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Attorney Mentoring Training

Wait, Wait...Don't Tell Me It's Not Ethical!

Announcer: From the Webster Batchelder AIC broadcast network in Concord, NH, this is Wait, Wait Don't Tell Me It's Not Ethical, the AIC ethics quiz. I'm Gary Hicks, and here are your hosts, Kate DeForest and Bill O'Sullivan.

Kate & Bill Thank you, thank you.

Kate We have a great show for you today. We have [Not My Job contestant] here tonight. He helps put the superior into the superior court and has an unfortunate for him but great for the rest of us reputation of being, not only an astute judge, but a good sport. He didn't realize it when he came in this evening, but he'll be joining us in a bit for "Not My Job," the game in which we ask notable experts questions on subject matter they know nothing about. We're very excited about that. Although you may be familiar with Wait Wait Don't Tell Me on NPR, please don't feel you have to call in for our version. Simply raise your hand, or stand up if you get really excited, and we'll choose you out of the crowd to play.

Bill It's time choose our first contestant. [pick volunteer]

Kate Now let's get started with "Who's Bill This Time?" Bill's going to read three quotes about ethics and professionalism and you're going to name who he's quoting. To make it easier for you, we've limited the time frame for the quotes to the past 500 years. The prize is [come up with a prize]. Bill, what's the first quote?

Bill [holds up life sized face of **Potter Stewart**.] "Ethics is knowing the difference between what you have a right to do and what is right to do."

Kate (NAME of contestant), this is a former US Supreme Court judge known for wearing a black robe on the bench. Which one is Bill today?

Contestant [ANSWERS]

Kate That's correct/Oh, sorry, it's Potter Stewart. A member of the Warren Court, Justice Stewart also generated the often quoted description of pornography in *Jacobellis v. Ohio*: "I shall not today attempt to further define the kids of material but I know it when I see it." For our purposes tonight, of course, ethics is NH's "Rules of Professional Conduct."

Next quote, Bill.

Bill [Holds up life sized face of Emily Post] “nothing is less important than which fork you use. Etiquette is the science of living. It embraces everything. It is ethics. It is honor.”

Contestant [ANSWERS]

Kate That’s correct/Oh, sorry, it’s Emily Post. American’s etiquette maven so mind your manners during the show. Bill, do we have one more quote?

Bill [Holding up life sized mask of CS Lewis] “Education without values, as useful as it is, seems rather to make a man a more clever devil.”

Kate That’s correct/No, that is C.S. Lewis. Author of the Narnia books and other children’s classics. And with a quote like that you’d think he would have gone to law school. Bill, how many did [Contestant] get right?

Bill Kate, [Contestant] go [number] right and wins Local brew:
[Name][Describes/hands out prize].

[Music outro]

Kate Now it’s time to play Bluff the Listener, the game in which our panelists present three ethical conundrums and we’re going to look to our audience to help us figure out which vignette applies the ethical rule correctly. Our panelists today are Jack Crisp, Heather Menezes and [one more panelist]. In our first vignette, we’re looking at conflicts of interest. Take it away, Heather.

Heather Thanks, Kate. Recently, Attorney Lex Lawyer found a novel way to make twice as much money without having to work twice as hard. When asked about the origin of his idea, he said, “I was sitting in the court room as opposing counsel was giving his closing and I thought, why can’t I do that? I’m here anyway.” So the next time he had a domestic abuse case, he decided he’d represent the alleged victim and the alleged abuser. “They both wanted the case dismissed by that point, so no conflict there. I could do divorces this way too – both parties want the same thing there too. They both want nothing else to do with each other.” Unfortunately, this attorney’s story didn’t have a happy ending, much like the divorces he was dreaming of. “It’s OK,” Luther said. “I counseled them both on the potential for a conflict and the fact that, if one of them decided not to seek dismissal, I wouldn’t be able to represent either of them.”

Kate Jack, what’s the story?

Jack You know the saying it takes two to tango? Mother-daughter tango instructors wanted to start a business together and approached Attorney Lori Lightfoot about

incorporating their business. “We couldn’t afford to each get a lawyer, that was our first month’s rent,” the daughter said. “So we decided to get one attorney. She represented us both and set up the corporation with 50/50 ownership.” The dance studio was successful, as was the mother’s tango, because she swept away one of her partners and now wants out of the business to move with her paramour to Argentina. Daughter approached Lightfoot to represent her in the dissolution of the business. Lightfoot applied her favorite motto: “First come, first served,” and proceeded to represent daughter in the dissolution of the business after notifying mother she was on her own. “No problems here,” Lightfoot said. “I notified the mother in writing that she needed to get her own attorney.”

Kate Thank you, Jack. Panelist 3?

Panelist 3 Ally McBeal thought she had the client of a lifetime – a super-litigious, super-loaded, super-paid-his-bills-on-time entrepreneur. She successfully pursued a trade secrets claim on his behalf which shut his competitor down and he’d eternally grateful. When he asked to see her about a more personal matter, she hopped on his private jet and met him on his yacht in the Hamptons. Once there, it became clear that he was not seeking estate planning advice, as McBeal had thought, particularly when he professed his undying love for her and showed her the mash-up photo of their future child. “I’m sorry,” McBeal told him. “I like you well enough, but I love your business, and it’s one or the other. The only relationship I’m interested in is the attorney-client one.”

Kate Ok. So to recap, we have one hearing for the price of two from Heather, dance studio dissolution from Panelist No. 2, and in it for the money, honey from Panelist No. 3. By a show of hands, which scenario correctly applies the rule – 1? 2? 3?

That’s right, it’s No. 3. Rule 1.8(j) specifically prohibits sexual relations with a current client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. This used to be a full out prohibition, but is now specific to sexual relationships that don’t predate the attorney-client relationship. The ABA comment notes not only does a sexual relationship further upset the balance between the lawyer-fiduciary and the client, it also has the potential to blur the line between personal confidences and attorney-client confidences.

No 1 was loosely based on the recent NH Supreme Court decision *In re Clauson’s Case*, in which the court held that representation on two clients who were directly adverse to one another was a violation of Rule 1.7(a)(2), regardless of whether both clients at the moment wanted the matter to come to the same resolution, in

this case dismissal. In representing directly adverse clients, there's no way a lawyer can maintain loyalty – which creates a non-waivable conflict. In looking at these kinds of situations, the court applied the “harsh reality” test, which states:

If a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent. If this “harsh reality test” may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation.”

No. 2 is incorrect, because the parties whose interests used to be aligned are now directly adverse to the former client, in this case the mother. Rule 1.9(a) prohibits an attorney from representing a person “in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client” unless the former client gives written consent, confirmed in writing.” Not only that, under Rule 1.9(c) prohibits a lawyer from using information relating to the representation of the former client to that former client's disadvantage unless the information has become generally known, cannot reveal information relating to the representation except as the Rules would permit, which is not much. It's hard to imagine under what circumstances a former client would give informed consent AND the lawyer would be able to competently represent the current client without breaching her obligations to her former client under the rules.

Bill, what's our second set of scenarios?

Bill In this next set, we're looking for our contestant to tell us which is the true story. They're all hard to believe, but only one is true. Heather, what's your story?

Heather A California lawyer decided that it was time to capitalize on being located in the land of the stars. In a bold marketing move, she started a “Publicity” page for her web site, which featured a large number of photos of the lawyer posing with a variety of political celebrities and entertainers, including Barack Obama, Bill and Hilary Clinton, George Clooney, Paris Hilton and Bill Mahr. The problem? It turns out the lawyer was a little too fond of Photoshop, and had “borrowed” celebrity photos to use as the background to insert her own image.

Bill Thanks, Heather. Jack?

Jack Our next story comes to us from virtual world of Facebook, and what could possibly go wrong there? It turns out a lot. Particularly if you mix your friends with your professional colleagues and acquaintances. The attorney in question regularly posted comments about her life, personal and professional, on her Facebook page, which was “private” – that is to say, available to all of her 500 “friends,” some of whom she wasn’t even sure of who they were. One night the attorney posted the following remarks on her profile page:

- “Case finally over. Unanimous verdict! Celebrating tonight.”

and

- “Another great victory in court today! My client is delighted. Who wants to be next?”

Unfortunately, her next call wasn’t a new client, but the attorney discipline office, which eventually issued her a reprimand.

Bill And [Panelist No. 3]?

Panelist 3 A Chicago lawyer launched a stellar marketing campaign that ended with a fizzle instead of a bang. This divorce attorney started using the slogan “Life’s Short. Get a Divorce.” to advertise her family law blog, and included photos of picturesque torsos of both male and female varieties to suggest what might be awaiting her future divorce clients if only they’d ditch their old spouses. Calls to the firm increased dramatically after the slogan and pictures went live, and the local media picked up on the marketing campaign. When asked if the campaign was worth the reprimand she received, the attorney replied, “Worth every penny,” before asking the conduct committee chair if he was happy in his marriage.

Bill Well, which one is the true story? We have the photoshop phenom, the facebook friender and the spousal upgrade advertising campaign?

Contestant [Answers]

Bill That’s right/wrong. The photoshop phenom is the true story. This happened in California, and was held to have breached California’s prohibition against Deceptive Advertising. If it had happened in New Hampshire, it would have been similarly prohibited under NH Rule of Prof’l Conduct 7.1, which governs communications concerning a lawyer’s services. This rule prohibits communications that are “false or misleading” such as adding your body into celebrity photos and implying said celebrities are clients or friends. Omissions and statements that are likely to create an unjustified expectation about results the lawyer can achieve are also prohibited.

The second scenario – the “facebook friender” – didn’t actually happen, but is based on an advisory opinion from the State Bar of California. The opinion indicated – “Case finally over. Unanimous verdict! Celebrating tonight” – didn’t pose an ethical problem because the message could not be reasonable construed to

be a message or offer concerning the availability for professional employment.

But the second statement: “Another great victory in court today! My client is delighted. Who wants to be next?” is a problem because it appears to be a solicitation for business and is not identified as an advertisement, which is required under California rules. Does anyone know what the NH position is on identifying advertisements? [7.3(c) requires any direct solicitation of prospective clients known to be in need of legal services to contain the work “Advertising” on the envelope, in the subject line or at the beginning and end of a recording. Advertisements in general are required to contain the name and office address of at least one person in the firm responsible for the ad’s content, pursuant to Rule 7.2.

The third scenario, spousal upgrade, was false, but is based on a real case where the slogan (and the racy pics) appeared on a billboard, not a blog. Although widely reported, I could not find any information indicating that the firm ended up being disciplined. In fact, the web profile of the attorney behind this marketing campaign¹ now boasts about the campaign. Her profile, in part, modestly describes her as:

“A force of nature, world famous and charismatic, [she] is known to some as a sumptuous former Playboy model, to others as the once wry, piquant “Love Lawyer” columnist for Playboy’s online magazine, and to others as the notorious mastermind of Chicago’s Gold Coast billboard, “Life’s Short. Get a Divorce”, which put her Chicago-based family law firm on the map, and made her the topic of a many a late night and daytime talk shows.”

I’ve omitted her name to protect the not-so-innocent.

Kate, what’s next?

Kate This next set of stories all involve new lawyers striking out on their own. Here, we’re looking for the true story once again. Heather, you’re up.

Heather Thanks, Kate. This is the sad tale of a promising, young attorney who got in over his head. After graduating from law school, he hung up his shingle and started handling DUIs. Wanting to drum up business, he started advertising as the “DUI Doctor” and distributing red solo cups on college campuses with his firm’s name and address printed on the outside. He received so much business, that he hired a paralegal to help him. And then another. Pretty soon he had three staffers and less and less time to spend with his individual clients. So he created a “cheat

¹ Corri Fetman (the named partner in this law firm, Corri Fetman & Associates)

sheet” for his paralegals to process incoming clients, including a list of documents for the client to bring to the initial meeting, a questionnaire to be used for obtaining basic material facts, and a primer of basic DUI law. Most times he wouldn’t meet his client until the first court hearing. Life was good, until it wasn’t and one of his clients, who repeatedly tried and failed to get the attorney to return a simple phone call, filed a complaint with the PCC.

Kate Jack?

Jack Solo lawyers, especially those who are just starting out, are often looking for a market niche to fill. One new attorney found his niche in the loan modifications, and grew a financially successful practice staffed by a number of attorneys and paralegals over the course of just a few years. As his practice grew, so did the scope of his advertising, and pretty soon, he and his staff were working on home loan modifications for residents of multiple states. He also worked with a lead-generating company, and executed a contract defining his firm as a mortgage lender/broker, and sent direct mailers to leads identified by the company. Brought to task by the Banking Commission, an administrative law judge found that the attorney committed multiple violations of the SAFE Act (RSA 397-A) by acting as an unlicensed loan originator, and that the attorney had not even known the SAFE Act existed throughout the time period in which he was in violation of the act.

Kate Wow. Panelist no. 3?

Panelist No. 3 Just out of law school and looking to capitalize on her ease and obsession with social media, one entrepreneurial newbie decided to offer a “Groupon” for her estate planning practices. Just 10 people had to pay \$20 for a 20% percent off five hours of legal services coupon or could prepay \$500 for \$1000 worth of legal service. The deals were great and the living was easy, until it turned out that two of her \$500 Groupon groupies were parties on the opposite sides of the same divorce. Unable to represent either of them, the attorney refunded their \$500, minus the marketing company’s cut. The groupies turned grumpy and filed a complaint with the PCC, and the attorney received a public reprimand and was required to return the marketing company’s cut of the \$500 to the groupies as an unreasonable fee.

Kate Summing it up for this round, we have the DUI Doctor from Heather, the Mortgage Modification Mortification from Jack, and Grumpy Groupon Groupies from Panelist No. 3. Which is the true story?

Contestant [Answers]

Kate

That's right/oh sorry. Jack's story is based on a law firm that closed in 2010. The attorney running the firm ran afoul of not only 397-A, but also advertising issues, about which he had been previously warned by the Attorney Complaint Screening Committee, the preliminary committee before a matter goes to the PCC. I'm not sure if it was ever addressed in the order issued by the presiding officer in the Banking Commission proceeding, as it would have been out of his jurisdiction, but attorney's professed lack of knowledge of the law that governs loan originators, as his firm held itself out to be, also would seem to implicate Rule 1.1 competence. That rule states that "legal competence requires at a minimum: 1) specific knowledge about the fields of law in which the lawyer practices; 2) performance of the techniques of practice with skill; 3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention; 4) proper preparation; and 5) attention to details and schedules necessary.

The first scenario is a complete figment of the imagination, but raises some interesting questions. First, is Solo cup advertising for DUI defense – is it ethical? Or is it perhaps just in bad taste? Could it be seen as advocating for students to break the law? The creation of the paralegal cheat sheet? Finally, the failure to return phone calls could very well result in a substantiated complaint, pursuant to Rule 1.4, depending on the circumstances, as could his competence based on a failure to adequately prepare (i.e. not meeting client until the hearing).

The final scenario has not, to my knowledge, been an issue in NH yet, but was the subject of an ABA opinion in 2013. In that opinion, the ABA concluded that the first groupon – offering a coupon for money – was less problematic than the second groupon – the one for discounted prepaid legal services. In the first offer, the ABA concluded that it would not violate the model rules for an attorney to collect and keep the money for the coupon, because the purchase of the coupon did not establish an attorney-client relationship and was not a fee for legal services, so could be deposited into an attorney's general fund and would not require a refund once accepted so long as the offer explicitly stated "no refunds."

In the second offer, an attorney would need to collect the money, which would constitute advance legal fees, identified by purchaser name and keep the money in trust until such services had been provided to the individual to allow the attorney to retain the money. Moreover, if the services were never used, or there was a conflict and the attorney could not represent the groupie, the prepaid fee would have to be returned in full, including the part of the fee that was collected by the marketing agency. The NH Rules, like the ABA Model Rules, prohibit the collection of unreasonable fees (Rule 1.5(a)), and require trust accounting identifiable by client (Rule 1.15), and would likely arrive at a similar, if not more restrictive conclusion.

Bill, I understand we have one last set of scenarios.

Bill Thanks, Kate. In this final round of Bluff the Listener, we're looking at "friendship" in the social media universe. One of the following stories is true. Heather?

Heather This is the story of the Friendly with a capital Facebook "F" judge, who denied a motion for his disqualification based on his "friend" status with the assistant state attorney who handled a three-count battery case. The Court of Appeals was less than pleased with the judge's decision, and ordered the judge to recuse himself.

Bill Jack, you're up next.

Jack The bar can be a small one and it's sometimes a literal one, where judges and attorneys share libation and stories. But this judge took it a step too far, when she "friended" a lawyer pal of hers and, amidst twitpics of their Pomeranians and Words with Friends maneuvers, messaged a few comments regarding what she felt were the key points of the case. Rethinking her actions the next day, the judge revealed her actions to the other party's counsel. When counsel asked the judge to recuse herself, the judge refused. She was later forced to recuse herself and was reprimanded for ex parte communications.

Bill Panelist No. 3?

Panelist No. 3 Hell hath no fury like a judge scorned. Or at least that was one divorce attorney's experience after he declined to accept a judge's "friend" request during the course of a week-long divorce trial. At the end of the trial, the judge awarded 75% of the marital debt to the attorney's client and a disproportionately high alimony award to the other spouse. The lawyer accused the judge of retaliating against him because of his refusal to accept the judge's "friend" request. An appeals court vacated the decision and remanded the matter for a new trial, reassigning it to a new judge.

Bill Well, [contestant], which is the true story? The friendly judge of story 1, the ex parte party in story 2, or the unfriendly judge in story 3?

Contestant [Answers]

Bill That's correct/ Sorry, but it was...story No. 1 the friendly judge. This was a case out of the District Court of Appeals in Florida, which recognized that friending could undermine confidence in a judge's neutrality. The court adopted a judicial ethics committee opinion which stated that a judge's listing of a lawyer as a "friend" on the judge's social networking page—" [t]o the extent that such identification is available for any other person to view"—would violate Florida

Code of Judicial Conduct Canon 2B (“A judge shall not . . . convey or permit others to convey the impression that they are in a special position to influence the judge.”) The Florida canon is similar to NH Code of Judicial Conduct Canon 2.4(c): “A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”

Scenario 2 is false, but the scenario is closely based on an actual case in North Carolina. However, in the actual case, the judge did not refuse to recuse himself at the second lawyer’s request. He actually recused himself but was reprimanded anyway for the ex parte communications and for independent fact gathering.

Scenario 3 (lawyer refuses judge’s “friend request”) is also false. However, it too, was somewhat similar to an actual case – one that happened in Florida. In the real case, the judge’s friend request went to the client (not the client’s lawyer) and the client refused the request. The appellate court concluded that the wife had a “well-founded fear of not receiving a fair and impartial trial.” Moreover, the court noted that the unrequited friend request “placed the litigant between the proverbial rock and a hard place: either engage in improper ex parte communications with the judge presiding over the case or risk offending the judge by not accepting the ‘friend’ request.”

Kate That does it for Bluff the Listener. Thanks to all of our contestants for playing. Not My Job is Up Next (or Limericks, depending on what we have time for].

[Music Outro: Why Can’t We Be Friends?]

Kate In this segment, Justice Hicks will perform for you three limericks, with the last word missing in each. If you can fill in the last word correctly in at least two of the limericks, you’ll win our prize. Who’s going to volunteer? Please introduce yourself and tell us a little bit about why you’re here tonight.

Contestant [Responds].

Kate Justice Hicks our first limerick please.

J. Hicks While friending on Facebook you may amuse,
Judges and lawyers should not be confused,
Though a judge you may “like,”
His guns you will spike,
If you “friend” then your judge must...

Contestant [responds]

Kate Yes, “recuse” is it. Again, we haven’t had this happen in NH to my knowledge, but it other jurisdictions have come squarely down on the side of no friending judges. Next limerick?

J. Hicks We lawyers sometimes like to talk a good game,
It can be puffery or flummery or of our own fame,
But on LinkedIn,
If your endorsement is thin,
It could be the basis for ...

Contestant [responds]

Kate Yes, it’s “shame.” LinkedIn, as many of you may know, has a function in which you can endorse other individuals for particular skills, and can be endorsed. Ethical opinions have warned that the acceptance or posting of an endorsement may run afoul of advertising-related ethical rules, including 7.1, which prohibits misleading communications about a lawyer’s services and 7.4 which prohibits a lawyer from stating or implying that he or she is a “specialist” excepted if they are admitted to engage in patent practice before the USPTO, practice in admiralty, or are certified as a specialist in a particular field of law by an organization that has been accredited by the ABA. Our last limerick please.

J. Hicks Jurors are people and people do Tweet,
On Twitter they flitter and chatter and bleat,
But lawyers can’t follow,
Or trouble they’ll borrow,
For Tweeters their followers they virtually....

Contestant [response]

Kate “Meet” it is. There is an opinion out of New York which holds that “following” a juror’s Tweet feed – that signing up to be notified when the juror posts a Tweet, is a prohibited communication with that juror because Twitter sends the juror a notification each time a user signs up to “follow” his or her Twitter feed. This notification was considered to be a direct communication, in violation of the NY corollary to NH’s Rule 3.5(b), which prohibits ex parte communications with judges, jurors, prospective jurors and “other officials.” The NY opinion states, however, that viewing jurors’ Twitter feeds is not prohibited. It leaves the

question out there: does failing to look into a juror's Twitter feed and other public social media accounts violate a lawyer's duty of diligence under Rule 1.3?

Bill [Contestant], you got X out of X correct. [What she/he won/consolation prize...].

Kate That's our show for today. Thanks for watching and thanks for playing. Now I'd like to turn it over to Karyl Martin Roberts, current New Hampshire Women's Bar Association president, who has been kind enough to share with us one of the mentoring moments that has made an impact for her.