A Primer

The Evolution of Legal and Ethical Claims in the Age of Attorney Blogging

By Peter Biging and Jason Ederer

Blogging carries risk for attorneys, but the court decisions do offer some ideas about how to reduce it.

In the internet age of lawyering, attorneys and law firms have often turned to social media as a means to opine on, report, share, and interpret decisions in their respective fields of practice. Use of a professional's blog, Twitter feed, or Facebook page provides an attorney or his or her law firm with an opportunity to disseminate criticism and commentary to a wider audience than could ever be imagined. These blogs have become a tool not only for "reporting" in the broad sense, but also of showing off an attorney's or firm's knowledge as a way to generate business and attract potential clients to a firm. For many, it has become a powerful and absolutely indispensable marketing tool. However, in the words of Peter Parker's Uncle Ben, with this great power has come great responsibility: these legal blog posts can potentially leave attorneys open to defamation claims against them as individuals or against their law firms, and their Facebook posts and Tweets could just as easily leave them on the hook for a potential malpractice claim based on the contention that an attorney or a firm provided legal advice or representation in the course of a communication. These posts can also result in ethics violations if not handled with care.

As the technology for disseminating and the dissemination of these materials has become more prolific and mainstream, a number of court rulings have helped detail the contours of what is safe and appropriate to do, and what can get you into trouble. This article will discuss several recent decisions throughout the United States that shed some light on the evolution of the legal analysis of the issues presented, and how the courts can be expected to deal with these issues. The article will also suggest some practical tips to avoid getting into trouble.

The Basic Rules

Defamation is defined as the making of a false statement of fact, which "tends to

■ Peter Biging is a partner with the law firm of Goldberg Segalla LLP, where he heads up the firm's New York metro area professional liability practice. He is a member of DRI, writes and lectures frequently on professional liability practice issues and is also the vice chair of the ABA TIPS's Professionals', Officers', and Directors' Liability Committee. Jason Ederer is a senior associate with the law firm Goldberg Segalla LLP in its New York metro area office, where he focuses his practice on professional liability, intellectual property, and sports and entertainment law. He is a member of DRI, a regular contributor to his firm's *Professional Liability Matters* blog, and has been published on a number matters in the realm of professional liability law, with a focus on trends in the field of legal malpractice and professional liability defense.

expose the plaintiff to public contempt, ridicule, aversion or disgrace. *Sandals Resorts Intl. Ltd. v Google, Inc.*, 925 N.Y.S.2d 407, 412 (N.Y. App. Div. 2011). *See also* Restatement of Torts (2d) §559. The basic elements of a claim for defamation based on a writing are fairly universal throughout jurisdictions in the United States. For example, to establish libel under New York law, a plaintiff must prove five elements: "(1) a written defamatory factual statement [of and] concerning the plaintiff; (2) publication to a third party; (3) fault; (4) falsity of the defamatory statement; and (5) special damages or per se actionability." *Sorvillo v. St. Francis Preparatory Sch.*, 2015 U.S. App. Lexis 6424, 2-3 (2d Cir. Apr. 20, 2015); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) (applying New York law). The same elements are regularly applied elsewhere. *See Armstrong v. Shirvell*, 596 Fed. Appx. 433, 441 (6th Cir. 2015) (applying Mich. law); *Hogan v. Winder*, 762 F.3d 1096, 1105 (10th Cir. 2014) (applying Utah law).

From an ethical standpoint, legal blogging has been analyzed under ABA Model Rule 7.1, which has been formally adopted or codified, or both, in many jurisdictions, and states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." *In re Hubbard*, 2013 U.S. Dist. Lexis 14949, 12–13 (S.D. Cal. Feb. 4, 2013); *Accord Mustang Enters. v. Plug-In Storage Sys.*, 874 F. Supp. 881, 885 (N.D. Ill. 1995). The rule adds that "[a] communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." *Id.* Additionally, Model Rule 1.6 states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.…" *See United States ex rel. Holmes v. Northrop Grumman Corp.*, 2016 U.S. App. Lexis 5370 (5th Cir. Mar. 23, 2016) (quoting ABA Model Rule 1.6(a)); *McClure v. Thompson*, 323 F.3d 1233, 1242 (9th Cir. 2003); *Nat'l Fedn. of Indep. Bus. v. Perez*, 2016 U.S. Dist. Lexis 89694, at *25 (N.D. Tex. June 27, 2016).

Normally, there are several defenses that are available to defendants in defamation cases, including the defense of truth. However, courts have examined two defenses in particular that have factored prominently in the defense of these types of cases: statements that are "non-actionable opinion" and statements that are protected by the "fair reporting privilege."

"Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false,… a libel action cannot be maintained unless it is premised on published assertions of fact," rather than on assertions of opinion. *Sandals Resorts Intl. Ltd. v Google, Inc.*, 925 N.Y.S.2d 407, 412 (N.Y. App. Div. 2011). The U.S. Supreme Court discussed statements of non-actionable opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), stating that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." Essentially, the First Amendment protection would clear statements of opinion by the statement's author.

The fair reporting privilege, which has actually been codified by numerous states, is also a prominent defense to defamation claims, shielding defendants from liability "against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding," with "[a] publication [] deemed 'fair and true' if it is 'substantially accurate.'" *See, e.g., Tacopina v. O'Keeffe*, 2016 U.S. App. Lexis 5740, at *2 (2d Cir. Mar. 29, 2016) (citing New York Civil Rights Law §74). *Amway Corp. v. P&G Co.*, 346 F.3d 180 (6th Cir. 2003) (citing Mich. Comp. Laws Ann. §600.2911(3)); *Walker v. Beaumont Indep. Sch. Dist.*, 2016 U.S. Dist. Lexis 41408 (E.D. Tex. Mar. 11, 2016) (citing Tex. Civ. Prac. & Rem. Code §73.002). While first used to allow newspapers and journalists to report the facts of judicial proceedings, as seen in more detail below, this defense and privilege have become a key argument for affording attorney bloggers with the chance to disseminate case results (either theirs, or the results of other interesting case in their fields) quickly and easily, without risking liability for potential defamation claims.

Due to the unique situation that blogs often present to a court, and the mixture of statements that they include that could be construed as either a fact or an opinion, a fair report of a judicial proceeding or simply an advertisement for a firm's accomplishments, the line marking defamatory conduct from conduct that is not has often been blurred. These situations are examined in turn below.

These blogs have become a tool not only for "reporting" in the broad sense, but also of showing off an attorney's or firm's knowledge as a way to generate business and attract potential clients to a firm.

An Examination of the Claims and Issues That Can Arise

An interesting case examining an attorney's use of social media and the possible legal and ethical ramifications arising out of the use was *Hunter v. Va. State Bar ex rel. Third Dist. Comm.*, 285 Va. 485 (Va. 2013). In that case, the attorney in question authored a blog, accessible from his law firm's website, which contained posts discussing "a myriad of legal issues and cases." *Id.* at 491. However, a majority of the attorney's posts were about cases for which the attorney had received favorable results for his clients. *Id.* Neither the posts nor the website contained any disclaimers to the effect that the attorney and his firm could not guarantee such results for others. *Id.* As such, the Virginia State Bar launched an investigation into the attorney and his blog, and eventually, in March of 2011, charged the attorney with violating several of the Virginia Rules of Professional Conduct, alleging that the posts were "inherently misleading as they lacked dis-

claimers," and they "reveal[ed] information that could embarrass or likely be detrimental to his former clients by discussing their cases on his blog without their consent." *Id*. at 492. Even though the attorney testified regarding legitimate reasons for posting, including marketing and creation of a community presence for his firm, after a hearing in which several of his former clients testified that the attorney's posts were embarrassing or detrimental to the clients themselves, the bar committee held that he had violated several rules in "disseminating client confidences" and "disseminating case results in advertising without the required disclaimer." *Id*. at 493.

The court noted that to the extent that the information about a case is aired in a public forum, such as a court, "privacy considerations must yield to First Amendment protections" and that "a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom."

After an unsuccessful appeal, the attorney appealed to the Virginia Supreme Court, arguing on First Amendment grounds that the content contained in the blog entries was political speech, and therefore it was not properly subjected to the stricter standard of review imposed by the bar (and the courts) for potentially violative commercial speech. In denying the appeal, the Virginia Supreme Court concluded that the attorney's blogs were what was, in essence, lawyer advertising, because they more often than not referred to the attorney's cases in which he had obtained favorable results for his clients, signaling to those potential clients around him that such results were ascertainable for *them* without a proper disclaimer. *Id*. at 504. Interestingly, though, the court noted that to the extent that the information about a case is aired in a public forum, such as a court, "privacy considerations must yield to First Amendment protections" and that "a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom." *Id*. at 503.

That same year, a New York federal court had a similar opportunity to examine claims arising from postings on an attorney's law blog in *Sang v. Hai*, 951 F. Supp. 2d 504 (S.D.N.Y. 2013). There, the plaintiff was a former internationally recognized gymnast who was previously represented by the defendant attorney and her law firm in an earlier action. *Id.* at 514–515. After that case was settled, the client and her attorney had a falling out, and the attorney made "several [allegedly false] statements about Plaintiff," which became the subject of the lawsuit. Some of the statements were allegedly made on the attorney's law blog, some in a press conference and some in an interview, all in the years 2011–2012. *Id.* at 514–515. The blog statements in particular were wide-ranging, and included statements in separate posts alleging that the plaintiff had ill-treated her own dog and she had engaged in criminal activity, in addition to other things. *Id.* at 515–516. An example included Hai's blog entry that "Sang Lan has defaulted on her rent and stole the keys. She also accused me of misleading her." *Id.* at 515. The plaintiff sued for defamation. The defendants moved to dismiss, arguing that the various statements were "not susceptible of defamatory connotation" because they were pure opinion, and in any event they were allegedly fair and true reports of a judicial proceeding. *Id.* at 521.

In finding that each of the blog statements withstood the dismissal motion, the court emphasized that because of the former attorney–client relationship between the parties, the statements were not necessarily pure opinion and had "precise meanings that are readily understood and are capable of being true or false," and they appeared to be relaying a conversation. *Id*. at 522. The court also noted that while the context and language suggested that the attorney was expressing his opinion in another of the statements, the statement arguably "impl[ies] the existence of undisclosed facts on which those opinions were based." *Id*. at 523.

Lastly, as to the fair reporting argument regarding the alleged criminal activity, the court opined that if it was untrue, "an accusation that one provided her attorney with false information amounts to a claim that she attempted to use her lawyer to get false evidence into a legal proceeding… [and] [s]uch an accusation is defamatory in nature." *Id.* at 524. So, again, while recognizing the inherent protections available to a lawyer to report court proceedings fairly and accurately, and to espouse nonactionable opinion, the court determined that these protections only go so far.

Also that year, a New York state court considered similar claims but reached a different conclusion. In *Rakofsky v. Washington Post*, 971 N.Y.S.2d 74 (N.Y. Sup. Ct. 2013), the plaintiff was an attorney who had represented a man accused of first-degree murder in Washington D.C. *Id.* at 74. During the trial for the accused, it came out that the attorney-turned plaintiff, who had retained a certified defense investigator to aid in his client's defense in the murder trial, had e-mailed the investigator requesting that the investigator "trick" a witness into admitting that she told lawyers that she did not see the shooting and did not provide the government with any information about the shooting. *Id*. Further, it came out during the plaintiff's opening statement that contrary to what he had previously informed his client, he had never tried a case before. The judge declared a mistrial, stating, on the record, "I was astonished that someone would purport to represent someone in a felony murder case who had never tried a case before," among other things. *Id*. Shortly afterward, articles about the mistrial appeared in the *Washington Post*, on the Reuters website, in an ABA online publication, and most importantly here, on several law firm and attorney legal blogs, which, according to the court, depicted the mistrial "as an 'object lesson' for those unsuspecting clients that contemplate retention of inexperienced

defense counsel in criminal cases based on low cost and exaggerated marketing." *Id.* The attorney plaintiff filed a defamation suit against the reporters and bloggers, alleging that the defendants had mischaracterized his e-mail request to "trick" the witness and that the defendants had incorrectly reported that the trial judge had declared a mistrial due to the plaintiff's incompetence or inexperience. All the defendants moved to dismiss the complaint, based on the fair report privilege and that the alleged defamatory statements were non-actionable as expressions of pure opinion. *Id.*

In finding that the defendant attorneys' blog entries fell under the First Amendment fair reporting privilege, the court stated that a comparison of blog reports and the e-mail requesting that the investigator "trick" a witness "reveal[ed] that they are a substantially and contextually accurate report" of the events that transpired at trial, even if the "precise words [we]re not exactly identical." And though the "reporting" of the facts did not "portray [the plaintiff] in a positive light, and [the plaintiff] may wish to disavow or interpret them in a different way, the defendants were permitted to publicly disseminate them as a report of a judicial proceeding." *Id.* The court also noted that "the clear import of [the trial court's] rulings was to excuse [the plaintiff] due to his lack of competence and inexperience to defend [his client] in a murder trial" and that, in any event, "[while] the reported statements that [the plaintiff] was allegedly not competent, inexperienced and unethical are [] operative words which may give rise to defamation, [] said content was privileged under the Civil Right Law §74." *Id.* In further acknowledging that the blog entries were also non-actionable expressions of opinion, the court opined that "[w]hen viewed from the broader social context, it is readily apparent that the online commentary and posts on legal blogs discussing [the plaintiff] were exchanges of opinions between criminal defense lawyers and other individuals" and that "the average reader would view its assertions with some reservations… and treat its contents as mere opinion rather than as a statement of fact." *Id.*

In *Perez v. Factory Direct of Secaucus, LLC*, 2013 U.S. Dist. Lexis 152407 (D.N.J. Oct. 23, 2013), a New Jersey federal court considered similar issues, again with a positive result for the attorney. In *Perez*, the plaintiff was employed at a furniture store from September 25, 2012, to October 8, 2012, as a Human Resources director. *Id.* at *3. During her time there, the plaintiff reported to the company's director of people services and development and its chief executive officer, who she claimed made a number of derogatory racial and sexual comments during her interview and her subsequent employment there. *Id.* On January 17, 2013, the plaintiff, through her attorneys, filed a lawsuit against the store and its two executives, alleging that during her employment she was treated discriminatorily and harassed due to her sexual orientation and was retaliated against after she filed a complaint of discrimination in violation of §1981 and the New Jersey Law Against Discrimination. *Id.* at *4.

The defendants filed an answer to the original complaint along with a third-party complaint against the law firm that represented the plaintiff in the employment case, alleging, among other claims, defamation on the basis of five separately published internet articles that appeared after the complaint was filed. *Id.* at *5, 9–10. The offending articles included a blog post on the firm's blog. *Id.* at *5. The blog, as described by the court, contained "self-authored reports on developments in employment law, and in particular, cases handled by [the firm]." *Id.* In the firm blog entry concerning the action, the author, one the firm's attorneys, wrote a post entitled "Fired for Being Gay" in which it was noted that the firm had "filed an employment discrimination case against [the furniture store] for firing our client over her sexual orientation" and that there had been significant media interest in the case "due to the outrageous nature of the alleged conduct and also because gay rights is becoming a national issue." *Id.* at *5. The firm filed a motion to dismiss the claims. The defendants argued in opposition that the firm's blog post was defamatory because the headline of the blog post, "Fired for Being Gay," "read in conjunction with" the blog post's first sentence, which stated that the firm had filed an employment discrimination case against the furniture store for firing the firm's client over her sexual orientation, "unquestionably indicates and expresses that an individual was, in fact, terminated from their employment with [the furniture store] 'for being Gay'." *Id.* at *13 (internal citations omitted).

The court agreed with the law firm that the claims should be dismissed, noting that the context of the blog post "show[ed] that it is not defamatory" because it "simply describe[d] the lawsuit filed by [the firm] on behalf of [the plaintiff in the employment case]." Due to the fact that the firm *had*, indeed, filed a lawsuit against the furniture store for firing the firm's client over her sexual orientation, this was a truthful statement and provided an absolute defense to the defamation claim with regard to the post itself. *Id.* The court also addressed the defendants' argument that because the statements had appeared on a law firm website, authored by a lawyer, that this, in some way, "heighten[ed] the defamatory harm of those statements because the readers are more inclined to perceive the contents of the statements as true." In further confirming its dismissal, the court found that the opposite was true: "[T]he context of the ["Fired for Being Gay"] Blog Post makes it clear to a reasonable reader that the statements within the Post describe disputed facts in a lawsuit," and the court specifically noted that the post simply referred to "the 'alleged conduct' of Third-Party Plaintiffs." *Id.* As a result, the court found that the post was not defamatory. *Id.* at *13–14.

So, again, while recognizing the inherent protections available to a lawyer to report court proceedings fairly and accurately,… the court determined that these protections only go so far.

A year later, in *Dreamstone Entm't Ltd. v. Maysalward Inc.*, 2014 U.S. Dist. Lexis 116977 (C.D. Cal. Aug. 18, 2014), the plaintiff alleged that the defendant breached a contract and committed various torts by withholding accounting information, profits, and intellectual property relating to a mobile video game. *Id.* at *4. Under the terms of the contract, the defendant was supposed to develop and distribute the game. The defendants counterclaimed, alleging that they were induced to develop the game through false representations that a film based on the concept of the game was in preproduction, that it was a "big production with well-known actors, and that Defendants could not be paid because all of Plaintiffs' resources were going into making same." *Id.* at *4–5. Among the counterclaims was a claim for libel per se against the plaintiff's law firm and its principal, based on an allegedly defamatory press release issued on March 25, 2014, and posted on the firm's website about the case, which included the quotes "[The defendants] have maliciously absconded with my clients' valuable intellectual property and hard earned money," and "We will fight tooth and nail to ensure the game is restored on gaming platforms and [d]efendants pay every dime needed to rectify the damage done to my clients' reputations and the [G]ame's franchise." *Id.* at *6–7. The law firm and attorney moved to dismiss the counterclaim for failure to state a claim.

In agreeing with the law firm's argument that the allegedly libelous statement was non-actionable opinion and granting the motion, the court noted that under California law, to state a claim for defamation, there must be "(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." *Id.* at *14 (citation omitted). Regarding potentially defamatory statements, the court explained how courts in the Ninth Circuit evaluated the statements:

> First, courts 'look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work.' Next courts 'turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in the particular situation.' Finally, courts 'inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.'

Id. at *14–15 (internal citations omitted).

The court opined that the press release was issued by the law firm representing the plaintiffs and counter-defendants, and republished on the law firm's website and that as a result, it was clear that "the author is an interested party in contentious litigation, so that the audience would be unlikely to read the press release as a neutral statement of facts." *Id.* at *18. Thus, the court found that the broad context of the statement suggested that the average reader would expect "a predictably one-sided account of the circumstances giving rise to the litigation" and therefore favored the plaintiffs and counter-defendants. *Id.* at *19. Further, the court opined that although the passage appeared factual in isolation, "the press release as a whole makes clear that [the attorney] was expressing his opinion" by using "cautionary language like '[t]he federal suit accuses' and '[t]he Complaint contends that'," which the court said signaled that the release "contain[ed] allegations, not proven facts," and due to its attribution, "a reasonable mind would expect the statement to be one-sided and even hyperbolic." *Id.* at *20–21. Thus the court found that the "totality of the circumstances" favored the dismissal because the language appearing in the press release and on the website, describing the case, was non-actionable opinion. *Id.* at *21–22.

A more recent New York Supreme Court decision highlights the murky waters of fair reporting of decisions by lawyers and firms, and when case reporting *could* cross the line into defamatory content. In the action, *Katz v. Lester Schwab Katz & Dwyer, LLP*, 2014 N.Y. Misc. Lexis 5362 (N.Y. Sup. Ct. Dec. 4, 2014), the plaintiff, Dr. Michael Katz, sued two law firms and some of their attorneys individually for a series of blog posts and an e-mail written by the defendants, on their respective blogs, regarding a personal injury case in which Dr. Katz, who had been retained by the defendants in the underlying trial as a medical expert, was shown to have lied about the length of two Independent Medical Exams (IME) of the plaintiff, conducted in conjunction with discovery in the case. *Id.* at *10–11. The trial judge, upon finding out about a hidden camera recording that impeached the doctor's testimony (purportedly showing that the IME could not have been performed in the course of his very brief examination), apparently railed on about the doctor's "lies" (up to 25 times in one day, according to the complaint), accusing Dr. Katz repeatedly, both on and off the record, of lying and perjuring himself through his IME-related testimony. *Id.* Yet, despite those accusations of lying, and threatening Dr. Katz further, on the record, with forced retirement, special proceedings, and contempt hearings, the trial judge took no further action in the case against Dr. Katz. *Id.* Subsequent to the trial proceedings, two of the defendant attorneys sued by Dr. Katz later wrote blog posts about the underlying trial for one of the attorney's own personal injury attorney and case reporting blog. Those posts, and a subsequent e-mail written by an attorney at one defendant firm, which was allegedly sent to "key members of the insurance defense industry" and linked to other blog and blog posts, formed the basis of the defamation action filed by Dr. Katz. *Id.* at *10–11.

As in the cases above, the defendants moved to dismiss Dr. Katz's complaint based on a failure to state a claim for defamation for any of the posts or e-mails, and the court agreed, noting that all of the alleged statements in the blog posts and the e-mail were either privileged or non-actionable assertions of opinion.

At the outset of its opinion, the court noted that the majority of the statements that were alleged to be defamatory were privileged under New York Civil Rights Law Section 74, known as New York's fair reporting privilege, which says that a "civil action cannot be maintained against a [person or firm] for the publication of a fair and true report of any judicial proceeding" and that because the blog posts were "substantially accurate." *Id.* at *12–13.

Indeed, the court's side-by-side comparison of the hearing transcripts and the blog posts showed that the posts accurately reflected the numerous disparaging remarks made by the trial judge against

Dr. Katz. *Id*. For example, stating that Dr. Katz was "busted for lying on the witness stand" in the blog post was an accurate reflection of the trial judge's repeated finding on the record that Dr. Katz had lied. *Id*. In any event, the court reasoned, the proper inquiry was not whether the statements in the blog "reflect" a fair and true report, but if they *were* a true report of what occurred during the course of proceedings. *Id*. The court found that the blogs did not "suggest more serious conduct than what occurred" in the judicial proceeding. *Id*. at *14.

Regarding the remaining alleged defamatory statements in the blog postings that fell outside the fair reporting privilege, the court noted, citing the seminal defamation case *Gross v. New York Times*, that a statement of opinion that is accompanied by a recitation of the facts on which it is based, or one that does not imply the existence of undisclosed underlying facts, is also not actionable because it is readily understood by the audience as conjecture. *Id*. at *16–21. Further, because the statements were made on the internet, the court, citing the First Department decision in *Sandals Resort Intl Inc. v. Google, Inc*., also noted that the defamatory import of the communications must be viewed in light of the fact that blogs are often the "repository of a wide range of casual, emotive, and imprecise speech" to which its recipients "do not necessarily attribute the same level of credence" as they would to statements made "in other contexts." *Id*. Thus, in dismissing the case, the court found that all the statements made in the posts regarding any potential legal fallout from the trial judge's statements regarding Dr. Katz were mere conjecture, and they did not portray facts about Dr. Katz. *Id*.

This decision appears to have affected the ruling by a California appellate court that evidences just how the courts have adjusted to dealing with the issues surrounding this developing issue. In that case, *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP*, 247 Cal. App. 4th 87 (Cal. Ct. App. 2016), the law firm defendant issued a press release after a favorable verdict in a False Claims Act litigation. *Id*. at 91. The verdict found that a manufacturing company had "knowingly misrepresented to [the firm's] governmental clients over a 10-year period that its polyvinyl chloride (PVC) pipe had been manufactured and tested in a manner that assured it had the strength and durability required by applicable industry standards." *Id*. Upon becoming aware of the press release, the manufacturing company sued the law firm for defamation and trade libel. *Id*.

While the trial court initially denied a motion to strike the complaint by the firm, based on the argument that the press release was privileged as a fair and true report of a judicial proceeding, the appellate court reversed. *Id*. at 91. In doing so, the appellate court noted that defamation under California law requires the "intentional publication of a false statement of fact that has a natural tendency to injure the plaintiff's reputation or that causes special damage." *Id*. at 97. The appellate court also noted that "whether a report of the official proceedings itself is 'fair and true,' provided [that] reasonable minds could disagree as to the effect of the communication on the average reader or listener, is a question of fact for the jury." *Id*. at 98. Further, the appellate court stated that in measuring what constitutes "a 'fair and true report'," the defendant is "permit[ted] a certain degree of flexibility/literary license," going on to say that "[i]f the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would." *Id*. at 99–100 (internal citations omitted).

The appellate court then opined that "the average reader of the entire three-plus-page press release would reasonably understand [that] the release described the substantial evidence presented at trial" and "the specific findings of the jury"; further, the court found that the plaintiff's "attempt to read the press release as inaccurately" reporting what had transpired was "predicated on a strained construction of the language used [in the release]." *Id*. at 101–102.

Also challenged was the firm's use of the terms "shoddy manufacturing practices" and "shoddy pipe" in the press release to describe the manufacturing practices at issue, but the court noted that "quotas created strong incentives to ship bad pipe" and that the pipe had "fail[ed] to meet quality standards." *Id*. at 103. As such, "[l]abeling these manufacturing practices and the resulting product 'shoddy' [wa]s a fair characterization of the trial evidence. No reasonable reader would understand it to be part of the jury's verdict…." *Id*. Instead, the reasonable reader would understand it simply as a fair report of trial itself.

In sum, the court noted that while the firm "may be guilty of self-promotion and puffery," its press release fell "within the permissible degree of flexibility and literary license afforded communications to the media concerning judicial proceedings," it was a fair report, and thus it was privileged under California law since the substance of its reporting was accurate. *Id*. at 105.

When you blog about work for your client, you need to be cognizant of the rules against disclosing client confidences without the client's consent.

Conclusion

The benefits of blogging and sending out e-mail blasts to promote a law firm's achievements, or otherwise bring attention to the firm, are readily apparent. However, this type of promotional activity carries risk. When you blog about work for your client, you need to be cognizant of the rules against disclosing client confidences without the client's consent. When blogging or otherwise reporting on case developments, there is no question that there are substantial protections in place for expressions of opinion and fair reporting of court proceedings. But care must still be taken to ensure that the facts are not teased or twisted to make a blog more eye-catching or promote readership. So if you are not watching over what the lawyers in your firm are blogging about, you may want to start doing so. And if you are the blogger, as the saying goes, discretion can often be the better part of valor.