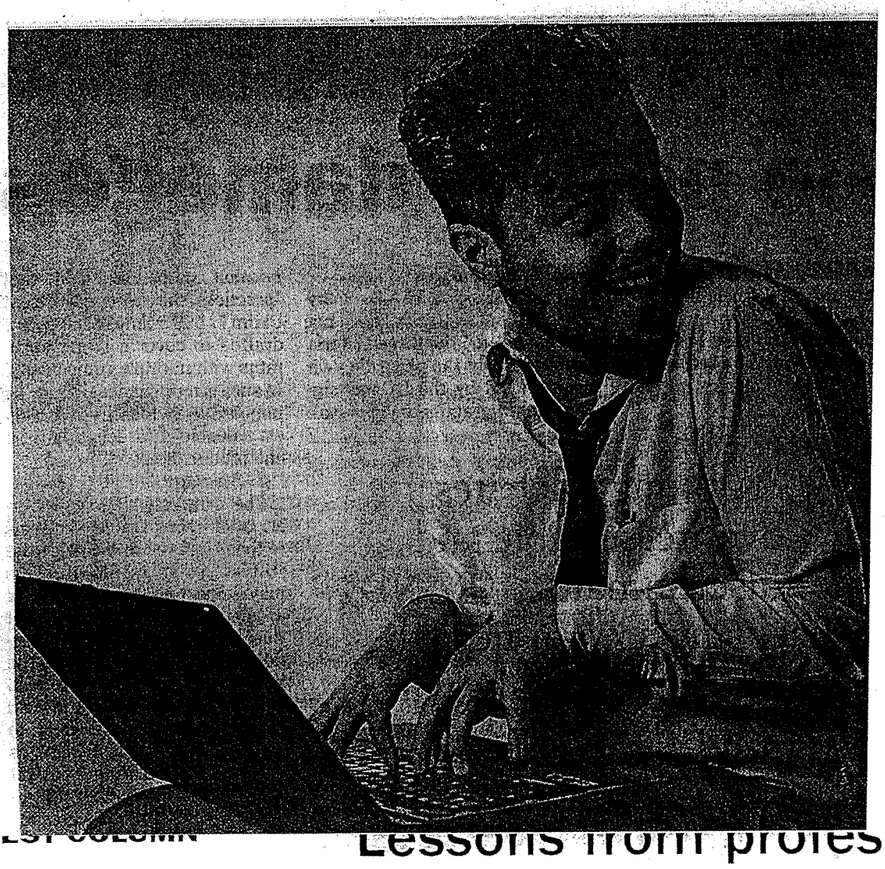

GUEST COLUMN

Professor confronts perils of blogging

By Marc D. Alexander

Since 2008, my colleague Mike Hensley and I have published the hard-law blog California Attorney's Fees. I have occasionally fretted about legal risks presented by blogging. Though we have posted over 3,600 times and had nearly 1.5 million page views, only once did a post become a cause for concern.

The legal risks of blogging were, however, brought home recently in *Welch v. University of San Diego et al.* (April 2, 2015, 4th Dist. Div. 1) (unpublished). Plaintiff Welch, a school teacher, was placed on administrative leave while the school district investigated allegations of her erratic behavior. In a first lawsuit and appeal, Welch successfully obtained reinstatement as a probationary employee (*Welch I*). In a second appeal, she unsuccessfully sought full reinstatement (*Welch II*). The third appeal concerned Welch's efforts to obtain disability retirement benefits. In *Welch III*, the Court of Appeal reversed a trial court determination that she was not entitled to benefits, and remanded.

Professor Shaun Martin's California Appellate Report posts about recent 9th Circuit and California appellate cases. His blog is substantive, entertaining and opinionated. Following Martin's post comment about *Welch III* ("facially" correct and "maybe all of this is complete justice. But maybe not. Depends profoundly upon your point of view"), Welch took umbrage. She wrote to Martin, who responded he believed the factual statements in his blog article were derived from *Welch III*, but invited correction. Correction did not follow, though a lawsuit did. Now we have *Welch IV*, in which Welch alleged defamation, suing Martin, the University of San Diego, the school's president,

Lessons from professor's trip to court over law blog

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Welch IV affirmed the trial court's granting of an anti-SLAPP motion in favor of the defendants: The statements were privileged under the "fair report privilege" embodied in Civil Code Section 47, they were statements of opinion that were not actionable, or they were statements of fact that were not untrue. The outcome of this legal kerfuffle may seem entirely just (depending on your point of view ...). But what a nuisance to be sued over a blog post. Furthermore, *Welch IV* can't be pleasant for the in pro per plaintiff/appellant, who is liable for attorney fees.

Written with speed and informality, blog posts can be liability bait. While bloggers carry legal risks, they also have protections.

Libel and defamation. This is the greatest risk for bloggers. Examples: The Mayor of Aurora, Ontario, suing bloggers for defamation; Zagg Inc., suing two business school professors publishing an article titled "Don't Gag on Zagg" on the Grumpy Old Accountants Blog; a defamation suit by the pastor of the Beaverton Grace Bible Church against Julie Anne Smith, blogger of the Beaverton Grace Bible Church Survivors blog; and, of course, the lawsuit against Martin. Even tweets can result in a defamation lawsuit — for example, Lord Robert Alistair McAlpine sued the wife of the speaker of the House of Commons in the U.K., for a tweet he alleged to be libelous.

Bloggers can protect themselves by getting their *facts* straight. Because statements of *opinion* are not generally actionable (but may be, if they imply provable assertions of fact; example: "I think he must be a drunk"), bloggers who clarify that their opinions are truly just opinions, build protection. As the court explained in *Welch IV*, a statement "phrased in terms of apparency, cautiously or otherwise" is likely to be understood by readers as opinion. Thus, statements prefaced by "my sense" or "my opinion" are likely to be understood as opinions.

For the legal blogger, hyperlinking to a case may lower risks of defamation by providing supporting facts for blogger "opinions" implying the existence of facts, and by providing a "fair report privilege."

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Invasion of privacy. California's right of privacy ur-case is *Melvin v. Reid*, 112 Cal. App. 285 (1931), in which a woman's former "life of shame" was publicized in the movie "The Red Kimono" — after she had changed her name to put her sordid past behind her. The right of privacy — sometimes called "the right to be let alone" — should not become a problem for legal bloggers who hew close to the text of published cases.

Copyright infringement. The ease with which one can copy photos from the internet and paste them into a blog creates copyright infringement risks.

Our blog avoids this pitfall several ways. We use old photographs and prints in the public domain. If we are concerned about an infringement issue, we may give a link, rather than reproduce the image. If the image is current, we will use a thumbnail reproduction and low resolution.

So what did we do about the one post I described as a "cause for concern"? We took it down. End of problem.

Also, we have chosen not to advertise on our blog, but rather to keep it educational. This supports a "fair use defense" if a copyright infringement issue ever arises. Of course, if a blogger receives a "takedown notice," the blogger can respond by taking down an image, limiting copyright damages to actual damages that can be proven. We have never encountered a copyright problem.

Bad legal advice. Legal bloggers worry about being sued for practicing law in foreign jurisdictions by readers who claim they relied to their detriment on bad legal advice in a blog.

For those reasons, many legal blogs contain disclaimers intended to avoid establishing an attorney-client relationship. Our disclaimer states:

"The content contained and opinions expressed in this blog are solely those of the author, and do not represent those of the author's employer or of any association to which the author belongs. Because this blog contains content and opinions related to legal topics, it would be unreasonable for the reader to rely upon the blog for legal advice. The purpose of this blog is to educate, not to provide legal advice. The reader should rely upon the advice of counsel of embarking on any course of action or inaction involving legal matters."

When answering email inquiries from readers, we admonish we are not acting as their attorneys, and they should seek their own legal advice.

Information created by third parties. Many blogs are interactive, and users add their own comments. Those comments could be defamatory or invade privacy. However, the blogger has a valuable protection in 47 U.S.C. Section 230. Those provisions, derived from the Communications Decency Act, generally protect against plaintiffs holding Internet service providers legally responsible for information third parties created. Provided the blogger who hosts the site is acting in good faith, those legal protections provide the blogger qua internet service provider significant protection from liability exposure due to the junk readers may add to the blogger's site. Thus, while bloggers are responsible for the creation and development of their own content, they do not have the responsibility of traditional publishers to curate content provided by third parties. "At its core, [Section] 230 bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content.'" *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014).

So what did we do about the one post I described as a "cause for concern"? We took it down. End of problem. We simply didn't want to deal with a barrister in the U.K., where libel law is more pro-plaintiff than here, and where the prevailing party recovers attorney fees.

Recommended for further reading: Frontier Electronic Foundation's online "Legal Guide for Bloggers," and Professor Eric E. Johnson's Blog Law Blog. One last tip: bloggers can also purchase insurance coverage.

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