

Livin' la vida blawga and staying within ethical bounds

Free speech issues pop up regarding legal blogs

TAMI KAMIN-MEYER

Lawyer/bloggers beware: The words you type today could be harmful to your legal career tomorrow.

At least they were to a South Florida lawyer, who, in mid-June, agreed to a public reprimand for comments he blogged about a local judge in October, 2006. In his post on www.jaablog.jaablaw.com, Sean Conway called the judge an "evil, unfair witch." Conway ignored his lawyer's advice to defend his First Amendment rights by opting for the public reprimand. If he would have been found guilty of the various charges leveled against him by the Florida Bar, including impugning a judge's qualifications, Conway's punishment could have included disbarment.

Although not referring specifically to the Conway situation, a leading legal ethicist from Los Angeles says lawyers should not lose the privilege of free speech when they become attorneys.

"Just because you're a lawyer does not mean you give away your right of free speech," says Diane Karpman, head of Karpman and Associates. However, she adds, "What lawyers say is usually commercial speech and states are allowed to enact reasonable limitations" on that.

So, do you still wanna' blog on?

Steering clear of potential liability

"I won't allow any comments [on my blog] I think are libelous or that advertises other sites. I don't edit comments but if I think it's defamatory or advertising something, it comes down," says J. Craig Williams, a partner with the Newport Beach law firm of WLF | The Williams Lindberg. Williams, who focuses his practice on business litigation, has been blogging on an award-winning blog for several years. Those posts led Kaplan Publishing to contact him about penning the recently released book, How to Get Sued.

Surf the web to find these lawyer blogs:
Denise Howell: www.bagandbaggage.com
Kimberly A. Kralowec:www.uclpractitioner.com
Jeff Lewis: www.blog.jefflewislaw.com
J. Craig Williams: www.mayitpleasethecourt.com


Williams

One of the ways Williams says he steers clear of potential liability for what he posts on www.mayitpleasethecourt.com is writing about topics relating to the federal system. "I'm entitled to write about that," he says, since those laws are national in nature. If he writes something related to laws of a state, he sticks to those four in which he is licensed. Says Williams, "I don't want another bar association to be concerned I'm practicing law in a state where I'm not licensed."

Still, with the Internet being a global communication tool, rather than one accessible in limited areas, can a blogging lawyer truly limit his or her liability?

Denise Howell, a Newport Beach solo practitioner and a longtime legal blogger credited with coining the term *blawg* in 2002, says standard blogging ethics should not only apply to lawyers. However, she notes, because the practice of law is intrinsically linked with privacy and client confidentiality, blogging lawyers would be wise to adhere to a standard of conduct befitting those responsibilities.

"Lawyers owe the duty of confidentiality to their clients, including work product. They should be careful and not slip," she cautions.

Howell also says bloggers should remember their posts "live in perpetuity and are reachable by a potentially global audience."

Another ethical consideration for attorneys is being careful not to reveal too many specifics about courtroom activities in their blogs. Although courthouse events might make for interesting blog fodder, lawyers should be careful to put their duties to their clients before their own desire to create captivating copy. "Just because you have a blog doesn't mean you have to use it in all instances," says Howell.

Another ethical consideration for Golden State lawyer/bloggers is that the state's Rules of Professional Conduct decree that attorneys must retain true copies of any communication made by written or electronic media for two years following its publication. Although Howell says she knows of no specific cases related to Section 1-400 (F), it does require "increased record keeping" for California lawyer/bloggers.

Is blogging tantamount to advertising?

The jury's still out about whether blogging can be construed as a form of attorney advertising.

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Karpman says that "well-settled principles of ethical obligations are that anything lawyers put their name on is a solicitation." Karpman, who represents lawyers facing disciplinary actions, says, "Whatever you put your name on is a way of looking for work." However, in an interesting paradox, Karpman humorously notes that she "does not look for human being as clients; they're all lawyers."

Section 1-400 of the State of California's Rules of Professional Conduct, which focuses on attorney advertising and solicitations, states that lawyer solicitation occurs using "any communication." Karpman interprets that rule to mean that in California, "Anything a lawyer puts their name on is a communication, so it falls under the advertising rules."

Jeff Lewis, a solo practitioner in Palos Verdes Peninsula who also blogs, says he doesn't necessarily agree that California's rules about lawyer advertising are that cut and dried. Calling the matter "an open question," Lewis says eventually that the issue will need to be resolved.


Lewis

Williams, on the other hand, was emphatic that even when written by an attorney, true blogging is not equivalent to the advertisement of one's legal services. "If a blog is advertising, then it does not fit the definition of a blog," he says. "A blog," explains Williams, "doesn't come near lawyer advertising. A blog is like a more frequent version of writing a journal. I don't think my blog is advertising my law practice."

Interestingly, nearly all complaints filed against lawyers for their advertising techniques are leveled by other attorneys disgruntled by what they perceive as client *poaching*. In fact, the figure approaches 99 percent, says Karpman, adding that states, including California, are "woefully inadequate in prosecuting advertising violations."

Read my blog: I am not your lawyer

Is it possible that an attorney-client relationship is established merely by readers surfing to a lawyer's blog?

While Lewis says including a succinct disclaimer on the blog stating that no attorney-client relationship is created just by a reader perusing the lawyer's blog, he says such a disclaimer can raise a problem of a different ilk for the attorney. If lawyers are sued for information they've posted on their blog, but the blog includes a disclaimer that a professional relationship does not exist between the lawyer and the reader, attorneys may not be able to use their malpractice insurance to help defend the claim.

Still, he says, it would be a "tough argument under most circumstances" for a reader to claim an attorney-relationship existed merely because he or she read the lawyer's blog.

However, Lewis says a caveat exists in that situation, too. If a lawyer's blog post invites reader responses or includes a contact form, then "you're inviting it, so it's more murky if a relationship is being solicited."

Williams, on the other hand, is emphatic that a professional relationship is not being established between the lawyer/blogger and the reader. "No one's coming to me asking me for legal advice merely by reading [my] blog," he says. To illustrate his point, Williams likens the scenario to the fact that if someone reads an article written by a doctor in the New England Journal of Medicine, a physician-patient relationship is not created.

Kimberly A. Kralowec, a partner in the San Francisco firm of Schubert Jonckheer Kolbe & Kralowec, and a longtime legal blogger, agrees with Williams. She says only after a client contacts a lawyer does the potential for the professional relationship exist. "Regardless of what you say in your blog, no attorney-client relationship is created under the California Rules of Ethics," she says.


Kralowec

Kralowec's blog features a disclaimer that whatever she posts is not to be construed as legal advice. She says that while such disclaimers are "prudent," she also does not believe that the lack of such a statement inherently creates an attorney-client relationship between the blogger and the reader.

Tami Kamin-Meyer is an Ohio attorney also licensed in the federal and U.S. Supreme Courts. She is an oft-published freelance writer whose byline has appeared in Ohio Lawyers Weekly, Ohio Super Lawyers, Ohio Magazine, Cleveland Magazine, GC Mid-Atlantic, Utah CEO, The Rotarian and Registered Rep. She is the author of a study guide about filing personal bankruptcy, published by a division of Barnes and Noble in 2007 and is the Ohio correspondent for www.legalnewsline.com, where her beat includes the Ohio Attorney General and the Supreme Court of Ohio.

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