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# Ethical Issues for Corporate Counsel in Internal Investigations: A Problem Analyzed

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## ARTICLES

### ETHICAL ISSUES FOR CORPORATE COUNSEL IN INTERNAL INVESTIGATIONS: A PROBLEM ANALYZED<sup>†</sup>

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#### PROBLEM

As an attorney for an Oklahoma corporation, you are handed the following resolution:

BE IT RESOLVED, that, as the Board of Directors deems it to be in the best interests of this Corporation and its stockholders, the Corporate Counsel be, and hereby is, authorized on behalf of the Board of Directors to conduct an investigation and inquiry into matters disclosed and discussed at this meeting, concerning possibly improper or illegal payments to domestic and foreign purchasers, for the purposes of eliciting facts, making certain findings, and providing to the Board of Directors of this Corporation a report containing recommendations as to course of action so that the Board of

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<sup>†</sup> This article originated as a presentation to the Eighth Annual House Counsel Institute, Oklahoma Bar Association, held on June 17, 1987.

\* B.A., Notre Dame University; J.D., University of Texas; Professor of Law, University of Oklahoma. I express my appreciation to my Oklahoma faculty colleagues who read and critiqued the original draft of this article.

Directors of this Corporation may properly discharge its duties;

FURTHER BE IT RESOLVED, that the officers and directors of this Corporation are directed to cooperate fully and also to secure the cooperation of all employees of this Corporation, with the Corporate Counsel and such other persons as the Corporate Counsel may retain in the foregoing investigation.

You take the resolution back to your office and begin to plan your investigation. You do so with a sense of sadness because, for a number of years in your role as corporate counsel, you have worked with many of the people who will be interviewed. You decide that the initial investigation can be conducted by your competent, trusted legal assistant to whom you decide to assign the first interviews. You ask your secretary to have the legal assistant come to see you immediately.

Before you go any further, you also decide that you had better ponder the professional responsibility issues that you face as you undertake this investigation.<sup>1</sup>

## I. IDENTIFYING THE CLIENT

As the corporate attorney thinks about the ethical issues, the most obvious ethical issue that assuredly comes to mind is making certain that he has clearly identified the client to whom the corporate attorney owes obligations of loyalty, confidentiality, zeal and competence. The corporate attorney is the attorney for the corporation as an entity.<sup>2</sup> Hence, the attorney's obligations are owed to the entity and not to any individual officer, director, or employee of the corporation. No

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1. The problem is a generic amalgam taken from four reported cases involving corporate investigations. *Upjohn v. United States*, 449 U.S. 383 (1981); *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978); *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2nd Cir. 1976); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969).

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983) (*Organization as Client*). All Code and Rule citations will be directly to the Code and Rules, respectively, but in all instances these are contained in T. MORGAN & R. ROTUNDA, 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY. See generally C. WOLFRAM, MODERN LEGAL ETHICS, § 13.7.2 (1986) (*Corporate Client-Lawyer Relationship*) [hereinafter C. WOLFRAM]; B. WUNNICKE, ETHICS COMPLIANCE FOR BUSINESS LAWYERS, § 8.1 (1987) (*Who is the Client?*) [hereinafter B. WUNNICKE].

matter how long the corporate attorney has worked with the persons whom he will investigate, nor how sad the duty to investigate makes him feel, the corporate attorney does not represent the persons who will be investigated. In the Problem fact pattern, the Board of Directors has made clear that the corporate attorney is to investigate on behalf of *the corporation* for the purpose, ultimately, of making recommendations to *the corporation* about appropriate actions for *the corporation* to take.<sup>3</sup>

Moreover, in light of the corporate resolution and the holding in *Upjohn v. United States*,<sup>4</sup> the corporate attorney clearly realizes that the investigation will be protected by the attorney-client privilege of *the corporation*. Hence, anything the corporate attorney learns must be kept confidential, except for disclosures made to the Board of Directors to allow them to take appropriate actions after full and competent advice has been provided.

Once the attorney has clearly identified the corporation as the client, the attorney may think that he has adequately addressed the ethical issues raised by the factual situation of the Problem. Assuredly such clear identification has allowed the corporate attorney to avoid serious conflicts of interest and confidentiality problems,<sup>5</sup> but focusing solely on these two ethical issues risks ignoring or underemphasizing several other

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3. The facts of the Problem purposefully indicate that the Board of Directors has made a clear decision that the corporation desires to investigate the payments. Hence, the corporate attorney cannot be confused or hesitant about the corporation's command. As a consequence, the corporate attorney has no difficulty in identifying who is the client nor the client's wishes. Of course, in many corporate representations, exactly who among the various corporate constituencies is the client or what precisely the client wishes may be very difficult to determine. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* ch. 3 (1978) (*Who is the Client?*). In situations where the client's identity or wishes are more difficult to determine, the ethical issues addressed by Rule 1.13, including possible obligations of disclosure about conflicts of interest or withdrawal, are of the utmost importance. The facts of the Problem analyzed in this article are intentionally drafted to minimize ethical issues under Rule 1.13, except subsection (d).

4. 449 U.S. 383.

5. For a general discussion of the confidentiality and conflicts of interest problems which exist in corporate representation, see C. WOLFRAM, *supra* note 2, at § 6.5 (*Corporate and Other Entity Clients*), § 8.3 (*Corporate and Other Entity Conflicts*). See generally B. WUNNICKE, *supra* note 2, at ch. 8 (*The Lawyer and Corporate Client*).

serious ethical questions which the corporate attorney must address before proceeding with the investigation. The focus of this article is on these additional ethical questions which almost invariably arise in the context of internal corporate investigations, but which have not received much attention.<sup>6</sup>

## II. FAIRNESS TOWARD OTHERS

In the very act of clearly identifying the client, the corporate counsel might overlook or ignore additional ethical obligations. Because the corporation is the client, the corporate counsel must ask what restraints, if any, exist with respect to contact with the officers, directors, and employees of the corporation who will be the objects of the investigation. Corporate counsel might assume that no significant restraints are applicable to the interviews. Indeed, corporate counsel might assume that zealous representation of the corporation requires that he conduct the investigation promptly and thoroughly to learn as much as can be learned from those interviewed, so that the corporation can protect its interests, regardless of the consequences that might befall individual corporate employees. After all, to show consideration for the interests of the corporate employees might indicate that the corporate attorney owes some *client* obligations to these employees which is clearly not so. Corporate counsel might even feel bolstered in the assumption to disregard totally the interests of the employees. This is because the corporate employees have been directed by the Board to be cooperative with the investigation and, as agents of the corporation, they have an obligation to work for the best interests of the corporation and to comply with lawful requests from the Board of Directors.

As a general rule, the corporate counsel's assumption is an ethically permissible assumption. Corporate employees do have the obligations to work for the best interest of the corporation and to cooperate with other co-agents of the corporation (the corporate counsel) when the co-agent is carrying out

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6. Although the additional ethical issues discussed in this article have been addressed by courts, bar associations and book authors, no law review article has focused specifically on the ethical issues (aside from those arising from client identity) raised by situations like that of the Problem.

corporate tasks. But the assumption is incorrect on the factual situation of the Problem because the interests of the corporation and those who are about to be interviewed are or are likely to be hostile, rather than compatible. Hence, if the corporate counsel proceeds full steam with the investigation without a sense of fairness toward the corporate employees who will be interviewed, the corporate counsel may well become entwined in ethical problems which will rebound to his detriment and the corporation he represents.<sup>7</sup>

### *A. Contact with Unrepresented Persons*

#### *1. Prohibition on Giving Advice*

Disciplinary Rule (DR) 7-104(A)(2)<sup>8</sup> states that an attorney contacting an unrepresented person whose interests "are or have a reasonable possibility of being in conflict with the interests of his client" shall not give advice to that person, except the advice to secure counsel. The rule serves two purposes. First, the rule insures that an unrepresented person is not manipulated or overreached by an attorney who has superior knowledge and skill, both factually and legally, about the interests of the two opposing persons. Second, the rule prevents an attorney from becoming entangled in an unintentional conflict of interest by trying, unadvisedly, to give "impartial" advice to parties with conflicting interests. By

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7. See generally G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 236-36.1, 243-44, 262-64 (1984 & Supp. 1986) [hereinafter G. HAZARD & W. HODES]. Cf. EC 7-10 ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm"); Rule 4.4 comment ("Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons").

8. DR 7-104. Communicating With One of Adverse Interest

(A) During the course of his representation of a client a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he 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 his client.

prohibiting advice, except the advice to secure counsel, DR 7-104(A)(2) protects against both the evils of manipulation and overreaching and the danger of conflict of interests.

The language of DR 7-104(A)(2) prohibits *advice*, not contact with an unrepresented person. Thus, corporate counsel would not commit an immediate ethical violation simply by contacting the corporate employees or by interviewing them. But the interview itself raises significant ethical risks because the word "advice" has not been clearly defined and may be so fact-dependent as to make any definition uncertain when applied to specific situations.<sup>9</sup> Assuredly, comments to the corporate employee during the interview which state or imply that it is in the employee's best interest to "confess fully so you can clear your name" should be considered advice within the prohibition of the rule.<sup>10</sup> Moreover, at least if there are no other factors insuring fairness to the employee, presenting any legal document to the corporate employee which constricts or undermines the employee's legal rights should also be considered advice within the prohibition of the rule.<sup>11</sup> And yet, despite these inclusions in the definition of

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9. See generally ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, at 71:502-71:503 (*Communications with Persons Not Represented by Lawyer*) [hereinafter ABA/BNA MANUAL]; G. HAZARD & W. HODES, *supra* note 7, at 439-44; C. WOLF-RAM, *supra* note 2, § 11.6.3 at 616-17 (*Contact with Unrepresented Persons*).

10. In *W.T. Grant & Co.*, 531 F.2d 671, the court labeled a five and one-half hour interrogation of a corporate employee, during which the employee was told to be candid to clear his name, given a lie detector test, and asked to sign authorizations to allow access to the employee's tax and financial records, as conduct "at least inappropriate and certainly not to be encouraged." Because the Second Circuit ultimately assumed a violation of DR 7-104(A)(2), it is somewhat unclear which particular components of the interrogation constituted the impermissible advice. The court's footnote 3 strongly implies, however, that the plea for candid answers, which suggests that the corporation and the corporate employee are "in the same boat," is the impermissible advice. *Id.* at 676.

Professors Morgan and Rotunda also take the position that a plea for candid answers that misleads the corporate employee is impermissible advice to an unrepresented person. T. MORGAN & R. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: TEACHER'S MANUAL* 124 (3d ed. 1984).

11. Prior to the advent of no-fault divorce laws, the ABA issued several ethics opinions which held that it was improper for an attorney to prepare documents, waiving certain procedural rights, for signature by a defendant in the divorce action. Under these opinions, preparation of such documents was considered giving advice to unrepresented parties. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1140 (1970); ABA Informal Op. 1255 (1972). See also ABA Informal Op. 58 (1931). But as divorce procedures changed to put the parties in a less contentious



"advice," DR 7-104(A)(2) does not facially appear to prohibit the corporate counsel from interviewing the corporate employee, even though the questions asked lead to very damaging, possibly incriminating, admissions on the part of the employee.<sup>12</sup>

Model Rule 4.3 is entitled *Dealing with Unrepresented Person*, but the language of Rule 4.3 is not a direct counterpart to DR 7-104(A)(2).<sup>13</sup> Rule 4.3 does not contain an explicit

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legal posture, the ABA opinions concluded that preparation of waiver documents did not constitute impermissible advice to unrepresented parties. ABA Informal Op. 1269 (1973); ABA Formal Op. 84-350 (1984) (withdrawing Informal Opinions 1140 and 1255). The fact that the interests of the divorcing parties were often not truly adverse under the new procedures for divorce apparently prompted the different attitude in more recent opinions. These "less-adversarial" procedures provide the safeguard which means that the preparation of waiver documents no longer need be considered giving advice to an unrepresented party.

The ABA also approved the actions of a corporate attorney who prepared settlement papers for an injured worker to sign in a worker's compensation suit when the settlement eventually was approved by a court which had been advised that the worker was unrepresented during the settlement negotiations. ABA Formal Op. 102 (1933). The safeguard of court supervision was apparently sufficient to protect the document from being considered improper advice to an unrepresented party. Professors Hazard and Hodes criticize this ABA ethics opinion as construing "giving advice" too narrowly. G. HAZARD & W. HODES, *supra* note 7, at 440. See also ABA Formal Op. 124 (1934) (condemned the actions of an attorney who prepared settlement documents which were thrust upon a *represented* party).

In *W.T. Grant Co.* the court opined that having the corporate employee sign an authorization allowing access to financial records was closer to "not giving advice" than "giving advice." 531 F.2d at 676. Similarly, the Oregon Supreme Court has ruled that preparing an affidavit and an assignment for signature by an unrepresented party did not violate the prohibition on giving advice to an unrepresented party. *In re Schwabe*, 408 P.2d 922 (Or. 1965).

12. See ABA Informal Op. 908 (1966) (attorney ethically is allowed to interview unrepresented prospective defendant); Virginia State Bar Op. 550 (1983) (attorney allowed to negotiate directly with adversary party and the insurance carrier before the lawyer knows that they are represented in the matter). See generally ABA/BNA MANUAL, *supra* note 9, at 71:501-71:509 (*Communications with Unrepresented Person*).

13. RULE 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

COMMENT:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

prohibition on giving advice to unrepresented persons. Instead, Rule 4.3's language is focused on prohibiting and preventing an attorney from misleading an unrepresented person about the attorney's loyalty. In the comment to the rule, however, the lawyer contacting an unrepresented person is admonished to "not give advice to an unrepresented person other than the advice to obtain counsel."<sup>14</sup> Placing the prohibition on giving advice to an unrepresented person only in the comment to Rule 4.3 is unfortunate. Even if an attorney does not mislead an unrepresented person about the attorney's loyalty, the unrepresented person still needs to be protected from being manipulated or overreached and the attorney needs to be warned against unwise attempts at giving "impartial" advice. Hence, courts are ultimately most likely to interpret Rule 4.3 as impliedly incorporating the comment's prohibition on giving advice to unrepresented persons into the rule itself.<sup>15</sup> Due to this likely interpretation, lawyers would have been better served if the prohibition on giving advice to unrepresented persons had been expressly, rather than an impliedly, included in the language of Rule 4.3.<sup>16</sup>

## 2. Obligation to Clarify Role

In the Problem, even though corporate counsel could interview the corporate employees, so long as no advice is

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14. As for the legal significance of the comments accompanying each proposed rule, the drafters of the Model Rules, in the last paragraph of the Scope, wrote as follows: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule . . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."

15. *Accord* G. HAZARD & W. HODES, *supra* note 7, at 440-43; C. WOLFRAM, *supra* note 2, § 11.6.3 at 616-17 (*Contact with Unrepresented Persons*).

16. The Model Rules of Professional Conduct were recently adopted by the Oklahoma Supreme Court as the standard of conduct for all members of the Oklahoma Bar Association. 59 OKLA. B.J. 718 (1988). In the Model Rules of Professional Conduct for the State of Oklahoma, the Oklahoma Model Rules Committee placed the prohibition against giving advice to unrepresented persons directly into the text of Rule 4.3. 57 OKLA. B.J. 2046 (1986). The second sentence of Oklahoma Rule 4.3 is almost identical to DR 7-104(A)(2) and should, therefore, be interpreted as DR 7-104(A)(2) has been interpreted. The Oklahoma Rule 4.3 is the better drafted rule on this particular ethical issue.

given,<sup>17</sup> the corporate employee is still in a very vulnerable position because the employee may misunderstand the role in which the corporate attorney is acting during the interview. Due to past working relationships with the corporate attorney or general assumptions about corporate group identity, the corporate employee may incorrectly believe that the corporate attorney is a friend, not an adversary, and that the corporate attorney is also protecting, to some extent, the employee's interests. Note that the misunderstanding of the relationship is the employee's misunderstanding because the attorney has already, at the very beginning, clearly identified the corporate entity as the client to whom professional obligations are owed.

The corporate employee's misunderstanding vividly points out that DR 7-104(A)(2) does not by its terms expressly cover a second danger which exists in encounters between the corporate attorney and the corporate employee during internal corporate investigations. If fairness in the encounter is the proper goal, then the corporate employee needs to be protected not only from manipulative or overreaching advice, but also needs to be protected from fundamentally misconstruing the relationship between the attorney and the employee at the interview. By its terms, DR 7-104(A)(2) adequately protects against the danger of improper advice, but the disciplinary rule does not specifically address the second danger of employee misunderstanding about the relationship.<sup>18</sup>

Despite the language of DR 7-104(A)(2), courts and ethics committees have imposed an obligation upon the attorney to clarify the relationship.<sup>19</sup> These authorities have properly re-

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17. DR 7-104(A)(2) allows, but does not require, an attorney to advise an unrepresented person to secure counsel. C. WOLFRAM, *supra* note 2, § 11.6.3 at 616 (*Contact with Unrepresented Persons*).

18. Professors Hazard and Hodes provide the clearest recognition and best discussion of this distinction between the prohibition on giving advice and the need for clarification of the relationship between the attorney and the unrepresented person. G. HAZARD & W. HODES, *supra* note 7, at 439-44.

19. See, e.g., ABA Formal Op. 117 (1934); ABA Formal Op. 102 (1933); ABA Informal Op. 908 (1966). See also *Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc.*, 440 F.2d 1216 (7th Cir. 1971); *Mompont v. Lotus Dev. Corp.*, 110 F.R.D. 414 (D. Mass. 1986); *In re FMC Corp.*, 430 F. Supp. 1108 (S.D. W.Va. 1977); *Brown*, 305 F. Supp. at 398. Cf. *W.T. Grant Co.*, 531 F.2d 671; *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2nd Cir. 1975); *Frey v. Department of Health and Human Servs.*, 106 F.R.D. 32 (E.D.N.Y. 1985). But see *Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc.*, 128 Ill. App. 3d 763, 471 N.E.2d 554 (1984).

alized that lawyers, not unrepresented laypersons, are in the best position to recognize the significance of the layperson's misunderstanding. Furthermore, lawyers possess the information which must be communicated if the misunderstanding is to be dispelled and the knowledge of how that information needs to be communicated if it is to be meaningful information for the unrepresented person.<sup>20</sup>

In contrast to the language of DR 7-104(A)(2), Rule 4.3 makes crystal clear that an attorney interviewing an unrepresented person has an obligation to clarify the relationship.<sup>21</sup> When an attorney is acting on behalf of a client, Rule 4.3 prohibits an attorney from stating or implying to an unrepresented person that the lawyer is disinterested. But Rule 4.3 does more than simply prohibit active misrepresentation on the contacting attorney's part. In addition, the second sentence of Rule 4.3 then imposes an affirmative obligation upon the attorney to make reasonable efforts to correct any misunderstanding about the attorney's role if the contacting attorney knows or reasonably should know that the unrepresented person is confused about the relationship. Hence, Rule 4.3 makes explicit in its language the obligation to clarify the relationship which courts have found through interpretation to exist in the less precise language of DR 7-104(A)(2).<sup>22</sup>

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20. As a general rule, lawyers have the obligation to use their legal expertise to clarify issues which arise during the attorney-client relationship. *See, e.g.*, EC 5-16 (lawyer should fully explain to each client the implications of possible conflicts of interest); EC 7-8 (lawyer should initiate full discussion of the relevant considerations, moral and legal, of client decisions if the client does not do so).

21. *See supra* note 13.

22. In the Model Rules for the State of Oklahoma, the affirmative obligation on the contacting attorney's part to correct any misunderstanding about the relationship is moved from the text of Rule 4.3 into the comments. The Oklahoma Model Rule 4.3, however, does retain the prohibition on active misrepresentation as the first sentence of Rule 4.3, just as adopted by the ABA. 57 OKLA. B.J. 2046 (1986). The inclusion of the affirmative obligation within the language of the rule itself is the better drafting and should be followed by Oklahoma and other states considering the adoption of the Model Rules.

The author believes that courts will interpret either version of Rule 4.3 to mandate that the attorney (1) clarify the role and relationship between the attorney and the unrepresented party and (2) refrain from giving advice (other than the advice to secure counsel) to the unrepresented person. As Professors Hazard, Hodes, and Wolfram have pointed out in their treatises, Rule 4.3 governing contact between an attor-

For a corporate attorney, Rule 1.13, *Organization as Client*, is as important as Rule 4.3. Under Rule 1.13(d), the corporate attorney does explicitly have the affirmative obligation to "explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."<sup>23</sup> As the comment to Rule 1.13(d) indicates, this subsection was adopted precisely to govern situations, such as that presented in the Problem, when the interests of the organization and a constituent of the

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ney and an unrepresented person only makes proper sense if both obligations are part of the rule. G. HAZARD & W. HODES, *supra* note 7, at 440-43; C. WOLFRAM, *supra* note 2, § 11.6.3 at 616-17 (*Contact with Unrepresented Persons*).

Canon 9 of the ABA Canon of Ethics, the precursor of both DR 7-104 and Rule 4.3, explicitly contained both the obligation to clarify the attorney's role and the obligation to refrain from giving advice when contacting unrepresented persons. Canon 9 states in part: "It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." See H. DRINKER, *LEGAL ETHICS* 201-03 (1953) (discussion of Canon 9).

23. ABA Rule 1.13(d) reiterates in a corporate context what ABA Rule 4.3 prescribes generally.

**RULE 1.13 Organization as Client**

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

**COMMENT:**

**Clarifying the Lawyer's Role**

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

By reading Oklahoma Rule 4.3 (*Dealing with Unrepresented Persons*) together with Oklahoma Rule 1.13(d) which is identical to the ABA version, Oklahoma has circuitously accomplished in the corporate context what treatise authors and this author have recommended be accomplished for all contacts between attorneys and unrepresented persons. See *supra* note 22. In Oklahoma, corporate attorneys now clearly have both the obligation to refrain from giving advice to the unrepresented person (Rule 4.3) and the affirmative obligation to clarify the attorney's role in the contact between the corporate attorney and the corporate employee (Rule 1.13(d)).

organization, such as officers, directors or employees, are adverse, rather than congruent.<sup>24</sup>

Rule 1.13(d) imposes this affirmative obligation upon the corporate attorney in any instance when the conflict between the interests of the corporation and its constituents is "apparent." By using this word in the rule and by the accompanying comment,<sup>25</sup> the drafters of the Model Rules clearly meant to indicate that a corporate attorney is not required to engage in clarification of roles and relationships as a standard procedure during ordinary inquiries by the attorney to corporate employees. The obligation to clarify only becomes mandatory when a degree of adversity exists between the interests of the corporation and the corporate employee to whom the inquiry is directed. At the same time, the word "apparent" should not be narrowly construed to mean that the required degree of adversity exists only when the conflict is so obvious that it cannot be ignored. To so narrowly interpret the word "apparent" would not be an adequate safeguard of the interests of the employee and would allow unfair treatment of the employee. The better interpretation of the word "apparent" makes its definition compatible with the obligation of Rule 4.3, which imposes the obligation when the lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter." Hence, on the facts of the Problem, the corporate attorney must be very careful to insure that the employees, with whom he has worked amicably in the past, now understand that he represents the corporation and not them individually.<sup>26</sup>

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24. Rule 1.13, comment (*Clarifying the Lawyer's Role*). Cf. *FTC v. Exxon*, 636 F.2d 1336 (D.C. Cir. 1980) (corporate attorney of Exxon barred from representing a subsidiary of Exxon on basis that the subsidiary constituent had a conflict of interest with the parent corporation).

25. "Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case." Rule 1.13 comment.

26. The language of Rule 1.13(d) and its accompanying comment, as adopted by the ABA, imposes the affirmative obligation upon the corporate attorney to explain the identity of the client to other corporate constituents in fewer instances than did the earlier versions of the rule. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(d) & comment (Proposed Final Draft, May 30, 1981). In the 1981 version, the corporate attorney had the obligation "when necessary to avoid misunderstandings on their part." This language, along with the interpretive comment, indicated an emphasis primarily upon protecting corporate employees from potential unfairness and,

When the comment to Rule 1.13(d)<sup>27</sup> is read carefully, the precise content of the clarification to the corporate employee appears to have at least five components: 1) the corporate attorney must inform the employee of the conflict or potential conflict (its subject matter); 2) that the lawyer represents the corporation (identity of client); and 3) that the corporate employee might want to have independent counsel (limited permissible advice). Once the attorney has communicated these three components of the clarification, the attorney then must be careful to insure that the employee understands the implications of what has been said by communicating two more components: 4) that the attorney cannot, therefore, represent the constituent; and 5) that discussions between the attorney and the employee are not privileged as between them. In effect, these components of the obligation to clarify serve as warnings to the employee which gives notice that the attorney is not acting in the employee's best interest and should be considered an adversary.<sup>28</sup> While these components are only found in the comments, not the language of the rule itself, the corporate attorney is well advised to act as if these components were part of the mandatory language of the rule, if undesirable potential consequences are to be avoided.<sup>29</sup>

When the ethical rules and their interpretation, either from the Model Code or the Model Rules, are applied to the factual situation of the Problem, the corporate attorney clearly has ethical obligations to the corporate employees who are about to be interviewed. In light of the corporate resolution from the Board of Directors, the attorney must refrain

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therefore, an expanded obligation to make sooner and more often the clarification about rules. In Rule 1.13(d) and the accompanying comment, as adopted by the ABA, the focus is more on identifying the corporation as the client with less emphasis on protecting the corporate employee from unfairness. As a consequence, in the final versions of Rule 1.13(d) and accompanying comment, the corporate attorney is given greater discretion as to precisely when and how often the clarification about identity of the client must be made to other corporate constituents.

27. See *supra* note 23.

28. These warnings have been likened to *Miranda* warnings from criminal procedure. G. HAZARD & W. HODES, *supra* note 7, at 243, 262-63; Cutler, *The Role of the Private Law Firm*, 33 BUS. LAW 1549, 1555-56 (1978).

29. See C. WOLFRAM, *supra* note 2, § 13.7.2 at 736 (*Corporate Client-Lawyer Relationship*). Professor Wolfram interprets Rule 1.13(d) expansively, as has been suggested by this author as the proper attitude toward the rule.

from giving advice to the employees because the interests of the corporation and the employees are or are likely to be in conflict. Moreover, the attorney must take special precautions to clarify his role as corporate attorney and to disabuse the employees, who have in the past worked with the attorney amicably and trustingly, of any thoughts that the attorney is now, as in the past, in that same role. Fairness requires that these employees be made fully aware that on this matter the attorney is a potential adversary.<sup>30</sup>

### *B. Contact with Represented Persons*

Before the attorney proceeds to interview corporate employees in accordance with the Board of Director's resolution, the attorney should also pause to learn whether any of those who are about to be interviewed are already represented in this matter by counsel of their own choice. The facts of the Problem are unclear as to how the Board of Directors came to have the information which led them to pass the resolution. It is possible that the Board is reacting to criminal or civil cases that have already been initiated by governmental agencies or private parties, in which case several of the corporate employees may well have personal attorneys representing them in the matter.

The corporate attorney needs to know whether or not a particular employee is represented by counsel because if that is true, then the corporate attorney must comply with DR 7-104(A)(1) and its Model Rule counterpart, Rule 4.2.<sup>31</sup> These

30. G. HAZARD & W. HODES, *supra* note 7, at 262-64.

31. RULE 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

COMMENT:

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications



two ethical rules prohibit communications between an attorney, representing one party, and the other party, who is represented, unless the attorney involved in the communication has the consent of the other party's attorney or is authorized by law to make direct contact.

The prohibition on communications between an attorney and a represented party becomes relevant on two conditions. First, the attorney involved in the communication must "know" that the other party is represented. Second, the other party must be represented "in the matter" to which the communication relates.

The word "know" means "actual knowledge."<sup>32</sup> Yet, only a foolish corporate attorney would contact employees without carefully ascertaining whether the employee is represented. If the corporate attorney communicates with the corporate employees without making a careful inquiry to learn the employee's representational status, the corporation is likely to become embroiled at a later time in wasteful litigation with the employee who will be claiming that the corporate attorney "knew" that the employee was represented. Corporate attorneys should not put themselves in the vulnerable position wherein their mental state is the "material element" being litigated.

Under DR 7-104(A)(2) and Rule 4.2, a person is not considered a represented party protected by the rule unless the

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authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by the counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

32. In the Terminology section of the Model Rules, the term "knows" is defined as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The Model Code of Professional Responsibility does not contain a definition of the word "knows."

person is represented "in the matter." Thus, a corporate employee who has a personal attorney whom the employee regularly consults may or may not be represented "in the matter," depending upon whether the employee has specifically referred "the matter" to the personal attorney.<sup>33</sup> But again, a corporate attorney, knowing that an employee regularly uses a particular attorney for personal legal advice, is foolish to ignore that attorney and communicate directly with the employee. The corporate attorney is much wiser to have communications through the personal attorney and through that attorney learn whether the employee is represented "*in the matter*."<sup>34</sup>

The prohibition on communications with a party represented by an attorney, unless the party's attorney consents, is a very broad prohibition.<sup>35</sup> While the rationale for the

33. Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party"*, 61 MINN. L. REV. 1007, 1029-32 (1977) (discussion of when a party is represented). See *In re Industrial Gas Antitrust Litigation*, No. 80-C-3479 (N.D. Ill. Oct. 8, 1985) (CALR). See generally ABA/BNA MANUAL, *supra* note 9, at 71:309 (*Communications with Represented Person*).

34. Professors Hazard and Hodes in their treatise counsel that in "close cases" it is better to direct inquiries to other attorneys who might represent a particular person, rather than directly with that person. HAZARD & HODES, *supra* note 9, at 436-37. The author agrees with the advice of Professors Hazard and Hodes, but with a caveat. Before making contact with the other attorney, the contacting attorney must be certain that he has client permission. For example, on the facts of the Problem, the corporate attorney should gain consent from the corporation before contacting attorneys who are or might be representing specific corporate employees because the corporation may prefer that the corporate attorney keep confidential either the existence of the internal investigation or its focus on particular employees.

35. Special mention should be made of class action lawsuits. Once the class has been certified, the attorney for the named class members is also considered the attorney for the absent class members. Hence, it is impermissible for an attorney to contact absent class members without the consent of the attorney for the class. Corporate attorneys must be particularly aware of this interpretation of DR 7-104(A)(1) and Rule 4.2 when the corporate attorney is investigating allegations raised in a class action such as an employment discrimination suit against the corporation. *Kleiner v. First National Bank*, 751 F.2d 1193 (11th Cir. 1985); *Resnick v. American Dental Ass'n*, 95 F.R.D. 327 (N.D. Ill. 1982); *Industrial Gas*, No. 80-C-3479 (N.D. Ill. Oct. 8, 1985) (CALR).

Prior to certification of a class action, the potential, but unnamed, class members are not represented by the attorney for the named class members. Hence, contact with these potential class members is ethically permissible without getting consent of the attorney for the named class members. DR 7-104(A)(1) and Rule 4.2 do not yet apply to these potential class members. However, as potential class members, the interests of these persons "are or have a reasonable possibility of being in conflict

prohibition is to prevent manipulation and overreaching and to insure that the party receives the legal advice which the party has clearly indicated, through the act of getting an attorney, a desire to receive, prohibited communications are not limited to those which involve these rationales. Even innocuous communications with a represented party are prohibited.<sup>36</sup> Most importantly, communications with a represented party are prohibited in "the matter"<sup>37</sup> unless the necessary attorney consent is obtained even though the party to be contacted is a witness or otherwise has relevant information which the attorney desiring to make the contact is entitled to have.<sup>38</sup>

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with the interests of" the defendant in the class action. Hence, the attorney for the defendant must abide by DR 7-104(A)(2) and Rule 4.3 which regulate contacts between attorneys and unrepresented persons. *Resnick*, 95 F.R.D. at 376. Cf. *Cada v. Costa Line, Inc.*, 93 F.R.D. 95 (N.D. Ill. 1981).

36. See *Schwabe*, 408 P.2d 922 (attorney disciplined for directly contacting an opposing party to inquire if a particular attorney did in fact represent the opposing party); ABA Informal Op. 1373 (1976) (sending copy of plea bargain to defendant at same time the original letter is sent to defendant's attorney is unethical); ABA Informal Op. 1348 (1975) (sending copy of settlement offer to opposing party at same time the original is sent to attorney for opposing party is unethical); San Diego B. Assoc. Op. 1983-4 (contact initiated by opposing client cannot be pursued by the attorney until the consent of the opposing attorney is obtained). But see *Industrial Gas*, No. 80-C-3479 (N.D. Ill. Oct. 8, 1985) (CALR) (approves contact limited to inquiry as to present employment status to determine if the employee is a party). See generally ABA/BNA MANUAL, *supra* note 9, at 71:304-71:307, 71:313 (*Communications with Person Represented by Lawyer*). There has been debate about whether such broad prohibition on attorney contacts with represented parties is wise or desirable. Compare Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136 (1977) (favorable) with Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683 (1979) (unfavorable).

37. An attorney is not prohibited from contacting an opposing party represented by an attorney in a matter in contention so long as the contact relates to other on-going, ordinary business affairs between the attorney and the person who is also an opposing party. Contact between the attorney and the person relating to other on-going, ordinary business affairs is not contact in "the matter" which is covered by the ethical prohibition of DR 7-104(A)(1) and Rule 4.2. Of course, the contacting attorney must be very scrupulous to insure that the matter in contention is not discussed during these permissible contacts about other on-going, ordinary business affairs. *Kleiner*, 751 F.2d 1193; *In re Korea Shipping Corp.*, 621 F. Supp. 164 (D. Alaska 1985); *Resnick*, 95 F.R.D. 372; *Industrial Gas*, No. 80-C-3479 (N.D. Ill. Oct. 8, 1985) (CALR).

38. Insofar as the contacting attorney is concerned, if an opposing party is also a witness, as will often be the case, the *represented* opposing party is within the protections from contact provided by DR 7-104(A)(1) and Rule 4.2. Contact with a *represented* opposing party who is a witness can be done ethically only with the opposing attorney's consent or under authority of law (for example discovery). *Resnick*, 95 F.R.D. 372; ABA Formal Op. 108 (1934); ABA Formal Op. 187 (1938).

Thus, even though corporate employees, as agents of the corporation, have an obligation to cooperate with the corporate attorney, if a corporate employee is represented in "the matter" and the employee's attorney refuses to consent to interviews (including interviews at which the employee's attorney is present), then the corporate attorney is effectively stymied from interviewing that particular corporate employee.<sup>39</sup> Despite the antagonism which the interview embargo is likely to generate between the two attorneys, the corporate attorney is prohibited from directly contacting the corporate employee even if the corporate attorney were personally convinced that the employee was receiving incompetent and unethical advice.<sup>40</sup>

At this point, corporate attorneys may properly feel that DR 7-104(A)(1) and Rule 4.2 lead to a strange and paradoxical result. The discussion of this Problem began with an argument that zealous advocacy required the corporate attorney to proceed without regard to the consequences for employees. After discussion of the various ethical rules, corporate attorneys may now agree that ethical rules do mandate fairness toward corporate employees in internal investigations and thereby willingly accept obligations prohibiting advice, requiring role clarification, and mandating contact with the employee through his attorney. But now the ethical analysis of the Problem, by allowing an employee's attorney to embargo the employee from interviews, means that the corporate

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39. At this point, the corporate attorney would have to search for an authorization at law which would allow an interview with the employee. Obviously, if the corporation filed a lawsuit against the employee, then the corporation could take the employee's deposition. Filing a lawsuit to gain access to discovery techniques is, of course, costly and possibly undesirable from the corporation's viewpoint.

40. ABA Informal Op. 1348 (1975) ("Under the Code of Professional Responsibility, we believe that it is not permissible for Lawyer A to send a copy of his settlement proposal to Lawyer B's client, even though he believes that Lawyer B is not relaying settlement offers submitted in connection with the litigation in question.") The ABA Committee specifically declined to adopt Professor Drinker's suggestion that on such facts Canon 9 of the Canons of Professional Ethics (the precursor of DR 7-102(A)(1) and Rule 4.2) should not be interpreted to prohibit contact between the attorney and the opposing party. H. DRINKER, *supra* note 22, at 203. See C. WOLFRAM, *supra* note 2, § 11.6.2 at 613-14 (*Represented Persons*).

attorney cannot fully complete the tasks assigned by the corporate client. The corporate attorney may feel that the corporate client is being deprived of zealous representation.

Yet, the rules do require what has been presented in this article. In that knowledge, it becomes clear that not only fairness, but also ethical limitations on zealous representation are involved. Attorneys often get so committed to "zealousness" that they forget that ethical limitations on "zealousness" exist. Corporate attorneys should remember that the corporate client is entitled to zealous representation, but that the representation, to use the language of Canon 7 of the Model Code, must be "within the bounds of the Law." Ethical rules, despite the arguably strange and ironic result on the facts of this Problem, help set the bounds of the law within which the corporate attorney must function.<sup>41</sup>

### *C. Consequences of Violating the Ethical Rules*

#### *1. Consequences to Client*

##### *a. Disqualification of counsel*

Represented and unrepresented persons who believe they have been contacted by an attorney in ways which violate the ethical rules governing such contact have not been reluctant to file motions to disqualify the attorney from further representation in the matter.<sup>42</sup> Hence, the most serious consequence that possibly can occur in this situation is for the corporation to lose the use of its corporate attorney because of ethical violations by the counsel.

Admittedly, courts are reluctant to grant this severe sanction. Disqualification of attorneys generally causes delay in solving legal issues and deprives the client of representation by the attorney of the client's choice. Courts will attempt to avoid these disqualification repercussions; but on the other

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41. "The duty of a lawyer, both to his client, and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." EC 7-1.

42. See *infra* note 43 (motions to disqualify based on violations of DR 7-104(A)(1) & (2) and Rules 4.2 & 4.3).

hand, courts have ordered disqualification when such severe sanction was warranted.<sup>43</sup>

Courts are most likely to order disqualification when the person contacted reasonably believed that the attorney, against whom disqualification is sought, represented the contacted person. Whether the attorney actively misled the contacted person or simply failed to correct the contacted person's confusion (which confusion was apparent to the attorney) is irrelevant. In either instance, courts are likely to order the attorney's disqualification because the attorney has the affirmative obligation to clarify the relationship.<sup>44</sup> Courts are also likely to order disqualification when the court becomes convinced that the attorney who made the prohibited contact acted with a conscious disregard of the ethical limitations on communications with represented parties and unrepresented persons. In these instances of conscious disregard of the ethical rules, courts use disqualification to give a clear message of deterrence.<sup>45</sup>

In situations where the contacted person reasonably believed that the attorney represented the contacted person, disqualification is quite appropriate because the contacted person moving for disqualification is, in effect, making a claim that the attorney has engaged in an irreconcilable conflict of interests. Although the attorney may have clearly understood the identity of the client, the contacted person did not, and

43. Cases granting the motion to disqualify for impermissible contact with represented or unrepresented persons include *Kleiner*, 751 F.2d 1193; *Shelton v. Hess*, 599 F. Supp. 905 (S.D. Tex. 1984); *Brown*, 305 F. Supp. 371; *In re Geiger Enterprises, Inc.*, 5 Bankr. 694 (Bankr. W.D.N.Y. 1980); *Mills Land & Water Co. v. Golden West Refining Co.*, 186 Cal. App.3d 116, 230 Cal. Rptr. 461 (1986); *Chronometrics, Inc. v. Sysgen, Inc.*, 110 Cal. App.3d 597, 168 Cal. Rptr. 196 (1980).

Cases denying the motion to disqualify for the same conduct include *Meat Price Investigators Ass'n v. Spencer Foods, Inc.*, 572 F.2d 163 (8th Cir. 1978); *Haines*, 531 F.2d 671; *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2nd Cir. 1975); *Korea Shipping*, 621 F. Supp. 164; *Syufy Enters. v. Columbia Pictures Indus., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,170 (D. Utah 1978); *State v. McLaren*, 402 N.W.2d 535 (Minn. 1987).

44. *Brown*, 305 F. Supp. 371 (unrepresented person). See *Kleiner*, 751 F.2d 1193 (represented parties); *Chronometrics*, 110 Cal. App.3d 597, 168 Cal. Rptr. 196 (represented party).

45. *Kleiner*, 751 F.2d 1193 (represented parties); *Geiger*, 5 Bankr. 694 (represented parties); *Mills Land*, 186 Cal. App.3d 116, 230 Cal. Rptr. 461 (represented party).

reasonably believed that the attorney had, at a minimum, two clients. Courts have used disqualification as a proper and common sanction in conflict of interest situations for many years.<sup>46</sup>

At the same time, if the contacted person had been properly warned and could not have reasonably believed that the attorney was representing the contacted person, the courts have generally refused to disqualify the contacting attorney. This is true even though the attorney should not have been contacting the *represented* person at all or should not have been giving the *unrepresented* person advice, other than the advice to secure counsel. Courts have refused to disqualify in these situations due to concern that the sanction requested is too severe for the ethical violation committed.<sup>47</sup>

As a general rule, the refusal of courts to disqualify an attorney who has violated the ethical rules on contact with others, but who has also made clear whom the attorney represents, is a proper decision. Attorneys who contact others when such contact is ethically prohibited, but without becoming entangled in a conflict of interest with the contacted person, have acted impermissibly, but they have not generally so irreparably prejudiced the contacted person that disqualification is mandated. The contacted person has, or may well have, been placed in a position from which prejudice flows, but that prejudice can usually be handled by lesser sanctions than that of disqualification.

If the arguments about the appropriate use of disqualification as a sanction are adopted, then it becomes clear that the corporate attorney in the Problem's factual situation must be especially careful during the internal investigation. Due to their past amicable working relationships and the employee's likely assumption that they are both working toward the same corporate goals, the employee may well misunderstand the

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46. See generally C. WOLFRAM, *supra* note 2, § 7.1.7 at 329, 332-33 (*Conflict Remedies and Procedures*).

47. *Spencer Foods*, 572 F.2d 163 (represented party); *Haines*, 531 F.2d 671 (unrepresented person); *Ceramco*, 510 F.2d 268 (represented party); *Korea Shipping*, 621 F. Supp. 164 (represented party); *Syufy*, 1978-2 Trade Cas. (CCH) ¶ 62,170 (represented parties). In *McLaren*, 402 N.W.2d 535, the Supreme Court of Minnesota affirmed a refusal to disqualify on the ground that the Supreme Court agreed with the trial court that no ethical violation had occurred.

adversariness of this contact with the corporate attorney. Hence, the corporate attorney must clarify his role and relationship. If the corporate attorney fails to do so, the corporation can suffer significant and unnecessary detriment to its desire to be properly advised as to what actions the Board of Directors should take in regard to these allegedly improper or illegal payments to domestic and foreign purchasers. Disqualification is the most serious consequence that the corporation can suffer if the corporate attorney acts in an ethically impermissible manner.

b. Privilege of confidentiality

As previously stated, when the corporate attorney speaks to corporate employees about legal matters on behalf of the corporation, the *corporation* has an attorney-client privilege with respect to those communications. Because the attorney-client privilege belongs to the corporation, the corporation also is the entity which gets to exercise control over the privilege, including the decision to waive it. Hence, when the corporate attorney interviews the employees, the employees need to understand clearly that anything said to the corporate attorney may be used by the corporation to further its interests regardless of the impact of the disclosure upon the employee.<sup>48</sup>

Corporate employees might assert that they too are entitled to an attorney-client privilege by arguing that they and the corporation were co-clients of the corporate attorney or that they and the corporation were engaged in a joint-defense each using their own attorney. Arguments based on the co-client doctrine or the joint-defense doctrine should be disregarded. While these two doctrines provide an attorney-client privilege against the world, they do not provide protection against disclosure by the co-client or the jointly-defended party when it is in his best interest to reveal. In other words, the co-client privilege and the joint-defense privilege only protect communications to the attorney so long as *each* party

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48. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985); See generally C. WOLFRAM, *supra* note 2, § 6.5.4. at 287-88 (*Scope of the Corporate Privilege*).



involved desires that the communication be kept from the remainder of the world.<sup>49</sup> Hence, even assuming the corporate employee had been a co-client or that the corporation and the corporate employee had been engaged in a joint-defense, the corporation should still be allowed to make independent decisions as to when or whether it is in the corporation's best interest to allow revelation of the confidential communications.<sup>50</sup>

Yet, courts have indicated that there is one instance in which the corporation may not be allowed to exercise independent control over the attorney-client privilege arising from communications between corporate attorneys and corporate employees. Let us assume that the corporate attorney has disclosed the initial three components of role and relationship clarification,<sup>51</sup> but that the attorney has failed to adequately insure that the corporate employee understands the impact and implications of those initial warnings.<sup>52</sup> The corporate employee might then be able to convince a court that he understood the attorney represented only the corporation, but that he still reasonably believed he was entitled to an attorney-client privilege with respect to the communications made to the corporate attorney during the interview. On this fact pattern, several courts have implied that the corporation would be *estopped* from waiving the attorney-client privilege, even though lawfully entitled to do so under the attorney-client privilege, because of the unfairness which would result to

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49. C. WOLFRAM, *supra* note 2, §§ 6.4.8, 6.4.9 at 274-78.

50. If the corporate employee can establish that he had a reasonable belief that the corporate attorney was representing the corporation and the employee as co-clients, when the corporation decides to reveal confidential communications, conflict of interest problems arise for the corporate attorney who has been trying to represent both as co-clients. While the corporation would be entitled to reveal the communication, the corporate attorney might well be subject to disqualification due to the conflict of interest. See *supra* text accompanying notes 44-47.

51. The initial three components of the clarifications as listed in the comment to Rule 1.13(d) are: 1) inform the employee of the subject matter of the conflict or potential conflict; 2) identify the client by informing the employee that the lawyer represents the corporation; and 3) inform the employee that the employee might want to have independent legal counsel.

52. In other words, the corporate attorney did not clearly inform the employee of the fourth and fifth components of the clarification as listed in the comment to Rule 1.13(d) which are: 4) the corporate attorney does not and cannot represent the employee; and 5) their discussion is not protected by an attorney-client confidentiality.

the employee. In effect, the courts faced with this fact pattern have adopted the equitable principle that persons (the corporation) must have "clean hands" before they can do that which the law otherwise allows.<sup>53</sup> By the corporate attorney's failure to abide by the ethical rules, the corporation can suffer a second consequence of being prevented from exercising independent control over the attorney-client privilege.<sup>54</sup>

### c. Evidentiary sanctions

Assuming that the corporate attorney has adequately clarified the role and relationship so that the corporate employee has no legitimate claim to the disqualification sanction or to estoppel control over the attorney-client privilege, the

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53. *Cf. Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1977). It should be clearly understood that the attorney-client privilege, arising from communications between a corporate attorney and corporate employees about corporate matters, belongs to the corporation exclusively. *Weintraub*, 471 U.S. 343. What is being argued is that under a particular fact pattern, a court could hold that due to the detrimental reliance of the corporate employee (which arose because corporate agents failed to clarify the meaning of the attorney-client privilege in an interview) the corporate employee may be entitled to *estop* the corporation from asserting its attorney-client privilege or waiving the privilege to the detriment of the employee. The estoppel argument is an estoppel argument, not an argument that the corporate employee shares the corporation's attorney-client privilege.

The estoppel argument should also be distinguished from the situation where the corporate employee is concurrently the client of the attorney who also represents the corporation. In this latter fact pattern, the communications between the corporate employee and the corporate attorney about corporate matters is the corporation's attorney-client privilege. But communications between the corporate employee and his attorney (who also happens to be the corporate attorney) about the employee's personal legal affairs, even those interconnected with the corporation's legal affairs, is the employee's attorney-client privilege. Of course, the attorney who is trying to fulfill this dual role is in a very difficult conflict of interest situation and may be forced to withdraw from representation of both clients. *See* Rule 1.13(e). *See generally C. WOLFRAM, supra* note 2, at §§ 7.2, 7.3. Most courts have clearly distinguished the corporation's attorney-client privilege from the employee's attorney-client privilege. Several other courts have not as clearly made the distinction. *Compare In re Grand Jury Investigation*, 575 F. Supp. 777 (N.D. Ga. 1983); *United States v. De Lillo*, 448 F. Supp. 840 (E.D.N.Y. 1978); *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977); *with In re Beville*, Bresler & Schulman Asset Management Corp., 805 F.2d 120 (3rd Cir. 1986); *In re Carter*, 62 Bankr. 1007 (Bankr. C.D. Cal. 1986). *Cf. also, Brown*, 305 F. Supp. at 400.

54. No case has faced the claim by an employee that his misunderstanding means that he can waive the attorney-client privilege even though the corporation does not desire to waive it. The resolution of this precise question is a question of evidence, not of ethics, and is outside the scope of this article.

corporate employee may still have other rightful claims arising from violations of the ethical rules governing attorney contact with represented and unrepresented persons. The corporate attorney, for example, could improperly advise the employee to sign a document which abandons or settles, to the detriment of the employee, certain legal rights in the matter being investigated. In addition, the corporate attorney could obtain statements from the employee which would not have been given, if the represented employee had been interviewed in his personal attorney's presence. Finally, the corporate attorney could ask questions in such a manner as to trap the employee into incriminating admissions which would not have been made if the unrepresented employee had properly understood the significance of the questions. In all these instances of unethical conduct by the corporate attorney, the courts have the power to protect the employee against use of the information gained through the ethical violations.

Courts have allowed improperly advised unrepresented persons or represented parties to disavow and disclaim documents that have been signed.<sup>55</sup> Through the remedy of suppression, courts have refused to admit statements obtained in violation of the ethical prohibitions on contact between attorneys and represented or unrepresented persons.<sup>56</sup> Courts have indicated that statements improperly obtained can be denied acceptance into evidence as "evidentiary admissions" against the party who made the statement, even though the statement might otherwise be allowed as a prior inconsistent statement for purposes of impeachment.<sup>57</sup> Courts have been willing to

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55. *Kleiner*, 751 F.2d 1193. *Cf. Cada*, 93 F.R.D. 95; *In re Snyder*, 51 Bankr. 432 (Bankr. D. Utah 1985). The first two cases cited involved class actions and the last case involved bankruptcy. Although class action and bankruptcy litigation have special procedural rules governing contact between attorneys and opposing parties (which reinforce the ethical rules governing such contact), the author believes that the sanction of voiding signed documents, as discussed in these cases, has broader applicability than just to class action and bankruptcy litigation.

56. *Trans-Cold Express*, 440 F.2d 1216; *Massa v. Eaton Corp.*, 109 F.R.D. 312 (W.D. Mich. 1985); *Bruske v. Arnold*, 44 Ill.2d 132, 254 N.E.2d 453 (1969). *Cf. Fair Automotive*, 128 Ill. App.3d 763, 471 N.E. 2d 554.

57. *See Frey*, 106 F.R.D. 32. The court ruled that if the prospective interviewees were not "parties" for purposes of DR 7-104(A)(1) (thus subject to being interviewed without opposing counsel's consent), then concomitantly these interviewees could not be "parties" under Fed. R. Evid. 801(d)(2)(D) whose statements would be binding

grant protective orders when convinced that an attorney is violating or about to violate the ethical rules governing contact with represented or unrepresented persons.<sup>58</sup> In these and many other ways, courts have wide discretion to control the evidence which is admissible and the manner of its use.<sup>59</sup>

The availability of these evidentiary sanctions explains why courts are, and should be, reluctant to use the severe sanction of disqualification. Disqualification should be reserved for violations of the ethical rules governing contact between represented and unrepresented persons which raise conflict of interest issues. However, violations of ethical rules which involve "sharp" practices or overzealousness, as opposed to conflict of interest claims, can be handled through these less severe evidentiary sanctions. A corporation should not be so severely punished for a corporate attorney's ethical violation as to lose its choice of counsel, especially when depriving the corporation of the evidence obtained through the

admissions upon their employer. *Id.* at 37-38. The remedy devised by the court implies that an attorney has an option: treat the proposed interviewee as a "party" which requires opposing counsel's consent before the interview can be conducted, but which allows the statement to be treated as a "party-opponent" admission; or interview the person without getting consent which treats the person as an unrepresented non-party whose statement might be relevant evidence, but whose statement cannot be admitted into evidence as a "party-opponent" admission. *Cf. Massa*, 109 F.R.D. 312.

58. Compare *Massa*, 109 F.R.D. 312; *Resnick*, 95 F.R.D. 372 (protective orders granted) with *Mompoin*, 110 F.R.D. 414; *Porter v. Arco Metals Co.*, 642 F. Supp. 1116 (D. Mont. 1986) (protective orders denied).

59. Courts have also been faced with motions to dismiss the action or motions to strike pleadings based on violations of the ethical rules governing contact between attorneys and represented and unrepresented persons. Due to the severity of the action to dismiss or strike, courts have been reluctant to grant these motions. Cases involving motions to dismiss include: *Haines*, 531 F.2d 671; *Korea Shipping*, 621 F. Supp. 164. Cases involving motions to strike pleadings include: *Ceramco*, 510 F.2d 268; *Fair Automotive*, 128 Ill. App.3d 763, 471 N.E.2d 554.

Courts have also been reluctant to impose vicarious disqualification on the partners and associates of an attorney who is being disqualified for violating ethical rules governing contact between an attorney and an unrepresented or represented person. See *Kleiner*, 751 F.2d 1193; *Mills Land*, 186 Cal. App.3d 116, 230 Cal. Rptr. 461; *Chronometrics*, 110 Cal. App.3d 597, 168 Cal. Rptr. 196. See also *Brown*, 305 F. Supp. at 395 n.70. Compare DR 5-105(D) with Rule 1.10 (ethical rules governing vicarious disqualification).

violations can prevent unfairness to the corporate employee.<sup>60</sup> Moreover, depriving the corporation of evidence which it needs to use for its own protection or for its own burdens of proof is still a serious, but not severe, sanction<sup>61</sup> that can be very detrimental to the corporation's interests.

Thus, in the Problem, the corporate attorney, who successfully protects the corporation from conflict of interest claims and issues relating to the attorney-client privilege, must still conduct the interviews with the corporate employees only when allowed and only under conditions of questioning and disclosure which insure fairness to the corporate employee. Failure to pursue fairness to the employee can result in a failure to protect the interests of the corporation through the imposition of evidentiary sanctions upon the corporation. Zealous representation on behalf of the corporate client is truly zealous only when fairness to the corporate employees is sufficiently considered and honored.

## 2. Consequences for the Corporate Attorney

Attorneys who violate ethical rules are subject to discipline for the violation. It is therefore not surprising to learn that the corporate attorney who unethically contacts represented or unrepresented corporate employees is likely to be disciplined. Courts have not hesitated to discipline attorneys who have violated DR 7-104 or Rules 4.2 and 4.3 in other contexts. No reason exists to believe that courts would react differently to violations in the context of the corporate attorney contacting represented or unrepresented corporate employees. Hence, the corporate attorney must be concerned not only with the consequences which the ethical violations might im-

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60. Courts often explicitly engage in a balancing process in deciding whether the sanction of disqualification, or some lesser sanction, is appropriate for violations of the ethical rules governing contact between an attorney and represented or unrepresented persons. *Compare, Sysgen*, 110 Cal. App.3d 597, 168 Cal. Rptr. 196 (balance in favor of disqualification) with *Korea Shipping*, 621 F. Supp. 164 (balance against disqualification despite violation).

61. The most severe evidentiary sanction is to grant a motion to dismiss or a motion to strike pleadings based on ethical violations arising from contact with represented or unrepresented persons. *See supra* note 59.

pose upon the corporation, but also with those disciplinary sanctions which might be imposed upon the attorney.<sup>62</sup>

The corporate attorney who violates the ethical rules governing contact with unrepresented or represented corporate employees during internal corporate investigations should also be aware that he may be opening himself to civil liability. Corporate employees who have been harmed as a result of the ethical violations may be able to prove economic damages for which courts will grant recovery. Although case law supporting civil claims based on ethical violations of DR 7-104 and Rules 4.2 and 4.3 is admittedly sparse, the corporate attorney should not ignore this additional risk.<sup>63</sup>

### III. NONLAWYER EMPLOYEES

The facts of the Problem indicate that the corporate attorney has decided to delegate the initial interviews to a legal assistant.<sup>64</sup> Now that it has been shown that ethical rules prohibit certain contacts between the corporate attorney and employees, the question arises as to whether similar or identical

62. Cases in which attorneys have been disciplined for violating ethical rules governing contact between attorneys and represented or unrepresented persons include: *Crane v. State Bar*, 30 Cal. 3d 117, 635 P.2d 163, 177 Cal. Rptr. 670 (1981); *State v. Thompson*, 206 Kan. 326, 478 P.2d 208 (1970); *In re Lewelling*, 678 P.2d 1229 (Or. 1984); *In re Burrows*, 629 P.2d 820 (Or. 1981); *In re Murray*, 601 P.2d 780 (Or. 1979) (disciplinary complaint dismissed); *In re McCaffrey*, 549 P.2d 666 (Or. 1976); *Schwabe*, 408 P.2d 922.

No attorney has been disciplined in Oklahoma for a violation of either subsection of DR 7-104. Indeed, only one Oklahoma case, *Crawford v. State*, 688 P.2d 357 (Okla. Crim. 1984) cites DR 7-104. The *Crawford* case involves a claim by a criminal defendant that the District Attorney violated subsection (B) by obtaining the unrepresented defendant's confession. Criminal investigations by public officials raise different, but analogous, ethical issues under DR 7-104 to those raised by the fact situation of the Problem analyzed in this article. See ABA/BNA, *supra* note 9, at 71:304; C. WOLFRAM, *supra* note 2, § 11.6.3. at 617-18 (*Contact with Unrepresented Persons*). Cf., Rule 3.8(c) & comment 2, (*Special Responsibilities of a Prosecutor*).

63. See Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. Rev. 281, 309 (1979).

64. The Problem's facts indicate that the corporate attorney made the decision to have the legal assistant conduct the initial interviews for reasons of efficient allocation of workload among the staff. However, if the corporate attorney had paused at this point to consider ethical rules, the attorney could have decided that having the legal assistant conduct the interviews is also wise ethically due to the precepts governing lawyers as witnesses. DR 5-102; Rule 3.7.

ethical prohibitions exist when the investigatory tasks are delegated.

*A. Responsibility for the Conduct of Legal Assistants*

DR 1-102(A)(2) and Rule 8.4(a) both make it professional misconduct for an attorney to circumvent or violate an ethical rule through the acts of another.<sup>65</sup> Hence, if the interviews with the corporate employees would constitute ethical violations when conducted by the corporate attorney, then the corporate attorney would also be violating those same ethical rules by having the legal assistant conduct them. Indeed, the Model Rules reinforce and expand this prohibition on violating the ethical rules through the conduct of another by language in Rule 5.3, *Responsibilities Regarding Nonlawyer Assistants*.<sup>66</sup>

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65. DR 1-102. Misconduct

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.

In Oklahoma, Rule 4.2 reads slightly differently than the ABA version. Oklahoma Rule 4.2 reiterates that an attorney can be held responsible for impermissible contacts by another with a represented party by stating: "In representing a client, a lawyer shall not communicate, or cause another to communicate . . ." 57 OKLA. B.J. 2046 (1986). This emphasized language is found in DR 7-104(A)(1), but the ABA, in contrast to Oklahoma, did not carry the emphasized language forward into Rule 4.2.

66. RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

On their face, DR 1-102(A)(2) and Rule 8.4(a) limit the accountability of a lawyer for the actions of another to direct acts by the lawyer in ordering or participating in the misconduct.<sup>67</sup> In other words, the attorney is accountable for the actions of another when the lawyer is an accessory. Under these two ethical rules, however, the lawyer is not responsible through the doctrine of vicarious (imputed) liability.<sup>68</sup> Rule 5.3(c)(1) reinforces DR 1-102(A)(2) and Rule 8.4(a) by stating that an attorney who "orders" or "ratifies" specific conduct that violates an ethical rule shall be responsible for that conduct. Rule 5.3(c)(1) is, therefore, restating the liability of an attorney for his own actions, direct or accessorial. Hence, on the facts of the Problem, if the corporate attorney ordered the

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

67. C. WOLFRAM, *supra* note 2, § 16.2.2. at 881 (*Subordinate and Supervising Lawyers*).

68. In their treatise on professional responsibility, Professors Hazard and Hodes make very explicit this distinction between accessorial liability and vicarious liability. G. HAZARD & W. HODES, *supra* note 7, at 463, 466.

Rule 8.4 also imposes liability upon an attorney when the attorney "attempts" to violate the Rules of Professional Conduct. The comparable provision, DR 1-102 (*Misconduct*), does not explicitly include attempt liability as a basis for attorney disciplinary responsibility and it is not clear that courts, under the code, would impose discipline upon attorneys for "attempts" to violate its Disciplinary Rules. *See Murray*, 601 P.2d 780 (The Oregon Supreme Court dismissed a complaint against an attorney for violating DR 7-104(A)(1) through an *attempted* communication with a party represented by an attorney). *See also In re Boothe*, 303 Or. 643, 740 P.2d 785 (1987).



legal assistant to contact a corporate employee who the attorney knew had retained counsel in the matter, then the corporate attorney would be violating the ethical rule prohibiting such conduct due to the attorney's accessorial liability for the conduct of the legal assistant. Similarly, the corporate attorney would be subject to discipline if the attorney ratified the actions of the legal assistant who gave advice, other than the advice to secure counsel, to an unrepresented person.<sup>69</sup>

But Rule 5.3 also expands the responsibility of the corporate attorney for the actions of the legal assistant in two different ways. First, Rule 5.3(c)(2) imposes responsibility upon an attorney who has direct supervisory authority over a non-lawyer and who fails to take "reasonable remedial measures" when the attorney knows of misconduct "at a time when its consequences can be avoided or mitigated." Whether Rule 5.3(c)(2) creates a form of "limited vicarious responsibility"<sup>70</sup> or only an "enhanced duty" of supervision,<sup>71</sup> it is clear that the attorney has an affirmative obligation to stop and to correct misconduct when the attorney has the supervisory ability to take such remedial actions. In the Problem, the corporate attorney would commit an ethical violation if he learned that the legal assistant was violating the ethical rules controlling contact with represented or unrepresented employees and failed to take corrective action. Even if the legal assistant violated express instructions to abide by the ethical rules while conducting the investigation, the corporate attorney, upon learning of the violations, is obligated under Rule 5.3(c)(2) to take corrective action. The corporate attorney cannot escape responsibility for the legal assistant's misconduct by averting the eyes or closing the ears.

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69. The legal assistant is not in Oklahoma, nor in most other states, a "licensed" person who is directly subject to the ethical rules governing the practice of law. Hence, the legal assistant cannot be disciplined by the Bar Association or other disciplinary apparatus. C. WOLFRAM, *supra* note 2, § 16.3.1 at 892 (*Scope of Lawyer Responsibility*). Three states, Florida, Iowa and Kentucky, have guidelines on the use of non-lawyer personnel that have been promulgated by the State Supreme Court. In these three states, legal assistants may have some direct accountability to the ethical codes. See ABA/BNA MANUAL, *supra* note 9, at 21:8604-21:8605.

70. C. WOLFRAM, *supra* note 2, § 16.2.2 at 882 (*Subordinate and Supervising Lawyers*).

71. G. HAZARD & W. HODES, *supra* note 7, at 466.

Second, Rule 5.3(b) imposes the obligation upon attorneys having direct supervisory authority to "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Rule 5.3(b) has two facets to its obligation: supervision and education.

The obligation of an attorney to properly supervise employees is not expressly set forth in the Code.<sup>72</sup> However, EC 3-6 discusses delegation of tasks to nonlawyers and says that such delegation is proper if "the lawyer . . . supervises the delegated work, and has complete professional responsibility for the work product." But, this language of EC 3-6 has not been interpreted as setting a standard of disciplinary liability of lawyers for the ethical misconduct of employees.<sup>73</sup> Yet, despite the silence of the Code, case law and ethics opinions have imposed disciplinary liability in many instances upon attorneys for failure to supervise.<sup>74</sup> In fact, attorneys have long had a special responsibility for supervision of legal assistants because without direct supervision by an attorney legal assistants often would be engaged in the unauthorized practice of law.<sup>75</sup> Thus Rule 5.3(b), in its supervision facet, is actually a codification of the ethical obligation to supervise and the

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72. C. WOLFRAM, *supra* note 2, § 16.2.2 at 882.

73. ABA/BNA MANUAL, *supra* note 9, at 91:204.

74. See, e.g., *Crane*, 30 Cal. 3d 117, 635 P.2d 163, 177 Cal. Rptr. 670, (contact through office staff); *Burrows*, 629 P.2d 820 (District Attorney, contact through police officers); *Murray*, 601 P.2d 780 (attempted contact through client); ABA Formal Op. 95 (1933) (Municipal attorney, contact through police officers); ABA Informal Op. 663 (1963) (contact through private investigator); Los Angeles B. Ass'n Op. 410 (1983) (contact through investigator). Cf. ABA Informal Op. 1320 (1975) (unethical for an attorney to have an investigator record an interview without the consent of the person being interviewed).

For cases in which courts have imposed non-disciplinary sanctions for the actions of others who improperly contacted represented or unrepresented persons, see *Kleiner*, 751 F.2d 1193 (contact through employees of client, disqualification); *Trans-Cold Express*, 440 F.2d 1216 (contact through private investigator, suppression of statement); *Industrial Gas*, No. 80-C-3479 (N.D. Ill. Nov. 25, 1985) (CALR) (contact through private investigator, ordered to disclose the names and dates of contacts plus pay court costs and attorney fees relating to motion); *Massa*, 109 F.R.D. 312 (contact through client, suppression of statement and protective order); *Geiger*, 5 Bankr. 694 (contact through client, disqualification); *Bruske*, 44 Ill.2d 132, 254 N.E.2d 453 (contact through private investigator, suppression of statement).

75. G. HAZARD & W. HODES, *supra* note 7, at 465; C. WOLFRAM, *supra* note 2, at § 16.3.2 (*Paralegals*). See generally, ABA/BNA MANUAL, *supra* note 9, at 21:8604-21:8607 and 21:8609-21:8612 (*Lawyer Responsibility for Nonlawyer Personnel*).

disciplinary liability which follows from a failure to supervise that has heretofore been imposed upon attorneys using the services of nonlawyers as assistants.<sup>76</sup>

In its educational facet, however, Rule 5.3(b) does impose new affirmative obligations upon the supervising attorney. Rule 5.3(b) apparently contemplates, though not expressed as clearly as the comparable obligation of partners set forth in Rule 5.3(a),<sup>77</sup> that supervising attorneys will institute procedures and instructions which will insure that nonlawyer employees conduct themselves in a manner that is "compatible with the professional obligations of the lawyer." Placed in the context of the facts of the Problem, the corporate attorney has the obligation to supervise the legal assistant to insure ethical conduct and to stop and correct misconduct. But in addition, the corporate attorney also has the obligation to instruct the legal assistant as to how to conduct the interviews in an ethically permissible manner so as to protect against the unknowing or inadvertent violation of the ethical rules by the legal assistant. In other words, even if the corporate attorney could prove that supervision would not have prevented the misconduct by the legal assistant, the corporate attorney is still subject to discipline under Rule 5.3(b) if the corporate attorney failed to fulfill the educational facet of the rule. The corporate attorney is not expected to guarantee that the legal assistant will not commit misconduct, but the corporate attorney is expected to educate the legal assistant in ethical responsibilities.<sup>78</sup> Hence, before the corporate attorney delegates

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76. See, e.g., Colo. B. Ass'n Op. 61 (1982); Mich. Bar Ass'n Op. CI-756 (1982). See generally ABA/BNA MANUAL, *supra* note 9, at 91:201, 91:204-91:206 (*Responsibilities within Firm*).

77. Rule 5.3(a) reads as follows:

With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

78. G. HAZARD & W. HODES, *supra* note 7, at 464-65. See C. WOLFRAM, *supra* note 2, § 16.3.1 at 892-94 (*Scope of Lawyer Responsibility*). Cf. *id.*, § 16.2.2 at 881-83 (*Subordinate and Supervising Lawyers*).

In their texts, Professors Hazard & Hodes and Professor Wolfram argue that the educational facet of Rule 5.3 is a mandatory requirement even if no misconduct is committed by non-lawyer employees. In other words, the obligation to have

interview tasks, time must be taken to educate the legal assistant about the ethical rules governing contact between an attorney and represented or unrepresented corporate employees.

### *B. Consequences of Legal Assistant Misconduct*

#### 1. Consequences for the Corporation

##### a. Disqualification, Privilege & Evidentiary Sanctions

If a legal assistant has violated the ethical rules prohibiting contact between attorneys and represented or unrepresented persons under circumstances which make the supervising attorney responsible for the misconduct, then the misconduct has, in effect, been committed by the attorney. As a corollary, it follows that when the legal assistant engages in misconduct that would result in disqualification, loss of independent control by the corporation over the attorney-client privilege, or evidentiary sanctions, if the conduct had been committed personally by an attorney, then identical sanctions should be used to censure the legal assistant's misconduct. Moreover, from the perspective of a corporation, both the attorney and the legal assistant are its agents and the misconduct whether committed by the attorney or the legal assistant is identical misconduct performed within the scope of employment. Hence, on the facts of the Problem, courts should not impose different sanctions on the same misconduct dependent on which of the corporate agents, the attorney or the legal assistant, actually engaged in the misconduct.<sup>79</sup> On the contrary, courts should impose the same sanctions for both attorney misconduct and for the identical misconduct of the legal assistant.

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protective measures against misconduct through educational and other precautionary measures exists independent of and prior to the occurrence of any actual misconduct. G. HAZARD & W. HODES, *supra* note 7, at 464; C. WOLFRAM, *supra* note 2, § 16.2.2 at 880-83 (*Subordinate and Supervising Lawyers*).

79. See *supra* note 74 (courts have imposed sanctions against the client for an agent's misconduct relating to contact with represented or unrepresented persons).

## b. Civil and Criminal Liability

This article focuses on ethical rules and the sanctions flowing from violations of ethical rules. The implications of corporate civil and criminal liability through the acts of its agents are not fully scrutinized. Yet, potential corporate liability must be listed as a possible consequence of the acts of the legal assistant or the corporate attorney that violate the ethical rules governing contact with represented and unrepresented persons. While this liability arises from the substantive legal doctrines of agency, torts, contracts and criminal law, rather than from the ethical rules, the potential civil and criminal liability of the corporation due to the acts of agents should not be overlooked.<sup>80</sup>

## 2. Consequences for the Corporate Attorney

If the legal assistant engages in conduct which violates the ethical rules concerning contact with represented and unrepresented persons in ways which impose responsibility upon the corporate attorney for that conduct, the corporate attorney can expect to be disciplined. Attorneys have been disciplined for the conduct of others in numerous cases.<sup>81</sup> In addition, the supervising attorney, in the Problem the corporate attorney, must be aware that the acts of the legal assistant, as the lawyer's direct supervisory responsibility, may also impose civil or criminal liability upon the attorney.<sup>82</sup> Furthermore, because the legal assistant's conduct can have

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80. See Wolfram, *supra* note 63, at 309 n.120.

81. See *supra* note 74 (attorneys held responsible for the conduct of nonlawyer employees, such as legal assistants, and disciplined). See generally, ABA/BNA MANUAL, *supra* note 9, at 21:8601-21:8602, 21:8607-21:8608, 21:8612 (*Lawyer Responsibility for Nonlawyer Personnel*).

82. The comments to Rule 5.1 (*Responsibilities of a Partner or Supervisory Lawyer*) end rather ominously with the following:

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. *Whether a lawyer may be liable civilly or criminally for another lawyer's [or non-lawyer employee's] conduct is a question of law beyond the scope of these Rules.*

(emphasis added). The author added the emphasis because a similar warning should have been included in the comments to Rule 5.3. See generally Wolfram, *supra* note 80.

detrimental consequences for the corporation, the corporate attorney must be concerned that malpractice liability may attach to the attorney personally if the legal assistant engages in conduct that results in harm to the corporate attorney's corporate client.

#### IV. CONCLUSION

The Problem analyzed in this article is a typical event for corporate attorneys. As such, corporate attorneys may be lulled into thinking that internal corporate investigations do not raise difficult and serious ethical questions. This article was written to dispel that assumption, to inform unwary corporate attorneys of the ethical traps that exist in internal investigations and to provide guidance on how to avoid the traps by acting ethically. By acting ethically, undesirable consequences for the corporation *and* for the corporate attorney will be avoided.