

Expert Blogs: Loose Lips Sink ... Trials?

By Robert Ambrogi

Experts in virtually every field of art and science are blogging these days. Some blog as an academic or scholarly exercise. Others do it in order to help market their expertise. But whatever the reason for an expert's blog, one group of readers will be the lawyers on either side of a case.

Their interest, of course, is in whether anything the expert said on the blog could open the door to impeachment. "Blogs are informal and quick," notes Jef Henninger, a white-collar criminal defense attorney in New Jersey. "As a result, the expert can say something that can be taken out of context. I always Google my expert and the expert for the other side."

Needless to say, a lawyer's perspective will depend on which side the expert is on. Nancy Delain, an intellectual property lawyer in Schenectady, N.Y., would never retain an expert who has a blog, she says. But as for her opponent's expert, "I pray for a blog. Very public, very quippy, very quickly written, very full of possible ways to hang him out to dry in front of the finder of fact."

What is it about a blog that raises such interest? Experts, after all, are frequent contributors to scholarly and trade journals. Many experts are regular sources of comment in the news media. With all that out there, why worry about blogs?

The answer, perhaps, lies in the more casual tone and greater frequency of blog posts. The more one says, and the more casual the setting in which one says it, the more likely one is to trip up.

"The key concern that I have is consistency," explains Charles Rainey, an entertainment lawyer in Las Vegas, Nev. "The informalities of the blog medium make it an easy forum in which to misstate or garble an opinion. If I were litigating a case where the opposition had called upon an expert witness that maintains a blog, I would very carefully mine the contents of that blog for any statements that favor my argument."

Collin J. Hite, a litigator with McGuireWoods in Richmond, Va., is similarly troubled by the informality of blogs. "Without the formal process of publication, especially peer-reviewed articles, the expert is open to strong cross examination to disclose support for the statements. What happens to the expert's credibility when the answer is 'I don't recall.' How would an expert that wrote an entry months or years ago be able to defend the statements during the deposition without cites and materials?"

Other Dangers of Blogs

Besides providing fodder for direct impeachment, an expert's blog could endanger a case in other ways, lawyers say.

One is the possibility of indirect impeachment based on an expert's "extracurricular" blog – a blog written not about the expert's field of expertise, but about an outside interest or hobby.

"What if you had an expert IT witness ready to testify about your internal security measures who also happened to blog passionately about 9/11 government conspiracies, alien landings, the lost city of Atlantis or Big Foot?" asks John Spence, an intellectual property attorney with Thomson Reuters in Eagan, Minn.

"Granted there are evidentiary rules that would limit the admissibility of some information, but I think you certainly increase the risk of finding something embarrassing or harmful to the case when your expert makes their life and opinions more and more public," he says.

Another danger comes not from the expert's own posts, but from comments posted to the expert's blog by readers. Opposing attorneys could use these comments as guideposts when developing strategies for attacking the expert's testimony, suggests John Dozier Jr., an Internet law specialist in Richmond, Va. They could also mine the comments for leads on experts with opposing viewpoints, he says.

"The impact of a high profile blog, even one that does not allow open comments or trackbacks, could lead the opposing side to plenty of ammunition to rebut the expert's contentions and reputation and reliability," Dozier says.

Experts Weigh In

Experts who blog say the benefits outweigh any risk – and the risk can be avoided through caution.

"As an expert who blogs occasionally," says security expert Kevin G. Smith, "I am always mindful of the content and slant of my posts. It's no different than when I write articles. I know that these writings will be with me throughout my career so I make sure they represent my true opinions."

But while blogging requires mindfulness, it also helps build an expert's credibility and reputation, adds Smith, who writes the blog [Insights](#).

In fact, blogging may be less risky than speaking to the news media, suggests Dr. Peter Rost, a pharmaceutical expert witness in Short Hills, N.J., and author of [The Pharma Law Blog](#). In a newspaper interview, the expert may be quoted incorrectly and that incorrect quote could later be used against the expert in court. With a blog, the expert controls his or her own words.

"The benefit of blogging is that you build real estate with value on the net, which increases the likelihood that your professional Web page will rank much higher," says Rost. "So it becomes essentially a marketing tool, since links from your blog will be much more valuable."

Derek Geer, a forensics engineering expert in San Diego, Calif., and author of the blog [Forensics Engineering](#), believes experts can avoid problems by carefully considering what they write. "I try to be self-consistent in my reasoning and opinions. If I write a point in a blog, I hope I am stating something that would not be contradictory to any future opinion I would make."

Plus, in Geer's case, he sees his posts as discussions of facts aimed at other engineers and scientists, not expressions of opinions that could later come back to

haunt him. "I am writing about natural phenomena or results and so they are not open to opinion – they are demonstrable fact."

Chris Smith, an expert in search engine optimization who writes [Natural Search Blog](#), believes that having a blog may actually make an expert more credible. Blogging, he says, allows an expert to establish a "voice" and stature within an industry.

"At least where modern technology and internet industry are concerned," Smith says, "I'd say there could be some dichotomy in wanting to get a credible, widely-respected witness, and not allowing them to have a voice in their industry through blogging. ... If you have two witnesses, pitted against one another, won't the one with the greater amount of recognition within the industry be more credible to the jury, even if he/she blogs, than a relative unknown expert?"

Caution is the Watchword

Experts should be encouraged to blog, but to do so carefully, concludes John Dozier. "If I were an expert, I would do a great job of using the blog as a marketing tool, be careful about what I write, be vigilant in monitoring the commentary about my views, and manage the situation proactively so savvy lawyers will still hire me."

As for lawyers, they need to make blogs a standard part of their due-diligence repertoire, counsels Barry Bayer, a Chicago lawyer and technology consultant.

"Once you have the witness ... due diligence obviously includes not only the books and articles published and trial and deposition transcripts and appellate opinions (and trial opinions in the federal courts) but also the blog in question – and every blog entry referring to one of the witness's blog entries."

Bayer adds one other cautionary point: Find out whether the expert has posted comments on other people's blogs, perhaps even anonymously, and hope the expert said nothing embarrassing.

And that, of course, is just one more reason for lawyers to lie awake at night.

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