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The Ethics of Blawging: A Genre Analysis

Judy Cornett

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*Judy M. Cornett**

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I. INTRODUCTION

Lawyers are blogging. As of October 16, 2009, the website Blawg.com tracked 2,788 legal blogs ("blawgs").[1] Another blawg directory compiled 4,622 blawgs in 69 substantive categories.[2] When lawyers communicate, by whatever medium, ethical dilemmas arise; when lawyers blog, ethical dilemmas arise that are unique to blogging. The most visible ethical debate inspired by this new genre is the issue of whether to treat a lawyer's blog as advertising.[3] Surprisingly, given the popularity of blawging, there are few resources addressing the full range of its ethical ramifications.[4]

This Article applies genre theory to blawging in order to highlight certain characteristics of the genre that can pose ethical temptations. This Article then discusses the potential ethical problems in terms of the Model Rules of Professional Conduct in order to determine whether certain blawg behavior could violate the Rules.[5] This Article draws upon empirical analysis of the *ABA Journal* Blawg 100,[6] hereafter referred to as "*ABA* 100," to quantify and illustrate these points.

In Part II, this Article defines the crucial terms and generally explains the phenomenon of blawging. In Part III, this Article introduces genre theory[7] and analyzes blawgs as a subgenre of blogs.[8] By doing so, in Part IV, this Article demonstrates that lawyers who blog have responded to the exigencies of the blog genre by creating a new subgenre, but this emerging subgenre gives rise to ethical temptations.[9] Finally, in Part V, this Article looks toward the future of blawging and suggests practical implications of this analysis.

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1. Blawg, http://www.blawg.com (last visited Oct. 16, 2009). Of this number, 1,485 are listed as "active." *Id.*

2. Justia Blog Search, http://blawgsearch.justia.com (last visited Oct. 16, 2009).

3. *See, e.g.*, Anthony Ciolli, *Are Blogs Commercial Speech?*, 58 S.C. L. REV. 725 (2007); Sarah Hale, *Lawyers at the Keyboard: Is Blogging Advertising and If So, How Should It Be Regulated?*, 20 GEO. J. LEGAL ETHICS 669 (2007); Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835 (2007); *see also* Christine D. Petruzzel, *Don't Go Blindly into That Law Blog*, N.J. LAW., Feb. 2008, at 80.

4. *See, e.g.*, Adrienne E. Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 RICH. J.L. & TECH. 5 (2007); Justin Krypel, *A New Frontier or Merely a New Medium? An Analysis of the Ethics of Blawgs*, 14 MICH. TELECOMM. & TECH. L. REV. 457 (2008).

5. This Article does not attempt to analyze the morality of blawg behavior.

6. Molly McDonough & Sara Randag, *ABA Journal Blawg 100*, 93 A.B.A. J. 30, 30 (2007).

7. *See infra* Part III.A.

8. *See infra* Parts III.B–C.

9. *See infra* Parts IV.A (discussing ethical issues related to authorship), IV.B (advertising), IV.C (client conflicts), IV.D (confidentiality), and IV.E (positional conflicts).

II. THE EMERGENCE OF BLAWGING

Ten years ago, one could find only a handful of blogs on the internet,[10] but today it is estimated that the number of blogs has grown into the tens of millions.[11] The topics covered by bloggers are immeasurably expansive, from the "Amish Community"[12] to "zephyrs."[13] The legal field and the issues and topics that it encompasses became popular within the blogging realm as the number of "blawgs" grew into the thousands by 2005.[14] This Part discusses how blawging emerged in the legal field.

My copy of the third edition of *The American Heritage Dictionary of the English Language*, published in 1992, the year I began teaching law full-time, contains no entry for "World Wide Web,"[15] nor does it contain entries for "web log"[16] or "blog."[17] The online dictionary, Dictionary.com, defines "World Wide Web" as "a system of interlinked hypertext documents: a branch of the Internet."[18]

For the definition of "Web log," Dictionary.com provides, "See blog."[19] Interestingly, "blog" is defined as both a noun ("web log") and a verb ("to write entries in, add material to, or maintain a weblog").[20]

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10. "Blog" is short for "web log." A "blawg" is a web log written by a lawyer or dealing with legal topics. The "web" is short for the World Wide Web.

11. *See* McDonough & Randag, *supra* note 6, at 30.

12. Amish Community, http://amishcommunity.blogspot.com (last visited July 24, 2009).

13. Zephyr (sail), http://zephyrsail.blogspot.com (last visited July 24, 2009).

14. Barbara Busharis, *A "Blawg" Might Be Just What You Need*, 26 TRIAL ADVOC. Q. 8, 8 (2007).

15. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2058 (3d ed. 1992) [hereinafter HERITAGE DICTIONARY] (showing no entry between "worldwide" and "worm").

16. *See id.* at 2024 (showing no entry between "web-footed" and "web member").

17. *See id.* at 204 (showing no entry between "Bloemfontein" and "Blois").

18. Dictionary.com, "World Wide Web" Definition, http://dictionary.reference.com/browse/world%20wide%20web (last visited Dec. 12, 2007). According to dictionary.com, the term originated 1990–1995. *Id.*

19. Dictionary.com, "Web Log" Definition, http://dictionary.reference.com/browse/web%20log (last visited Dec. 12, 2007).

20. Dictionary.com, "Blog" Definition, http://dictionary.reference.com/browse/blog (last visited Dec. 12, 2007). "Blog" is a noun but is also used as a verb, which reflects its continually-created nature. It is also interesting that the definition is circular—weblog, see blog, a weblog. The absence of substantive definition reflects a perceived instability of the genre, an inability to assign its "necessary elements." *See* ALASTAIR FOWLER, KINDS OF LITERATURE: AN INTRODUCTION TO THE THEORY OF GENRES AND MODES 39, 259–60 (1982) (describing the use of "fundamentals" in the process of genre recognition). However, genre analysts who study blogs seem to agree that weblogs have achieved enough generic stability to be definable. *See* Carolyn R. Miller & Dawn Shepherd, *Blogging as Social Action: A Genre Analysis of the Weblog*, INTO THE BLOGOSPHERE: RHETORIC, COMMUNITY, AND CULTURE OF WEBLOGS, Nov. 4, 2004, http://blog.lib.umn.edu/blogosphere/blogging_as_social_action_a_genre_analysis_of_the_weblog

But recognition of these terms is no longer confined merely to the online world. Even the *Oxford English Dictionary* now defines these terms.[21]

It is easy to establish a blog, and lawyers were quickly attracted to this form of communication.[22] When lawyers started blogging, the English language took advantage of the similarity between "lo" and "law" to create the new word "blawg."[23] Currently, this word is in common use in both print and internet sources, but surprisingly, searching for the word on Dictionary.com yields no results.[24] Likewise, the online *Oxford English Dictionary* contains no definition of "blawg."[25] Fortunately, the website Blogossary.com, "the blogosphere's dictionary,"[26] does define a "blawg" as "[a] blog written by a legal professional (hopefully) that focuses primarily on areas of the legal system. (In other words, a law blog.)"[27] One of the most visible uses of the word appears on the cover of the December 2007 *ABA Journal*: "The Blawg 100."[28] The cover article explains that "[t]here

.html ("When a type of discourse of communicative action acquires a common name within a given context or community, that's a good sign that it's functioning as a genre. . . . There is strong agreement on the central features that make a blog a blog.").

21. The *Oxford English Dictionary* is also available online, and these definitions appear in the online version as well. *See* Oxford English Dictionary, "Blog" Definition, http://dictionary.oed.com/cgi/entry/00316671 (last visited Feb. 22, 2008). According to one scholar, "*blog* was added to the venerable *Oxford English Dictionary* in 2003 and was the most popular search word in the online version of the *Merriam-Webster's Dictionary* in 2004." NANCY FLYNN, BLOG RULES: A BUSINESS GUIDE TO MANAGING POLICY, PUBLIC RELATIONS, AND LEGAL ISSUES 3 (AMACOM Books ed. 2006) (footnotes omitted).

22. *See generally* Petruzzell, *supra* note 3, at 80 (describing the benefits of "blawgs" for marketing, especially for small firms and niche practices).

23. Several sources credit Denise Howell, who blawgs at Bag and Baggage, with coining the term. *See, e.g.*, McDonough & Randag, *supra* note 6, at 31.

24. Dictionary.com, "Blawg" Definition, http://dictionary.reference.com/browse/blawg (last visited Dec. 15, 2008).

25. *See* Oxford English Dictionary, "Blawg" Definition, http://dictionary.oed.com (search for "blawg" using "Find Word" tool) (last visited Dec. 15, 2008) (indicating no matching results).

26. Blogossary, http://www.blogossary.com/define/blawg/ (last visited July 21, 2009).

27. Blogossary, "Blawg" Definition, http://www.blogossary.com/define/blawg (last visited Feb. 11, 2008).

28. *See* McDonough & Randag, *supra* note 6, at 34. In the December 2008 issue, the *ABA Journal* published its "Second Annual" Blawg 100, again as the cover story, suggesting that blawgs are still novel enough to rate a cover. *See* Molly McDonough & Sara Randag, *The Blawg 100*, 94 A.B.A. J. 34 (2008). As blawgs become ever more commonplace and as new technologies like Twitter arise, it is doubtful that the top 100 blawgs will continue to be interesting or newsworthy enough to rate a cover. *See* Kay Johnson, *Are Blogs Here to Stay?: An Examination of the Longevity and Currency of a Static List of Library and Information Science Weblogs*, 34 SERIALS REV. 199 (Sept. 2008) (discussing the ephemeral impact of blogging in the field of science). *But see* Editor's Note, A.B.A. J. LAW NEWS NOW, Sept. 11, 2009 (illustrating the current interest in blawgs by inviting law blog fans to "plead their case for their favorite blawgs").

are between 2,000 and 3,000 legal blogs—what we call blawgs."[29] But the *ABA Journal* does not clarify whether a "legal blog" is one written by a lawyer, or on a legal topic, or both.[30] For purposes of ethical analysis, it does make a difference how a "blawg" is defined because the ethical issues lawyers face when blawging are different from those confronting non-lawyers who blog about the law.[31] Despite the potential harm resulting from non-lawyer blawgs, the scope of this Article is limited to only one subset of blawgs: those in which lawyers blog about the law.

III. THE GENRE OF BLAWGING

In this Part the Article discusses genre theory and how it helps us understand the characteristics of blogs and blawgs. Applying genre theory to blawgs demonstrates how the characteristics of the genre can pose ethical temptations for blawgers.

A. Background of Genre Theory

"[T]here is no genreless text . . . ."[32] Instead, "[e]very text participates in one or several genres. . . ."[33] "Genre" is defined as "[a] category of artistic composition, as in music or literature, marked by a

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Now that members of Congress are tweeting from the floor of Congress during Presidential speeches, blogs are beginning to seem downright old-fashioned. *See* Peter Hamby, *Members of Congress Twitter through Obama's Big Speech*, CNN, Feb. 25, 2009, http://politicalticker.blogs.cnn.com/2009/02/25/members-of-congress-twitter-through-obamas-big-speech. And if jurors tweet about the trials on which they are sitting, can lawyer tweets from counsel table be far behind? *See* Jon Gambrell, *Appeal Says Juror Sent "Tweets" During Trial*, KNOXVILLE NEWS-SENTINEL, Mar. 15, 2009, at A15.

Twitter is a social networking website and blog-like service where users post updates using a maximum of 140 characters, known as *tweets*. Tweets are displayed on the user's profile page and sent to other users who have signed up to "follow" them. Steven Levy, *Twitter: Is Brevity The Next Big Thing?*, NEWSWEEK, Apr. 9, 2007, *available at* http://www.newsweek.com/id/35815. One commentator has characterized Twitter as "blogs on speed." Michael Silence, *Twitter: Blogging on Speed*, KNOXVILLE NEWS-SENTINEL, Mar. 15, 2009, at F5.

29. McDonough & Randag, *supra* note 6, at 31.

30. The cover of the magazine does characterize the *ABA* 100 as "[t]he best web sites by lawyers, for lawyers." *Id.* Though the magazine characterizes the blawgs as "web sites," a comparative genre analysis of blawgs and websites would reveal significant formal and functional differences between the two. Such an analysis is beyond the scope of this Article.

31. This conclusion follows from the fact that only lawyers, and not non-lawyers, are subject to discipline for violating a jurisdiction's ethics rules.

32. Jacques Derrida, *The Law of Genre*, *in* MODERN GENRE THEORY 219, 230 (David Duff ed., 2000).

33. *Id.*; *see also* FOWLER, *supra* note 20, at 20 ("Every work of literature belongs to at least one genre.").

distinctive style, form, or content."[34] Genre theory has evolved along two branches. The first, and oldest, focuses on traditional "literary" forms such as plays, poems, and novels.[35] This branch, dating back to Aristotle, focuses on the classification of works and assumes that "genres are definable and mutually exclusive."[36] While traditional genre theory focuses on "literary texts" in the traditional sense (plays, poems, novels), modern literary critics increasingly use the term "genre" in the "classification of non-literary (and non-written) as well as literary texts."[37] Since all works belong to a genre, understanding the genre aids our understanding of the work; as Mikhail Bakhtin notes, "[W]hen the speaker's speech plan with all its individuality and subjectivity is applied and adapted to a chosen genre, it is shaped and developed within a certain generic form."[38] Analyzing a work's genre reveals the uniqueness of the work because genre both constrains and liberates.[39]

The constraining and liberating effect of genre is a function of the way in which genre defines the relationship between author and consumer (for our purposes, the reader):

> Even where a verbal creation negates or surpasses all expectations, it still presupposes preliminary information and a trajectory of expectations . . . against which to register the originality and novelty. This horizon of the expectable is constituted for the reader from out of a tradition or series of previously known works, and from a specific attitude, mediated by one (or more) genres and dissolved through new works. . . . [I]t is . . . unimaginable that a literary work set itself into an informational vacuum, without indicating a specific situation or understanding. To this extent, every work belongs to a genre—whereby I mean neither more nor less than that for each work a preconstituted horizon of expectations must be ready at hand . . . .[40]

The reader's "horizon of expectation," which is at least partially "unconscious,"[41] simply means that a reader expects certain things from

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34. HERITAGE DICTIONARY, *supra* note 15, at 757.

35. *See* FOWLER, *supra* note 20, at 5–6.

36. *Id.* at 38.

37. MODERN GENRE THEORY, at xiii (David Duff ed., 2000).

38. MIKHAIL BAKHTIN, SPEECH GENRES & OTHER LATE ESSAYS 78 (Vern W. McGee trans., 1986).

39. *See id.* at 2 (referring to "genre as the enabling device, the vehicle for the acquisition of competence"); *id.* at 31 ("Far from inhibiting the author, genres are a positive support. They offer room, as one might say, for him to write in—a habitation of mediated definiteness; a proportioned mental space; a literary matrix by which to order his experience during composition.").

40. Hans Robert Jauss, *Theory of Genres and Medieval Literature*, *in* MODERN GENRE THEORY, *supra* note 37, at 131.

41. *See* FOWLER, *supra* note 20, at 259–60 (describing the role of recognizing genre in

the work depending upon its perceived genre. A reader is able to develop a perception of genre not only because the work itself emits certain generic signals,[42] but also because the reader has a history of encountering texts. Thus, we (usually) know whether we are reading a novel, a poem, or a play because of our familiarity with previous similar works.[43] The reader's knowledge of the possible forms of expression, and the characteristics of those forms, condition the reader's response to any given work. The author acknowledges the reader's familiarity with certain types of works and chooses to write in a certain genre in order to profit from that familiarity.[44] To write in a particular genre is to accept and fulfill its unique characteristics.[45] By choosing a particular genre, the writer surrenders some freedom of form in exchange for the reader's recognition and acceptance. As Todorov says, "It is because genres exist as an institution that they function as 'horizons of expectation' for readers and as 'models of writing' for authors."[46]

This concept of the reader's "horizon of expectation" is the point at which the traditional theory of literary genres intersects with the second, more recent, branch of genre theory: genre as social action.[47] Genre as social action is practiced primarily by rhetoricians and focuses less on the characteristics of the work itself and more on the "rhetorical situation" within which a work is created and encountered.[48] This branch of genre theory centers its inquiry, "not on the substance or the form of discourse but on the action it is used to accomplish."[49] In this theory, the author creates individual works within "a 'complex of persons, events, objects, and relations' presenting an 'exigence' that can be allayed through the mediation of discourse."[50] Genre results from the recurrence of similar rhetorical situations: "'[f]rom day to day, year

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understanding literary works).

42. *See id.*

43. *Id.*

44. "In a given society, the recurrence of certain discursive properties is institutionalized, and individual texts are produced and perceived in relation to the norm constituted by that codification. A genre, whether literary or not, is nothing other than the codification of discursive properties." Tzvetan Todorov, *The Origin of Genres*, *in* MODERN GENRE THEORY, *supra* note 37, at 198.

45. The exception is if the author is writing to challenge a particular genre, which is still a recognition of its characteristics.

46. Todorov, *supra* note 44, at 199.

47. *See* Carolyn R. Miller, *Genre as Social Action*, 70 Q.J. OF SPEECH 151 (1984) (describing the issues related to rhetorical genres, including lack of definition).

48. *Id.* at 154 (rejecting previous "systems" of "classifying discourse" because they are "based upon formal rather than pragmatic elements").

49. *Id.* at 151.

50. *Id.* at 152.

to year, comparable situations occur, prompting comparable responses.' The comparable responses, or recurring forms, become a tradition which then 'tends to function as a constraint upon any new response in the form.'"[51] Importantly, the accretion of recurring individual works, which eventually becomes a genre, links the author's private impulse with its public expression and also links the intention of the author with the reaction of the reader. From the author's perspective, genre provides "a form . . . for making public our private versions of things."[52] From the reader's perspective, genre "shapes the response of the reader or listener to substance by providing instruction, so to speak, about how to perceive and interpret; this guidance disposes the audience to anticipate, to be gratified, to respond in a certain way."[53]

Notably, genre as social action does not limit its study to traditional literary genres. Instead, it takes a functional approach to its object of study, focusing on "'de facto' genres, the types we have names for in everyday language."[54] Genre as social action democratizes genre by studying "such homely discourse as the letter of recommendation, the user manual, the progress report, the lecture, and the white paper."[55] Everyday people and the everyday forms in which they communicate have become the stuff of genre analysis. This new respectability of nontraditional genres appears to play an implicit role in current discussions of blawging as lawyer advertising.[56]

Both branches of genre theory recognize that genres are not static. Instead, "the history of literary genres [is] a temporal process of the continual founding and altering of horizons."[57] The study of generic origins is important to traditional genre theory because it helps classify works and map the relationships among various genres.[58] The conventional view is that new genres come "from other genres."[59] In contrast, while admitting the relevance of "ancestral genres" to new genres, genre as social action looks further, to the social context of a new genre.[60] While Alistair Fowler has attempted to catalogue the

51. *Id.*

52. *Id.* at 158.

53. *Id.* at 159.

54. *Id.* at 155.

55. *Id.*

56. *See infra* Part IV.B.

57. Jauss, *supra* note 40, at 132.

58. The complex taxonomies of genre can be seen as nothing more than atemporal maps of generic creation and transformation. FOWLER, *supra* note 20, at 47.

59. Todorov, *supra* note 44, at 197 ("A new genre is always the transformation of an earlier one, or of several: by inversion, by displacement, by combination.").

60. Miller & Shepherd, *supra* note 20, at 2.

ways in which new genres develop—topical invention, combination, aggregation, change of scale, change of function, counterstatement, inclusion, and generic mixture[61]—Carolyn Miller examines the "evolutionary forces operating on existing genres, the opportunities available for innovation, the available social roles and relationships, and the possibilities for social action."[62] Theories of generic origin are particularly relevant to our inquiry because blogs did not exist fifteen years ago.[63] To the extent that blogs and blawgs are new genres, we may be witnessing the mutual struggles of creators and readers to negotiate the instability of generic definition. More specifically, both the exigencies motivating bloggers and the horizons of expectations defining reader responses may still be unsettled and unsettling.

B. The Genre of Blog

The three scholars who have attempted to define the blog genre agree that blogs are characterized by "reverse chronology, frequent updating, and [a] combination of links with personal commentary."[64] Because of its "casual, conversational" tone,[65] the blog genre is uniquely communal.[66] The communal nature of blogging creates an entire world, the blogosphere.[67]

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61. FOWLER, *supra* note 20, at 170–90.

62. Miller & Shepherd, *supra* note 20, at 2.

63. *See supra* Part II; *see also* Declain McCullagh & Anne Broache, *Blogs Turn 10—Who's the Father?*, CNET NEWS, Mar. 20, 2007, http://news.cnet.com/2100-1025_3-6168681.html (discussing the origins of the first modern blog created in 1997).

64. Miller & Shepherd, *supra* note 20, at 5; *see also* Susan C. Herring et al., *Bridging the Gap: A Genre Analysis of Weblogs*, 37 HAWAI'I INT'L. CONFERENCE ON SYSTEM SCIENCES 1–11 (2004), http://www2.computer.org/portal/web/csdl/doi/10.1109/HICSS.2004.1265271; Posting of Rebecca Blood to Rebecca's Pocket, Weblogs: A History and Perspective (Sept. 7, 2000), http://www.rebeccablood.net/essays/weblog_history.html [hereinafter Rebecca Blood Posting].

65. FLYNN, *supra* note 21, at 8–9.

66. *See* Andrew Updegrove, *Essentials of Creating a Successful Legal Blog*, 51 BOSTON B.J. 16, 17 (May/June 2007) (noting that "[t]he Internet is a social space" and that "[m]ost bloggers include a 'Blog Roll' at their sites, providing permanent links to the bloggers they read regularly").

67. Dictionary.com, "Blogosphere" Definition, http://dictionary.reference.com/browse/blogosphere (last visited Feb. 22, 2008) (reading "[t]he set of all weblogs on the Internet."). This bland definition hardly gives a sense of the vitality of this separate world. The existence of the blogosphere as a separate world has given rise to a noun identifying the residents of that world: "netizens." *See, e.g.*, Posting of Robert Raines to DipNote, U.S. Dep't of State Official Blog, http://blogs.state.gov/index.php/entries/chinese_netizens_webchat (Feb. 24, 2009, 10:04 EST); Miao Xiaojuan & Quan Xiaoshu, *Yearender: Chinese Netizens Flex Their Muscles in 2008*, CHINAVIEW, Dec. 22, 2008, http://news.xinhuanet.com/english/2008-12/22/content_10543441.htm.

C. The Subgenre of Blawg

Subgenres can arise solely from differences in content.[68] Because blawgs consist primarily of legal content, they can be considered a subgenre of blog. However, they have also developed formal differences that set them apart from blogs. For example, even when a blawg permits reader comments, blawg authors typically engage in less dialogue with readers than do blog authors.[69] Also, blawgs contain more extensive disclaimers than do blogs. Like lawyer website disclaimers, blawg disclaimers attempt to preempt ethical issues related to formation of the attorney-client relationship, provision of legal advice, and confidentiality of information shared through the blawg.[70] Unlike website disclaimers, however, many blawg disclaimers are written in a conversational tone.[71] Thus, the blawg subgenre sets itself apart, not just from blogs, but also from lawyer websites.[72] These

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68. For example, the war eclogue and the piscatory eclogue can be classified as subgenres based on their content. FOWLER, *supra* note 20, at 158–59. An eclogue is "[a] pastoral poem, usually in the form of a dialogue between shepherds." *Id. See also* Dictionary.com, "Eclogue" Definition, http://dictionary.reference.com/browse/Eclogue (last visited Dec. 15, 2008). A piscatory eclogue substitutes fishermen for shepherds, while a war eclogue substitutes soldiers. FOWLER, *supra* note 20, at 158.

69. *Cf.* Carter, *supra* note 4, at 28 (discussing ethical safeguards for attorney bloggers).

70. *Id.*

71. *See* The Washington Employment Law Blawg, Disclaimer, http://washingtonemploymentlawblawg.com/disclaimer (last visited July 23, 2009), for a blawg disclaimer that exemplifies the typically conversational tone.

72. A particularly elaborate example of a lawyer website disclaimer can be found on the Mayer Brown website. Mayer Brown Legal Notices and Terms of Use, http://www.mayerbrown.com/legalnotices/index.asp#disclaimer (last visited Dec. 16, 2008). The disclaimer, which appears to be combined with the website's "Terms of Use," consists of 36 numbered, single-spaced paragraphs. The following paragraph is one of the shorter ones:

> 2.2 No Attorney-Client Relationship. No attorney-client relationship will be formed based on your use of any Practice Website or any Services provided through any Practice Website. Information that you provide through a Practice Website will not be treated as confidential or proprietary unless the Practice expressly agrees to treat such information in such manner.

Id. A more typical website disclaimer consisting of 5 paragraphs (plus some additional international disclaimers) appears on the Davis, Polk & Wardwell website. Davis Polk Disclaimer, http://www.dpw.com/disclaimer (last visited Dec. 16, 2008). No matter how elaborate or spartan, however, website disclaimers are written in formal English using the tone of an insurance contract.

In contrast, blawg disclaimers are often downright playful. For example, the disclaimer of the Patent Baristas blawg reads as follows:

> Disclaimer: Look, the *Baristas* provide this site for ***informational purposes only***.... These materials do not constitute legal advice and do not create an attorney-client relationship between you and us. Please note that you are not considered a client until you have signed a retainer agreement and your case has been accepted by us. This site should not be used as a substitute for competent legal advice from a licensed professional attorney in your state. Got it? THIS SITE IS "**AS IS.**" WE MAKE NO

formal differences between blogs and blawgs appear to be conscious responses to potential ethical concerns, indicating that blawgers are already accounting for and shaping their genre to accommodate their constraints as lawyers and their readers' expectations as potential consumers of legal services.

D. Why Genre Theory?

Applying genre theory to blawging helps address potential ethical issues in many ways. First, by paying attention to the "necessary elements" of a blawg, we can see how blawgers have adapted the weblog to the motives and occasions of legal discourse.[73] Second, genre theory permits us to ask how the elements of a blawg establish reader expectations that may come into play when examining the ethical propriety of blawger behavior. Third, analyzing blawging as social action opens up the issue of context: how do the exigencies of internet technology at the turn of the twenty-first century—the arena which one blogger has termed the "wild west"[74]—intersect with the constraints of established ethics rules? What ethical temptations and pitfalls, cultural

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Patent Baristas, http://patentbaristas.com (last visited Dec. 16, 2008). Interestingly, the Legal Juice blawg's disclaimer, accessed by clicking on the "Disclaimer" link at http://www.legaljuice.com, links to a lawyer website disclaimer, and borrows the website's formal language and tone:

> The information in this Website is provided for informational purposes only, and should not be construed as legal advice on any subject matter. No recipients of content from this site, clients or otherwise, should act or refrain from acting on the basis of any content included in the site without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue from an attorney licensed in the recipient's state.

Legal Juice, http://www.dc-attorney.com/lawyer-attorney-1111027.html (last visited Aug. 14, 2009).

73. For example, Mark Herrmann, creator of the Drug and Device Law Blog (http://druganddevicelaw.blogspot.com), describes the difficulties of blawging, implicitly referring to the exigencies of the subgenre:

> To attract and maintain a readership, a blogger must regularly post fresh content, written in an engaging style, about interesting issues. That means investing time each week searching for content, analyzing issues and crafting a worthwhile post. On some Saturday mornings, after you've wasted an hour reading a 50-page opinion and come up with nothing worth saying, the game hardly seems worth the candle.

Mark Herrmann, *Legal Blogs: Four Lessons Learned*, 30 NAT'L L.J. 27, 27 (2008).

74. Michael Silence, *Silence: Unfiltered Outlet Entices Doctor*, KNOXVILLE NEWS-SENTINEL, June 1, 2008, http://www.knoxnews.com/news/2008/jun/01/unfiltered-outlet-entices-doctor (summarizing an interview with Dr. Helen Smith, who blogs at drhelen.blogspot.com).

tensions, and incongruities are revealed when we examine the relationship between blawger and reader? This Part addresses these emerging issues.

In their analysis of blogs, Miller and Shepherd found a dynamic and troubled relationship between public and private. Pointing out that the late 1990s saw a rise in both "mediated voyeurism" and "mediated exhibitionism,"[75] Miller and Shepherd hypothesized that blogs serve two sets of goals: (1) "self-disclosure functions of both self-clarification and self-validation," and (2) the goals of "[r]elationship development and social control," using "self-disclosure to build connections with others or to manipulate their opinions."[76] Thus, blogging serves both private and public goals through both its introverted and extroverted qualities.

In the analysis of blawging ethics, there is a similar dynamic between public and private. First, and most obviously, some blawgers, even those who are licensed attorneys, may consider blawging to be "private" in the sense that they are not participating in the justice system via the representation of a client. Bloggers cited by Miller and Shepherd expressed surprise that their private thoughts could become so public once posted to a blog.[77] Similarly, law students are often surprised that potential employers access their Facebook or other public web pages.[78] Blawgers, too, may be lulled into a false sense of privacy by the genre's accommodation of private commentary.[79] Second, from the point of view of ethics regulators, there is confusion about the status of attorney discourse on a blawg.[80] Traditionally, attorneys speak as attorneys in legally sanctioned spaces—offices, courtrooms, conference rooms, and so forth—and their work product appears in the traditional genres of client letters, legal memoranda, pleadings, and briefs. In the days

75. Miller & Shepherd, *supra* note 20, at 3–4.

76. *Id.* at 7.

77. *Id.* at 1.

78. *See* Dina Epstein, *Have I Been Googled? Character and Fitness in the Age of Google, Facebook, and Youtube*, 21 GEO. J. LEGAL ETHICS 715, 723–25 (2008); Samantha L. Miller, *The Facebook Frontier: Responding to the Changing Face of Privacy on the Internet*, 97 KY. L.J. 541, 544–45 (2008–2009).

79. The blawger may also be lulled into a false sense of privacy by the material conditions in which blawgs are created. Most blawgs are created in a one-on-one transaction between a lawyer and a computer keyboard and are consumed by unseen readers who interact with the author only through the mediation of a computer keyboard. Contrast this dynamic of private creation and consumption with the paradigmatic courtroom scene of public creation and consumption. Even outside of the litigation context, the typical transaction closing is a public event, with authors and consumers seeing and interacting directly with one another.

80. *See generally* Carter, *supra* note 4, at 8 (discussing the ethical considerations for legal blogs).

before attorney advertising, these spaces and genres confined and defined the public persona of attorney.

When attorneys began advertising their services in newspapers and phonebooks, and via television and radio, their discourse was still public, but their speech occurred in a debased space (the marketplace) and in a non-legal genre (the advertisement).[81] This shift in the public persona of attorneys resulted in incremental accommodation by the legal system, specifically First Amendment protection for certain types of attorney advertising.[82] When attorneys began blawging, their discourse was not so clearly public, despite the fact that blawgs are far more accessible to many more people than any advertisement. But blogs, by their very nature, are meant to communicate private speech.[83] Some blogs serve exclusively as an electronic version of the traditional diary genre, providing a forum for the author's thoughts and feelings.[84] Even non-diary blogs consist primarily of personal commentary.[85] Traditionally, private attorney speech had no sanctioned public space; for example, it is hard to imagine the legal system providing discursive space to an attorney's personal letters, or to his lunchtime conversations about the local legal scene.[86] The most we can imagine, perhaps, is an attorney writing a general legal advice column for a newspaper (although the content again would presumably be public rather than private), or a letter to the editor of a newspaper or bar journal giving a personal perspective on a news story or legal development. The "war story" comes closest to the type of discourse attorneys engage in while blawging.[87] War stories usually provide details of a case or transaction

81. *See generally* Jill S. Chanen, *Watch What You Say: Regulators Still Take Ethics Rules on Lawyer Marketing Seriously, So Practitioners Should, Too*, 91 A.B.A. J. 59 (2005) (discussing the progression of law firm marketing from word of mouth to phone directory ads to the Internet).

82. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Krypel, *supra* note 4, at 464.

83. *See* Miller & Shepherd, *supra* note 20, at 5–6.

84. *See* Herring et al., *supra* note 64; Rebecca Blood Posting, *supra* note 64.

85. *See* Herring et al., *supra* note 64.

86. Such attorney speech could accurately be described as "gossip." *See generally* PATRICIA MEYER SPACKS, GOSSIP (1986) (explaining gossip as a social phenomenon). Interestingly, many blawgs are known for gossipy posts. *E.g.*, Skadden Insider, http://skaddeninsider.blogspot.com (last visited Sept. 21, 2009); Above the Law, http://www.abovethelaw.com (last visited Sept. 21, 2009); *see also* Martha Neil, *Legal Gossip Maven David Lat Dishes on Above the Law*, A.B.A. J. LAW NEWS NOW, Feb. 21, 2008, http://www.abajournal.com/news/legal_gossip_maven_david_lat_dishes_on_above_the_law. Perhaps the legal system provides a legally sanctioned private space for attorneys by protecting from discovery "the mental impressions, conclusions, opinions, or legal theories of a party's attorney." FED. R. CIV. P. 26(b)(3)(B).

87. For example, the *Pennsylvania Lawyer* magazine has included a regular column entitled "War Stories" in which lawyers shared their humorous or enlightening experiences. *E.g.*, *War Stories*, PA. LAW., May 2007, at 54. Similarly, the ABA E-Report has contained a column called

previously hidden from public view, as well as heavily opinionated personal commentary based on the attorney's knowledge of the previously private details. The war story has its own ethical problems—primarily the risk of revealing ethically protected information—and the Model Rules have accommodated the war story by providing an exception for "hypothetical" narratives.[88]

Thus, blawgs occupy a liminal discursive space, a space that resides uneasily between public and private. The tension between public and private expression inherent in a blawg becomes clear when a blawg is compared to a website.[89] An attorney's website occupies a clearly public space because it looks like a familiar type of public attorney speech—an advertisement. A website has a design; it contains traditional elements like the attorney's name, address, and phone number; but most of all, it is static, like an attorney's phonebook advertisement, which looks the same every time you turn to it. An attorney may have several different television advertisements, but each will play repeatedly. One of the hallmarks of a website is the stability of its design; a website is designed to look the same every time it is accessed. In contrast, because of its reverse chronological structure, a blawg will frequently look different each time it is accessed.[90] The ever-changing content of the blawg aligns it with first-person narratives like diaries and journals that chronicle the unfolding of consciousness.

To sum up, we can see the exigence of the blawg as the lawyer's ego, plus her desire to communicate on a legal topic outside the constraints of traditional legal genres, plus technology that transforms private thoughts confided privately into permanent declarations accessible to a worldwide audience. This exigence is embodied in the blawg's necessary elements—reverse chronology, frequent updating, and links combined with personal commentary. As the next Part discusses, each of these elements engenders ethical temptations or dilemmas.

"War Stories," in which "Lawyers Share Their True Tales About Life in the Trenches." *E.g.*, Brian Sullivan, *War Stories*, A.B.A. J. E-REPORT, Feb. 20, 2004, at 6. *See generally* Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 ST. LOUIS U. L.J. 1191 (2006) (discussing the use of war stories by practitioners in legal education).

88. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (2008) ("A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.").

89. *See* Jennifer M. Liebman, *Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J.L. TECH. & POL'Y 343, 353 (2006) (noting the differences between static web pages and blogs, bulletin boards, or chat rooms).

90. Or, at least, it should. The reader returns to the blawg because she wants to see new content. The desirability of changing content is one of the hallmarks of the reader's expectations of blawgs. *See* Herrmann, *supra* note 73; Liebman, *supra* note 89, at 353.

IV. ETHICAL PITFALLS OF BLAWGING

The generic characteristics of blawgs combine with the material conditions under which blawgs are created to create a panoply of potential ethical issues. Among those issues are vicarious liability for ethical violations, anonymous blawging, compliance with advertising and marketing rules, forming an attorney-client relationship, giving legal advice to blawg readers, maintenance of ethical protection for client information, and positional conflicts.

A. Who Is Responsible for This?

Because authorship is not always apparent in cyberspace, issues arise when blawgs are created by more than one person or created by a subordinate on behalf of a superior. Similarly, anonymous blawging raises ethical issues.

1. Multiple or Delegated Authorship

The first issue is who is responsible for the blawg. The issue is straightforward if one lawyer is the sole creator and maintainer of the blawg, but ethical issues may arise if more than one individual is involved in the blawging. Early in the blawging movement, when solo practitioners and small-firm lawyers created the most successful blawgs, the issue of responsibility was less urgent.[91] But as large firms begin blawging, issues of responsibility for ethical lapses become more obvious.[92]

The existence of this issue is somewhat ironic if we assume that the lawyer's ego-driven desire to communicate motivates blawging. If a blawger wants to communicate his private thoughts and if this desire is satisfied by a private interaction with his keyboard, it is hard to see how multiple authorship or delegated authorship of a blawg could meet the exigency, unless it is satisfied by individual entries on the blawg rather than authorship of all the entries. A blawger might well turn to multiple or delegated authorship in response to the logistical and psychological pressures resulting from the requirement of frequent updating.[93] Similarly, multiple or delegated authorship might help avoid overhasty and perhaps ethically problematic entries. A lawyer who is too busy to create a thoughtful post is more likely to run afoul of ethics rules. By

91. Blogging: Ethical Considerations for the Lawyer, Legal Implications for the Client (ABA Law Practice Management Section and ABA Center for Continuing Legal Education CD-ROM, Sept. 20, 2007) [hereinafter Blogging: Ethical Considerations] (comments of Tim Stanley).

92. *Id.*

93. *See* Carter, *supra* note 4, at 16–17.

sharing authorship with others, the busy lawyer can perhaps avoid those pitfalls. Additionally, the proliferation of multiple or delegated authorship in the blawgosphere suggests that those blawgs may be moving away from the generic element of personal commentary and towards a more formal, public type of discourse akin to a legal information column or advertising.

If a partner or other lawyer with managerial authority delegates the creation or maintenance of a blawg to a subordinate lawyer, Model Rule 5.1 requires that lawyer to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."[94] The question becomes what constitutes "reasonable efforts" to ensure ethical compliance? With respect to blawging, this Rule arguably implies that firms must have blawging policies in place to ensure compliance.[95] Comment [3] to Rule 5.1 suggests that "informal supervision and periodic review" may be sufficient in "a small firm of experienced lawyers."[96] However, given the temptations of spontaneous ethical violations and the irretrievable nature of blawg content, it may not be "reasonable" to occasionally glance over the shoulder of a subordinate lawyer who is contributing to a firm blawg. Comment [3] also suggests that "more elaborate measures may be necessary" in larger firms or "practice situations in which intensely difficult ethical problems frequently arise."[97] In the business world, elaborate written policies

94. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2008). Subsection (b) of the Rule subjects any lawyer who has "direct supervisory authority over another lawyer" to a duty to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." *Id.* R. 5.1(b). This provision "applies to lawyers who have supervisory authority over the work of other lawyers in a firm." *Id.* cmt. 1. Thus, a lawyer who delegates blawging duties to another lawyer on an ad hoc basis would be covered by this provision.

95. *See* Petruzzell, *supra* note 3, at 83 (advocating "[t]he adoption of specific policies and guidelines governing the content and publication of blogs," including "who at the firm is authorized to post content on the blog; [and] whether content must first be reviewed and approved internally and, if so, by whom"); *cf.* FLYNN, *supra* note 21, at 67–81 (advocating written blogging policies for businesses to minimize risk of legal liability).

96. MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 3.

97. *Id.* What did the drafters have in mind by "practice situations in which intensely difficult ethical problems frequently arise"? Is the blogosphere such a practice situation? Does a firm's decision to blawg automatically transform its "situation" into one where "intensely difficult ethical problems frequently arise"? *See In re* Myers, 584 S.E.2d 357, 360–61 (S.C. 2003) (holding that county Solicitor's office was a "practice situation in which intensely difficult ethical problems frequently arise" and that Solicitor violated Rule 5.1 by failing to adequately supervise Deputy Solicitor); Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1938 (2006) (decrying law firm's failure to "make reasonable efforts to establish and to enforce ethics rule-mandated internal firm policies and procedures" with respect to conflicts of interest). *See generally* Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. VA. L. REV. 449 (2003) (examining the professional duties of

about blogging are becoming more common.[98] Rule 5.1 may require that firms with blawgs have written policies about blawging that are communicated to all lawyers involved in the creation and maintenance of the blawg.[99]

Similarly, with respect to non-lawyer employees, Model Rule 5.3 requires a partner or managing lawyer to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer."[100] Comment [1] to Rule 5.3 provides:

> A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.[101]

This comment assumes that confidentiality will pose a special challenge for lay employees; thus, breach of confidentiality looms as a huge ethical pitfall in blawging.[102] However, giving legal advice and forming attorney-client relationships also might present special risks to non-lawyers who create or maintain blawgs.[103] The question remains, what constitutes "reasonable efforts" or "appropriate instruction or supervision"? The Rule 5.3 comment cautions lawyers to tailor their efforts to the layperson's lack of "legal training" and the fact that they "are not subject to professional discipline."[104] It suggests that more supervision, not less, may be required for lay employees than for subordinate lawyers. The effect of a blawg post is identical whether a lawyer or layperson makes it, and therefore, it is unlikely that a layperson could be appropriately supervised by anything short of the efforts made to ensure compliance by blawging lawyers.[105] Again,

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supervisory and subordinate lawyers).

98. FLYNN, *supra* note 21, at 165–70.

99. *Id.* at 77–81.

100. MODEL RULES OF PROF'L CONDUCT R. 5.3(a)–(b). Note the distinction between "conform to" in Rule 5.1 and "is compatible with" in Rule 5.3. The lawyer must actively comply with (conform to) the Rules, while nonlawyer employees need only not violate (be compatible with) the Rules. Partners and managing attorneys cannot ensure that nonlawyers "conform to" the ethics rules because they have no independent duty to do so.

101. *Id.* cmt. 1.

102. *See* Carter, *supra* note 4, at 25.

103. *See id.* at 16–18.

104. MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 1.

105. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 44.4 (3d ed. 2001 & Supp. 2004) ("[S]ince nonlawyers cannot be disciplined under the Model Rules, it

appropriate supervision may well require a written policy for lay employees, accompanied by appropriate training and enforcement.[106]

While subsections (a) and (b) of Rules 5.1 and 5.3 are prospective, seeking to prevent ethical lapses, subsections (c) of both Rules are retrospective, setting out the circumstances under which a lawyer will be vicariously responsible for the ethical violations of a subordinate lawyer or a lay employee.[107] The standards are substantially the same; a lawyer is responsible for another's ethical violation in two situations: (1) if "the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved,"[108] or (2) in the case of a partner, managing lawyer, supervisory lawyer, co-counsel, or lawyer sharing fees with another, if the lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action."[109] Because these provisions provide the incentive to establish and maintain the preventative measures mandated by subsections (a) and (b), it is important to examine how they might apply to blawging.

First, what would it look like for a lawyer to "order" another person to violate the ethics rules in the blogosphere? We experience instinctive recoil at the thought of such a deliberate violation, yet in the new frontier of the blogosphere, such a scenario is not unimaginable.[110] For example, violations of intellectual property rights may be taking place on blawgs every day.[111] To the extent it is unethical to violate another's intellectual property rights, a supervisory lawyer could "order" another person to commit an ethical violation simply by saying, "Be sure to post that article on the blawg today." Until the parameters of ethical behavior in the blogosphere are better delineated, it is not far-fetched to imagine a lawyer ordering another person to engage in unethical conduct.[112]

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may be appropriate for supervising lawyers to exercise a correspondingly stricter discipline within the law office.").

106. *See* FLYNN, *supra* note 21, at 67–81.

107. MODEL RULES OF PROF'L CONDUCT R. 5.1(c), 5.3(c); *see In re* Myers, 584 S.E.2d 357, 360–62 (S.C. 2003).

108. MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(1). The standard is the same for laypersons. *Id.* R. 5.3(c)(1).

109. *Id.* R. 5.1(c)(2). With respect to vicarious responsibility for the conduct of laypersons, the standard is the same for partners, managing lawyers, or direct supervisors. *Id.* R. 5.3(c)(2).

110. *Cf.* Matter of Lassen, 672 A.2d 988, 991–93 (Del. 1996) (involving an attorney who ordered the firm's accounting personnel to charge his personal expenses to various clients).

111. Blogging: Ethical Considerations, *supra* note 91 (comments of Micah Buchdahl).

112. It is open to question whether a lawyer's violation of another's intellectual property rights is itself an ethical violation. Model Rule 8.4(b) provides that "[i]t is professional

More common, however, would be a situation in which a lawyer ratifies unethical conduct that has already occurred.[113] In the context of blawging, it is not clear what kinds of words or acts would constitute ratification. Could a lawyer ratify an unethical act of blawging simply by making another post to the blawg? Since the Rule provides that ratification occurs only "with knowledge of the specific conduct," it is unlikely that a lawyer who does not keep up with another person's activity on the blawg would ratify an unethical act simply by making another post. Arguably, it would take something more to ratify, such as a direct reference to the unethical content.

2. Anonymous Blawging

A final issue related to ethical responsibility is the anonymous blawg. Is it ethical for a lawyer to blawg anonymously? Of the *ABA* 100, eight appear to be anonymous.[114] Two concerns may be raised by anonymous blawging. The first is related to enforcement of ethics rules: when the author of a blawg is not named, how can the ethics authorities detect and punish an ethical violation? This concern may be

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misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." MODEL RULES OF PROF'L CONDUCT R. 8.4(b). Thus, unlike the attorney who ordered his accounting staff to fraudulently bill his clients for his personal expenses, an attorney who orders a subordinate to post a copyrighted article to the blawg may not realize that her action is potentially unethical. *Cf. Lassen*, 672 A.2d at 991.

113. The Model Rules do not define "ratify." *Black's Law Dictionary* defines ratification as follows: "In the law of principal and agent, the adoption and confirmation by one person with knowledge of all material facts, of an act or contract performed or entered into in his behalf by another who at the time assumed without authority to act as his agent." BLACK'S LAW DICTIONARY 1135 (5th ed. 1979); *see* State *ex rel.* Okla. Bar Ass'n v. Taylor, 4 P.3d 1242, 1251 (Okla. 2000) (involving an attorney who ratified his bookkeeper/wife's forgery of client's name on settlement checks by subsequently writing checks against funds for his own fee with knowledge that client had not endorsed check).

114. A Year in the Life, http://pdsurrogate.blogspot.com (last visited Sept. 26, 2009) (author uses first name only); Blawg Review, http://blawgreview.blogspot.com (last visited Sept. 26, 2009); Blonde Justice, http://blondejustice.blogspot.com (last visited Sept. 26, 2009); Capital Defense Weekly, http://www.capitaldefenseweekly.com (last visited Sept. 26, 2009); Crime Scene KC, http://blogs.kansascity.com/crime_scene (last visited Sept. 26, 2009); Overheard in Law School, http://overheardinlawschool.blogspot.com (last visited Sept. 26, 2009); PT-LawMom, http://ptlawmom.com (last visited Sept. 26, 2009); and Skadden Insider, http://skaddeninsider.blogspot.com (last visited Sept. 26, 2009). Several other blawgs appear to be pseudonymous: From the Desk of Patrick J. Fitzgerald, http://patrickjfitzgerald.blogspot.com (last visited Sept. 26, 2009); Nuts & Boalts, http://boaltalk.blogspot.com (last visited Sept. 26, 2009); The Chicago Syndicate, http://www.thechicagosyndicate.com (last visited Sept. 26, 2009); and There's No Competition in Law School, http://lawbitches.blogspot.com (last visited Sept. 26, 2009). For purposes of this discussion, I treat pseudonymous blawgs identically to anonymous blawgs.

sufficiently addressed by the availability of identifying information through electronic recordkeeping by the blog site host.[115]

The second concern with anonymous blawging relates to the first, but deals more closely with the blawger's relationship with his or her audience. Lawyer anonymity before a tribunal is prohibited.[116] Federal Rule of Civil Procedure 11 requires that "[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name." [117] There have long been ethical restrictions on ghostwriting by attorneys on behalf of pro se litigants.[118] These restrictions have been justified on the grounds that the undisclosed assistance of a lawyer violates the lawyer's duty of candor and honesty,[119] and "give[s] putative pro se litigants an unfair advantage, and may decrease the efficiency of court proceedings."[120]

Anonymous blawging raises similar concerns. First, there is fear that the lack of accountability conferred by the cloak of anonymity will permit blawgers to make false or scurrilous claims.[121] Second, there is concern that readers cannot evaluate an anonymous blawger's content because they cannot discern her true interests and affiliations.[122] Concealing these interests and affiliations makes it more difficult for a

115. *See* Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 325 (2008) (citing Richard Morgan, *A Crash Course in Online Gossip*, N.Y. TIMES, Mar. 16, 2008, at ST7).

116. FED. R. CIV. P. 11(a).

117. *Id.*

118. *See, e.g.*, Tenn. Bd. of Prof'l Responsibility, Formal Op. 85-F-83 (1985). *But see* Tenn. Bd. of Prof'l Responsibility, Formal Op. 07-F-153 (2007) (permitting ghost writing of a "leading pleading" as part of limited assistance to pro bono client but continuing to prohibit "extensive undisclosed participation in litigation"). *See generally* Jeffrey P. Justman, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 MINN. L. REV. 1246, 1258–62 (2008) (discussing why ghostwriting occurs and the controls put in place to reduce this practice). Ghostwriting has also posed ethical problems for the medical profession. *See* Joseph S. Ross et al., *Guest Authorship and Ghostwriting in Publications Related to Rofecoxib*, 299 JAMA 1800 (2008).

119. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2008) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal . . . .").

120. Justman, *supra* note 118, at 1248.

121. This is especially true given the weakness of libel and slander law as applied to the blogosphere. *See* Gleicher, *supra* note 115, at 324–25; Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L.R. 1157, 1159–60 (2006) (arguing that libel and slander law is less needed in the blogosphere given its "low-trust culture," the generally quick correction of errors, and the easy accessibility of comparable media in which the potential plaintiff can respond).

122. *E.g.*, Eric Goldman, *Overview of Blogs and Social Networks*, *in* PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. 69, 73–74 (Course Handbook Series No. 19051, 2009) ("I rarely subscribe to anonymous blogs. I need to know the blogger's life experiences and biases before I can give them full credibility.").

blawg reader, particularly an untutored reader, to assess the legitimacy and accuracy of information contained on the blawg. These concerns are not exactly the same as those underlying the regulation of ghostwriting, but they share the same underlying desire for candor.[123]

These concerns were on display recently when an attorney criticized by an anonymous blawger offered a $10,000 reward for the blawger's identity.[124] The anonymous blawger, calling himself the Troll Tracker, "criticized Raymond Niro and his 30-lawyer IP boutique, Niro Scavone Haller & Niro, for representing clients who own patents but don't necessarily make products. Instead, the firm earns licensing fees from users of the patented technology—and potentially sues users if they don't pay up."[125] In seeking the blawger's identity, Niro argued not only that the blawger "should take responsibility for his or her views," but also that readers' knowledge of "the identity and affiliations of the blogger likely would affect the way that readers perceive the Troll Tracker's critique."[126]

Interestingly, of the seventy-eight comments to this story, none focused on the ethical dimension of anonymity.[127] Instead, most[128] argued about whether the identity of the speaker affects the validity of the ideas conveyed and whether anonymity is a valid enhancement to

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123. *See, e.g.*, Delso v. Trs. for Ret. Plan for Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *15–18 (D. N.J. Mar. 6, 2007) (holding that attorney's ghostwriting for *pro se* litigant violated his duty of candor under Model Rule 3.3).

124. Martha Neil, *Partner Offers $10K Bounty for Blogger's Identity*, A.B.A. J. LAW NEWS NOW, Jan. 22, 2008, http://www.abajournal.com/weekly/partner_offers_10k_bounty_for_bloggers_identity. The reward was later increased to $15,000. Niraj Chokshi, *'Troll Tracker' Tracked to Cisco IP Team*, LAW.COM, Feb. 26, 2008, http://www.law.com/jsp/article.jsp?id=900005560386.

125. Neil, *supra* note 124.

126. *Id.*

127. *Id.* Coming closest to an ethical focus was comment #68, posted by Brian:

> I understand the concept of free speech, but why in this day and age when everything is so publically accessible, is it still considered right to chastise others on public forums, potentially harming them financially or otherwise? If the rights you choose to exercise influence the rights, prosperity, or general well being of another, then you should man up, and be prepared to back up those words in court. If damages have been found, then those damages should be justly compensated. If more people were called to the carpet for the words, ideas, and venom they so easily spew, then there would be much less lying and deception in the world.

Id. The lack of interest in the ethics of anonymity is especially intriguing since the readership of the online *ABA Journal* is presumably lawyer-heavy.

128. Or, more correctly, most *substantive* commentators. Of the eighty that posted comments, ten involved a debate about whether another commentator used the noun "effect" correctly; eleven were tongue-in-cheek confessions to being the Troll Tracker; and seven were the kind of totally nonsensical comments that these sites seem to attract. Thus, only fifty-two comments dealt with the substance of the article.

free speech. For example, one commentator opined: "while it is true that knowing the blogger's affiliations might have an effect on opinion about his or her credibility, it has no effect at all on the validity (or not) of the blogger's criticisms . . . ."[129] In rebuttal, one commentator replied:

> How can so many people say that the blogger's identity would not affect the perception of his comments? Of course it would! It wouldn't change the validity of the comments, but that's not what's important. It's the perception of the comments that really matters, and knowing who the blogger is would certainly affect that.[130]

Another commentator supported anonymity, asserting that it furthers truth-seeking:

> If there's one thing that the internet has given to the people, it's the practical ability to easily post material anonymously. This is SUCH an important tool for keeping large groups honest without fear of immediate reprisal. There's nothing cowardly about wanting to protect those you care about from fallout, especially when what you are doing IS in fact morally justifiable.[131]

Defending anonymity, some commentators looked to the future,[132] while others invoked history.[133] One commentator, whose "business hosts a number of controversial websites including . . . [a] 'politically inflammatory' [site] and . . . a 'snitch site'" declared, "I will protect the anonymity of my clients. I believe that breaking the anonymity of some people will have a chilling effect on free speech."[134]

Ultimately, the commentators' concerns were validated when the Troll Tracker "unmasked himself" as Richard Frenkel, one of Cisco Systems' IP group directors."[135] The revelation of Troll Tracker's identity supported Niro's claim that his anonymity could disguise self-interest and prevent readers from accurately evaluating the merits of his

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129. Neil, *supra* note 124 (comment #4 posted by Carol).

130. *Id.* (Comment #34 posted by anonymous). A later commentator noticed the irony of posting anonymously to express an opinion about anonymity. *Id.* (Comment #72 posted by Not someone).

131. *Id.* (Comment #30 posted by gideon).

132. *Id.* (Comment #39 posted by paranoid) ("The only security of the future is anonymity.").

133. *Id.* (comment #19 posted by Tim Bracken) ("Has anyone ever heard of the Federalist Papers? The right to publish one's opinions anonymously is as old as this country itself.").

134. *Id.* (comment #27 posted by Panaqqa).

135. Chokshi, *supra* note 124. "Cisco Systems, Inc. is a multinational corporation with more than 66,000 employees and annual revenue of US$39 billion as of 2008. Headquartered in San Jose, California, it designs and sells networking and communications technology and services." Cisco News, http://newsroom.cisco.com/dlls/corporate_overview.html (last visited July 26, 2009). The company "holds 5,000 patents worldwide and has 7,000 more in applications." Chokshi, *supra* note 124.

comments. However, "patent attorneys who regularly read the blog say Frenkel's credibility is unaffected by his job."[136] In the wake of the revelation, Frenkel announced that he was taking a break from blogging, leading some regular readers to bemoan the possible loss of a source of "very reliable and prompt information about what's going on in patent litigation."[137]

But apart from these concerns about concealed affiliations and the chilling of free speech, is the concealment of a blawger's identity an ethical violation? Model Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[138] Although the comment to Rule 8.4 does not address the scope of this prohibition, it has long been interpreted to reach a lawyer's private conduct, not just her conduct in her role as an attorney.[139] Thus, a lawyer who blawgs anonymously is not necessarily shielded by the argument that he is blawging as a private citizen, and not specifically as a lawyer. A better argument on behalf of anonymous blawgers is that none of the dangers posed by anonymity in the legal setting are posed by anonymity in the blogosphere. When a lawyer's audience is a legal tribunal, every consideration of fairness and efficiency counsels against anonymity.[140] But when a lawyer's audience is blawg readers, there is no state or public interest that is furthered by requiring the lawyer to use his name. It is true that blawg readers can better assess the integrity of the information presented on the blawg if the author reveals his name (and, concomitantly his interests and affiliations), but arguably, sufficient safeguards exist against reader confusion. First, the very nature of a blawg counsels caution in evaluating its content because the blawg reader's horizon of expectations encompasses the free-wheeling immediacy of blawg posts.[141] As Glenn Reynolds has noted, "the blogosphere . . . is a low-trust culture."[142] Second, virtually every blawg incorporates specific

136. Chokshi, *supra* note 124.

137. *Id.* Frenkel was sued for defamation, and the case settled on September 23, 2009. Posting of Walter Olson to Overlawyered, Troll Tracker Blawg Suit Settles (Sept. 23, 2009), http://overlawyered.com/2009/09/troll-tracker-blog-suit-settles.

138. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2008).

139. Edward J. Cleary, *Accountability or Overkill: Disciplining Private Behavior*, 58 BENCH & B. OF MINN. 11 (2001); *see generally* Dean R. Dietrich, *Ethics Rules Apply 24-7*, 77 WIS. LAW. 18 (2004).

140. *See, e.g.*, Delso v. Trs. for Ret. Plan for Hourly Employees of Merck & Co., No. 04-3009, 2007 WL 766349, at *15–18 (D. N.J. Mar. 6, 2007) (holding that attorney's ghostwriting for *pro se* litigant gave litigant unfair advantage and violated his duty of candor under Rule 3.3).

141. *See supra* Part III.A.

142. Reynolds, *supra* note 121, at 1159; *accord* Neil, *supra* note 124 (comment #71 posted by Michael) ("Everyone should know by now to take EVERYTHING you read on the Internet with a

disclaimers against relying on blawg information as legal advice.[143] Thus, both implicit and explicit warnings exist to protect blawg readers against dangers posed by blawger anonymity. Defining anonymous blawging as an ethical violation would not serve the purpose of protecting the public.

B. Blawgs as Advertising and Marketing Tools

Most scholars who have addressed the ethics of blawging have focused on the rules regarding advertising and marketing of legal services.[144] This focus is not surprising because blawgs are a type of website, and websites often resemble advertisements. Even though the blawg genre is quite different from the advertisement genre and the blawg genre is not a derivative of advertisements, regulators have identified blawgs with the next closest thing in their universe, the lawyer advertisement.[145] Moreover, blawging promoters explicitly urge lawyers to use blawgs as marketing tools.[146] The audience envisioned for this type of marketing includes new clients, existing clients, and other lawyers.[147]

Proposals to regulate blawgs as advertising have elicited a vehement response.[148] Those who oppose regulating blawgs as advertising rightly discern the generic distinctions between blawgs and advertisements. Most blawgs deal with legal news and opinion;[149] the commentary on most blawgs looks similar to a newspaper editorial or newsmagazine

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grain of salt . . . .").

143. *See* Thomas J. Watson, *Blogging in Today's Electronic Age*, 80 WIS. LAW. 29, 30–31 (2007). Watson suggests the following as a "typical disclaimer":

> This blog is made available by this law firm for general information purposes only and to provide a general understanding of the law, not to provide legal advice. Readers of this blog are cautioned that reading the blog does not create a lawyer-client relationship between the reader and this law firm.

Id. at 31; *see also supra* note 72 and accompanying text (providing examples of some blawgs' disclaimers).

144. *See supra* note 4 (providing examples of such scholarship).

145. *See* Petruzzell, *supra* note 3, at 80–82.

146. *E.g.*, Benjamin W. Glass III, *Build Your Practice with a Blog*, 44 TRIAL 30 (2008); Grant D. Griffiths, *Top 10 Strategic Benefits of Blogging for the Law Firm*, 76 J. KAN. B. ASS'N 14 (2007); Blogging: Ethical Considerations, *supra* note 91 (comments of Tim Stanley).

147. Blogging: Ethical Considerations, *supra* note 91 (comments of Tim Stanley).

148. *See, e.g.*, Julie Hilden, *Are Lawyers' Blogs Protected by the First Amendment? Why State Bar Regulation of Law Blogs as "Advertising" Would Be Elitist and Reductive*, FINDLAW, Oct. 16, 2006, http://writ.news.findlaw.com/hilden/20061016.html (arguing that restricting attorney advertising is harmful and that blogs are not advertising).

149. Watson, *supra* note 143, at 30. *See generally* Carter, *supra* note 4, at 10–14 (discussing some of the ethical obligations of attorneys with respect to advertising and giving advice, then explaining that most blawgs avoid problems because the advice is "general").

commentary. Thus, blawg proponents view blawgs as closer to political speech than to commercial speech.[150] Many blawgs do not trumpet their authors' identities or promote their services. Indeed, many of the *ABA* 100 Blawgs are not authored by practicing lawyers.[151] None of the dangers associated with lawyer advertising would seem to be implicated by web postings by attorneys who do not practice law. However, this conclusion is in tension with blawg proponents' frequent touting of blawgs as great marketing tools for lawyers and law firms.[152] If blawgs can be used to attract clients or retain existing clients, then aren't they akin to advertising, and shouldn't their authors accept regulation of their blawgs as advertising?

This tension between blawgs as political speech and blawgs as marketing tools boils down to the content of individual blawgs, or indeed, individual blawg postings. In response to my question to Tennessee's chief disciplinary counsel about whether blawgs will be regulated as advertising, he responded: "It all depends on the content."[153] If a blawg promotes the services of a lawyer or law firm, or if an individual posting does so, then it can reasonably be subject to regulation as commercial speech.[154] One speaker at a recent ABA-sponsored CLE[155] program on blawging indicated that he adamantly

150. Petruzzell, *supra* note 3, at 81.

151. *E.g.*, American Constitution Society Blog, http://www.acsblog.org (last visited Oct. 18, 2009) (authored by American Constitution Society); Bench Memos, http://bench.nationalreview.com (last visited Oct. 18, 2009) (authored by *National Review*); Jurist-Paper Chase, http://jurist.law.pitt.edu/paperchase (last visited Oct. 18, 2009) (authored by Univ. of Pittsburg Law School); Law Beat, http://newhouse-web.syr.edu/legal/blog.cfm?type=1&on=6 (last visited Oct. 18, 2009) (authored by Carnegie Legal Reporting Program at Syracuse University); Point of Law, http://www.pointoflaw.com (last visited Oct. 18, 2009) (authored by Manhattan Institute); QuizLaw, http://www.quizlaw.com (last visited Oct. 18, 2009) (authored by Quizlaw); Law Blog, http://blogs.wsj.com/law (last visited Oct. 18, 2009) (authored by *Wall Street Journal*).

152. *See, e.g.*, Blogging: Ethical Considerations, *supra* note 91 (comments of Tim Stanley).

153. Telephone Interview with Tripp Hunt, Chief Disciplinary Counsel, Tenn. Bd. of Prof'l Responsibility (Apr. 2007). New Jersey has a stricter standard that depends less on the blog content than on the interactive features of the blog. *See* Petruzzell, *supra* note 3, at 82 (noting that in response to informal inquiry, the N.J. Committee on Attorney Advertising "stated that where an attorney blog is interactive, enabling the public to contact the attorney . . . and the purpose is to obtain professional representation, there must be compliance with the advertising rules").

154. *See* Petruzzell, *supra* note 3, at 81–82. *But see* Krypel, *supra* note 4, at 479–80 (arguing that blawgs are entitled to "substantial First Amendment protection" because "it is untenable to argue that blawgs, even in their most abhorrent, self-promoting form, serve only an advertising function"). *See generally* Ciolli, *supra* note 3, at 729–35 (addressing the question of when a blog becomes commercial speech).

155. Acronym for "Continuing Legal Education," a program that fulfills the requirements of many states that attorneys receive a certain number of hours of continuing legal education per year.

refuses to tout his own services or his firm's services on his blawg so as to steer clear of regulation.[156]

If blawgs are regulated as advertising, the issue of enforcement looms large because, by definition, the content of a blawg changes quickly, sometimes daily or more frequently.[157] Most states require lawyers to submit copies of advertisements to bar disciplinary authorities within a short period after the advertisement appears.[158] This requirement means that each blawg author must police each post on his or her blawg to determine whether it qualifies as an advertisement; if so, a copy must be provided to the bar disciplinary authority.[159] Obviously, if blawgs are treated as advertisements, this filing requirement could prove quite onerous[160] and might chill the robust give-and-take of blawg discourse.[161] To the extent this discourse constitutes or borders on political speech, any chilling effect of regulation imposes a heavy cost and likely could not survive constitutional review.[162] This potential chilling effect of blanket regulation of blawgs explains the vociferous opposition to such regulation by blawg proponents.

The most visible attempt to regulate blawgs came in early 2007, when the New York Code of Professional Responsibility was amended to include "weblogs" in its definition of "computer-accessed communication."[163] The initial rule defined "advertisement" broadly as "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

156. Blogging: Ethical Considerations, *supra* note 91 (comments of Robert Ottinger).

157. *See id.* (comments of Tim Stanley). A survey of the *ABA* 100 conducted by my research assistant between July 18 and August 14, 2007 revealed that only fifty-six appear to be updated daily, while twenty-three appear to be updated every 2–5 days.

158. *E.g.*, TENN. RULES OF PROF'L CONDUCT R. 7.2(b) (2008) ("Within three days after the publication, distribution, or dispatch of an advertisement or a communication not directed to a specifically identified recipient, the lawyer shall file a copy of the advertisement or communication with the Board of Professional Responsibility . . . .").

159. *See* Petruzzell, *supra* note 3, at 81.

160. The filing requirement would be onerous to both blawger and regulator. The generic requirement of frequent updating may actually protect blawgs from regulation. It would create a logistical nightmare to require every blawger licensed in a particular state to submit every post to the regulatory authority. Maybe the reason why blawgs haven't been more thoroughly regulated as advertising is that everyone recognizes that bar authorities just don't have the resources to do so.

161. *See* Krypel, *supra* note 4, at 483; Petruzzel, *supra* note 3, at 81.

162. *See* Krypel, *supra* note 4, at 458. *But see* Ciolli, *supra* note 3, at 725.

163. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.1(c) (2009) ("Terminology"). Other technologies included in the definition are "web sites, . . . search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences." *Id.*

services."[164] This broad definition elicited heated response from blawgers.[165] However, the final rule narrowed the definition of advertisement to those communications "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."[166] Thus, a blawg is explicitly defined as "computer-accessed communication" and could also be considered an "advertisement" if it met the test.[167] With respect to "computer-accessed communication," the rules provide that a firm shall not use "a pop-up . . . advertisement in connection with computer-accessed communications, other than on the lawyer or law firm's own web site or other internet presence."[168] The rules also provide that "[a]ny advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year."[169] Finally, the rules prohibit a lawyer from soliciting potential clients "by . . . real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client."[170]

Several aspects of the final New York rules are noteworthy. First, the rules do not classify blawgs as advertising *per se*.[171] Instead, advertisements are defined by content and purpose.[172] Second, blawgs are classified as "computer-accessed communication," and are regulated only insofar as they "contained" advertising or constituted

164. Petruzzell, *supra* note 3, at 81 (quoting a proposed definition of "advertisement" under New York's new lawyer advertising rules).

165. Joseph Goldstein, *Proposed Attorney Advertising Rules Could Place Restrictions on WebLogs,* N.Y. SUN, Sept. 26, 2006, *available at* http://www.nysun.com/new-york/proposed-attorney-advertising-rules-could-place/40302/; Posting of Greg Beck to Consumer Law and Policy Blog, http://pubcit.typepad.com/clpblog/2006/09/this_blog_is_fa.html (Sept. 14, 2006 14:20 EST).

166. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.1(a) (2009) ("Terminology").

167. *Id.*

168. *Id.* § 1200.7.1(g). A firm is also forbidden from using "meta tags or other hidden computer codes that, if displayed, would violate a disciplinary rule." *Id.*

169. *Id.* § 1200.7.1(k).

170. *Id.* § 1200.7.3(a)(1). The rule defines "solicitation" as:

> any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

Id. § 1200.7.3(b). The rules also provide that "[a]ny solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need." *Id.* § 1200.7.3(h).

171. *Id.* § 1200.7.1.

172. *Id.* § 1200.7.1(b).

solicitation.[173] Certain portions of the rules were attacked as violative of the First Amendment, and in July 2007, the U.S. District Court for the Northern District of New York invalidated several provisions, primarily those prohibiting testimonials or fictionalized depictions in lawyer advertisements.[174] Interestingly, the portions of the rules dealing specifically with weblogs were not challenged.[175] Therefore, the rules dealing explicitly with blawgs are still in effect. Nationwide, there appear to have been no attempts to enact blanket regulation of blawgs as advertising, and no enforcement actions directed at blawg postings.[176]

A related, and perhaps thornier, question is the treatment of advertising contained *in* blawgs. The New York rules recognize that "computer-accessed communications" like blawgs can "contain" advertising.[177] At least ten of the *ABA* 100 display advertisements for goods and services offered by someone other than the author.[178] Traditionally, regulation of lawyer advertising targeted advertisements by and for the lawyer himself.[179] Here, we have the question of

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173. Arguably, blawgs could also be subject to regulation as websites, since they are located on websites. *See* Blogging: Ethical Considerations, *supra* note 91 (comments of Micah Buchdahl). The rules contain two additional provisions related to websites. First, "[e]very advertisement . . . shall be labeled 'Attorney Advertising' . . . on the home page in the case of a web site." N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.7.1(f) (2009). Second, the contents of any applicable website "shall be preserved [for not less than three years] upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days." *Id.* § 1200.7.1(k). Because "web sites" and "web logs" are mentioned separately in the definitional section, however, it is likely that web logs would not be subject to regulation as websites under the rules. Additionally, the generic characteristics of the two genres are distinct.

174. Alexander v. Cahill, No. 04-3009, 2007 WL 2120024 (N.D. N.Y. July 23, 2007).

175. *Id.* at *2–4.

176. An exception is the early threat by the Kentucky Advertising Commission to treat blawgs as advertising, which dissipated when "the Commission adopted an interpretation of the rule that only requires attorneys to obtain Commission approval of the 'About' page of a blog, or any other section that contains biographical information." Carter, *supra* note 4, at 18 (citing Ben Cowgill, *Update: How Kentucky's Attorney Advertising Commission is Now Treating Blogs by Kentucky Lawyers*, BEN COWGILL'S LEGAL ETHICS NEWSLETTER, http://cowgill.blogs.com/legalethics/2006/08/update_ how_the_.html).

177. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.7.1(k) (2009).

178. Bench Memos, http://bench.nationalreview.com (last visited Oct. 8, 2009); InstaPundit, http://www.pajamasmedia.com/instapundit (last visited Oct. 8, 2009); Legal Juice, http://www.legaljuice.com (last visited Oct. 8, 2009); May It Please the Court, http://www.mayitpleasethecourt.com/journal.asp (last visited Oct. 8, 2009); Legal Pad, http://legalpad.blogs.fortune.cnn.com (last visited Oct. 8, 2009); QuizLaw, http://www.quizlaw.com (last visited Oct. 8, 2009); The Volokh Conspiracy, http://volokh.com (last visited Oct. 8, 2009); Patently-O, http://www.patentlyo.com (last visited Oct. 8, 2009); and Adam Smith, Esq., http://www.adamsmithesq.com/blog (last visited Oct. 8, 2009).

179. *See generally* Ralph H. Brock, *"The Court Took a Wrong Turn with Bates": Why the*

whether speech *by* a lawyer that incorporates advertisements *for* another's goods or services is or should be subject to regulation.[180]

C. Forming an Attorney-Client Relationship and Giving Legal Advice

By definition, blogs are interactive. The blog genre includes the capability for readers to post comments to the blog and to receive responses from the blog author and from other readers. One of the most frequently repeated terms of advice to businesses who wish to blog is to regulate the interactivity of their blogs.[181] Commentators recognize that anything posted on a blog, including reader comments, tends to be attributed to the blog author, even if it is critical of or contrary to the blog author's interests or positions.[182] Also, the immediacy and contemporaneous nature that defines the blog genre encourage off-the-cuff or ill-thought-out responses by the blog author to reader posts, potentially resulting in damage to the author's image, or even to the author's business.[183]

These same dangers result from the interactivity of blawgs.[184] The ability of readers to post comments and the author to respond results in a dialogue that can look like a relationship, specifically, an attorney-client relationship. Also, the content of reader posts and author responses can look like the giving and receiving of advice, specifically, legal advice.[185] The dangers of forming an attorney-client relationship and of giving legal advice over the Internet—especially in a blawg environment—are well recognized.[186] As a result, blawgs are generally less interactive than blogs and have more disclaimers.

The danger that blawg readers will believe that they have formed an attorney-client relationship with an attorney via the blawg is a result of the democratizing function of the blogosphere.[187] Anyone who has

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Supreme Court Should Revisit Lawyer Advertising, 7 FIRST AMENDMENT L. REV. 145 (2009) (highlighting the established limitations placed on lawyer advertising and the Supreme Court's evolving jurisprudence on legal advertising).

180. *See generally* Ciolli, *supra* note 3 (discussing whether blogs are commercial speech). The issue of whether a blawg's sponsorship of speech by another constitutes endorsement of that speech justifying regulation also arises in connection with hyperlinks. A detailed analysis of this issue is beyond the scope of this Article.

181. *See* FLYNN, *supra* note 21, at 91–95.

182. *Id.* at 91.

183. *Id.* at 91–92.

184. Carter, *supra* note 4, at 30–32.

185. *Id.*

186. *See, e.g.*, Katy Ellen Deady, *Cyberadvice: The Ethical Implications of Giving Professional Advice Over the Internet*, 14 GEO. J. LEGAL ETHICS 891 (2001).

187. *See* GLENN REYNOLDS, AN ARMY OF DAVIDS (2006).

access to the Internet can access a blawg, and anyone who can access a blawg that accepts reader comments can contribute to the blawg (assuming that the moderator, if any, permits the posting).[188] In turn, other readers or the author can respond to the reader's posts. Thus, as a result of blawg interactivity, the horizon of reader expectation includes a relationship, and when the author of the blawg is a lawyer, the type of relationship the reader can expect could well be described as an attorney-client relationship.[189] In contrast, viewers of advertisements do not have the impression that they can form an attorney-client relationship with an attorney by viewing a phonebook or television advertisement, or by hearing a radio advertisement. In the face of these traditional genres, viewers or listeners are passive; they do not participate in a conversation with anyone else through the media.[190]

There is little law on what it takes to form an attorney-client relationship;[191] however, there does appear to be consensus that the relationship must be consensual.[192] That is, at its inception, both attorney and client must wish to enter into the relationship.[193] The requirement of mutuality would appear to be sufficient to fend off claims of blawg-based, involuntarily formed attorney-client relationships. However, the client's reasonable expectations sometimes

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188. *See* Glass, *supra* note 146, at 30–31 (describing the nature of blogs).

189. *See* Shawn A. Turner, *Blawgs Offer Attorneys Forums for Info, Publicity*, CRAIN'S CLEVELAND BUS., July 9, 2007, at 6 ("The deeper into it [blogging] you get, the more chance you have of planting the seed in someone's mind that this could be an attorney-client relationship.") (quoting Mike Stovsky, partner at Cleveland office of Ulmer & Berne LLP).

190. The conditioning of viewers by these passive media may exacerbate the blawg reader's belief that he or she has entered into a relationship simply by communicating over the Internet. Similar considerations apply to communications by readers to lawyers over a website's "Contact Us" link.

191. The Third Restatement provides:

> A relationship of client and lawyer arises when: (1) 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: FORMATION OF A CLIENT LAWYER RELATIONSHIP § 14 (2000).

192. *See* Sheinkopf v. Stone, 927 F.2d 1259, 1265 (1st Cir. 1991) ("To imply an attorney-client relationship . . . the law requires more than an individual's subjective, unspoken belief that the person with whom he is dealing, who happens to be *a* lawyer, has become *his* lawyer."). *But see* Carter, *supra* note 4, at 23 ("[A] client's subjective belief about whether an attorney is representing him will play a major role in the court's analysis."). *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FORMATION OF A CLIENT LAWYER RELATIONSHIP § 14 cmt. b (2000) ("The client-lawyer relationship ordinarily is a consensual one . . . .").

193. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FORMATION OF A CLIENT LAWYER RELATIONSHIP § 14(1)(a) (2000).

trump mutuality.[194] Although this phenomenon is most often seen in the area of scope of representation, it can also occur when formation of the attorney-client relationship is at issue.[195]

Similar considerations apply to the issue of providing legal advice. Lawyers prefer to give legal advice only when they have time to research, speak, and write in a considered way, and only when they have the opportunity to embody their advice in formal documents. The "advice letter" is the classic example of the genre embodying legal advice.[196] However, clients and non-clients frequently seek advice from lawyers in much less formal ways, and lawyers frequently offer informal legal advice. This "curbstone advice" or "cocktail party conversation" is generally held not to give rise to malpractice liability, largely on the rationale that the people receiving such informal advice cannot expect it to give rise to an attorney-client relationship.[197]

But is there an ethical problem with forming an attorney-client relationship or giving legal advice over the Internet? The Model Rules do not expressly address how to properly form an attorney-client relationship or how to give legal advice. The only provision of the Rules that might apply to these issues is Rule 8.4(c), which prohibits

194. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FORMATION OF A CLIENT LAWYER RELATIONSHIP § 14(1)(b) (2000). Under these circumstances, the lawyer is deemed to have given implied assent to the relationship. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FORMATION OF A CLIENT LAWYER RELATIONSHIP § 14(1)(b) cmt. e (2000); *see also* Letter from Nick Critelli, Chairman, Iowa State Bar Ass'n Comm. on Ethics and Practice Guidelines to Dwight Dinkla, Executive Director, Iowa State Bar Ass'n (Aug. 8, 2007) (noting that a prospective client's unilateral communication to a lawyer, usually insufficient to form an attorney-client relationship, can nonetheless create an "expectation of privacy," which begs the question "whether counsel did anything that would lead a reasonable person to believe that they were permitted to share confidential information and the confidentiality would be respected").

195. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FORMATION OF A CLIENT LAWYER RELATIONSHIP § 14 cmt. b (2000). *See generally* Carter, *supra* note 4, at 18–25 (discussing the formation of attorney-client relationship).

196. *See* David E. Sorkin, *Advice Letters*, 82 ILL. B.J. 335 (1994) (explaining advice letters' importance and components).

197. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: FORMATION OF A CLIENT LAWYER RELATIONSHIP § 14 cmt. c (2000) ("[A] lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising."); Michael J. Hoover, *Legal Malpractice in Light of Togstad – Liability for Curbstone Opinions?*, BENCH & B. OF MINN., Nov. 1980, *available at* http://www.mncourts.gov/lprb/80bbarts/togstad1180.html; Paul Knisely, *Lawyers' Liability in Dispensing Legal Advice at a Social Gathering: Can Casual Conversation Cause a Malpractice Claim?*, 65 TEX. B.J. 907, 907 (2002); Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113, 1173 (2007); *cf.* Leonard Berlin, *Malpractice Issues in Radiology: Curbstone Consultations*, 178 AM. J. ROENTGENOLOGY 1353 (2002), *available at* http://www.ajronline.org/cgi/content/full/178/6/1353 (discussing medical malpractice for curbstone medical advice).

"conduct involving dishonesty, fraud, deceit, or misrepresentation."[198] To the extent that a blawger dishonestly or fraudulently invites a reader to believe that he or she has entered into an attorney-client relationship, or misrepresents the content of a blawg post as individualized legal advice, the blawger would arguably violate this rule. But the real risk posed by this behavior is a legal malpractice suit. A blawg reader, believing she had acquired an attorney and received legal advice, might act on that advice to her detriment, leading to a suit for damages against the blawger.[199]

To guard against such claims, blawgers have begun to use disclaimers.[200] Attorney and law firm websites employ widespread and sophisticated use of disclaimers,[201] and this reservoir of disclaimers has undoubtedly proved to be an important resource for blawgers. Most blawg disclaimers relate specifically to giving legal advice and formation of the attorney-client relationship.[202]

Blawgers obviously hope that these disclaimers will provide protection against readers' claims in case of a lawsuit, but the effectiveness of disclaimers, in both the blawg and website contexts, is largely untested.[203] From the perspective of genre theory, disclaimers are an attempt to control the reader's horizon of expectation.[204] A reader who comes to a blawg expecting that she can acquire an attorney and receive legal advice learns from the disclaimer that her expectation will remain unfulfilled.[205] Whatever the reader may have expected from the blawg, an attorney-client relationship and legal advice are not available. In legal terms, the disclaimer would make it unreasonable for

198. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2008).

199. There appear to have been no reported cases based on this theory. *Cf.* Knisely, *supra* note 197, at 907 (noting the unlikelihood that malpractice suit would be brought based upon cocktail party advice).

200. Interestingly, despite the widespread use of disclaimers on attorney and law firm websites, a survey conducted by my research assistant between July 18 and August 14, 2007 revealed that only twenty-six of the *ABA* 100 contain disclaimers.

201. *See, e.g.*, Mayer Brown Disclaimer, *supra* note 72.

202. *See, e.g.*, *supra* note 72 (citing multiple disclaimers).

203. *See* Blogging: Ethical Considerations, *supra* note 91 (comments of William Bowser). *But see* Wash. State Bar Ass'n, Informal Op. 2080 (2006) (responding to inquiry about potential conflict of interest resulting from receipt of confidential information from adverse party over firm's website, advising attorneys to "[u]se conspicuous and easily understood disclaimers, including, where appropriate, disclaimers that the inquirers must click on to show their approval of the terms").

204. *See supra* Part III.A.

205. Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 186–94 (1999).

the reader to rely on the blawger as her attorney or to rely on blawg content as legal advice.

However, it is not clear that blawg content can effectively counter the inherent generic characteristics of the blawg. To the extent that the blawger interacts with her readers, and to the extent blawg postings look like individualized legal advice, the reader's horizon of expectation may be governed by the genre rather than by its content. In this context, it is interesting to compare blawgs with newsletters and newspaper columns dispensing legal information. Recently, lawyers have sought to "educate" the public about legal issues. Public interest law firms, legal aid offices, government lawyers, and bar associations sponsor educational seminars with handouts or brochures giving rudimentary information about particular areas of the law.[206] Newspapers publish columns by lawyers discussing legal issues or informing readers of recent developments in the law.[207] Most of these sources contain a disclaimer distinguishing between legal advice—which is not being dispensed—and information.[208]

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206. *See, e.g.*, Michael Genz, *Technology and Client Community Access to Legal Services–Suggestive Scenarios on Community Legal Education, Intake and Referral and Pro Se*, 5 D.C. L. REV. 225 (2000); Elisabeth C. Kehoe, *Community Legal Education by Michigan Legal Aid Programs*, 77 MICH. B.J. 785 (1998).

207. For example, lawyer Pamela Reeves, a former president of the Tennessee Bar Association, writes a regular Sunday column on legal topics in the *Knoxville News-Sentinel*. The disclaimer accompanying her column is relatively weak: "Because factual situations vary, competent legal counsel should be consulted for individual advice." *E.g.*, Pamela Reeves, *Case Affects Workers' Comp Action*, KNOXVILLE NEWS-SENTINEL, Nov. 16, 2008, at 30. For a history of the organized bar's reaction to such newspaper columns, *see* Lanctot, *supra* note 205, at 223–29.

208. For example, the website of the Tennessee Administrative Office of the Courts contains links to "Self-Help" and "Forms and Publications." The "Self-Help Center" page contains a fairly strong disclaimer:

> In accordance with Tennessee Code Annotated, Section 16-3-804(b), no employee of the state court system shall engage, either directly or indirectly, in the practice of law. This includes making legal referrals, performing legal research or giving legal advice. If you need any legal advice, please contact a licensed attorney in your area.

Tennessee Administrative Office of the Courts, http://www.tncourts.gov/geninfo/help/selfhelp.htm (last visited Mar. 23, 2009). However, the "Forms and Publications" page contains no disclaimer at all, even though the site contains an extensive menu of clickable standardized legal forms, including a Petition for Order of Protection, an Application for Writ of Immediate Possession of Personal Property, and a Notice of Appeal. *See* Tennessee Judiciary Trial Court Forms, http://www.tncourts.gov/geninfo/Publications/Forms/TrialCourtForms.htm (last visited Mar. 22, 2009).

Arizona has been a leader in providing legal education to pro se litigants. The website of the Arizona Judicial Branch, http://www.supreme.state.az.us, contains an area entitled "Public Information and Assistance." Viewers can choose from a menu of subject-matter areas leading to printable forms. These sites do contain a fairly strong disclaimer:

Attorney and law firm websites often contain legal information. Many websites of large law firms offer an array of newsletters in various substantive areas of law.[209] Although websites may be materially more ephemeral than, for example, printed pamphlets, a lawyer's website is replete with formalities—such as the firm name and the overall design of the website—that make the website appear authoritative. Just as it is difficult for an Internet user to understand why medical information on an authoritative website would not apply to her, it is difficult for a reader to understand why legal information on an authoritative website would not apply to her. And, again, the democratizing influence of the Internet may play a role. While a sophisticated visitor to a website may well understand that her particular situation might exempt her from generalized legal information, a less sophisticated reader might not.[210]

D. Confidentiality

Another ethical risk inherent in blawgs is breach of confidentiality. The Model Rules require attorneys to protect "information relating to the representation of a client."[211] As the comments to Model Rule 1.6 emphasize, this ethical protection "applies . . . to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."[212] This prohibition on disclosure contains no "public record" exception; that is, the public reporting of an incident that underlies a lawsuit, or the reporting of the pleadings or disposition of a case, does not justify breach of the ethical prohibition

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> The information offered on this site is made available as a public service and is not intended to take the place of legal advice. If you do not understand something, have trouble filling out any of the forms or are not sure these forms and instructions apply to your situation, see an attorney for help. Before filing documents with the court, you should consult an attorney to help guard against undesired and unexpected consequences.

Arizona Judicial Branch, http://www.supreme.state.az.us/nav2/selfserv.htm (last visited Aug. 17, 2009).

209. For example, the Skadden Arps website provides a link to "Events and Publications." Printable publications include articles by Skadden lawyers on class actions, IRS tax guidance, REITS, and the TARP program. Skadden, Arps, Slate, Meagher & Flom, http://www.skadden.com/Index.cfm?contentID=6&viewType=2 (last visited Dec. 18, 2008).

210. There is precedent for distinguishing between sophisticated and unsophisticated consumers of professional ads. *Compare* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding prohibition on lawyer's in-person solicitation of young female accident victim in hospital room), *with* Edenfield v. Fane, 507 U.S. 761 (1993) (overturning prohibition on accountant's in-person solicitation of sophisticated business executives).

211. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008).

212. *Id.* R. 1.6 cmt. 3.

by the parties' lawyers.[213] Therefore, a blawger who discloses "information relating to the representation of a client," even if that information has been otherwise publicly disclosed, violates Model Rule 1.6(a), unless an exception to the ethical protection applies.[214]

Two exceptions are potentially applicable to a blawger's disclosure of information relating to the representation of a client: the client consent exception and the impliedly authorized exception.[215] Model Rule 1.6(a) permits disclosure if "the client gives informed consent."[216] The Model Rules define "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[217] If a blawger wishes to rely on this exemption, she must show that she met this standard. Realistically, most blogs by large law firms probably rely on client consent to disclose ethically protected information, since large law firm websites often contain blurbs about recent cases that would appear to require client consent to disclosure.[218] Presumably, obtaining client consent to disclosure on a blawg would require only incrementally more consultation than obtaining consent to disclosure on a website.

The ethical prohibition on disclosure is also subject to the proviso that the lawyer may make such disclosures as are "impliedly authorized in order [for the lawyer] to carry out the representation."[219] The comments give two illustrations: "[i]n some situations, for example, a lawyer may be impliedly authorized to [disclose information by]

213. The Tennessee Bar Association recently approved proposed amendments to the Tennessee Rules of Professional Conduct that permit disclosure of ethically protected client information when "the disclosure is limited to information relating to the representation of a client which has already been made public and the disclosure is made in such a way that there is no reasonable likelihood of adverse effect to the client." TENN. RULES PROF'L CONDUCT R. 1.6(a)(3) (Discussion Draft 2008), *available at* http://www.tba.org/Committees/Conduct/TRPC_draftrevisions_052708.pdf.

214. Carter, *supra* note 4, at 25.

215. *See id.* The permissive disclosure situations delineated in Rule 1.6(b) would be much less likely to apply to a typical blawg post. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(6).

216. *Id.* R. 1.6(a).

217. *Id.* R. 1.0(e).

218. For example, clicking the "Practices" link on the Perkins Coie website and choosing "Copyright Litigation" and "Experience" leads to a full page of clickable case blurbs including information such as "case settled." Perkins Coie, Copyright Litigation Experience, http://www.perkinscoie.com/services/Services_Detail.aspx?service=379cbd0b-e5ea-43bf-b34c-29163ffcd818&op=experience (last visited Dec. 19, 2008).

219. MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

admit[ting] a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to the matter."[220] Obviously, neither of these examples addresses public disclosure of ethically protected information. This issue has been raised most often in the context of trial publicity, in which courts' efforts to control the flow of information about an ongoing case have been subject to First Amendment challenge.[221] In the trial publicity context, disclosure of ethically protected information may well be impliedly authorized in order to counter unfavorable information publicized by the opponent.[222] Similarly, attorney comments on recently filed cases may serve a litigation purpose that would be impliedly authorized.

Implied authorization may also operate in the blawg context. If it serves the client's best interest for a lawyer to comment to a newspaper, it may well serve the same best interest of the client for a lawyer to blawg about her client's case.[223] Although the newspaper genre seems more dignified and more traditionally news-oriented,[224] there is no requirement that disclosure that is impliedly authorized take place in the most dignified or traditional medium. Indeed, if the lawyer's goal is to obtain maximum exposure for the client's claims or other information, she should disclose the information on a blawg rather than in a traditional newspaper.[225]

Even given the consent and implied authorization provisos, blawgs pose special temptations to disclose ethically protected client information. Several inherent features of blawging may lead a careless blawger to disclose ethically protected information: the imperative to update the blawg periodically; the spontaneous nature of communication, especially in response to reader posts; and the notion of

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220. *Id.* R. 1.6 cmt. 5.

221. *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

222. *See* Smith v. State, 756 So. 2d 892, 909 (Ala. Crim. App. 1997) (holding that defense counsel's disclosure of ethically protected information to press was "impliedly authorized" under Rule 1.6); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.6 (discussing trial publicity).

223. *But see* Helen W. Gunnarsson, *Blogging and Legal Ethics*, 94 ILL. B. J. 225, 225 (2006) (urging caution in complying with trial publicity rule).

224. Although law firm blawgs are typically "limited to analysis of current legal developments," and are thus "news-oriented," they are still blawgs and thus lack the generic indicia of authority associated with printed newspapers. Busharis, *supra* note 14, at 8.

225. A blawg entry may lead to newspaper publicity. A criminal defense lawyer in Knoxville, Tennessee, blawged that his client could earn a reduced sentence if he underwent drug rehabilitation while incarcerated. Responding to the suggestion that this revelation could be "ethically problematic," the lawyer stated that "no attorney-client confidences were revealed, and his client approved of the posting." Jamie Satterfield, *Letters Asking for Tough Sentence for West Piling Up*, KNOXVILLE NEWS-SENTINEL, Nov. 5, 2006, at 23.

the blogosphere as a community.[226] Some blawgers simply refuse to blawg at all about client matters.[227]

A related problem exists with respect to confidential information conveyed over a blawg by a potential client.[228] If this potential client is an adverse party in an ongoing case, the blawger's receipt of the confidential information can create a disqualifying conflict of interest. An example of this danger is illustrated in California Ethics Opinion 2005-168.[229] There, a law firm's website contained a link labeled, "What are my rights?"[230] Clicking on this link took the reader to a page entitled, "Wondering about a legal problem you have?" with an email form with space for "Facts."[231] A reader of the website, a female defendant in a divorce suit, accessed the website and accepted the invitation to share her "facts," as described by the California State Bar Committee on Professional Responsibility:

> Wife explained that she was interested in obtaining a divorce. She related that her Husband . . . was cohabiting with a co-worker. She also stated that her 13-year-old son was living with her and asked if she could obtain sole custody of him. She noted that Husband was providing some support but that she had to take part-time work as a typist, and was thinking about being re-certified as a teacher. She revealed that she feared Husband would contest her right to sole custody of her son and that, many years ago, she had engaged in an extra-marital affair herself, about which Husband remained unaware. Wife stated that she wanted a lawyer who was a good negotiator, because she wanted to obtain a reasonable property settlement without jeopardizing her goal of obtaining sole custody of the child and keeping her own affair a secret. She concluded by noting she had some money saved from when she was a teacher, and stating, "I like your web site and would like you to represent me."[232]

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226. The danger is not merely hypothetical. Recently, a firm brochure published by Quinn Emanuel Urquhart Oliver & Hedges revealed the amount of a confidential settlement—$65 million—received by a former client in a patent infringement case. Debra Cassens Weiss, *Oops. Confidential Settlement Revealed in Quinn Emanuel Brochure*, A.B.A. J. LAW NEWS NOW, Feb. 10, 2009, http://www.abajournal.com/index.php?/news/confidential_settlement_revealed_in_quinn_emanuel_ brochure/print (last visited Sep. 26, 2009).

227. *See* Blogging: Ethical Considerations, *supra* note 91 (comments of Robert Ottinger).

228. *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2008) ("[E]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.").

229. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 168 (2005), *available at* 2005 WL 3068090.

230. *Id.* at *1.

231. *Id.*

232. *Id.*

Unfortunately, the law firm was already representing the husband, who had contacted the firm to "explore the possibility of a divorce."[233] In arguing that they did not take on a duty of confidentiality to the wife, the law firm relied upon the disclaimer contained in the list of "Terms." This list appeared immediately following the email space, and upon completing the email, the wife had to click either "Submit my inquiry pursuant to the foregoing terms," or "Cancel my inquiry."[234] The relevant term read as follows: "I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship."[235]

The Committee held that the wife's email was not sufficient to create an attorney-client relationship with the law firm.[236] However, with respect to the law firm's duty of confidentiality, the disclaimer contained in the "Terms" was not sufficient to "defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's web site is subject to confidentiality."[237] The Committee also opined that "Law Firm may be disqualified from representing Husband should the court conclude that the information Wife submitted was material to the resolution of the dissolution action."[238]

The analogy to blawging is clear. Because of the conversational tone of blawgs, a reader is likely to feel more comfortable reading a lawyer's blawg than reading her official website. Even a reader who would not feel comfortable conveying confidential information via an email invited by a "contact us" link might feel comfortable posting confidential information on a blawg that accepts comments. Thus, no matter how vigilant a blawger may be in not disclosing the ethically protected information of her own clients, her representation can be affected by the actions of a blawg reader.

E. Positional Conflicts

A final ethical issue with blawgs is the creation of positional conflicts. Model Rule 1.7(a)(2) prohibits representation when the representation may be "materially limited by the lawyer's

233. *Id.* at *2.
234. *Id.*
235. *Id.*
236. *Id.* at *3.
237. *Id.* at *1.
238. *Id.* at *5.

responsibilities to another client."[239] Comment 24 to Model Rule 1.7 defines a "positional conflict" as:

> a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken [by the lawyer] on behalf of the other client.[240]

This definition of positional conflicts is limited to positions taken "in different tribunals." Because a blawg is not a "tribunal," this ethical restriction would seem to be inapplicable to positions taken in blawgs. However, it is conceivable that positions taken by a blawger may create a conflict if she subsequently takes a position contrary to her previously stated position. If a blawger whose reputation is entwined with her blawg[241] needs to take a contrary position in order to advance a client's interests, she may be "materially limited" from doing so because of that reputational interest.[242] This concern is not unique to blawgs; lawyers who take positions on legal issues in any medium may be faced with the same issue of positional conflicts. But the nature of blawging encourages lawyers to freely take positions on legal issues;[243] blawgers who eschew posting client information do not hesitate to express their views on controversial legal issues.[244]

Although a blawg post is not equivalent to taking a position before a tribunal, posts can come back to haunt the blawger. Blawg posts could plausibly be used for evidentiary purposes,[245] and to the extent a blawg

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239. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008).

240. *Id.* cmt. 24.

241. *See* Krypel, *supra* note 4, at 468–69 (asserting that "the currency of the blogosphere is reputation").

242. Model Rule 1.7(a)(2) also prohibits representation when the representation may be "materially limited" by "a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2). Thus, the positional conflict engendered by a blawger's reputational interest would be slightly different from the one defined in R. 1.7, cmt 24.

243. For example, blawger Professor Douglas Berman reprints an excerpt from a Slate.com article on Bernard Madoff by Harlan Protass, who opines that federal sentencing guidelines provide inordinately long sentences for white-collar criminals. Berman comments: "Regular readers know that I agree with a lot of what Harlan has to say . . . ." Posting of Douglas Berman to Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2008/12/madoff-mercy-how-long-should-the-ponzi-schemer-go-to-prison-for.html (Dec. 18, 2008, 16:04 EST).

244. *See* Blogging: Ethical Considerations, *supra* note 91 (comments of Robert Ottinger).

245. *See* Chris W. McCarty, *Blogging for Evidence*, TENN. B.J., Apr. 2007, at 26. *But see* Nicholson v. City of Chattanooga, No. 1:04-CV-168, 2005 U.S. Dist LEXIS 42041, at *21 (E.D. Tenn. Oct. 17, 2005) (refusing to admit statement from blog allegedly "written by one of the emergency medical professionals sent to the scene of the shooting" on the ground that the blog entry was "unidentified and unauthenticated").

is intended for marketing purposes, any position taken on a blawg could turn off some potential clients, or even make current clients wonder about the zealousness of positions taken on their behalf.[246] It is not hard to imagine that a losing client might point to blawg posts on a given legal issue as evidence that his attorney had a personal conflict of interest in advocating the other side of that issue. Even lawyers who are careful not to use their blawgs for marketing purposes, confining themselves to comment on legal issues,[247] can easily run into trouble with clients or potential clients depending upon the positions expressed in blawg posts.

V. PRACTICAL CONSIDERATIONS[248]

What can a blawger do to make sure she stays on the right side of the ethical line? First, a blawger needs to take responsibility for the blawg, either by maintaining the blawg herself, or delegating maintenance to a subordinate lawyer or layperson, with the understanding that, under

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246. For example, Professor Berman recently opined on his blawg that a jail sentence received by football professional Donte' Stallworth in the death of a pedestrian was too light:

> This very short jail term strikes me as insufficient for killing someone while driving drunk, especially since drunk driving is a deterrable offense that ends lots of innocent lives unnecessarily. Though the house arrest and other parts of the sentence make the sanction more severe than just a month in jail, the message that will resonate with the average citizen is that the "price" of drinking and driving and killing is merely a month in jail. I wonder how many innocent lives this lenient sentence might cost as football fans now have even less of a reason to give much thought to finishing that extra beer before driving home after the big game.
>
> I get aggravated about undue leniency in this context in part because I represent clients sentenced to so much more prison time for doing what strikes me as a much less serious offense purportedly for the sake of general deterrence. Consider, for example, my client Weldon Angelos is now serving his sixth year of his 55-year sentence for dealing marijuana. Or consider the sentencing fate of other NFL players who committed seemingly less serious crimes: Michael Vick got years in federal prison for dog fighting and Plaxico Burress is facing years in state prison for shooting himself. But Donte' Stallworth gets only a month for killing an innocent pedestrian while drinking and driving.

Posting of Douglas Berman to Sentencing Law and Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2009/06/nfl-player-gets-very-short-jail-term-for-drunk-driving-killing.html (June 16, 2009, 13:01 EST). If Professor Berman ever represents a defendant in a drunk driving case, one wonders whether his plea for leniency might be countered by a reference to this post. In addition, by portraying himself as a person who abhors lenient sentences for drunk drivers, Professor Berman may have created reputational interests that would materially limit him in arguing for a light sentence for a future DUI client.

247. *See* Blogging: Ethical Considerations, *supra* note 91 (comments of Micah Buchdahl).

248. Some of the material that follows first appeared in the newsletter of the Knoxville Bar Association. Judy M. Cornett, *Avoiding the Ethical Risks of Websites and Blogs: The Top Five Tips*, DICTA, June 2007, at 6, *available at* http://www.knoxbar.org/PDF/2007/JuneDicta.pdf.

certain circumstances, she will still be responsible for any ethical lapses.[249]

Second, the blawger must decide whether or not her blawg is a marketing tool. If it is not, she must make sure not to place self-promotional material on the blawg or to engage in self-promotion in posts. If it is, the blawger must make sure she complies with the advertising and marketing rules in her jurisdiction.[250] Compliance may mean adding disclaimers to the site or submitting individual posts periodically to a regulatory authority.

Third, a blawger should regulate the way in which she interacts with blawg readers. The goal should be to avoid raising an expectation that an attorney-client relationship has been formed, giving legal advice, revealing ethically protected client information, and receiving information that might create a conflict of interest.[251] This goal requires, at a minimum, adding appropriate disclaimers regarding attorney-client relationship and legal advice to the blawg. It also means that free-wheeling reader comments should be eliminated. Restricting comments altogether is the safest strategy, but detracts from the spontaneity and reader-friendliness of the blawg. A blawger who moderates comments would presumably be more thoughtful in responding to those comments, reducing the temptation to reveal ethically protected information, to offer legal advice, or to suggest formation of an attorney-client relationship, but moderating comments does nothing to dispel problems associated with receipt of confidential information.[252]

Fourth, regardless of whether a blawg accepts reader comments, a blawger should carefully review the substance of all material available on the blawg. The blawger should ensure that ethically protected client information has not been disclosed without consent or implied authorization. She should also ensure that information and commentary does not appear to be legal advice and that readers are not misled into believing that they are forming an attorney-client relationship with the blawger.[253] Finally, she should ensure that positions taken on legal issues do not turn away clients she wishes to attract and do not create a quasi-positional conflict that could be raised by a disappointed client. If a blawger wishes to post ethically protected information on the blawg,

249. *See supra* Part IV.A.

250. *See supra* Part IV.B.

251. *See supra* Part IV.C.

252. *See supra* Part IV.D.

253. *See supra* note 72 and accompanying text.

she should always procure informed consent from clients whose information she might wish to post.[254]

VI. CONCLUSION

These are exciting times for lawyer communication. The Internet and its concomitant new genres of blogs and blawgs have given lawyers and laypersons new contexts for interacting. But new genres pose new challenges, and blawging poses particular temptations to behavior that might violate the Model Rules of Professional Conduct. Understanding those characteristics and temptations should help blawgers avoid running afoul of the ethics rules.

254. *See, e.g.*, Watson, *supra* note 143, at 31 (providing checklist for blawgers).