

The Impact of Blogging on the Practice of Law: Hit the Snooze Button

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I. Introduction

New technologies can revolutionize the practice of law. Consider the impact that writing, printing, or—to cite a somewhat more recent innovation—computer databases have had on the ways that attorneys work.¹ What about blogging? Does it, too, herald a revolution in the practice of law?

We can predict the future only by revisiting the past. To forecast how blogs will impact the practice of law, therefore, we need to consider how some similar, equally revolutionary technology has impacted attorneys. But what technological innovation best matches blogging in terms of how it works and what it does? For reasons described in Part I, I nominate the clock radio.

Given that example, you might suppose that I don't think blogging will radi-

cally change the practice of law. Correct. Blogging has many virtues. It offers a largely harmless outlet for extroverted cranks and cheap entertainment for procrastinating office workers. Blogging even stands to do some very real good. Blogging seems likely to affect politics in largely healthy ways, for instance.² I have nothing against blogging as I blog myself.³ I simply don't think it will change the practice of law very much.

Why not? First, because blogs seldom offer the sort of detailed and applied legal analysis that careful attorneys perform. Second, because an ethical attorney would find it next to impossible to practice law via a blog. Parts II and III expands on those points, respectively. The essay concludes that that neither reading nor writing blogs will have a significant influence on the practice the law.

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II. The Clock Radio Precedent

Why do I think that the clock radio offers an apt example of how blogging will—or, as the case may be, largely will not—affect the practice of law? In brief, because both clock radios and blogs act as one-to-many communication devices.

Like a blog, a clock radio opens an almost entirely one-way channel between a single, prominent speaker and a large, mainly hidden public. Some of the most popular blogs do not let the public comment at all.⁴ Others do so selectively, depending on the blogger⁵ or the post.⁶ At all events, a blog offers outsiders' comments as a matter of distinctly secondary interest, making them available only on a separate page and after another click.⁷

Clock radios may afford even fewer opportunities for public commentary, but they at least put call-in listeners front-and-center. If your phone call reaches a broadcasting studio, and you do not curse slowly enough to get cut-off, you will definitely enjoy at least a brief bit of air time. Even a call-in radio show will, however, quickly revert to its host. On balance, then, both clock radios and blogs function more like public address systems than like private telephone conversations.

Why do I choose the *clock* radio, in particular, as my model for blogs? A blog doesn't tell the time, admittedly. But clock radios operate, for most of us, as the only radio receivers to which we devote our undivided attention. We generally listen to automobile and portable radios somewhat distractedly, while doing something else. But for at least a few moments each morning, as we loll about our

warm beds, we give our clock radios undivided attention.⁸

So, too, with blogs. For the brief—or, especially if work calls, rather too longish—periods of time, we focus on a blog alone. Nobody (I hope) reads blogs while jogging, cooking, or driving. Like a clock radio, a blog catches your attention, monopolizes it for a few moments, and then gives it up entirely.

III. How Reading Blogs Will Affect the Practice of Law

Clock radios have no doubt affected the practice of law in some small ways. They have certainly roused many a tired attorney to the billable hours of the day ahead. Unless they hit their snooze buttons and fall back asleep, some of those waking attorneys may have enjoyed some mild amusement or heard superficial comments about important news events. But in the end, their clock radios played next to no role in those attorneys' day-to-day work.

Reading blogs will, I predict, have a similarly minor impact on the practice of law. Attorneys may count on blogs to alert them—waking them up, as it were—to developing legal issues. But, like a clock radio spitting out the headlines, a blog will typically offer only superficial coverage of a recently-decided case or newly-enacted statute. The careful attorney will generally have to do additional research, and apply what she learns to the particular problems of her client, before she risks offering legal advice. Attorneys—good ones, at least—will thus find that reading blogs does not

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radically change how they practice their profession.

IV. How *Writing Blogs* Will Affect the Practice of Law

The practice of law concerns, at its core, the attorney-client relationship.⁹ Far from a mere casual acquaintance, the attorney-client relationship comes freighted with confidential¹⁰ and fiduciary¹¹ obligations. Though a client may waive the former,¹² no attorney can escape the latter.¹³ A lawyer acts as the agent of his or her client¹⁴ and must act in the client's interest.¹⁵

An ethical attorney would find it nearly impossible to practice law via a blog. An attorney speaks in whispers to his client. A blog shouts to the world. How could you practice law via a blog without violating your client's confidentiality? Granted, your client could waive those rights. But how could revealing your client's private legal affairs to the public serve your client's interests? It almost certainly could not. Thus, you as an ethical attorney could not practice law via a blog.¹⁶

Law firms can use blogs as outreach, granted.¹⁷ We should smile on attorneys who thereby offer timely and expert legal commentary, as it represents a significant positive externality. Or, to put the matter in non-economic terms, a lawyer's blog may provide a valuable service to the bar and the public at large. But just because lawyers can or even should do it doesn't make it the practice of law.

V. Conclusion

I've argued that, in terms of their likely impact on the practice of law, blogs resemble clock radios. In other words, blogs, will not significantly change the day-to-day work of attorneys. That claim may leave you with two questions.

First, supposing that your attention wandered during the essay, you might wonder why I downplayed the impact of blogs. While silently remarking on your short attention span, I would happily seize on the opportunity to offer a traditional, if somewhat pedantic, summary. To wit: Attorneys will not find that reading blogs gives them the sort of detailed and applied legal analysis they need to help their clients, nor will attorneys find they can ethically practice law via blogging.

Second, and more likely (since you surely absorbed my two main points), you might wonder why I bothered writing so contrary an essay. "What has he got against blogs?" You might ask. I would sigh and remind you that I *already* said I had nothing against blogs¹⁸ (while silently wondering whether you really were paying attention).

I'll say it again: I take great pleasure in and accord all due respect to reading and writing blogs. Blogs cannot, however, be everything to everybody. Blogs seem tailor-made to suit academics like me, offering a cheap and easy way to bloviate before the world without suffering an editor's interference. Lawyers, however, have quite different and, I dare say, more serious needs. For them, blogs offer little more than a mildly amusing

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diversion from the duties of the attorney-client relationship.

Notes

1 See generally, Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403 (1993) (discussing the impact of changes in communications technologies on the practice of law).

2 See Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 Nexus L.J. 99 (forthcoming May, 2006).

3 See Agoraphilia, <http://agoraphilia.blogspot.com> (last visited Feb. 27, 2006).

4 See, e.g., Instapundit.com, <http://instapundit.com> (last visited Feb. 27, 2006).

5 See, e.g., The Volokh Conspiracy, <http://volokh.com> (last visited Feb. 27, 2006).

6 See e.g., Marginal Revolution, <http://www.marginalrevolution.com> (last visited Feb. 27, 2006).

7 See, e.g., Daily Kos, <http://www.dailykos.com> (last visited Feb. 27, 2006).

8 In the interests of full disclosure, I admit that I personally use the buzzer on my clock radio. But how I've configured my clock radio doesn't really matter, anyway, as my kids don't usually let me sleep until it sounds.

9 See *In re Fletcher*, 655 N.E.2d 58, 60 (Ind. 1995) ("The core element of practicing law is the giving of legal advice to a client and placing oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney."), ABA MODEL RULES OF PROF'L CONDUCT, Preamble [1] (2005) ("A lawyer, as a member of the legal profession, is a representative of clients . . .").

10 See, e.g., CAL. BUS. & PROF'L. CODE § 6068(e)(1)(2005) (explaining that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.>").

11 See, e.g., *Lee v. State Bar of Cal.*, 472 P.2d 449, 457 (Cal. 1970) ("The relationship between an attorney and client is a fiduciary relationship of the very highest character.>").

12 See, ABA MODEL RULES OF PROF'L CONDUCT, R. 1.6(a) (2004) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .").

13 See, Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 760 (1978) (claiming that "all fi-

duciaries have an unwaivable obligation of fairness toward the other party.>").

14 *Comm'r v. Banks*, 125 S. Ct. 826, 833 (2005) ("The attorney is an agent who is duty bound to act only in the interests of the principal . . .").

15 ABA MODEL RULES OF PROF'L CONDUCT, R. 1.3, cmt. 1 (2004) ("A lawyer must [] act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf.>").

16 See ABA MODEL RULES OF PROF'L CONDUCT, R. 1.1 (2004) ("A lawyer shall provide competent representation to a client.>").

17 See, e.g., IP Law Observer, <http://www.iplawobserver.com> (last visited Feb. 27, 2006).

18 See *supra*, Part I.