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INSIDE AN IN-HOUSE LEGAL ETHICS PRACTICE

PETER R. JARVIS & MARK J. FUCILE*

INTRODUCTION¹

The past quarter century has seen enormous increases in the attention paid by law schools and lawyers to legal ethics. The year 2000 will mark the twenty-sixth year of the ABA National Conference on Professional Responsibility and the sixteenth year of the ABA/BNA Lawyer's Manual on Professional Conduct. The year 2000 will also be a year in which all American law schools teach legal ethics and in which a significant number of states require continuing legal ethics training for members of the bar. Few law schools, and no states, did so twenty-five years ago. One of the less well-known aspects of this increase is the development of in-house legal ethics expertise at law firms.² The lawyers

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1. This article is a revised and expanded version of a paper presented in June 1999 at the 25th ABA National Conference on Professional Responsibility. For their many thoughts and insights, the authors wish to thank Professor Lisa Lerman, who teaches legal ethics at Columbus School of Law at Catholic University, Deborah Shortridge, who has in-house ethics responsibility at Saul, Erving, Remick & Saul LLP, and William Wernz, who has in-house ethics responsibility at Dorsey & Whitney LLP. The authors also wish to acknowledge Joe Dean, Brent Giaouque and Tim Smith, the other Stoel Rives lawyers with significant responsibility for in-house ethics. All mistakes and shortcomings are solely the fault of the authors.

2. For other articles on this subject or related issues, see Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011 (1994); Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271 (1996); Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169 (1997); Martin C. McWilliams, Jr., *Limited Liability Law Practice*, 49 S.C. L. REV. 359 (1998); Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory*

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 extremely important to a firm's well-being. 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 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 over 250 lawyers with offices in four 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 four years. This article explains what Stoel Rives in-house ethics lawyers do, why we do it and how we believe our work affects our firm. This article is divided into three principal areas: how we are organized within our firm, the subjects we handle and the effects of in-house ethics counsel on our firm. We caution the reader at the outset, however, that we make no claim to perfection; other lawyers at other firms have made different yet equally successful choices on how they organize their in-house ethics practices.

I. ORGANIZATION, MEMBERSHIP AND DELIVERY

A. *Practice Organization*

We are organized as a practice group called the Professional Responsibility Practice Group. Our organization as a distinct practice group is a reflection both of our firm's general management structure and the needs of our clients. Although our own firm is our primary client, we also provide legal ethics advice to other lawyers, law firms, corporate legal departments and government agencies. We defend lawyers in disciplinary proceedings, handle the prosecution or defense of motions for disqualification and handle motions for sanctions. We also provide training

Duties, 70 NOTRE DAME L. REV. 259 (1994); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497 (1998); Douglas R. Richmond, *Associates as Snitches and Rats*, 43 WAYNE L. REV. 1819 (1997); Robert Eli Rosen, *The Growth of Large Law Firms and Its Effect on the Legal Profession and Legal Education: The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989); S. S. Samuelson & L. Fahey, *Strategic Planning for Law Firms: The Application of Management Theory*, 52 U. PITT. L. REV. 435 (1991); John Richards, Note, *Illinois Professional Service Firms and the Limited Liability Partnership: Extending the Privilege to Illinois Law Firms*, 8 DEPAUL BUS. L.J. 281 (1996).

programs and expert witness services. Our firm treats in-house and outside work equivalently for compensation purposes.

Our firm first developed in-house ethics expertise when it had fewer than 100 lawyers. However, we do not see this as a minimum size. The nature and extent of in-house expertise can vary, based upon the complexity of the firm's practice and the availability of outside ethics counsel on an "as-needed" and reliable basis. In fact, we perform such roles for lawyers at other firms, thus reducing other firms' need for legal ethics services. Furthermore, it is not only private law firms that can benefit from in-house legal ethics expertise, government and corporate legal departments can also benefit from such expertise.

B. *Practice Membership*

All of us in the Professional Responsibility Practice Group are volunteers. We do not believe that this work could or should be undertaken by someone who does not have a sincere interest in legal ethics work, coupled with fairly good instincts. Our group's lawyers do not spend all their time on legal ethics work. We believe it is helpful for us to remain involved in the outside practice of law for firm clients. Although most lawyers in our group are litigators, we think that lawyers with a transactional background can be equally successful providing legal ethics advice.

There are times when running an in-house ethics practice and representing outside clients lead to conflicting demands on time. Many in-house ethics questions must be answered (or, at least, the lawyers want answers) almost immediately. The urgency of legal ethics questions often requires that we drop our other work to give priority to ethics questions. In order to minimize these interruptions, we have increased the number of lawyers who can answer legal ethics questions. On the other hand, we wish to emphasize 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.

C. *Delivery of Advice*

We provide our advice in several different ways: individual counseling, periodic firmwide email alerts, standardized forms, training programs, a quarterly newsletter distributed to lawyers at our firm and to our outside clients and, increasingly, our firm's intranet. Before turning to the specifics of how we deliver our advice, we should note that with offices in multiple states and

with lawyers licensed and handling matters in still more states, jurisdictional questions are sometimes the first issues we face. The rules on communications with represented parties, the attorney-witness rules and the rules relating to conflicts of interest are not the same in all jurisdictions. Any legal ethics advice must bear these jurisdictional differences in mind.

We try to be pragmatic about jurisdictional problems. 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, the firm is seeking a waiver to perform work for Client A in State B that is adverse to Client C whom the firm represents on unrelated matters in State D. In such situations, our general approach is to apply the most restrictive rule that is potentially applicable to a situation. In this way, no matter which rule applies, we feel we can better protect our clients' interests.

1. Individual Counseling

We generally give advice as individuals. However, where necessary, and time permitting, two or more of us may analyze a question together. Much of our individual counseling is done in-person. But, given the wide geographic dispersion of our lawyers, a good share is handled over the telephone or by email as well. In a typical year, we generally handle in excess of 1,000 questions or issues from both firm lawyers and staff.

We do not view ourselves as a police force, and neither do our lawyers. Therefore, the lawyers seeking advice initiate almost all contact. Because we believe that our advice will be best received if it is voluntarily sought, we have opposed efforts to make consultation mandatory in situations that raise ethics issues. We also believe, however, that this is an issue on which reasonable minds can and do differ.

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 email to all members of our group. Except in unusual circumstances, a copy of the memorandum is also sent by email to the lawyers who consulted us. Among other things, this reduces the risk of miscommunication.

2. Periodic Alerts and Standardized Forms

Although most of our counseling is done individually, some issues we confront may have broader implications for the firm.

In those situations, we act collectively. 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. In those situations, once an overall consensus is reached with firm management, we then usually discuss the issue and the firm's approach to that issue in a firmwide email. Similarly, when significant court decisions or ethics opinions are issued that affect large numbers of our lawyers, we let them know via email. This often leads, in turn, to individual questions and counseling about how those developments will impact particular situations or practice areas.

We have also developed a set of standardized conflict waiver letters and new-hire screening forms that are available through our firm's central word processing network. This allows individual lawyers and practice groups within the firm to take the lead in identifying and clearing conflicts while at the same time providing them with a group of customizable forms that meet the general requirements of our various practice jurisdictions.

3. Training Programs and Newsletters

We offer annual workshops for our lawyers that deal with recent developments in professional responsibility matters and usually include hypotheticals to foster discussion of the nuances of the issues. We videotape the workshops so that lawyers unable to attend can watch them later. Where permissible, our workshops are registered with our state bars and the lawyers attending obtain CLE credit. In addition, we also hold lunch meetings or other specialized training sessions for individual practice groups so that we can address more focused issues.

We have also begun publishing a quarterly newsletter on professional ethics and attorney-client privilege developments affecting our principal practice locations. The newsletter, *Counsel's Corner*, is distributed primarily to our outside clients at other law firms, corporate legal departments and government agencies, but we also distribute copies to our own lawyers. As with our internal email alerts, articles in our newsletter can lead to further individual questions by our lawyers about how particular developments will affect their practice.

4. Firm Intranet and the Internet

Our firm now has an intranet available twenty-four hours a day to all lawyers in all offices that can be accessed both internally and remotely. Given this new technological avenue, we are

in the process of moving our standardized waiver letters and screening forms, along with instructions on how to use them, to a practice group home page on the firm's intranet. We are also in the process of developing a set of "frequently asked questions" and links to formal ethics opinions maintained by state bar sites and other ethics resources on the World Wide Web.

II. AREAS OF ADVICE AND THE ATTORNEY-CLIENT PRIVILEGE

A. *Principal Subject Matters*

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

Conflict of interest issues include current client conflict issues, former client conflict issues and at times issues relating to conflicts between lawyer and client. For example, we provide advice on such issues as the simultaneous representation of multiple would-be incorporators and multiple plaintiffs or defendants in litigation. We also advise lawyers when personal or business conflicts emerge between lawyer and client. Where necessary or appropriate, we assist in the preparation of conflicts waiver or disclosure and consent letters. We also review draft waiver letters on request and advise as to the adequacy of disclosure. The firm does not require, however, that all conflicts waiver letters be reviewed by us in advance, and we prefer to keep the matter voluntary.

2. Decisions to Represent New Clients

Our views are sought in some circumstances where issues arise at the outset of a potential representation. For example, on one occasion, a would-be corporate client who wanted the firm's assistance in borrowing money from a bank to buy property told a corporate attorney at the firm that it also wanted the attorney to document an under-the-table side deal under which the seller would finance the part of the transaction that the borrower-buyer had informed the bank represented the corporation's own funds. One of us assisted in the preparation of a letter to the corporation outlining why the proposed conduct was impermissible, stating that we assumed that the corporation did not really intend to proceed in that manner and suggesting how we proposed to proceed. When the would-be client replied that it wanted us to follow its original plan, the firm declined the representation. The

corporate lawyer who had wanted to do the work agreed with this approach and its resolution.

3. Attorney-Client, Work Product and Other Privilege Issues, Including Joint Defense and Privilege Waiver Issues

We do not purport to be the firm's only experts on these issues, but we make ourselves available as an additional resource. One of us encountered an instance in which a client of ours told the corporate lawyer handling his matter that he was so frustrated with his opponent that he was going to kill him the next time they got together. The corporate lawyer was convinced that this statement was more than hyperbole and the normal venting of frustration. We advised the corporate lawyer to inform the client that we felt obligated to alert the other side's counsel to his intention unless, at a minimum, our client could subjectively satisfy us that he intended no such thing. The client said he understood and allowed us to inform the other side. The firm also withdrew from the matter.

4. 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. We tell the firm's attorneys what they may do and, upon request, review marketing and client development materials. For attorneys raised in the pre-advertising and solicitation era, this often involves telling them that they can do more than they think they can. For attorneys raised in the Internet era, the converse is sometimes true.

5. Communication with Represented-Parties Issues

We advise our attorneys both about when they or their clients may make direct or indirect contact with an opposing party's present or former personnel and about keeping counsel for the other side away from the firm's clients' present or former personnel.³ This includes direct or indirect contact with current or former corporate officers or employees.

6. Lawyer and Nonlawyer Lateral Hire and Departure Issues

We advise the firm when a proposed new lawyer or nonlawyer may ethically be hired and when a proposed new lawyer or nonlawyer must or should be screened from one or more ongoing matters at the firm. We have also developed procedures to

3. Cf. Or. State Bar, Op. 80 (1991).

follow and forms to use when a lateral hire is to be screened from a matter.

7. Attorney Fee, Billing, Lien and Trust Account Issues

Upon request, we advise the firm about more general or policy-related issues as well as specific problems that may arise. This includes, but is not limited to, advice as to when or under what circumstances the firm may impose an attorney lien, may modify a preexisting fee agreement or may accept client securities or other noncash compensation in exchange for legal work.

8. Mandatory and Permissive Withdrawal Issues

This includes, but is not limited to, “noisy withdrawal”⁴ or client perjury types of situations. It also includes more mundane situations such as when the firm can withdraw or how to accomplish withdrawal when a client has not paid the firm. On one occasion, a litigator at the firm had taken on a pro bono case for an indigent and incarcerated plaintiff who alleged that he had been assaulted by a prison guard. The litigator’s investigation revealed that there was no support anywhere for the plaintiff’s allegations beyond the plaintiff’s highly dubious, but not necessarily frivolous, testimony. Because the case was pro bono, we could not use the risk of future fees to convince the client to drop the case. And because the client would be in jail for a long time, the deterrent effect of a possible sanctions motion was also minimal. The litigator was advised to take the case to trial unless the plaintiff was voluntarily willing to drop it.

9. Issues Relating to the Duty to Report Misconduct by Other Lawyers

We are sometimes asked for advice on opposing counsel’s conduct. At times, we have also been asked about the ethical propriety of settlement agreements proposed by opposing counsel or about whether or when the firm’s lawyers may have an obligation to turn opposing counsel in to the bar.⁵ We have counseled both for and against reporting.

4. *Cf.* ABA Comm’n on Ethics and Professional Responsibility, Formal Op. 92-366 (1992).

5. *Cf.* Or. State Bar, Op. 95 (1991).

10. Issues that Arise When a File or Lawyer at the Firm is Subpoenaed

This can also be thought of as a subset of attorney-client privilege and, sometimes, conflict of interest issues. It involves both litigation in which the firm or a current or former firm client is a party and litigation in which the firm or its client may only be a fact witness.

11. Responding to Bar Complaints Filed Against Firm Lawyers

This does not happen often, but it does occur. To this point, we have successfully defended those claims that have been filed against firm lawyers. We are also available to handle or assist with prosecuting or defending motions for disqualification.

B. *The Attorney-Client Privilege*

Is the advice we give privileged? The answer is “yes, qualified.” To begin with, we generally regard the firm as our client or at least as one of our clients, and we have explained this to attorneys and nonattorneys 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 at the firm.⁶ 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. Nonetheless, we also recognize that if the actions of an attorney who has consulted us are later called into question in a malpractice or disciplinary context, it may be in that attorney’s and the firm’s interest to assert an “advice of counsel” defense and that this would result in a waiver of the privilege.⁷

If, on the other hand, 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

6. Cf. *In re Grand Jury Proceedings*, 156 F.3d 1038, 1040-41 (10th Cir. 1998); *In re Grand Jury Subpoenas*, 144 F.3d 653, 658 (10th Cir. 1998) (describing very limited situations in which corporate officer or employee can assert personal claim of privilege for conversation with corporate counsel). In those few instances in which we have felt that the interests of the lawyer or nonlawyer consulting us and the firm’s interests may substantially diverge, we have recommended that the person consulting us retain independent counsel.

7. See, e.g., *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995).

subject to a claim of privilege than the advice of any other lawyer at the firm. We also believe that there can be no question about the availability of privilege when we advise the firm or its lawyers on what are essentially nonclient matters, such as the standards applicable to lawyer advertising and solicitation or the defense of a bar complaint.⁸

III. EFFECTS ON THE FIRM

A. *The Principal Effects of In-House Legal Ethics Work*

The typical modern law firm is, and presumably should be, organized as a profit-making entity. Even though the majority of law firms contain individuals with high ethical standards and the best of intentions, the emphasis on profit-making can sometimes cause ethical issues to take a back seat. We believe that the presence of in-house ethics lawyers whose work is supported by firm management helps to keep ethics issues in the forefront and thereby significantly to influence the culture of the firm. This happens in at least three overlapping ways: A firm that expressly devotes personnel to ethics issues is telling its lawyers that it cares about those issues and their resolution; a firm with readily available and user-friendly ethics resources makes it easier for its attorneys to comply with the rules and to avoid taking imprudent or unnecessary risks; firm morale is improved when lawyers know they can get reliable help when they need it.

When a member of our practice group joins a conversation with other lawyers at the firm, one of them might say to another that they have to be careful what they say. Such statements are usually said with a smile, and we take them as compliments. If our colleagues did not believe that our advice benefits them, they would not make these statements. It is also a compliment when one of our firm's lawyers tells law students interviewing at the firm that they should consider the firm because we handle in-house ethics questions.

B. *Other Effects of In-House Legal Ethics Work*

The primary strength of any firm lies in the quality of work it provides clients. Nonetheless, we believe that in-house ethics work helps keep the firm successful in both positive and negative ways.

On the positive side, we look for ethical means for our attorneys to undertake work they want. If, for example, we are able to help an attorney to structure a particular new client relationship

8. See, e.g., *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996).

in a manner that is consistent with the applicable ethical rules and to produce a reliable conflicts waiver letter, the firm's "bottom line" will be improved. Our attorneys can be more confident in the work that they do if they know we have reviewed any difficult ethical issues.

On the negative side, keeping the firm out of trouble with the bar and reducing civil claims against the firm avoids potential problems that any firm would clearly prefer to avoid. For example, early detection or avoidance of conflicts problems and assistance in the transfer of work to a new firm can turn a potential breach of fiduciary duty action into a situation where the client realizes that everyone makes mistakes. The client might also be glad that she or he is dealing with forthright people who want to make things right. Since the mid-1980s, when the firm began its in-house ethics practice, nobody has sued the firm or filed a bar complaint based on an issue reviewed by the in-house ethics lawyers in advance. It also is fairly common for a lawyer at the firm to ask us to justify a decision that the lawyer has already reached. Sometimes this is a decision not to do what a client or potential client has requested. More often, the decision is positive in nature. On most occasions, we find that we agree with the lawyer and are glad to help out.

C. *General Philosophical Approaches to In-House Legal Ethics Work*

We have three general philosophical approaches to our work. The first and most important is that we view things with a positive attitude and from a constructive perspective. We try very hard to help lawyers accomplish their objectives and to let them know that we are on their side. We also look for practical approaches to real world problems and attempt to avoid having to deal with unnecessarily complicated or controversial issues. Suppose, for example, that a longtime client asks a corporate lawyer at the firm to represent her and two other would-be incorporators in creating a new business entity. As a technical matter, we know that the ability of the firm to represent all three would-be incorporators is likely to depend on the extent to which the interests of the three are consistent.⁹ As a practical matter, we know that if the corporate lawyer simply tells the longtime client that we will not represent all three of them, the client may feel that we are trying to create more work for more attorneys. In such a situation, the client might take her work to someone more

9. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1997) ("The question is often one of proximity and degree."); THE ETHICAL OREGON LAWYER § 12.14 (Oregon State Bar CLE 1991).

inclined to do her bidding. However, we have found that if the lawyer explains that, because business marriages often end in divorce, our representation of all three might prevent the firm from representing the client if a dispute arises, the client will often thank us for our concern and follow our advice.

Second, we try to avoid unnecessary risk to the firm, its lawyers and their clients. When possible, we look for a way to accomplish an objective that eliminates all risk. If not, we attempt to make sure that the degree of risk is appropriate under the circumstances and sufficiently well understood by the concerned parties. Suppose, for example, that a lawyer becomes concerned about a client falling behind in making payments to the firm. We advise the lawyer to write a letter to the client about his or her concerns, to write another if the problem persists and, if necessary, to seek to withdraw far in advance of a trial or critical event.¹⁰ We also caution lawyers about what they write in publicly filed withdrawal documents to avoid releasing unnecessary client information.¹¹ On the other hand, we also have advised lawyers to go ahead and complete work on a matter when we feel that the client has not been given fair or adequate warning.

Finally, all of us work very hard to listen and to achieve consensus. We start with the presumption that once we understand the facts of a given situation and once the lawyer understands the ethical concerns, the conclusions that we draw ought to be the same. If we fail to draw the same conclusions, we presume it is probably because we overlooked something and need to go back to find out what that is. Our focus on consensus is a critical part of what we do. Many ethical issues we address stem from many different fields of law in which the firm's ethics lawyers may have little direct experience; a careless or less than fully informed opinion may well not be the right opinion. Since the firm's in-house ethics practice started, there have been very few instances in which a lawyer who received advice insisted that he or she would do something that the in-house ethics lawyer thought was clearly inappropriate. In each such instance, the managing partner rapidly resolved the issue.

IV. SUMMING UP

Like any area of law, the in-house practice of legal ethics has moments that are better and worse. There are moments of high drama, such as those involving the apparent discovery of client

10. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983).

11. Cf. *id.* Rule 1.6.

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 cannot be gathered before a decision must be made. For the most part, we all 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 expertise.

