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# The Ethical Obligations of Lawyers, Law Students and Law Professors Telling Stories on Web Logs

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# The Ethical Obligations of Lawyers, Law Students and Law Professors Telling Stories on Web Logs

Anna P. Hemingway<sup>FNA1</sup>

I am always at a loss at how much to believe of my own stories.

Washington Irving<sup>1</sup>

I'm writing for a record and also kind of writing stories for a book, but I got no deadlines, and I got no contracts.

Jimmy Buffett<sup>2</sup>

## I. Introduction

A recent debate has ensued about what ethics, if any, bloggers should follow. This debate centers around whether bloggers should be expected to be honest and fair in their postings; whether they should be required to minimize harm; and whether they should be accountable for the stories they tell.<sup>3</sup> The obligations arise from a number of sources including etiquette, blogging codes of ethics and professional codes of ethics.

The debate is further complicated when legal professionals are the ones blogging. The World Wide Web now contains everything<sup>4</sup> from well-organized law professor blogs<sup>5</sup> and lawyer blogs<sup>6</sup> to individual, journal-type law student blogs.<sup>7</sup> Like so many other bloggers, lawyers, law professors and law students alike are running into ethical issues while telling stories of their everyday lives on blogs.

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<sup>1</sup> Washington Irving was a lawyer and author (as many blawgers are) of the early 19<sup>th</sup> century.

<sup>2</sup> Jimmy Buffett is a famous singer, songwriter and author.

<sup>3</sup> *A Bloggers Code of Ethics*, <http://www.cyberjournalist.net/news/000215.php> (last visited Sept. 11, 2007).

<sup>4</sup> The blog search engine, [www.technorati.com](http://www.technorati.com), makes an informed guess that there are now over 71 million blogs worldwide. See Dave Sifry, *The State of the Live Web*, April, 2007, <http://technorati.com/weblog/2007/04/3028.html> (last visited Sept. 11, 2007).

<sup>5</sup> On last count, there were 307 blogs maintained by law professors. Posting of Daniel J. Solove, [http://www.concurringopinions.com/archives/2007/07/law\\_professor\\_b\\_9.html](http://www.concurringopinions.com/archives/2007/07/law_professor_b_9.html) (July 31, 2007, 12:36 AM).

<sup>6</sup> The number of blogs run by attorneys is unknown. They appear, however, to be a growing market. Lexblog.com is an internet company selling blog design services to lawyers interested in establishing law blogs. See <http://lexblog.com> (last visited Sept. 11, 2007).

<sup>7</sup> The number of blogs run by law students is also unknown, however, one web site lists 404 law student blogs from seventy-four schools. See <http://krhunt.blogspot.com/2006/03/law-student-blogger-directory.html> (last visited Sept. 11, 2007). Undoubtedly, many more exist on blog sites such as LiveJournal and MySpace.

For example, on [prawfsblawg.blogs.com](http://prawfsblawg.blogs.com), a law professor recently recounted the story of a “lazy” student who was not prepared for class.<sup>8</sup> The professor did not identify the student, but he did explain, in detail, the student’s insolent behavior that day in class and what he planned to do about the situation-punish the student by decreasing his grade and calling on him every class thereafter.<sup>9</sup> Every student in that class read the blog and several students from law schools throughout the United States posted angry comments to the blog.<sup>10</sup>

A former Assistant U.S. Attorney from New Jersey, David Lat, was the mastermind behind a blog that ran for eighteen months entitled “Underneath Their Robes.”<sup>11</sup> Writing under the pseudonym of “Article III Groupie,”<sup>12</sup> Lat’s blog consisted of regular features such as “Superhotties of the Federal Judiciary,”<sup>13</sup> and “The Dancing Queen of the Ninth Circuit.”<sup>14</sup> Unfortunately for Lat, the U.S. Attorney’s Office had a policy against its attorneys speaking with the media without prior approval.<sup>15</sup> Although the policy did not specifically address blogs, Lat agreed to shut the site down after reaching a mutual decision with his then supervisor to do so.<sup>16</sup> Not to be discouraged (or perhaps he was even encouraged) by the notoriety gained from “Underneath Their Robes,” Lat has gone on to become the editor of the legal blog “Above the Law.”<sup>17</sup>

In April 2006, a California prosecutor was reprimanded by a Superior Court Judge for writing a story in his personal blog about a misdemeanor case he was handling.<sup>18</sup> Apparently, the judge read the attorney’s blog posting where he called his opposing counsel a “chicken” for requesting a continuance.<sup>19</sup> Finding the posting “unprofessional” the judge informed the state

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<sup>8</sup> Posting of Michael Dimino to [prawfsblawg.blogs.com](http://prawfsblawg.blogs.com), [http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining\\_th.html](http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining_th.html) (Oct. 5, 2006, 10:53 EST).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Charles Toutant, *Blogger’s Demise May Chill Other Federal Lawyers’ Online Gossip*, 182 N.J.L.J. 719 (2005) (discussing blogger David Lat and his experiences with web-based logs).

<sup>12</sup> *Id.*

<sup>13</sup> Posting of Article III Groupie to Underneath Their Robes, [http://underneaththeirrobes.blogs.com/main/2004/07/big\\_swinging\\_ga.html](http://underneaththeirrobes.blogs.com/main/2004/07/big_swinging_ga.html) (July 21, 2004, 4:47 EST).

<sup>14</sup> Posting of Article III Groupie to Underneath Their Robes, [http://underneaththeirrobes.blogs.com/main/2004/11/courthouse\\_foru\\_1.html](http://underneaththeirrobes.blogs.com/main/2004/11/courthouse_foru_1.html) (Nov. 19, 2004, 8:02 EST).

<sup>15</sup> Toutant, *supra* note 11 at 719.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Pam Smith, *Judge Pastes DA for Blog Post Item ‘Juvenile, Obnoxious, and Unprofessional’*, 130 The Recorder 1 (Apr. 27, 2006).

<sup>19</sup> *Id.*

bar of the prosecutor's actions.<sup>20</sup> Although he was not directly asked to do so, the prosecutor resigned from his temporary position at the District Attorney's office.<sup>21</sup>

These types of situations give rise to the question of whether there are ethical requirements that should govern the legal community in the recounting of stories on blogs. This article explores this question. In Part II, this article provides a brief review on what blogs are and how they operate. Part III elaborates on the blog entries already introduced and provides additional examples. In Part IV, the article provides an examination on the ethics of blogging by others and legal professionals and considers whether those in the legal community have additional ethical obligations. Finally, this article makes teaching suggestions for those involved in legal academia instructing students on the ethics of blogging.

## **II. The How, What and Why of Storytelling on Blogs.**

In the early 1990s, blogs were created from online journals, Internet sites where people would write running accounts of their lives.<sup>22</sup> Although blogs did not initially gain a huge following, by the end of the 1990s, as technological advances were made, blog usage began to rapidly spread.<sup>23</sup> By now, most individuals in the legal community are familiar with blogs, even if they do not blog themselves. In their purest form, blogs are simply web-based journals.<sup>24</sup> The word "blog" is short for "weblog,"<sup>25</sup> and the word "blawg" is short for a law weblog.<sup>26</sup> Blogs, as well as blawgs,<sup>27</sup> post entries on various topics in reverse chronological order.<sup>28</sup> These sites allow writers to reflect on a variety of issues while also creating an interactive format by allowing readers to post comments.<sup>29</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See <http://en.wikipedia.org/wiki/Blog> (last visited Sept. 11, 2007).

<sup>23</sup> *Id.*

<sup>24</sup> Susan L. Ward, *Something to Blog About*, 182 N.J.L.J. 947 (Nov. 14, 2005). Interestingly, to today's students, the idea of journaling may seem very old fashioned; but the idea of blogging is trendy.

<sup>25</sup> *Id.*

<sup>26</sup> Blogossary defines blawg as "a blog written by a legal professional (hopefully) that focuses primarily on areas of the legal system." [www.blogossary.com/define/blawg/](http://www.blogossary.com/define/blawg/) (last visited Sept. 26, 2007).

<sup>27</sup> This article uses the term "blawg" to refer exclusively to law based web logs and the term "blog" to refer to all other web logs.

<sup>28</sup> Ward, *supra* note 24 at 947.

<sup>29</sup> Jonathan Bick, *Defamatory Blogging*, 186 N.J.L.J. 675 (Nov. 13, 2006) (reviewing defamation claims against bloggers for original and reprinted material). For example, there are blogs specializing in topics for lawyers, journalists, educators, administrators and many other professionals which all cover different topics. See also Ward, *supra* note 24 at 947.

The blog is a relatively inexpensive and permutable tool for communicating on the World Wide Web.<sup>30</sup> Unlike web sites, individuals can post to blogs throughout the day.<sup>31</sup> This ability to keep blogs easily updated attracts readers to visit blogs frequently in the hope of reading new entries. This makes blogs similar to, but more accessible than, e-mail. While most e-mail accounts are password protected, many posts to blogs can be archived and retrieved by all who have access to the Internet.<sup>32</sup>

Web log software is easy to use and requires little, if any special expertise, making a blog simple to start and maintain.<sup>33</sup> All blog software features user-friendly interfaces allowing the blogger to enter a post without needing any specialized programming knowledge for the Web.<sup>34</sup> Contributing to a blog is also relatively easy. Simple searches on the Internet will produce a number of blogs that are available to the general public, as well as those that can be read but require a password to contribute or make comments. Some blawgs have no agenda at all, while others are formed to encourage discussion by certain members or on certain topics.<sup>35</sup> There are even law review articles listing authors' favorite blogs, making it almost effortless to find blawgs that deal with specific legal topics.<sup>36</sup> For example, [www.blawg.com](http://www.blawg.com) is a blawg directory tracking over seventeen hundred blawgs covering such diverse topics as law students, bar exams, and religion and the law.<sup>37</sup>

Because web logs often involve research and always involve writing, they seem to especially appeal to many involved in the legal profession.<sup>38</sup> Although many use blawgs to simply access information on a particular area of the law, others use them as diaries, while still others use them as a form of marketing.<sup>39</sup> Blawgs allow individuals with similar interests to gain knowledge from others' experiences by being focused in content and frequently visited.<sup>40</sup> They

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<sup>30</sup> Sarah Kellogg, *Do you Blog?*, 17 S.C. Law. 31, 32 (July 2005).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Ward, *supra* note 24, at 947. Software includes Wordpress, Moveable Type, and Radio Userland. Websites, including Typepad and LiveJournal, also provide services allowing a person to set up a blog for free or a nominal fee. See Rebecca Porter, *Do you Blog?* 41 Trial 44 (Feb. 2005).

<sup>34</sup> David Gulbransen, *Welcome to the Blawgsosphere*, 20 CBA Rec. 36 (Apr. 2006).

<sup>35</sup> Lawprofessorblogs.com is a resource for law professors containing a network of blawgs, ranging from a business law professors' blawg to a poverty law professors' blawg.

<sup>36</sup> See Kellogg, *supra* note 30, at 38.

<sup>37</sup> See [www.blawg.com](http://www.blawg.com) (last visited Sept. 12, 2007).

<sup>38</sup> See Kellogg, *supra* note 30, at 31.

<sup>39</sup> *Id.*

<sup>40</sup> Ward, *supra* note 24, at 947. Because blawgs are so focused in content, they often attract more visitors than web sites.

appeal to legal professionals because they provide a place for people to agree, disagree and to generally engage in legal discourse.

### **III. A sampling of blawg entries recounting stories giving rise to potential ethical concerns.**

Blawgs provide a twenty-four-hour meeting place for crowds to gather and discuss what is often a very loose agenda. Blawgers often come with a story to tell and it is through this storytelling that communities and bonds are formed.<sup>41</sup> Just as society is comprised of numerous communities that come to be, in part, because of individuals' shared stories,<sup>42</sup> so too are blawg communities formed. These blawg communities can take on a personal feel to them, making it easy to forget that anyone can read the posting. It is no wonder, therefore, that some of the stories told on blawgs would perhaps be better suited for smaller audiences.

For example, as introduced at the beginning of this article, the following post about disciplining a lazy student was made by a constitutional law professor to [prawnsblawg.blogs.com](http://prawnsblawg.blogs.com):

Perhaps the most aggravating thing about this profession is the attitude held by some students that the responsibility for their learning is on us and not them. I encountered perhaps my worst example of such laziness in class yesterday. I called on the student to analyze whether certain arguments for restricting marriage to heterosexual couples was "irrational," as held by the Massachusetts Supreme Judicial Court. The student declined to answer, claiming that he did not hear the question because he was typing on his computer; that he had no opinion on the matter; and that he could not develop any opinion because he had not been listening closely enough to the discussion and did not bring his book to class. This was not the first time he was unprepared.

What should I have done? I called on someone else and plan to call on the lazy student every day for the rest of the semester (or at least a suitably lengthy period short of the whole semester) plus decrease his grade one step for poor class participation, but I suspect such treatment is not nearly severe enough (plus it wastes the time of other members of the class). Have some of you ejected students from the class for such inexcusable behavior? If so, do you let them return for the next class? What happens if they don't leave? What other means are appropriate and effective?<sup>43</sup>

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<sup>41</sup> Indeed, blawgs are often designed to build a readership and community by providing links to other blawgs and enabling comments.

<sup>42</sup> Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 Mich. J. Race & L. 107, 111 (2006).

<sup>43</sup> Dimino, *supra* note 8.

This posting received sixty-five comments made by both academics and students in less than two days.<sup>44</sup> The responses took on various tones.<sup>45</sup> Some commentators sympathized with the constitutional law professor and tried to provide answers to his questions.<sup>46</sup> Others were outraged by the professor's behavior in class.<sup>47</sup> A few raised the issue of whether or not the professor behaved inappropriately by posting the story on a blawg. For example, an anonymous commentator wrote:

On the off chance that the original post doesn't play with the details, I wonder whether it's appropriate to so nearly identify the student. I don't know the appropriate response to the underlying problem, but this kind of public shaming, would strike me as one of the less promising ones.<sup>48</sup>

A student at Yale Law School followed up on this comment by writing "Obviously, Mr. Dimino has never practiced in the field of law where confidentiality is sacred and things like unpreparedness are not taken personally. Shame on you Mr. Dimino, I think you will grow largely unpopular among your students as well as your colle[a]gues with such an attitude."<sup>49</sup>

Similarly, a law student recently made a journal entry on his own blawg discussing how he had to wait a long time for his conference to review a legal methods paper with his professor because a "law review student" was taking up too much time with the professor.<sup>50</sup> The student discussed how he overheard the law review student's low grade while waiting outside the professor's office.<sup>51</sup> He then went on to post the student's name and grade, along with his own

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<sup>44</sup> *Id.* See generally comments responding to the Disciplining the Lazy Student entry made from October 5, 2006 to October 7, 2006.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* For example, Ethan Lieb wrote "My sense is that if you call on enough people randomly in every class and generally assign a reasonable amount of reading for each class, the vast majority of students do their part. If they don't we can decrease their grades, which is punishment enough." Posting of Ethan Leib to [prawfsblawg.blogs.com](http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining_th.html), [http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining\\_th.html](http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining_th.html) (Oct. 5, 2006, 11:45 EST).

<sup>47</sup> *Id.* For example, one anonymous commentator wrote "but to threaten to call on a student punitively or eject him from class(!) is petty, abusive, and obnoxious. [I] hope your law school has policies to prevent this sort of behavior, but even if it doesn't, that bullying is legal does not make it moral." Posting of loafer to [prawfsblawg.blogs.com](http://prawfsblawg.blogs.com), [http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining\\_th.html#comments](http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining_th.html#comments) (Oct. 5, 2006, 1:38 EST).

<sup>48</sup> Posting of Just Me to [prawfsblawg.blogs.com](http://prawfsblawg.blogs.com), [http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining\\_th.html#comments](http://prawfsblawg.blogs.com/prawfsblawg/2006/10/disciplining_th.html#comments) (Oct. 5, 2006, 1:58 EST).

<sup>49</sup> Posting of Josh Rockafeller to [prawfsblawg.blogs.com](http://prawfsblawg.blogs.com), [http://prawfsblawg.blogs.com/prawfsblawg/2006/10/the\\_virtues\\_of\\_.html](http://prawfsblawg.blogs.com/prawfsblawg/2006/10/the_virtues_of_.html) (Oct. 7, 2006, 10:15 EST).

<sup>50</sup> This entry was originally posted in October of 2006. The law student was asked to put a block on the material and thus, it is no longer accessible.

<sup>51</sup> *Id.*

grade.<sup>52</sup> Of course, the law review student, along with her classmates, read the story, and became very upset. The student who wrote the story saw no harm in what he did.

Questionable storytelling on blawgs is not limited to the world of academia. Jay Kuo, a litigation firm attorney acting as a temporary prosecutor<sup>53</sup> was reprimanded by a judge for posting the following story to his blawg:

The jury was waiting outside to be seated. I knew all their names. I had my peremptories ready. My witnesses were prepped. My opening statement was polished. I had just won a tentative ruling on a major evidentiary issue admitting the defendant's prior conviction for armed robbery. I was going to skewer him on the stand.<sup>54</sup>

The attorney followed this statement with "The Public Defender pulled the "I'm pregnant, and I can't proceed." IN THE MIDDLE OF JURY SELECTION. Her doctor said that this was supposed to be her last trial-there was no medical emergency preventing her from going forward. She's just chicken. Chic-KEN!"<sup>55</sup> Upon learning about the postings, defense counsel filed a motion requesting a dismissal.<sup>56</sup> Judge Karnow denied the motion concluding that the defendant's constitutional rights were not violated.<sup>57</sup> Focusing solely on the blawger's intent, the judge reasoned that "[t]he issue of intent is of central importance,...such thoughts were far from mind: [The prosecutor] sought only to celebrate himself, tout his prowess and to preen his own feathers, as it were, unconscious of other effect."<sup>58</sup> As a result, the attorney resigned from his temporary position at the DA's office citing that "it was just not a comfortable environment any more."<sup>59</sup> The DA's office also reacted by changing its personnel manual to specify that criminal cases and office business "should not be mentioned on the Internet."<sup>60</sup>

Judges may wish to consider adding similar language to their personnel manuals. David Lat,<sup>61</sup> editor of Above the Law,<sup>62</sup> has posted a blawg entry requesting horror stories from judicial

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<sup>52</sup> *Id.*

<sup>53</sup> Smith, *supra* note 18 at 1. This temporary assignment was part of a loaner program that allows firms to send attorneys to a district attorney's office to gain trial experience. *Id.*

<sup>54</sup> Posting of Skelly Wright to Arbitrary and Capricious, <http://skellywright.blogspot.com/2005/12/ca-you-take-boy-out-of-the-biglaw.html> (Dec. 15, 2005, 7:19 EST).

<sup>55</sup> *Id.*

<sup>56</sup> Smith, *supra* note 18 at 1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* The attorney went on to resign from the firm to compose music for musicals. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> David Lat is the former editor of Underneath Their Robes, where he worked under the pseudonym of Article III Groupie, *supra* note 11 at 719.

clerks. His posting, entitled “Judicial Clerkships From Hell: Submissions, Please” asks for “tales of clerkship woes.”<sup>63</sup> This request was motivated by a new book entitled *Chambermaid: A Novel*<sup>64</sup> written by Saira Rao, former judicial clerk to Dolores K. Sloviter of the U.S. Court of Appeals for the Third Circuit.<sup>65</sup> In the book, Rao describes a young attorney’s year clerking for a “sociopathic, homicidal, bipolar jurist,”<sup>66</sup> a story supposedly loosely based on her own clerkship experience.<sup>67</sup> After the book’s release, law professor Mike Rappaport posted a story briefly explaining his unpleasant experience clerking for Judge Sloviter in the 1980s:<sup>68</sup>

In 1985, having just graduated from law school, I arrived for my first day of work as a law clerk to Dolores K. Sloviter of the Third Circuit. . . . My two co-clerks, who had arrived a week earlier, took me to lunch. I asked how things were going, and they looked kind of uncomfortable. They explained that on their first day, a week earlier, they had gone to lunch with the holdover clerk, and had asked her, almost making small talk, how her year had been. . . . [S]he spent the next hour and a half detailing the horrors of the experience, and how she wasn’t sure how she had gotten through it. That law clerk’s year of hell turned out to be quite similar to our year.<sup>69</sup>

Although this story “doesn’t provide very much in the way of juicy details,”<sup>70</sup> one commentator hinted that Rappaport may have revealed confidential information he should have kept to himself.<sup>71</sup> In a follow-up post, Rappaport argues that he did not reveal any confidential information, goes on to name Judge Irving Kauffman of the Second Circuit as another jurist clerks may wish to avoid, and suggests that he wishes he would have told the story earlier to help others.<sup>72</sup> AbovetheLaw.com picked up on the plea to find a way to warn future clerks about certain judges by requesting clerkship horror stories.<sup>73</sup> Lat’s call for submissions and assurances

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<sup>62</sup> Above the Law is a self-proclaimed legal tabloid. See <http://www.abovethelaw.com/>.

<sup>63</sup> Posting of David Lat to Above the Law, [http://www.abovethelaw.com/2007/07/judicial\\_clerkships\\_from\\_hell.php](http://www.abovethelaw.com/2007/07/judicial_clerkships_from_hell.php) (July 11, 2007 (5:00 EST)).

<sup>64</sup> Saira Rao, *Chambermaid: A Novel* (Grove, 2007).

<sup>65</sup> Judge Slovitar is the alleged inspiration for the villainous character in *Chambermaid*, Judge Helga Friedman. See Lat, *supra* note 63.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Posting of Mike Rappaport to The Right Coast, <http://rightcoast.typepad.com/rightcoast/2007/07/the-clerkship-f.html> (July 11, 2007, 12:01 EST).

<sup>69</sup> *Id.*

<sup>70</sup> Posting of Steve to the Volokh Conspiracy, <http://volokh.com/posts/1184181908.shtml> (July 1, 2007, 3:56 EST).

<sup>71</sup> Posting of Anderson to the Volokh Conspiracy, <http://volokh.com/posts/1184181908.shtml> (July 1, 2007, 3:58 EST).

<sup>72</sup> Posting of Mike Rappaport to The Right Coast, <http://rightcoast.typepad.com/rightcoast/2007/07/more-on-the-cle.html> (July 11, 2007, 6:10 EST).

<sup>73</sup> Lat, *supra* note 63.

that contributors will not be identified suggested that his solicitation is most certainly for less innocuous stories.<sup>74</sup>

These postings all give rise to similar ethical concerns. First, do legal professionals have an ethical duty to their readers? If so, does this obligation entitle the reader to as much information as possible about the source and the story? Second, do legal professionals bear a duty to the people they write about? If so, do they have a responsibility to be discreet and minimize harm that can arise from their stories? Finally, do legal professionals owe a duty to society in general when blawging? If they do, should they be accountable for the stories they tell, and if so, how?

#### **IV. An Examination of the Ethics of Blawging.**

Because of their very nature of being essays or diaries that are so accessible, blawgs create an increased risk of unintentional ethical problems arising for the storytelling legal professional. The questions involving duty can be examined by looking at the role the legal professional plays while blawging. Some blawgers have made it clear that although they are attorneys, they are not acting as attorneys when they blawg. For example, attorney William Dyer, author of the Beldar Blog, has a lengthy disclaimer stating “[a]ny legal opinions or information that I may publish on the BeldarBlog weblog should be considered to be exclusively for purposes of entertainment. No reader of this website should ever rely upon legal opinions or other information published here-not even just a little bit!”<sup>75</sup> Dyer goes on to explain that he is a lawyer but “not your lawyer.”<sup>76</sup>

If some lawyers, like Dyer, do not wish to be considered lawyers when blawging, perhaps they would prefer the label of journalists, those who write on newsworthy events to inform and entertain the public.<sup>77</sup> When a law student, law professor, or lawyer decides to blawg, in many ways, he is acting not only as a storyteller, but also as an amateur journalist.<sup>78</sup> Just as journalists write so that the public can receive news, often in the format of entertaining stories; many legal professionals blawg to tell stories they believe would interest others. Although some have argued that the “often participatory, unedited and sometimes ill-considered content of blogs challenges

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<sup>74</sup> *Id.*

<sup>75</sup> William Dyer, <http://beldar.blogs.com/about.html> (last visited Sept. 12, 2007).

<sup>76</sup> *Id.*

<sup>77</sup> Some bloggers have attempted to claim a journalistic privilege when asked to reveal sources. See Anne Flanagan, *Blogging: A Journal Need Not A Journalist Make*, 16 Fordham Intell. Prop. Media & Ent. L.J. 395, 399 (2006).

<sup>78</sup> He may, however, not receive the legal protection that journalists receive when writing stories. See *id.*

traditional notions of journalism”<sup>79</sup> most blawgers, similar to journalists, write on recent newsworthy events, “thing[s] thought to merit special attention.”<sup>80</sup>

Journalists have faced many ethical dilemmas arising from storytelling on weblogs. For example, Eason Jordan, a former journalist for CNN resigned after bloggers posted remarks Jordan made at the World Economic Forum in 2005 regarding the deaths of journalists in Iraq.<sup>81</sup> These postings were made even though the Forum’ organizers stated that the information from the Forum was “off-the-record.”<sup>82</sup> Once the information became public, bloggers harshly criticized Eason for making untrue statements and a scandal ensued which ultimately led to Eason’s resignation.<sup>83</sup>

Borrowing from the Society of Professional Journalists Code of Ethics,<sup>84</sup> which if Eason did in fact fabricate his story, he would have breached, CyberJournalist.net created a model Bloggers’ Code of Ethics.<sup>85</sup> The website urges bloggers to adopt the code in order “to convey to their readers that they can be trusted.”<sup>86</sup> The code is centered around three main principles. First, bloggers should “be honest and fair in gathering, reporting and interpreting information.”<sup>87</sup> The website provides guidelines on how to do this by explaining that bloggers should not plagiarize or publish information they believe to be inaccurate.<sup>88</sup> Second, bloggers should work to “minimize harm.”<sup>89</sup> The website suggests that “ethical bloggers treat sources and subjects as human beings deserving of respect.”<sup>90</sup> For example, bloggers should show compassion, be sensitive and recognize that reports can cause discomfort in others.<sup>91</sup> Third, bloggers should be accountable.<sup>92</sup> Although the website does not discuss anonymous post, it does explain that bloggers should admit

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<sup>79</sup> *Id.* at 395.

<sup>80</sup> Webster’s New World Dictionary (3d ed., 1988) (defining “news”).

<sup>81</sup> The bloggers posted that Jordan indicated that U.S. forces had deliberately targeted some journalists. Some politicians expressed concern that the comments appeared anti-American and could tarnish the United States image. See CNN.com, <http://www.cnn.com/2005/SHOWBIZ/TV/02/11/easonjordan.cnn> (last visited Sept. 12, 2007). See also Howard Kutz, *Eason Jordan, Quote, Unquote*, The Wash. Post, Tuesday, Feb. 8, 2005 at C1.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> The Code requires journalists to “seek truth and protect it.” Deliberate distortions are not permitted. See Society of Professional Journalists, [www.spj.org/ethicscode.asp](http://www.spj.org/ethicscode.asp) (last visited Sept. 12, 2007).

<sup>85</sup> See Cyberjournalist.net, [www.cyberjournalist.net/news/000215.php](http://www.cyberjournalist.net/news/000215.php) (last visited on Sept. 12, 2007).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

their mistakes, expose other bloggers' unethical practices, and invite discussion over the bloggers' conduct.<sup>93</sup>

Bloggers other than journalists have also suggested that a code of ethics be embraced by the blogging community. After calling for help from fellow bloggers, blogger Timothy O'Reilly<sup>94</sup> created a Blogger's Code of Conduct.<sup>95</sup> The Code is divided up into modules that bloggers may choose from to apply to their own blog.<sup>96</sup> The ten suggested modules are: (1) take responsibility for our own words; (2) do not post what we would not say in person; (3) in case of a dispute, connect privately first; (4) take action against attacks; (5) do not post anonymous comments or pseudonymous comments; (6) ignore the trolls;<sup>97</sup> (7) encourage the enforcement of terms of service; (8) keep sources private; (9) retain discretion to delete comments; and (10) do no harm.<sup>98</sup>

Although they do so in varying degrees of detail, both of these model codes encompass the two areas that seem to give law professionals the most trouble while blawging: accountability and not doing harm. The Blogger's Code of Conduct refers to accountability as taking "responsibility for our own words."<sup>99</sup> This taking of responsibility is defined, in part, as avoiding unacceptable postings and comments that would violate confidentiality or the privacy of others.<sup>100</sup> Minimizing harm is defined as "treating sources and subjects as human beings deserving of respect."<sup>101</sup>

An examination of each sample blawg entry presented in this article suggests an ethical concern based on either a potential violation of confidentiality or a disrespect for another's privacy. Professor Dimino and Professor Rappaport both blawg on topics that some would suggest intrude on the privacy of others: a law student's conduct in the classroom and a judge's conduct towards his clerks. The law student was shamed by the posting. He felt embarrassed and did not want to return to the classroom because everyone would know what happened and would

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<sup>93</sup> *Id.*

<sup>94</sup> Mr. O'Reilly is a conference promoter and book publisher. See Brad Stone, *A Call for Manners in the World of Nasty Blogs*, N.Y. Times, Apr. 9, 2007 at A1.

<sup>95</sup> *Id.*

<sup>96</sup> See Blogging Wikia, [http://blogging.wikia.com/wiki/Blogger's\\_Code\\_of\\_Conduct](http://blogging.wikia.com/wiki/Blogger's_Code_of_Conduct) (last visited Sept. 12, 2007).

<sup>97</sup> Bloggossary defines a troll as "someone who leaves comments on blogs solely to antagonize the author." [www.bloggossary.com/index.php?s=troll](http://www.bloggossary.com/index.php?s=troll) (last visited Sept. 12, 2007).

<sup>98</sup> *Id.*

<sup>99</sup> See Blogging Wikia, [www.blogging.wikia.com/wiki/Responsibility\\_for\\_our\\_own\\_words](http://www.blogging.wikia.com/wiki/Responsibility_for_our_own_words) (last visited on Sept. 12, 2007).

<sup>100</sup> *Id.*

<sup>101</sup> *Supra* note 85.

be watching him.<sup>102</sup> Professor Rappaport's blawg hinted at a judge's disrespectful behavior in chambers.<sup>103</sup>

It is unclear, however, if either professor truly did violate any social or ethical norms. Students and professors do not enter into a confidentiality agreement when they engage in discourse in the classroom. A professor who attempts to hide what occurred in the classroom would, to many, be much more worrisome, than the professor who openly discusses the goings on in the classroom. Some may suggest that it would have been wise for Professor Dimino to have waited some time before making his post. The argument is that time would have protected the student's identity a bit more and, if the post were made after the semester ended, the student would not have been as concerned with the story being told.

Yet it is questionable if time really would have made a difference. Professor Rappaport waited over twenty years to write anything about the judge. Even though what he did write appears very tame in comparison to others blawg entries, there seems to be a concern that an obligation of confidentiality was breached. Certainly, many would feel that what occurs in a judicial chamber should be confidential, much more so than a classroom, but the post did not actually describe any episode that occurred in court or in chambers. Rather, the story was about a lunch date taking place in an open area. It would be difficult for even a judge to claim a breach of confidentiality over a lunch discussion occurring in a public area such as a restaurant.

The earlier recounting of the student's blawg entry regarding the law review student's grade is in many ways more troubling than either professor's posts because it potentially violated the law review student's right to privacy. Although she stated her grade in an office without the door closed, she had no reason to suspect that another student was standing outside of the office door listening.<sup>104</sup> At many American law schools, grades are confidential and students are encouraged to keep them private. Most law schools would find the posting of another student's grades to be of questionable judgment; this breach of trust would reflect adversely upon the student's fitness to practice law.<sup>105</sup> The student blawger was in fact disciplined by the professor

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<sup>102</sup> This information was obtained through a private interview conducted with the student.

<sup>103</sup> Rappaport, *supra* note 68.

<sup>104</sup> This information was obtained through a private interview conducted with the student's professor.

<sup>105</sup> Many of the Board of Bar Examiners in the United States require law schools to complete questionnaires providing information on the fitness and character of each student who applies to take the bar exam.

and the law school requested that he put a lock on that blawg entry so that it could not be read in the future.<sup>106</sup>

Attorney Kuo's post is similar to the student's post. Although calling a fellow member of the bar a "Chic-ken" may have not been the finest example of social etiquette, it is Kuo's comment on a tentative evidentiary ruling regarding a defendant's prior criminal record that is most concerning. Since the defendant was not his client, he would not have owed him a duty of confidentiality. The ruling, however, was not yet definite, and even if it were, it was not wise to reveal it on a blawg where jurors could potentially access the information during the trial. As an officer of the court, Kuo came dangerously close to "undermining the integrity of the adjudicative process."<sup>107</sup>

David Lat's solicitation for horror stories from judicial clerks could also be considered to be walking on the edge of violating an obligation of confidentiality. Although Mr. Lat would be acting as a journalist and not as a clerk, the clerks submitting their stories about the judges they work for would be revealing information usually considered to be of a confidential nature. Lat's offer to keep the names of the sources submitting the stories confidential seems to suggest that this storytelling would not be a wise career move for any of the clerks.<sup>108</sup> It also suggests that perhaps there are additional ethical responsibilities for blawgers working in the legal profession. Although etiquette and various blogging codes of ethics may call for confidentiality, the professional codes of ethics that govern lawyers demand confidentiality and can be enforced through disbarment.<sup>109</sup> Enforcement of the general obligation of confidentiality called for from the other sources are much more difficult to fulfill.

The ethical obligation accepted by most bloggers, journalists and attorneys of doing no harm is another potential problem area for all of the authors of the stories recounted in this article. The key is in how "doing harm" is defined. If one were to follow Judge Karnow's suggestion that "intent is of central importance"<sup>110</sup> then the crux of the definition would be whether the post was made in a malicious, or even just a reckless or negligent manner. This definition, however, would wrongfully focus primarily on intent. Effect must also be considered.

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<sup>106</sup> The professor deducted professionalism points from his grade and the student complied with the request.

<sup>107</sup> Rule 3.3, ABA Annotated Model Rules of Prof. Conduct (5<sup>th</sup> ed. 2003).

<sup>108</sup> Lat, *supra* note 63.

<sup>109</sup> See Preamble and Rule 1.6, ABA Annotated Model Rules of Prof. Conduct (5<sup>th</sup> ed. 2003).

<sup>110</sup> Smith, *supra* note 18 at 1.

Wikia<sup>111</sup> provides a definition for “doing no harm” that encompasses both intent and effect: “A blogger must not use his or her blog to willfully cause harm. A blogger must consider the impact of his or her actions on others. A blogger must not send his or her audience to harass other bloggers or people.”<sup>112</sup>

Even David Lat’s legal tabloid, *abovethelaw.com*, is devoid of nasty comments for the sake of willfully harming others. His postings tend to tell stories that are humorous and informative instead of hurtful or malicious. For example, the solicitation for judicial clerkship stories is being done to help warn potential future clerks instead of to willfully harm any judges.<sup>113</sup>

The postings by the professors display a recognition that the stories being told could cause the characters some discomfort. Neither professor “pandered to lurid curiosity”<sup>114</sup> by providing unnecessary facts. Although Professor Dimino could have refrained from calling the student “lazy,”<sup>115</sup> he exhibited good judgment in not naming the student in the story<sup>116</sup> or adding additional commentary on the student’s behavior. Rather, he simply reported his view of what happened in class, what he planned on doing about it, and asked for help from other professors.<sup>117</sup> Even though Professor Rappaport did name Judge Sloviter in his story, he only did so after *Chambermaid*, the book loosely based on her, was in print.<sup>118</sup> He also did not name any of the other clerks speaking poorly of the judge.<sup>119</sup> There was no harmful intent or effect in either situation. The obligation to not harm does not mean that a blawger cannot post anything that might hurt someone’s feelings. Rather, a blawger should be careful to not intentionally damage another’s life.

Although both deny any harmful intent or effect, some may argue that the student’s and attorney Kuo’s postings, could have caused real damage. The student’s name along with her grade were made available to the general public, including both students and faculty at her law

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<sup>111</sup> Wikia is an online encyclopedia; it is not a primary source. It is being used because it provides some interesting insights on minimizing harm.

<sup>112</sup> [http://blogging.wikia.com/wiki/Do\\_no\\_harm](http://blogging.wikia.com/wiki/Do_no_harm) (last visited Sept. 12, 2007).

<sup>113</sup> Lat, *supra* note 62.

<sup>114</sup> *Id.*

<sup>115</sup> Dimino, *supra* note 8.

<sup>116</sup> Although students in the class could recognize the incident and may be able to identify the student, the post did not provide any information which would lead those outside of the class to identify the student.

<sup>117</sup> Dimino, *supra* note 8.

<sup>118</sup> Rappaport, *supra* note 68.

<sup>119</sup> *Id.*

school. This disclosure of a private matter potentially exposed the student to ridicule and mocking by others. It also could have threatened the integrity of the faculty's grading.

Similarly, Kuo's posting could have harmed the defendant. Although the judge focused primarily on Kuo's intent, the effect of Kuo's posting could also have been considered. A juror could have been biased by reading that the defendant had a prior record on a blawg, instead of hearing it in the courtroom from the proper parties. The obligation of not harming others is two-fold. First, the obligation means bloggers should treat characters in their stories as people worthy of respect. Second, it entails recognizing that the posting of a story, even a truthful one, can cause discomfort in others.<sup>120</sup> Intent and effect should both be considered.

#### **V. Teaching the ethics of storytelling through blawgs.**

Perhaps the student's and the attorney's dilemmas could have been avoided if training on blawging was provided in law school. At first glance, this may seem like an unnecessary topic to be added to the law school curriculum, just as teaching proper e-mailing etiquette was viewed seven years ago. Today, however, many skills and writing professors in law school discuss e-mailing in their classroom because e-mailing has become a common way of communicating with others in the legal profession.<sup>121</sup> Blawging, too, is becoming a common form of writing for many lawyers. Instruction on how to blawg without violating ethical standards or etiquette would be helpful for law students.<sup>122</sup>

Instead of just lecturing on ethical obligations, an effective way to enhance the teaching of the ethics of storytelling on blawgs would be to also require students to blawg. This would be a relatively simple assignment for professors requiring only two major decisions and, of course, some time commitment to monitor the blawgs. First, the professor would need to decide what type of blawg to assign. Blawgs can be either personal journal type blawgs or non-personal blawgs.<sup>123</sup> In deciding whether to assign both or, if only one, which one, the professor would

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<sup>120</sup> Kuhn, Martin, *C.O.B.E. A Proposed Code of Blogging Ethics*, <http://rconversation.blogs.com/COBE-Blog%20Ethics.pdf> (last visited Sept. 12, 2007). Interestingly, some ethicists have argued that technology has served to de-humanize people and turn them into cyborgs. *See id.* at 12.

<sup>121</sup> *See* Anne Enquist & Laurel Oates, *You've Got Mail: Ten Tips to Take With You to Practice*, 15 *Persp.* 127 (2007).

<sup>122</sup> In addition to legal writing and skills courses, the ethics of blawging could also be worked into other courses, such as Professional Responsibility.

<sup>123</sup> Posting of DrPat to Paper Frigate, <http://paperfrigate.blogspot.com/2005/07/results-are-in-ethics-in-blogging.html> (July 21, 2005, 8:55 EST). A survey conducted by three undergraduate students at Nanyang Technological University in Singapore in 2005 classified bloggers as either personal bloggers or non-personal bloggers. Personal

need to consider time constraints, the goals for requiring a blawg, and class dynamics. Content and intended audiences are different for each blawg type, so students would most likely “have different perspectives on the functions and impact their bl[aw]gs have, which [could] influence their ethics in bl[aw]ging.”<sup>124</sup>

For example, the stories told by the student and the attorney in their personal blawgs were the ones that ran into more serious ethical dilemmas because they did not fully appreciate their ethical obligations while blawging. This is partially explained by examining the intended audience for each blawg type. The blawgers writing on personal blawgs did not expect to have large audiences. Neither the student nor the attorney expected anyone other than a few close friends to read their stories.<sup>125</sup> The writers of the non-personal blawgs realized that their stories would be reaching a much larger audience. With that in mind, they were more careful to not breach confidentiality or violate privacy rights.

Second, professors would need to decide how much direction and feedback they want to provide in the blawging assignments. Professors would need to decide whether they wanted to allow students to choose the stories they tell on blawgs or whether they wanted to require concrete writing assignments, or perhaps a mix of both. A mix of both could be achieved nicely by requiring students to have individual personal blawgs as well as setting up one blawg for the entire class. Before actually instituting the blawgs, the professor and the class could decide what code of ethics they wish to follow while blawging and whether the same code should apply to both blawgs. The professor could require each student to make at least one post and one comment to the class blawg on a topic of his choice while also directing the students on weekly blawging assignments for their personal blawgs. The personal blawg assignments could include reflective storytelling topics such as “what motivated you to come to law school,” “what, if any, ethical dilemmas have you faced while being in law school,” and “what do you expect to get out of your law degree.” Although a professor could decide to give no feedback or only individual feedback, it would probably be worthwhile to also discuss entries to the class blawg during class time.

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bloggers write online diaries; non-personal bloggers focus on specific topics and contribute stories intended for a large audience. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Smith, *supra* note 18 at 1.

Beyond learning from the actual content of the entries, blawging assignments would teach students several important lessons on ethics. First, it should help to teach law students that they will be held accountable for the stories they tell on blawgs. They should write as if everyone will read their personal stories. Today's technology makes it virtually impossible to truly keep blawg stories away from uninvited readers. Even though personal blawgs usually are only open by invitation to a few of the blawger's personal friends, other people in the same social circles will often have similar interests and search for websites that could produce a list of sites including the blawger's personal blawg.<sup>126</sup> Having blawgs in class will help to make it clear to students how accessible their websites are to one another. Therefore, it is imperative that blawgers respect the rules of confidentiality and write as if everyone they want to, as well as those they do not want to, were reading every single word.<sup>127</sup>

In addition, by requiring students to blawg and by reviewing postings in class, the professor will have more of an opportunity to discuss what it means to do no harm and to respect other's privacy interests. Entries and comments to the class blawg could be routinely reviewed in class to make sure that the code of ethics embraced at the beginning of the semester was still being followed. The class could also use the entries to discuss other ethical obligations such as the importance of being honest and not plagiarizing.

## **VI. Conclusion**

The actions a person takes and the decisions a person makes while blawging have definite ethical import.<sup>128</sup> As legal professionals, blawgers need to be aware of their ethical obligations while telling stories on blawgs. Although blawgs are on line journals, blawgers cannot write stories as they would in a personal journal.<sup>129</sup> They need to consider whether the stories they tell could harm others, are truthful, and are accessible. Blawgers should be prepared to be held accountable for what they write. Legal professionals need to appreciate that the stories they tell on blawgs could have an impact not only on the characters of the story, but also fellow readers and the larger social community.

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<sup>126</sup> Posting of Reynolds to Random Acts of Reality, [http://randomreality.blogware.com/blog/\\_archives/2005/3/17/443453.html](http://randomreality.blogware.com/blog/_archives/2005/3/17/443453.html), (Mar. 17, 2005, 2:38 GMT).

<sup>127</sup> *Id.*

<sup>128</sup> Kuhn, *supra* note 119 at 15.

<sup>129</sup> Interestingly, several legal writing professors already require journals for their classes. Requiring blawgs may be an updated version of this type of assignment.





