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Hypotheticals: Hot Topics in Legal Ethics

Hypothetical I

[Social Media/Confidentiality/Ex Parte Communications]

- A. Attorney Paul Postit has a stressful life and uses social media as an emotional outlet. Most of the time he posts about personal or political issues, but occasionally (particularly after a few drinks) he gripes about work-related matters. On the eve of a high-pressure trial, he posts on Facebook: “Just finished a week of all-nighters prepping clients for their testimony. My job would be a lot easier if they shared more than one brain between them.”
- B. After the third day of trial, Paul posts: “Judge overruled all of our objections today (even the ones that weren’t completely frivolous). She is obviously a complete witch and an idiot.” He follows up with “But, Juror no. 5 is cute. Wonder if she’ll go on a date with me.” He finds Juror no. 5’s Facebook page and sends her a friend request, which she accepts.
- C. On the last day of trial, the Judge requests that all counsel meet with her in chambers to discuss a “Facebook” issue. Paul attends the meeting nervously. The Judge discloses that during the course of the trial, opposing counsel sent her a friend request, which she accepted, and they exchanged several “innocuous” posts about the trial – mostly relating to the timetable and scheduling. Paul immediately moves for a mistrial, based on the judge’s communication with opposing counsel.

Hypothetical II

[Billing/Supervision/Duty to Report/Internal Communications/Risk Management]

A. Bigg Law associate Uma Underling works on several matters for Multi Corp. under the supervision of Partner Bob Bluster. Bigg Law has an agreement with Multi Corp. to cap its fees at \$800,000 per month for all matters. Bluster has instructed Uma and the other associates working on Multi Corp. matters to ensure that their monthly billing meets that cap, even though their actual time is much less. When Uma expresses misgivings about this practice, Bluster yells “I’m instructing you to do it! Just do it!” Fearful of Bluster’s frequent tirades, Uma and the other associates comply with his instructions.

B. After complaints from several associates, Bigg Law begins conducting an internal investigation into Bluster’s billing practices. In the midst of the investigation, Bluster resigns from Bigg Law and moves to another large firm. Bigg Law terminates the investigation upon Bluster’s departure. Another partner, Stan Stickler, assumes responsibility for Multi Corp.’s matters. He instructs the associates in clear terms that Bluster’s billing practices are no longer permitted. Stickler adds seven more associates and three junior partners to assist with the Multi Corp. matters. Bigg Law continues to meet the \$800,000 cap for Multi Corp. matters each month.

C. After not paying its legal bills for several months, Multi Corp. fires Bigg Law leaving a balance of \$2.4 million owing. Bigg Law sues Multi Corp. to collect its fees. In discovery, Bigg Law produces the following e-mails among the associates who worked on Multi Corp. matters:

- “Hey, now that Stickler’s on the case, you can bet we’ll see at least ten more associates and partners added before the end of the year.”
- “I hear we hit 800k again this month — that’s Team Bigg Law!”
- “Now Stickler has random people working full time on random research projects in standard ‘churn that bill, baby!’ mode. That bill shall know no limits.”

Hypothetical III

[Outsourcing/Supervision/Limited Scope Representation/

E-discovery Obligations/Inadvertent Disclosure]

A. Bigg Law partner Luther Litt represents Mega Corp. in a lawsuit against Jumbo Corp., which involves millions of electronic documents. Mega's general counsel insists that Litt use an overseas law firm to review the documents, because it charges a much lower hourly rate. The overseas lawyers are to make an initial judgment about responsiveness, privilege, or usefulness of each document. After the document production is complete, Jumbo files a discovery motion claiming that Mega has withheld hundreds of responsive documents. At the hearing, the Judge asks Litt to explain his process for identifying responsive documents. Litt explains that his firm was not retained to handle the document review, and that it was done by another firm.

B. Litt subsequently learns that the overseas firm has been working on an unrelated matter for Jumbo's subsidiary. The overseas firm mistakenly sent a batch of Mega's privileged documents to the subsidiary's lawyer, who shared them with Jumbo's counsel. When Litt demands that the documents be returned and not used, the Jumbo's counsel responds that Mega waived its privileges by outsourcing document review to an overseas firm that was inadequately supervised.

Hypothetical IV

[Prospective Client; Confidentiality; Duty of Loyalty; Deceptive Conduct]

Corporate lawyer Tony Trans has a long-term corporate client, Omni Inc., which is going through a messy corporate restructuring. At the end of this process, Omni plans to terminate several employees, including in-house counsel Penelope Prospect. One morning, Tony receives an email from Penelope stating "My friend John is looking for a good employment lawyer regarding a wrongful termination claim. Is there anyone at your firm who does that kind of work?" Tony responds with the name and contact information of Edith Emory, an employment lawyer at his firm. Penelope sends Edith an email detailing the nature of the wrongful termination claim. In the third paragraph, she reveals that she is the employee at issue, not her friend John. Upon discovering this, Edith stops reading the email and sends a reply stating that she cannot accept the representation because her firm represents Omni.