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Admission of Internet Evidence

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I. INTRODUCTION

Businesses, governments, employers, ordinary citizens, and even attorneys are becoming increasingly creative in how they use social media. This paper provides an overview of some of the potential ethical, legal, and evidentiary issues implicated when entities and their attorneys attempt to use social media for gain in dealing with their employees and litigation adversaries.

II. THE DISCIPLINARY RULES AND SELF-HELP DISCOVERY

Social networks like Facebook, Twitter, LinkedIn, and others represent new opportunities for attorneys to conduct discovery cheaply and occasionally lead to exceptional evidentiary finds. At the same time, the use of "self-help" discovery—typically without notice to other parties—can implicate an attorney's ethical obligations and may even brush up against statutory limits governing the review of electronic information. Moreover, independently discovered social media evidence must still be authenticated and proved up if the attorney wishes to admit it into evidence (as opposed to using it simply to educate other formal discovery requests), which can create unique challenges if the origin, authenticity, or connection to the party is in doubt.

A. Early Developments

Blogs were the first example of social media to emerge as fertile ground for informal discovery.[1] Some examples of potential uses of blogs or more "modern" forms of social media for

[1] *See, e.g., Goupil v. Cattell*, 2007 WL 1041117 (D.N.H. 2007) (slip copy) (defendant moving to set aside criminal conviction after discovering that the jury foreman had been composing a blog before, during, and after the trial that included the foreman's negative impression of criminal defendants); *Mark Hanby Ministries, Inc. v. Lubet*, 2007 WL 1004169, *6-8 (E.D. Tenn. 2007) (slip copy) (analyzing whether blog postings, among other things, provided sufficient basis for exercise of jurisdiction); *Healix Infusion Therapy, Inc. v. Helix Health LLC,* 2008 WL 1883546 (S.D. Tex. April 25, 2008) (slip copy) (same); *Pitbull Productions, Inc. v. Universal Netmedia, Inc.,* 2008 WL 1700196, *6 (S.D.N.Y. April 4, 2008) (slip copy) (same); *cf. Lorraine v. Markel American Ins. Co.*, 2007 WL 1300739, *39-55 (D. Md. 2007) (analyzing a variety of hearsay exceptions as they relate to blogs and other electronically stored utterances).

informal discovery purposes include monitoring an opposing party's posts for useful tidbits of information or searching for potential witnesses to support a case.[2]

In this context, questions under Rules 4.2 and 4.3 of the Model Rules of Professional Conduct (the "Model Rules") and Rules 4.02 and 4.03 of the Texas Disciplinary Rules of Professional Conduct first began to arise. In particular, the use of blogs by litigators raised the issue of whether blogging constituted a "communication" for purposes of rules governing communications with represented and unrepresented parties.

B. The Model Rules and the Texas Rules

According to the American Bar Association, 49 states have rules of professional conduct relating to lawyers that follow the format of the Model Rules.[3] Accordingly, analysis under the Model Rules serves as a useful guideline in addressing questions of lawyers' ethical responsibilities.[4]

The Model Rules and Texas Rules include two rules that generally govern communications by lawyers with persons other than their clients or potential clients. The first, Model Rule 4.2 and Texas Rule 4.02, addresses communication with persons who are represented by counsel, such as adverse parties in litigation:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer

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[2] *See, e.g., X17, Inc. v. Lavandeira*, 2007 WL 790061, *4 (C.D. Cal. 2007) (not reported in F.Supp.2d) (excluding as hearsay blog entries identifying defendant as the source of allegedly infringing photographs); *Cingular Wireless, LLC v. Hispanic Solutions, Inc.*, 2006 WL 3490802, *1 (N.D. Ga. 2006.) (slip copy) (plaintiff relying on "certain 'blog' chat" to support allegations that defendant made unsolicited phone calls to the mobile phones of plaintiff's customers); *McCabe v. Basham*, 450 F.Supp.2d 916, 924 (N.D. Iowa 2006) (in suit alleging nationwide conspiracy to suppress dissent, plaintiffs moving court to consider an anonymous blog entry from someone claiming the President shot him the bird at a rally in Pennsylvania).

[3] http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html. According to the ABA, only California has not adopted the format of the Model Rules.

[4] Despite the adoption of the form of the Model Rules and their comments in most states, there may be some variation on a state-by-state basis regarding any particular rule or comment. Therefore, the applicable state's version of the rules of professional conduct should be consulted when reviewing questions pertaining to any particular situation.

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