

PROFESSIONAL LIABILITY

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IN THIS ISSUE

The authors explore attorneys' potential professional liability for blogging.

Professional Liability and the Blogosphere: Perils of a 21st Century Digital Lawyer

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ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves: (1) to update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership and the insurance industry.

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Hypothetical

Imagine you are sitting in your office, reading the December 2008 issue of the ABA Journal Magazine. As you flip through the article entitled “Best of the Blogosphere,” your phone rings. It is your college roommate’s son and fellow Bar member, Peter. Peter is a fifth year associate at a mid-sized firm, handling a variety of cases with a personal injury focus. He tells you he has been served with a Summons and Complaint alleging legal malpractice arising out of his postings to a legal blog he maintains on his personal time, titled “Man v. Law.”¹ Peter explains “Man v. Law” touts itself as “Dedicated to Injury Victims” and is primarily used as a medium in which he can inform the public about new and developing legal issues in the region. He notes that the blog has an interactive component that is sometimes used by visitors of the site and him to exchange ideas, opinions, and to debate issues, such as the merits of tort reform, for example. He provides his contact information with the firm, including his e-mail address, with the intent that visitors contact him or the firm for professional advice if needed. He also uses the firm’s logo, but only to identify his employer in his bio information on the site.

In this case, Peter tells you Plaintiff visited “Man v. Law” and posted a response to one of his entries. Plaintiff made several general comments concerning the entry, but also described an accident she had a couple years earlier and inquired whether she could seek any recourse. Peter responded to Plaintiff’s posting, stating that she might have a claim, but additional information was needed. He then directed her to several of his archived posts regarding the subject matter of her inquiry. Peter tells you that he never considered he was offering legal advice and thought that a disclaimer at the bottom of the home page to his blog made that clear. That disclaimer reads:

This Blog/Web Site is made available by the lawyer or law firm publisher for educational purposes only as well as to give you general information and a general understanding of the law, not to provide specific legal advice. By using this blog site you understand that there is no attorney client relationship between you and the Blog/Web Site publisher. The Blog/Web Site should not be used as a substitute for competent legal advice from a licensed professional attorney in your state.

Peter did not hear from Plaintiff again, until receiving the suit papers. The Complaint alleges that Peter committed legal malpractice by failing to advise Plaintiff of the statute of limitations applicable to the underlying claims in which she sought advice. Peter wants you to represent him. Although the firm Peter works for is not named as a defendant, he is concerned Plaintiff may add the firm as a defendant, which might not be good for his continued employment. He believes Plaintiff will soon realize the firm has much deeper pockets than his. He asks you what liability, if any, the firm may have based upon his blog. Although the firm does not have a policy concerning blogs and does not try to control the content of his blog, Peter has occasionally sought feedback from some of the partners in the firm, who have been encouraging. He would hate for this lawsuit to cause them any trouble. Because you love a challenge, you agree to defend him and analyze the potential liability of the firm.

¹ The facts discussed herein are fictional and hypothetical; any similarity to real persons, events or websites is accidental.

What is a Blog?

A blog, short for “Web log,” is defined as a Web site, commonly displaying entries of commentary or other materials in reverse-chronological order, usually maintained by an individual. Wikipedia, Blog, <http://en.wikipedia.org/wiki/Blog> (last visited March 2, 2009). There has been enormous growth in the number of blogs, including those maintained by professionals, such as attorneys. The ABA has recently announced its 2nd Annual “Blawg 100,” listing its top 100 legal blogs for the year, and offers descriptions and links to more than 2,000 law-related blogs on its website. See ABA Journal, Blawg Directory, <http://www.abajournal.com/blawgs> (last visited Dec. 15, 2008). While blogs may be a relatively new phenomenon, they are becoming increasingly legitimized and significant. Legal blogs provide an easy means to distribute information quickly – whether informing current clients, attracting potential clients, or marketing legal services. See Renée Mancino, *The 411 On Digital Marketing, The Internet and Beyond*, Nev. Lawyer, Oct. 2008, at 6 (“[B]logs are great marketing tools and a great way to get up-to-date legal information.”). To be successful, blog posts should be “current, informative, and insightful.” Thomas J. Watson, *Blogging in Today’s Electronic Age*, 80 Wisc. Lawyer, Dec. 2007, at 29 (discussing both the benefits of additional Internet presence and some of the risks associated with legal blogs).

With the rise of blogs, however, also come new risks and potential liabilities. Already, there have been a number of lawsuits concerning issues of defamation, copyright, securities, etc. in the realms of the blogosphere. See Media Law Resource Center, Legal Actions Against Bloggers, <http://www.medialaw.org/bloggerlawsuits> (last updated Dec. 11, 2008) (cataloging legal cases in the United States in which bloggers have been sued civilly, or been subject to criminal investigations or prosecutions). Blogs are often interactive, such as Peter’s, allowing posts/comments by third parties. Therefore, the Internet has placed many attorneys in the difficult position of deciding not only to what extent to correspond with third parties on blogs, but whether to correspond at all in that medium. Although allowing posts is not required and prohibiting such posts would help reduce exposure to legal liability, losing the interactive component can have practical downsides. See Lawrence Savell, *Is Your Blog Exposing You to Legal Liability?*, Law.com (Dec. 22, 2006).

This article explores what factors to consider in determining whether an attorney’s blog gives rise to possible liability for claims of malpractice against the attorney or his firm. Because communication between attorneys and potential clients through posts on blogs raises new legal questions surrounding the existence of an attorney-client relationship, this issue is discussed in some detail. This article also considers what factors may determine whether a law firm might be exposed to malpractice for personal blogs its lawyers maintain and whether a lawyer might have coverage through the firm’s insurance policy.

Was an Attorney-Client Relationship Created?

Certainly, the existence of an attorney-client relationship depends on the pertinent jurisdiction’s substantive law. Most states’ laws are similar to South Carolina’s law that liability for malpractice may be imposed on an attorney whenever he has failed to possess or exercise “the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the legal profession.” *Holy Loch Distrib., Inc. v. Hitchcock*, 531 S.E.2d 282, 285 (S.C. 2000).² The key threshold issue in almost any case of alleged malpractice against an attorney relating to a legal blog will be whether an actual attorney-client relationship

² The authors of this article practice in South Carolina, and therefore, South Carolina authority is cited herein where authority on point exists. This article is intended for informational use only. When handling any case, the common and statutory law of the respective jurisdiction should be considered.

ever existed. See *Am. Fed. Bank, FSB v. Number One Main Joint Venture*, 467 S.E.2d 439, 442 (S.C. 1996) (“Before a claim for [legal] malpractice may be asserted, there must exist an attorney-client relationship.”); see also 7 Am. Jur. 2d *Attorneys at Law* §§ 201 and 234 (2008) (recognizing existence of attorney-client relationship is a prerequisite to a legal malpractice claim, with limited exceptions). Under South Carolina law, the attorney-client relationship is created when the attorney “undertakes to perform a particular legal service for the client” who seeks legal advice with “the view of employing the attorney professionally” by “communicating in confidence with [the] attorney for the purpose of obtaining such advice.” See 1 S.C. Jur. *Attorney and Client* § 18 (2008). The Restatement provides that an attorney-client relationship arises when “a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either: (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.” Restatement (Third) of The Law Governing Lawyers § 14(1)(a)-(b) (2000).

Currently, there is no direct authority governing a claim of malpractice of this type that is based upon “advice” provided through a lawyer’s blog. Certainly, each case will present unique circumstances and will be analyzed in light of its facts. Until there is authority directly on point, the analysis of the attorney-client relationship in the electronic age is “one of new wine in old bottles.” See Douglas K. Schnell, *Don’t Just Hit Send: Unsolicited E-mail and the Attorney-Client Relationship*, 17 Harv. J.L. & Tech. 533, 536 (2004).

Did Plaintiff manifest reasonable intent to seek professional legal advice or services?

An interactive legal blog is inherently susceptible to risks that participants, such as Plaintiff, pose questions to an attorney concerning a specific legal difficulty. See Joel Michael Schwarz, *Practicing Law Over the Internet: Sometimes Practice Doesn’t Make Perfect*, 14 Harv. J.L. & Tech. 657, 675 (2001) (recognizing this risk in the context of online chat rooms). Plaintiff alleges she communicated with Peter and posed a question with the specific intent of seeking his legal advice. Peter may have arguments, however, that Plaintiff did not have sufficient or reasonable intent to justify her expectation that an attorney-client relationship had been formed.

In South Carolina, “[a] person attains the status of a ‘client’ when that person seeks legal advice by *communicating in confidence* with an attorney for the purpose of obtaining such advice.” *Marshall v. Marshall*, 320 S.E.2d 44, 47 (S.C. App. 1984) (emphasis added). Discussion of this requirement in South Carolina cases is primarily limited to its application to the attorney-client privilege. It has not yet been interpreted to bar the creation of an attorney-client relationship on the sole basis that the communication occurred in an open, non-confidential setting, such as a blog. However, that Plaintiff could have no expectation of confidentiality in communicating with Peter via his blog may, nonetheless, be a reasonable defense in South Carolina and other jurisdictions because it suggests blog postings are more casual than typical consultations between a lawyer and prospective client. See 48 Am. Jur. Proof of Facts 2d 525 at § 9 (2008) (discussing there can be no attorney-client relationship “where the consulting party engages the attorney in what amounts to a casual or incidental discussion of a legal matter, without any real and present intent to employ the attorney to work on the matter professionally”).³

³ If specific advice is given by the attorney, however, an attorney-client relationship may be formed even if there was no expectation of confidentiality initially. The consequences of what type of information or advice that is given by the attorney is discussed below.

The objective reasonableness of the request for legal advice or services should also be considered. See Model Rules of Prof'l Conduct R. 1.18 § a, cmt. 2 (2002) (“[I]nformation communicated unilaterally by a client without a reasonable expectation that the lawyer is willing to enter an attorney-client relationship does not, by itself, give rise to a prospective client relationship.”); see e.g., *Knigge v. Corvese*, 2001 WL 830669, at *4 (S.D.N.Y. July 23, 2001) (holding it was unreasonable for a “client” to believe that an attorney-client relationship existed or was created through his unilateral decision to leave voice mail messages with an attorney requesting advice that went unreturned). “The client cannot unilaterally impose the relationship upon the attorney.” 1 S.C. Jur. *Attorney and Client* § 18 (2008). Therefore, it might be unreasonable to believe an attorney-client relationship is created by soliciting legal advice through a posting on a blog. Where the blog’s publisher responds, however, as Peter did, the “client” has a stronger argument the request was reasonable than the unreturned voicemails discussed in *Knigge*.

Does a disclaimer bar creation of an attorney-client relationship?

The subjective nature of the “intent” requirement and uncertainty surrounding blog liability makes it important to examine the affirmative measures Peter had in place as protection. A disclaimer should always be used to state, in part, the content of the blog is for *informational use only*, that it *is not legal advice and does not create an attorney-client relationship*. See Steven A. Meyerowitz, *The Wild World of the Web*, Pa. Lawyer, Dec. 2008, at 32 (recognizing it is “crucial” that any lawyer’s outside blog contain a disclaimer); Watson, *supra* at 30 (“Bloggers and technology experts all agree that a disclaimer statement on a law firm blog is essential.”). In addition, the disclaimer should state the following: (1) it may not reflect the most current legal developments; (2) it is not a solicitation; (3) it reflects the blogger’s own opinions and not necessarily the opinions of the blogger’s law firm or its clients; (4) that readers should contact an attorney if legal advice is required; and if applicable, (5) that the blog is the individual’s and not the law firm’s blog. See Meyerowitz, *supra* at 32. Peter’s disclaimer, at least, states the blog is not intended to constitute legal advice and no attorney-client relationship arises from the use of the blog.

The mere presence of a disclaimer, however, does not guarantee protection from liability. See Savell, *supra* (noting that disclaimers provide greater protection, but are not “ironclad”). “[E]ven the use of disclaimers might be futile if the subjective belief of the recipient is that the advice was offered specifically for his situation” Schwarz, *supra* at 674-677. Therefore, the content and the placement and prominence of the disclaimer should be examined.

The ABA has approved a set of best practice guidelines, stating “[w]hen a site provides only legal information, the provider should give users conspicuous notice that legal information does not constitute legal advice.” American Bar Association, LPM eLawyering Task Force, *Best Practice Guidelines for Legal Information Web Site Providers*, at <http://www.elawyering.org/tool/practices.shtml> (Feb. 10, 2003) (setting forth ten recommended guidelines).⁴ Peter’s disclaimer warns users of his blog that the information provided does not constitute legal advice and that an attorney-client relationship does not exist. The effectiveness of the disclaimer, however, may depend on more than just the substance of it. See Margaret Hensler Nicholls, *A Quagmire of Internet Ethics Law and the ABA Guidelines for Legal Website Providers*, 18 Geo. J. Legal Ethics 1021, 1034 (Summer 2005) (“[T]he advantages of disclaimers in reducing misleading information can only be realized if consumers actually read the disclaimers.”). Peter’s only disclaimer is located at the bottom of the blog, so that a reader would have to scroll through all of the prior posts in reverse-

⁴ The ABA’s Best Practice Guidelines are a good source for lawyers who offer legal information, documents and other services to the public. However, the Guidelines do not address websites providing legal advice. For examples of language that can be used in disclaimers, see Savell, *supra* at <http://www.law.com/jsp/llf/PubArticle.jsp?id=900005470020>.

chronological order to view the disclaimer. Plaintiff can, therefore, reasonably argue that she was never aware of the language in disclaimer. *See Schnell, supra* at 558 (noting there are problems with online disclaimers that can easily go unread because they are easily missed or purposely avoided).

Moreover, a standard disclaimer in a circumstance such as Peter's may not be effective because of the specific nature of the question posed by Plaintiff and the response given. There still may be some question here as to whether Peter's response was really "advice," but "[a] detailed response from an attorney could reasonably create an impression in the mind of a putative client that the attorney has both consented to a relationship and has provided competent, informed advice," regardless of a disclaimer to the contrary. *Id.* ("This is a much different scenario from a client sitting across from an attorney who verbally disclaims any duties or requires the client to read and sign a disclaimer of certain duties before giving any advice."); *see also* Ass'n of Bar of the City of New York, Comm. on Prof'l Ethics, Opinion 1998-2 (opining that a disclaimer may not serve to shield a law firm from a claim that an attorney-client relationship was in fact established by reason of specific online communications).

Did Peter give, or promise to give, the requested legal advice or services?

An attorney-client relationship is created when the attorney "undertakes to perform" legal services, which may be implied from the attorney's conduct. *See* 1 S.C. Jur. *Attorney and Client* §§ 18, 19 and 21 (2008). "In some instances, a prospective client may reasonably rely on the attorney's lack of communication" if the attorney's rejection is not communicated to the client. *Id.* at § 21; *see also* Restatement (Third) of The Law Governing Lawyers § 14(1)(a)-(b) (2000) (recognizing attorney-client relationship can be formed if the lawyer fails to manifest lack of consent to advise the client and the lawyer knows or reasonably should know that client reasonably relies on the lawyer to provide the services).

The question likely turns on whether Peter simply provided general legal information without giving personalized advice. In a similar setting, concerning the propriety of advice on radio call-in shows and telephone call-in lines, various ethics opinions have "[a]lmost uniformly . . . approved the giving of *general* legal guidance and information, while prohibiting specific, targeted advice to individual persons. *See Schwarz, supra* at 674-677. The South Carolina Bar opined in an ethics opinion that participation on general discussions on legal topics via electronic media is permissible to the extent the attorney avoids the "giving of advice or the representation of any particular client." S.C. Ethics Advisory Op. 94-27 (1994).

Therefore, it should be considered whether Peter's referral of Plaintiff to further information on the "Man v. Law" blog constitutes legal advice. One risk management professional has acknowledged that "it could be argued that referring a client to information posted on your blog post could be construed as providing 'advice' from the blog." Watson, *supra* at 31. Because Plaintiff posed a specific and personal legal question, almost any response by Peter that does not explicitly disclaim the creation of an attorney-client relationship and limited nature of the information provided runs a substantial risk of being "advisory." *See Schnell, supra* at 543 ("[I]f the lawyer is responding to a specific question or offering advice on specific facts, she is much closer to an implied attorney-client relationship because of the potential for reasonable reliance than if she is just answering a general question about the law."); Shari Claire Lewis and Dylan Braverman, *Unauthorized Practice of Law in the Cyber Age*, DRI For the Defense, Oct. 2007, at 28 ("[T]he extent to which specific questions are addressed by the lawyer instead of provisions of general topical information to the public at large is the gravamen of the analysis no matter what form of electronic media is used.").

Is the Law Firm Exposed to Liability for Peter's Blog?

Although Peter's firm was not named as a defendant, Peter is concerned that his blog may have unintentionally exposed his firm to possible liability. Standard principles of agency law make any law firm susceptible to liability for the actions of employees within the scope of their employment. See Restatement (Third) of Agency § 7.07 (2006).⁵ Several factors should be taken into account when evaluating whether Peter was "acting within the scope of his employment." The firm may be protected in that Peter maintained the blog on his own personal time, it was not part of his assigned work, and the firm did not exercise any control over the content or format of the blog. See *id.* at cmt. b and c; Deborah A. Kane and David J. Rosenberg, *Employment and the Blogosphere: Risks for Employer in the New Communication Era*, IADC Employment Law Committee Newsletter, Jan. 2008, at 3 (noting employer's policies should state that employees are not to post to personal blogs during working hours or by using company equipment, etc.). Peter's use of the firm logo, posting his firm e-mail address, and his intent to use the blog to generate business for the firm, however, may pose significant risks that he was acting in his professional capacity as an associate with the firm when posting on the blog.

Moreover, as discussed above, the blog should contain a conspicuous disclaimer that indicates the blog is that of the individual and not of the law firm, and that it does not necessarily reflect the views or opinions of the firm. See Meyerowitz, *supra* at 32. The disclaimer on Peter's blog fails to explicitly indicate that the firm does not control the blog. In addition, the law firm should have a well-written policy concerning blogs that is communicated to all attorneys. *Id.* (discussing firm training, monitoring and communication as additional protective measures a firm can use to address blogging on the front end); see also Kane and Rosenberg, *supra* at 3; Patrick Robben, *Welcome to the Blogosphere: A Primer for Business Lawyers*, ABA Bus. L. Today, May/June 2006, available at <http://www.abanet.org/buslaw/blt/2006-05-06/robben.shtml> (last visited Dec. 15, 2008) (discussing company policies regarding blogging). Peter's firm did not have a policy in place. Rather, partners at the firm were aware of the blog and had, in fact, "been encouraging" of Peter's efforts. Although more investigation might be necessary to provide Peter a fully informed opinion, there are facts that might suggest the firm has potential liability.

Does Peter Have Insurance Coverage Under the Firm's Policy?

Another issue that may need to be addressed with Peter is whether claims arising out of his publishing a blog are covered by the malpractice insurance purchased by his firm. There has been some writing on this subject, but issues are far from resolved. Certainly, these issues need to be addressed with the attorney's respective insurer in light of the terms and conditions of his or her policy. However, some insurers may draw a similar distinction to that discussed above between blogs providing general legal information versus personalized advice. See Christine D. Petruzzell, *Don't Go Blindly Into That Law Blog*, N.J. Lawyer, Feb. 2008, at 82-83 (discussing major malpractice insurance carrier that has distinguished between "informational blogs" and "advisory blogs," and "suggested that it may not provide coverage on what it deemed to be an 'advisory blog'"); Watson, *supra* at 31 (discussing the distinction between informational blogs and advisory blogs, and one underwriter's approach to handle the coverage issue on a firm-by-firm basis).

⁵ For an interesting discussion of employee/employer agency principles in the context of blogging, see Samuel A. Terilli, Paul D. Driscoll, & Don W. Stacks, *Business Blogging In the Fog of Law: Traditional Agency Liability Principles and Less-Than-Traditional Section 230 Immunity in the Context of Blogs About Businesses*, Pub. Relations J., Vol. 2, No. 2 (Spring 2008), available at <http://www.prsa.org/prjournal/Vol2No2/TerilliDriscollStacks.pdf> (last visited Dec. 15, 2008).

Peter, as most blog owners would, will likely contend that neither his blog nor any postings he wrote were intended to “advise” Plaintiff, or any other person. Rather, the blog’s purpose is to offer insightful commentary on current legal issues or points of interest. While Peter likely has a good argument his blog was intended to be “informational,” there may be an issue whether his interaction with Plaintiff transformed it to an “advisory” blog, so that the insurer could deny coverage. Moreover, because this was a personal blog and not published by the firm, there is the additional issue of whether the firm’s policy would extend to him anyway. See P. Blake Keating, *Avoiding Blog Liability*, Media Insights, Jan. 2007, available at http://www.firstmediainc.com/insights/minsights_iss11.pdf (last visited Dec. 15, 2008) (stating that First Media’s policies do not provide coverage for blog sites of employees that are not “sponsored” by the employer). Many of the same factors discussed above that are relevant to whether the law firm can be held liable for Peter’s blog may be relevant to the analysis of whether he has insurance coverage. Accordingly, Peter should be made aware of the potential that actions taken via his blog are not covered under the firm’s policy. However, it remains to be seen how the issue of malpractice insurance coverage will be handled in these cases.

Conclusion

The popularity of the Internet and of blogs, in particular, creates more opportunities for lawyers in the 21st century. It also increases the demands lawyers face regularly in protecting themselves from liability risks. Precedent dictates that an attorney-client relationship may be established in the absence of face-to-face contact. Now, we must recognize the possibility that courts may decide that an attorney-client relationship exists where a prospective “client” corresponds with an attorney on a legal blog. Therefore, we should be prepared to take on these new legal questions and issues when the telephone rings, and a lawyer like Peter needs our help.



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