Ethics and the Law: Sticks and Stones - By Robert Pelton

?Sticks and stones may break my bones but words will never hurt me.? An old saying we most all grew up with, and also one that many have discovered to be untrue. The phrase was originally presented as an ?old adage? and was first cited in The Christian Recorder of March 1862, a publication of the African Methodist Episcopal Church. Notably, the reference to the phrase as an ?old adage? suggests an even earlier coinage. Although the phrase has good intentions to help toughen a person?s skin, it has become fairly clear that what happens after the words are uttered and transmitted not only do hurt, but also break bones, destroy relationships, cause injury, and in extreme cases cause death. We quickly find out the statement is false and misleading when we enter a place called ?the real world.?

In the legal field, words have a grave effect on essentially every part of the practice. Attorneys are taught early on that their chosen words can and will be the deciding factor of a client?s fate?whether the words are uttered in front of a courtroom or transmitted through messages and social media. Even words from a jailhouse snitch or co-defendant can have the effect of stripping people of their rights and sending them to jail?regardless if those words were in fact true or whether they were simply presented in a way others were willing to accept as true.

This is also very critical when speaking to a police officer. James Duanne, a Regent University School of Law professor, former criminal defense attorney, and Fifth Amendment expert, gave a lecture specifically targeting this issue and emphasizing the importance of not speaking to the police. His lecture went viral after being posted on Youtube (www.youtube.com/watch?v=CkZf6_iK3Zs) for its controversial nature; however, Duanne stands firm in his belief that speaking to an officer can only hurt your case?regardless if you are truly innocent or guilty. Duanne gave this lecture to a group of law students with Virginia Beach Police Department Officer George Bruch present?both of whom both explained in practical terms why people should never talk to the police under any circumstances. Duanne begins his lecture by providing a quote from Supreme Court Justice Robert Jackson, who stated in Watts v. Indiana, 338 U.S. 49, 59 (1949), ?Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.?

Duanne then provides some top reasons why speaking to the police can only harm your case. A brief recall of his top rules include: 1) Even perfectly innocent citizens may get themselves into trouble, even when the police are trying to do their jobs properly because police malfeasance is entirely unnecessary for the innocent to convict themselves by mistake; 2) talking to police may bring up erroneous but believable evidence against even innocent witnesses; and 3)
individuals convinced of their own innocence may unknowingly commit a crime which they inadvertently confess to during questioning. Duanne also provides practical examples to illustrate this notion.

One example Duanne gave that could essentially happen to anyone was where a police officer went to a citizen’s home investigating a murder in the area, asking the citizen if he had known or heard anything about the shooting. The citizen replied that he knew nothing about the shooting, and that he’d never shot a gun before in his life. Later, a witness mistakenly told police she thought she saw that citizen near the victim around the time of the shooting. The citizen got charged for the murder, and the prosecutor called the officer who had initially questioned the citizen to the stand and asked if there was anything suspicious about the citizen’s answer. The officer simply replied: ‘Yes, I had never mentioned anything about a shooting. I had asked simply him if he had known anything about the murder.’

And just like that, regardless of what the citizen said on the stand, the officer’s statement has been heard by the jury, and it is now up to the jury to decide whether the officer misremembered his own question or whether the citizen is just trying to cover up what really happened. Duanne then provides famous examples of celebrities who didn’t get convicted of the underlying crime or offense because there was not enough evidence?but because they had denied the act to the police and/or FBI, they were charged and convicted solely for lying to an officer, which is a punishable crime. We should all take note of Duanne’s lecture and points so that we can apply it in our daily lives. Citizens should not only follow Duanne’s rules when speaking to police; they should also apply these principles when speaking through public forums since those statements are just as permanent.

In this new age of technology, with Facebook, Twitter, Snapchat, Instagram, email, and the like, it is much more important that we all as professionals choose our words appropriately and cautiously because once those words are out there, the bell cannot be unrung?even if later deleted or erased, a recording will always exist on the web and may well resurface at any time.

Joel Colvin, a cybersecurity consultant and attorney who helps me on cyberspace cases and owner of Colvin Training and Consulting Inc., is specifically hired by law firms to help set policy, pass security audits, and investigate breaches of security. He warns that it is simply not possible to retract an electronic message or force a delete once sent. The message is then essentially in the control of the recipient, who can choose to save it, forward it, take a picture of it, print it, or do a number of different things with it. Further, anyone who the recipient sends the message to also holds that same power, and the chance of distribution is that much greater. The problem expands exponentially as each recipient becomes a new sender.

Accordingly, how far a message goes effectively depends on each recipient and the length of time the message is kept. For example, electronic mailing lists accelerate publications of messages even faster now. Emails sent to an electronic mailing list are automatically saved by the mailing list server as well as potentially any or all members of the list. By design, a mailing list is created to get the message out to a large number of people, quickly and conveniently?two factors that are usually largely the cause of most mistaken message transmittals. The concept behind Twitter, Facebook, LinkedIn, and other social media platforms is based on this same ?mass publication made easy,? but in turn this means that there is always a way to capture the message.

Joel further advises that for lawyers, this presents both a problem and an opportunity. If someone finds the system where the message still exists, a client may be screwed or saved, depending on what that message says or to whom it was sent. For lawyers as publishers, it boggles the mind why any would post, email, or tweet anything damaging about their client or their case, regardless if that message was intended to only reach a ‘safe’ recipient. Sometimes, even the location from where a message was sent can be damaging to a client by being locatable geographically through metadata associated with the message sent.

Michael Mowla, an esteemed member of the Texas Criminal Defense Lawyers Association and Ethics
Committee, as well as a Board Certified Criminal Appellate Lawyer by the Texas Board of Legal Specialization, makes it a point to live by this principal: *Unless you are willing to allow it to be read in open court, do not send a communication by electronic means.* Mowla continues by stating that he also always follows two main rules: 1) Never text information about a case?texting is to tell someone you are running late or sending a newspaper article; and 2) never send negative or incriminating information about any client through any electronic means.

With all the technological advancements and changes, the legal world is beginning to take note and is slowly churning out new laws regarding social media and text messages. The Mississippi Ethics Commission, for example, has issued an opinion that text messages concerning government business, regardless of the device used to produce them, qualify as public records, which the press and anyone else is entitled to request. Moreover, the commission stated, ?Any doubt about whether records should be disclosed should be resolved in favor of disclosure.?

Leonard Van Slyke, media-law attorney and adviser to the Mississippi Center for Freedom of Information, stated that he believes the goal and significance of this ruling is to prevent public officials from using text messages as a method to circumvent compliance of the Public Records Act. This serves as another example of the growing connection between ethics, the legal world, and social media/messaging.

As lawyers, we will always be held to a higher ethical standard than the average layman. Therefore, prior to speaking, you must think about how one?s words will affect the client and whether the statements will better serve to zealously advocate for the client. By gaining a better understanding of the power of words, attorneys can speak more strategically and provide more effective litigation.

Assessing the statements you make to others is a vital key to successful representation, and although words may not break bones, they can break an individual?s spirit and reputation and is likely to breed apathy and resentment.

*I believe that life and death are in the power of the tongue; those who love to talk will reap the consequences.*  
?Proverbs 18:21

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