

Professionalism in the Digital Age: The Ethical Use of Social Media and Artificial Intelligence

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“Once you realize that you’re in something that you’ve always wanted and you don’t want to lose it, you behave differently. And that means the integrity, the professionalism, and knowing what’s right from wrong and still making choices that you probably wouldn’t have made.”

— Paul Anka¹

“Digital is really two things. It refers to a set of technologies, everything from artificial intelligence to the use of e-commerce. But digital is really about a different way of working, of making decisions, of partnering and reaching your clients, and so it’s also about how you do things.”

— Julie Sweet²

1. *Paul Anka Quotes*, BRAINY QUOTE, <https://www.brainyquote.com/authors/paul-anka-quotes>.

2. *Julie Sweet Quotes*, BRAINY QUOTE, https://www.brainyquote.com/quotes/julie_sweet_1104461.

Defining Professionalism and Ethics

Paul Anka's quote refers to integrity, professionalism, *and* knowing right from wrong as three separate elements woven into conduct that supports and preserves a desired career. Professionalism in the legal profession is a much-referenced aspiration yet lacks a precise definition. Ethics, or the knowing of right from wrong, has a more accessible, widely accepted home in the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) and the state bar legal ethics rules adopted from the Model Rules.

The literature often describes the legal ethics rules as the floor or minimum behavior required and professionalism as the ultimate behavior to which to aspire. Neil Hamilton and Verna Monson's definition of professionalism encompasses ethics as a significant element. They write:

Professionalism is an internalized moral core characterized by a deep responsibility or devotion to others—particularly the client—and some restraint of self-interest in carrying out this responsibility. . . . Professionalism [may also include] these elements: ongoing solicitation of feedback and self-reflection, an internalized standard of excellence at lawyering skills, integrity, honesty, adherence to the ethical codes, public service (especially for the disadvantaged), and independent professional judgment and honest counsel.³

This description of professionalism and ethics provides a working focus for a discussion of lawyers' obligations in the digital world.

3. Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325 (2011).

Ethics and Professionalism for the Digital World

Technology has impacted the legal profession since the 19th-century invention of the typewriter and the telephone. In fact, some lawyers were reluctant to use the telephone based both upon a perceived lack of professionalism and confidentiality concerns. Ultimately, the legal profession embraced the telephone; however, with each iteration—cordless, cellular, and smart phone—ethics issues emerged, often followed by ethics advisory opinions. The advent of the telefax and email generated similar as well as additional concerns about client communication and confidentiality.

In fact, a 1999 ABA Ethics Advisory Opinion provided email guidance to allay lawyers' concerns. The opinion advised that email was generally a reasonably safe method of communication without the use encryption. Fast forward to 2017, when the ABA released Opinion 477r, which explained that encryption had become much easier to employ and was now a worthy, reasonable consideration. ABA guidance had evolved in tandem with the advances in technology.

It is important to note that between the 1999 and 2017 opinions the ABA amended the notes to the Model Rule 1.1 "Competence" to include knowledge of the "benefits and disadvantages" of technology as a component of being a competent lawyer. Since 2012 at least 40 states have adopted this language or otherwise included technological competence in ethics advisory opinions or case law.

Thus, without dramatically amending the rules to discuss technological devices, social media, or artificial intelligence, the legal profession has acknowledged, if not always embraced, the fact that lawyers, as Julie Sweet notes, are engaged in "a different way of working, of making decisions, of partnering and reaching . . . clients . . . and doing things." Because technology

evolves so rapidly, the ABA and state bars continue to release ethics advisory opinions and guidelines to provide advice on the ethical use of technological devices, social media, and, most recently, artificial intelligence.

The guidance aimed at technical devices and equipment includes cloud computing, encryption, virtual private networks, password choice and storage, device security, cybersecurity, and other aspects of technology. The focus is generally on the rules pertaining to competence, diligence, and confidentiality; in certain situations, communication with a client as to the use of technology is required. Many articles and books have been written to assist lawyers in understanding and employing technology. For the purpose of this essay, suffice it say that it has become both a professional and ethical duty to both understand and appropriately employ technology in the practice of law. A bit more nuanced are the obligations in some of the subsets of technology such as social media and artificial intelligence.

The Professional, Ethical Use of Social Media

Social media networks were born in the mid-2000s and slowly but inevitably began to permeate the practice of law. The Philadelphia Bar Association released one of the first social media opinions in 2009 pertaining to the ethical guidance in researching a witness on social media. The Pennsylvania Bar Association followed with an advisory opinion in 2014 that defined knowledge of social media as a necessary component of competence.

There is no doubt, today, that the proliferation of social media platforms and their universal use has rendered social media an essential consideration in the effective, ethical practice of law. From jurisdiction and service of process to discovery

to investigation of jurors and judges, social media acumen plays a role in litigation. In each of these areas, lawyers must follow the traditional legal ethics rules regarding contact with opposing parties, witnesses, jurors, and judges. The state bars and the literature in this area have done a good job of providing guidance such that violations have decreased over time.

Unfortunately, however, lawyers using social media continue to trip on both professional and ethical landmines. In fact, the social media landscape often gives rise to the online challenges of engaging with professionalism and legal ethics. The three main areas that illustrate the overlapping challenges of employing professionalism and ethics involve posts about cases, responses to client negative online reviews, and general commentary about current events or other personal matters.

As we often acknowledge, lawyers are human, too. Sometimes the emotion of the moment (or just a habit of sharing) results in a lawyer sharing an update on a case that may be of interest to others. Recently, a Massachusetts lawyer returned from a hearing at which he attempted to secure custody of a grandchild for the grandmother and posted “his day” on Facebook. Friends asked questions about why the government agency was opposing the placement and the lawyer explained that they did not trust that the grandmother could control her daughter, the mother. Seems that the lawyer did not focus on the fact that it was both unprofessional and a violation of the confidentiality rule to post in this manner.

The Massachusetts Bar notified the lawyer about the inappropriate nature of the post after the child’s mother saw the posts and reported them to the grandmother who in turn informed the Massachusetts Bar. In other words, sharing is not caring, and the bar reprimanded the lawyer.

As opposed to lawyers generally posting about their cases, lawyers specifically responding to clients’ negative online reviews comprises another challenging area for lawyers on

social media. Defaulting to the premise that lawyers are human, too, it becomes easy to understand why a lawyer (or any human) has a natural inclination to defend themselves.

Unfortunately, the legal ethics rules do not provide an exception to client confidentiality to post an online defense. While the internet may serve as a court of public opinion, it does not constitute a tribunal under the rules. ABA Opinion 496 and several state bar ethics advisory opinions provide guidance that suggests that a lawyer may politely disagree with the client's opinion but may not share any confidential information in so doing.

It is important to note that a New Jersey lawyer's creative approach to avoiding a direct response by posting on his client's Yelp page did not avoid repercussions to his license. He posted, "Well, [client] is a convicted felon for fleeing the state with children. A wonderful parent. Additionally, she has been convicted of shoplifting from a supermarket. Hide your wallets well during a massage. Oops, almost forgot about the DWI conviction. Well, maybe a couple of beers during a massage would be nice."

The lawyer's defense to the posts before the New Jersey Bar included the argument that the convictions were public record and his belief that what was "good for the goose was good for the gander." He admitted that he had been quite upset.

The New Jersey Review Board distinguished public record from information that is generally known and did not appreciate the "goose/gander" defense. The attorney received a one-year suspension for this and various other violations.

Another prevalent area of concern involves lawyers posting "passionate" commentary on current events or other personal matters. (And in continuing with our "human" theme, psychological studies on online behavior have demonstrated that a primary motivation for posting may be anger that in turn

often results in the use of highly emotional, biased, or profane language.) While these posts do not reveal the confidential information about a specific case, the unprofessional language or sentiment of a post may cause reputational damage, loss of employment, and violations of the legal ethics rules. When clients are publicly associated with the lawyer they may suffer because of that association.

Numerous examples exist of both prosecutors and public defenders losing both credibility and their employment after emotionally posting about events such as the George Floyd protests, the Orlando nightclub shooting, and other high profile current events. Prosecutors and public defenders admittedly practice under the additional challenge of public scrutiny of government offices and the requirement of the fair administration of justice in the legal ethics rules. However, lawyers in private practice have also been subject to reputational and job loss for commenting on current events. Law firms, government legal offices, and other legal organizations have developed social media policies to govern conduct and permit dismissal.

Of course, the unprofessionalism need not result from an emotional response to a current event. One lawyer posted negative comments about an ethnic community in the context of household employment. He found himself attacked online and deemed to be a terrible lawyer by those who were not clients, but sympathetic to the defamed ethnic community. He unsuccessfully sued for reputational damage perhaps further calling attention to his unprofessional posts ala the “Streisand effect.”

Another lawyer felt compelled to post a video portraying himself screaming obscenities at a stowaway racoon on the lawyer’s boat who appeared once the boat was underway. The video ends with the lawyer shoving the racoon into the water and leaving it to drown. The Florida Bar did not miss the viral nature of the video, launched a seven-month investigation, and

then sent the lawyer to a diversion program that included a \$750 professionalism workshop. One of the things we give up in exchange for the privilege of practicing law is the unfettered right to public self-expression.

The Professional, Ethical Use of Artificial Intelligence

James McCarthy, a Dartmouth professor, coined the term artificial intelligence (AI) in 1956 as part of a proposal for a summer symposium to explore the proposition that machines *might* be able to perform human tasks. McCarthy's proposition has become a 21st-century reality and generative AI has taken the legal profession by storm. However, it is important to note that between 1956 and today, various forms of AI have become prevalent in society. Examples range from navigation systems, Siri, Alexa, and Netflix suggestions for movies to legal research, automatic word processing corrections to spelling and grammar, and various billing programs.

So, why has AI recently become the focus of so many CLE panels, news stories, state bar committees, and even disclosure orders by judges? Generative AI and open access provide the answer. Anyone can now download a generative AI application (think ChatGPT) and ask for information, drafting assistance, or legal research. While touted as efficient and inexpensive, for lawyers, ethics issues and parameters abound.

To date, Florida, California, Texas, North Carolina, Pennsylvania, Michigan, Missouri, Kentucky, New Jersey, Mississippi, and Washington, DC, have all issued ethics opinions regarding lawyers' use of generative AI. Like the early social media advice, the states are interpreting the traditional legal ethics rules to apply to the emerging generative AI technology. Competence and confidentiality, often the two predominant

ethics concerns in the context of technology use may top the list. Competence (or the lack thereof) has made the headlines in several states. The need to understand the “benefits and disadvantages of technology” codified in the notes to the ABA Competence rule in 2012 has acquired new significance in the world of generative AI.

There are numerous examples of lawyers filing court documents with cites of nonexistent cases that ChatGPT provided as a result of “hallucinations.” While not only unprofessional and violative of the legal ethics rules, some lawyers worsened their situations by engaging in a “cover up is worse the crime” scenario. In other words, by making various excuses and not immediately admitting their error to the court, they compounded the legal ethics issues by violating both the candor to the tribunal rule and the misconduct rule. The simple law school rule of reading every case before you cite it, would have saved these lawyers from both sanctions and reputational embarrassment.

Leaving these early incidents aside, some of the other ethics issues that emerge from the use of generative AI involve the duty to supervise, communication with clients, billing, and advertising. In other words, does a lawyer have to share with their client that they are employing generative AI? How does a lawyer bill for generative AI? When may it become incompetent not to employ generative AI? Does the use of an advertising bot risk the establishment of an attorney–client relationship? The list of questions continues to grow.

ABA Formal Opinion 512, issued in late July 2024, provides much-needed guidance regarding each of these questions and more. Like state ethics opinion counterparts, it addresses the issue of attorney competence and emphasizes that while lawyers are not required to become experts in this daunting new technology, they must have “a reasonable understanding of the capabilities and limitations of the specific [generative

AI] technology that the lawyer might use.” The opinion also reminds lawyers that their duties in this regard are ongoing and not “a static undertaking.” Even if lawyers do not necessarily expect to use generative AI in a given matter, they should still be aware of the tools relevant to their work so that “they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.”

Formal Opinion 512 goes on to discuss the predictable ethical duties implicated by the use of generative AI, such as confidentiality, communication, candor to the tribunal, and the duty to supervise. But perhaps the most novel conundrum posed to lawyers involves billing. May an “AI surcharge” be added to a lawyer’s invoice? Perhaps a more controversial question is whether the lawyer may be deemed to be charging an unreasonable fee if the lawyer legitimately bills 15 hours of her time when AI could have produced the same result in an hour. Here, too, Formal Opinion 512 offers guidance. It states that in determining the reasonableness of fees, lawyers should account for AI’s potential to be “a faster and more efficient way to render legal services.” The opinion also instructs lawyers to “analyze the characteristics of generative AI tools and how they will be used before deciding if each tool is part of the firm’s overhead, or an out-of-pocket expense to be billed to clients.”

Will lawyers’ use of generative AI—full of fits and stumbles as it has started out—ever reach the point of becoming an expectation, part of the attorney’s reasonable standard of care? While the profession is not there yet, we feel it will be—and that it will be at least in part client-driven. Formal Opinion 512 speculates that “robust client demand for [generative AI] tools as an efficiency or cost-cutting measure,” along with increased acceptance, widespread availability of AI technologies, and “a track record of reliable results” will lead to the establishment of such an expectation.

Conclusion

Whether it's the revolutionary advent of the typewriter, the telephone, the computer, or the smart phone, as technology evolves so too does the practice of law. Social media's arrival in the mid 2000s changed the practice of law—not only did smoking gun evidence find a new home, but also the requisite competence to discover it became a necessity. Moreover, unwary lawyers have found themselves stepping on ethical landmines as they publicly post thoughts that previously might have only been shared with a colleague over lunch.

Generative AI is the latest and perhaps most dramatic technological evolution. No doubt it is already both revolutionizing the practice of law and creating ethical challenges for lawyers. In fact, U.S. Supreme Court Chief Justice John G. Roberts, in his December 2023 Year End Report on the Federal Judiciary, sounded a warning about “the latest technological frontier: artificial intelligence (AI).” Even as this technology has “great potential to dramatically increase access to key information for lawyers and non-lawyers alike,” he noted, it also “risks invading privacy interests and dehumanizing the law.” The use of AI, Roberts observed, “requires caution and humility.”

It is difficult to ignore the siren song that is generative AI. It is perhaps even more difficult to resist the lure of having a technological “sorcerer’s apprentice” at a lawyer’s beck and call, ready to generate a trial-ready motion or brief with just a few helpful prompts. Early experience with lawyers foiled by AI “hallucinations,” however, reminds us that we must be more cautious. Such episodes are not mere tech problems, but ethical lapses.

The 21st-century trial lawyer must ensure not only that AI-generated content is accurate, but also that the lawyer’s own use conforms to the ethical standards of our profession. Chief Justice Roberts was correct to be concerned about the risk of

AI “dehumanizing the law.” With its immense potential to enhance efficiency and accuracy, generative AI is indeed transformative, but its output is no substitute for a lawyer’s professional judgment and adherence to ethical duties.

Social media and generative AI are here to stay—the proverbial tech genie is out of the bottle. While the practice of law continues to adapt, the fundamental legal ethics requirements remain the same. Thus, lawyers must embrace technological evolution while remaining committed to ethically serving clients as the world continues to turn.

“It is change, continuing change, inevitable change, that is the dominant factor in society today. No sensible decision can be made any longer without taking into account not only the world as it is, but the world as it will be.”

— Isaac Asimov⁴

4. *Isaac Asimov Quotes*, BRAINY QUOTE, https://www.brainyquote.com/quotes/isaac_asimov_124394.