

*NEW YORK STATE BAR ASSOCIATION*  
*Committee on Professional Ethics*

Opinion #650 - 6/30/93 (3-93)

Topic: Lawyer participation in corporate "Compliance With Law" program; conflict of interest; communication with one of adverse interest

Digest: Lawyers may participate and "Adverse Interest" statement suffices if timely read

Code: DR 1-102(A)(4), DR 3-101(A); EC 4-4, 4-5; DR 5-109, DR 7-104; Canon 9, EC 9-6

QUESTION

May a corporate attorney participate in a "compliance with law" program under which employees are required to report illegal or unethical behavior?

OPINION

Corporate legal department lawyers and paralegals have been asked to participate in the corporation's "compliance with law" program. The program, influenced by the Federal Sentencing Guidelines, requires all employees "to report all instances of unlawful or otherwise unethical behavior by any employee." Employees may satisfy this obligation by speaking with personnel department representatives, management personnel, corporate officers or department heads, or with "any member of the Corporate Legal Department." In addition, and as an alternative reporting device, lawyers and legal assistants will staff and answer a "help line" telephone in the corporate legal department, taking reports from employees. The fruits of these calls will be passed on to the corporation's compliance officer for further investigation and such other responses as may be appropriate.

The corporation's program appears to contemplate at least two separate functions served by lawyers (\*1) who answer the help line. First, corporation lawyers accustomed to fielding inquiries from employees about the application of law to corporate business, and employees are accustomed to having such access. Some of the calls on the help line will be of this sort. Second, the help line will receive complaints and reports of misconduct by other employees, and some callers may report on or seek advice respecting their own misconduct.

Because some of the reports received may reveal conflicts of interest or adversity of interests between the caller and the corporation, an adverse interest script has been prepared to be read by the corporate lawyers to a caller who has disclosed such adversity. It provides:

When it appears that a caller's interest may differ from or there is a reasonable possibility that such interests may be 'in conflict' with the Company's interests

1. Determine whether the caller is represented by counsel. If yes, make the following statement:

'The Company's policy requires that you report non compliance with the law or other unethical behavior. However as you are represented by counsel, I can only talk to you through your counsel. Please have him/her call me or give me his/her name and I would be happy to call him/her.'

2. If the caller is unrepresented by counsel, please make the following statement:

'I want to caution you that I am an attorney for the Company and not for you or other employees. Therefore, while I can record your complaint, I cannot and will not give you legal advice, and you

should not understand our conversation to consist of such advice. I do advise you to seek your own counsel, however, as your interests and the Company's may differ. Having said this, I would be happy to listen to your complaint, etc.'

The lawyers who would talk with callers on the help line are employees of the corporation. DR 5-109 provides:

When a lawyer employed or retained by an organization is dealing with ...employees ..., and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

The threshold requiring the lawyer to offer an explanation is not high. An appearance of potentially different interests triggers the obligation. Thus, at minimum, compliance with DR 5-109 by help line lawyers requires them to be sensitive to the communication, and to determine as soon as possible whether there is the appearance of potential conflict.

Moreover, DR 5-109 requires the lawyer to explain that the lawyer is the lawyer for the corporation and not for the employee. The implicit assumption is that, absent such expressed disclaimer, the employee may believe that the lawyer is the lawyer for the employee. Especially, as on the instant facts, where employees habituated to access and communication with corporate counsel may be inclined to believe that their communications with lawyers on the help line might be held confidential or might insulate them from public or private liability, the Code requires that the lawyer take pains not to be misleading. DR 1-102(A)(4); EC 9-6.

The precise content of the lawyer's explanation as required by DR 5-109 will vary depending on the sophistication of the employee, the nature of prior discussions or understandings between the employee and the lawyer, and the content of the conversation revealing the adversity of interest. In providing the explanation, however, the lawyer must ensure that the employee does not labor under the mistaken belief that what the employee says will be confidential between the employee and the lawyer.

DR 7-104 governs communication with callers after the determination of potential adversity:

DR 7-104. Communicating with one of adverse interest.

During the course of the representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.
2. Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

The proposed "Adverse Impact Statement" correctly requires the attorney to inquire if the caller is represented by counsel in the matter about which the caller is reporting. If so, in addition to the previously described requirement of DR 5-109, the attorney must advise the caller that the attorney can only speak to the caller's counsel about the matter, unless there is prior consent to speak with the caller. DR 7-104(A)(1). If the caller is not represented by counsel in this matter, the attorney cannot give any further advice other than the advice to secure counsel. DR 7-104(A)(2).

In determining that the proposed adverse interest script submitted by the inquirer and reviewed in this opinion satisfies ethical requirements, we do not suggest that use of that script is the only means

available to corporate counsel to comply with DR 5-109 and DR 7-104 in the context of a corporate compliance program intended to qualify under the criteria set out in the recently-issued Federal Sentencing Guidelines for Organizations. Indeed, it is possible that other approaches can satisfy ethical requirements without deterring the desired communication to the extent that may occur with implementation of the particular adverse interest script reviewed here.

## CONCLUSION

For the reasons given and subject to the qualifications discussed above, the question is answered in the affirmative.

## NOTES

(\*1) It is unclear what division of function is anticipated between paralegals and lawyers.

While the Code of Professional Responsibility is addressed to lawyers, not paralegals, attorneys must be diligent in the supervision of nonlawyer employees in order that the obligations of the attorney be met. See EC 4-4, EC 4-5. Further, tasks assigned paralegals must not violate DR 3-101(A). A determination of "adversity," for example, might require professional judgment. If so, it cannot properly be delegated to a legal assistant.