

# Challenges For The Entertainment Attorney In A “Do It Yourself” World

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## Philip Lyon

grew up in South Arkansas in the 50's and early 60's. He graduated from University of Arkansas School of Law, with Honors, in 1967 where he twice served as Editor-In-Chief of the Arkansas Law Review. He practiced first Environmental Law and later Labor Law until the mid '80s when he left his position as Managing Partner of a 65-member firm in Little Rock to help found Jack, Lyon & Jones. In 1987 he started up a Nashville practice. In 2007 he and his son Bruce Phillips spun off the JLJ Nashville office and formed Lyon & Phillips, PLLC. He is a charter inductee as a Fellow into the College of Labor & Employment Lawyers, served as Management Chair of the Ethics Committee of the ABA Labor and Employment Section and currently serves on the Governing Board of the ABA Forum on the Entertainment & Sports Industries as Director of Recruitment, Membership and Promotion. He has consistently been listed in Best Lawyers In America and as a Mid-South Super Lawyer. This article is based on a paper presented to the Nashville Bar Association, The Changing Role of Entertainment Lawyers in Today's Climate. The author wants to thank law clerk Cameron Caldwell, (J.D. expected May 2010, Florida Coastal School of Law) and Jordan Vandiver, Esq. of Lyon & Phillips, PLLC for their exhaustive research and assistance in the preparation of this paper. email: [pklyon@lyonandphillips.com](mailto:pklyon@lyonandphillips.com), [www.lyonandphillips.com](http://www.lyonandphillips.com). © Philip K. Lyon 2010..

## Philip K. Lyon

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### Are you on the cutting edge or cutting your own throat?

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**WILLIAM B. GOLDCHAIN** (Billy Bob) wakes up eager and excited to begin a new day. He (I use the male reference based on my thoughts that a female attorney would be more savvy) cleans up, gets dressed, and hops in his sports car to drive to work. He is in such a good mood on his way to the firm, Bigshot & Blowhard, PLLC (B&B), that he decides to let the rest of the world know just how happy he is by updating his status on his Facebook and Twitter profiles using his iPhone. (Billy Bob is actually breaking a new Tennessee law prohibiting texting and driving. See Tenn. Code Ann. §55-8-136.) Upon arriving at work, he flicks on his computer screen and heads straight for his Gmail account. Billy Bob has set up his office email account to automatically forward all mail to his Gmail account, and he is quite pleased with himself, knowing that he is saving time by eliminating the burden of checking two inboxes. He sends an email to a client informing her that he is going to post an Engagement Letter on his Google Docs account and give the client sole access to view and edit the document to meet her needs. Next, Billy Bob shoots over to the LexisNexis Web site to spend a couple of hours researching before heading to lunch. Driving back from lunch, Billy Bob almost forgets to let everybody know how full he is, so he pulls

out his iPhone and tweets and updates his status as he pulls into the B&B parking lot. Now back at his computer, Billy Bob logs on to the law firm's Facebook account. He has been put in charge of creating and maintaining the firm's Facebook account by his supervising attorney, James "Platinum Plus" Carouser. He checks out some wall posts, ignores some event invitations, and then begins searching for unsigned artists with large fanbases that might be interested in being represented by Billy Bob's entertainment law firm. He finds a couple of unsigned artists in the area and sends them friend requests before signing out. The rest of the day is spent revising some agreements and researching a few issues. He then totals up his hours, (rounding up of course, so as to meet B&B's eight-hour minimum), and sends a couple of text messages to some friends as he drives to the first of four showcases that night after a productive day. Billy Bob thinks that he is utilizing today's technology in a way that can maximize his potential as an attorney, and he very well may be, but he is also exposing himself, and the law firm he works for, to numerous ethical violations.

**HEAD IN THE "CLOUDS"** • Facebook, Twitter, YouTube, and Google Docs are examples of services that are commonly referred to today as cloud computing services. "Cloud computing services store a user's data — messages, photos, documents or any other kind of information — on a computer that is not under the user's control." Edward A. Adams, *Legal Ethics of Facebook, Twitter & Cloud Computing*, ABA Journal, Aug. 2, 2009, [http://www.abajournal.com/news/legal\\_ethics\\_of\\_facebook\\_twitter\\_cloud\\_computing\\_abachicago](http://www.abajournal.com/news/legal_ethics_of_facebook_twitter_cloud_computing_abachicago). Services such as Facebook and Twitter started out as social networks aimed at teens and college students, but have quickly evolved into mass communication networks used by some of the largest companies and law firms in the world to contact current clients, advertise, and even solicit employ-

ment opportunities. A cloud computing service such as Facebook is unparalleled because it gives a person access to a network of over 250 million users worldwide without charge. Notwithstanding the networking ability of these Web sites, tech savvy, multi-tasking lawyers who use cloud computing services can expose themselves to an array of ethical issues.

For example, Rule 1.6 of the TRPC governs the confidentiality of information in the client-lawyer relationship (*see* MRPC 1.6. Please note that each reference to the Tennessee Rules of Professional Conduct (TRPC) is followed by a parenthetical citation to the applicable 2009 Model Rule of Professional Conduct (MRPC).). Comment 18 under this rule states, "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or by other persons who are participating in the representation of the client or who are subject to the lawyer's supervision" (*see* MRPC 1.6 cmt. 16). Comment 19 under the same rule states, "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients" (*see* MRPC 1.6 cmt. 17). In the example above, Billy Bob used Google Docs to allow a client to instantly see a proposed Engagement Letter and also make any changes that she might see fit. However, if Billy Bob had read the fine print, he probably would not have posted such sensitive information on that site. Google Docs is a fine Web site that promotes the backing up of users' uploaded files instantly, and also the sharing of various documents, spreadsheets, and presentations to a limited amount of people or to anyone who can log on to the Internet. However, "the terms of service say Google does not guarantee any defects in the product will be fixed, and the company reserves the right to disable a user's account without providing copies of the

data the user has stored on Google's computers." Adams, *supra*. Billy Bob may have thought that he took "reasonable precautions" in protecting the information from being viewed by "unintended recipients," but after taking the terms of service into consideration, posting this confidential information to the Web site may not have been so reasonable. In effect, a software malfunction or hacker breach could turn what seemed like the perfect use of present-day technology into an ethical nightmare.

Forwarding email from an office account to a personal, third-party email account can also put an attorney at risk for ethics violations. Though the risk may not seem as great, an attorney that chooses to engage in this activity is allowing confidential information to be stored on a server that they have no control over. A judge may be more reluctant to impose sanctions on an attorney that leaks confidential information due to an office server being hacked, as compared to an attorney whose Yahoo mail account malfunctioned and forwarded confidential emails to his entire address book and then on to the address books of all his friends and so on. Even though keeping up with two inboxes may seem like the most daunting of tasks to some, an attorney is better off leaving his work in the office... office server, that is.

#### **MORE PROFILES, MORE PROBLEMS •**

Massive social networks such as Facebook and Twitter are not only being used by individuals to create personal profiles, but lawyers and law firms are also using these networks to create profiles in which they can interact with a variety of people or other firms at any given time. There are many useful tools a social network presents to a member of the legal profession, such as being able to invite large groups of people to social or charity events hosted by the lawyer's firm, keep people updated on areas of law that are handled by the attorney or the attorney's firm, and even allow past clients to comment on how well a particular lawyer handled their

situation. Although the benefits seem endless, these legal professionals are throwing themselves into an ethical arena that has not yet been specifically addressed by the Rules of Professional Conduct.

According to Rule 7.2(a) of the TRPC, "[A] lawyer may advertise professional services or seek referrals through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, world wide web site, or other forms of communication not directed to specifically identified recipients" (*see* MRPC 7.2). Rule 7.2(b) of the TRPC adds, "Within three days after the publication, distribution, or dispatch of an advertisement or a communication not directed to a specifically identified recipient, the lawyer shall file a copy of the advertisement or communication with the Board of Professional Responsibility..." (*See* MRPC 7.2. The Model Rule, however, does not contain a specific three-day requirement.). The fact that lawyers are creating profiles on social networks through which they can directly and indirectly communicate with people presents an interesting ethical question: Is a lawyer or law firm's social network profile subject to the Rules of Professional Conduct, specifically in regards to advertising? The answer seems to be yes; but should it be? An attorney or law firm's social network profile is serving little purpose other than to make his or her presence as a member of the legal profession known to users of that particular network. Therefore, that attorney should be subject to the Rules of Professional Conduct, and be required to file a copy of the profile to the Board of Professional Responsibility. If these Rules do in fact apply to online profiles, avid Facebook users and "tweeters" in the legal field could find themselves with a burdensome and costly habit, as Rule 7.2(b) (2) requires communications that are changed in any material respect be filed within three days of publication (*see* MRPC 7.2).

A bigger concern for lawyers and social networking is the solicitation of professional employ-

ment to specifically identified recipients. Rule 7.3(a) of the TRPC governs this issue and states, “[i]f a significant motive for the solicitation is the lawyer’s pecuniary gain, a lawyer shall not solicit professional employment by in-person, live telephone, or real-time electronic contact from a prospective client who has not initiated the contact with the lawyer and with whom the lawyer has no family or prior professional relationship” (*see* MRPC 7.3(a)). Rule 7.3(c)(1) allows this type of solicitation only if it includes the words “THIS IS AN ADVERTISE-  
MENT” (*see* MRPC 7.3(c)). In the above example, Billy Bob works at an entertainment law firm, and while maintaining the firm profile, he sends friend requests to unsigned artists.

Considering the fact that it is most likely impossible to include the words laid out in Rule 7.3(c)(1) in the friend request, Billy Bob is soliciting legal representation to specific people that

he feels may be in need of legal services without meeting the conditions of the Rule. Therefore, every time he clicks to add a friend, he is potentially violating the Rule. I wonder if this construction of the Rule would pass constitutional muster? Probably not.

With the growing trend in the use of these social networks, the problem could get worse long before it gets better. In the ABA’s recent Legal Technology Survey Report, 43 percent of lawyers surveyed admitted to participating in an online social network, nearly triple the 15 percent that answered affirmatively the prior year. Law firms jumped up to 12 percent from four percent in 2008. Reginald Davis, *Getting Personal*, ABA Journal, August 2009 Issue, [http://www.abajournal.com/magazine/getting\\_personal](http://www.abajournal.com/magazine/getting_personal). Partners and supervising attorneys are also at risk of ethical violations, even if they do not participate in an online social network. Rule 5.1 of the TRPC holds these attorneys responsible

for making “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct” (*see* MRPC 5.1). A solution to this problem is for a firm to implement a policy that allows attorneys to have personal profiles on these social networks, but they may not give any legal advice through the network, or list that they are in fact a working attorney. (Could this lead to claims of misleading communications?) The number of firms incorporating these policies has also increased within the last year. Davis, *supra*. If a supervising attorney or partner knows that an associate is violating a Rule and fails to take “reason-

able remedial action,” then they will be responsible for the attorney’s violation. Years ago, the TRPC even required an attorney to obtain the client’s permission to be able to communicate through email. This rule

was eliminated as email became one of the more common forms of communication. Thus far, the ABA has declined to incorporate online social networks into the explicit language of the Model Rules of Professional Conduct, from which the TRPC is modeled, but they may be forced to act if attorneys or law firms continue taking advantage of the ease and effectiveness of contacting potential clients through these networks.

**IT’S ALL UP TO YOU** • The average lawyer of today is turning into a one-man/one-woman legal team. An efficient attorney can answer a client’s question in a matter of minutes, and can do so without even moving from behind the desk. Pulling a client’s file used to require a secretary taking a trip to the file room, or maybe even storage, but that process is near extinction. With a few clicks of the mouse, an attorney can search the local office server and have a client’s file pulled up on his com-

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puter in seconds. In the amount of time it takes a lawyer to get to a law library or to explain a factual scenario to a law clerk, an attorney proficient in LexisNexis could have found five relevant case rulings on a particular issue. Face-to-face meetings and phone calls are becoming unnecessary due to the ease and document-sharing capabilities of email, not to mention the fact that most cell phones give users access to their email accounts in the palms of their hands. For the everyday business person, the speed and convenience of new technology is a Godsend. However, from an attorney's standpoint, that same heavenly speed and convenience can result in costly mistakes and liability.

In the not-so-distant past, when an attorney needed to communicate with a client in a manner other than an in-person meeting or by telephone, it was accomplished through a letter. Typically, the attorney would explain to his secretary what needed to be said, and it would be the secretary's job to draft the letter. The attorney would then proof-read the letter and send it back to the secretary with changes that needed to be made. This process could occur two or three times before the attorney was finally satisfied. Although this procedure may seem tedious and unnecessary, it ensured clarity and guaranteed a well-written and error-free correspondence. The current system that lawyers seem to be using involves brief emails that often lack the proper substance and precision. These emails can be riddled with mistakes due to a client's need for instant feedback, as well as a lack of time for proof-reading and editing by someone other than the attorney.

A more costly mistake that is much easier to make given the present-day mode of operations is sending a confidential email to the wrong person, or even worse, to opposing counsel. In the past, it

was much more difficult for this mistake to occur. A secretary would have to look up the wrong name, print the wrong address on the envelope, and mail the letter without ever realizing throughout the entire process that it was being sent to the incorrect person. An attorney could expect this to happen once or twice in his or her entire career, at most. However, through the use of email, this mistake could occur once or twice a week with ease. For example, suppose that Billy Bob has a new client named Dave Smith, and Dave's email address is DaveSmith@gmail.com. Whenever he wants to email Dave, he simply clicks in the address box, presses the letter "D" on the keyboard, and Dave's email address is always the first one to pop up. After months of communication with Dave through

email, Billy Bob files a complaint on his behalf, and is later contacted through email by the opposing party's attorney, Dan Jones, whose email address is DanJones@bigfirm.com. The next time that Billy Bob emails his client, Dave

Smith's email address will no longer be the first address that pops up when he presses "D" on the keyboard, it will be Dan Jones' address. This potential mistake may not be so difficult to catch while sitting in front of a computer, but what if Billy Bob is trying to compose this email on his SmartPhone...in traffic? Not only is he violating a newly enacted law in the State of Tennessee prohibiting texting while driving, but he is significantly increasing the likelihood of a breach in client confidentiality.

Email is not the only advancement in technology that is allowing the modern attorney to accomplish with a "click" what was once required by a staff of employees. In the past, keeping up with a busy attorney's schedule could be a grueling task for the most capable of secretaries. Now, however, programs such as Microsoft Outlook allow a lawyer

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to read an email, and then copy information from that email directly into a calendar located within the same program. The calendar will then remind the attorney through his computer or SmartPhone about the upcoming event or meeting. Not only are tools like Outlook being utilized by attorneys to keep track of client meetings and trials, but other programs such as Abacus Law can be used to organize a firm's docket calendar. Medium to large firms used to employ docket clerks, whose sole responsibility was maintaining the docket calendar for the firm's attorneys, and also issuing reminders of appearance dates in advance. However, these positions are considered extinct, as the one-time fee of purchasing docket calendar software and installing it on the firm's computers is obviously a much more attractive expense when compared to the salary of a full-time employee. Once again, these programs can be extremely useful, but they also leave room for small disasters. Whereas an attorney and secretary used to communicate back-and-forth regarding the attorney's schedule, present-day attorneys are often shouldering this burden on their own, in effect disregarding the wise adage "Two heads are better than one." A crash in the docket calendar software could lead to a missed court date, exposing the attorney to malpractice liability or sanctions. This growing trend in the use of technology is steering today's lawyer into running a one-person show, which can lead to higher efficiency, but can also lead to a reputation as an error-prone attorney.

### **THE OLD DOG MUST LEARN NEW TRICKS** •

Not only is the ever-changing present legal and technical environment creating more ways for today's lawyer to subject him- or herself to ethical implications, but a lawyer not utilizing new technology can also find him- or herself in an ethical dilemma. Lawyers who do not take advantage of online resources and new technology are potentially at a greater risk of liability for legal malpractice. "Legal malpractice is typically

defined as a failure to exercise the degree of skill or knowledge ordinarily possessed by an average member of the legal profession in the same or similar circumstances." Diane Karpman, *Not Using New Technology: Ethical and Liability Risks?*, GP Solo, Vol. 20 No. 4, June 2003, <http://www.abanet.org/gen-practice/magazine/2003/jun/keepup.html>. An attorney fresh out of law school would be considered a below average attorney, especially compared to a lawyer who's been practicing for 30 years. The veteran practitioner uses law books to research cases, while the inexperienced attorney conducts research using online tools like LexisNexis or Westlaw. The ink on the young lawyer's diploma may not even be dry yet, but given today's legal environment and resources, the experienced attorney who refuses to take advantage of current technology is at a much higher risk of legal malpractice than the tech-savvy rookie, as well as being considered "out of touch" by today's clients. This is true for a few reasons.

### **Competency**

Even though the Model Rules hold a lawyer to the lowest level of competency, that bar should be viewed as steadily rising. New technology has given attorneys access to and the ability to find more information, almost instantly. Karpman, *supra*. The minimum competency level of attorneys will continue to rise as access to information becomes easier, which is why it is a lawyer's duty to keep up with current technology and to be able to utilize these tools for their clients' benefit.

### **Standard Of Care**

The standard of care that is expected of a lawyer is best measured by looking at the abilities of the average attorney and determining whether the level of competency that the average lawyer exhibits has been met. "Falling below the average, typical, ordinary standard in the community opens the door to charges of professional negligence." *Id.* Lawyers being reprimanded for failing to conduct

reasonable research is a legal malpractice issue that could take on a whole new meaning, given the current resources that are available. For example, in 2003, the State of California began using LexisNexis as the official publisher of the state's case law. In return, Lexis posted all state opinions since 1850 on a Web site which can be viewed by anyone (even lawyers), free of charge. This makes it very difficult for a lawyer practicing in California to argue unreasonable expense as an excuse to not including a critical ruling in a brief. *Id.* If other states follow this example, technologically disinclined attorneys across the nation will be forced to learn the necessary technical skills, or subject themselves to the possibility of legal malpractice.

### **Excessive Fees**

The average lawyer in the present legal community has the ability to find information and conduct research in a fraction of the time that it took the average lawyer 20 years ago. "If the use of computer research engines makes the average attorney in the community capable of researching a particular issue in 1.5 hours, while without the computer it takes an attorney six hours to do the work, the potential for litigation with clients respecting fees increases significantly." *Id.* If these two attorneys bill at the same hourly rate, the attorney not using the computer will have charged his client four times the amount the average attorney billed their client. An attorney need not throw away the books alto-

gether, but that attorney must be able to find the same information that other attorneys are locating in a fraction of the time through the use of modern technology.

**CONCLUSION** • A lawyer practicing in today's legal environment must be quicker and more proficient than ever before. Current technology has given clients access to resources that were only available to attorneys in the past, and because of this, attorneys are expected to accomplish tasks and resolve issues at the drop of the proverbial hat. Although these issues apply to attorneys in all areas of law, entertainment lawyers are most likely feeling the heaviest effect. When the majority of your clients spend most of their time on tour or on location, they are going to expect you to be able to communicate with them by any means necessary. These higher expectations are leading lawyers to new on-line services in order to be able to communicate with clients faster and easier, as well as being able to network without leaving the comfort of your office. But attorneys beware, as a simple hacker breach or software malfunction may land you in an ethical quandary, and if this happens, you won't be able to click the "back" button.

Welcome to the Brave New World. Fasten your seat belt because the ride may be fun and challenging, but also fraught with danger, liability, and heartache

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