



ALFA INTERNATIONAL

2017 INTERNATIONAL CLIENT SEMINAR

March 2-5, 2017 – Turnberry Isle Miami – Aventura, FL

Teaching a Lawyer to Fish: The Karaoke Session

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TEACHING A LAWYER FISH: THE KARAOKE SESSION

Because we spend some much of our time focusing on rules, lawyers can fall into thinking that our ethics are defined by the Rules of Professional Conduct. Of course, no set of rules can define ethics. We define ethics for ourselves as we balance our obligations to clients, courts, partners, adversaries, family, society, and ourselves. As the Preamble to the American Bar Association's Model Rules of Professional Conduct recognizes:

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise.¹

The ABA goes on to suggest attorneys should resolve the difficult issues of professional discretion by looking to "the basic principles underlying the Rules."² But it isn't clear what the ABA means by "the basic principles underlying the Rules." The ABA provides no list of basic principles, and it doesn't try to explain how looking at basic principles will be any more helpful than looking at the Rules themselves. In fact, a few paragraphs later in the Preamble, the Model Rules admit "[t]he Rules do not ... exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."³

¹ MODEL RULES OF PROF'L CONDUCT Preamble, ¶ 9 (2016).

² *Id.*

³ *Id.* ¶ 16.

So if the Rules don't identify the basic principles or moral and ethical considerations that lawyers should consider, where do we find that information? The authors of this article propose to answer that question. We suggest the information we need to avoid and resolve ethical conundrums can be obtained by learning GHOTI.

GHOTI isn't a word. It is a mnemonic device, like HOMES⁴ or FANBOYS⁵ that can be pronounced phonetically. But the phonetic pronunciation of GHOTI is far from obvious. For the first two letters, G and H, there are at least four possible pronunciations. Those letters could be pronounced separately, with a schwa between them (guh-oti). The letters could be silent, as they are in "sigh." They could be read as a hard g, as in "ghost." Or they could be pronounced as we have chosen, which is the way GH is pronounced in "enough" or "cough." Using that pronunciation for the GH, pronouncing the O as in women, and pronouncing the TI as in imagination or notion, we pronounce GHOTI as "fish." However, GHOTI has nothing to do with water-dwelling creatures.

GHOTI stands for five words that provide a way of approaching the work we do as lawyers, work that is fraught with conflict and rife with opportunities to err in spectacular and embarrassing ways. The letters in GHOTI represent four attitudes and one reminder that attorneys can bring to bear when we want to make better decisions for our clients,

⁴ HOMES is a way of remembering the names of the Great Lakes: Huron, Ontario, Michigan, Erie, Superior.

⁵ FANBOYS is a way of remembering the seven coordinating conjunctions: For, And, Nor, But, Or, Yet, So.

our firms, our families, our profession, and ourselves. The four attitudes are Gratitude, Humility⁶, Optimism, and Trust, and the reminder is In context.

In our presentation, we explore the elements of GHOTI through a play. The play raises several ethical issues, and the characters will explore the issues in a variety of ways. The play also incorporates music, specifically karaoke. Why? Well, every problem lawyers address is a story that must be told and “[s]ongs are obviously a form of storytelling,” but songs eschew the rigorous analysis and logic that lawyers are trained to use; “[w]hat is crucial in popular songs is the primacy of sound and direct transmission of feeling and belief via lyrics, melody and rhythm.”⁷ We suggest ethics is more about feeling and belief than rules and logic – hence, GHOTI.

I. Gratitude – Appreciate What You Have⁸

“Gratitude bestows reverence, allowing us to encounter everyday epiphanies, those transcendent moments of awe that changes forever how we experience life and the world.”⁹

Gratitude or gratefulness is a concept that makes an annual appearance in American culture as part of the Thanksgiving holiday. One year our family was so

⁶ The spelling may look wrong but is intentional, as we will explain later.

⁷ Philip N. Meyer, *Songs Lawyers Sing: What Adele and Taylor Swift can teach you about finding justice*, A.B.A. J., June 2016, at 26.

⁸ This section was contributed by Kimberly S. Moore, Strasburger & Price, Dallas, Texas.

⁹ Sarah Ban Breathnach, *SIMPLE ABUNDANCE JOURNAL OF GRATITUDE* 1-2 (1996).

fractured, my children were not with me on Thanksgiving, my father was questioning my life decisions such that being grateful was extremely challenging. In such times, should gratefulness prevail? The experts uniformly tout the emotional and health benefits of practicing gratefulness. So yes, even when we do not feel grateful, we should focus on being grateful.

Gratitude has two key components, affirming goodness and recognizing the source as outside of ourselves.¹⁰ Some individuals have a natural propensity towards gratefulness. Regardless of outside challenges, a gene variation (CD38) has been associated with gratitude.¹¹ Thus, some folks are more genetically pre-disposed to satisfaction and love. That said, gratitude can be cultivated and learned.¹²

In fact, there are specific portions of the brain, the pregenual anterior cingulate, which are connected with actions affecting others. This portion of the brain has shown substantial sustained stimulation following specific gratefulness exercises such as writing thankfulness letters.¹³ Gratitude also stimulates the hypothalamus (stress-regulator) and the ventral tegmental area (pleasure sensations).¹⁴ Specifically, with anxiety and depression patients, the mere act of writing appreciation letters changed their brains,

¹⁰ Robert Emmons, *Why Gratitude is Good*, BERKELEY GREATER GOOD SCIENCE CENTER (Nov. 16, 2010), http://greatergood.berkeley.edu/article/item/why_gratitude_is_good.

¹¹ Arthur Brooks, *Choose to Be Grateful. It will Make You Happier.*, THE NEW YORK TIMES (Nov. 21, 2015), http://www.nytimes.com/2015/11/22/opinion/sunday/choose-to-be-grateful-it-will-make-you-happier.html?_r=0.

¹² *In Praise of Gratitude*, HARVARD MENTAL HEALTH LETTER (Nov. 2011), http://www.health.harvard.edu/newsletter_article/in-praise-of-gratitude.

¹³ Christian Jarrett, *How Expressing Gratitude Might Change Your Brain*, *Science of Us*, NEW YORK MAGAZINE (Jan. 7, 2016, 10:39 AM), <http://nymag.com/scienceofus/2016/01/how-expressing-gratitude-change-your-brain.html>.

¹⁴ Brooks, *supra* note 11.

making them more likely to “pay it forward,” causing them to feel better and more grateful – a “virtuous cascade.”¹⁵

In addition to improved mental health, grateful people are more likely to take care of themselves with exercise and appropriate check-ups.¹⁶ Grateful people also have improved sleep.¹⁷

Perhaps most importantly, grateful people have improved relationships. Even difficult relationships are improved by locating something positive about the person or contribution. For example, thanking a critic for his prompt insight or for reading what you wrote.¹⁸ Because gratitude improves self-esteem, grateful people are also better able to appreciate other’s accomplishments.¹⁹

Expressing gratitude has one potential downside. One study suggests that people expressing gratitude crave sweets.²⁰ One author call this the “Pumpkin Pie Paradox” given the association with Thanksgiving. Despite the potential for the sweet tooth, the benefits far exceed the detriments.

¹⁵ Jarrett, *supra* note 13.

¹⁶ Amy Morin, *7 Scientifically Proven Benefits of Gratitude That Will Motivate You To Give Thanks Year-Round*, FORBES (Nov. 23, 2014, 6:12 PM), <http://www.forbes.com/sites/amymorin/2014/11/23/7-scientifically-proven-benefits-of-gratitude-that-will-motivate-you-to-give-thanks-year-round/#38593d486800>.

¹⁷ *Id.*

¹⁸ Brooks, *supra* note 11.

¹⁹ Morin, *supra* note 16.

²⁰ Brooks, *supra* note 11.

Practicing gratitude can take many forms. Those who have had a successful practice over a significant time suggest keeping a journal of specific items for which you are grateful. For example, instead of reciting that you are thankful for your family, state something specific for which you are thankful, such as, your daughter fixed your computer, you saw a beautiful new moon, or you found a lost pair of gloves.²¹ If you have an aversion to journaling, try another method such as placing notes in a jar you share later or writing notes of thanks to others.²² Finally, include others in your gratitude practice as it is, in fact, contagious.

II. Humiliority – Keep Your Perspective

“Humiliority” isn’t in the dictionary, at least not yet. We invented the word because we wanted a single word that means self-deprecating humor. We combined them as Humiliority, but we could have used humorility instead. Either way, we mean we are ready to laugh, especially at ourselves.

A. Humility²³

The Spanish philosopher and writer Miguel de Unamuno is credited with the phrase “nationalism is remedied by traveling”. Miguel de Unamuno, one of the greatest representatives of the generation of 98, was an essayist and novelist and also one of the most remembered rectors of the University of Salamanca, a position he achieved at only

²¹ Derek Carpenter, *The Science Behind Gratitude (and How it Can Change Your Life)*, HAPPIFY DAILY (last visited Dec. 20, 2016), <http://www.happify.com/hd/the-science-behind-gratitude/>.

²² *Id.*

²³ This section was contributed by Ignacio López-Balcells, Buigas, Barcelona, España.

36 years of age. His confrontation with Millán-Astray in a speech that opposed the greatness of the culture of death, remains one of the most dignified defenses of freedom and humanism against the absolutism of ideas.

That same concern to widen horizons and not be locked in the “certainties” is why Miguel de Unamuno reminded us of the importance of traveling to meet other cultures and other ways of life and to learn to respect them.

So, let's travel then, but make a real trip

There is no consensus whether the universe is finite or infinite, but what is certain and verified is its overwhelming immensity. In order to have a reference that allows us to organize things in the proper perspective, we must take only proven and verified data and leave any speculation aside.

The Earth has a total surface of 510,072,000 km² and the length of the terrestrial circumference is approximately 40,000 km.

The speed of light is approximately 300,000 km/sec, which means light would circumnavigate the Earth 8 times in only one second.

The history of the Earth comprises about 4.6 billion years since its formation from the protosolar nebula. This time is about a third of the total time since the Big Bang, which

is estimated to have occurred 13.8 billion years ago.

The Moon, which has only been reached by a dozen people, was formed about 4,000 million years ago, and is approximately 380,000 km away, so if we travel at the speed of light, we will take only a little more than a second. About 4,000 million years ago, our very young planet, the Earth, suffered the impact of another planet that took a considerable piece of its mass and launched it into the space. As a result of that collision and over the next millennia, the debris compacted into a single sphere and formed the Moon.

Our next stop on this exciting trip could be our star, the Sun, which was formed about 4.6 billion years ago. The sun is 150 million kilometres from Earth, so it will take us 8 minutes and 19 seconds to reach it at the speed of light. This visit is very recommendable since it is estimated the Sun will be vanishing within about 5 billion years.

The Sun is about 110 times bigger than the Earth, meaning that if the Sun was the size of a watermelon, the Earth would be about 43 micrometres and we would need a powerful magnifying glass to see it.

The Sun is the source of all our energy. If the human being were able to capture all the energy radiated by the Sun in one second, that would be enough to sustain the needs of the whole planet Earth during the next 500 years.

We continue our travel leaving behind Mercury, Venus and Mars, the rocky worlds closest to the Sun, and we pass close to Jupiter, Saturn, Uranus and Neptune, the gaseous giants, all of them huge planets.

We move forward at full speed and after overcoming the outer limit of the cloud of Oort, we leave the solar system and we go deep into the kingdom of another star, that is the next closest star to the Earth, Proxima Centauri, which is at a distance of 4.2 light years and is about six times smaller than the Sun. When the Sun explodes, Proxima Centauri will have not changed in the slightest and will be shining as now for the equivalent of 300 times the current age of the universe.

Although our journey already seems long, we have not practically left home. The Earth, the Moon, the Sun, Centauri and many other planets and stars are part of our galaxy, called the Milky Way, which is composed of about 300,000 million stars.

To get an idea of the size of our galaxy, physicist Christophe Galfard suggests we fill 300 boxes that hold one cubic meter each with beach sand. Each grain of sand represents one of the stars of the Milky Way. Galfard further suggests that we paint one of the grains of sand yellow and then pour all 300 boxes of sand on Trafalgar Square so the whole Square is covered. If we then climb up to the shoulders of the statue of Nelson and from there look among all the 300,000 million grains of sand for the one grain painted in yellow ... that is the Sun ..., in case you find it. To look for the Earth or some part of it is pointless. That is the Milky Way whose average diameter is estimated at about 100,000

light years and the distance between the Sun and the centre of the galaxy is 27,700 light years (that is, it will take 27,000 years to travel at the speed of light to go from the Sun at the centre of the Milky Way).

If we divided the stars of the Milky Way among the 7 billion inhabitants of the Earth, each of them would have 4 trillion stars.

We do not finish our trip in the Milky Way at all, it just begins here, because the Milky Way is part of what is called the Local Group, which is composed of about 40 galaxies like the Milky Way, being the galaxy of Andromeda the largest and located at the distance of 2 million light years from the Milky Way. This is only the Local Group.

As a curiosity on our journey, it has been observed that Andromeda and our galaxy are fast approaching at a speed of about 500,000 km/h, which suggests that a collision between both might occur within 3,000-5,000 million years depending on the mass of these galaxies. If this crash occurs, it should not be understood as two solid bodies shocking together, but the galaxies would pass through each other producing a total devastation. Under this perspective, perhaps the problem of the Sun's explosion is no longer such because the fusion of galaxies will occur one billion years before.

Our trip continues. Beyond Andromeda there are 100 billion galaxies and each has at least 200 billion stars.

Following the recommendation of Miguel de Unamuno, I believe that we must go on with the journey, provided that at this point it has not already caused its effect.

If we fly at the speed of light for 13.8 billion years, at last we will encounter the first real limit. After that long journey for 13.8 billion years at the speed of light that is to say 300,000 km per second, we will arrive at a wall called the Surface of Last Scattering. The wall that limits the transparent universe is so thick that light can no longer pass through. This is not the end of the road, it is only the result of the Big Bang, that is the explosion of a very dense mass that create the universe. Behind this wall there are other universes probably of similar dimensions or greater than the universe travelled in our journey and where we find the cause of the Big Bang.

From there, the Earth and all of its occupants – including the lawyers – are insignificant.

B. Humor²⁴

Laughter is good for us, the “best medicine” as Readers’ Digest says. Norman Cousins says laughter is the reason he lived 26 years longer than his doctors predicted. His extended lifespan couldn’t be attributed to medical science because when his doctors told him he had just days to live, he checked himself out of the hospital, stopped taking medications, and starting treating himself by watching his favorite funny movies. His disease went into remission and he regained his strength, so he wrote a best seller about the experience and urged medical providers to incorporate humor into treatment plans.²⁵

²⁴ This section was contributed by Tom Singer, Axilon Law Group, PLLC, Billings, Montana.

²⁵ NORMAN COUSINS, ANATOMY OF AN ILLNESS (2005).

Some hospitals are now following Cousins's advice. They are using clowns and comedy carts loaded with funny movies, comic books, and whoopee cushions as pain management tools.²⁶ Hospitals have found that patients who laugh report a 50 percent decrease in stress, have less pain, require fewer medications, and recover more quickly.²⁷

Of course, people who are not hospitalized can benefit from laughter too. Laughing suppresses glucose levels in diabetics, reduces chemicals associated with joint swelling in arthritis patients, and helps allergy sufferers combat dermatitis.²⁸ Laughter also significantly improves our bodies' immunoglobulatory response and enhances the natural killer cells that help our bodies stave off diseases such as cancer and HIV.²⁹

Laughter is a form of aerobic exercise. Studies suggest that laughing 100 times is roughly equivalent to spending 10 to 15 minutes on an exercise bike. Laughter raises both systolic and diastolic blood pressure, which strengthens our hearts just as jogging does.³⁰ In fact, watching a funny movie can improve blood flow in our bodies for as much as 24 hours.³¹

Laughter also benefits us psychologically. "[H]umor taps directly into the brain's pleasure-production system."³² It triggers the brain's dopamine reward circuit. Dopamine

²⁶ SCOTT WEEMS, HA!: THE SCIENCE OF WHEN WE LAUGH AND WHY, 149-50 (2014).

²⁷ *Id.*

²⁸ *Id.* at 139.

²⁹ *Id.* at 139-40.

³⁰ *Id.* at 137.

³¹ *Id.* at 138.

³² *Id.* at 18.

is a neurotransmitter and one of the most important chemicals in the human brain. Scientists hypothesize that dopamine production skyrocketed in the brains of our ancestors when they began eating meat around two million years ago, giving rise to the cognitive and social processes associated with dopamine, which include risk-taking, goal-driven behavior, and attention.³³ Dopamine is linked to motivation.³⁴ Rats injected with dopamine will work two to three times harder to get what they crave.³⁵

Dopamine is released in our brains in response to chocolate, sex, cocaine, and other stimuli that can be harmful if overused or abused.³⁶ Fortunately, dopamine release is also triggered by laughter, the side effects of which are rarely life-threatening.

People who laugh more exhibit higher levels of vitality, greater self-control, and better self-concepts. They are better equipped to deal with stress, more socially adapted, and better adjusted to their condition.³⁷ People who enjoy or create humor also score higher on intelligence tests.³⁸ Laughing makes us more productive and happier, and it helps us learn better.³⁹ Laughter also is linked to optimism.⁴⁰ And whenever we laugh, we actually become – for a time at least – smarter, more creative, better at rotating mental images in our heads, and better at solving problems and puzzles.⁴¹

³³ *Id.* at 19.

³⁴ Maia Szalavitz, *The Currency of Desire*, SCI. AM. MIND, Jan.-Feb. 2017 at 51.

³⁵ *Id.*

³⁶ WEEMS, *supra* note 26, at 17.

³⁷ *Id.* at 58.

³⁸ *Id.* at 184-85.

³⁹ *Id.* at 178-81

⁴⁰ Robert M. Sapolsky, *For Rats, a Good Tickling Can Change the World*, WALL ST. J., July 16-17, 2016, at C2.

⁴¹ WEEMS, *supra* note 26, at 185-86.

Humor also builds social bonds. We wouldn't laugh much watching comedies on TV when we are alone at home if it weren't for laugh tracks.⁴² When we hear others laughing, even complete strangers, we will laugh more.⁴³ But the laughter we share with friends is better yet. When we laugh with people we know, we use shorter and more variable bursts of laughter than when we laugh with strangers.⁴⁴ Though the differences are minute and seem imperceptible, they are significant enough that neutral observers are able to distinguish pairs of laughing friends from pairs of laughing strangers.⁴⁵

Of course, not all humor is beneficial. Humor that is aggressive or insulting or self-denigrating tends to be associated with depression, anxiety, and low self-esteem. The humor that is beneficial – that raises our self-esteem and conscientiousness – is affiliative.⁴⁶ By joking about our own short-comings, we can remind our listeners of our common humanity, and we often can bridge the political and social barriers that may divide us.⁴⁷ That is why the most effective humor is laced with humility.

C. Humorility or Humiliority

If we can take steps to become more humble, then we certainly can also become more humorous. Heritability studies suggest that the genetic influence over humor is less than 25 percent, which leaves 75 percent to be influenced in other ways. Influences that

⁴² *Id.* at 154-64.

⁴³ *Id.* at 163-64.

⁴⁴ Robert M. Sapolsky, *Laughter Is the Best Medicine to Gauge Social Ties*, WALL ST. J., December 3-4, 2016, at C2.

⁴⁵ *Id.*

⁴⁶ WEEMS, *supra* note 26, at 146-47.

⁴⁷ *Id.* at 182-83.

can improve our humor are available, for a fee, from books, comedians, workshops, and online training companies that offer humor training.⁴⁸ And there is some evidence that such training does make people funnier.⁴⁹

If we can train ourselves to be both funnier and more humble, that should make us healthier, happier, and more popular. We also will be more creative and better problem solvers. It is worth a try.

III. Optimism – Assume Things Will Work Out⁵⁰

A positive attitude can lead to higher energy levels, greater creativity, and an improved personality.⁵¹ Research indicates that “optimists” and “pessimists” approach problems differently, and their ability to cope successfully with adversity differs as a result.⁵² Pessimistic and optimistic people explain negative experiences to themselves in different ways. Pessimists tend to look at negative events as permanent, universal, and personal/internal.⁵³ That means that pessimists believe that their negative situation will last forever, generalize the negative event to all areas of their lives, and tend to blame

⁴⁸ WEEMS, *supra* note 26, at 191.

⁴⁹ *Id.* at 192.

⁵⁰ This section was contributed by Dina Cox, Lewis Wagner, Indianapolis, Indiana.

⁵¹ Cheryl Stephens, *Life Tools for Lawyers: Practice Optimism*, <http://documents.jdsupra.com/9fafb4c2-9158-4ddd-8665-00dc0b79ebf8.pdf>.

⁵² *Mindfulness and Positive Thinking*, THE PURSUIT OF HAPPINESS, <http://www.pursuit-of-happiness.org/science-of-happiness/positive-thinking/> (last visited Dec. 19, 2016).

⁵³ Linda Gabriel, *What's Your Explanatory Style?*. THOUGHT MEDICINE, <http://thoughtmedicine.com/2010/04/whats-your-explanatory-style/> (last visited Dec. 19, 2016).

themselves for the negative event. Optimists tend to view negative events as temporary, specific, and impersonal/external.⁵⁴

Negative and positive moods vary throughout the day and week. Negative mood is highest on Sunday, Monday, and Tuesday; positive mood rises on Thursday and is at its highest on Friday and Saturday.⁵⁵ Over the course of the day, positive affect is lower in the morning and rises to a peak throughout the day then weakens at night.⁵⁶ Mood also rises and falls based on a 90-minute alertness cycle; at the beginning of that cycle, we are in a better mood and have more initiative.⁵⁷

Research has shown that positive emotions, associated with optimism, fuel creativity and enhance reasoning skills.⁵⁸ Optimism has been proven to improve the immune system, prevent chronic disease, and help people cope with unfortunate news.⁵⁹ One study concluded that a superior “fighting spirit” found in optimists predicted substantially better quality of life one year after breast cancer surgery.⁶⁰ Optimism seems to protect against an urge to withdraw from social activities, which may be important for healing.⁶¹ Optimists are generally happier with their lives than pessimists; optimists are able to recover from disappointments more quickly by attending to positive outcomes to

⁵⁴ *Mindfulness and Positive Thinking*, *supra* note 52.

⁵⁵ Joe Robinson, *Working Smarter: How Optimism Boosts Productivity and Work-Life Balance*, JOE ROBINSON OPTIMAL PERFORMANCE STRATEGIES, <http://www.worktolive.info/blog/bid/336460/How-Optimism-Boosts-Productivity-and-Work-Life-Balance> (last visited Dec. 19, 2016).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Dana Lightman, *Organisation: Optimism Brings Positive Results to the Workplace*, LEADER VALUES, <https://www.leader-values.com/article.php?aid=456> (last updated 2005).

⁵⁹ *Mindfulness and Positive Thinking*, *supra* note 52.

⁶⁰ *Id.*

⁶¹ *Id.*

a greater extent than negative ones.⁶² For example, research has shown that in dealing with failed in-vitro fertilization attempts, pessimists were more likely to develop depressive symptoms and to feel personally responsible for the failure of the IVF attempt.⁶³ Pessimistic thinking leads to a waste of time and energy rather than focusing on what is within one's control.

But optimism does not mean blind optimism that all will be "fine". People need to have the right kind of optimism. The right kind of optimism means having self-awareness, flexibility, self-confidence, initiative, resiliency, and adaptability.⁶⁴ In deciding to be optimistic, one must be cautious to avoid "wishful thinking."⁶⁵ Optimism does not mean being willfully ignorant of negative realities or being in denial.⁶⁶ Research has found that we need three positive to one negative event to stay in the positive camp.⁶⁷

Interestingly, lawyers as a group lean towards pessimism.⁶⁸ Lawyers are trained to study the facts; optimism can make a lawyer overly confident in one's position, ignorant of opposing facts, and reluctant to examine every aspect of an issue.⁶⁹ Some even say, "In law, pessimism is considered prudence."⁷⁰ Pessimistic and optimistic lawyers can be separated by five major differences. First, pessimistic lawyers view clients as unhappy,

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Lightman, *supra* note 58.

⁶⁵ Stephens, *supra* note 51.

⁶⁶ *Id.*

⁶⁷ Robinson, *supra* note 55.

⁶⁸ Pamela DeNeuve, *Attorneys: Pessimism vs. Optimism – Your Choice – 5 Reasons*, LINKEDIN (Feb. 11, 2016) <https://www.linkedin.com/pulse/attorneys-pessimism-vs-optimism-your-choice-5-pamela-deneuve->

⁶⁹ *Id.*

⁷⁰ *Id.*

angry, or dissatisfied people.⁷¹ The pessimistic lawyer becomes engrossed and worn out after battling one problem after another.⁷² On the other hand, an optimistic lawyer is excited about the client's problem and values the client-attorney relationship.⁷³ Second, the pessimist feels the 50% chance of losing looming over him while the optimist finds a way to not take adverse events personally.⁷⁴ Third, a pessimist is convinced that she can never do enough to compensate for the opposition and that, no matter what, the pessimist will never win; the optimist understands the saying: "you win some, you lose some," and refuses to take losses personally.⁷⁵ Fourth, pessimists loathe the billable hour and feel as if there are no "time-outs" for illness, hobbies, family because an hour not billed is an hour wasted.⁷⁶ Optimists, on the other hand, recognize the supremacy of family, mental health, and the bigger picture.⁷⁷ Fifth, pessimistic lawyers feel stuck in a profession that "brings them down," where optimistic lawyers feel a sense of fulfillment or belief that what they are doing matters.⁷⁸

Research has shown that a more optimistic style can be learned. The first step in learning optimism is to identify your style. Recognize your thoughts and feelings and whether they focus on blame, helplessness, and hopelessness.⁷⁹ Once you identify these thoughts, realize that you do not have to believe every negative thought that goes through your head. Rather than engaging in thinking that centers on inaction, helplessness,

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Gabriel, *supra* note 53.

avoidance, and conflict, respond to a difficult situation by focusing energy on areas of the situation that can be controlled.⁸⁰

An unhappy lawyer will never be a good lawyer.⁸¹ To be a happy lawyer, look at the big picture; a career is not defined by a single adverse decision. Learn to laugh and value humor and learn to identify and re-channel pessimistic thoughts. Concentrate on what needs it, whether that be work, family, friends, etc. Engage your colleagues in positive relationships and give back to the profession. We can choose to be happy lawyers and we should.⁸²

IV. Trust – Rely on Others⁸³

Trust matters a great deal – particularly in this era of uncertainty, global upheaval, political acrimony, and unsettling changes in our profession. The most satisfying relationships, whether personal or professional, rest on a foundation of implicit trust. The Oxford Dictionary defines trust as “a firm belief in the reliability, truth, ability, or strength of someone or something.” Trust really is a feeling of security that one has, based on the belief that someone or something is knowledgeable, reliable, good, honest, and effective. At a minimum, there exists a meaningful combination of some of these important attributes. When applied to human relationships, trust develops when people interact and

⁸⁰ Lightman, *supra* note 58.

⁸¹ Marian C. Rice, *A Good and Happy Lawyer*, 40 A.B.A. L. PRAC. MAG. 4, July/Aug. 2014, available at, http://www.americanbar.org/publications/law_practice_magazine/2014/july-august/ethics.html.

⁸² *Id.*

⁸³ This section was contributed by Stan Siegel, Nilan Johnson Lewis PA, Minneapolis, Minnesota.

then approve of the quality of the information or service they receive and the way in which it was delivered.

Our own personal experiences lead us to trust people who are generous toward us, who have integrity, and whose actions parallel their words. We trust those who are reliable, honest, and who we can count on to consistently do what is “right.” And when you trust your colleagues and your clients, you are able to form a powerful bond that helps you work and communicate more effectively. Simply put, if you trust the people with whom you work, whether teammates or opponents, you can be open and generous and honest in your thoughts and actions, and you don’t have to continually look over your shoulder.

Trust is a core ingredient to build successful personal and professional relationships, and it is a major leadership characteristic. But building and maintaining trust requires mindfulness and effort. You need to work hard to earn trust and to keep it. On the other side of the equation, learning to trust is also difficult. If you want to be a successful leader or counselor or teammate, you have to cultivate and maintain trust at all times – and if you are not vigilant, you can squander or lose trust almost immediately.

Andreas von der Heydt identified a number of simple, straightforward thoughts on the most important principles to building, regaining, and sustaining trust.⁸⁴

⁸⁴ Andreas von der Heydt, *How To Build Relationships Of Trust*, LINKEDIN, (Mar 30, 2014), <https://www.linkedin.com/pulse/20140330130915-175081329-how-to-become-a-leader-of-trust>.

Walk Your Talk. Say what you mean and mean what you say. Your word is your bond – always keep it! When you make a commitment to deliver a task or a duty, always deliver on time and in full. Be reliable. Be consistent. Be punctual. If you think you might miss an agreed upon timeline, let your colleague or client or opponent know in advance – communicate proactively, apologize if necessary, and then set a new timeline and do not miss it. Always lead by example and demonstrate consistently that you deliver on your promises and can be counted on.

Communicate Frequently And Openly. Always be direct, accurate, and honest in your communications with your clients, your colleagues, and your adversaries. There simply is no other way to build trust. To demonstrate that you have no hidden agendas or political motivations, regularly share information with others. Be the best listener you can be. And always take on and address possible trust issues in an open and prompt manner.

Tell The Truth And Take A Stand. Always be honest and never lie. This is not as easy as it might sound. Studies show that people lie all the time. In fact, a recent study demonstrated that 60% of people lie two to three times during a typical 10-minute conversation. It usually isn't about the big stuff but instead for the purpose of appearing more likeable and competent. Women were more likely to lie to make the person they were talking to feel good, while men lied most often to make themselves look better. But if you want to build and maintain trust, you just cannot lie. Tell it like it is. Don't leave out relevant facts, figures, and opinions when communicating about something important – or ever – and particularly when it's awkward and painful. People will appreciate it. Finally,

if you want to earn trust and respect, be willing to take a stand and to say no – you can't be everything to everyone.

Always Be Transparent and Show People You Care. Share your objectives and your strategy and your values. Your colleagues and clients genuinely want to know what you think and believe so they have confidence in you and in your intentions. Always strive to create a common identity and establish a sense of companionship. And be out for others and not for yourself. Show sensitivity to your colleagues' and clients' interests and their needs. Consistently express your sincere gratitude – thank your clients and your colleagues and let them know that you value them. And do it from the heart.

Coach and Empower Others. Guide people around you and assist and support them to find their own way. Don't tell them what to do or how to do it. Instead, ask them for their input and their opinions. And most importantly, show people that you trust them. Be flexible, encourage them to be proactive and to take initiative, and always ask for regular feedback. Have faith in others skills and capabilities and be willing to let go and to share power with others. As Hemingway said, "The best way to find out if you can trust somebody is to trust them."

Be Positive and Admit Mistakes and Weaknesses. We all are only human, and we all make mistakes. One of my favorite sayings is: "that won't be the worst thing that will happen in our lives today." When you don't do the right thing, and you will, openly admit it. Be transparent and authentic and willing to talk about your mistakes and your

shortcomings in a constructive manner. We all are vulnerable – when you show that you have nothing to hide, you will radiate trust and people will respect you for it. And never, ever, punish mistakes. They will happen regularly; when they do, speak openly and honestly about them in a results-oriented and forward-looking way. Be mindful of your mistakes; learn from them. Look with others for solutions and implement actions to avoid making the same mistakes again.

Establish Long Term Relationships. Trust is usually not the result of short term actions and profits. It is created from deeper values, ethics, and fundamental principles. Take your time and don't force things. Don't rush. Always be willing to let trust evolve and flourish. And don't expect something in return. Give for the sake of giving. As someone once observed, the best trust fertilizer is to "give without any strings attached."

The Golden Rule. Finally, always follow the highest ethical standards. Do the right thing, especially when it might be hard. Live the Golden Rule always – treat others as you would like others to treat you. If you do these things, your colleagues, your clients, and even your adversaries, will respect and trust your integrity.

In summary, trust is more important than ever in today's challenging and ever-changing world, not only in our personal relationships, but also in our relationships with our clients, colleagues, and our adversaries. Sustainability in any of these essential relationships is simply not possible without trust. And if we are mindful and deliberate about engendering and nurturing trust, then like gratitude, humilosity, and optimism, it can

be the basis and form the foundation for healthy personal and professional relationships, effective communication, and ultimately, success in the important things we do in our lives.

V. In Context – Don't Overlook the Rules

We started this article by highlighting some things the Rules of Professional Conduct don't address, but that doesn't mean we think you should ignore those rules. We encourage you to look at the rules before you make your final decision on any issue of legal ethics. However, we expect the rules will do little more than confirm the conclusions you have reached after framing the issues with Gratitude, Humility, Optimism, and Trust. To illustrate why, we now summarize vignettes that will be presented during the program and offer some analysis of the ethical issues they raise.

A. Crossing Borders and Cultures⁸⁵

Vignette: Company established a business unit in Romania and built a production facility. A mid-level manager, who was under pressure to move the project quickly and also hoped that moving the project would lead to a promotion, was able to obtain the building permit from Romanian authorities without submitting the necessary paperwork because he had personal relationships with some local officials. The lack of paperwork isn't discovered until a year later, when the company tries to register the completed building and learns it is built on land the Company does not own. In-house Counsel is blamed for failing to

⁸⁵ Vignette concept contributed by Ioana Hategan, Hategan Attorneys, Timisoara, Romania.

monitor the acquisition process. The Company's actions almost certainly violated Romanian and U.S. laws.

Analysis:

Lawyer's problems do not start with the Rules of Professional Conduct. They start with statutes such as the Foreign Corrupt Practices Act of 1977⁸⁶, which makes it unlawful to pay foreign government officials to assist in obtaining or retaining business. The Act makes it a crime to pay or offer to pay a foreign official to induce the official to do anything unlawful or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

Lawyer did not pay a government official, but if Lawyer failed to prevent Company from violating the law, then Lawyer's job may have become less secure and Lawyer could be subject to discipline for violating Rules 1.1 (failing to provide competent representation) and 1.2 (assisting a client in conduct the lawyer knows is criminal or fraudulent). Lawyer is obligated to protect Company and its confidential information (Rule 1.13), but if other attorneys at Company participated in wrong-doing, Lawyer may be obliged to report those attorneys to disciplinary authorities. (Rule 8.4.)

B. Identifying Your Client

Vignette: In-house Counsel is visited by a mid-level Manager who reports that the supervisors in Manager's department are engaging in activity the Manager believes is

⁸⁶ 15 U.S.C. §§ 78dd-1, et seq.

illegal. Counsel listens to Manager, asks questions, and assures Manager his identity will be protected pursuant to the “We Are Constantly Improving” procedure set out in the company handbook. Counsel investigates and discovers that Manager is engaged in a different type of wrongdoing.

Analysis:

The Lawyer represents the organization and must proceed in a manner that is in the best interests of the company. See Rule of Professional Conduct 1.13(a).⁸⁷ This may include referring the issue to a higher authority within the organization, even if doing so could potentially require the Lawyer to disclose information shared with him or her by an employee of the organization. See Rule of Professional Conduct 1.13(b).⁸⁸

In certain situations, the Lawyer is required to explain to employees that the Lawyer represents the company and not the company’s employees or officers. See Rule of Professional Conduct 1.13(f).⁸⁹ This “corporate Miranda warning” or “Upjohn warning” emanates from the United States Supreme Court case of *Upjohn Co. v. United States*.⁹⁰

⁸⁷ Rule 1.13(a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

⁸⁸ Rule 1.13(b): If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

⁸⁹ Rule 1.13(f): In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

⁹⁰ 449 U.S. 383 (1981)

In *Upjohn*, the Court discussed the context in which warnings for individual employees might be necessary. An “Upjohn warning” provides clarification to an employee being interviewed as part of an investigation that the attorney is representing the company, and not the individual. Giving an employee an “Upjohn warning” prevents the employee from later asserting a belief that there was an attorney-client privilege; and, it prevents confusion as to the identity of the client.

The In-house counsel must understand that he/she represents the organization, not the mid-level Manager. The In-house counsel is required to act in the best interests of the organization. In this situation, the investigation revealed that the Manager was engaged in some type of wrongdoing, which most likely must be reported in furtherance of the best interest of the Company. The fact that the Company has the “We Are Constantly Improving” procedure in its handbook does not impact the Lawyer’s duties under the Rules of Professional Conduct. While that procedure may allow the Manager to make anonymous complaints, it does not relieve the Lawyer of his or her responsibility to report wrongdoing by a managerial employee. In the future, the Lawyer should make it clear to officers and managers that the Lawyer’s responsibility is to act in the best interest of the company, not necessarily the best interest of the officer, which means that anonymity is not always a guarantee for the employee. The Lawyer can make it clear to the employee that any wrongdoing discovered in an investigation will be reported and the Lawyer will proceed as required, such as informing a higher authority of the discovered wrongdoing.

C. Keeping Your Perspective

Vignette: Lawyer works in-house for a major accounting firm. At the gym, Lawyer develops platonic but sexually-fraught friendship with stock investor. Lawyer reveals to Friend that Lawyer occasionally becomes privy to insider information belonging to clients of the accounting firm that are publicly-traded. Over time, Friend coaxes Lawyer into sharing a tidbit of insider information. Friend uses the information to profit on trades and then rewards Lawyer by offering sex. Lawyer accepts offer and thereafter provides additional bits of insider information, which are rewarded in the same way.

Analysis:

Under Rule 1.6⁹¹, Lawyer has duty of confidentiality to his client, which is the accounting firm.⁹² The Lawyer's duty of confidentiality bars "reveal[ing] information relating to the representation of a client..." Because Lawyer's access to Information belonging to clients of the accounting firm relates to Lawyer's representation of the accounting firm, the Lawyer's duty of confidentiality presumably extends to the client information he disclosed to Friend. Lawyer's disclosure therefore violated Rule 1.6. It also violated the firm's obligations under rules governing accountants and federal laws prohibiting insider trading. Insiders are forbidden both from personally using undisclosed corporate information to their advantage and from giving such information to an outsider for the same improper purpose of exploiting the information for their personal gain.⁹³

⁹¹ Rule 1.6: A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

⁹² See notes 87-89, *supra*.

⁹³ *Salman v. United States*, No. 15-628, 2016 U.S. LEXIS 7418, at *18 (Dec. 6, 2016).

D. Avoiding Discrimination

Vignette: A past member of the Board of Directors of ALFA International receives from the Commission on Legal Practice in her home state a complaint charging her with violating Rule 8.4(g) of the state's Rules of Professional Conduct. The complaint alleges she knowingly engaged in discriminatory conduct related to the practice of law by proclaiming publicly her opposition to ALFA International's practices of closing Women's Initiative events to males and offering discounts and other inducements to encourage women, minorities, or other groups to participate in events.

Analysis: In August 2016, the ABA adopted a Resolution to Amend Rule 8.4 of the ABA Model Rules of Professional Conduct by adding a new subsection (g) that says it is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.⁹⁴

While the Rule forbids all discrimination, the Comments to the Rule permit discrimination so long as the beneficiaries are deemed “underserved.” The Comments say lawyers do not violate the rule by engaging in “conduct undertaken to promote diversity and inclusion” or “by limiting the lawyer’s practice to members of underserved populations....”⁹⁵ Query

⁹⁴ ABA Resolution 109, as revised and adopted the House of Delegates, August 8-9, 2016.

⁹⁵ *Id.*, comts. 4 & 5.

whether it is a violation of Rule 8.4(g) to represent a young, white, heterosexual male in a discrimination claim.

Conclusion

Lawyers are busy. We want to be helpful. We have to earn a living. Sometimes, we make choices without taking the time to think. If our instincts are good, we will make the right decision, the one that will make us proud later rather than get us disbarred, divorced, and thrown in jail. We are more likely to make the right decision if we have the right outlook. We function better and have less need to worry about the rules when we are grateful, humble, happy, hopeful, and among people we trust.

When you, or a friend, are wondering about the right thing to do, take some time to “Go GHOTI.”