Building Blogs (and Law Firm Web Sites): Ethically, Effectively

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BUILDING BLOGS

AND LAW FIRM WEB SITES

ETHICALLY EFFECTIVELY

BY WALTER A. EFFROSS

One popular guidebook promises that to start blogging, “you don’t need to know much more than how to use a web browser, open and create files on your computer, and get connected to the Internet.”

Blogs can be an excellent platform for immediate and unmoderated publication, especially in an environment of never-ending news cycles, minute (or minute) attention spans, intense competition for potential clients, and perpetual pressure for professional self-promotion.

Although a blog has been described as a Web page that features frequent updates, reverse chronological arrangement, categorization of entries (or posts), and (often, but not always) the ability of readers to leave comments, courts are still grappling with the definition. To make matters more confusing, some law firms’ Web sites present as “blogs,” collections of client alerts arranged in reverse chronological order; other firms’ sites offer focused, in-depth, and frequent entries by members of particular practice groups; and some firms even invite visitors to post comments on such pages.
Nor do firms limit themselves to one blog each: One commentator recently noted that the "American Lawyer 100" law firms collectively operated at least 416 blogs, and that 12 of those firms were responsible for 179 (or 46 percent) of the blogs.4 (On the other hand, a law blogger has suggested that "[a] presence in the blogosphere may ... be a more effective business development tool for small firms than for large ones," which already have "brand recognition" and which may be marketing themselves to more select audiences.)

In developing their Web sites and/or blogs (collectively referred to in this article as "sites"), law firms and individual lawyers (the "operators") should keep in mind not only often-overlooked legal concerns, but also the application of the American Bar Association (ABA) Model Rules of Professional Conduct to the online world. Without offering legal advice, this article identifies a range of legal and ethical issues, reviews some of the relevant advisory (non-binding) opinions of state bar ethics committees,6 and addresses the ways in which disclaimers and other site features can be deployed to diminish such risks.

Disclaimer of Advertising
Because potential clients initiate contact with law firm Web sites, these sites have been found by some state bar ethics committees not to constitute solicitations, which (like direct e-mails to potential clients) are governed by Model Rule 7.3 (Direct Contact With Prospective Clients).7 However, these committees have generally concluded that sites constitute advertisements, and thus, they are governed by Model Rules 7.1 (Communications Concerning a Lawyer's Services) and 7.2 (Advertising).8 For instance, operators in some states must retain print or digital copies of their sites, along with any material changes, for a specified period of time (three years, for example) after the dissemination of such information.

Some sites nonetheless assert that they are "not intended to constitute advertising," are "primarily intended for use by law school students considering a career at our firm," or are only made "available as a service to clients and friends" of the law firm. Such disclaimers may also constitute attempts to avoid arguments that the sites are governed by the rules of every state from which they are accessed.

In 1996 the Pennsylvania Ethics Committee characterized this issue as "an open question" and "rapidly evolving,"9 but two years later it concluded that "[l]awyers should not ... be subject to disciplinary proceedings in states where they, or members of their firm, are not licensed to practice."10

A more effective technique for avoiding such universal jurisdiction could be for the site to specify the states in which its operators (for firms, every attorney in the firm) are licensed. For example, one firm named the states and countries in which it operated and stated that it "does not intend or purport to practice in any other jurisdictions. The jurisdictions in which our lawyers are licensed to practice are indicated in the 'Our Lawyers' section of this website." Such language would help operators to defend themselves against accusations of unauthorized practice of law in states where they are not licensed.11 Yet, as the California Ethics Committee has recognized, these strategies might not work in a state (such as Arizona or Iowa) that requires out-of-state law firms with offices in their state, or lawyers licensed to practice in the...
state[,] to comply with its own regulations on professional responsibility.12

Disclaimer of Legal Advice and of Content Applicability
Sites could also specify that their contents do not constitute legal advice, but are provided “for informational purposes only,” that they merely “provide a general description of the law” rather than “specific legal advice,” and that for legal advice visitors should consult their own counsel.

In addition, warnings that a site’s information (including publications or posts that may have been written months or years previously) is not guaranteed to be complete, accurate, and updated could appear prominently near all such content, and might not be relegated to the site’s “Terms and Conditions” page, especially if the link to that page is itself inconspicuous.13

Disclaimer of Permanence
Operators should specify that they may revise or remove without notice whether by direct e-mail to visitors or a post on some part of the site itself, any of the site’s content, and that the site itself is not guaranteed to be continuously accessible.

Disclaimer of Attorney–Client Relationship and of Confidentiality
Model Rule of Professional Conduct 1.18 requires that lawyers keep confidential the information they receive from prospective clients, and that the receipt of such information may disqualify them from representing a client (current or prospective) with adverse interests to those of the prospective client.

Thus, sites should display conspicuous warnings to visitors that a confidential attorney-client relationship will not be formed merely by a visitor’s accessing the site’s contents or sending an e-mail to the operators. (Some firms even provide the telephone number of a staff member to contact about representation.)

Such disclaimers, though, might not fully protect operators from being disqualified from their representation of existing clients. In its Formal Opinion 2005-168, the California Ethics Committee addressed a situation in which a visitor, in completing a form on a law firm’s site to request representation in divorcing her husband (whom the firm was, without her knowledge, already representing), confided that she had had an extramarital affair. The committee concluded that the firm might be disqualified from representing the husband: Despite the site’s “click-through” disclaimers of a “confidential relationship,” the potential client could still reasonably have believed that the firm would keep her information confidential.

The committee suggested that the law firm would have been better protected if it had required potential clients to indicate that “I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm,” or if it had requested that visitors furnish the firm with only the information that would have been necessary for it to conduct a conflicts check.

Five years later, the ABA’s Formal Opinion 10-457 emphasized the value of “reasonably understandable, properly placed, and not misleading” disclaimers of the creation of an attorney–client relationship, of the confidentiality of information submitted by the visitor, of the provision of legal advice, and of an obligation not to represent an adverse party.14

Such warnings are often addressed to anyone who is not “an existing client” or “a current client” of the firm. However, they
should also be made explicitly applicable to existing or former clients who seek to be represented by the firm in new matters. (Conversely, the "Disclaimer" page of one law firm's site includes the provision that "If you are a client of [the firm], nothing in [the disclaimers] will supersede any provision of your engagement letter, or other agreement with respect to the attorney-client relationship.")

A Refinement of Click-Through Disclaimers
Some law firms display these disclaimers on windows that appear when a visitor clicks on the e-mail link on an individual attorney's page, requiring the visitor to disable the window by clicking on its "I agree" option before being allowed to compose or send an e-mail.

Yet the effectiveness and enforceability of these terms may be destroyed if that attorney's full e-mail address appears (perhaps as the link itself) on that page, or if, when the visitor positions her cursor over the link, the e-mail address becomes visible in the lower left portion of her browser's window. In either of these cases, the visitor might very simply type the exposed e-mail address into her own e-mail program, thereby avoiding exposure to, and not being bound by, the disclaimer.

To prevent this, some firms install on attorney pages "Contact this attorney" links that bring up disclaimer windows. Visi tors who click on that window's "I agree" option are presented with a template into which they can type their communication's text, but which does not reveal the attorney's e-mail address. (Of course, someone confronted with this arrangement, or even someone who had not visited the site, could simply guess that, say, Jane Smith's address at Jones & Brown is jsmith@jonesbrown.com, smith@jonesbrown.com, or jane smith@jonesbrown.com, and thereby possibly bypass the disclaimers.)

Other Disclaimers
- Some firms warn visitors that information sent by e-mail is not necessarily secure in transit, and might be subject to interception by third parties. At least one firm invites visitors with such concerns to contact a specified member of the staff who can arrange for encryption of the visitor's messages.
- In this connection, visitors might be advised that they should not send time-sensitive requests for representation to the firm through e-mail.
- Operators might wish to clarify in their terms and conditions, or in a disclaimer posted more prominently on their site, that opinions expressed in posts or other publications by one or more individual members of the firm are not to be taken as those of the entire practice group or firm, or of any clients of the firm.
- In discussing previous representations, operators might want to clarify that because the facts of each situation vary, their previous successes do not guarantee future results. In addition, care should be taken not to name clients unless they have consented to the reference.
- To avoid professional responsibility concerns about misrepresentations of its photographs (particularly generic "stock images") do not depict the firm's lawyers and/or clients.

Privacy and Security Policies
- Sites should identify the types of information they collect from visitors (especially through "cookies" and other automatic processes); how they use that information (including whether, when, and how it is shared with third parties); and whether visitors can view the data collected from them and/or opt out of its collection, and if so, how.

- If the organization operating a site is acquired by or merges with another entity, will the information collected from visitors be considered a business asset that can be transferred to the other entity? Can the information be licensed or sold to one or more parties if the organization that collected it is in bankruptcy or reorganization proceedings?

- If they address the issue at all, operators typically indicate quite vaguely the nature and intensity of their efforts to protect visitor information. Examples include physical, electronic, and procedural safeguards "that comply with our professional standards," "that comply with the highest professional standards," and that reflect "our best efforts to ensure [your information's] security on our system."

- Operators might indicate the circumstances under which they would voluntarily (and/or would be required to, under state or federal law) contact visitors to report a possible compromise of the security of the visitors' information.

- To prevent "phishing" or "social engineering" by criminals misrepresenting their e-mails as originating from the operators of a site, operators might wish to include conspicuous notices that they will not authorize anyone to contact a prospective, current, or former client by e-mail or telephone to ask for certain sensitive information such as e-mail passwords or bank account numbers. Alternatively, the operator might wish to specify its security procedures (such as the use of special passwords or a telephone number for the client to call) to confirm the legitimacy of such a request.

- The operator could specify whether (and if so, how) the site will indicate any changes to its privacy policy and/or its terms and conditions generally. By a notice on the home page and/or the page in question? Will that notice specify the nature and location of the change? Will the operator e-mail notice of the changes to the visitors whose e-mail addresses it had collected? Will the operator pledge that any changes to the privacy policy will only protect visitors' information more strongly? If not, and if a revised policy weakens the protection of this infor-

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**A Proposal**

One simple, efficient, and inexpensive method of displaying effective disclaimers and privacy policies on law firm Web sites and blogs would be for the ABA and state bar associations to adopt standardized sets of terms, each identified by a particular icon and designation. For example:

- A finger held over pursed lips in a "Shh" symbol with the designation "Read Before E-Mailing Us." or a closed vault door with the designation "Privacy." Each icon itself would serve as a link to a page maintained by the ABA that displayed the corresponding set of terms.
- For a given icon, different colors could indicate different standard "flavors" of the underlying policy or disclaimers. A green vault door might, for example, signify a very visitor-friendly privacy policy, while a red one might indicate one less so.
mation, will the terms of the previous policy still apply to the information collected while it was in force, or are the changes retroactive?

**Ownership, Editing, Removal, and Moderation of Comments**

Section 230(c)(1) of the Communications Decency Act provides that "[n]o 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," thereby insulating the operator of a Web site or blog from certain types of liability (e.g., for defamation) under state law based on content added by visitors to the site.15 Nonetheless, operators may wish to indicate explicitly not only that comments by visitors do not necessarily reflect the operators' views, but also that the operators, as one site puts it, "reserve the right to remove any comments that contain spam or include negative or defamatory comments about another person or subject." Other candidates for removal could include comments that are "clearly 'off topic' or that promote services or products or contain any links . . . [or] that make unsupported accusations." (Lengthier lists of categories of objectionable comments can be found in the terms and conditions of Internet service providers like AOL.16)

If visitors cannot post their comments directly but must submit them for approval and posting by the operators, the operators might indicate that submissions will be posted (and possibly edited) subject to the sole discretion of the operators. As the comment policy of one leading academic law blog acknowledges, "We realize that such a comment policy can never be evenly enforced, because we can't possibly monitor every comment equally well . . . Those we read, we read with different degrees of attention, and in different moods. We try to be fair, but we make no promises."17

In either case, the site could display an e-mail address or link through which complaints about comments could be brought to the attention of the operators. That address or link could also be used by visitors to alert the operators to allegedly copyright-infringing posts or comments in the "notice-and-takedown" procedure provided by the Digital Millennium Copyright Act.18

**Other Issues**

- Some operators arrange for a third party to display a selection of alternating advertisements on their sites, although the operators might not endorse, or even have any knowledge of, some or all of the items or services advertised. Such operators might consider disclaiming any personal endorsement of, or liability for, the subjects of the advertisements.

- The Federal Trade Commission requires full disclosure of "a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience)."19 Thus, operators who have been given free products or services should conspicuously reveal that fact in any of their sites' reviews or discussions of the products or services.

- Given the legal uncertainties about whether (and if so, when) a blogger can qualify as a journalist or media representative for purposes of invoking the "shield law" of particular states, a blogger anticipating receiving sensitive information might want to disclaim any absolute guarantee or expectation that he would be able to shield the name of his source, assuming that the information was provided in such a way that the identity of the sender could subsequently be established (for instance, by non-anonymous e-mail).

- A significant number of state ethics advisory opinions has addressed the question of whether counsel have an ethical duty to ensure that metadata—embedded but often easily retrievable information about the author, date, last changes to, and other production history of a digital document—is scrubbed from a client-related document before providing it to third parties, and whether counsel have a duty to refrain from attempting to view the metadata of digital documents provided to them.

- Less often discussed in advisory opinions, but regularly appearing in news reports, are failures of digital redaction: when a document is converted into a digital format (by scanning, for instance), which is then redacted (by, for example, digitally "blackout" passages of text in the image of a page). Such redaction can sometimes be digitally reversed, and the original sensitive information recovered. Operators posting files or images should thus take care to ensure that the redaction is made to the hard copy before it is digitized and posted.

- It remains unclear to what extent sites constitute "place[s] of public accommodation" subject to the Americans with Disabilities Act,20 and how sites can and should be modified to enable their use by individuals with disabilities.

- The few ethics opinions addressing the issue have concluded that the domain names used by sites "cannot be false, deceptive or misleading." A domain name does not have to contain the name of the firm or of one or more of its lawyers, but in that instance the

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**Assessing—and Approaching—a Law Firm Through Its Blog**

- Law students, possible clients, and others might find important clues to a law firm's dynamics embedded in its blog(s):
  - In which area(s) does the firm operate a blog?
  - By whom are the blog posts written? By only some of the partners in a practice group? By senior and/or junior associates? Are any individual posts credited to two or more partners as co-authors, or to two or more associates, or to a partner and an associate?
  - How often, and in what detail, are new items posted?
  - Does the blog feature occasional comments by, or "guest" participation of, any members of other practice groups at the firm?
  - Are different bloggers at the firm elaborating on, disagreeing with, or otherwise reacting to each other's posts?
  - What types of questions or comments, if any, are being added by visitors? Are lawyers at the firm responding to such comments in detail? Are visitors responding to each other's comments?
  - How do the operators deal with inappropriate, off-topic, and/or offensive comments made by visitors?
  - How carefully worded—and conspicuously displayed—are the site's disclaimers?

**Using Blogs to Clarify Paper Topics/Analyses**

Visitors might post comments or questions as a way of introducing themselves and their interests to members of the practice group, especially if the visitors are identifying or developing topics for papers, or are in the process of writing papers, that they would like to bring to the attention of the firm.
firm's advertisements cannot use only the domain name to identify the firm.21

Operators' Expressions Contrary or Embarrassing to Client Positions
The New York City Bar Association's conduct will not adversely affect the rights of a lawyer's specific representation of a client in a matter that would adversely affect the lawyer's handling, the lawyer may take positions on public issues and espouse legal reforms favored by the lawyer without regard to the individual views of any client.

Although it would seem to be a violation of a lawyer's professional responsibility for her to post arguments against a position that she is currently arguing on behalf of a client, could she ethically publish such views online if another member of her firm were representing the client? According to the formal opinion, in the latter situation the lawyer could "take a personal position on the issue in public." Would a lawyer's blogging about a topic entirely unrelated to his or her firm's representation of a client cross any lines of professional ethics if the lawyer's views were so extreme, and/or the topic so controversial, that the lawyer's self-expression embarrassed the client?

Would it make any difference, from a professional ethics if not an employment law perspective, if the lawyer's firm had adopted a social media policy that, as does at least one actual policy, prohibits its employees from doing anything "detrimental to the reputation, goodwill or best interests of [the firm] and/or any of its personnel," and requires them, "[w]hen posting to a blog, [to] refrain from posting about controversial or potentially inflammatory subjects?"22

Conclusion
Click-through windows, conspicuous and detailed disclaimers, and other legal and ethical safeguards might make law firms' Web sites, or lawyers' blogs, less user-friendly than their operators might prefer. Yet the risk of professional embarrassment, if not also of financial liability, could well outweigh these considerations.

In fact, a visitor might be most likely to appreciate these features when they appear on the site of a lawyer or law firm whom she is considering retaining for counsel concerning online issues.

Walter Effross is a professor at American University Washington College of Law. This article is adapted from material he presented at a recent conference at the law school and at continuing legal education programs of the D.C. Bar.

For additional resources for law bloggers, see

Notes
Id. at 16.
1 See, e.g., State v. Lead Indus. Ass'n, Inc., 64 A.3d 1183, 1199 n.5 (R.I. 2013) (quoting a dictionary definition of a blog as "a website that displays in chronological order the postings by one or more individuals and usually links to comments on specific postings"); Hunter v. Virginia State Bar, 744 S.E.2d 611, 613 n.1 (Va. 2013) (quoting another dictionary definition: "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer"); Masov v. Otsuka Pharm. Co., 929 N.E.2d 666, 671 n.1 (Ill. App. Ct. 2010) (defining a blog as "a frequently updated Web site consisting of personal observations, excerpts from other sources or, more generally, an online journal or diary"); Apple Computer, Inc. v. Dot 1, 2005 WL. 578641, *2 n.4 (quoting an online dictionary's definition as an "online diary; a personal chronological log of thoughts published on a Web page").
4 For simplicity, the opinions are identified here by the state name and opinion number, and the committees are identified as the [state name] Ethics Committee.
7 Additionally, Section 7.2 doesn't exist under the D.C. Rules of Professional Conduct.

In February 2013, the Supreme Court of Virginia upheld, against a lawyer's First Amendment challenge, the Virginia State Bar's power to regulate the content of his firm's Web site under Virginia Rules of Professional Conduct 7.1 and 7.2 in order to protect the public from being misled by its advertising content. Hunter v. Va. State Bar, 285 Va. 485, 744 S.E.2d 611 (Va. 2013).
8 Pennsylvania Opinion 98-85.
9 See Utah Opinion 97-10 (not deciding the issue, but observing that it would be a fact-sensitive matter).
10 California Formal Opinion 2001-155.
11 For an extensive disclaimer of liability for content, see www.bingham.com/TermsOfUse.
14 Cf. Daniel Solove, Our Comment Policy, Concurring Opinions, Apr. 19, 2009, www.concurringopinions.com/archives/2009/04/our_comment_pol.html (legal academics' blog policy providing in part that "Since our aim is for a discussion that is civil and intelligent, we may delete comments that strike us as stupid, that don't contribute to the debate, or that are shallow and not in the spirit of reasoned discourse. . . . Our judgment on whether to delete a comment or ban a commenter is final. Please feel free to disagree with us, and to disagree strongly, but be respectful of us and others.")
16 51 U.S.C. § 512(c).
18 42 U.S.C. § 12182.
20 For a discussion of whether corporate executives' fiduciary duties include the responsibility of not embarrassing their firms, see Walter A. Effross, Corporate Governance: Principles and Practices 183-196 (2d ed. 2013).

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