

Eight Simple Ways to Lose Your Law License by Email

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When email first came on the scene in the early 1990s, lawyers and judges were noticeably concerned about the propriety of using electronic communication in connection with the representation of clients. Electronic messages could be misdirected, computers could be hacked, back up systems could fail and all would be lost. Some courts and bar associations initially issued advisory opinions and proposed rules that would prohibit the communication of confidential information by email. We were warned of the dangers of corresponding with clients and others about legal matters using email. But what was once a quirky computer toy useful only for sending chain letters and sharing pictures of the grandkids soon became a ubiquitous replacement for telephone calls, faxes, and letters. Courts and bar associations had little choice but to revise earlier pronouncements and bless the use of email in connection with the practice of law, finding primarily that electronic mail was no more susceptible to interception and misdirection than telephone conversations and correspondence sent by regular mail.

The reality is that in order to be responsive to our clients and to provide efficient and effective legal services, lawyers have to use email. It's cheap, quick, and almost effortless. Unfortunately, it is the cheapest, quickest, and most effortless way to get yourself in ethical (and sometimes legal) trouble. There are a number of important ethical considerations to think about when using email in the law office, such as client confidentiality (Rule 1.6), conflicts of interest (Rules 1.7 – 1.13), solicitation (Rules 7.1 – 7.5), candor and truthfulness (Rules 3.1, 3.3, 3.4, 4.1, 8.4), supervision of associates and nonlawyer staff (Rules 5.1 – 5.5), threatening criminal prosecution (Rule 4.5), and the Lawyer's Oath (Rule 402(k), SCACR).

Attorney discipline cases involving improper and unethical use of email communication are starting to crop up in reported opinions all over the country. Lawyers are finding a number of creative ways to completely mess up their careers without even leaving their keyboards. Here are some of their methods that you might want to avoid:

- (1) If a judge sanctions you \$80,000, be sure to thank him by sending an email to all your friends calling him a whacko.

Mr. Moseley represented a client in a contract dispute. The defendant said that there was an arbitration clause in the contract. Mr. Moseley's client said that there wasn't. At the time the lawsuit was filed, neither party could locate a copy of the contract. Later, Mr. Moseley's client found his copy, which confirmed that there was an arbitration clause. He gave it to Mr. Moseley, who didn't tell anyone about it. On cross-examination at trial, Mr. Moseley's client admitted to finding the contract, learning of the arbitration clause, and giving his copy to Mr. Moseley prior to trial. The judge sanctioned Mr. Moseley and his client and awarded the defendant about \$80,000.00 for fees and costs. In a flash of brilliance, Mr. Moseley decided to circulate an email in which he indicated that opposing counsel "reek[ed] of evil" and was "demonically empowered." He also mentioned that the sanctions award was "an absurd decision from a whacko judge [who] was bribed." In re Moseley, 643 S.E.2d 190 (VA 2007).

- (2) The best way to help your friends with their cases is to get a job as a judicial law clerk and feed them inside information by email.

Ms. Sauter got her first big break with an appellate clerkship. It was a big break for her friend in the city attorney's office, too, seeing as how Ms. Sauter had access to all those neat books and stuff. The city was scheduled to appear at a hearing on an appeal of an eminent domain case in front of Ms. Sauter's judge's panel. Ms. Sauter sent an email to her friend the assistant city attorney explaining that the judges on the court were leaning towards a "not based on

sound reasoning” standard of abuse of discretion rather than an “arbitrary or unconscionable” standard. She advised that one judge “especially thinks this is a better standard for abuse-of-discretion review. This type of review is probably better for the city, so you might want to hammer on the lack of sound reasoning by the lower court.” Ms. Sauter ended the email with the quip, “This message will self destruct in two hours.” Unfortunately for her, the email didn’t, but she did. Although her friend might have failed appellate practice in law school, she passed ethics with flying colors and turned the email over to another attorney in her office. Cincinnati Bar v. Sauter, 772 N.E.2d 620 (Ohio 2002).

- (3) If you are going to solicit a bribe from the opposing party to tank your client’s case, email is a good way to make sure your efforts are adequately documented.

Mr. Kiczales represented the landlord in suit for eviction and back rent against Mr. Gosain. After Mr. Gosain’s deposition, Mr. Kiczales asked Mr. Gosain’s attorney if he could speak privately with Mr. Gosain. Mr. Gosain’s attorney, an accommodating fellow, said “Sure!” In their private conversation, Mr. Kiczales informed Mr. Gosain that he had recalculated the back rent and he actually owed \$2,000 less than originally thought. Mr. Gosain, also an accommodating fellow, offered to pay Mr. Kiczales the \$2,000 difference if he could get the case settled and get him a favorable lease. Mr. Kiczales agreed because his wife was mad at him for losing \$1500 in Atlantic City. Mr. Gosain told Mr. Kiczales that he would want the money back if the case went to trial. In a series of email messages that followed between the two, Mr. Kiczales repeatedly pressed Mr. Gosain to make the payment nonrefundable. At some point, Mr. Gosain shared the emails with his attorney, who surely regretted his earlier accommodation. The emails were turned over to Mr. Kiczales’s boss. He was fired. The court noted that he had some trouble getting work as an attorney after that, so he started doing “brokerage work” – no mention of what he was brokering. In the Matter of Kiczales, 36 A.D.3d 276 (NY 2006).

- (4) If you are trying to cover up insurance fraud, it's best to keep your emails short and to-the-point.

Mr. Grew's (a lawyer) backed his van into Mr. Labrie's parked car. Mr. Grew gave Mr. Labrie his contact information and the police were not called. The next day, Mr. Grew left a voice mail for Mr. Labrie letting him know that he was going to call his insurance company. He said, "I will let them know that I backed into you, um, and there's some damage to your car and that I was driving the *green* Ford Windstar." Just to be sure Mr. Labrie got the message, Mr. Grew called back a few minutes later and said that he had just called the insurance company. He said that he had explained to the agent what happened and that he "was driving the Ford Windstar, which is *dark green*." He also said that Mr. Labrie "may want to note that it's a *dark green* van." Mr. Grew informed Mr. Labrie that he could call him back in order to "get the facts straight." Only thing was, Mr. Grew was driving his Econoline van when he hit Mr. Labrie, not his Windstar. It wasn't green. Oh, and it wasn't insured. When the adjuster discovered the discrepancy, he wrote to Mr. Grew asking that he come in for a talk. When Mr. Grew didn't respond, he dropped off his business card. Mr. Grew wrote a check for the property damage and then sent a quick email to the adjuster that said, "Thank you for leaving your card yesterday. Email is a good way to communicate. ... I wanted to inform you that I have paid for the repair out of my own pocket. His damage was minimal. [The insurance company] is not responsible for his claim. Thank you for your assistance." Mr. Grew's law license was suspended and he was charged with insurance fraud. In re Grew's Case, 934 A.2d 537 (NH 2007).

- (5) While on administrative leave from your job as a solicitor because you downloaded porn on the government's computers, find another way to get your jollies – like maybe sending some dirty emails to your former co-workers.

Mr. Beatse (or is it Beastie?) was in court the day the IT department had to shut down the computers in the solicitor's office for maintenance. Mr. Beatse's secretary went into his office to shut down his computer for him (so helpful!). It

took a few minutes because of all the porn images Mr. Beatse had minimized before he left for his hearing. The secretary reported Mr. Beatse to the boss (ok – not so helpful after all). He explained that the pictures came from his son’s computer at home. He claimed to have downloaded them onto a flash drive to view at work to see what his kid had been up to. Turns out, that wasn’t exactly true. Investigation revealed that in about a month Mr. Beatse had spent 36 hours at work on the Internet looking at dirty pictures. While he was suspended without pay, he apparently got bored at home, so he accessed the state’s computer system and sent some emails to two women in the office bragging about his sexual exploits. When he got caught doing that, he didn’t blame it on his son, but he did say that he was just kidding. The Supreme Court of Wisconsin didn’t think it was funny. In the Matter of Disciplinary Proceedings against Beatse, 722 N.W.2d 385 (Wis. 2006)

- (6) When sending emails disparaging the opposing party, make sure you have your thesaurus handy.

Mr. Foster was involved in what the Court referred to as “antagonistic collection proceedings” with a pro se party on the other side. For reasons not disclosed in the opinion, Mr. Foster decided to engage in an email exchange with the opposing party’s older brother. In his communications with the brother, Mr. Foster characterized the opposing party as an “anencephalic cretin” with a “single operating brain cell” whose “brain-dead ravings” and “anal rantings” were characteristic of the “lunatic fringe.” Not satisfied with insulting little brother, Mr. Foster suggested that the family had been “seriously inbred for the last few generations” and that the family’s gene pool (which he thought would be better described as a “gene pond”) needed a filter. Although they took into consideration letters from some judges who said that Mr. Foster “ordinarily practiced in a professional and competent manner,” the Court suspended him. Butler County Bar v. Foster, 794 N.E.2d 26 (Ohio 2003).

- (7) If you don't like a former client, email can be an effective tool for informing others about your opinion of him.

Mr. Heghmann represented two clients, Mr. Stender and Mr. Rose, in various civil matters. Mr. Rose is also an attorney. At some point, the relationship ended. Mr. Heghmann then became involved in a case on behalf of another client that was similar to the prior representation. In an attempt to settle the new case, Mr. Heghmann sent some emails to opposing counsel suggesting that he make a deal before Mr. Stender and Mr. Rose found out about the case. He said that they would likely become involved and that they favored "circus" litigation, suggesting that the case would be tried in the media. He said that his former clients would resort to "vendetta-type" personal attacks. He went on to describe his view of what had happened in the previous litigation with Mr. Stender and Mr. Rose and to predict a re-play of that scenario in the new case. Regarding Mr. Rose, Mr. Heghmann said that was "not a very good attorney but can copy and edit." He also referred to Mr. Rose as an "incompetent buffoon." Mr. Heghmann was disciplined for violating client confidentiality. *Statewide Grievance Committee v. Heghmann*, unpublished (Conn. 2004).

- (8) If you are going to hack into your firm's email and download confidential information, make sure every employee in the firm knows about it.

Ms. Brown worked for a legal aid law firm. She was part of a committee to unionize the firm. Management opposed the unionization effort. In the months leading up to the union vote, Ms. Brown used stolen passwords to access the office email accounts of her co-workers and superiors in an effort to gauge anti-union sentiment. She downloaded some of the messages and deleted others. Ms. Brown came across a particularly interesting email message to her boss from the firm's outside counsel. She shared this email message with her committee, which decided that Ms. Brown should disseminate it to all of the firm's employees eligible to vote in the union election. Ms. Brown lost her job and her license to practice law. *In the Matter of Brown*, 628 S.E.2d 885 (SC 2006).

When we read these disciplinary opinions, we shake our heads and wonder how these lawyers could make such bad decisions. At the same time, we can all remember that email we probably shouldn't have sent (or wish we had never received) – whether it was unnecessarily harsh, a bit off-color, or embarrassingly hurtful. Email is good. It helps us be more efficient and responsive. It is a useful tool for getting things done in a fast-paced world where regular mail doesn't cut it and no one is around to answer the telephone. But we have to be smart about using it. When using email in a law office, the following tips can help you keep your name out of the advance sheets:

- Always consider the ethical implications of your email message.
- Think before you 'Send'.*
- Have (and enforce) written email usage policies that apply to all users in the office.
- Email unto others as you would have them email unto you.*
- Don't use office email for personal use.
- Don't get personal in case-related emails.
- Don't lie.
- Don't be mean, or angry, or sarcastic, or condescending.
- Only use 'Reply All' when necessary and appropriate.
- Don't discuss highly sensitive matters in email.
- Make conscious choices about whether to relay information by email or in person.
- Write an email as if it were a letter (good grammar, spell check, no shorthand, etc.).
- Remember where you work - your email might be subject to disclosure under FOIA.
- Don't send jokes, or vacation photos, or gossip, or chain letters, or prayers.
- Don't put anything in an email that you would not want published in the newspaper.
- Change your settings so that email addresses won't automatically fill in as you type.
- Use your software tools to automatically sort your email messages.
- Keep your email password a secret.
- Remember that email is permanent, even if you delete it.
- Beware of Instant Messaging.

*SEND: The Essential Guide to Email for Office and Home, by David Shipley and Will Schwalbe (Alfred A. Knopf, 2007)