

# Raising the Bar: Attorney Mentoring

October 7

# 2014

---

Presented by the Webster-Batchelder American Inn of Court, the Gajarsa American Inn of Court, UNH School of Law, the New Hampshire Bar Association, and the New Hampshire Women's Bar Association; written materials by Webster-Batchelder AIC.

Why We Should  
and How We Can  
Mentor Law  
Students and New  
Attorneys

# COMMON ETHICAL MISTAKES BY LAWYERS NEWLY ADMITTED TO PRACTICE

*By Katherine DeForest, Esq.*

Although attorneys of all ages and experience levels are bound by the same ethical rules, there are some rules that prove particularly difficult for newer practitioners. Inexperienced attorneys may never have addressed a situation that implicates the Rules of Professional Conduct prior to graduating law school outside of the Model Professional Responsibility Exam (MPRE), and sometimes no amount of academic rigor can adequately substitute for the wisdom of experience. The following are some issues to keep in mind when mentoring law students and new attorneys.

1. Misleading Advertising. The financial pressure on newly graduating attorneys has probably never been greater than it is at present, and those pressures are likely to continue to mount as law school tuition increases outpace salaries, and student loan debt continues to rise. That, compounded with the ease of access to large audiences through social media, provides new attorneys with ample opportunities for going astray. NH Rules of Professional Conduct (“Rules”) 7.1 to 7.5 govern advertising and include particular requirements regarding direct contact, advertising for “specialty” fields or practice, and prohibit misleading or false communications about a lawyer’s services. The ways in which these rules may be applied to social media are growing exponentially, and include issues that can arise with the use of the popular communication vehicles of web sites generally, LinkedIn, Twitter, Facebook, Groupon, and others.
2. Candor Toward the Tribunal. Even if the Rules didn’t exist, attorneys of all experience levels know that you don’t lie to judges. However, when an inexperienced attorney is faced with an in-courtroom dilemma regarding a false statement of fact or law, that attorney’s gut reaction may not squarely align with the extent to which the Rule 3.3 requires that attorney to act. For example, pursuant to Rule 3.3(a), a lawyer is obligated to disclose to the tribunal “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” This can seem like a bitter pill to swallow, and as though the attorney is being forced to make out her opponent’s case for her, but failing to address the adverse authority head-on is, not only a violation of the Rules, but can be incredibly damaging to a new attorney’s reputation with the bar and bench, and is likely to be to the detriment of the client as well, particularly after the judge or law clerk finds the adverse

authority on their own. Likewise, the Rule may, under certain circumstances, require an attorney to notify the tribunal of the false statement, or present facts at an ex parte hearing that are favorable to the opposing party, but necessary for the judge to render a fair decision.

3. Confidentiality. The scope of confidentiality of information goes further than some might imagine under Rule 1.6, which generally prohibits a lawyer from revealing “information relating to the representation of a client unless the client gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation.” Rule 1.6(a). Additionally, confidential information may be revealed if disclosure is necessary to “secure legal advice about the lawyer’s compliance with [the Rules],” or to prevent “reasonably certain death or substantial bodily harm” or to prevent a criminal act “the lawyer believes is likely to result in substantial injury to the financial interest or property of another.” Rule 1.6(b). There is no exception to the rule for cocktail party chatter, complaining about a client’s personality, or de-identified information that can be re-identified through context. The 2004 ABA Model Rule Comment expressly states: “The confidentiality rule...applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Hypotheticals are permitted, according to the Comment “so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”
  
4. Competence. Rule 1.1(a) requires that a lawyer “shall provide competent representation to a client,” which is an easy enough concept to grasp. However, that’s not all the rule provides. Rule 1.1(b) enumerates the specific requirements of minimum legal competence, which includes the requirement of “identification of areas beyond the lawyer’s competence and bringing those areas to the client’s attention.” The temptation may be great for new attorneys to take on any and all kinds of work, regardless of whether they have any expertise in the area requested. Or may wish to handle that one divorce for the president of the corporation who was so pleased with the revised bylaw work she just completed. However, the Rules, not to mention prudential client relations management, require the attorney to inform that client of the attorney’s limitations regarding particular areas of the law.

5. Responsibilities of a Subordinate Lawyer. New attorneys who practice under the supervision of a more senior attorney or attorneys may feel as though they're off the hook when an ethical decision goes awry. However, the Rules apply with equal force to a subordinate attorney acting at the direction of a senior attorney as they do to that senior attorney, unless the subordinate attorney acts in accordance with the supervisory attorney's "reasonable resolution of an arguable question of professional duty." Rule 5.2. This means that subordinate attorneys need to be prepared to raise issues they may identify with respect to action proposed by their supervising attorneys, which can be a very difficult thing to do, particularly if the subordinate attorney does not have another more experienced attorney with whom to discuss how to handle the situation.