



## NEW YORK STATE BAR ASSOCIATION

### COMMITTEE ON PROFESSIONAL ETHICS

Opinion 828 – 3/10/09

Topic: Staff attorneys of state agency;  
communication with persons  
represented by counsel;  
imputation of non-lawyer  
investigator's conduct

Digest: Conduct of state agency's non-  
lawyer investigators would not  
be imputed to its staff  
attorneys unless investigators  
operated under staff attorneys'  
supervision

Code: DR 1-104(C) and (D),  
DR 7-104(A) and (B)

### QUESTION

1. A certain New York State agency maintains a staff of attorneys and non-lawyer investigators to oversee the operations of its licensees. Usually, an investigation will be undertaken by the agency without any supervision of the investigators by staff counsel. When misconduct by a licensee is discovered, a report will be prepared by one of the investigators for review by counsel; and, where appropriate, counsel may then prosecute the matter pursuant to the New York State Administrative Procedure Act.<sup>1</sup>

2. On occasion, before a matter is assigned to a staff attorney, an investigator will learn that one of the licensees under investigation is represented by counsel. Under such circumstances, what are the ethical obligations of the staff attorneys employed by the agency and do they have any obligation to condition or prevent its investigator from continuing to communicate directly with the licensee?

### OPINION

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<sup>1</sup> We express no opinion on whether the New York State Administrative Procedure Act authorizes the procedures described in this opinion. Our jurisdiction is limited to answering questions of professional ethics and does not extend to deciding issues of substantive or procedural law.

3. DR 1-104 states in relevant part:

C. A law firm shall adequately supervise, as appropriate, the work of . . . non-lawyers who work at the firm. . . .

D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed by or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:

1. The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or

2. The lawyer . . . has supervisory authority over the . . . non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

4. DR 7-104 states in relevant part:

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

1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

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B. Notwithstanding the prohibitions of DR 7-104(A) . . . , a lawyer may cause a client to communicate with a represented party . . . provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

5. In light of the foregoing provisions, we will initially assume for purposes of our analysis that the agency's investigators are acting under the supervision or control of its staff attorneys. If that were so, then once the staff attorneys knew that the subject licensees were represented by counsel in connection with the agency's investigation of their conduct, the staff attorneys would be prohibited

from ordering or directing the agency's non-lawyer investigators to communicate further with the licensees without obtaining the prior consent of the licensees' counsel or complying with the "advance notice" requirement of DR 7-104(B). *See, e.g.*, N.Y. State 768 (2003) (explaining when lawyer "knows" that counter-party is represented by counsel); N.Y. State 735 (2001) (defining "party"). In such circumstances, the lawyers' ethical responsibility would derive from the expectation that they would properly supervise the investigators; it would not derive from the mere fact that they use non-lawyer investigators.

6. On the facts stated, however, the agency's investigators do not appear to be acting under the supervision or control of the staff attorneys. It also does not appear that the staff attorneys have any ethical responsibility under DR 1-104 to supervise the non-lawyer investigators' conduct.<sup>2</sup>

7. The non-lawyer investigators are clearly not "employed or retained" by the staff attorneys. *Cf.* DR 1-104(D). Rather, they are employed by the agency. Similarly, they do not "work at the firm." *Cf.* DR 1-104(C). Rather, they work at the agency. Nor can the investigators be said to be "associated" with the staff attorneys because, as that term is used in DR 1-104, the non-lawyer investigators are deemed to be associated only with the agency, not with its counsel.

8. Hence, on the facts here present, the provisions of DR 1-104 must be deemed inapposite to the relationship between the agency's investigators and its staff counsel. Accordingly, absent other factors discussed below, the agency's staff attorneys would have no ethical obligation to supervise the non-lawyer investigators.

9. Although the Code would not necessarily require the agency's staff attorneys to supervise the non-lawyer investigators, the agency could require such supervision as a condition of their counsel's employment. Once such supervision becomes a condition of the staff attorneys' employment, the ethical responsibility described in DR 1-104 would follow. Under such circumstances, the requirements of DR 1-104(C) and DR 1-104(D)(2) would then prohibit the staff attorneys from being willfully ignorant of their investigators' conduct, and responsibility for that conduct could be imputed to the staff attorneys.

10. Ultimately, imputation of the non-lawyer investigators' conduct to the agency's staff attorneys will thus depend on whether the lawyer has "supervisory authority" over the conduct of the non-lawyer. Whether a lawyer has supervisory authority over the conduct of a non-lawyer, *vel non*, will often be a matter of analyzing the operational relationship between the two individuals within the context of the organization, and the purpose and function of the agency in question. Where, for example, the agency requires its investigators to be instructed by staff attorneys concerning the

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<sup>2</sup> We caution that, even in the absence of any systemic supervision or control of the non-lawyer investigators, the agency's staff lawyers would still be prohibited by the provisions of DR 1-102(A)(2) ("circumvent ... through the actions of another") and DR 7-104(A)(1) ("cause another to communicate") from directing or causing the non-lawyer investigators to continue having such communications in violation of the lawyer's prescribed ethical responsibilities under the Code.

procedures to be followed before undertaking an investigation, the conduct of the investigators will generally be imputed to the attorneys. *Cf.* N.Y. County 737 (2007). Where, on the other hand, there is no requirement or expectation that the agency's investigators will operate under the guidance of the staff attorneys, then consistent with the standards set forth in DR 1-104, the conduct of the investigators will not ordinarily be imputed to the staff attorneys.

11. The new New York Rules of Professional Conduct that will take effect on April 1, 2009 are substantially identical to the Disciplinary Rules construed and applied in this opinion.

### **CONCLUSION**

12. For the reasons stated, subject to the qualifications set forth above, the question posed is answered in the negative.

(19-08)

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