

Do Your Clients Have Blogging Policies? Maybe They Should.

by Mari L. Myer

This article originally appeared in two parts in the State Bar of Georgia's Technology Law Section's newsletter, Georgia Journal of Technology Law, in the summer and fall 2006 issues.

By now, an employer would have to be conducting business under a rock in order to be unaware of the explosion in Internet blogs, an online journal that is frequently updated. Some blogs have a single author while others contain contributions by a group of authors. It is possible to find Internet blogs covering virtually every aspect of life, including the workplace.¹

Although there are many issues surrounding blogging that we can expect the courts to address in the coming years, to date there have been no reported decisions by the state and federal courts sitting in Georgia regarding blogging. But, many of the issues raised by employee blogging can be analyzed within the framework of other caselaw.

Some Statistics on Blogs

One of the characteristics of blogs that makes them unique is that bloggers tend to make stream of con-



sciousness postings. They speak their minds in much the same way in which they use the spoken word. But, unlike the spoken word, blogs can be permanent. An angry tirade against an employer or co-worker made to a friend in the privacy of one's home—or in a bar—will leave no evidence behind except in the memories of the

parties to the conversation. An angry tirade in a blog will still be available for the entire world to read long after the anger has passed. Any policy regarding blogging must take this characteristic into consideration.

A survey conducted by the Employment Law Alliance (ELA) in January 2006 revealed that 5 percent of American workers maintain personal blogs, and that only 15 percent of American workers are employed by companies that have policies regarding blogs.² According to an April 11, 2006, posting at www.newdogtricks.blogspot.com/2006/04/executives-should-encourage-employee.html, IBM and Microsoft each have at least 2,000 employees who maintain blogs. We should expect the number of American workers who maintain personal blogs to grow rapidly.

Here are some statistics gathered by the ELA survey regarding those employers with blogging policies in place as of January 2006:

- 58 percent of those policies addressed all employee blogging.³
- 33 percent only addressed employer-related blogging.⁴
- 81 percent did not encourage promotion of the employer's business or reputation on the employees' blogs, and 18 percent encouraged such promotion—reflecting a diversity of views among employers that have considered such issues as to the appropriate role of a blog.⁵
- 49 percent distinguished between posting a blog using the employer's computer network and posting a blog from a non-workplace location.⁶
- 77 percent prohibited or discouraged the posting of specified employer-related information. Those restrictions included prohibitions against posting of (1) any employer-related information or material, including personal opinions (62 percent); (2) criticism or negative comments about the employer (60

percent); and (3) specified types of references to the employer, supervisors, co-workers, customers and clients (57 percent).⁷

- 23 percent placed no limitations on the information that an employee was authorized to post on a blog.⁸

Of the employers with blogging policies restricting the information that an employee was authorized to post on a blog, 79 percent specified in their policies the consequences of policy violations.⁹

Of the 5 percent of American workers who currently maintain a blog,¹⁰ the vast majority—84 percent—reported that they had never posted any employer-related information on their blog. However, the remaining 16 percent reported hav-

By implementing a policy before blogging becomes entrenched in the company's culture, the employer can establish and enforce clear standards, including disciplinary procedures to follow when a policy is violated.

ing posted information that could be considered critical of their employer, supervisors, co-workers, customers or clients.¹¹

The ELA survey also inquired of American workers regarding their attitudes towards employer blogging policies. Surprisingly, only 59 percent of the workers who were polled agreed that employers should be allowed to discipline and/or terminate employees who had posted confidential or proprietary employer-related information on a blog.¹² This survey result raises a serious question regarding the attitudes of—and the need to educate—the remaining 41 percent concerning the importance of protecting confidential and proprietary information.

According to the ELA survey, 55 percent of those workers who were polled agreed that employers

should be allowed to discipline or terminate employees posting damaging, embarrassing or negative information about their employers, but 23 percent believed that employees should be free to post criticism or satire of their employer, co-workers, supervisors, customers and/or clients on a blog without repercussion.¹³ Former employees of numerous companies, including an airline, a social networking site, and a technology company, are rumored to have been terminated as a consequence of blog postings that either criticized their employers and co-workers or contained personal information about themselves that their employers found embarrassing. These rumors have not, however, been confirmed.

Why Have a Policy?

With these statistics, it is easy to understand that employers need to implement thoughtful blogging policies sooner rather than later, because later may be too late. By implementing a policy before blogging becomes entrenched in the company's culture, the employer can establish and enforce clear standards, including disciplinary procedures to follow when a policy is violated.

What Kind of Policy Should the Company Implement?

The "why" question may be easily answered. The "how" question may not be. Companies that have considered blogging policies have struggled with many issues, all of which must be resolved with the

Companies have three general types of policies available to them: (1) allowing any and all employee blogs, with no restrictions; (2) forbidding all employee blogs that make any reference to the company, and disciplining personnel who violate the policy; and (3) the vast grey area in between these two extremes.

company's goals, the corporate culture, the nature of the company's product or service, and applicable laws in mind. Blogging ground rules used by a technology company may not be appropriate for an airline and vice versa.

Companies have three general types of policies available to them: (1) allowing any and all employee blogs, with no restrictions; (2) forbidding all employee blogs that make any reference to the company, and disciplining personnel who violate the policy; and (3) the vast grey area in between these two extremes.

What Happens When the Company Imposes No Restrictions on Employee Blogs?

Companies that allow blogs with no restrictions whatsoever may run the risk of having their employees use blogs to (1) identify themselves as employees of the company, naming the company in the blogs, without offering a disclaimer distinguishing personal opinions from company policies; (2) criticize the company, management, and/or co-workers; (3) embarrass the company or the company's clients or customers; or (4) disclose information that the company does not want to have disclosed to third parties.

The lack of any restrictions may make it difficult for the company to respond to any of this conduct, because the employee will be able to point to the lack of policies and also to any inconsistency by the company in its response to various blogs. As a consequence, a failure to

have any company policy regarding blogging can be risky for the company. But these are the same risks that companies lacking other personnel policies face, and the risks may not be insurmountable.

Even a company with no official blogging policy will have in its arsenal the entire body of statutes and caselaw that protect against violations of privacy, gender or racial harassment, defamation, tortious interference with employment and business relationships, terroristic threats, extortion, misappropriation of trade secrets and similar conduct. Thus, blog postings falling into any of these categories could—and should—be subject to discipline by the company in the same fashion that such comments would be disciplined if made orally or in a letter or memorandum.

For example, although there is a risk that the blogger may disclose confidential information and/or trade secrets belonging to the company or the company's clients or customers, it is not necessary to have a policy specific to blogging in order to protect against such disclosures, so long as all personnel with access to sensitive information are required to sign employment agreements containing a nondisclosure covenant cast in language broad enough to encompass disclosures made in a blog. In addition, the Georgia Trade Secrets Act¹⁴ should encompass the disclosure of trade secrets in a blog where the disclosure occurs within Georgia. The employer would be wise to periodically remind personnel who have access to confidential information and/or trade secrets that disclosure of such

information in a blog is just as bad as disclosure by any other method.

A larger concern is the fact that the absence of a policy forbidding specific categories of postings may leave the employer vulnerable to allegations by third parties who are targets of such postings that the company's lack of a policy was tantamount to condoning the postings. With these considerations in mind, the employer that chooses not to implement a policy specific to blogging should, at a minimum, note in its personnel handbook, and remind its personnel in other communications, that statements in blogs should be made with the same level of care as is expected with respect to all other types of work-related communications, and that such statements are no less subject to discipline when made in blogs than when made in any other format. The company will need to monitor blogging by its employees and consistently take appropriate disciplinary action with respect to any blogs that violate the law or company policy in the same fashion in which the company disciplines comparable violations in other formats.

What Happens When the Company Forbids all Employee Blogs That Make Reference to the Company?

On the opposite extreme from imposing no restrictions on employee blogging is a policy of forbidding all employee blogs that make any reference to the compa-

ny. A restriction this severe may create a variety of difficulties for the company. First, the company must enforce this policy uniformly. If the company implements such a policy and makes violation of the policy subject to specific discipline (which could mean termination), the company must be willing to enforce the policy by disciplining *all* violators uniformly, regardless of the content of the blog. Such a policy, while clear, may be difficult to enforce if a high percentage of the rank and file personnel are willing to risk their jobs to test (or protest) the policy. In this instance, such a policy may backfire on the company by forcing the company to discipline, or even terminate, multiple employees or risk eviscerating its policy by failing to enforce it. The company may also unnecessarily create a morale problem if personnel regard such a policy as overly draconian. Depending on the nature of the posting, Title VII, whistleblower or other legal protections for employees may be violated if the company disciplines the employee for the posting. And if the discipline imposed by the company is termination, a terminated employee will have no reason to keep quiet about the company and may be tempted to post even more negative blogs following termination. This can create a public relations problem, and potentially have an impact on the stock value of a public company, if not handled delicately.

Moreover, a company policy banning all blogs that make reference to the company presumes that any blog that refers to the company will contain negative comments about the company. Some blog postings can (1) make constructive suggestions for how the company may improve itself, and (2) drum up positive "press" for the company. An absolute ban on blogs that make reference to the company will prevent even such positive postings and deprive the company of a potential benefit.

CERTIFIED POLYGRAPH EXPERT

IMBORDINO POLYGRAPH EXAMINATIONS, LLC

"When the Need for the Truth is Important"

- FORMER FEDERAL POLYGRAPH SUPERVISOR
- 19 YEARS OF POLYGRAPH EXPERIENCE
- EXPERT WITNESS
- AMERICAN POLYGRAPH ASSOCIATION
- AMERICAN COLLEGE OF FORENSIC EXAMINERS
- APA CERTIFIED POLYGRAPH INSTRUCTOR

DONALD J. IMBORDINO

(678) 986-9600

E-mail: dimbordino@earthlink.net Web site: www.ImbordinoPolygraph.com

The
winning edge
for Georgia
attorneys
since
1969

NLRG

National Legal Research Group

CHARLOTTESVILLE, VIRGINIA

Put us to work helping you win today.

1-800-727-6574 or research@nlrg.com

*Fast, Affordable, Specialized
Research, Writing and Analysis*

For more information, and to see what your peers are saying about us: www.nlrg.com

MEDIATOR

Practice Limited to

Construction, Commercial & Contract Matters

Christopher H. Dunagan is a partner in the construction law firm of Phillips, Morgan & Dunagan, LLP, and former in-house counsel of Textron Financial Corporation.



Available for mediations throughout Georgia.

770.438.8225

chdunagan@pmdllp.com • www.constructoresolution.com

CLE

Important Deadlines and Late Fees for CLE

March 31, 2007: You must complete your 2006 CLE by March 31. There will be \$100 late CLE penalty after March 31.

June 30, 2007: An additional late fee of \$150 will be required if still deficient in hours or late fee payments for 2006 CLE after June 30.

What About the Vast Middle Ground of Allowing Blogging Within Company-Imposed Guidelines?

Thoughtful guidelines regarding employee blogging, particularly those established with the input of some employees, can allow employees to post their thoughts without necessarily creating an adversarial atmosphere between management and the rank and file. Some guidelines available to employers—all of which should be implemented with the company's goals and culture in mind—include the following:

- Allow postings but require personnel to submit their blogs to the company for prior approval as to content, thereby placing

the company in the role of censor and potentially exposing the company to risk in the event that an inappropriate posting is not filtered out by the company.

- Allow only postings that place the company and its personnel in a positive light.
- Require that all postings be made using the blogger's personal e-mail address, with no information to be posted linking the employee to the company.
- Require that all postings be made using the employee's real name, rather than a pseudonym, to ensure accountability.
- Require that postings only be made on the employee's personal time.
- Allow postings to be made on company time using the company's computer equipment and Internet account.

- Embrace and encourage blogs as a mechanism to foster creativity, team-spirit and problem-solving, allowing personnel to make postings in their own names on company time and to link those postings to the company's website.

A company may enjoy a public relations benefit if its customers become convinced that the company is allowing its personnel to comment on the company in blogs without restriction and without using personnel as mouthpieces for the company. The thinking is that an employee who is not subject to any restrictions on his or her blogging is free to make both positive and negative comments about the company, and as a result customers are likely to regard the employee as very credible on matters pertaining to the company.

Microsoft, Novell, Hewlett Packard and SunMicrosystems all allow such uncensored blogs.¹⁵ Earthlink also has a blog linked to its website, with a single blogger responsible for content.¹⁶ Some company-sponsored blogs feature opportunities for employees to publicly troubleshoot and critique company products while building trust on the part of the company's customers, because the customers can be certain that the postings have not been censored by the company. In this context, the company has to be able to trust that its personnel will refrain from making any postings that may expose the company to claims of defamation, violation of privacy, tortious interference with employment or business relations, gender or racial harassment, and similar claims. The company also has to be able to trust that its personnel will refrain from disclosing confidential information and/or trade secrets.

Companies that officially sanction blogs must choose whether to set up a separate website for the blogs, or to link the blogs to the official company website. If the



**Presiding Judges and Evaluators
ARE NEEDED FOR
Mock Trial Competitions**

REGIONAL COMPETITION CITIES and DATES:
Athens (2/24) • Atlanta (2/17 & 2/24) • Brunswick (2/24)
• Canton (2/24) • Cartersville (2/24) • Columbus (2/24)
• Dalton (2/17) • Douglasville (2/24) •
Jonesboro (2/16-17) • Lawrenceville (2/23-24) •
Macon (2/24) • Marietta (2/24) • McDonough (2/17) •
Savannah (2/23-24)

**Presiding Judges and Scoring Evaluators
With Prior High School Mock Trial
Experience Needed for State Finals**

Gwinnett Justice Center, Lawrenceville, March 10 & 11

For more information, contact the mock trial office at
404-527-8779/800-334-6865, Ext. 779 or email:
mocktrial@gabar.org; www.georgiamocktrial.org




company sets up a separate website, it may choose to add a disclaimer (if true) that it exercises no control over content and that the opinions expressed are not necessarily those of the company.¹⁷

If the company chooses to link employee blogs to its official website, the company should consider whether and how to exercise control over content. One option is to require advance approval by the company of all such postings. At a minimum, the company should require employees to include with all postings a disclaimer that the opinions expressed in the blog are those of the blogger and not necessarily those of the company.

While allowing employees to offer constructive comments, the company that links its employees' blogs to its website may be exposed to some risks that necessitate the company's ability to either block or remove offensive or illegal blogs. For this reason, the company should establish a mechanism for either pre-approval of blogs (and blocking the posting of offensive or illegal blogs), the removal of offensive or illegal blogs, or both. Risks to the company include, but are not limited to, defamation of the company, co-workers and/or clients by the blogger; creation of a hostile work environment by making postings that are offensive to women, those more than 40 years of age, or particular religious, ethnic or racial groups; posting of obscenities; harassment of co-workers; violations of privacy; copyright infringement; misappropriation of trade secrets; and embarrassment. The blogging policy should establish penalties for any such inappropriate postings, and the company should enforce the penalties consistently. The manner in which the company anticipates and protects against inappropriate postings may have a bearing on the company's potential exposure in the event that the subjects of the postings pursue a claim against the company.

Conclusion

Blogging will likely be the subject of much litigation over the next several years. The wise employer will protect itself now by implementing a thoughtful blogging policy that reflects the company's culture and needs, and by consistently enforcing that policy. 



Mari L. Myer practices law with Friend, Hudak & Harris, LLP, in Atlanta. Her business and employment litigation practice focuses

on technology and intellectual property issues, including the protection of trade secrets and confidential business information, and the drafting, interpretation and enforcement of restrictive covenants in employment agreements. She earned her A.B. from Wellesley College, *cum laude*, and earned her J.D. from Boston University School of Law. She may be reached at 770-399-9500 or via e-mail at mmyer@fh2.com.

Endnotes


1. This article will focus on private-sector employees who are engaging in blogging activity that pertains to or impacts their workplace and is not protected by the National Labor Relations Act or other laws governing collective bargaining and related activities. To the extent that a blog may be protected as concerted activity for the mutual protection of employees or as a union organizing activity, the issues surrounding such protections are beyond the scope of this article. Blogs posted by public sector employees, and the impact of the First Amendment and other protections on those blogs, are also beyond the scope of this article.
2. Press Release, Employment Law Alliance, *Blogging and the American Workplace – As Work-Related Web Blogs Proliferate, New National Survey Finds Few Employers Are Prepared For the Impact, at*

<http://www.employmentlawalliance.com> (Feb. 6, 2006) (The ELA conducted a telephone survey of 1000 American adults over the weekend of Jan. 22, 2006. The ELA reports a confidence interval of +/- 4 percent.) [hereinafter *Press Release*].


3. *Id.*
4. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 1.
5. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 2.
6. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 3.
7. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 4.
8. *Id.*
9. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 5.
10. *Press Release, supra*, note 3.
11. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 6.
12. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 7.
13. *Id.*
14. O.C.G.A. §§ 10-1-760-767 (1990).
15. *See, e.g.*, <http://scobleizer.com/>; <http://rollerweblogger.org/roller/>; <http://minimsft.blogspot.com/>; <http://blogs.msdn.com/>; and <http://blogs.sun.com/> (bearing the headline, "This space is accessible to any Sun employee to write about anything.").
16. *See* <http://blogs.earthlink.net/>. It is not clear how much control Earthlink exercises over the content of its blog.
17. Readers may be familiar with similar disclaimers expressed in printed publications to accompany editorials over which the publisher exercises no control.

Kudos

> Three attorneys at the law firm of **Davis, Matthews & Quigley, P.C.**, were recognized among *Georgia Trend's* "Legal Elite" for 2006, featured in the magazine's December issue. **Baxter L. Davis, Elizabeth Green Lindsey and Richard W. Schiffman Jr.**, are among the attorneys being honored in the area of family law. Baxter L. Davis is a founding member and shareholder of Davis, Matthews & Quigley. Elizabeth Green Lindsey, shareholder, has been with the firm since 1989, practicing primarily in the firm's family law section. Richard W. Schiffman Jr., shareholder, has been with DMQ since 1988 practicing in the firm's family law section.

>  **Stephan J. Frank** has been named **circuit court administrator** for the **Bell-Forsyth Judicial Circuit and Forsyth County courts**. Frank will assist the superior, state, probate, juvenile and magistrate courts. He is responsible for fiscal affairs, personnel management, and trial court administration.


>   **Kilpatrick Stockton LLP**, announced that **Bill Dorris** and **Diane Prucino** have been selected as the firm's new **managing partners**. In January, they succeeded Bill Brewster who served as managing partner for the past six years. Prucino became the first female managing partner at a Southeastern-based AmLaw 100 law firm and she will share management of the firm with a focus on attorney development. She has been the chair of the firm's employee benefit, labor and employment department for 6 years, and has also served on the firm's executive committee. Dorris shares the management reins with a focus on client service and practice management. He works with the firm's department chairs and team leaders to continue the growth of the firm's national and international practice areas.

>  The **Municipal Court of the city of Atlanta building** has been named in honor of the late **Judge Lenwood A. Jackson Sr.**—a longtime judge and active member of several judicial associations. A special ceremony took place in December, designating the complex as the **Lenwood A. Jackson Sr. Justice Center**. The dedi-

cation ceremony was attended by hundreds of judicial dignitaries and members of the Jackson family. Judge Jackson recognized the need for improved court facilities and was instrumental in bringing the new traffic court building to fruition. The Atlanta law offices of Head, Thomas, Webb & Willis have established and funded an annual academic scholarship in memory of Jackson and his commitment to achievement and excellence.

> **Hon. Christopher N. Smith** was appointed **Honorary Consul of the Kingdom of Denmark** by Her Majesty, Queen Margrethe II. He also received the "Outstanding Foreign Relations" award from the Annual Georgia European Summit and was a finalist for the Governor's International Awards. He practices business, personal injury and international law at his offices in Macon. He also serves as a mediator for diplomacy mediation and arbitration.

> As assistant secretary of labor for occupational safety and health, attorney **Edwin G. Foulke Jr.** heads the Occupational and Safety Health Administration (OSHA) and its staff of more than 2,200 safety and health professionals and support personnel. Named by President George W. Bush to head OSHA in September 2005, Foulke was confirmed by the Senate in March 2006, and sworn in as the head of the agency in April. Prior to his nomination, Foulke was a partner with the law firm of Jackson Lewis, LLP, in Greenville, S.C., and Washington, D.C., where he chaired the firm's OSHA practice group.

>  **Edward M. Manigault**, a partner in the Atlanta office of law firm **Jones Day**, has been elected a **Fellow of the American College of Trust and Estate Counsel**. He is the only Georgia attorney so honored this year.

> **Kilpatrick Stockton LLP** announced that **Brian Corgan, Anthony Smith, Susan Cahoon** and **Miles Alexander** were named to the *Lawdragon 3000*, a leading look at the lawyers who will define the future of the legal profession. Earlier this year, Cahoon was selected for the *Lawdragon 500*. Corgan, Smith and Cahoon are partners in the firm's litigation department. Alexander is a partner in the firm's intellectual property department.

> The **National Republican Congressional Committee** announced that Atlanta attorney **Ben Shapiro** has been appointed to serve on the **Business Advisory Council**. Shapiro will serve the state of Georgia and is