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Don't Go Blindly into that Law Blog

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Having started as a personal online journal to record and share thoughts, opinions and descriptions of events, blogs are now a principal method by which many lawyers provide general information about legal topics and new developments in the law to clients, prospective clients and members of the public. As such, they are a powerful marketing tool for attorneys.¹ The benefits of law blogs—or blawgs as they are often called—are many, including the ease with which they can be created and published; the broad exposure provided since they are readily accessible to the online community; and the ability to quickly update their content to address current issues, new judicial decisions and developing trends.

Blogs are particularly attractive to small firms with limited marketing budgets because they are less expensive than traditional forms of marketing. Niche practices can benefit as well, because they allow an attorney to promote his or her expertise in a particular area.² Their growing presence and influence in the legal field is demonstrated by the fact that blogs have been cited in judicial opinions,³ and are published by law professors and legal scholars as well.⁴ However, the growing popularity of blogs has likewise spawned an increasing number of legal and ethical issues that attorneys publishing them should keep in mind.

Law Blogs and Attorney Advertising

An issue of recent concern has been whether attorney blogs constitute advertising or client solicitation, making them subject to attorney advertising regulations.⁵ In New Jersey, this issue has not yet been decided by the courts, the Disciplinary Review Board or the Committee on Attorney Advertising. However, the experience in other states is instructive, particularly where attorney advertising regulations have recently been revised, and may provide guidance for the treatment of law blogs in New Jersey.

The question of whether law blogs should be regulated is controversial in light of conflicting views regarding their purpose. Under one view, they are essentially informative, and do not constitute advertising or solicitation in the traditional sense, as do ads in print media or on radio or television, and should be treated as protected speech. For example, blogs often discuss a

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legal issue within the particular expertise of the author or the practice area of the law firm, or analyze a new judicial decision or proposed legislation. As such, there is a strongly held view that they are not advertisements, but instead are more akin to journal or magazine articles and should not be regulated.

First Amendment rights also are implicated. When written as informative pieces, law blogs serve the public interest by educating consumers, and assist consumers in selecting an attorney by allowing them to assess the attorney's analytical and advocacy skills.⁶

Yet, law blogs may fit within the literal definition of an advertisement to the extent that it is defined broadly as any public or private communication made by or on behalf of a lawyer or law firm about that lawyer's or law firm's services, or may otherwise fall within the scope of ethics rules, particularly since many attorney regulations now cover electronic communications and the Internet.⁷ Even a blog that is purely informational, and enhances and promotes the credibility of the author, has the collateral effect of implicitly advertising the attorney's services, thereby soliciting clients. And the goal of advertising regulations—protection of consumers from misleading and unscrupulous advertising—is certainly laudable.

The dilemma presented by these competing considerations is of particular concern because attorney advertising rules obviously open the door to regulation of law blogs and subject the attorney or law firm to disciplinary action for non-compliance with the relevant rules. Additionally, the application of disciplinary requirements to law blogs may serve as a deterrent to their publication and use, thereby impairing the free flow of information to the public about legal issues of importance.

If advertising or client solicitation

rules apply, what are the implications? Some states require that copies of advertisements be retained by the attorney for a year or more,⁸ that they be filed with the body having jurisdiction over attorney advertising, and that a filing fee be paid with each such submittal.⁹ Under the advertising rules in New Jersey, RPC 7.2(b) requires that a copy of an advertisement or written communication be kept for three years after its dissemination, along with a record of when and where it was used. If a communication is unsolicited direct contact with a prospective client that has a pecuniary gain as a significant motive, RPC 7.3(b)(5) requires that the word "advertisement" be prominently displayed in capital letters on the first page of text, that a notice at the bottom of the last page of text state that the selection of an attorney is an important decision warranting careful thought, and that notification be included that if the communication is inaccurate or misleading, it should be reported to the Committee on Attorney Advertising. The ethical requirements of other states governing attorney advertising and client solicitation may not be of simple theoretical interest to New Jersey attorneys maintaining law blogs, because if blogging by an attorney practicing here is directed toward consumers in other states, compliance with the requirements of those states may be required.¹⁰

Because law blogs are a relatively new phenomenon, applicable ethical requirements are in an evolutionary stage. For example in Kentucky, it was initially believed that because of the broad definition of "advertise" ("furnish any information or communication containing a lawyer's name or other identifying information to make known a lawyer's services"), law blogs would need to comply with the requirements of the recently revised advertising rules by having a copy of the blog filed with the Advertis-

ing Commission and a filing fee of \$50 paid each time the attorney published something new on the blog.

Substantial criticisms of this procedure were raised by members of the Kentucky bar, including the point that such burdensome requirements would effectively preclude attorneys from publishing law blogs. A series of informal discussions with the Advertising Commission resulted in clarification through a "working policy" adopted by the commission.¹¹ Under this policy, law blogs are generally not considered advertisements unless they are soliciting clients. Provided the commission is satisfied that the law blog constitutes a legitimate exercise in journalism (in contrast to client solicitation and advertisement), an attorney is expected to obtain commission approval of only the "About" page or any other page of a law blog containing information about the lawyer under the same regulations that apply to a law firm website. Under these circumstances, and provided that a blog is not a website or solicitation, there is no need to submit each and every blog post to the commission, or pay the filing fee otherwise applicable to attorney advertisements.¹²

In New York, certain new lawyer advertising rules were adopted effective Feb. 2007. Under the proposed rules, the term "advertisement" was initially defined broadly to mean "any public communication made by or on behalf of a lawyer or law firm about a lawyer or law firm, or about a lawyer's or law firm's services." All such communications "disseminated through the use of a computer" were required to be filed with the Appellate Division and retained by the attorney for one year.

Objections were raised that the proposed definition was overbroad, with concern that this would require lawyers to treat any communication on legal issues, even law review articles or emails

to other attorneys, as an advertisement.¹³ The rules, when adopted, added the following modifying language to the definition: "the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers."¹⁴

Although there has not yet been any ruling on this issue, some practitioners have taken comfort in the belief that many law blogs are not advertisements under this definition because their primary purpose is often not to secure the retention of a lawyer or law firm.

The issue has not yet been formally addressed in New Jersey by the courts or by the Committee on Attorney Advertising, although the committee anticipates appointing a subcommittee shortly to study the issue. However, upon informal inquiry, the committee has suggested that it will address blogs by attorneys on a case-by-case basis, focusing upon the primary purpose of the blog. If the primary purpose is solicitation (suggesting that the client contact the attorney, even if by multiple links to the attorney contact information), rather than generally providing a discussion of the law, the committee has suggested that the advertising rules will apply, as noted below.

In a response provided in June 2007 to an informal inquiry by a member of the bar asking about the applicability of attorney advertising rules to law blogs, the committee stated that where an attorney blog is interactive, enabling the public to contact the attorney through the blog, and the purpose is to obtain professional representation, there must be compliance with the advertising rules set forth in the Rules of Professional Conduct. Additionally, the committee referenced the notice to the bar published in Nov. 2005,¹⁵ advising that when a form of personal contact with a prospective client for the purpose of obtaining professional employment, email advertising through the Internet

must comply with the advertising rules set forth in RPC 7.3(b)(5) and Attorney Advertising Guidelines 1 and 2.¹⁶

This preliminary view of law blogs is consistent with the committee's prior formal opinion addressing the publication of a law-related column in a local newspaper that also included information about the attorney's law firm, its practice and philosophy, and its telephone number. The committee found that the inclusion of this contact information converted the column into an advertisement.¹⁷

A formal opinion by the committee on the issue of law blogs in New Jersey would be welcome in order to provide necessary guidance to assist attorneys in avoiding potential violation of the disciplinary rules governing advertising and client solicitation. In that regard, the committee may wish to consider avoiding burdensome requirements that would deter blogging and the dynamic, interactive form of communication that it fosters, particularly since attorneys are already bound by the duty to avoid false or misleading communications under existing ethics rules. For attorneys who seek specific guidance while the advertising committee is studying the issue, a request for an advisory opinion might provide interim assistance.

A related question is the issue of the effectiveness of a disclaimer in a law blog stating that the blog should not be construed as offering legal advice, and that posts/emails sent to the author will not create an attorney-client relationship. These are common disclaimers contained in law blogs. Some guidance on this question has already been provided in New Jersey by the Committee on Advertising in a prior opinion in another, but related, context cited in the response to the informal inquiry on law blogs referenced above.

Addressing the use of a 900 telephone number through which a consumer may consult with an attorney regarding a spe-

cific legal problem, the committee explained that an attorney-client relationship may arise simply from the conduct of the parties in the absence of execution of a retainer agreement. Despite the disclaimer read to the caller to the 900 number stating that only broad answers to questions of a general nature would be provided, the committee observed that consumers would not call if they did not have specific problems for which they sought advice and intended to rely upon. This, together with the fact that the consumer paid a fee for the call, caused the committee to state that consumers will have every reason to believe that an attorney-client relationship will exist, the same conclusion reached by the committee.¹⁸

Despite this opinion, publishers of law blogs would be wise to indicate, by disclaimer on the blog, that specific legal advice is not being provided, and that there is no intention to create an attorney-client relationship through communications on the blog.

Law Blogs and Malpractice Insurance Coverage

Another issue of concern to those publishing blogs is malpractice insurance coverage. Whether a blog is informational or constitutes advice to potential clients has implications beyond the need to comply with regulations governing attorney advertisements, extending into the area of malpractice insurance coverage.

In New Jersey, this is illustrated by the controversy triggered in early 2007 by the Chubb Group of Insurance Companies, one of the largest carriers of lawyers' professional liability insurance. Initially, upon learning of a law blog proposed by a New Jersey firm, Chubb declined to provide coverage, stating that "this is not a risk they are interested in undertaking."¹⁹ Shortly thereafter, Chubb modified its position, stating that it would insure this new form of com-

munication "within select parameters."

Chubb distinguished between what it described as an "informational blog," that presents information or provides a forum for the discussion of issues in a neutral way, and an "advisory blog," by which a law firm offers advice, for example through a question and answer format, and often being interactive, potentially establishing attorney-client relationships that can lead to malpractice suits. Although Chubb stated that its underwriters would evaluate each submission on its own merits, Chubb suggested that it may not provide coverage on what it deemed to be an "advisory blog," which, by its nature, increases the risk of a malpractice lawsuit against the firm.

Referencing the risks presented by advisory blogs, Chubb noted it is often difficult to perform conflict checks, and that comments/questions are posed by consumers in states where the attorney may not be licensed to practice. In contrast, Chubb noted that informational blogs, which it defined as a forum for discussion of issues in a neutral unbiased way, "pose a minimal level of risk from Chubb's underwriting perspective."²⁰

The line between the two types of blogs Chubb sought to delineate may not always be clear, since *information* can readily be construed as *advice*, and a law firm's perception of how its law blog may be construed may not necessarily be shared by its malpractice carrier. Consequently, the implied advice resulting from Chubb's position is the obvious one—that a lawyer first check with his or her malpractice carrier regarding the blog to be published to determine whether it will imperil the malpractice coverage provided, result in any limitations on coverage, or result in higher premium rates. For this reason as well, the use of a disclaimer in the blog stating that it does not offer legal advice is advisable.

The Risk of Lawsuits Arising From Law Blogs

Although there have been few reported lawsuits against attorneys or law firms arising from the publication of a law blog, attorneys should obviously be sensitive to the potential for such claims, including the most predictable claim—that of defamation—based upon the content of the law blog. Indeed, the Rule of Professional Conduct in New Jersey prohibit the inclusion of misleading information in an advertisement or written communication.²¹

However, suits based upon law blogs can extend beyond claims of defamation. For example, in *Genesis Healthcare Corp. v. McHugh Fuller Law Group*, Genesis asserted claims of trademark infringement and dilution, false advertising and unfair competition against a personal injury law firm that had published a discussion of nursing home abuse on its web page containing certain negative comments about Genesis and including the Genesis trademark and logo.²² The claim was based on statements in the law blog that nursing home abuse is a serious problem, that nursing homes often violate the rights of residents, and that the potential for neglect grows because nursing homes are frequently understaffed. The blog also criticized the care provided by several nursing homes owned by Genesis. The last paragraph urged readers to call the law firm immediately if they observed certain physical conditions or injuries in nursing home residents. The law firm denied the allegations of the complaint, asserting that it constituted censorship that violated the firm's rights of comment and criticism serving the public interest.

In another case, a law firm seeking to solicit clients published a notice on its website stating that it was investigating conditions it contended were caused by defectively manufactured screws and fasteners produced by a certain named company. The company filed suit against the

law firm, asserting claims for defamation, trade libel, tortious interference with business relationships and violation of the Tennessee Consumer Protection Act.²³

Risks other than lawsuits also arise from attorney blogs. A temporary prosecutor in San Francisco, in his personal blog, wrote about his adversary in unflattering terms, which then triggered a reprimand by the judge before whom they were trying a matter. The judge stated that he found the comments to be "juvenile, obnoxious and unprofessional," stating his intent to send the matter to the state bar.²⁴ Statements on a law firm's blog also can constitute admissions in a lawsuit against the firm or its attorneys.²⁵

Conclusion

In light of these legal and ethical issues, a law blog should no longer be viewed as a simple online diary or discussion piece. The adoption of specific policies and guidelines governing the content and publication of blogs should be considered by a law firm. First and foremost, the law firm should determine whether state ethics rules exist, including regulations governing attorney advertising, that could be construed as being applicable to a law blog. Other matters should be addressed, such as who at the firm is authorized to post content on the blog; whether content must first be reviewed and approved internally and, if so, by whom; sensitivity to protecting confidentiality of firm clients by not revealing identifying information directly or by reference in discussing legal issues or cases; and the avoidance of defamatory remarks or trademark/copyright infringement.

The use of blogs will continue and likely increase; the same may be true of attorney regulations. Both blogs and attorney regulations should remain sensitive to the benefits each offer when properly utilized. Most importantly, attorneys should continuously remain aware of the bene-

