

The Role of Counsel in Human Rights Strategy

The emergence of standard-driven corporate responsibility is the source of unique opportunity for businesses and stakeholders alike. The structure and precision are good for business. But they are also the source of increasing legal risk. Against this backdrop, a human rights strategy that does not consider legal risk is bad business. Lawyers, therefore, have a critical role to play in designing and implementing effective corporate responsibility policies and procedures. The contours of that role, however, are still unclear.

Human rights due diligence is central to respect for human rights. But it is also the source of potentially significant legal risk, particularly in jurisdictions that mandate or encourage evidence sharing between parties. The role of lawyers is, in part, to balance the demands of due diligence and confidentiality in implementing effective corporate responsibility strategy.

In this white paper, we explore a model for flexible and collaborative attorney involvement in corporate responsibility decisions that caters to the field's increasing complexity. Any role for lawyers must be sensitive to the human rights tasks for which they are not suited. Respect for human rights, in particular, is neither built on compliance nor defined exclusively by legal risk. As Shift's General Counsel John

Sherman has noted, beyond legal issues, "the challenge for a company is also about improving relationships and changing ways of doing business."¹ An effective model should, therefore, draw on attorneys' particular strengths while recognizing the specific limitations inherent in their role as counsel.

NB: *The focus in this paper is on external counsel, as internal counsel have different roles and privileges. Nor do we focus on legal ethics as such.² For that we would recommend reading the [American Bar Association \(ABA\) endorsement of the Guiding Principles](#) or a [John Sherman article on the Guiding Principles and the legal profession](#). Rather, the focus is on how best to meet legal duties practically and in the best interests of corporate clients.*

THE IMPORTANCE OF LEGAL INSIGHT

Lawyers have a vital role to play in corporate responsibility strategy chiefly because of (i) their expertise in understanding relevant concepts and (ii) their legally protected role as confidential advisors.

First, the heart of standard-driven corporate responsibility is the United Nations Guiding Principles on Business and Human Rights.³ These standards are inherently legal. They are built on legal concepts defined in jurisprudence and

¹ John F. Sherman III, *The UN Guiding Principles for the Corporate Legal Advisor: Corporate Governance, Risk Management, and Professional Responsibility* (Apr. 4, 2012), Shift, http://www.americanbar.org/content/dam/aba/administrative/human_rights/sherman_legal_advisors_paper.authcheckdam.pdf.

² For a discussion of legal ethical responsibility in the context of the Guiding Principles, see *id.*

³ See *Understanding the Arc of Corporate Responsibility: From Art to Science*, Enodo Rights, <http://enodorigths.com/blog/#arttoscience>.

international commentary: human rights, causation, and proportionality.⁴ Defining rights and the scope of business responsibility precisely is the first step in implementing effective human rights due diligence and response.⁵ Independent of whether the standards are law, legal insight is as central to understanding the scope of respect for human rights and designing an effective corporate responsibility program as engineering insight is to building a bridge.

Precision is critical because human rights risks are increasingly legal (albeit indirectly).⁶ Whereas the arbiters of corporate responsibility strategy were once exclusively stakeholders, that role increasingly is shared with courts and international tribunals. These legal institutions are starting to assess business adherence to corporate responsibility standards based on definition, not perception. As the legal risks crystallize, companies will need to be able to justify the scope of their due diligence and their prioritization of response in courts of law. **That is, all corporate responsibility strategy needs to be litigation ready.** The basis of effective justification will be a sophisticated understanding of the Guiding Principles' core terms.

LEGAL RISK INVITES LEGAL PRIVILEGE

Second, the role of lawyers as confidential counselors provides necessary protection for companies seeking to limit legal risk. The seeping of corporate responsibility risks into law elevates the importance of privilege, a legal protection shared in some form by a wide array of jurisdictions.⁷ (Privilege is a complex and evolving area of corporate law; we will not explore its nuances here.) Privilege ensures that certain information remains confidential and inviolate in courts of law. Attorney-client privilege is well known, and is essential to effective legal representation because it facilitates honest discussions for appropriate advice.

Privilege is particularly important in jurisdictions that allow discovery (i.e., obliging parties in a legal proceeding to share evidence with the opposing party). Discovery is extensive in the United States; less so in Canada and the United Kingdom; and, increasingly, discovery is part of international arbitration, including in resource nationalism cases and contract disputes. **As corporate responsibility standards ground legal risk, businesses will need to think strategically about discovery of evidence gained through human rights due diligence, because that evidence could play a decisive role in findings of legal liability.** Involving external counsel in the due diligence process can thus be an effective means of limiting emerging legal risks while a business aspires to be better.

Raising the importance of privilege seems anathema to the "know and show" framework of the Guiding Principles. From a practical perspective, however, privilege is an inevitable consideration in potentially litigious settings, and it is valuable for even the most well-meaning business to implement an effective corporate responsibility program.

Respect for human rights is a process. Businesses manifest their respect for human rights by adopting policies, conducting due diligence, and implementing appropriate responses. Done well, that due diligence will often reveal vulnerabilities in company processes and potential rights impacts on stakeholders. **Companies need a safe space in which to explore adverse impacts and design effective remedies without fearing that the due diligence itself will expose them to additional risk.** In the context of legal risks, "know and show" will need to be balanced against confidentiality as a corporate imperative.

THE LIMITATIONS OF COUNSEL

The tension between "know and show" and litigation strategy reveals the limits of legal counsel's role in corporate responsibility policy implementation. That limit is at the

⁴ See, e.g., *Emerging Legal Implications of the Guiding Principles on Business and Human Rights*, Enodo Rights, <http://enodorights.com/wp-content/uploads/2015/09/3-Primer-on-Human-Rights-Strategy.pdf>.

⁵ *The Language of Corporate Responsibility: Defining the Two Dimensions of Human Rights*, Enodo Rights, <http://enodorights.com/blog/#twodimensions>.

⁶ [TITLE], Enodo Rights, <http://enodorights.com/s/Enodo-Risk-Method-Final.pdf> [this is a dead link]

⁷ See, e.g., *Legal Professional Privilege*, LINKLATERS, <http://www.linklaters.com/Insights/Thought-Leadership/Legal-professional-privilege/Pages/Index.aspx>.

frontier of stakeholder expectations and engagement.

Legal risk is a new and additional dimension of corporate responsibility; it does not supplant social or reputational risk and opportunity. An effective corporate responsibility strategy attends to both legal and stakeholder concerns. In this regard, however, the very basis for privileging attorney-client communications undermines the ability of legal counsel to engage with stakeholders.

Lawyers are agents and fiduciaries for their clients. They are not independent. Their duty is to represent the interests of their clients vigorously within the bounds of the law and their professional ethics. The advice that lawyers are duty-bound to give is fundamentally legal. But that duty will, at times, be at odds with the fluid nature of corporate responsibility risk and opportunity, which flows between legal and reputational. As a result, the best corporate responsibility strategy may be hampered by over-involvement of counsel.

1. **Corporate responsibility is as much about good business practice as it is about legal compliance.** The Guiding Principles are not law; they will filter into law in different ways, but it is not yet clear whether they will do so wholesale or piecemeal. **Good business practice, catering to stakeholder expectations and legal risk, will not necessarily align with sufficient business practice, catering only to legal risk.** While the ABA's endorsement of the Guiding Principles places respect for human rights within lawyers' ethical obligations, the ABA guidelines are neither binding nor reflective of widespread bar association views.⁸ Even if they were, it is too early to tell how, in representing their clients' interests vigorously, counsel will integrate human rights advice when the law does not demand it.
2. **Stakeholder engagement remains essential to corporate responsibility and is a core component of the Guiding Principles.** The role of corporate counsel as agents of the company, with a duty to defend corporate interests,

limits their ability to engage effectively with stakeholders because of their perceived formalistic and adversarial stance.⁹ This is not to say that corporate counsel necessarily has such a stance, or that such a stance is the best way to defend corporate interests. Rather, lawyers are not experienced in stakeholder engagement and are often perceived skeptically by stakeholders because of their role; in addressing stakeholder concerns, perception is paramount.

3. **Counsel's involvement in implementing a corporate responsibility strategy can work against the client, should it be forced to defend the policy and procedures in a legal dispute.** First, privilege may hamstring counsel in explaining the steps taken by the firm to ensure compliance with the relevant standards. Second, a law firm that designed and assisted in implementing a corporate responsibility strategy may have a conflict of interest with the client when it comes to justifying the program—as it has a vested interest in defending the rigor of its corporate responsibility advice, independently of whether that is in the best interests of the client. Third, the evidentiary weight of counsel's defence of its own program is likely to be lessened by its involvement in program design and implementation.

A COLLABORATIVE MODEL: COUNSEL AS THE CORPORATE RESPONSIBILITY HUB

The unique opportunity presented by a standard-driven approach to corporate responsibility is that it unites stakeholder and business interests around a language of precision and accountability. The unity in advantage comes with increased tools for accountability. But that additional risk requires practical approaches by companies to address it. **Businesses cannot afford to be naïve about legal risk. Pragmatism requires caution. Caution demands privilege.**

An effective model for legal counsel's involvement in corporate responsibility strategy should therefore incorporate legal

⁸ *Resolution Regarding the Guiding Principles and OECD Guidelines for Multinational Enterprises* (2012), American Bar Association, http://www.americanbar.org/content/dam/aba/administrative/human_rights/hod_midyear_109.authcheckdam.pdf.

⁹ See, e.g., Danna Moore Pfahl, *10 Tips for Stakeholder Engagement with Activists* (Jul. 5, 2013), Future 500, <http://www.future500.org/10-tips-for-stakeholder-engagement-with-activists/> ("It is in the corporate DNA to call upon a legal team when being attacked.").

insight and legal protections without sacrificing stakeholder concerns. **One model is that of counsel as the corporate responsibility hub.** External counsel would oversee the development of effective corporate responsibility strategy while relying on diverse groups of corporate staff and independent consultants to implement it. Counsel would play the roles of information manager and the intermediary between the company and any third parties involved in implementation.

The exact parameters of the relationship between counsel, the company, and external consultants would depend on the nature of the industry, the type of risks, and the extent of existing corporate knowledge and commitment to human rights risks. Companies and law firms are familiar with this model, as it is the basis for different types of litigation and due diligence, particularly under the US Foreign Corrupt Practices Act (FCPA).¹⁰ The critical element is that all independent consultants report to counsel in order to preserve privilege. (The privilege is different than attorney-client privilege, but with similar practical effect.¹¹)

An example of how such an arrangement would work is:

- **External counsel advises the company regarding:**
 - Legal risks related to corporate responsibility under national and international law
 - The scope of an effective corporate responsibility program to mitigate those risks
 - The proper definitions of relevant terms, particularly legal terms, under relevant international standards
- **The company develops corporate responsibility program:**
 - Incorporating counsel's recommendations, while remaining sensitive to legal and reputational risk
 - Implemented, as appropriate, for the company's different functions

- **Independent consultants are retained by, and report to, external counsel to:**
 - Advise on stakeholder concerns and reputational risks
 - Develop appropriate due diligence and reporting indicators based on definitions of core terms
 - Conduct due diligence regarding potential impacts based on the relevant definitions
 - Engage with stakeholders regarding potential impacts and remedial measures
 - Train company executives and staff regarding corporate responsibility policies and procedures
 - Prepare independent reports on the company's impact and remedial measures
 - Assist in the development and implementation of grievance mechanisms

The specific distribution of responsibilities is flexible, and will turn on the respective expertise of the company and the consultants. By placing counsel at the corporate responsibility hub, however, the company can ensure control over the information flowing from human rights due diligence. The effect is to transform all human rights due diligence into preparation for potential litigation. But that can hardly be avoided as corporate responsibility grounds substantial legal risk.

ADVANTAGES OF COUNSEL AS THE CORPORATE RESPONSIBILITY HUB

Relying on counsel as the information manager and intermediary in corporate responsibility strategy has significant advantages for companies:

1. Privilege ensures a protected space in which businesses can honestly assess and respond to adverse impacts on rights

¹⁰ See, e.g., Rebekah J. Poston, *Practical Guidance on How to Conduct FCPA Due Diligence*, Squire Patton Boggs, http://www.squirepattonboggs.com/~media/files/insights/publications/2012/06/practical-guidance-on-how-to-conduct-fcpa-due-di_/files/poston-saltzman-sbc_business-law-news_proof/fileattachment/poston-saltzman-sbc_business-law-news_proof.pdf.

¹¹ For detailed consideration of how privilege issues apply to the work product of independent consultants under US law, see, e.g., Jason J. Rawnsley, *The 2010 Amendments to the Expert Discovery Provisions of Rule 26 of the Federal Rules of Civil Procedure: A Brief Reminder* (Apr. 2012), American Bar Association, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/43-4_2010_amendments_to_rule_26.authcheckdam.pdf; Cheryl C. Magat, *How Attorney-Client Privilege and the Work Product Doctrine May Apply to Third Parties in Tax Law* (2011), American Law Institute, http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/PTXL1108_Magat_thumb.pdf.

2. Legal expertise ensures that businesses accurately understand the scope of relevant standards and business responsibility as well as the particular legal risks they need to address
3. Implementation by independent consultants preserves legitimacy before stakeholders and effective engagement
4. Counsel's separation from the implementation process preserves its ability to defend corporate responsibility policies and procedures in legal settings and to provide a legal opinion regarding the efficacy of the program
5. Separating counsel from the time-intensive process of implementation and due diligence is cost effective

This model is certainly not the only one for counsel's involvement in corporate responsibility. A central purpose of this paper is to spur discussion on what those roles might be. But it would be naïve to think about the emerging corporate responsibility space in practical terms without considering the importance of counsel for efficient mitigation of legal risk.