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The Inside Story

Peter R. Jarvis* and Mark J. Fucile**

I. INTRODUCTION

The past quarter century has seen enormous increases in the attention paid by law schools and lawyers to legal ethics issues. 1999 marks the twenty-fifth year of the ABA National Conference on Professional Responsibility and the fifteenth year of the ABA/BNA Lawyer's Manual on Professional Conduct. 1999 is also a year in which all American law schools offer instruction in legal ethics and in which a significant number of states require continuing legal ethics training for those who are already members of the Bar. Few law schools, and no states, did so 25 years ago.

One of the less well-known aspects of this increase is the development of in-house legal ethics expertise at an increasing number of law firms. The lawyers that handle these functions and the firms of which they are a part have decided that the field of legal ethics constitutes a distinct subject matter area of law that can be as important to a firm's well-being as subject matter expertise in areas of direct client interest. These lawyers and their firms have also decided that in light of the increasing complexity of legal ethics issues, it makes no more sense to have everyone at the firm be an expert in legal ethics issues than it would to have everyone in a general practice firm be an expert in the details of ERISA or workers' compensation law.

We are the two lawyers with principal in-house responsibility for legal ethics issues for a firm of 250 lawyers with offices in three states and the District of Columbia. One of us has had this responsibility since the mid-1980s when the firm had fewer than 100 lawyers and offices in only one state. The other has become involved in this practice in the past three years. This paper explains what we do and why we do it.

We have written this paper in the hope that it may be useful both to law professors and to lawyers and firms that may be interested in establishing similar practices. We caution the reader at the outset, however, that there are other

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lawyers who perform similar roles at other firms who have made different choices on a number of points.

We have decided to present this paper in a question and answer format based on a series of overlapping questions in four principal areas: organizational and administrative issues, subject matter issues, privilege issues and miscellaneous issues.

II. ORGANIZATIONAL AND ADMINISTRATIVE ISSUES

A. *How did you get selected for this work at your firm?*

We volunteered.

B. *Do you work full-time as in-house legal ethics lawyers?*

No. Neither one of us spends as much as half of our time on in-house legal ethics work. In addition, three other lawyers at the firm assist us in giving in-house advice. We believe it is helpful for us to remain involved in the outside practice of law for firm clients.

We wish to emphasize, however, that having multiple lawyers involved is not necessary to the success of an in-house legal ethics practice. For the first six or seven years, our firm's in-house ethics practice was run by a single lawyer.

There are times when running an in-house ethics practice and representing outside clients can lead to conflicting short-run demands on time. Many of the in-house ethics questions that we receive must be answered (or, at least, the lawyers expect answers) almost immediately. This requires at times that we drop what we are doing in order to turn to the questions of others. We believe, however, that the fact that we are consulted so often shows that lawyers at the firm value what we have to offer. In addition, the fact that we have a number of lawyers who can answer legal ethics questions cuts down on these interruptions.

C. *Must the lawyers at your firm discuss legal ethics issues with you?*

No. We believe that our advice will be best received if it is voluntarily sought. We have, in fact, opposed efforts at the firm to make consultation with us mandatory in some or all situations that raise ethics issues. This does not mean, however, that lawyers at the firm ignore us. We estimate that on an annual basis, the firm's in-house legal ethics lawyers address in excess of 1,000 questions or issues per year.

To paraphrase *Field of Dreams*, "if you build it, they will come." We like to think that the lawyers at our firm call us because they know from experience that they can get prompt and helpful advice from us more quickly and more reliably than they can develop it on their own.

It is important to note that we also get questions from nonlawyers at the firm. Sometimes these are questions from secretarial or managerial personnel about the policies that the firm should follow. Sometimes these are questions about what specific lawyers may have done or directed them to do in specific circumstances.

D. Do you act as a committee or as individuals?

Most of the legal ethics questions that we face seem to arise in a hurry and to require a nearly immediate answer. For this reason, we generally give advice as individuals.

This does not mean that we always do so, however. Where necessary, and time permitting, two or more of us may analyze a question together. In addition, and for the sake of consistency, we feel it is essential that each of us be aware of the advice that the others are giving. A brief memorandum summarizing the key background facts, the questions asked and the answers given is prepared in each case and circulated by e-mail to all members of our group. Except in unusual circumstances, a copy of the memorandum is also sent by e-mail to the lawyer or lawyers who consulted us. Among other things, this reduces the risk of possible miscommunication.

We tend to act collectively on issues of potential firm-wide importance. If, for example, an ethics issue arises that we believe should be presented to the Firm Management Committee, we will generally try first to reach consensus among ourselves so that we can speak with one voice.

E. How does the firm value in-house ethics time?

As a matter of firm policy, in-house ethics time is treated as the equivalent of time billed to clients.

F. How large does a firm have to be before in-house ethics expertise makes sense?

As is noted in the introduction, our firm began to have in-house ethics expertise when it had fewer than 100 lawyers. We do not see this as a minimum required size, however. The nature and extent of in-house expertise can vary with matters such as the complexity of the firm's practice and the availability of outside expertise on an "as needed" and reliable basis. In fact, we perform such roles at times for lawyers at other firms.

It bears mention that it is not only private law firms that can benefit from in-house expertise. For example, a number of government legal departments of which we are aware have such expertise. There is no reason in principle why corporate legal departments cannot develop in-house ethics expertise.

III. SUBJECT MATTER ISSUES

A. What are the principal subjects on which you give advice?

We believe that at one time or another, we have given advice on virtually every imaginable legal ethics issue. The issues with which we regularly deal include at least the following:

1. *Conflict of interest issues.* This includes current client conflict issues, former client conflict issues and at times issues relating to conflicts between lawyer and client. We also assist in the preparation of conflicts waiver or disclosure

- and consent letters, and we have made a set of form letters available to the firm.
2. *Attorney-client, work product and other privilege issues including but not limited to so-called joint defense issues.* We do not purport to be the firm's only experts on these issues, but we make ourselves available as a resource.
 3. *Advertising and solicitation issues.* We provide advice to the firm's overall marketing efforts and to individual lawyers who wish to engage in client solicitation.
 4. *Communication with represented parties' issues.* We advise our lawyers both about direct or indirect contacts with an opposing party's personnel and about keeping counsel for the other side away from our clients' personnel.
 5. *Lawyer and nonlawyer lateral-hire and departure issues.* We have, for example, developed forms to use when a lateral hire must be screened from a matter, and we advise the firm when a lawyer or nonlawyer must or should be screened.
 6. *Attorney fee, billing and trust account issues.* Upon request, we advise the firm with regard to more general or policy-related issues as well as specific problems that may arise.
 7. *Mandatory and permissive withdrawal issues.* This includes but is not limited to "noisy withdrawal" or client perjury types of situations, but it is not limited to these. It also includes more mundane situations such as when the firm can withdraw or how to accomplish withdrawal when a client has not paid us.
 8. *Issues relating to the duty to report misconduct by other lawyers.* We are at times asked by our lawyers whether they have an obligation to turn in other lawyers for conduct in a matter that they have observed.
 9. *Issues that arise when a file or lawyer at the firm is subpoenaed in litigation.* This could be thought of as a subset of attorney-client privilege and, sometimes, conflict of interest issues.
 10. *Responding to Bar complaints filed against firm lawyers.* This does not happen often, but it does occur.

B. Do you have any general philosophical approaches to the issues that you address?

We have three. One is that we try to view things from a positive and constructive perspective. We try very hard to help lawyers accomplish the objectives that they seek and to let them know we are on their side. We also try very hard to look for practical approaches to real-world problems to avoid having to deal with unnecessarily complicated or controversial issues.

We also try to avoid, or at least quantify, risk to the firm, its lawyers and their clients. If at all possible, we look for a way to accomplish an objective that eliminates all risk. If not, we try to make sure that the degree of risk assumed is both appropriate under the circumstances and sufficiently well understood by all concerned parties.

Finally, we work very hard to achieve consensus. Only rarely does it happen that, after consultation, one of our lawyers disagrees with the advice given and states an intention to pursue what we believe to be an inappropriate course of conduct.

C. Do you handle professional liability issues as well as legal ethics issues?

Neither one of us has direct responsibility for handling the firm's professional liability issues. The lawyer who does so is, however, one of the three other lawyers who provides in-house ethics advice, and we are in turn available to assist that lawyer on professional liability as needed. In short, we work closely together.

One of the biggest advantages of an in-house legal ethics practice, however, is that we often can stop potential professional liability issues before they start. We have found on a number of occasions that an ethics question that is brought to our attention may carry with it the risk of financial exposure to the firm or to a client. Early action can often avoid the need to encounter much more troublesome and costly issues at a later time.

D. Do you do anything besides answering specific questions that are put to you?

Yes. We also alert lawyers at the firm to potential developments that may or should be of interest to them. We also develop and maintain forms of various types for use by lawyers at the firm, such as form conflicts waiver letters and form screening affidavits.

IV. PRIVILEGE ISSUES

A. Who is your client?

We generally regard the firm as our client or at least as one of our clients, and we have explained this to lawyers and nonlawyers at the firm. We therefore believe that we are free to share with firm management any information that may come to our attention from a lawyer or nonlawyer employee at the firm.¹ In those few instances in which we have felt that the interests of the lawyer or nonlawyer consulting us and the firm's interests have substantially diverged, we have in fact recommended that the person consulting us retain independent counsel.

B. Do you believe that the advice that you give is privileged?

The answer is "yes, qualified." If, for example, we are advising a lawyer at the firm about whether to seek the disqualification of opposing counsel or to challenge an opposing party's assertion of attorney-client privilege in litigation, there is no reason for our advice to be less subject to a claim of privilege than the advice of any other lawyer at the firm.

We believe that there can be no question about the availability of privilege when we advise the firm or its lawyers on what are essentially non-client mat-

1. Cf. *In re Grand Jury Proceedings*, 156 F3d 1038, 1040-41 (10th Cir 1998) and *In re Grand Jury Subpoenas (Jane Doe and John Doe)*, 144 F3d 653, 658 (10th Cir 1998) (describing the very limited situations in which a corporate officer or employee can assert a personal claim of privilege for a conversation with corporate counsel).

ters, such as the standards applicable to lawyer advertising and solicitation or the defense of a Bar complaint.²

We understand that one can question whether we would be entitled to claim privilege as against a firm client for advice that we might give with respect to the firm's handling of that client's work. We believe, however, that the privilege ought also to be available in such cases.

In addition, if the actions of a lawyer who has consulted us are later called into question in a malpractice or disciplinary context, it may be in that lawyer's and the firm's interest to assert an "advice of counsel" defense. Although this has yet to occur,³ we write our summaries of the advice that we give with an eye towards this potential use.

V. MISCELLANEOUS ISSUES

A. Is the firm your only legal ethics client?

No. We also perform legal ethics work for other lawyers and law firms. We believe that these two aspects of our practice strengthen each other.

B. How do you deal with variation in rules from jurisdiction to jurisdiction?

This can be one of the hardest issues that we have to face. The rules on communications with represented parties, the attorney-witness rules, and certain rules relating to conflicts of interest are not the same in all jurisdictions.

We try to be pragmatic. For example, it is fairly obvious that the applicable attorney-witness rule is the rule of the jurisdiction in which a trial will occur. On the other hand, multiple states' rules can also apply if, for example, we are seeking a waiver to perform work for Client A in State B that is adverse to Client C whom we represent on unrelated matters in State D. In such situations, our bias is in favor of applying the most restrictive rule that is potentially applicable to a situation.

VI. CONCLUDING REMARKS

Like any area of law, the in-house practice of legal ethics has moments that are better and worse. There can be moments of high drama, such as those involving the apparent discovery of client wrongdoing, moments of extreme satisfaction, such as those involving the implementation of a particularly creative solution to a potentially troublesome problem, and moments of extreme frustration, such as those in which no pertinent authority can be found or information about critical facts is missing. For the most part, we enjoy what we do for the firm—both as an end in itself and because it benefits the firm. We are firmly convinced that more firms could benefit from the development of in-house legal ethics practices.

2. See, e.g., *United States v. Rowe*, 96 F3d 1294 (9th Cir. 1996).

3. Since the mid-1980s when this practice began, the firm has not been sued and no Bar complaints have been filed based on any issue about which we were consulted in advance.