

# What I need to learn in law school –Lessons in Ethics

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As thousands of aspiring lawyers enter law school this month, we decided to depart from our usual NYPRR contributions on the ethics of lawyers and judges, and instead discuss matters relating to law students. We wanted to go beyond law school honor codes and standards for academic integrity, despite their undeniable importance, and focus on less obvious ways that law students can get into trouble.

These more subtle snares matter, because your pre-admission conduct will be relevant when you are seeking admission to the bar. *See* 22 NYCRR 520.12 (noting the requirement of good moral character and general fitness in the Appellate Divisions). Moreover, it is never too early, particularly in an uncertain economy, to develop practices and make choices that can help you stand out for good reasons, not bad ones. This article is intended to provide students with pointers to help them get a head-start on attorney ethics and professionalism, illustrated with some memorable ethics stories.

## 1. Liar, Liar.

Despite clichés to the contrary in popular culture, lawyers are expected to be honest. NY Rules 4.2, 8.4(c). As a law student with your eyes on a legal career, you'll want to make sure you are scrupulously truthful and forthright in all matters relating to your education or employment, despite any competitive pressure you may feel to embellish your credentials. When you are applying for internships or summer jobs, make sure your resume is accurate. If an interviewer has clearly misinterpreted your qualifications or experience, take the initiative to clear up the record. Once a lie enters into your credentials, whatever its genesis, it becomes more and more difficult to correct over time. *E.g.*, Tamar Lewin, Dean at M.I.T. Resigns, Ending a 28-Year Lie, *N.Y. Times* (April 27, 2007). Your law school application should also reflect the obligation for truthful reporting and updating of possibly embarrassing information about your disciplinary record and criminal history. *See, In re Grachanin*, 2009 WL 2341845, \*2 (Ohio 2009) (noting applicant's failure to update the university with respect to the various criminal charges against him during law school). The questions may feel intrusively broad, demanding information about past conduct that seems irrelevant to your current and future plans, especially when the record of your conduct has been expunged by court order. However, you should bear in mind that the bar application is no less broad than your law school application (<http://www.nybarexam.org/Docs/AdmissionsPackage.pdf> at 10 [visited August 4, 2009]), and that your application may be crosschecked against other information you provided to your law school or to prospective employers. *See, In re Stern*, 943 A2d 1247, 1258 (Md 2008) (denying admission to applicant who, among other things, failed to report a judgment entered against him on his law school application); *In re Anonymous*, 40 AD3d 141, 142 (4th Dept 2007) (denying admission to applicant who failed to disclose his complete criminal history in applying for the bar and for legal employment, and also made false statements concerning his credentials in an employment application).

## **2. You're not going to believe this....**

Be aware, as you gain experience with clients in your clinics and internships, that you need to be careful about whom you talk to about client matters. Cf. NY Rule 1.6. Your fellow students are not automatically in the circle of trust, nor, certainly, are your friends, family or significant others. The easiest way to maintain confidentiality is to avoid gossiping or kvetching about your clients and assignments. Discuss client matters in detail only with your colleagues. Of course, even when you're talking to the right people, you must be aware of anyone around you within hearing distance. We know too many instances in which attorneys spoke freely about their cases while riding a crowded ferry or elevator with complete strangers ...and those strangers happened to be familiar with the case.

## **3. Beware the unauthorized practice of law.**

When people learn that you are in law school, they will turn to you with questions ranging from, "Can you take a look at this agreement?" to "How can I get more child support?" Their reliance on your advice can be very flattering. Unfortunately, relationships with friends and family can sour quickly if they come to believe that your informal advice was not in their best interests. You need to be aware of your limits, and should make clear that you are not admitted to practice law and cannot provide legal advice. You may suggest they retain counsel, and direct them to helpful resources, such as Legal Aid, a lawyer referral service, or a court-based help-center for the unrepresented. Of course, you can, and should, seek to gain appropriate experience as a law student, but always under the supervision of attorneys or your law professors. See, e.g., NY Rule 5.3; NYC Bar Op. 2009-3; NYS Bar Op. 794 (2006). Just don't give in to the temptation to provide unsupervised legal assistance. See, *In re Jordan*, 2009 WL 1385932, \*1-2 (La 2009) (denying admission to applicant who engaged in the unauthorized practice of law and shared fees with a licensed attorney); *In re Monaco*, 856 P2d 311, 312-13 (OR, 1993) (denying admission to applicant who engaged in the unauthorized practice of law to help a friend, and who could not satisfactorily explain a dubious insurance claim he had made while in law school); *In re Weiner*, 31 AD2d 603, 604 (2d Dept 1968) (attorney disbarred for improper conduct, including the unauthorized practice of law for the three months before his admission to the bar).

## **4. Take student loans seriously.**

The NY Court of Appeals has held that debtors are not shielded from reasonable inquiries about their ability to manage financial matters when the ability to do so is related to their fitness for practice. See *In re Anonymous*, 74 NY2d 938, 939 (1989) (denying admission based on the applicant's lack of the character necessary to discipline himself to control his standard of living and the amount of his indebtedness, thus showing a lack of financial responsibility necessary for an attorney.) This year, at least two aspiring lawyers were deemed unfit to practice law based on their outstanding debts. See *In re Anonymous*, 61 AD3d 1214 (3d Dept 2009) (per curiam); *Santulli v Texas Bd of Law Examiners*, 2009 WL 961568 (Tex App 2009). Although it remains to be seen what will happen on appeal or rehearing, neither intermediate appellate court was initially receptive to arguments that the applicant needed to be admitted to practice in order to earn enough money to repay the loans. The bottom line here is that if you find it difficult to meet your payments, it may be helpful to consult with the student finance office at your law school, or to seek legal counsel, in order to find out what resources and options are available to help protect your reputation for financial responsibility.

## 5. Do I really need to share this?

You are probably accustomed to rapid-fire electronic exchanges with friends, relatives and classmates in text messages, instant messaging, or the like.

These communications can be as natural as thought. In some ways, constant electronic availability is a good habit; after all, once you're admitted, the Rules will require you to keep your clients reasonably informed about their cases and to respond in timely fashion to client inquiries. NY Rule 1.4.

You should remember, however, that everything you post or send on the internet is likely to be saved somewhere, even long after you've tried to change or delete it. Emails are typically saved in multiple locations outside the sender's control, including email servers and backup tapes. Earlier versions of websites may be archived and made freely accessible by services such as <http://www.archive.org/web/web.php> (the Wayback Machine) [visited July 24, 2009], and cached versions of websites may come up on routine internet searches.

Therefore, what you post online now, during your time as a law student, may come back to haunt you if it undercuts your personal and professional reputation, and especially your reputation for competence, diligence, honesty, or trust-worthiness. Cf. NY Rules 1.1, 1.3, 8.4; *Butler County Bar Ass'n v Foster*, 294 NE2d 26 (Ohio 2003) (suspending attorney for sending unprofessional emails to the brother of a *pro se* litigant, which threatened to make the litigant's life as miserable as possible, disparaged the family as possibly "inbred" [sic], and described the brother as an "encephalic cretin").

In other words, now may be the right time to develop a slight paranoia about hitting "send" or "reply" or "post". Ask yourself, who is likely to see this email (or comment, blog post, tweet or status update), and will they understand the true context?

The Anonymity Illusion. A popular cartoon features one dog at a computer, speaking to another: "On the Internet, nobody knows you're a dog." (Peter Steiner, *The New Yorker*, July 5, 1993), available at [http://cartoonbank.com/assets/1/22230\\_m.gif](http://cartoonbank.com/assets/1/22230_m.gif). ) [visited July 24, 2009]. As an aspiring lawyer, however, you should exercise caution even in supposedly anonymous blogs, website posts and comments. Software programs constantly index everything that is publicly accessible, and if the material is intriguing enough, people will work tirelessly to discover your identity. See, e.g., Anna Mikhailova, "By Day She Worked on Harry Potter. But By Night..." *Sunday Times* (August 6, 2006) (exposing the hitherto anonymous author of a sexually explicit blog); Jonathan Miller, "He Fought the Law. They Both Won," *N.Y. Times* (January 22, 2006) (profiling the previously anonymous author of the "Underneath Their Robes" blog). One New York court has even ordered an internet service to disclose information that "could reasonably lead to the identification of" certain anonymous posters. *Ottinger v. The Journal News*, 2008 WL 4375330 (NY Sup 2008) (following New Jersey and Delaware decisions).

The Forwarding Blues. Is it safe to be unprofessional in emails sent just to specific pre-selected persons, or when posting a message on sites such as MySpace, where access is password-restricted? Probably not. Remember that others can share your message after you have sent it, whether by a cut-and-paste operation or otherwise. One intern told his manager that he would "not be able to come into work tomorrow" because "[s]omething has come up at home and I have to go to New York... for the next

couple of days.” Unfortunately for the intern, a coworker found the intern’s party photos on Facebook and shared them with management. The intern was apparently fired soon after. *See*, Owen Thomas, “Bank Intern Busted By Facebook” (November 12, 2007), available at <http://valleywag.gawker.com/321802/tech/your-privacy-is-an-illusion/bank-intern-busted-by-facebook> [visited July 24, 2009]; Maria Moscaritolo, “Online Amity Out of Style,” *Mercury* at 38 (December 22, 2007).

## 6. Prune your social networks.

The very social networks you use to stay in touch with family, friends, and acquaintances can be used against you. Think about whether some of your online acquaintances stand out for unusually indiscreet or derogatory comments about you or others, whether “jokingly” or otherwise. Do you need these people in your social network?

The “just joking” defense. You should, moreover, be careful not to *be* one of those people who stand out for their unusually vicious practical jokes. Attorneys risk professional discipline even when their misconduct does not relate to representation of a client and does not violate any law. *E.g.*, *In re Bikman*, 304 AD2d 162, 165 (1st Dept 2003) (attorney suspended for continuing to occupy a rent-controlled apartment for two years after the death of the tenant of record, even if his conduct was not technically illegal). An Oregon lawyer was publicly reprimanded for a post he made in the name of a former classmate who had become a high school teacher. The lawyer had heard rumors that his former classmate, now married, had an affair with a student at the school and, possibly, other dalliances with underage girls. So, apparently as a practical joke, the lawyer impersonated the teacher on classmates.com and bragged about having sex with students. The Oregon Supreme Court disciplined the lawyer for his actions, even though they did not involve “professional conduct or conduct that violates criminal laws or administrative rules.” *In re Carpenter*, 95 P3d 203, 208 (Or 2004). The court found the lawyer’s conduct “dishonest” within the meaning of Oregon’s rules (*compare* NY Rule 8.4[c]), because he had assumed the teacher’s identity and posted a message purporting to be written by the teacher. *Carpenter*, 95 P3d at 209. Critically, “[t]he message purported to be an admission by the teacher that he had engaged in socially and legally unacceptable behavior,” which showed a “willingness to disregard the teacher’s legal rights.” *Id.* at 210. The scandal directly affected the attorney’s career aspirations; he “ceased campaigning for the office of district attorney to avoid further publicity.” *Id.* at 207.

Forbidden fruit. Many people have grown accustomed to communicating electronically with practically everyone they meet. When it comes to legal proceedings, however, some contacts will be off-limits, because they will be seen as attempts to circumvent proper legal procedures and/or applicable ethics rules:

- One Massachusetts law student, after obtaining judgments against a former employer in small claims court, apparently decided to try to collect the judgments without further legal process. He sent emails “claim[ing] (falsely) to have attached” both personal and company property and threatening to seize the property and have the manager’s relatives arrested. His bar application, submitted shortly thereafter, was denied. *Desy v Board of Bar Examiners*, 894 NE2d 1135, 1137-38 (Mass 2008).

- In Ohio, an appellate law clerk was reprimanded for sending an email ex-parte to a friend in the city attorney's office regarding how best to appeal to the panel members in the city's upcoming oral argument before the clerk's judge. *Cincinnati Bar Ass'n v Sauter*, 772 NE2d 620 (Ohio 2002). The law clerk closed her email, facetiously, with the words "[t]his message will self destruct in two hours." *Id.* Instead, her message is now permanently recorded in official case reports.

Your ethics radar should be telling you that harassing an adversary is improper, as are ex-parte contacts between neutral decision-makers and witnesses or attorneys for one side. NY Rules 3.5, 8.4(d). It may not be as intuitively obvious, however, that when you represent a client, whether in a transactional or litigated matter, you will be limited in your contacts with the other lawyers' clients. NY Rule 4.2.

## **7. Proofread everything.**

One attorney was recently criticized, by name, for his failure to proofread. See *Johnson v Roma II-Waterford, LLC*, 2009 WL 929049 (Wis App 2009). The court quoted several of his poorly drafted statements, detailed several of his serious procedural errors, directed him to a university website for tips on proofreading, and forwarded a copy of its opinion to the Office of Lawyer Regulation. *Id.* Your carelessness can jeopardize your client's case, and torpedo your own reputation in the process. Take full advantage of research and writing courses while you are in law school, and develop the habit of proofreading all your work carefully.

Email Yoga. Proofreading can be even more important when email is involved. Although they often contain material as significant as formal memoranda or letters, emails are often prepared far less carefully. When you reply to an email, get into the habit of checking carefully whether your reply will go only to the sender or to others as well. This will help you protect confidential information. For the same reason, double-check the list of recipients to make sure that the auto complete feature will not misdirect your email. Among the many lawyer email mistakes we could describe, one favorite from personal experience involved an email from a distant colleague. The email concerned a hot-button political issue and was apparently intended for the writer's friend, Ali. It went to Ali all right – along with everyone else in the firm. Auto-complete turned "Ali" into "All". While you're at it, get into the habit of double-checking your attachments as well. You will owe a duty of confidentiality to both Client A and Client B, so you do not want to be the law student whose itchy "send" finger inadvertently sends Client A's privileged information to Client B. Instead of looking at all this double-checking as an extra burden, we like to think of it as "email yoga", i.e., the opportunity to take a deep breath and a few moments of reflective review of all the details before we hit "send".

## **8. Go easy on file-sharing software.**

You'll want to make sure that you are not illegally downloading files at any time, especially during your internships. Cf. NY Rule 8.4(b)-(c). It would be wise to get used to working on computers that do not have file-sharing software installed on them, in order to protect the confidentiality of client files. In one high-profile incident, an employee of an investment firm downloaded the LimeWire file-sharing software to a work computer. The employee merely intended to share entertainment items, but the computer also contained at least 2,000 client records, many of which included social security numbers, names and dates of birth. Six months later, it was discovered that the file-sharing software had exposed all the files on the computer to the world. U.S. Supreme Court

Justice Stephen Breyer was among those clients whose confidential information was compromised. At least 12 users of the software worldwide accessed the client records. See, "Personal Data Leaked Over LimeWire Network," *L.A. Times* (July 9, 2008); Debra Cassens Weiss, "Justice Breyer and Several Lawyers Were Victims of Data Breach" (July 9, 2008), available at [http://www.abajournal.com/index.php?/news/justice\\_breyer\\_and\\_several\\_lawyers\\_were\\_victims\\_of\\_data\\_breach](http://www.abajournal.com/index.php?/news/justice_breyer_and_several_lawyers_were_victims_of_data_breach) [visited July 23, 2009]; see, also, e.g., Eric Gershon, "Pfizer Suffers Data Breach," *The Hartford Courant* (June 12, 2007) (17,000 employees compromised).

## **9. If you do ever find yourself in trouble.**

We hope that you will steer clear of all legal and ethical troubles. But it is a simple reality that no one is perfect, and that everyone will make a mistake from time to time. How you handle your mistakes is critical; remember that a coverup can be worse than the original transgression. Consider a recent case from Australia, *R v Einfeld* [2009] NSWSC 119, available at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2009/119.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2009/119.html) [visited July 23, 2009]. The defendant was a well-respected former judge, prominent in the legal community and known for his international humanitarian work. One day, he received a speeding ticket in the mail. Although the ticket involved a relatively small fine, it could also lead to suspension of his driver's license. Drawing on his unimpeachable reputation, he denied under oath that he was driving his car at the time; he claimed that he had loaned his car to a friend. Unfortunately, the friend had died several years before. As details of the denial were publicly reported and challenged, and as he was being investigated for perjury, the former jurist's story – under oath – became increasingly elaborate. He was ultimately convicted of perjury and sentenced to jail. He may have dodged the speeding ticket, but he will not be driving for a while. The court order calls for him to be released in March 2011.

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