

“Blogging for Lawyers”

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Wanamaker Building
Philadelphia, PA
Thursday, November 13, 2008

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Pennsylvania Bar Institute - - Panel Presentation on “Blogging For Lawyers”

This summary outlines topics for a presentation on legal blogs and blogging. I begin by citing statistics relating to the prevalence and popularity of law blogs. Next, I discuss how blogs help lawyers with their professional development. I then address the key elements to maintaining a successful blog. I conclude with a brief examination of blogger liability and finally attorney ethics.

I. Statistics

A. General Blogging Statistics

Technorati, an online blogosphere authority, tracks about 112.8 million blogs.² Additionally, Technorati reports that there are over 175,000 new blogs every day, and blog updates amount to “1.6 million posts per day, or over 18 updates a second.”³

In 2006, the Pew Internet & American Life Project, a nonprofit “fact tank” exploring the impact of the internet on various aspects of American life, reported:⁴

- 8% of internet users, or about 12 million American adults have created blogs.
- 39% of internet users, or about 57 million American adults, read blogs.
- 54% of bloggers are under the age of 30.
- Women represent 46% of bloggers and men 54%.
- 64% of bloggers say a reason they blog is to share practical knowledge or skills with others.
- 87% of bloggers allow comments on their blog.

² See <http://technorati.com/about/> (last visited July 16, 2008).

³ See *id.*

⁴ See Press Release, Pew Internet & American Life Project, Bloggers: A portrait of the internet's new storytellers, (July 19, 2006) [available at](http://www.pewinternet.org/PPF/r/186/report_display.asp) http://www.pewinternet.org/PPF/r/186/report_display.asp (last visited July 24, 2008).

- 72% of bloggers post photos to their blog.
- 55% of bloggers blog under a pseudonym.
- 41% of bloggers say they have a “blogroll” or “friends list” on their blog.
- 8% of bloggers earn money on their blog.

B. Legal Blogging Statistics

In 2006, the American Bar Association reported: (a) more than 6% of all lawyers had blogs, (b) legal blogs averaged 1.2 million daily posts, and (c) 57% of lawyers read at least one blog a day.⁵ The ABA Journal website’s Blawg Directory currently links to over 2000 legal blogs in more than 100 categories.⁶ In addition, it lists 5 blogs written by judges,⁷ 96 sponsored by law firms and 181 authored by law professors and 38 published by legal news outlets.⁸ Blawgsearch.justia.com, another online law blog directory, currently lists 2876 blogs in 67 categories.⁹ On July 16, 2008, Blawg.com, the leading directory of law blogs, reported that it was currently tracking:¹⁰

- Total Law Blogs: 2,232

⁵ See Jennifer J. Rose, The Blog Spot, 11 NO. 10 **Internet L. Researcher** 9 (2006).

⁶ See <http://abajournal.com/blawgs> (last visited July 16, 2008).

⁷ See The Becker-Posner Blog, <http://www.becker-posner-blog.com/>; The Pennsylvania Workers’ Compensation Journal, <http://www.robertvonada.com/>; Content and Carrier, <http://www.contentandcarrier.eu/>; Convictions, <http://www.slate.com/blogs/blogs/convictions/default.aspx>; Say What?, <http://www.texasbar.com/saywhat/weblog/>; The Magistrate’s Blog, <http://thelawwestofealingbroadway.blogspot.com/>; A Criminal Waste of Space, http://www.acriminalwasteofspace.com/journal_beds.asp.

⁸ See *id.* (last visited on July 24, 2008).

⁹ See <http://blawgsearch.justia.com/category.aspx> (last visited July 16, 2008).

¹⁰ See <http://www.blawg.com> (last visited July 24, 2008).

From lawyers writing about their area of expertise, to law librarians offering research tips and tricks, to law professors expressing their opinions and analysis, to technologists discussing the latest trends and ideas in legal technology, these law-oriented blogs or “blawgs,” were providing an early view of the changing dynamics for communication and collaboration within the legal community.

See *id.* at <http://www.blawg.com/About.aspx> (last visited July 16, 2008).

- Active Law Blogs: 1,364
- Total Posts: 378,513
- Posts Today: 91

In March 2008, Lexblog.com, a company that sets up, hosts, customizes, maintains and promotes legal blogs, reported on the AmLaw 200 firms' blogging activities.¹¹ The following results were taken directly from Real Lawyers Have Blogs.¹²

- 53 of the 2007 AmLaw 200 firms were blogging.
- Those 53 firms were responsible for a total of 110 blogs.
- 82 of the 110 blogs were firm branded; the remaining 28 blogs were not branded.
- 16 blogging firms are LexBlog clients; those 16 firms are behind 42 of the 110 blogs AmLaw blogs.
- Of the non-LexBlog client blogging firms, there were a range of other platforms used:
 - 24 were using Blogger;
 - 8 were using Typepad;
 - 2 were using Movable Type;
 - 3 were using Justia;
 - 2 were using WordPress; and
 - 29 had their blogs published and hosted through other services or on personal domains.

II. Why Should Attorneys Maintain Law Blogs?

Blogs are effective online tools¹³ for people who find lawyers by searching the internet.¹⁴

Blogs are highly visible on internet search engines' results pages.¹⁵

¹¹ See posting of Kevin O'Keefe to Real Lawyers Have Blogs, <http://kevin.lexblog.com/2008/03/articles/large-law/state-of-the-amlaw-200-blogosphere-march-2008/> (March 27, 2008) (citing State of the AmLaw 200 Blogosphere March 2008 by Lexblog.com). The AmLaw 200 are America's top 200 revenue grossing law firms.

An effective internet presence is bigger than a website—it does not come from having a website that can be seen all the time. Effective Internet presence is the ability to communicate and demonstrate expertise. It is what causes people to talk about you online. We network more online now than we do offline.¹⁶

Popular bloggers gain “credibility as experts in their field.”¹⁷ Blogs can “enhance [a lawyer’s] reputation as a reliable and trusted authority and allow [the lawyer] to network both with prospective clients and with those people who influence prospective clients.”¹⁸ Additionally, blogs may influence public opinion.¹⁹

III. Creating a Successful Law Blog

- Update your blog at least once a week.²⁰
- Post quality content.²¹
- Be succinct.²²
- Focus on one niche or practice area.²³

¹² See id.

¹³ See Benjamin W. Glass III, Build Your Practice With A Blog, 44-JAN **Trial** 30, 30-31 (January 2008).

¹⁴ See Kevin O’Keefe and Wells H. Anderson, Start A Blog To Grow Your Practice, **GP Solo**, 13, 15 (December 2007).

¹⁵ See id.

¹⁶ See O’Keefe and Anderson, supra note 9, at 18.

¹⁷ See id. (suggesting that bloggers gain credibility with both potential clients and the media). See also posting by Larry Bodine, Blogs Bring Lawyers Calls from the Media, <http://blog.larrybodine.com/2008/07/articles/blogging/blogs-bring-lawyers-calls-from-the-media/> (July 22, 2008) (suggesting that lawyers who write blogs will get called and quoted by news reporters) (citing a new study by eMarketer).

¹⁸ See id. at 15.

¹⁹ See Glass, supra note 8, at 30-31.

²⁰ See O’Keefe and Anderson, supra note 9, at 16.

²¹ See id. at 15.

²² See id. at 17.

- Join a blogging network.²⁴
- Register with online legal blog directories.²⁵
- Post comments on other related blogs.²⁶

IV. **Blogging and the Law**

A. **What are a Blogger's Liabilities?**

The Electronic Frontier Foundation, a nonprofit organization advocating “digital freedom in the courts”, explains that bloggers have the same liability issues as any conventional publisher, including:²⁷

- Defamation
- Intellectual property
- Trade secret
- Right of publicity
- Publication of private facts

²³ See id. at 16.

²⁴ See Glass, supra note 8, at 32.

²⁵ See id.

²⁶ See id.

²⁷ See Bloggers' FAQ - Overview of Legal Liability Issues, at <http://w2.eff.org/bloggers/lg/faq-overview.php> (last visited July 16, 2008).

B. Vicarious Liability Protection – Federal Statutes

The Communications Decency Act (“CDA”) § 230(c)²⁸ immunizes bloggers from liability for defamatory content developed by third parties that is published on their blogs or websites.²⁹ See e.g., DiMeo, III v. Max, 433 F.Supp.2d 523 (E.D. Pa. 2006) (barring defamation claim against under § 230(c) because he did not “develop” the offensive content although he selected and edited it for publication). One court has suggested that section 230(c) may apply only to publishing-related claims.³⁰ However, § 230(c) has been applied to claims of invasion of privacy, negligence, trespass, nuisance and intentional infliction of emotional distress.³¹

The Digital Millennium Copyright Act (“DMCA”) § 512(c)³² limits a blogger’s liability for acting “as passive networks or provid[ing] unknowing assistance to copyright infringers.”³³

²⁸ 47 U.S.C. § 230(c) states in pertinent part:

Protection for “good samaritan” blocking and screening of offensive material
(1) Treatment of publisher or speaker - No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
(2) Civil liability - No provider or user of an interactive computer service shall be held liable on account of--
(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Id.

²⁹ See Cyndey Tune and Marley Degner, Blogging and Social Networking: Current Legal Issues, **Practising Law Inst.** 75, 80 (March-April 2008) (citing Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir. 2007); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); Doe v. Myspace, Inc., 474 F.Supp.2d 843 (W.D. Tex. 2007); DiMeo, III v. Max, 433 F.Supp.2d 523 (E.D. Pa. 2006); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Schneider v. Amazon.com, Inc., 108 Wash.App. 454 (2001); Ben Ezra, Weinstein and Co., Inc. v. American Online, Inc., 206 F.3d 980 (10th Cir. 2000); Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998); Zeran v. American Online, Inc., 129 F.3d 327 (4th Cir. 1997)).

³⁰ See Lori E. Lesser, Social Networks and Blogs, **Practising Law Inst.** 15, 19 (March-April 2008) (citing Chicago Lawyers Committee for Civil Rights Under the Law v. Craigslist, 461 F. Supp. 2d 681 (N.D. Ill. 2006)).

³¹ See id. at 18.

³² 17 U.S.C. § 512(c) states in pertinent part:

(1) In general.--A service provider shall not be liable for monetary relief, or . . . for injunctive or other equitable relief, for infringement of copyright by reason of the storage at

To qualify for DMCA protection, the blogger must remove the infringing material from the website upon notification.³⁴ Additionally, “the site cannot receive financial benefit directly attributable to the infringing activity.”³⁵

C. Blogger Anonymity Protection

The federal statutes discussed above protect persons who maintain or publish a blog from liability for defamatory content developed by a third party that is posted on their blog. However, a third party, whether posting anonymously or not, can be held liable for actionable content. Persons who maintain a blog may be compelled to reveal the identity of anonymous third party bloggers.³⁶ Courts apply different standards to compel the identity of anonymous bloggers, from a “motion to dismiss” standard to a “summary judgment” standard.³⁷ For example, the Delaware Supreme Court, in Doe v. Cahill, applied a summary judgment standard to compel disclosure of an anonymous bloggers identity. The Court required the plaintiff to take “reasonable steps to

the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--
(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

Id.

³³ See Lesser, supra note 25, at 24 (discussing the protections afforded to internet service providers by the DMCA).

³⁴ See id.

³⁵ See Tune and Degner, supra note 24 at 83-84 (citing The Football Association Premier League Ltd. V. YouTube, Inc., (S.D.N.Y. Complaint filed May 4, 2007); Viacom International, Inc. v. YouTube, Inc., (S.D.N.Y. Complaint filed March 13, 2007); Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007)).

³⁶ See Lesser, supra note 25, at 31 (“Courts disagree on standard to compel discovery of anonymous Internet authors and posters.”).

³⁷ See id. at 32-33.

advise the anonymous defendant that it is the subject of the subpoena discovery action” and demonstrate “that sufficient facts existed to support a prima facie case of defamation that could survive a motion for summary judgment.”³⁸

V. Blogging and Attorney Ethics

An attorney who maintains a law blog should adhere to the state rules of professional conduct, specifically those rules regarding internet advertising, as a blog may constitute advertising or solicitation.³⁹ Additionally, when writing a blog an attorney should:⁴⁰

- Follow existing firm protocols and rules (or if your firm’s policy is too restrictive, negotiate a compromise).
- Use disclaimers.
- Not offer legal advice or create an attorney-client relationship.
- Not breach client confidences.
- Not engage in any false or misleading communication.

The Pennsylvania bar ethics committee has not yet issued a formal opinion about whether legal blogs constitute advertising or solicitation, however other states have addressed the issue.

- Kentucky: Kentucky’s Advertising Commission adopted a working policy whereby law blogs are not advertisements unless they solicit clients. The blog must contain legitimate journalistic content to avoid the rules applicable to attorney advertisements and the Commission must approve the “About” page (i.e., the page containing information about the attorney or the firm).⁴¹

³⁸ See id. (citing Doe v. Cahill, 884 A.2d 451 (Del. 2005)).

³⁹ See posting of Kevin O’Keefe to Real Lawyers Have Blogs, <http://kevin.lexblog.com/articles/blog-law-and-ethics/> (May 3, 2008). See also Tune and Degner, supra note 24 at 92 (“There are several ethics opinions that clearly indicate that a web page is an ad. There are no ethics opinions on whether profiles posted on social networking sites are ads.”).

⁴⁰ See id. See generally Sarah Hale, Lawyers at the Keyboard: Is Blogging Advertising and If So, How Should It Be Regulated?, 20 Geo. J. Legal Ethics 669 (2007).

⁴¹ See Christine D. Petruzzell, Don’t Go Blindly Into That Law Blog, 250-FEB N.J. Law 80, 81 (2008).

- New York: New York adopted new advertising rules in February 2007 requiring public communications made by a lawyer or law firm via the internet to be filed with Appellate Division. The rules limit this requirement to only those communications dealing with client solicitation or attorney retention. It does not include “communications to existing clients or other lawyers.” To date, no there have been no opinions applying this rule to legal blogs.⁴²
- New Jersey: The Committee on Attorney Advertising issued an informal opinion stating that where a legal blog’s primary purpose is client solicitation, and the blog is interactive (i.e., allowing clients to contact the lawyer), then it must conform with the professional conduct rules for legal advertising.⁴³

⁴² See id. (citing N.Y. Comp. Codes R. & Regs. 22 § 1200.1(k)).

⁴³ See id. (citing Notice to the Bar, 182 N.J.L.J. 558 (Nov. 7, 2005)).

Outline of PBI Panel Presentation on Blogging for Lawyers

- 1) Why should lawyers blog in their area of practice concentration?
 - (i) Forces one to stay up to date more frequently and consistently on one's practice area.
 - (ii) Knowledge management – all the cases and updates one blogs about are available by search words (no more wondering how to find that “case I read about that may be relevant”).
 - (iii) People doing internet search (e.g., on Google) on your practice area will find your posts - - thereby giving the impression that you are up-to-date and knowledgeable on the topic. (The last item has untold benefits in burnishing one's online image.)
 - (iv) Fosters more interaction with other experts and practitioners in one's practice area, e.g., Professors Bainbridge and Ribstein and Kevin LaCroix - - many of whom will have blogs and will often refer to, and link to your blog on topics of interest. Professionally rewarding feedback.
 - (v) It's enjoyable and rewarding despite the hard work required. (This may only apply if one already publishes frequently and/or if you are someone for whom writing is not a chore or a bore).
 - (vi) Successful blogs lead to quotes sought by reporters; seminar requests; consults by other lawyers.
 - (vii) Hard work is worth it when other lawyers and judges you meet tell you they are frequent readers of your blog.
2. Current statistics on “who blogs” among the general populace and among lawyers - - and who reads them.

- (i) How many lawyer blogs are there?
 - (ii) What are liability issues for bloggers?
3. How does a lawyer start a blog?
 - (i) Free online software.
 - (ii) Providers such as LexBlog.
4. How much time is required to blog?
 - (i) Depends on how often you update.
 - (ii) I summarize Delaware corporate cases that are often 50 or more pages, so it depends on how many opinions the courts issue each week.
 - (iii) I need to read cases anyway so might as well summarize or highlight key issues; and with search terms I can easily go back and refer.
 - (iv) Sometimes a few hours a week and sometimes 10 or more hours a week.
5. Blogging as lawyer in Big Firm.
 - (i) Every firm has different approach.
 - (ii) There are many blogs by partners in big firms who operate their blog independent of firm involvement.
 - (iii) Other blogs are sponsored by firms and written by members of particular departments.