THE ETHICAL CONSIDERATIONS OF BLOGGING

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1. The Use of Blogs:
   a. Recent advances in technology and the use of the internet.
   b. Lawyers have begun using “blogs” (or “blawgs”).
      i. Define “Blogs” generally: Online journals used for various purposes (general discussion, personal logs, to give advice).
      ii. Legal and Non-legal blogs are so popular because:
           1. They are easy to create, basically anyone with access to the internet can create one;
           2. They allow for one person to communicate directly with a large number of people.
      iii. The ABA has estimated that 19% of lawyers write blogs.
      iv. From law students and professors to solo practitioners and large firms, blogs are being utilized by almost every part of the legal community.
         1. Students:
            a. e.g., “Above the law”; School based blogs (e.g., “Nuts & Bolts”)
            b. Information about future employers; law school admissions etc.
         2. Professors:
            a. e.g., Tax Prof Blog
            b. Used to reach out to students, other faculty, and to discuss nuances and developments in specialty areas of the law
         3. Solo Practitioners:
            a. Use blogs to get advice from other attorneys
         4. Large Firms:
            a. Use blogs to access potential clients and demonstrate expertise in particular areas
            b. Use blogs written by employees as a means to humanize firm

2. Ethical Considerations:
   a. While there are many benefits of lawyers using blogs, there are also many potential ethical and other business considerations that those lawyers who author blogs need to be aware of.
      i. Business Considerations:
         1. Malpractice Insurance and Law Firms:
            a. Violations of the Rules of Professional Conduct can lead to malpractice actions.
            b. Law Firms face pressure from malpractice insurance carriers who see blogging as a potential minefield for malpractice claims.
            c. Some insurers refuse to insure attorney bloggers entirely, while others see blogging as just another form of attorney communication.
d. In April, 2007, Chubb Group of Insurance Companies released a statement outlining the restrictions on its acceptance of the risks posed by attorney blogging.
   i. Chubb Group views law firm blogs as either informational or advisory.
      1. Informational (Low-risk):
         a. An informational blog provides information and allows for discussions to be had in a neutral manner.
         b. These blogs do not provide advice to a specific individual or on a unique or personal matter.
         c. These blogs pose a minimal level of risk,
      2. Advisory (High risk):
         a. A blog that provides advice to a client.
         b. Problem here is that these blogs can establish an attorney-client relationship without the usual safeguards of a conflict check.
   ii. Chubb Group has stated that it will only insure blogging activity that falls into the informational category.
   iii. To date, other insurers have not specified whether or not they will insure blogging activity.

ii. Ethical Considerations:
   1. Start with Story of Blogging Temp Prosecutor:
      a. A California law firm had an extern program which allowed them to “lend out” junior associates to the DA’s office for a few months.
      b. One such junior associate happened to have a blog where he, while prosecuting a case while at the DA’s office made several comments about his opposing counsel and also mentioned a prior conviction of the defendant in the case which had not yet been deemed to be admissible at trial.
      c. Opposing counsel made a motion to dismiss the case.
      d. The judge, while refusing to rule that the postings were prejudicial enough to throw out the entire case, called the temporary prosecutor’s conduct “juvenile, obnoxious and unprofessional” and noted that he would send his written ruling to the State Bar.
      e. While this certainly didn’t help his career (soon after the incident the young attorney left his internship, and his
firm), he might have bigger problems if it were found that he violated ethics rules in the process.

2. Generally:
   a. The fact that blogs can be posted on anonymously and can be read by a vast number of people means that attorneys have to be aware of some ethics rules that might be implicated by blogging.
   b. No ethics committee has yet determined what rules are (besides Kentucky, which has considered whether blogs must be submitted for review by the advertising commission), or might be implicated by blogging, but several academics have opined on the topic.

3. Attorney Advertising:
   a. Many attorneys do not view their blogs as attorney advertising but rather as a form of publication.
   b. Attorney advertising is one area of the ethics rules that many states strictly regulate.
      i. Note that most states regulate the truthfulness and accuracy of statements regarding an attorney’s qualifications and experience.
   c. Blogs often contain information about a law firm, the bios of the attorney authors of a blog and representations about a firm’s experience and individual qualifications.
   d. Several states require attorneys to submit advertisements in advance of dissemination for approval by the committee.
      i. Kentucky:
         1. Has examined the issue of whether attorney blogs constitute attorney advertising and require submission to the state advertising Commission.
         2. Prior to the decision of the Commission, it was thought that an attorney blog, under Kentucky Rule 7.2, would require submission to the Commission for approval (along with a $50 fee) each and every time a new post was added.
         3. However, the Commission decided that a lawyer need only get approval of the “About” page (or any other page containing biographical information about the lawyer) pursuant to the same rules that govern law firm web sites.
   e. Generally, the issue of whether or not blogs constitute attorney advertising and are therefore subject to the strict rules that govern such content is an issue that has gone undetermined.
f. Lawyers and law firms have dealt with this by including strong disclaimer language on blogs that they author.

g. What would happen if other states do not find in the same way as Kentucky with respect to filing requirements (explain or restate that ethics rules are state regulated):
   1. Maintain records of advertisements (hard because blogs are modified and updated constantly)
   2. One author has said that this would lead to the “ultimate downfall” of legal blogging.

4. Unauthorized Practice of Law:
   a. Generally:
      i. Major issue involves the potential for a lawyer to be subject to sanctions in a jurisdiction where they do not maintain an office or reside.
      ii. This is particularly a problem in FL, MS, NJ and TX where no attorney-client relationship needs to have been formed, nor a fee be paid before finding an individual has engaged in the UPL.

   b. Holding Oneself out as an Attorney:
      i. Generally, a lawyer cannot advertise in a state in which he is not licensed.
      ii. Because there are no jurisdictional limits on the internet, even if attorneys are in compliance with their own state’s rules, they might be in violation of the rules in a state where their advertisement reaches.
      iii. This subjects authors and firms to potential liability since they can’t control who will read their posts and where those readers live.
      iv. Example:
         1. The Ad: Attorney Jones includes a biography page on his blog where he has a link to his firm’s website, his contact information and he states that he is “board certified” in intellectual property law. His firm is located in Houston, Texas.
         2. Problems: Attorney Jones never says in which state he is licensed, but indicates that he is “board certified” in IP law. His website, to a person unfamiliar with licensing regulations, makes it appear that he is licensed everywhere and/or nowhere. Someone unfamiliar with the legal
profession might not understand that Attorney Jones is licensed in Texas or that his license limits his practice to that one state.

c. **Dispensing Legal Advice:**
   i. Another area involving the UPL involves the dispensing of legal advice.
   
   ii. The dispensing of legal advice through blogs is analogous to the problems created by chat rooms, law firm websites and emails.

   iii. NY, NC, AZ and IL have established concrete rules regarding legal advice that is given over the Internet. These states all distinguish between general and specific legal advice.
      1. If specific advice is given to an individual in one jurisdiction in response to a specific factual scenario, it is an ethical violation and the UPL when the attorney is not admitted in that jurisdiction.
      2. However, an attorney who is not admitted to the bar, who provides general legal advice, is not liable for the UPL.
      3. Basically, these rules evolved from the notion that lawyers may speak and write publicly on general legal issues (can give lectures, seminars, write and publish articles that the public will read).
      4. So, with respect to blogging, posts regarding new developments in the law are considered to be general in nature and do not subject the posting lawyer to liability for the UPL.
      5. Problems can arise with respect to the “comments” sections of many blogs where members of the public can pose specific questions. If lawyers do not know where the recipient of their advice lives, they may not be aware that the law that applies to a particular question is different than the law where the lawyer is licensed and would therefore be unable to know whether it would be the UPL to give specific legal advice.

   iv. **Ways to Protect Oneself:**
      1. If a lawyer does want to give specific legal advice there are various ways for them to protect themselves:
a. Include a jurisdictional disclaimer
b. Require those making comments to indicate in what state they reside before posting a comment

2. NEW YORK: DR 2-104:
   a. 2-104(C): A lawyer may accept employment which results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.
   b. 2-104(E): Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.
   c. In Formal Op. 1998-2 the NYC bar ethics committee noted that with respect to an internet discussion area, even if a law firm, in response to a specific legal question, indicates that such a question requires the establishment of an attorney-client relationship and cannot be carried out through the use of the web page, such a disclaimer might not shield a law from a claim that an attorney-client relationship was established.

5. Aiding the Unauthorized Practice of Law:
   a. Blogging takes lots of time so some lawyers delegate blogging maintenance to non-lawyer staff members to maximize marketing benefits without losing billable hours.
   b. It is a violation of the Model Rules to aid in the UPL.
      i. In one case, an attorney who was admitted to practice in PA engaged in the UPL in Ohio when he completed tasks similar to what a paralegal would do. These tasks constituted the UPL because they lacked the requisite level of attorney supervision and the lawyer was not licensed in Ohio.
   c. An attorney can protect himself from violating the ethics rules if he assigns researching and updating responsibilities to a non lawyer and then he reviews and approves all posts before the non-lawyer publishes them.
6. The Attorney-Client Relationship:
   a. Generally:
      i. Where advice is given by a lawyer over the internet, a court may find that an attorney-client relationship has been created.
      ii. If such a relationship is found, this may result in penalties that are more severe than the UPL (where an a-c relationship need not necessarily be created) because it potentially subjects the attorney to malpractice liability.
      iii. Once an attorney-client relationship is created, certain duties arise, and a lawyer’s failure to uphold these duties (confidentiality, diligence, and the duty to ensure no conflicts exist) can result in liability.
      iv. An attorney-client relationship can be created either by consent (express or implied) or by estoppel.
      v. Implied consent arises from the conduct of the parties. Many courts, when deciding if implied consent exists, will look at whether there was a consultation with the attorney; the consulting party’s intent to seek legal advice or services; the consulting party’s request for legal advice or services; and the attorney’s giving of, or promise to give, legal advice or services.
      vi. This consultation requirement requires only that there was some initial exchange of information between an attorney and a potential client. Therefore, if a “client” posts a comment or question on a lawyer’s blog, and the lawyer replies, a court might easily find that an attorney-client relationship has been formed.
   1. Compare/contrast with telephone consultations (no real time communication, but requested/received legal advice).
   2. 9th Circuit has found that the completion of an online questionnaire is an initial consultation (even though the exchanged involved only a one way dissemination of information).
   3. Attorney can easily give, or promise to give, legal advice/services.
   4. We just don’t know which side courts would come out on. Lawyer can easily give, or promise to give (expressly or impliedly) advice by posting a response to a question,
comment or directly contacting individuals through email, phone or regular mail.

vii. A lawyer can protect himself from forming an unwanted lawyer-client relationship through a blog by either specifically prefacing a response to a reader with a statement indicating that no lawyer-client relationship is being formed, or use a general disclaimer to convey the same message. The lawyer must also avoid giving specific advice to the reader to prevent the formation of an attorney-client relationship.

7. Insulating Attorney Bloggers from Ethical Violations
   a. Disclaimers!! Use them!
      i. A general statement that readers should consult competent counsel in their state rather than rely on information in a blog might do the trick.
      ii. Do not use legal jargon that a layperson would not understand.
      iii. If the disclaimer states that the advice being given is not intended as specific advice, the lawyer must not provide specific advice. A disclaimer is not an all-purpose shield.
      iv. State where the attorney blogger is licensed. The disclaimer should also state that an attorney can only legally practice in states where they are licensed.
      v. The disclaimer should state that none of the content is intended to be attorney advertising and is not a solicitation of business.
      vi. The disclaimer should state that nothing in the blog constitutes the invitation to form an attorney-client relationship and that the lawyer does not wish to represent any reader or commenter of the blog.
      vii. The disclaimer should state that none of the information included is legal advice.
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David is a member of the New York City Bar Association and its Committee on Professional and Judicial Ethics. He is a founding member of the New York County Lawyers Association’s Ethics Institute’s Board of Advisors. David is also a member of the Association of Professional Responsibility Lawyers and serves on the Practicing Law Institute’s Associate Advisory Board.

David often lectures on the topic of legal ethics and professional responsibility to bar associations, law firms and other national legal professional organizations.

David also maintains an active Pro Bono practice. He is an active participant in Proskauer Rose’s mentoring program. In 2007, David was honored by being awarded: the Legal Aid Society Pro Bono Publico Award for legal work on behalf of the Legal Aid Society’s Juvenile Rights Practice; the New York State Bar Association honorific designation of “Empire Counsel” and the Proskauer Rose Golden Gavel Book Award for Pro Bono service.