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GETTING FROM INTERNET TO EVIDENCE

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I. INTRODUCTION

Businesses, governments, employers, ordinary citizens, and even attorneys are becoming ever more 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.[1]

II. THE DISCIPLINARY RULES AND SELF-HELP DISCOVERY

Social networks like Facebook, Twitter, LinkedIn, and others, and online forums all represent new opportunities for attorneys to conduct discovery cheaply. However, the use of "self-help" discovery instead of the formal discovery process could implicate an attorney's ethical obligations.

A. Early Developments

Blogs were the first example of social media to emerge as fertile ground for informal discovery.[2] Some examples of potential uses of blogs or more "modern" forms of social media for informal discovery purposes include monitoring an opposing party's posts for useful tidbits of information or searching for potential witnesses to support a case.[3]

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

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[1] The author is an employment attorney and thus approaches most legal issues from the point of view of an employer's relationship with an employee, governmental agency, judge, or jury.

[2] *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).

[3] *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).

arose. In particular, the use of blogs by litigators raised the issue of whether blogging constituted a "communication" for purposes of the Model Rules and Texas Rules and, if so, whether that communication runs afoul of the rules for communicating with a represented or unrepresented party.

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.[4] Accordingly, analysis under the Model Rules serves as a useful guideline in addressing questions of lawyers' ethical responsibilities.[5]

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 in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[6]

The second, Model Rule 4.3 and Texas Rule 4.03, addresses communication with persons who are not represented by counsel:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a

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[4] 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.

[5] 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.

[6] MODEL R. OF PROF. CONDUCT 4.2; *see also,* TEX. DISCIPLINARY R. PROF. CONDUCT 4.02(a) ("In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

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