

CASE

THE NATIONAL JUDICIAL COLLEGE

POINT

IN

SPRING/SUMMER 2007

ARE YOU OUT THERE?

Blogging on the Bench



A Technology-Gifted Court

Dwelling on the Past

Clarity on Conduct

BENCH BLOGGING

Where Should Judges, Lawyers and Court Personnel Draw the Line?

With the ease of high-speed computers and the Internet, information is always just a click away – lots of information. In the midst of information overload is the eternally ongoing struggle to define justice – a struggle both aided and obstructed by our advanced technology and the ease with which information has become available.

“Blogsites give the reader instant access to a whole range of materials,” explained Professor Doug Berman, an attorney who teaches at Moritz College of Law in Columbus, Ohio, and writes the nationally-read blog, *Sentencing Law and Policy*. “Blogging is a wonderful medium to gain immediate access to raw materials. Blogs often link to other blogs and give credit to other bloggers. Basically, blogsites are often a one-click way to access a whole range of information on certain topics.”

The numbers of judges, attorneys, law professors, legal analysts, jurors and others utilizing the modern blog phenomenon have increased dramatically during the past decade. Blogs – the term is a result of combining “Web log” – have become a way to share information on a multitude of levels from fact-based to opinion-driven. Legal and judicial bloggers tread far more risky waters than most other bloggers because justice can easily be jeopardized. Yet at the same time, shared knowledge can increase public awareness and understanding of the justice system as well as empower jurists with an outlet to inform. Opinions surrounding the ethics of legal and judicial blogging span as many viewpoints as the blogs themselves.

“To me, blogs are a special medium,” explained Professor Berman. “They have a special value and virtue that supercede other media in the sense that they are interactive and can engage a whole community at large.”



CBS legal analyst, Andrew Cohen, has discovered his blogs, *Court Watch* and *Bench Conference*, serve as catalysts in fueling debates and discussions on a wide range of topics. In the section of his blog that allows readers to leave comments, Cohen said the first few comments are usually about his recent blogpost, but after that, the readers often discuss the topic amongst themselves within the comment forum.

“The readers argue over different points they have made in their comments,” he said. “To the extent of fostering conversations, blogging is a good thing. There are more positives than negatives in regard to blogs, but for the negative, it is a medium where people can say things anonymously, so as a writer, I remind myself to not take all of the comments so personally.”

Judges, attorneys and other legal and judicial bloggers have carved a valuable niche as information sources for those in and outside of the legal and judicial professions. With the do’s and don’ts enduring much scrutiny, most appear to agree that as long as blogging judges adhere to the canons of ethics and avoid ethical pitfalls, there are many upsides to this new communication medium.

“Judicial blogs can be an excellent method for judges to come together and share information,” explained Judge Adam Fisher, Jr., of Greenville, S.C., a former member and chair of the NJC’s Faculty Council, who teaches ethics courses. “Blogs on timely judicial issues are highly valuable to judges.”

Judge Susan Criss, 212th District Court, Galveston, Texas, who has gained widespread publicity for her blog, *As the Island Floats*, agreed. “Blogs are a way to share a lot of valuable information,” she explained. “I enjoy reading them. You can learn a lot about different areas of the law. Sometimes lawyers will analyze cases in their blogs, and you can learn from those as well.”

The Power of Words

Long before advanced technology, computers and the Internet, people realized the dramatic impact of the written word. Actress and comedienne, Carol Burnett, said, “Words, once they are printed, have a life of their own.”

More than a century earlier, in 1839, English playwright, Edward Bulwer-Lytton, wrote what is now the familiar cliché, “The pen is mightier than the sword.” The meaning still holds truth and wisdom today, even if the modern pen is a keyboard.

According to Cohen, CBS legal analyst, judges have adequate outlets to explain their judicial opinions and are putting their cases in jeopardy if they write blogs. “I think no judge should have a blog – ever,” stated Cohen. “There is no reason for a judge to want or need to blog about anything. They run too much of a risk about blogging on the wrong issues.”

Lawyers who blog must do so with caution, added

Cohen. “They have to be very careful of what they say, how they say it and how they project themselves, especially attorneys in large lawfirms. Many law websites have whole limited liability disclaimers on them.”

Blogging judges can have a positive impact as long as they write with caution, said Professor Berman. “We tend to inappropriately deify judges more than we should,” he added. “Judges are different from the rest of us but often an artificial distance is created.” Jurists are not the only ones who should write cautiously, Professor Berman pointed out. “Prosecutors, defense attorneys and anyone in the legal and judicial fields should do so as well,” he emphasized.

Ian Best, founding editor of *Law Blog Metrics* (formerly *3L Epiphany*), compiled a taxonomy of legal blogs while in his third year of law school. He was the first law student in the nation to receive academic credit for blogging. Best also interviewed several judges who cited blogs in their judicial opinions. As an explanation for why judges might be reluctant to blog, Best points out that “judges who blog could unnecessarily complicate their work. For example, judges who blog about particular legal topics might be asked to recuse themselves more often because their personal opinions are no longer discreet. Lawyers might read such blogs for the sole purpose of seeking insights into how to persuade the judge.”

Drawing the Line

So where should judges draw the line between appropriate and inappropriate subject matter? According to Judge Fisher, judicial blogs are considered a mode of communication and the same ethical rules apply to them as with any other forms of communication. “There is nothing in the cannon of ethics specifically pertaining to blogs,” explained Judge Fisher. “However, the same rules apply as those of any judicial communications.”

Hon. William F. Dressel, president of The National Judicial College, agreed. He stated that all codes of judicial conduct have provisions that impact what judges can say, which clearly apply to blogs and websites. Although the *ABA Model Code of Judicial Conduct* was updated in February of 2007, most states follow the version of Canon 3B(9) which reads as follows:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge’s direction and control.

“As long as judges are using blogs to enhance public education and understanding of our justice system and not compromising the integrity of cases, then judicial blogs

could serve and promote a greater understanding of the challenges and difficulties judges face in advancing justice,” said Judge Dressel.

Former National Judicial College Faculty Council secretary, Hon. Margaret Poles Spencer, Circuit Court of the City of Richmond, Va., said she feels judges must avoid the appearance of impropriety and participate in extra-judicial activities in a manner that minimizes the risk of conflict with judicial obligations.

“I preside in a general jurisdiction state trial court, in an urban area over civil and criminal cases,” explained Judge Spencer, who reads blogs, but does not yet write one of her own. “Therefore, to avoid recusal issues, I think there are a limited number of topics that I could discuss in a blog if I were to have one.”

“There is nothing in the canon of ethics specifically pertaining to blogs,” explained Judge Fisher. “However, the same rules apply as those of any judicial communications.”



Judge Criss, of Texas, explained that legal and judicial blog authors should use the same careful consideration in writing their blog posts as they would with any other form of writing within their professions. “Blogs are the same as any other communication venue and the same rules of judicial conduct apply,” she said. She did emphasize the importance of judges keeping security and safety issues in mind as well.

Some of Judge Criss’ favorite legal and judicial blogs to read, she said, are *Have Opinion Will Travel*, *Grits for Breakfast*, *Blonde Justice* and *Anonymous Lawyer*. *Underneath Their Robes*, *A Criminal Waste of Space*, *U.S. Supreme Court Blog* and the *Blakely Blog* have also garnered a large national audience. Ian Best’s *Taxonomy of Legal Blogs* contains a large list of legal and judicial blogs organized into separate categories. *Courthouse Forum* also contains an extensive list of legal and judicial blogsites.

“My audience consists of people who’ve been working hard and feel the need for a break and enjoy relaxing and having a laugh,” said Justice William Bedsworth, author

Judicial Blogs

There are thousands of legal and judicial blogs in existence. This list is a compilation of blogs mentioned by those who were interviewed for this article.

Becker/Posner Blog

<http://www.becker-posner-blog.com>

Say What?!

<http://www.texasbar.com/saywhat/weblog>

Underneath Their Robes

<http://underneaththeirrobes.blogspot.com>

A Criminal Waste of Space

http://www.acriminalwasteofspace.com/journal_beds.asp

SCOTUSblog

<http://www.scotusblog.com/movabletype>

As the Island Floats

<http://astheislandfloats.com>

Blakely Blog

<http://blakelyblog.blogspot.com>

Have Opinion Will Travel

<http://haveopinionwilltravel.blogspot.com>

Sentencing Law and Policy

<http://sentencing.typepad.com>

Court Watch

<http://www.cbsnews.com/sections/opinion/courtwatch/main15515.shtml>

Bench Conference

<http://blog.washingtonpost.com/benchconference>

Blonde Justice

<http://blondejustice.blogspot.com>

Grits for Breakfast

<http://gritsforbreakfast.blogspot.com>

Anonymous Lawyer

<http://anonymouslawyer.blogspot.com>

How Appealing

<http://howappealing.law.com>

Law Blog Metrics (formerly 3L Epiphany)

http://3lepiphany.typepad.com/3l_epiphany

Taxonomy of Legal Blogs

http://3lepiphany.typepad.com/3l_epiphany/2006/03/a_taxonomy_of_l.html

Courthouse Forum

<http://www.courthouseforum.com>

Indefensible

<http://davidfeige.blogspot.com>

Jurist – Paper Chase

<http://jurist.law.pitt.edu/paperchase>

The Volokh Conspiracy

<http://volokh.com>

Instapundit

<http://instapundit.com>

Blawg Review

<http://blawgreview.blogspot.com>

May it Please the Court

<http://www.mayitpleasethecourt.com/journal.asp>

of *A Criminal Waste of Space*, which the author described as more of a syndicated column than a blog. However, the term blog is often loosely applied to any online journal or log which is frequently updated. “I get a lot of feedback, almost exclusively from people who have enjoyed the column and want to congratulate me. Occasionally I get something from someone who says, essentially, “This was really funny, but there is something you may not have considered about this.”

An occasional blog reader, Judge Margaret Poles Spencer said the *Becker/Posner Blog* and *Say What?!*, are among her favorites. *Say What?!*, a blog written by U.S. District Judge Jerry Buchmeyer, Dallas, Texas, about humorous court happenings, offers a lighter approach to judicial topics. Professor Berman’s blog, *Sentencing Law and Policy*, draws his readers with a wide range of sentencing law topics. “I try to cover all the bases and serve as a user-friendly information clearinghouse,” he said. *How Appealing*, *SCOTUSblog* and *The Volokh Conspiracy* blogs are among Professor Berman’s top reading choices.

“Those are three of my favorites because of the different topics they cover and the diversity of perspectives they explore,” he said. “They are all written by lawyers and law professors but they all focus on a broad range of topics. They also do a nice job of living up to the basic do’s and don’ts of legal and judicial blogging.”

In one of her blogposts, Judge Criss wrote, “I decided to publish this blog after being inspired by the bloggers who post about the justice system and the government.” While her intent is to share information and knowledge, she is mindful of judicial ethics. In her blog, she also writes, “The *Judicial Code of Conduct* limits my ability to discuss pending litigation in my court. I have to refrain from expressing opinions about subjects that could lead to my being recused from hearing certain lawsuits. Don’t assume that you can guess how I will rule on matters in court based on what you read here.”

The Rules of Blogging

By following a few simple rules, blogging judges can ensure their information is valued without compromising judicial ethics. Judge Fisher emphasized the importance of never writing about pending cases or anything that might go against the *Judicial Canons of Ethics*.

“Blog-worthy topics consist of handling the press, managing a heavy caseload docket and *ex parte* communication,” expressed Judge Fisher. “These sorts of information topics can benefit all judges.”

Judges, attorneys, court personnel and other similar bloggers should be sure not to mix their professional and personal lives into one blog, cautioned Professor Berman.

“If you are writing a professional blog, you must write it with the same approach as you would any other form

Do's & Don'ts

Some Do's and Don'ts for Blogging Judges

- DO** provide links to other sites and to raw materials so people can find information more easily.
- DO** treat blogs the same as any other mode of communication, adhering to the canons of ethics.
- DO** blog on judicial issues to provide information other judges may need.
- DO** provide helpful tips on challenges such as caseload management.
- DO** write about judicial issues that might give citizens a better understanding of the court system.
- DON'T** write blog posts about pending cases.
- DON'T** mix your personal and your professional life into one blog.
- DON'T** write anything that could compromise your safety or the safety of those in the courthouse.
- DON'T** blog on issues that could increase the number of cases from which you could be recused.

of writing in your profession, whether you are typing up correspondence or writing judicial opinions. At the same time, if this is a non-work-related blog, you must be careful to avoid topics surrounding your profession or ones that could impact your profession.”

Gary Hengstler, director of the Reynolds National Center for Courts and Media (RNCCM) at the NJC, said judicial blogs are so new that their role in society is still evolving. Anyone can post any information on the Internet – sometimes fiction disguised as fact and sometimes harmful information, Hengstler emphasized.

“The question for the judiciary is whether the reporters and commentators of tomorrow will bolster public confidence in the judicial system or whether bloggers will erode that confidence,” expressed Hengstler. “To the extent that websites, such as CourthouseForum.com, provide the public with information about the courts in our nation, it can be a service. To the extent such sites permit people to suggest specific judges should be injured or even slain, it can be a detriment.”

Hengstler added that it is too soon to tell which blog-sites are resonating long-term with the public and which are just the rantings of extremists on their modern-day soapboxes. “One thing is clear though: The Web is the primary communications vehicle today and will only become more critical as traditional media, such as newspapers and television, converge into this cheaper, faster and more effective delivery system,” he said.

According to a Pew Research Center 2006 survey, there are approximately 12 million blogging adults in the United States and 57 million blog readers. The survey reported that a total of 147 million American adults use the Internet. It also found the blogs to be as diverse as the people who write them. More than half (54%) of bloggers are under the age of 30. Men and woman were evenly divided in the blogging population. To date, much of the public and press attention to bloggers has focused on the small number of high-traffic, A-list bloggers.

“I think it is valuable for everyone to dip their toes into blogging waters,” expressed Professor Berman. “The technology has so much potential. I would like to encourage people to not be afraid of it. There is so much you can do with blogs.” 

The Complexities of Commercial Driver's Licensing



Many judges dealing with traffic issues are not aware of the differences between commercial motor vehicles and commercial driver's license laws and their state's traffic laws. Because the commercial motor vehicle is a totally different object from the automobile, with different tolerances, parameters and restrictions, the federal government passed the Commercial Motor Vehicle Safety Act of 1986.

The Act subjects commercial motor vehicle drivers to new, uniform sanctions for certain unsafe driving practices. Though federal in origin, these sanctions are to be imposed by local traffic judges when commercial driver's license holders appear before them for traffic violations.

The NJC provides judges with the opportunity to learn first-hand the intricacies of commercial motor vehicle law and regulation. For the previous five years, the NJC has trained judges from 47 states to make presentations to their peers on commercial motor vehicles and commercial driver's license laws and regulations. These faculty development courses allow judges to become acquainted with the applicable federal laws and regulations (49 U.S.C. §31301, 49 C.F.R. §383) to climb into the cab of a big rig, learn the required federal sentencing and reporting parameters for violators, and to develop public speaking and presentation skills (including developing a CDL PowerPoint).

NJC's last class for this grant year will be held in Reno, Nevada, October 8-11, 2007. To register, contact the NJC at (800) 25-JUDGE or registrar@judges.org.

CREATE A LEGACY THROUGH THE NJC

Providing a planned gift in your estate will assist in supporting the future of judicial education, shape the growth and continued success of The National Judicial College, and create a lasting legacy. Not only does a planned gift strengthen the NJC's future, it also provides substantial benefits to donors.

YOUR GIFT CAN MAKE A DIFFERENCE AT THE NJC

To learn more about Planned Giving options, please contact Gretchen Struble Alt at (775) 327-8257 or alt@judges.org

