Opinion is to avoid situations where organizational constituents mistakenly believe that they can rely on the lawyer's advice as if the lawyer represents them personally. This policy goal formalizes and expands upon the existing practice of many attorneys to ensure clarity regarding the lawyer's role.

Earlier formal ethics opinions have clarified a lawyer's role as an advisor in various contexts. They recognized that a key aspect of this role is to help clients comply with legal requirements, which involves guiding clients in identifying and responding to legal risks. ABA Formal Opinion 491 (2020) explained that assisting in suspicious transactions is not competent if a reasonable lawyer, driven by serious doubts, would have refrained from providing assistance or would have investigated further to address those concerns. However, the Opinion also emphasizes that lawyers and clients are not required to avoid all legal risk.

### Overview

Formal Opinion 514, is entitled "A Lawyer's Obligations When Advising an Organization About Conduct that May Create Legal Risks for the Organization's Constituents." It is premised on the understanding that when advising an organization, lawyers (inside and outside) necessarily provide their legal advice through organizational constituents, e.g., employees, officers, or board members. It recognizes that there will be situations when the organization's decisions about its future actions may have legal consequences for its constituents who will be acting on the organization's behalf, including the constituents through whom the lawyer provides advice to the organizational client.

The Opinion addresses three particular situations where: (1) a lawyer – in-house or outside counsel – is giving advice to an organization client through a constituent about future action the organization may choose to take; (2) the lawyer knows or reasonably should know that the constituents are likely to have their own legal interests at stake – for example, where the lawyer is advising the organization about possible future conduct for which the constituents may be subject to personal civil or criminal liability; and (3) the lawyer does not intend to create a client-lawyer relationship with the constituent or otherwise to assume fiduciary or contractual duties to the constituent.

*(ABA Formal Opinion addresses a lawyer's advice to an organization regarding future conduct. It does not address a host of other situations in which counsel for an organization interacts with organization constituents. Among other things, the opinion does not address when a lawyer speaks with an organization constituent in the course of conducting an internal investigation of alleged misconduct on the part of the organization or in the course of other fact gathering. Nor does the opinion address when an organization's counsel attends a deposition of an organization's constituent and counsel represents only the organization or counsel represents the organization and the constituent. Nor does the opinion address the possibility that an*

*organization's lawyer might give a legal opinion to a nonclient constituent of the organization.)*

The Opinion points to two tiers of the Model Rules of Professional Conduct in support of its requirements. The first tier includes the general standard of competent representation under Rule 1.1, necessary communication under Rule 1.4, and candid advice under Rule 2.1. Where a lawyer (in-house or outside counsel) is providing advice to an organization client about future action of the organization, these three rules may require the lawyer to advise the organization when its actions pose a potential legal risk to the organization's constituents. That will be a fact-based determination.

The second tier includes Rules 4.1 ("Truthfulness in Statements to Others"), 4.3 ("Dealing with Unrepresented Person"), and 1.13(f) ("Explain Identity of Client"). When an organization's lawyer provides advice to the organization about proposed conduct that may have legal implications for individual constituents, the risk exists that the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe that the lawyer represents them, and as a result they can rely personally on that lawyer's advice. In such a situation, the Opinion interprets Rules 4.1, 4.3, and 1.13(f) as requiring the organizational lawyer to take "reasonable measures" to avoid or

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“reasonable measures” to prevent a misunderstanding about the lawyer’s role. Those may include reminders about the lawyer’s role early and often during the attorney-client relationship, and not only at times when the parties are involved on projects that carry legal implications for leadership, line management, and others.

## More to Consider

Most importantly, the Opinion recognizes that there may be more situations in which the board (and some members of management) seek their own counsel given the potential for adversity with management in particular scenarios.

The involvement of counsel to leadership team members or the board is likely to impact the time and cost associated with a particular strategy development. This goes back to the lawyer’s duty to educate non-client constituents.

Perhaps the reminders may have the salutary compliance impact of making those constituents more alert to the legal risks associated with strategies and initiatives while

deciding to pursue a particular strategy or initiative.

Any notification regarding potential legal risks to non-client constituents is to be made to the organization, not directly to the implicated non-client constituents (likely to avoid any inference by the non-client constituents that the lawyer is advising them about their risks). In that same vein, and for a number of reasons, in-house counsel should be prepared to respond to these circumstances with a list of unconflicted counsel which list could be given to the non-client constituents without recommendation.

The Opinion does not prescribe a particular form by which any notification is to be made to the organization for the benefit of the non-client. Any notification should be reflective of the underlying facts and circumstances.

## Conclusion

ABA Formal Opinion 514 (2025) serves as a reminder to lawyers about their professional obligations when advising an organization. By providing clear communication, particularly in situations where legal advice could expose constituents to personal legal risks, lawyers can ensure they maintain compliance with ABA guidelines and avoid potential ethical pitfalls. Attorneys should closely review the Opinion and tailor their approach to meet the requirements laid out in the guidance, ensuring they educate organizational leaders and constituents about the scope and limits of their legal representation. ■

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dispel constituents’ misunderstandings about the lawyer’s role.

Educating organizational leaders who may receive the lawyer’s advice may establish a foundation from which, in the future, lawyers may be more successful in advising the organization on matters with legal implications for the organization’s constituents. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that non-client constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

## Practical Observations

Lawyers should take the issuance of the Opinion seriously, even if they believe it simply formalizes their own practices. The Opinion recognizes a professional responsibility to educate. Attorneys, both in-house and outside counsel, should also recognize that the Opinion speaks to more situations than those that have traditionally given rise to Upjohn warnings (e.g., witness interviews of constituents).

Interestingly, the Opinion interprets the professional rules as requiring

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