

BLOGGER BEWARE: ETHICAL CONSIDERATIONS FOR LEGAL BLOGS

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“The Internet was designed with no gatekeepers over new content”¹

I. INTRODUCTION

[1] Attorneys are, in a sense, their own gatekeepers. Like many professions, the legal profession is self-regulating.² However, ethical and professional rules have always acted as the gates of attorney conduct – restricting and guiding attorneys in their professional actions. Ethical rules continue to serve this function when attorneys utilize the Internet to reach a larger community.

[2] The legal profession has been quick to embrace new technology, and attorneys are now making their own distinct mark on the Internet with the legal blog. Traditional weblogs, or “blogs,” as they are commonly known, are online journals and contain everything from political news to personal

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¹ Letter from Vinton Cerf, Chief Internet Evangelist, Google, Inc., to Joe Barton, Chairman, Committee on Energy and Commerce (Nov. 8, 2005) (on file with author), available at <http://does-not-exist.org/mail-archives/ip/msg07591.html>.

² MODEL RULES OF PROF'L CONDUCT pmb1. (2007).

musings.³ It is estimated that there are over seventy million blogs today with approximately 120,000 created every day.⁴ While the popularity of mainstream blogs grows at rapid speed, attorneys have begun to publish a specialized form of blog tailored entirely to legal topics, fittingly called “blawgs.”⁵ The term “blawg” was coined by Denise Howell, author of the intellectual property blog “Bag and Baggage,” to reflect the difference in conventional blogs and those of a legal nature.⁶ At the end of 2005, the American Bar Association estimated that nineteen percent of lawyers were writing blogs.⁷ A compilation of blogs ranging from those authored by solo practitioners to blogs maintained by law students and professors can be found at www.blawg.com.⁸

[3] Lawyers use blogs to discuss nearly every legal subject from animal law,⁹ to wills and trusts,¹⁰ to the judiciary.¹¹ Those seeking advice on a

³ See Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 195 (2006); Rebecca Porter, *Do You Blog?*, TRIAL, Feb. 2005, at 44.

⁴ Dave Sifry, *The State of the Live Web*, TECHNORATI, Apr. 2007, <http://technorati.com/weblog/2007/04/328.html>.

⁵ See Sarah Kellogg, *Do You Blog?*, S.C. LAW., July 2005, at 30.

⁶ *Id.* at 30.

⁷ American Bar Association Section of Litigation, http://www.abanet.org/litigation/question/results_dec05.html (last visited Oct. 7, 2007). This survey was created as part of the ABA Section of Litigation’s “Question of the Month” in December of 2005. The survey may not be as accurate as it suggests because the pool of respondents likely consisted of “lawyers who [probably] spend a fair bit of time online, which would likely bias the sample toward blog readers and writers.” Ron Friedman, *Do Blawgs Burn as Brightly as Surveys Suggest?*, LAW.COM, Jan. 17, 2006, <http://www.law.com/jsp/legaltechnology/pubArticleLTN.jsp?id=1137146711171>.

⁸ Blawg-Legal Blogs, <http://blawg.com> (last visited Sept. 28, 2007). Blawg.com is a legal blog directory created in December 2002. It currently tracks over 1,500 legal blogs. About Blawg <http://www.blawg.com/About.aspx> (last visited Apr. 12, 2007).

⁹ See e.g., Animal Law Blog, <http://animallawonline.blogspot.com> (last visited Apr. 12, 2007).

¹⁰ See e.g., Wills, Trusts, & Estates Law Prof Blog, http://lawprofessors.typepad.com/trusts_estates_prof (last visited Apr. 12, 2007).

¹¹ See e.g., Underneath Their Robes, <http://underneaththeirrobes.blogspot.com/main> (last visited Oct. 7, 2007). By far the most popular blog focused on the judiciary, Underneath Their Robes was for many months written under the pseudonym Article III Groupie. Once the blog gained popularity its author was outted as David Lat, a federal prosecutor based in Newark, New Jersey. Jeffrey Toobin, *Scotus Watch*, THE NEW YORKER, Nov.

certain legal subject need only do a simple Internet search to discover a wealth of information on any topic from experts and novices alike.

[4] Attorneys in all areas of practice find blogs beneficial to both themselves and their clients.¹² Solo practitioners use blogs to obtain advice from other attorneys as a substitute for the colleague down the hall that a larger firm offers.¹³ Larger firms access potential clients and demonstrate their areas of expertise through practice-specific blogs.¹⁴ Law professors use blogs to reach out to their students and other faculty, and to engage in a discourse on the nuances and developments within their specialties.¹⁵

[5] Legal blogs are popular due to many of the same factors that motivate mainstream blogs, including ease of use¹⁶ and the ability to directly communicate with a large audience.¹⁷ Virtually anyone with an Internet connection can create a blog¹⁸ as blogging services eliminate the need to know HTML,¹⁹ thereby reducing blogs to easy-to-use online diaries. In addition to law firms, many businesses, large and small, use blogs to further their public images.²⁰ Corporations like Sun Microsystems and

²¹ 2005, available at

http://www.newyorker.com/talk/content/articles/051121ta_talk_toobin.

¹² See generally Kellogg, *supra* note 5 (citing cases where lawyers and clients find legal blogs useful).

¹³ Porter, *supra* note 3, at 45; see also Kellogg, *supra* note 5, at 33.

¹⁴ See Kellogg, *supra* note 5, at 33, 35.

¹⁵ See e.g., PrawfsBlawg, <http://prawfsblawg.blogs.com> (last visited Apr. 12, 2007); Tax Prof Blog, <http://taxprof.typepad.com> (last visited Apr. 12, 2007).

¹⁶ Denise Howell, *Blog You*, 11 NEXUS 69, 72 (2006).

¹⁷ See Porter, *supra* note 3, at 48.

¹⁸ Blogs provide ease of use unlike any other Internet innovation as “[a]ny bumpkin with \$49.50 and a modem can have a blog.” Franklin G. Snyder, *Late Night Thoughts on Blogging While Reading Duncan Kennedy’s Legal Education and the Reproduction of Hierarchy in an Arkansas Motel Room*, 11 NEXUS 111, 113 (2006) (Author’s note: With public libraries to provide Internet access and free blogging services, the average person may not even need \$49.50).

¹⁹ David Gulbransen, *Welcome to the Blawgosphere*, 20 CBA REC. 3, Apr. 2006, available at <http://www.Chicagobar.org/ro/042006/gulbransen.htm>.

²⁰ See Jason Krause, *To Blog or Not to Blog*, ABA J. E-REP., 2005 at 5. See generally Porter, *supra* note 3, at 45.

Microsoft use blogs written by employees as a means of humanizing their companies and reaching a broader customer base.²¹

[6] For attorneys, these benefits have greater effect as they are able to advance the legal profession by making it accessible to people in need as well as to those who are simply curious.²² Lawyers are finding that the ability to directly communicate with the general population, without the filter of media outlets, allows for a more human discourse between lawyer and potential client.²³ A blog's comment feature, which allows readers to post their own comments directly to the blog, transforms a blog from a one-sided legal article into a discussion on the law.²⁴

[7] While blogging offers seemingly endless benefits, it can have serious consequences for attorneys who fail to recognize the ethical considerations implicit in this type of communication.²⁵ Blogging often requires a substantial time commitment, making it an endeavor not to be taken lightly if one intends to make a beneficial impact on the blogosphere.²⁶ Legal blogs lack the peer review of scholarly and legal journals, making them vulnerable to both error and credibility problems.²⁷ Lawyers subject themselves to disciplinary and malpractice actions when they do not dedicate the appropriate time and care to blogging.²⁸

²¹ Krause, *supra* note 20, at 5.

²² See generally Helen Gunnarsson, *Do We Blawg and How?* 94 ILL. B.J. 236, 241 (2006), available at <http://www.isba.org/IBJ/may06lj/236%20new%20technology.htm> (quoting attorneys with successful blogs).

²³ See Colin Samuels, *Humanizing the Profession: Lawyers Find Their Public Voices Through Blogging*, 11 NEXUS 89, 89 (2006); see also Porter, *supra* note 3, at 45 (stating that blogs make attorneys more approachable).

²⁴ Gunnarsson, *supra* note 22, at 237.

²⁵ The first wave of terminations and ethical violations for personal blogging are already making headlines. In December 2005, a temporary prosecutor was reprimanded by a Superior Court Judge for posting derogatory comments on his personal blog about opposing counsel and evidence that had not yet been deemed admissible at trial. Pam Smith, *Judge Reprimands Temp Prosecutor for Personal Blogging*, THE RECORDER, Apr. 28, 2006, <http://www.law.com/jsp/article.jsp?id=1146139204085>.

²⁶ See Gunnarsson, *supra* note 22, at 240. "Blogosphere" is the term used to collectively refer to the millions of blogs that exist on the Internet. Patrick Robben, *Welcome to the Blogosphere: A Primer for Business Lawyers*, BUS. L. TODAY, May/June 2006, at 43.

²⁷ See Kellogg, *supra* note 5, at 34.

²⁸ The lack of peer review contributes to the unique problems bloggers face. The idea is easily summed up by the famous quote by Jonathan Klein, current president of CNN:

Attorney A authors “Employment Law Today” an employment law specific blog. Attorney A lives and works in Dallas, Texas. He writes about recently decided federal and state cases. Attorney A’s blog includes an “About” page which contains his experience, a link to his firm’s website, and his contact information. He has placed a simple disclaimer in this section stating “nothing appearing on this website is intended to be legal advice.”²⁹

[8] While the above hypothetical blog seems like an innovative marketing tool, it poses many problems. This article will focus on the ethical considerations for attorneys and law firms that choose to blog by relating those considerations to Attorney A’s hypothetical blog. Attorney A’s hypothetical blog is similar to many found on the Internet today, but has been altered to generally demonstrate the problems faced by attorney bloggers. Part II of this article will discuss malpractice insurance concerns emerging with the popularity of attorney blogging. Part III will explore the intersection of ethical rules and legal blogs, focusing on the areas of attorney advertising, the unauthorized practice of law, and formation of the attorney-client relationship online. Part IV will explain how attorney bloggers can avoid ethical violations by utilizing disclaimers and acting in accordance with those disclaimers.

II. MALPRACTICE INSURANCE CONCERNS

[9] Professional rules of conduct are promulgated by state bars and sometimes the highest state court in each jurisdiction.³⁰ With the exception of California, Maine, and New York, all states have adopted

“bloggers have no checks and balances. . . . You couldn’t have a starker contrast between the multiple layers of checks and balances and a guy sitting in his living room in his pajamas writing.” Howard Kurtz, *After Blogs Got Hits, CBS Got a Black Eye*, WASH. POST, Sept. 20, 2004, at C1 (omission in original). While the blogger may actually be wearing a suit and tie in a large law firm, the lack of appropriate “checks and balances” nevertheless contributes to the problems of legal blogging.

²⁹ All hypothetical scenarios used to illustrate the different aspects of blogging are the work of the author. Any similarities to actual blogs are entirely coincidental.

³⁰ 7 C.J.S. *Attorney & Client* § 42 (2007).

some variation of the ABA Model Rules of Professional Conduct.³¹ Violations of the rules can result in both bar proceedings and malpractice actions, depending on the attorney's conduct.³² While disbarment and other sanctions are a threat to individual attorney bloggers, firms also face pressure from malpractice insurance carriers who view blogging as a potential minefield for malpractice claims.³³

[10] Many insurers see blogging as just another form of attorney communication, carrying with it the same ethical considerations.³⁴ Some insurers, however, refuse to insure attorney bloggers entirely.³⁵ Chubb Group of Insurance Companies released an official statement in April 2007, outlining the restrictions on its acceptance of the risk posed by attorney blogging.³⁶ The company views law firm blogs as falling into one of two categories: informational and advisory.³⁷ Chubb Group will only insure blogging activity falling into the former category.³⁸ According to the statement, an informational blog provides information and allows discussion on issues in a neutral manner.³⁹ Informational blogs are more like articles as they are generalized as to audience and matter.⁴⁰ Advisory blogs, as the category title suggests, provide advice to clients.⁴¹ These kinds of blogs pose problems of establishing an attorney-client relationship without proper safeguards such as checks for conflicts of interest.⁴²

³¹ American Bar Association, Center for Professional Responsibility, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Oct. 5, 2007).

³² Gena L. Sluga & Douglas L. Christian, *Playing By the Rules: Violations of Ethics Rules as Evidence of Malpractice*, 51 FED'N INS. & CORP. COUNS. Q. 333, 340 (2001).

³³ See Lisa Brennan, *Before You Blog, Check with Your Insurance Carrier: Even with Disclaimers, Professional Liability Issues May Lurk*, N.J.L.J., Mar. 20, 2007, <http://www.law.com/jsp/article.jsp?id=1174307783120>.

³⁴ *Id.*

³⁵ *Id.* This issue may be limited by the fact that many attorneys and law firm bloggers do not contact their insurance carriers prior to commencing a blog.

³⁶ See *Chubb Clears Up Confusion on Risk of Insuring Law Firm Blogs*, INS. J., Apr. 5, 2007, <http://www.insurancejournal.com/news/national/2007/04/05/78494.htm>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

Attorney A's blog includes several sources that he finds to be very helpful to his readers. One is a compilation of Federal and Texas employment laws that he has summarized and categorized by topic. The other is a Frequently Asked Questions section where Attorney A posts common contract questions and links to several types of contract provisions for each scenario. Once readers click on a contract type they are directed to sample clauses dealing with that type of provision. Attorney A advises readers not to use any of the sample contract clauses before consulting an attorney.

[11] Attorney A's blog demonstrates a problem with the oversimplified definitions of Chubb Group, as it has elements of both an informational and an advisory blog. The compilation and categorization of state laws on an area of law seem to fit Chubb's distinction of an informational blog because it presents the information in a neutral way that is not specific to certain clients. Members of the public can access this information and read about the laws of their states which may or may not affect them. They are directed to these laws simply by choosing their state without receiving specific advice from Attorney A as to which law will apply to them.

[12] The portion of Attorney A's blog which contains specific sample contract provisions may be considered advisory. Chubb has provided no definition of what constitutes an advisory blog. However, in defining informational blogs, Chubb Group stated that "informational blogs do not provide advice to a specific individual on a unique matter,"⁴³ implying that the only other type of blog, advisory blogs, therefore provide the sort of specific advice on individualized matters that Chubb Group will not insure. By including sample contract provisions for specific factual scenarios, Attorney A appears to be providing specific advice to clients according to Chubb Group's distinction. Individuals are directed to the specific contract provisions after locating a factual scenario similar to their own from a list provided by Attorney A.

⁴³ *Id.*

[13] Further, a problem lies in Chubb Group's assertion that an advisory blog may create an attorney-client relationship simply because it provides advice. While specific advice, as will be shown, can create an attorney-client relationship, the actions of one party alone are not enough to form the relationship.⁴⁴ By classifying blogs as fitting into only one of two categories, Chubb Group has provided an oversimplified delineation that is neither accurate nor realistic for blogs as they exist today.⁴⁵

[14] Although Chubb Group has provided some guidance as to which blogs it will not cover, other malpractice insurance carriers have been silent as to whether they will insure blogging.⁴⁶ To be sure, one theme emerges from Chubb's statement: whether an attorney's blog raises an ethical problem depends heavily upon the type of information the attorney provides.

III. ETHICAL CONSIDERATIONS FOR ATTORNEY BLOGGERS

[15] Legal blogs create ethical gray areas. This is due to two characteristics of Internet communication which may very well be the Internet's greatest assets: the ability to reach a limitless number of people and the ability to communicate anonymously. Attorneys must be aware that these attributes of the legal blog may subject them to regulation for attorney advertising, the unauthorized practice of law, and the duties arising when an attorney-client relationship is formed.

⁴⁴ See *In re Makowski*, 374 A.2d 458, 460 (N.J. 1977) (implying that an attorney-client relationship cannot be formed on the actions of one party alone because of the requirement that there be an initial *exchange* of information).

⁴⁵ Real Lawyers Have Blogs, *Lawyers Respond To Chubb Insurance's Position on Law Firm Blogs*, <http://kevin.lexblog.com/2007/04/blogs-in-the-news/lawyers-respond-to-chubb-insurances-position-on-law-firm-blogs/> (Apr. 6, 2007) (citing several blog posts from attorneys discussing the confusing definitions of what Chubb has deemed informational blogs and advisory blogs).

⁴⁶ See Brennan, *supra* note 33.

A. ATTORNEY ADVERTISING

[16] Attorney bloggers often state that they do not view their blogs through the lens of attorney advertising, but rather see it as a form of publication.⁴⁷ Attorneys must be cognizant that many of the representations made on a blog, even if found in only one location, such as a biography section, may be subject to a state's attorney advertising rules.

[17] Attorney advertising is an area strictly regulated by states⁴⁸ but with constitutional limitations due to its qualification as commercial speech.⁴⁹ A complete discussion of attorney advertising is beyond the scope of this article, as it requires an in-depth analysis of the different states' current attorney advertising rules where many states have yet to address the issue. However, states generally regulate the truthfulness and accuracy of statements about attorney qualifications and experience found in advertisements.⁵⁰ Advertising problems arise with blogs as many firms use blogs to promote their expertise in a legal specialty.⁵¹ Blogs often include information about the firm, biographies of the attorney authors, and representations about firm experience and individual qualifications.⁵²

[18] Some states require attorneys to submit advertisements in advance of publication for approval by the bar.⁵³ At least one state, Kentucky, has extensively examined the issue of whether attorney blogs constitute

⁴⁷ Leigh Jones, *Will Law Firm Blogs Be Regulated As Advertising?* NAT'L L.J., Oct. 11, 2006, <http://www.law.com/jsp/article.jsp?id=1160471119300#>.

⁴⁸ Melissa Blades & Sarah Vermylen, *Virtual Ethics for a New Age: The Internet; and the Ethical Lawyer* 17 GEO. J. LEGAL ETHICS 637, 644 (2004).

⁴⁹ *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-84 (1977) (holding that attorney advertising is commercial speech).

⁵⁰ See MODEL RULES OF PROF'L CONDUCT R. 7.1 (1983) (stating "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading . . .").

⁵¹ See Kellogg, *supra* note 5, at 35.

⁵² See Jones, *supra* note 47.

⁵³ For example, Florida provides detailed rules on submission requirements and procedures for ads in various forms of media. FLA. RULES OF PROF'L CONDUCT R. 4-7.7(a) (2006).

attorney advertising and thus require submission.⁵⁴ Kentucky Rule of Professional Conduct 7.02 was previously thought to require submission of each and every post to Kentucky's Attorney Advertising Commission for approval along with a fifty dollar submission fee.⁵⁵ This interpretation of the rule would have resulted in a large increase in time and funds devoted to blogging.⁵⁶ After some debate and an explosion of blog posts on the subject, 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.⁵⁷ This is similar to the approach taken with respect to the average Kentucky law firm website.⁵⁸

[19] As blogs reach states beyond that in which the attorney practices,⁵⁹ the potential for violating professional rules and criminal statutes in states where the attorney is not licensed poses a broader threat by reaching beyond attorney advertising and into the unauthorized practice of law.⁶⁰

B. UNAUTHORIZED PRACTICE OF LAW

[20] Perhaps the largest hurdle for attorney bloggers is the potential for sanctions in jurisdictions where they neither maintain an office nor reside. Practicing law in a state where one is not admitted is the unauthorized practice of law and is an ethical violation.⁶¹ Florida, Mississippi, New Jersey, and Texas do not require that an attorney-client relationship be

⁵⁴ Ben Cowgill, *Update: How Kentucky's Attorney Advertising Commission is Now Treating Blogs by Kentucky Lawyers*, Ben Cowgill's Legal Ethics Newsletter, Aug. 27, 2006, http://cowgill.blogs.com/legaethics/2006/08/update_how_the_.html.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Allen W. Chiu, Note, *The Ethical Limits of eLawyering: Resolving the Multijurisdictional Dilemma of Internet Practice Through Strict Enforcement*, 2004 UCLA J.L. & TECH. 1, § II (2004).

⁶⁰ Joel Michael Schwarz, *Practicing Law Over the Internet: Sometimes Practice Doesn't Make Perfect*, 14 HARV. J.L. & TECH 657, 666 (2001); Chiu, *supra* note 59.

⁶¹ MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 1 (2007).

formed, nor a fee paid, before finding an individual has engaged in the practice of law.⁶²

[21] Many states actively prosecute this type of ethical violation through unauthorized practice of law committees which bring suits in the name of the committee.⁶³ Additionally, at least fifteen states criminalize the unauthorized practice of law.⁶⁴ The practice of law in the Internet context takes place at the location of the recipient of the information or services.⁶⁵ Therefore, the unauthorized practice of law subjects an attorney to both the laws of the state where he is admitted and any other jurisdiction within which he practices.⁶⁶

[22] The practice of law is defined on a state-by-state basis with some generalizations emerging.⁶⁷ For instance, the practice of law generally includes appearing before an adjudicative body on behalf of a client, advertising legal services, consulting clients, or rendering other services which require legal skill and knowledge.⁶⁸ Of particular concern to attorney bloggers, is that the practice of law often includes holding oneself out as an attorney⁶⁹ and dispensing legal advice.⁷⁰

⁶² See Fla. Bar v. Keehley, 190 So. 2d 173, 175 (Fla. 1966); Darby v. Miss. State Bd. of Bar Admissions 185 So. 2d 684, 687 (Miss. 1966); *In re Baker*, 85 A.2d 505, 514 (N.J. 1951); Grievance Comm. of State Bar v. Dean, 190 S.W.2d 126, 129 (Tex. Civ. App. 1945).

⁶³ Blades & Vermylen, *supra* note 48, at 638.

⁶⁴ See ALA. CODE § 34-3-7 (1975); ARK. CODE ANN. § 16-22-501 (West 1987); FLA. STAT. ANN. § 454.23 (West 2004); GA. CODE ANN. § 15-19-51 (2000); IND. CODE ANN. § 33-43-2-1 (West 2004); MINN. STAT. ANN. § 481.02. (West 1999); N.J. STAT. ANN. § 2C:21-22 (West 1997); N.Y. PENAL LAW § 478 (McKinney 1970); TENN. CODE ANN. § 23-3-103 (West 2006); TEX. PENAL CODE ANN. § 38.123 (Vernon 1993); VA. CODE ANN. § 54.1-3904 (West 2000); WASH. REV. CODE ANN. § 2.48.180 (West 2003); WYO. STAT. ANN. § 33-5-117 (2001); *see also* Schwarz, *supra* note 60, at 665.

⁶⁵ See *Birbrower v. Super. Ct. of Santa Clara*, 949 P.2d 1, 5 (Cal. 1999) (holding that attorney practiced law in California where the recipient of his legal advice and services was located).

⁶⁶ Schwarz, *supra* note 60, at 664.

⁶⁷ See MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2007); *see also* Blades & Vermylen, *supra* note 48, at 638.

⁶⁸ See 7 C.J.S., *Attorney and Client* § 3 (1980); 7 C.J.S. *Attorney & Client* § 30 (1980).

⁶⁹ 7 C.J.S. *Attorney & Client* § 30 (1980). *See also* MODEL RULES OF PROF'L CONDUCT R. 5.5 (2007).

1. HOLDING ONESELF OUT AS AN ATTORNEY

[23] A state's inclusion of "holding oneself out as an attorney" in the definition of practicing law, serves to prevent individuals from representing to the public that they are licensed attorneys and therefore qualified to assist in legal matters.⁷¹ When an individual, even if licensed in another jurisdiction, represents herself as licensed in a particular jurisdiction where she is not, she is engaged in the unauthorized practice of law.⁷²

[24] The prohibition on this form of unauthorized practice has its basis in attorney advertising regulation.⁷³ Attorneys are generally prohibited from advertising in states where they are not licensed.⁷⁴ In *Florida Bar v. Kaiser*,⁷⁵ a New York attorney was liable for his firm advertising in Florida where the advertisements made it appear that he was licensed in that state, when in fact he was not.⁷⁶ In that case, the firm advertised through outlets that are typically limited to certain jurisdictions such as telephone book ads, television, and newspapers.⁷⁷ Because the Internet has no jurisdictional limit to its reach,⁷⁸ attorneys who advertise on the Internet, even if in compliance with their own state's licensing rules, violate the laws of states where they are not licensed.⁷⁹ Blogs that advertise that their authors are licensed attorneys subject the authors and firms to potential liability because it is almost impossible to know who will read the posts and where those readers live.⁸⁰

⁷⁰ 7 C.J.S. *Attorney and Client*, § 30 (1980); 7 AM. JUR. 2D *Attorneys at Law* § 118 (1962). See also *Gemayel v. Seaman*, 533 N.E.2d 245, 248-49 (N.Y. 1988).

⁷¹ See MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2007).

⁷² Schwarz, *supra* note 60, at 666.

⁷³ *Id.* at 667.

⁷⁴ *Id.* at 666.

⁷⁵ Fla. Bar v. Kaiser, 397 So. 2d 1132 (Fla. 1981).

⁷⁶ *Id.* at 1133

⁷⁷ *Id.*

⁷⁸ Schwarz, *supra* note 60, at 667; Kristine M. Moriarty, Comment, *Law Practice and the Internet: The Ethical Implications That Arise From Multijurisdictional Online Legal Service*, 39 IDAHO L. REV. 431, 441 (2003).

⁷⁹ Moriarty, *supra* note 78, at 440.

⁸⁰ Schwarz, *supra* note 60, at 666.

Attorney A has found that individuals often wish to know about his experience and background as the author of "Employment Law Today." On the "About" page he has included a short biography, a link to his firm's website, and his contact information. In his biographical information, Attorney A has stated that he is "board certified in labor and employment law." He provides a link to his firm, which is located in Dallas, Texas.

[25] Attorney A's "About" section assumes his readers know the state in which he is licensed. He never states that he is licensed in Texas, but indicates that he is "board certified" and that his firm is located in Dallas. A page such as this may confuse laypersons unfamiliar with attorney licensing regulations. Attorney A's biography makes it appear that he is licensed everywhere, and nowhere, at the same time. Individuals inexperienced with the legal profession may not understand that Attorney A is licensed in Texas, nor that his authority to practice is limited to this one state.

[26] Attorney bloggers can avoid most unauthorized practice of law problems by clearly stating to the public the status of their licenses. Such statements, along with a disclaimer as discussed in Part IV, will remove the appearance that attorneys are licensed in any jurisdiction other their own and limit liability for the unauthorized practice of law.

2. DISPENSING LEGAL ADVICE

[27] The unauthorized practice of law, as it involves dispensing legal advice through blogs, is analogous to the problems created by law firm websites, chat rooms, and even to some extent, e-mail.⁸¹ Courts have adapted the analysis of legal advice disseminated through 900 number lines and radio programs to the Internet.⁸² New York, North Carolina, Arizona, and Illinois have established concrete rules regarding legal advice given over the Internet.⁸³ These states make a crucial distinction

⁸¹ E-mail is generally only viewed "as an alternative form of written correspondence." Schwarz, *supra* note 60, at 706.

⁸² *Id.* at 674.

⁸³ *Id.* at 674-77.

between general and specific legal advice.⁸⁴ Specific advice given to an individual in one jurisdiction in response to a specific factual scenario is an ethical violation when the attorney is not admitted in that jurisdiction.⁸⁵ Conversely, an attorney not admitted to the bar, who provides general legal advice, is not liable for the unauthorized practice of law.⁸⁶

[28] The distinction between specific and general legal advice evolved from the idea that lawyers are permitted to speak and write publicly on general legal issues under ethical rules.⁸⁷ For instance, lawyers are permitted to give lectures and seminars and write articles and columns which the public will read as long as the information is general in nature.⁸⁸ Lawyers provide a valuable service to the public by sharing their knowledge on general legal subjects and are permitted to continue to do so as long as they comply with ethical rules.⁸⁹

[29] Where legal blogs are concerned, the information provided is typically of a general nature. Blog postings often center on recent developments in the law or newly decided cases that affect the attorney's area of specialty.⁹⁰ The practice of law on the Internet does not typically involve an ongoing interaction where legal services are provided to one client, but instead is more "the provision of legal advice to unknown clients on an ad hoc basis."⁹¹ In this respect, blog posts that contain legal advice are for the most part of an entirely general nature.

[30] Yet, problems can arise where attorneys respond in a "comments" section that allows members of the public to pose specific questions.

⁸⁴ *Id.* at 675.

⁸⁵ *Id.*

⁸⁶ *Id.* at 674-77.

⁸⁷ N.Y. Ethics Op. 625 (1992).

⁸⁸ Catherine Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 227 (1999). While the Model Rules of Professional Conduct do not mention a lawyer's ability to speak publicly, the Model Code of Professional Responsibility, which preceded the current rules, allowed attorneys to write newspaper articles as long as they did not emphasize their expertise or offer personal legal advice.

Id.

⁸⁹ See Brad Hunt, *Lawyers in Cyberspace: Legal malpractice on Computer Bulletin Boards*, 1996 U. CHI. LEGAL F. 553, 554 (1996).

⁹⁰ See generally Kellogg, *supra* note 5.

⁹¹ Schwarz, *supra* note 60, at 663.

Here, contact with the public through comments mirrors call-in services and radio programs where attorneys are on hand to answer the specific questions from listeners who dial in to receive legal advice. The New York State Bar addressed these services in a 1994 ethics opinion.⁹² There, the Bar upheld the prohibition on specific advice, finding the call-in services acceptable as long as the advice given could still be considered general.⁹³

[31] Bloggers often do not know where their readers are located.⁹⁴ For this reason, attorney bloggers are again like the attorneys of radio shows and call-in services. If attorneys do not know where the recipient of their advice resides, they may be unaware of the law that applies to a particular question and thus unable to know whether it would be the unauthorized practice of law to give specific legal advice.

[32] If attorney bloggers do not wish to limit their blogging to general advice only, they must protect themselves in other ways. The most feasible solution for most attorney bloggers would be a jurisdictional disclaimer as discussed below.⁹⁵ An additional protection would be for the blogger to require that commenters indicate the state in which they reside before posting a comment. Attorney bloggers can then be certain as to whether their own state law applies to the commenter's situation, and can ensure that they are not practicing in states in which they are not licensed. Commenters would have the incentive to be truthful in disclosing their location to ensure that they receive accurate legal advice. Where the locations differ, attorneys can include an additional preface to their answers that again makes readers aware that they are not licensed in the reader's state and cannot offer specific, reliable advice.

⁹² N.Y. Ethics Op. 664 (1994).

⁹³ *Id.* Interestingly, the Bar noted that such advice should only be given after the attorney has properly made the client aware of the boundaries of the advice and limitations on any attorney-client relationship created as a result of the advice. Thus it is apparent that at least in New York, some sort of disclaimer is needed to properly outline the limitations of the attorney's assistance for individuals seeking legal advice.

⁹⁴ Katy Ellen Deady, Note, *Cyberadvice: The Ethical Implications of Giving Professional Advice Over the Internet*, 14 GEO. J. LEGAL ETHICS 891, 906 (2001).

⁹⁵ See discussion *infra* Part IV.

Attorney A posts on his blog once or twice a week and spends a good deal of time responding to the comments left by readers and colleagues. Some of these are simply offers of thanks for an informative and well-written blog and others are questions directed to Attorney A. If a question is fairly simple and does not require any research, Attorney A generally posts a short answer. If the question is detailed, Attorney A simply refers the reader to his compilation of state and federal laws.

[33] Attorney A's communication with his readers poses some problems. When readers post specific questions to Attorney A's blog which are based on particular factual situations, Attorney A must avoid giving specific legal advice. As one study has shown, most inquiries on the Internet are not of a general nature as people are not "prompted by mere idle curiosity or academic interest," but by the need for specific legal advice.⁹⁶ Attorney A's method of directing readers to his compilation of state and federal laws allows him to act as a resource for specific information, but forces readers to seek out the information on their own. This removes Attorney A from the role of legal advisor and shifts the burden to readers to locate the specific information they need. As long as his response is limited to general advice only, Attorney A's direction to readers is not the practice of law.⁹⁷

C. AIDING THE UNAUTHORIZED PRACTICE OF LAW

[34] An issue that frequently confronts attorney bloggers is the investment of time that blogging requires.⁹⁸ Between billable hours, continuing legal education requirements, and live client contact, attorneys may find that there is precious little time to spend advancing their Internet presence through blogging. Some commentators suggest delegating blog maintenance to non-lawyer staff in order to maximize marketing benefits

⁹⁶ Schwarz, *supra* note 60, at 676 (quoting Joan C. Rogers, *Cyberlaws Must Chart Uncertain Course in World of Online Advice*, 52 DAILY REP. FOR EXECUTIVES C-1 (2000)).

⁹⁷ Chiu, *supra* note 59, at 1.

⁹⁸ Porter, *supra* note 3, at 46.

while minimizing the attorney's profitable time lost to blogging.⁹⁹ Yet, such delegation presents the added problem of aiding the unauthorized practice of law, an ethical violation under the Model Rules of Professional Conduct.¹⁰⁰

[35] In *Cleveland Bar Association v. Moore*, an attorney admitted to practice in Pennsylvania engaged in the unauthorized practice of law in Ohio when he completed tasks similar to that of a paralegal, but was not "under the supervision and control of the attorneys in whose office he worked."¹⁰¹ The respondent's completion of tasks that were normally assigned to a paralegal constituted the unauthorized practice of law when lacking the requisite level of attorney supervision.¹⁰²

[36] Additionally, where an attorney utilizes a non-lawyer to dispense legal advice, ethical issues arise as to whether a partnership has been formed with a non-lawyer for the practice of law.¹⁰³ Model Rule 5.4(b) prohibits such a partnership as it is considered a form of aiding a non-lawyer in the practice of law.¹⁰⁴ Again, the distinction between whether the advice given is general or specific will necessarily dictate whether the act is the practice of law.¹⁰⁵

[37] In a 1991 ethics opinion, North Carolina considered legal advice dispensed through a call-in service provided by a for-profit organization where non-lawyers spoke to the public.¹⁰⁶ The Bar determined that the practice was acceptable only because the advice given was general.¹⁰⁷ Had the service provided targeted, specific advice as could easily be done on a

⁹⁹ Edward Poll, *Look Before You Blog – Without a Marketing Strategy, You'll Waste Your Time*, L. PRAC. TODAY, Mar. 2006, available at <http://www.abanet.org/lpm/lpt/articles/mkt03061.shtml>.

¹⁰⁰ MODEL RULES OF PROF'L CONDUCT R. 5.5 (2007).

¹⁰¹ *Cleveland Bar Ass'n v. Moore*, 722 N.E.2d 514, 515 (Ohio 2000).

¹⁰² *Id.*

¹⁰³ See Schwarz, *supra* note 60, at 683-84 (discussing aiding the unauthorized practice of law of a third-party moderator when the moderator dispenses legal advice on behalf of a legal expert in an Internet forum discussion).

¹⁰⁴ MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

¹⁰⁵ Schwarz, *supra* note 60, at 684.

¹⁰⁶ N.C. Ethics Op. RPC 115 (1991).

¹⁰⁷ *Id.*

blog by non-attorney staff, this would have constituted aiding the unauthorized practice of law.¹⁰⁸

In an effort to maximize his time and efforts, Attorney A assigns researching and updating the compilation of laws on his blog to a law clerk. Occasionally, the law clerk writes blog posts based on research, but final drafts are always reviewed by Attorney A before publication. Because he enjoys the interaction with readers, Attorney A always replies to comments and questions himself and frequently writes his own posts as well.

[38] The manner in which Attorney A manages his blog sufficiently avoids aiding his law clerk in the unauthorized practice of law. The law clerk never publishes a post to Attorney A's blog without the review and approval of Attorney A. This alleviates the problems posed by *Moore* because Attorney A supervises the work of non-lawyer staff which could otherwise be considered the practice of law. Additionally, Attorney A is able to prevent the formation of a partnership with a non-lawyer as he is the only person to reply to comments posted by readers, thereby controlling the dissemination of legal advice through his blog. Had Attorney A wished to delegate to a law clerk or other non-legal staff the task of responding to readers, his review of each comment before publication would likely be sufficient supervision to avoid a *Moore* problem.

[39] Attorneys can avoid many of the pitfalls of the unauthorized practice of law by recognizing the multijurisdictional aspects of practicing law on the Internet. Disclaimers that alert readers to the jurisdictional limits of an attorney's license, as discussed below,¹⁰⁹ can eliminate many of the ethical risks associated with blogging.

D. THE ATTORNEY-CLIENT RELATIONSHIP

[40] Where an attorney gives advice on the Internet, a court may examine the specificity of the advice and find that an attorney-client relationship

¹⁰⁸ Schwarz, *supra* note 60, at 684.

¹⁰⁹ See discussion *infra* Part IV.

has been created.¹¹⁰ An attorney-client relationship is not a prerequisite to finding an attorney is engaged in the practice of law.¹¹¹ Yet, the ramifications of forming an attorney-client relationship are more severe than for the unauthorized practice of law because an attorney-client relationship subjects the attorney to potential malpractice liability.¹¹² The first element of the prima facie case for attorney malpractice is an attorney-client relationship.¹¹³ Upon the creation of an attorney-client relationship, certain duties arise and failure to uphold these duties can result in liability.¹¹⁴ Duties inherent in an attorney-client relationship include confidentiality, diligence, and the duty to ensure that no conflicts of interest exist prior to representation.¹¹⁵

[41] Formation of the attorney-client relationship is analyzed in a factually specific manner, on a case-by-case basis according to state statutes and case law.¹¹⁶ The analysis depends largely on the subjective beliefs of the client.¹¹⁷ However, the subjective and unspoken belief of a putative client *alone* is not enough to find a relationship.¹¹⁸ Courts have consistently sought to protect laypersons who may not understand the complex analysis of whether an attorney-client relationship has been created or whether the attorney is practicing law.¹¹⁹

¹¹⁰ Kelcey Nichols, *Client Confidentiality, Professional Privilege and Online Communication: Potential Implications of the Barton Decision*, 3 SHIDLER J. L. COM. & TECH. 10 (2007).

¹¹¹ This is because simply holding oneself out as a licensed attorney constitutes the practice of law, but does not alone create an attorney-client relationship. *See* discussion *supra* Part III. B. 1.

¹¹² Chiu, *supra* note 59.

¹¹³ Richard H.W. Maloy, *Proximate Cause: The Final Defense in Legal Malpractice Cases*, 36 U. MEM. L. REV. 655, 658 (2006).

¹¹⁴ Lancot, *supra* note 88, at 250-51 (arguing that specific legal advice, if determined to create an attorney-client relationship, would impose upon the attorney “core obligations to the client that could not be disclaimed.”).

¹¹⁵ *Id.* at 251-52.

¹¹⁶ Schwarz, *supra* note 60, at 660.

¹¹⁷ *Id.* at 676.

¹¹⁸ Sheinkopf v. Stone, 927 F.2d 1259, 1265 (1st Cir. 1991).

¹¹⁹ *See* Schwarz, *supra* note 60, at 676 (discussing the inability of disclaimers to negate the formation of an attorney client relationship when laypersons might believe that advice was tailored to their situations).

[42] The Restatement (Third) of the Law Governing Lawyers provides a widely accepted test for when an attorney-client relationship is created and is easily adapted to the Internet forum:

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 services¹²⁰

The rule allows an attorney-client relationship to be created either by consent, express or implied, or out of an estoppel theory.

[43] In the absence of an express agreement, courts will imply an agreement giving rise to the attorney-client relationship from the conduct of the parties.¹²¹ In implying an attorney-client relationship, the majority of courts analyze whether there was a consultation with the attorney;¹²² the consulting party's intent to seek legal advice or services;¹²³ the consulting party's request for legal advice or services;¹²⁴ and the attorney's giving of, or promise to give, requested legal advice or services.¹²⁵ These factors are typically viewed through the perspective of the client.¹²⁶ An attorney-client relationship can exist where there is no prior relationship such as a friendship,¹²⁷ blood relationship,¹²⁸ or prior attorney-client relationship.¹²⁹

¹²⁰ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

¹²¹ 48 AM. JUR. PROOF OF FACTS 2D 525, §7 (2004).

¹²² *Id.* at §8.

¹²³ *Id.* at §9.

¹²⁴ *Id.* at §10.

¹²⁵ *Id.* at §11.

¹²⁶ See Nichols, *supra* note 110.

¹²⁷ 48 AM. JUR. PROOF OF FACTS 2D 525 § 7 (2004).

¹²⁸ *Id.* (citing Nicholson v. Shockey, 192 Va. 270 (1951)).

¹²⁹ See Green v. Montgomery County, 784 F. Supp. 841, 844-45 (M.D. Ala. 1992)

(holding that while an attorney-client relationship existed between Green and the disqualified attorney several years prior to the instant case, the court specifically found

[44] The requirement of a consultation with the attorney requires only that there be some initial exchange of information between the attorney and potential client.¹³⁰ Consultation is a threshold issue because without it the other factors indicative of an attorney-client relationship often would not arise.¹³¹ However, consultation alone is not enough to form the relationship.¹³² All jurisdictions require at least one additional factor, though a required concrete number is difficult to determine.¹³³

[45] The consultation requirement regarding advice given through an attorney blog may be easily met if courts are willing to extend the analysis of telephone consultations to non real-time exchanges of information. In *Green v. Montgomery County*, the Alabama court disqualified an attorney after it found that an initial exchange of information via telephone, about a putative client's case, satisfied the consultation requirement and triggered the creation of an attorney-client relationship.¹³⁴ There, the court sought to protect initial consultations, even when not conducted in person.¹³⁵ Without such protection no person would be able to safely seek out legal advice for fear that disclosures would not be confidential.¹³⁶ Thus, the attorney-client relationship, and therefore the duty of confidentiality, must apply.

[46] Consultations via an attorney blog are different from telephone consultations in that an individual posts a question or emails the attorney directly, and the attorney responds after some time has passed. In *Barton v. U.S. District Court for the Central District of California*, the United States Court of Appeals found an individual's completion of an online questionnaire to be an initial consultation.¹³⁷ This exchange involved only a one way dissemination of information.¹³⁸ The Ninth Circuit's rule seems

that an attorney client relationship was based entirely on the new and distinct initial consultation by telephone).

¹³⁰ *In re Makowski*, 374 A.2d 458, 460 (1977).

¹³¹ 48 AM. JUR. PROOF OF FACTS 2D 525 §8 (2004).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Green*, 784 F.Supp. at 845.

¹³⁵ *Id.* at 847.

¹³⁶ *Id.*

¹³⁷ *Barton v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 410 F.3d 1104, 1110 (9th Cir. 2005).

¹³⁸ *See id.* at 1107.

to allow an extension of the non-in-person consultation to blogs. Therefore, client comments and requests for advice may be considered consultations when they are transmitted to the attorney as in *Barton*.

[47] An attorney can easily give, or promise to give, requested legal advice or services through a blog. A promise may be made expressly through a post or e-mail indicating to the client the attorney's willingness to provide legal advice.¹³⁹ Or, as is more common, the attorney can impliedly consent to provide advice through performance by posting a response to a question, responding to a comment, or directly contacting the individual through e-mail, phone, or regular mail.¹⁴⁰ As this article focuses specifically on blogs, only general posts and responses to comments are of concern here.

[48] Where legal advice is requested and given, two cases are particularly illustrative of the minimum requirements needed to form an attorney-client relationship.¹⁴¹ In *Foulke v. Knuck*, the court considered whether an attorney-client relationship was formed in order to determine the necessity of disqualifying an attorney from representing the wife in a divorce proceeding where the attorney had a previous attorney-client relationship with the husband.¹⁴² The attorney met with the husband and discussed the legal issues surrounding his case, but was never retained by him.¹⁴³ The court found that an attorney-client relationship existed because the husband sought and received legal advice, although there was no continuing relationship.¹⁴⁴ *Foulke* represents the basic parameters for an attorney-client relationship: legal advice requested and received.¹⁴⁵

[49] Blogs often involve much less back and forth communication than that demonstrated in *Foulke* because there is no real-time communication between lawyer and reader. In order to see the most basic exchange of information necessary to meet the consultation requirement, *Todd v. State*

¹³⁹ Lanctot, *supra* note 88, at 179.

¹⁴⁰ *Id.* at 186.

¹⁴¹ *Id.* at 175.

¹⁴² *Foulke v. Knuck*, 784 P.2d 723, 725 (Ariz. Ct. App. 1989).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 726.

¹⁴⁵ *Id.*

of *Nevada* is illustrative.¹⁴⁶ In *Todd*, the court explored whether the attorney-client privilege was created upon acceptance of a request for legal advice.¹⁴⁷ During the course of a consultation with his incarcerated client, an attorney received a letter from another inmate containing the facts of his case.¹⁴⁸ The court found an attorney-client relationship because the inmate had requested legal advice by handing the note to the attorney, and the attorney's acceptance of the note constituted an implied agreement to render legal advice.¹⁴⁹ *Todd* represents the floor for an attorney-client relationship: request for legal advice and an implied promise to deliver the advice sought.¹⁵⁰

[50] It is important to note that *Foulke* and *Todd* embody different applications of the attorney-client relationship. In *Foulke*, the court found a relationship which resulted in disqualification of the attorney.¹⁵¹ In *Todd*, the court was concerned with whether an attorney-client relationship existed to support the assertion of the attorney-client privilege.¹⁵² Given that *Todd* dealt with protecting a client's rights, it is not surprising that the court applied a lower standard in order to find an attorney-client relationship existed. Still, *Todd* reinforces the idea that a client's subjective belief about whether an attorney is representing him will play a major role in the court's analysis.

Attorney A posts a summary of a recent Texas case that has a significant impact on employment laws in his state. In response to his post, Reader B leaves a comment that the case sounds just like her situation. Reader B reached Attorney A's blog through an Internet search while researching her possible options for pursuing a lawsuit against her employer. She states that she is located in Texas and would like to know if she would have a chance at recovering from her former employer now that this new case has been decided.

¹⁴⁶ *Todd v. State*, 931 P.2d 721 (Nev. 1997).

¹⁴⁷ *Id.* at 725; see *Lancot*, *supra* note 88, at 175.

¹⁴⁸ *Todd*, 931 P.2d at 723-24.

¹⁴⁹ *Id.* at 725.

¹⁵⁰ *Id.*

¹⁵¹ *Foulke*, 784 P.2d at 727.

¹⁵² *Todd*, 931 P.2d at 725.

[51] Attorney A should be cognizant that Reader B will likely rely on any advice he gives, as Reader B has specifically asked whether she would be able to recover. It may be justified for Attorney A to believe Reader B is not requesting specific legal advice, as Reader B did not detail the facts of her case as in *Todd*.¹⁵³ However, it is clear that Reader B believes her situation closely resembles the facts of the recently decided case and is requesting advice on her ability to receive a similar result.

[52] Where an individual seeks out legal advice by posting a specific factual question on an attorney or law firm blog, *Todd* and *Foulke* indicate that simple acceptance of the question at a minimum, and advice given at a maximum, can form an attorney-client relationship. Given that many courts look to the subjective belief of the client that the attorney is acting on his behalf, an attorney-client relationship could be implied here. Attorney A should either specifically preface his response to Reader B with a statement indicating that no attorney-client relationship is being formed as a result of his response, or employ a general disclaimer to convey the same message. In either case, Attorney A must also avoid giving specific advice to Reader B to prevent the formation of an attorney-client relationship.

[53] As legal blogs are often discovered when individuals seek out legal information and locate an attorney's blog, as in Reader B's case, greater weight can be given to the reasonableness of the client's reliance on any advice sought.¹⁵⁴ This is different from the cocktail party scenario where an individual happens upon an attorney and obtains general legal advice.¹⁵⁵ However, while blogs do allow for some level of discourse between the public and the lawyer, it is not in real time, as a face-to-face encounter at a cocktail party would be.¹⁵⁶ Therefore, the lawyer often may not have the same ability to decipher the individual's intent when asked a legal question over the Internet because of the limited interaction. This presents a thorny area where a layperson is likely to believe an attorney-

¹⁵³ *See id.* at 724.

¹⁵⁴ Lancot, *supra* note 88, at 178 (arguing that “[w]hat might be unreasonable reliance in a social setting might well be reasonable in the environment of cyberspace . . .”).

¹⁵⁵ *Id.* at 178.

¹⁵⁶ Blogs, like bulletin boards, are static and do not involve real time communication. Schwarz, *supra* note 60, at 685.

client relationship exists while the attorney does not.¹⁵⁷ To some extent a disclaimer can mitigate the confusion and alleviate any misunderstandings as to the relationship between attorney bloggers and their readers. Attorneys should always give extra attention to how their interactions may be received by a layperson over the Internet.

1. CONFIDENTIALITY

[54] When attorneys undertake to represent clients, either expressly or impliedly, they also undertake the duty of confidentiality.¹⁵⁸ Under the Model Rules of Professional Conduct an attorney must keep confidential “information relating to the representation of a client unless the client gives informed consent”¹⁵⁹ The rule also contains limited exceptions which permit the disclosure of confidential information to prevent or mitigate certain types of harm to others in accordance with the law.¹⁶⁰

[55] In seeking to establish oneself in the blogosphere, it can be tempting to discuss past and ongoing cases, particularly when a favorable outcome was reached for a client or the case presented an interesting issue.¹⁶¹ Generally, attorneys are permitted to seek advice on their cases from other attorneys as long as it is done in a hypothetical manner.¹⁶² In some circumstances, the attorney may obtain the informed consent of clients to discuss their cases or disclose confidential information.¹⁶³ Attorney bloggers should always remain aware that the duty of confidentiality comes before their own interest in self promotion. Therefore, changing the names and facts of a case to make it unrecognizable is likely the only option for attorneys wishing to discuss litigation in which they have participated.

¹⁵⁷ Nichols, *supra* note 110.

¹⁵⁸ MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Kellogg, *supra* note 5, at 37.

¹⁶² MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. n. 4. (2003) (“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 [another person] will be able to ascertain the identity of the client or the situation involved.”).

¹⁶³ MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

2. DILIGENCE

[56] As mentioned above,¹⁶⁴ only general legal advice may be given when attempting to avoid the unauthorized practice of law in jurisdictions where an attorney is not licensed. However, in some instances, once an attorney-client relationship has been established, only specific legal advice will suffice.¹⁶⁵ This is because lawyers are charged with the duty to diligently assist, zealously represent, and ardently protect the interests of their clients.¹⁶⁶ This duty is not upheld when the attorney offers only general advice, or upon giving specific advice, fails to expound upon all the legal implications of the client's problems.¹⁶⁷ Thus, should an attorney-client relationship be created as a result of a legal blog, the duties owed to that client may not be upheld with minimal Internet contact.¹⁶⁸ Attorney bloggers must be aware that once an attorney-client relationship is formed, whether intended by the attorney or not, the duty of diligence may require that more attention be dedicated than a simple general response to the client's question.¹⁶⁹

3. CONFLICTS OF INTEREST

[57] Attorneys have a duty to ensure there are no conflicts of interest present prior to representing a new client.¹⁷⁰ Conflicts may be due to an adverse interest of a client the attorney already represents,¹⁷¹ or an adverse interest of the attorney himself.¹⁷² Because attorney-client relationships may be formed through blogs in a somewhat unexpected way, without the attorney intending such a relationship, an attorney will often not have an opportunity to check for conflicts prior to forming an attorney-client relationship.¹⁷³

¹⁶⁴ See discussion *infra* Part III.B.2.

¹⁶⁵ Lanctot, *supra* note 88, at 251.

¹⁶⁶ MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002).

¹⁶⁷ Lanctot, *supra* note 88, at 251.

¹⁶⁸ See *id.* at 224.

¹⁶⁹ See *id.*

¹⁷⁰ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. n. 3 (2002) (stating that representation must be declined if there is a conflict of interest prior to representation, absent informed consent).

¹⁷¹ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

¹⁷² MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. n. 1 (2002).

¹⁷³ Dedy, *supra* note 94, at 906.

[58] Additionally, because much of the communication with readers and potential clients through a blog is anonymous, attorneys may be severely limited in their ability to check for conflicts.¹⁷⁴ It would be impossible to check for conflicts of interest among staff and current clients when a client is anonymous and the attorney does not know all of the facts and circumstances of the client's problem.¹⁷⁵ Conflicts of interest may be alleviated through the informed consent of each party,¹⁷⁶ but informed consent is unattainable if each party does not know who they are waiving a conflict against.¹⁷⁷

[59] Therefore, attorneys must avoid forming attorney-client relationships with clients who are anonymous.¹⁷⁸ One way to achieve this is to require that commenters give their real names and a list of all the parties involved in their case before the attorney renders legal advice. This could be similar to the conflicts check that most law firms do before taking on a new client. However, Internet users would likely be opposed to this as people often seek advice on the Internet to avoid the embarrassment of a face-to-face encounter where anonymity is lost.¹⁷⁹ Further, attorneys would have no way of knowing that the commenters are being truthful thus rendering reliance on the statements of commenters difficult at best.

¹⁷⁴ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. n. 2 (2002) (stating that the first step in resolving a conflict of interest is to clearly identify the clients).

¹⁷⁵ Deady, *supra* note 94, at 906.

¹⁷⁶ Lancot, *supra* note 88, at 194-95.

¹⁷⁷

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. n. 18 (2002) (internal citations omitted).

¹⁷⁸ See Deady, *supra* note 94, at 906.

¹⁷⁹ See *id.* at 894.

IV. INSULATING ATTORNEY BLOGGERS FROM ETHICAL VIOLATIONS

[60] Strict adherence to the rules of the attorney blogger's state is an absolute necessity. Yet, due to the variety in state ethical rules, it is likely impossible to comply with the rules of each state a legal blog reaches.¹⁸⁰ Therefore, an attorney's best course of action is a comprehensive and unambiguous disclaimer.¹⁸¹

[61] Many law firm websites include routine disclaimers, particularly where a lawyer dispenses legal advice on the website.¹⁸² Disclaimers are a simple way to lessen liability by reducing the possibility that a reader will rely on inaccurate, misleading, or illegal information contained in a blog.¹⁸³ The National Law Journal recommends a disclaimer that states the author "does not wish to represent anyone desiring representation based upon viewing this Web page in a state where the Web page fails to comply with all laws and ethical rules of the state."¹⁸⁴ However, such a disclaimer is not effective if readers are unaware of the laws and ethical rules of the

¹⁸⁰ Schwarz, *supra* note 60, at 667.

¹⁸¹ The popular *Bag and Baggage* uses the following disclaimer:

My musings on legal issues posted to my Bag and Baggage weblog or any other are provided as a service to the Web community, and do not constitute solicitation or provision of legal advice. I try to provide quality information, but I make no claims, promises or guarantees about the accuracy, completeness, or adequacy of the information contained in or linked to from Bag and Baggage. Legal advice must be tailored to the specific circumstances of each case, and laws are constantly changing, so nothing in Bag and Baggage or any other weblog should be used as a substitute for the advice of competent counsel. I am admitted to practice law in California and the Ninth, Sixth, and Federal Circuit Courts of Appeals, and nowhere else, and do not intend to represent anyone desiring representation in a state where this site may fail to comply with all applicable laws and ethical rules.

Bag and Baggage-About, http://bgbg.blogspot.com/bgbg_about.html (last visited Oct. 6, 2007).

¹⁸² See Deady, *supra* note 94, at 899; Brennan, *supra* note 34.

¹⁸³ Deady, *supra* note 94, at 900.

¹⁸⁴ Jeffrey R. Kuester, *Attorney Sites Can Avoid Violations of Ethics Rules*, NAT'L L.J., Aug. 12, 1996, at B11.

state in which they view a blog.¹⁸⁵ A general statement that readers should consult competent counsel in their state rather than rely on the information found on the blog conveys to readers that the information provided is not sufficient for their reliance.

[62] Disclaimers should always be specific and devoid of legal jargon, as the objective is to inform the layperson.¹⁸⁶ Courts are protective of important client rights such as confidentiality, and are likely to analyze disclaimers that waive these rights from the perspective of the putative client.¹⁸⁷ Therefore, legalese is ineffective to disclaim important legal obligations when it is confusing or ambiguous to a layperson.¹⁸⁸

[63] In addition to the actual language used, the presentation of the disclaimer can influence whether it is effective. In 2004, Texas adopted a new set of attorney advertising rules which revised the way disclaimers are to be presented.¹⁸⁹ The new rules require that any disclaimer in conjunction with attorney advertising be presented in the same manner and size as the information disclaimed.¹⁹⁰ Thus, a small disclaimer found only on one page of a website cannot sufficiently disclaim information that is presented more prominently elsewhere on a blog.

[64] To be effective, a disclaimer must be used in conjunction with consistent actions.¹⁹¹ If a disclaimer states that advice given is not intended as specific advice, the attorney must not then provide specific advice.¹⁹² Using a disclaimer as an all-purpose shield will not protect an attorney blogger from liability when that attorney acts inconsistently with the disclaimer.¹⁹³

¹⁸⁵ Schwarz, *supra* note 60, at 671.

¹⁸⁶ Barton v. U.S. Dist. Ct. for the Cent. Dist. of Ca., 410 F.3d 1104, 1110 (9th Cir. 2005) (addressing the need for a disclaimer in “plain English,” the court stated, “our focus is on the clients’ right, not the lawyers.”).

¹⁸⁷ See *id.* at 1111.

¹⁸⁸ See Nichols, *supra* note 110.

¹⁸⁹ Order Approving Referendum on Proposed Changes in the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 04-9220 (Oct. 1, 2004).

¹⁹⁰ TEX. GOV’T CODE ANN. § 9, R. 7.04(q) (Vernon 2007).

¹⁹¹ Lanctot, *supra* note 88, at 189; Nichols, *supra* note 110.

¹⁹² See *e.g.* Lanctot, *supra* note 88, at 189.

¹⁹³ *Id.* at 193.

[65] To prevent problems of both attorney advertising and the unauthorized practice of law, a statement as to the jurisdiction in which the attorney blogger is licensed is essential.¹⁹⁴ To be clear, the disclaimers should include an explanation that attorneys can only legally practice in the states in which they are licensed and that not all information on the blog will be applicable to every reader. Additionally, the attorney blogger should state that none of the content is intended as attorney advertising, and is not a solicitation of business.¹⁹⁵ Collectively, these statements help to avoid application of the disciplinary rules in states where the attorney is not licensed by eliminating any inference that the attorney is licensed there or offering legal advice.

[66] Attorney bloggers can also reduce the potential for unexpectedly forming an attorney-client relationship by providing a clear disclaimer. First, the attorney should include a statement that nothing included in the blog constitutes an invitation to form an attorney-client relationship.¹⁹⁶ This should be followed by a statement that the attorney does not wish to represent any reader or commenter, as well as a statement that none of the information included is legal advice.¹⁹⁷ This disclaimer provides both express and implied rejection of the attorney-client relationship by the attorney blogger.¹⁹⁸ By indicating that the attorney does not wish to form an attorney-client relationship, or to represent any person viewing the blog, the attorney's express intent not to form an attorney-client relationship is conveyed to the reader.¹⁹⁹ By indicating that nothing on the blog should be taken as legal advice, the disclaimer renders any reliance on the blog unreasonable.²⁰⁰

[67] In some states, disclaimers preventing the creation of the attorney-client relationship cannot disclaim all of the duties normally attendant in the attorney-client relationship.²⁰¹ In *Barton*, the court considered whether a law firm's website disclaimer stating that an attorney-client relationship

¹⁹⁴ Schwarz, *supra* note 60, at 671.

¹⁹⁵ Blades & Vermeylen, *supra* note 48, at 642.

¹⁹⁶ Kuester, *supra* note 184, at B11.

¹⁹⁷ *Id.*

¹⁹⁸ See Lanctot, *supra* note 88, at 186.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See generally, Nichols, *supra* note 110.

was not formed through the submission of an online questionnaire effectively disclaimed the duty of confidentiality.²⁰² Under California law, an attorney owes a duty of confidentiality to prospective clients as well as current clients.²⁰³ Therefore, when the law firm disclaimed that attorney-client relationship, it had no effect on the duty of confidentiality.²⁰⁴

[68] The rule that emerged from the Ninth Circuit is that a disclaimer must be clear as to exactly what is being disclaimed and cannot mislead the reader.²⁰⁵ Disclaimers are viewed from the client's perspective and, therefore, "[m]ore important than what the law firm intended is what the clients thought."²⁰⁶

[69] Where a disclaimer of the attorney-client relationship is not appropriate or is unenforceable by a court, attorney bloggers may choose to rely on a disclaimer that limits the scope of representation.²⁰⁷ The Model Rules of Professional Conduct allow an attorney and client to agree to limit the scope of representation.²⁰⁸ Informed consent of the client must be obtained before the limitation.²⁰⁹ A client may give informed consent where a disclaimer explains that the representation will be limited to "a competent legal response, without further requiring the lawyer to take steps to protect the client's interest"²¹⁰ However, a disclaimer that limits the scope of representation to a point where the attorney is no longer providing competent legal services is not enforceable.²¹¹

²⁰² *Barton v. U.S. Dist. Ct. for the Cent. Dist. of Ca.*, 410 F.3d 1104, 1108 (9th Cir. 2005).

²⁰³ *Id.* at 1111 (concluding that because the definition of a client includes a person who consults an attorney in order to retain the attorney or to seek advice, legal or otherwise, the duty of confidentiality is owed to a client before the formation of an attorney-client relationship).

²⁰⁴ *Id.* at 1110.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1107.

²⁰⁷ *Lancot*, *supra* note 88, at 194.

²⁰⁸ MODEL RULES OF PROF'L CONDUCT R. 1.2(C) (1983).

²⁰⁹ *Lancot*, *supra* note 88, at 195.

²¹⁰ *Id.*

²¹¹ *Id.*

[70] Courts have been reluctant to uphold all broad website disclaimers due to a fear that if attorneys are allowed to disclaim everything from the formation of the attorney-client relationship to the correctness of their advice, the practice will bleed over into the real world.²¹² It would only be a matter of time before a client entered a law office and was presented with a lengthy disclaimer that waived all of the rights and duties of the attorney-client relationship.²¹³ For this reason, blog disclaimers should be tailored in a way that informs the client of the boundaries of their use of a legal blog instead of whittling away the attorney-client relationship.

V. CONCLUSION

[71] It has been argued that lawyers practicing on the Internet are more likely to shirk their ethical obligations because clients are physically removed from them.²¹⁴ Yet, blogs actually make the legal community more accessible by inviting the public to join lawyers in a discussion of the law. As long as attorney bloggers clearly inform the public of the limitations of their assistance and act in accordance with these limits, blogs have the potential to eliminate many of the traditional barriers between lawyer and potential client. Attorneys must continue to self-regulate professional conduct by acting as the gatekeepers for legal content on the Internet.

²¹² Deady, *supra* note 94, at 900.

²¹³ *Id.*

²¹⁴ *Id.* at 892.