The Sharper Lawyer

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SOCIAL MEDIA ETHICS IN THE AGE OF DOCUMENTED MISCHIEF

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Social Media Ethics in the Age of Documented Mischief

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By Cynthia Sharp

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You are what you share.

—C.W. Leadbeater

Newly admitted to the bar, Sharon treats herself to a well-deserved vacation at a remote and private destination. During her week of frolic, she documents her leisure activities by posting on Facebook numerous pictures of herself in various stages of undress, inebriation, and general mischief. Although her privacy settings were properly set, her "message" reaches an unintended audience because one of her high school friends shares the photos with *all* of *her* Facebook friends. Much to Sharon's personal and professional embarrassment, the provocative photos spread like wildfire through her real-world and virtual communities.

Avoid Professional and Personal Embarrassment

Indiscriminate posting can lead not only to embarrassment but also to charges of professional misconduct. Information and documentation posted long ago (before maturity set in) could come back to haunt you when least expected. It is unwise to allow a partner to take sexually explicit photos or videos. Those who have been humiliated by revenge porn, now illegal in more than 15 states, undoubtedly regret disrobing in front of a camera.

Adhering to the following rule is a step toward maintaining a pristine online reputation: Don't post anything that you wouldn't want your grandmother to see. Now let's carry this concept a step further: Don't divulge anything in an e-mail that you don't want shared with the world. Nothing stops your frenemies from publishing or distributing the views expressed in your e-mails. Hackers have also been known to wreak havoc. For example, sensitive information contained in e-mails exchanged by Sony corporate executives was revealed in 2014 by hackers. Many executives were cast in a bad light.

Although the classic idiom cautions against closing the barn door after the horse has bolted, it's at least worth a try. If someone posts a picture of you inconsistent with your professional brand, request removal of the offensive picture and remove any identifying tag. Both are proactive steps toward reputation protection.

By the way, *never* post on social media when you are angry, overly fatigued, drunk, or otherwise impaired. Although "private" e-mails, text messages, and oral recorded messages don't fall under the definition of social media, the same advice applies.

Circulating pornography is also a bad idea. Former Pennsylvania Supreme Court justice Seamus McCaffery resigned from the bench in October 2014 after it was discovered that he had sent 234 e-mails containing sexually explicit photos and videos to an agent in the attorney general's office. This rule also applies to pictures of your own private anatomy; former U.S. representative Anthony Weiner can attest to the destructive nature of this pattern of behavior. It appears that even our highest officials can't resist electronic temptation.

And remember who might have access to your social media posts. One young lawyer apparently forgot that she was Facebook friends with Susan Criss, a judge in Texas. Judge Criss had granted her a one-week continuance in a matter because she claimed that her father had died. After viewing the attorney's Facebook posts depicting a week of relentless partying, Judge Criss denied further requests for adjournment. No lawyer would enjoy this embarrassing predicament.

Even the most highly educated people may suffer a lapse of judgment and make ill-advised comments that they later regret. Unfortunately, social media and other digital communication offer the opportunity to broadcast commentary to more than a billion people worldwide, all of whom can preserve these little gems forever by taking a screenshot of the post or message. Voice mail messages also have that forever quality.

Guard Your Ethics

Duty of Confidentiality. Sharing client confidences online not only violates ABA Model Rule of Professional Conduct 1.6, but it also makes the posting attorney a highly visible target for the scrutiny of the ethics committee.

Illinois attorney Kristine Peshek was author of the blog "The Bardd Before the Bar—Irreverant [sic] Adventures in Life, Law, and Indigent Defense" when she posted her career-altering rants and disclosures. One of her clients was described as "taking the rap for his drug-dealing dirtbag of an older brother," and according to the disciplinary complaint, clients about which Peshek blogged were easily identifiable. Referring to one judge as an "—hole" and another as "Judge Clueless" certainly added fuel to the fire. She was let go from her 19-year position as a public defender when her supervisor discovered her blog. A 60-day suspension was imposed by the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission in 2010.

Hypotheticals. One of the most valuable resources that lawyers have is each other. When we get stumped while working on a case, we can phone a friend and usually get guidance or referred elsewhere. Our expanded spheres afford us the opportunity to seek answers from our virtual communities, including listserves and LinkedIn groups.

Comment 4 of Model Rule of Professional Conduct 1.6 sanctions use of a hypothetical to discuss issues relating to a matter "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." When you relate the hypothetical to one lawyer, it is usually safe to presume that the "reasonable likelihood" standard is met so long as your description is not too revealing. Can the same be said if the hypothetical is broadcast to a professional online group that may include an adversary in the matter among its members? Even if you are careful with your wording, a lawyer involved in the case may very well accurately identify both the client and the situation.

Reputation management. Attorney Margaret A. Skinner of Georgia discovered the professional folly of responding to a former client's negative online reviews by posting personal and confidential information obtained during the course of the lawyer-client relationship. Finding that she had posted the client's name, employer, amount paid in legal fees, and county in which the divorce was filed and further stated online that her former client had a boyfriend, the Georgia Supreme Court imposed a public reprimand. Skinner's actions were ill-advised from a marketing standpoint as well. Reputation management efforts approached from a positive standpoint have greater impact than negative campaigns that simply take the original victim down to the attacker's level.

Trial publicity. Attorneys involved in an investigation or litigation of a matter are prohibited under Model Rule of Professional Conduct 3.6 (a) from publicly commenting on the case if the communication "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." This rule extends to posts made on social and electronic media to which jurors, the judge, and the media may have access.

Spoliation of evidence. Just as posting improvidently can land a lawyer in ethics hot water, deleting or advising a client to attempt to delete certain posts can also have undesirable consequences. Severe monetary sanctions have been imposed on lawyers and clients alike. Courts also have delivered adverse inference instructions to juries, permitting jurors to make a negative inference against the responsible party regarding the destroyed evidence. In addition to sanctions directly available to the trial court, the lawyer may be subject to disciplinary proceedings. A five-year suspension was deemed appropriate in a matter where the attorney had counseled the client to remove postings from the client's Facebook page subsequent to being served with a discovery request.

Those interested in exploring this topic in more depth are referred to the Professional Ethics of the Florida Bar Proposed Advisory Opinion 14-1, issued on January 23, 2015 (tinyurl.com/k9xwnx2). The opinion summarizes several relevant cases as well as ethics opinions issued by the New York County Lawyers Association, North Carolina State Bar, Pennsylvania Bar Association, and Philadelphia Bar Association Professional Guidance Committee. Social Media Ethics Guidelines published by the New York State Bar Association's Commercial and Federal Litigation Section are also referenced.

Safeguard Your Bar Admission and Employment Prospects

Under scrutiny even before being admitted to the bar, applicants for admission to the bar throughout the United States must submit a character and fitness application. In 2009, Florida's Board of Bar Examiners became the first to set forth a policy of examining social media sites of certain bar applicants, including those "with a history of substance abuse/dependence" or with "significant candor concerns." Careful attention to social media activity will reveal a clean "record" for those seeking future bar admission in Florida or other states adopting similar rules. This policy provides yet another reason to advise younger friends and relatives to reveal only their conservative side to the virtual world.

Mark Rosch, vice president of marketing for Internet for Lawyers, related that he is often asked whether prospective employers can really track down previously deleted posts. First, Rosch differentiated between public and more private posts. He advised that although the deleted digital information may remain indefinitely in cyberspace (in a backup copy of the social network, for example), in practice it would be very difficult to find deleted public posts and nearly impossible to locate deleted private posts. He suggests conducting your own test by making an innocuous public post and, once it's posted, making note of its web address. Then delete it. There are a number of ways you can test whether that digital information is still readily accessible after you've deleted it. You might try typing the web address into your browser's address bar, conducting a Google search using the web address of the post as your search criteria, or searching for posts by your name while logged into a friend's Facebook account. Looking forward, why not set up a Google alert for your name to monitor new public content that may relate to you?

Adjust Your Privacy Settings

If you are actively engaged in the social media community, you must adjust your privacy settings appropriately. And repeatedly. Carole Levitt, co-author of *Internet Legal Research on a Budget: Free and Low-Cost Resources for Lawyers* (ABA, 2014), recommends a periodic check of privacy settings because "social media sites update privacy rules at will."

Plan for the Digital Hereafter

Everyone, young and old alike, should have a current will and power of attorney granting the fiduciary specific powers to administer digital assets. Don't you want to leave instructions with respect to disposition of private e-mails and financial and other online assets? Some of these most likely contain confidential information.

A handful of states have enacted statutes (some already outdated) addressing cyber-property issues arising after death. In addition, most social media sites and e-mail service providers have developed policies in this regard. In my book *The Lawyer's Guide to Financial Planning* (ABA, 2014), I discuss the topic

of digital assets and offer both a sample will clause and sample power of attorney clause (see pages 160–163 for more).

Conclusion

Social media's power cuts both ways. Most have not explored the full panoply of benefits in the worlds of marketing and research. Yet, many have felt the sting of making fools of themselves and have even jeopardized their careers. In most situations, using common sense and restraint of pen and tongue will prevent many of the mishaps described above.