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Executive Vice President, Compliance & Governance Solutions
at NYSE Governance Services

Head of Global Issuer
Services at NYSE Euronext

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Legal ethics for compliance lawyers

Lawyers often help promote their respective organization's ethical standards through the roles that they play in compliance and ethics (C&E) programs. But lawyers also have to be attuned to legal ethics as well as business ethics. What is the interplay between business ethics and legal ethical standards?



Kaplan

I do not think that there is any great tension between the two. Of course, a company's lawyers have to abide by somewhat different rules with respect to reporting suspected violations than do employees generally, because the lawyer's knowledge of possible wrongdoing may be

subject to the attorney-client privilege. But this is as it should be, since jeopardizing the privilege would make it less likely that a company would seek legal advice on C&E matters, thereby weakening C&E programs.

More interesting to consider is how C&E changes the *context* for legal ethics issues arising in business organizations. For instance, because C&E programs and internal investigations now often play a significant role in governmental enforcement decisions, there is increased potential harm from C&E lawyers attempting in bad faith to portray the company's C&E measures as more meaningful than they actually are. Potential risks for lawyers here could arise from falsely executing compliance certifications or taking part in a sham internal investigation. C&E programs do not change the standards of ethicality expected of lawyers—these sorts of steps would always

have been viewed as wrong—but could create an enhanced likelihood of violation and punishment for such wrongdoing.

Finally, it is worth asking: To what extent do lawyers apply C&E program measures to promoting legal ethics? For instance, and returning to the topic of lawyer whistleblowing, section 307 of the Sarbanes-Oxley Act requires lawyers (covered by the rule) to “report up” material violations of securities laws or breaches of fiduciary duty. When the rule was first promulgated, many corporate law departments drafted policies and trained

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their attorneys on it and communicated their policies to the law firms that provided services to them. However, based on anecdotal evidence, these compliance measures have largely fallen into disuse in recent years. One can readily imagine how little sympathy the Securities and Exchange Commission would have, in the face of a violation of this rule, with a law department (or law firm) that failed to use compliance measures with respect to its own ethical risks. *

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