

Risk Management Memo

Professional Liability Division

VOLUME FOURTEEN NUMBER TWO

SECOND QUARTER 2006

www.greatamericanlawyer.com

Legal Malpractice Prevention on the Electronic Frontier (Part Two)



By Sally J. Field
Division President

This article is part two of a paper I wrote for the American Bar Association's (ABA) Tort Trial and Insurance Section for presentation at the 2005 Annual Meeting. It highlights a few of the electronic issues facing the legal practice and suggests guidelines for electronic best practices.

Part one, in the 1st Qtr. *RMM*, covered the lack of distinction, in the eyes of the court, between paper and electronic documents and communication; potential safeguards against dangers from hackers,

(Continued on p. 3)

For The GREAT American Law Firm

Blogs: The Hot New Technology for Communication and Information

By Bonnie Shucha
Head of Reference
University of Wisconsin Law Library



Blogs are hot right now in the legal community, and for many legal professionals, they're a love/hate technology. Some want to jump on the bandwagon while others want nothing to do with what they view as a *flash in the pan* fad. Whichever camp you're in, it's important to remember that a blog is simply one of many communication tools at your disposal. Don't rush out to create a blog just so you can say you have a blog. And, conversely, don't avoid this potentially useful technology just because it's a blog. Take a step back from the hype before evaluating whether this tool is right for you.

(Continued on p. 2)



INSIDE

Blog Software
& Hosting4

Ethics CLE in
Las Vegas6

GREATAMERICAN[®]
INSURANCE GROUP

What is a Blog?

One of the most commonly asked questions about blogs is what is the difference between a blog and a website. The answer is that a blog is simply one type of website. It's like asking what the difference is between an attorney and a human being — sounds like the beginning of a bad lawyer joke, doesn't it? Of course, an attorney *is* a human being just as a blog is a website. And as with any website, there are some really great blogs, there are some really rotten ones, and there are a lot of them in between.

According to a recent study on the *State of the Blogosphere* (Technorati, *State of the Blogosphere*, Feb. 2006 at <http://www.technorati.com/weblog/2006/02/81.html>) there are currently over 27.2 million blogs. The blogosphere doubles every 5½ months and, on average, a new blog is created once every second. Responsible for some of this staggering growth are *splogs*, or machine-generated spam blogs, which account for 9% of all newly created blogs. Splogs exist to drive traffic to other sites to which they link, thereby raising the search engine rankings of those sites.

Establishing a Blogging Policy

Regardless of what you may think about blogs, if you own, manage, or represent a business, you should consider creating an employee blogging policy. According to a study by Employment Law Alliance (http://fm.employmentlawalliance.com/ela/FMPro?-DB=ela_articles.fp5&-Format=article.html&-RecID=33678&-Find=), perhaps as many as 5% of the American work force are blogging, but only about 15% of employers have specific policies addressing work-related blogging. What might your employees be saying about you?

Blogging policies should cover company blogs, as well as employees' off-duty blogs. Policy language should be clear and simple, and should attempt to balance liability protection with some degree of blogger freedom to be honest and frank. Among those companies that have

established policies are Feedster and Yahoo! (Feedster's Corporate Blogging Policy is available at http://feedster.blogs.com/corporate/2005/03/corporate_blogg.html and Yahoo!'s *Personal Blog Guidelines* are available at <http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf>)

Reading Blogs

There are a number of ways in which legal professionals can find value in reading blogs. One of these is for continuing education. Reading blogs is a great way to stay informed of new legal or business developments. Blogs can also be a competitive intelligence tool for tracking what competitors are doing and saying.

By searching blogs, you may be able to gather some valuable information about potential new clients or hires. You can also use blogs to monitor what the public thinks about you, your clients, and their interests. (See the *Online Reputation Monitoring Beginners Guide* from *Marketing Pilgrim blog* at <http://www.marketingpilgrim.com/2006/03/online-reputation-monitoring-beginners.html>)

There are a number of ways to find blogs. The first is to browse a blog directory for topics that may be of interest.

Two good legal blogs, a.k.a. blawg, directories are *Blawg: Law & Legal Related Weblogs and TVC Alert's RSS News Feeds for Law*. (*Blawg: Law & Legal Related Weblogs* is available at <http://www.blawg.org/> and *TVC Alert's RSS News Feeds for Law* is available at http://www.virtualchase.com/resources/rss_law.html)

You can also keyword search for blog content using a blog search engine such as Google Blog Search or Feedster. (Google Blog Search is available at <http://blogsearch.google.com/> and Feedster is available at <http://feedfinder.feedster.com>)

Creating A Blog

Blogs can also be a useful communication tool for the legal professional, both for sharing information externally, with clients, potential clients, the media and public, as well as

What might your employees be blogging about you? Create an employee blogging policy.

(Continued on p. 5)

viruses and spyware; and the importance of consistent records management and retention in the post Sarbanes-Oxley era. In this quarter's *RMM*, we continue our exploration of legal malpractice on the electronic frontier by way of *wi-fi*, *blawgs*, *spam* and technology usage policies.

Wireless Technology

What a wonderful convenience. It is possible now to sit down at a Starbucks in Seattle and connect to the office in Chicago. But inherent in that convenience is the risk of sharing that connection with others — even hackers — making security measures extremely important. "One of the techniques hackers use is called 'packet sniffing,' which allows them to intercept and copy any of the data being sent out over the wireless network." (Harris, Brian R., "Protecting Clients in a Wireless World," *Law.com's Legal Technology*, March 4, 2005)

A wi-fi connection played a dubious part in the highly publicized criminal trial of Scott Peterson. A reporter used the court's own wi-fi network to provide his Sacramento television station with a live text scroll of the proceedings. The court had banned video, but the wi-fi network was apparently not anticipated. "The judge's staffers later said they'd been outfoxed." (Charny, Ben, "Peterson Case Puts Courtroom Wi-Fi Use on Trial," *Law.com's Legal Technology*, December 21, 2004)

Some courts are addressing the problem by only allowing attorneys to use laptops in courtrooms or by installing technology shields to limit use in certain areas. (*Id.*) This does not yet appear to be in widespread use.

Then there are camera phones, text messaging, etc., etc. In Detroit, a judge banned cell phone use in the courtroom when a rumor surfaced that someone in the courtroom communicated with a juror with a text message. (Baldas, Tresa, "Text Messaging and Trials: A Volatile Mix," *The National Law Journal*, May 6, 2005)

Blawgs

This is not a typo. "Blog is short for weblog. Los Angeles lawyer Denise Howell, publisher of the 'Bag and Baggage' blog, ... coined the phrase 'blawg' for a legal blog." (Tooher, Nora Loskwood, "Lawyers leap into 'Blogosphere,'" *Daily Record (Kansas City, MO)*, May 25, 2005)

"Robert J. Ambrogi, a solo lawyer and internet consultant in Massachusetts, estimates there are currently about 1,000 legal blogs. But he says he gets several announcements every day about new ones." (*Id.*)

Considerations and safeguards for blawgs include:

Make the blawg read only, not interactive.

Include a disclaimer that the blawg does not constitute legal advice.

Blawgs can be time-consuming. Is the firm willing to make the commitment?

Do not write about firm cases.

Would the blawg come under advertising rules?

See Bonnie Shucha's article on blogs, including the information on blog software.

CAN-SPAM

The federal privacy law, Controlling the Assault of Non-Solicited Pornography and Marketing Act, went into effect on January 1, 2004. According to an article on *LegalTimes.com*:

"Law firms might not consider themselves to be spammers, but CAN-SPAM applies to any unsolicited email having a commercial 'primary purpose.' For example, an unsolicited email promoting a new law firm, subsidiary or alliance may be construed by an aggressive regulator to serve only a commercial purpose and therefore trigger the requirements of CAN-SPAM."

According to the article, the requirements regarding emails that may be considered non-solicited include that:

"... all such messages must contain: 'clear and conspicuous' identification that the message is an advertisement or solicitation; they must contain a valid reply email and postal address; and they

(Continued on p. 4)

must provide a mechanism for opting out of future emails." (Wolf, Christopher, "Is Your Law Firm Private Enough?" *LegalTimes.com on Law.com's Legal Technology*, February 22, 2005)

Law Firm Technology Usage Policies

Law firms need policies that will regulate employee usage of firm technology. Like any procedure, it is important that the policy be enforced consistently.

Potential problem usage by employees that may lead to firm liability include, but are not limited to:

- Downloading copyrighted images and/or unlicensed software.

- Downloading pornography, sexual harassment, etc.

- Postings to personal websites, news groups, political or racist groups.

Preventing disclosure of trade secrets or confidential information:

- Take reasonable precautions against discovery or disclosure.

- Clearly mark electronic locations with confidential legends and warnings, when the locations contain confidential information.

Restrict access to some information to only those within the firm who need to have access.

Immediately block access to electronic information upon an employee's departure from employment.

Conduct exit interviews, reminding employees that confidentiality survives their departure.

In Summary

This is an electronic frontier. Technology is a huge advance and, as in any advance, there are drawbacks and issues as it forges ahead. As the dangers inherent in cyberspace present themselves, steps must be taken to control the risk.

The reality is each time the American Bar Association does a new study on legal malpractice, administrative errors (correctable errors) rank as top causes of legal malpractice. As you would with other loss control measures, identify the issues, create internal policies to control them and make sure the policies are followed. Then use technology to help track adherence.

Blog Software & Hosting (For more, see Gardner, Susannah, *Time to Check: Are You Using the Right Blogging Tool?*, USC Annenberg Online Journalism Review at <http://www.ojr.org/ojr/stories/050714gardner/>)

Blogger - www.blogger.com

Pros - Easy to get started, easy to use, software and hosting free

Cons - Domain not well respected, target of "splogs" (spam blogs), limited features, lack of customization

TypePad - www.typepad.com

Pros - Easy to get started, easy to use, some advanced features

Cons - Some cost involved (starts at \$4.95 per month), customization can be difficult

WordPress - www.wordpress.org

Pros - Software free, easy-to-use

features, powerful customization

Cons - No hosting (requires own server)

MovableType - www.sixapart.com/movabletype

Pros - Easy to use, advanced features, powerful customization, great support

Cons - Start-up costs higher (starts at \$69), no hosting (requires own server)

Expression Engine - www.pmachine.com/ee

Pros - Advanced features, offers additional content management tools such as mailing lists and images

Cons - More difficult to use, start-up costs higher (starts at \$149), no hosting (requires own server)

Risk Management Memo

Great American Insurance Group
Professional Liability Division
1060 Maitland Center Commons Blvd.
Suite 100
Maitland, Florida 32751-7244

PRSR STD
US POSTAGE
PAID
MID-FLA, FL
PERMIT #147



For More Information

For more information or to arrange for a presentation on current malpractice issues and loss prevention tips, please contact us at **800-299-4331** or log on to our website at www.greatamericanlawyer.com. For claims information or reporting, please call **800-531-2297**.

*Join us for Ethics CLE in Las Vegas
Coming in October 2007 (date to be announced)
Earn up to 9 Hours of CLE Credit in Ethics*

www.greatamericanlawyer.com

The *Risk Management Memo* is published by Great American Insurance Group, Professional Liability Division. Mailing address: 1060 Maitland Center Commons Blvd., Ste. 100, Maitland, FL 32751; phone: 407-667-7881. Offices are also located throughout the country. It is not the intent of this publication to establish an attorney's standard of due care. Instead, the articles make suggestions about conduct which may be well above the standard of due care. This publication is intended for general information purposes only; it does not imply or warrant that implementation of suggestions will prevent claims. For legal questions, the reader should consult experienced legal counsel to determine how applicable law relates to specific facts or situations. While all articles are carefully researched, no warranty is offered as to the accuracy. No material herein may be reproduced in any manner without written permission.



© 2006 by Great American Insurance Company.
All rights reserved.

Professional Liability Division
Lucia S. Duggins, Editor
www.greatamericanlawyer.com



Risk Management Memo