SOCIAL MEDIA CONCERNS FOR LITIGATORS:
How Facebook, Twitter, LinkedIn and other social networking sites can impact your case

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- Board Member, Austin Symphony BATS, 2003-2006
- Board Member, Austin Symphony Orchestra, 2006-present

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- Board Member/Executive Committee, Austin Bar Association, 2004-2006
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I. INTRODUCTION

A husband's avatar[1] is caught cuddling another woman's avatar online in the virtual reality game, Second Life. His real-life wife files for divorce as a result.[2] A political figure alleges invasion of privacy and intentional infliction of emotional distress after finding out that his former lover posted intimate details about their sexual exploits on her blog.[3] A juror blogs about jury duty proclaiming, "now I get to listen to the local riff-raff try and convince me of their innocence."[4]

As any teenager can tell you, social networking sites[5] are virtual treasure troves of information. As some of your more techno-savvy friends can tell you, blogging and Twitter can help anyone from a rock band to a Fortune 500 company market its brand effectively. As any juror can tell you, sitting in the box for days on end can be mighty dull, and it is difficult to comply with a judge's admonishment to avoid discussing the case and engaging in self-education. This paper is provides a brief overview of some of the issues related to social media by attorneys and jurors, whether for discovery, juror conduct/research, or firm marketing.

The online world now permeates the courtroom and social media affects everything from jury selection to the trial itself. For example, the number of Facebook users has grown 198 percent in the past year, while time spent on Facebook per user is more than an hour a week, or a 240 percent increase in a year's time. According to the social media statistics site Compete.com, Twitter had 54 million visits in January 2009 alone. The advent of sites like MySpace, Facebook, Twitter, virtual reality games like Second Life, plus the ever-proliferating blogosphere has colored legal issues and changed attorney trial tactics and responsibilities. With this in mind, trial lawyers should have a grasp of how social media can affect a case from its early stages to its conclusion.

During jury selection, social media may be used to verify juror answers to questionnaires or to get a clearer picture of juror beliefs. Such information can be used to strike jurors, to select jurors, or to appeal to them during opening and closing arguments. During trial, social media can affect juror conduct because of the ease of internet access, and the inclination some jurors may have to do independent research or to share their jury experiences with the public on their blogs or other social networking sites. The challenge here is finding and challenging such behaviors.

Evidentiary issues involving social media in informal discovery include whether or not monitoring of or participation in social media sites violates the Texas Disciplinary Rules of Professional Conduct (the "Rules") by constituting communication with an opposing party without his or her attorney present.

Creative lawyers seeking to maximize their personal brand often create blogs and utilize Twitter extensively as a way to communicate with the general public, as well as targeted audiences. Some attorneys actively participate in chat rooms that focus on a particular area of interest, such as employment rights or certain types of accidents. Ensuring that attorney communications stay within the bounds of the Rules, as well as other states' rules, while still creating a useful communication tool, can be tricky.

II. SOCIAL MEDIA AND JURY ISSUES

A. Social Media in Jury Selection and Voir Dire

Social media has become increasingly relevant to jury instruction and can assist attorneys in "picking the right jurors, bouncing potential jurors and even

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[1] An avatar is a computer user's representation of himself/herself or an alter ego. In this instance, the avatar is a three dimensional representation in a video game.

[2] *Second Life Affair Ends in Divorce*, CNN.com/Europe, Nov. 14, 2008, http://www.cnn.com/2008/WORLD/europe/11/14/second.life.divorce/index.html

[3] *Steinbuch v. Cutler*, 463 F. Supp. 2d 4 (D.D.C. 2006).

[4] *State v. Goupil*, 154 N.H. 208, 214 (2006).

[5] Social media has been defined as "primarily Internet – and mobile-based tools for sharing and discussing information… The term most often refers to activities that integrate technology, telecommunications and social interaction, and the construction of words, pictures, videos and audio." Marc R. Packer, *Corporate Governance Feature: Using Social Media Technology in Proxy Solicitations*, 13 No. 5 M&A Law. 12 (2009) (quoting *Social Media vs. Social Technology: Refining Definitions*, Posting of Ken Fischer to Web 2.0 Blog – Discovering Innovation Opportunities Using Social Media, http://web20blog.org/2009/01/04/social-media-vs-social-technology/ (Jan. 4, 2009)). Wikipedia defines social media as inclusive of blogs, Internet forums, micro-blogs, of which Twitter is currently the most popular, social networking services, such as Facebook, MySpace and LinkedIn, and file-sharing web sites like YouTube. *Id.* (citing *Social Media*, Wikipedia, http://en.wikipedia.org/wiki/Social_media (last visited Aug. 11, 2009)). *See also* Joe Laratro, *Social Medi: The Cost-Cutting, Business-Building Opportunity*, 09-5 Partner's Rep. 1 (2009) (citing *Social Media*, Wikipedia, http://en.wikipedia.org/wiki/Social_media).

influencing jurors through the trial and in closing arguments."[6]

Courts have already begun using internet selection procedures to choose jurors and to streamline the jury selection process.[7] In many states, including Texas, potential jurors are allowed to respond to questionnaires via the internet. This is the first step in what is becoming an online process of choosing jurors. Jury consultants and trial lawyers alike are engaging in background checks of potential jurors via the internet. Many are even turning to private investigators for help sleuthing juror backgrounds. Private investigators, in turn, have started niche practices "offering internet jury research and 'personality profiling' of jurors".[8]

It is often not enough to simply have jurors fill out voir dire questionnaires. Trial lawyers find that jurors often fail to answer the questionnaires honestly.[9] Such was the case in the federal terrorism trial against Jose Padilla. A team of defense lawyers learned that one of the jurors lied on her jury questionnaire. She claimed to have no personal experience in the criminal system; however, an internet search revealed that she was actually under investigation for malfeasance.[10]

With incidents like this in mind, trial lawyers are beginning to consider internet background research par for the course during jury selection. In fact, many "state laws explicitly state that the reason for releasing jury lists prior to voir dire is to permit counsel to undertake pretrial investigation of prospective jurors."[11]

Internet jury research is not just an ounce of prevention, or a way to choose jurors to strike when their views are too strong to objectively decide a case. Internet research also offers deeper insight into the twelve minds in the jury box, giving a clearer picture of what moves them, what their values are and what their interests are. This knowledge can be vital when crafting closing arguments. It allows trial lawyers to create arguments that appeal to the members of the jury and that are ultimately more persuasive. Trial lawyers can use this information to provide the best representation for their clients. In fact, the trial lawyer who does not conduct internet research is at a disadvantage when the other side is engaging in such research. Though online research of potential jurors can be a goldmine of information, trial attorneys should be discrete about their use of such research. Trial lawyers should be aware that many jurors are sensitive about their privacy rights. Investigatory techniques that harass and intimidate jurors will be curtailed. A privacy violation can occur even without direct contact.

B. Social Media and Jury Conduct During Selection and Trial

1. Juror Self-Education

Trial lawyers should conduct ongoing internet research to ensure that the jury box does not become tainted by juror misconduct. Attorneys should monitor juror internet activity during trial to ensure that jurors are not engaging in behaviors that have the potential to prejudice the entire jury.

Ease of internet access as the result of innovations in cell phones and other electronic devices has resulted in an increase in jurors who use social media during trials. Because of clear-cut rules of evidence that limit the jury's use of outside information, social media and its ease of access poses a threat to the fairness of the trial process.

One of the main juror misconduct uses of internet access and social media during trials is juror self-education. Despite standard jury instructions prohibiting the use of outside information, the temptation to hop on the internet for an answer to a legal or factual question is often too great for jurors. Cases in which jurors use the internet to self-educate are starting to appear.[12] Instances of juror research can

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[6] Julie Kay, *Vetting Jurors Via MySpace: Social Websites Contain a Trove of Data for Attorneys*, 30 Nat'l. L.J. 1, Col. 1 (2008).

[7] *See Smith v. State*, 149 S.W.3d 667 (Tex. App.—Austin 2004, pet. ref'd) (defendant objected to use of internet for jury selection because he claimed it excluded minorities and people of low socioeconomic levels); *Feagins v. State*, 142 S.W.3d 532, (Tex. App.— Austin 2004, pet. ref'd) (holding that court clerk's practice of allowing potential jurors to respond by internet did not violate defendant's right to a cross-section of community in venire).

[8] Kay, *Vetting*, *supra* at 1.

[9] *Id.*

[10] *Id.*

[11] Jonathan M. Redgrave & Jason J. Stover, *The Information Age, Part II: Juror Investigation on the Internet – Implications for the Trial Lawyer*, 2 Sedona Conf. J. 211 (2001) (citing *United States v. Credit*, 2 M.J. 631, 640 (A.F.C.M.R. 1976)).

[12] *See Rocco v. Yates*, No. CV 08-4604-GHK (JTL), 2009 WL 2095991, at *1 (C.D. Cal Jul. 13, 2009) (affirming trial court's dismissal of juror for conducting online research of the Declaration of Independence and gun size.); *Lister v. Cate*, No. 07cv822 BEN (JMA), 2009 WL 585450 at *1 (S.D. Cal. Mar. 6, 2009) (affirming denial of habeas based on claims that the jury was prejudiced by outside internet research.); *Johnson v. State*, 2004 WL 744409 (Tex. App. – Houston [14th Dist.] April 8, 2004, pet. ref'd) (mem. op.) (stating that a juror was excused from trial for conducting internet research about some of the legal terms used in an aggravated robbery trial.).

result in the dismissal of one or more jurors or even a mistrial. Juror internet research in and of itself does not necessarily have consequences.[13] The research usually must be disclosed to other jurors before a court will find that it has prejudiced the jury and thus dismiss the juror or declare a mistrial.

The steps to determining whether such research has tainted the jury involve a thorough investigation of the internet research. The investigation should directly address the misconduct and not simply reiterate the court's original jury instructions prohibiting outside research.[14] If a court finds that the juror disclosed either the fact or the results of his or her internet research, then the court should voir dire the other jury members to determine the extent of prejudicial influence the actions of the juror in question may have had.[15]

If the information reached other members of the jury, and may have colored their decision-making process, then a judge may declare a mistrial.[16] For instance, in *State v. Scott*, a juror conducted internet research on each defendant and their potential sentences, shared her findings and then held up a piece of paper telling the other members of the jury her verdict before deliberations began. Her actions were found to have prejudiced the jury. The appellate court that reviewed the case found that the problems she raised were "not personal, but pervasive" and that a mistrial should have been declared.[17]

Cases involving internet research have more frequently ended in a juror being excused and a finding that the juror's behavior did not prejudice the jury. Perhaps the trial court in *State v. Hollis* summed it up best when it stated, "*I guess I'm always amazed that no matter what you say, people on juries sometimes want to investigate on their own*."[18] If this is the case, then juror self-education can only become more prevalent as the technology becomes more accessible, intuitive and discrete.

As a preemptive measure, some courts are prohibiting juror use of cell phones and the internet during trial.[19]

2. Juror Blogging/Social Media Posting

Aside from juror self-education, juror misconduct also comes in the form of a juror's publication of his or her jury experiences. Such publication usually occurs on a blog, or a social networking site such as Facebook, MySpace, or Twitter. Attorneys have discovered juror publication after their client has been convicted, and have used this misconduct to appeal the case. Few have been successful thus far; however, the potential for a successful appeal is there. In *State v. Goehring*, a juror posted on his blog that he was highly opinionated and that he dared "anyone to cross him on this verdict." However, the appellate court affirmed the defendant's conviction, determining that the juror's comments did not reveal his leanings in the pre-verdict blog post. Instead, his comments were vague and referred to his duty not to disclose information about the trial.[20]

In *State v. Goupil* a juror blogged that he had feelings of resentment about serving on a jury. His blog stated, "Lucky me, I have Jury Duty! Like my life doesn't already have enough civic participation in it, now I get to listen to the local riff-raff try and convince me of their innocence."[21] The defendant in the case appealed his conviction complaining that he was

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[13] *See Ramos v. Shearer*, No. G038135, 2008 WL 2445485, at *1 (Cal. App. June 8, 2008) (finding no judicial misconduct when a juror researched how long the plaintiff's attorney had been at bar. Court could not identify how this may have prejudiced the jury); *State v. Hollis*, No. 16-08-10, 2009 WL 162466, at *1 (Ohio App. Jan. 26, 2009) (finding no prejudicial error when juror looked for the definition of restraint on the internet); *Rojem v. State*, 207 P.3d 385, (Okla. Crim. App. 2009) (finding that the trial court did not abuse its discretion when it did not excuse a juror who admitted to researching the case beforehand on the internet. Defendant could not prove that the juror could not set aside her prior knowledge and fairly consider the case).

[14] *See United States v. Bristol-Martir*, 570 F.3d 29 (1st Cir. 2009) (finding that a trial court abused its discretion by engaging in inadequate investigation of juror misconduct); *People v. Hill*, No. F054334, 2009 WL 1961667, at *1 (Cal. App. 2009) (determining that trial court erred in not granting an evidentiary hearing to determine if jurors who brought in internet research articles prejudiced the jury).

[15] *See Wardlaw v. State*, 971 A.2d 331 (Md. Ct. Spec. App. 2009) (finding that a trial court abused its discretion when it decided not to voir dire jurors to determine if they could reach an impartial verdict after one of the jurors researched a psychological disorder and disclosed her findings).

[16] *State v. Scott*, No. 04-02-0153, 2009 WL 2136273, at *1 (N.J. Super. App. Div. July 20, 2009) (deciding that the trial court judge should have declared a mistrial instead of excusing a juror who conducted internet research and shared it with others).

[17] *Id.* at *10.

[18] *Hollis*, 2009 WL 162466 at *10.

[19] Tresa Baldas, *For Jurors in Michigan, No Tweeting (Or Texting, Or Googling) Allowed*, Nat'l. L.J. Online (July 1, 2009)http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431952628&For_jurors_in_Michigan_no_tweeting_or_texting_or_Googling_allowed_&slreturn=1.

[20] No. OT-06-023, 2007 WL 3227386, at *6 (Ohio App. Nov. 2, 2007).

[21] 154 N.H. 208, 214 (2006).

deprived of his right to exercise a peremptory challenge due to the late discovery of the juror's blog. However, the court affirmed his conviction citing his attorney's failure to make a voir dire inquiry into potential juror internet presence during jury selection. The court determined that the juror's statements did not impact his right to a fair and impartial jury.[22]

Both of the juror comments in question were vague and did not disclose the facts of the case. Also, neither juror definitively discussed his opinions about the guilt or innocence of the defendant. Certainly if the jurors had spoken directly about the case or the jury deliberations, or had expressed a strong opinion about the verdict, a court may have found that such misconduct interfered with the defendant's right to a fair and impartial jury.

III. SOCIAL MEDIA AND EVIDENTIARY/ETHICAL ISSUES

A. Informal Discovery

Social media can be used for both formal and informal discovery. Trial lawyers use social media for informal discovery to monitor both their own client and the opposing party. However, if the lawyer's online monitoring becomes more interactive, and less passive, then the attorney could potentially be violating the Model Rules of Professional Conduct. Forty-seven states, including Texas, have Rules of Professional Conduct that are modeled after the Model Rules of Professional Conduct. The Model Rules of Professional Conduct Rule 4.2 prohibits attorney contact with opposing parties when the opposing party's lawyer is not present.[23]

Trial lawyers can monitor the opposing party's internet presence passively without implicating Rule 4.2 of the Model Rules of Professional Conduct. For example, in State ex. Rel. State Farm Fire & Cas. Co. v. Madden, the Supreme Court of West Virginia held that lawfully observing a represented party's activities that occur in full view of the general public does not violate any ethical rule. 451 S.E. 2d 721, 730 (W. Va. 1994).

However, if an attorney initiates contact via the internet, then that contact may be considered communication outside of the presence of the third party's attorney. There is no current case law on the subject, but logically speaking, passive monitoring is less like "communication." Thus it is not likely to fall under the prohibited communication in Rule 4.2. However, if an attorney became more interactive in his or her monitoring and began posting or openly communicating with the third party, this could fall under the communication prohibited by Rule 4.2.[24] For example, Rule 4.2 would restrict an attorney from sending a friend request to a witness or opposing party's MySpace or Facebook page.

Further, attorneys should tread carefully in conduct with fact witnesses or other related parties. For example, misrepresenting who you are could be considered an ethical violation of Rule 4.01 (false or misleading statements).

B. Introduction/Authentication of Social Media Evidence

Trial attorneys must take care when introducing social media evidence at trial. It is not enough just to approach the bench with a printout from an online social media site. It would be risky to inquire about blogs and other social media within interrogatories and requests for production because "this offers an opposing party the opportunity to delete harmful blog entries."[25] Instead, attorneys should inquire about blogs and social media during deposition. Attorneys should then pull up the blog during deposition and ask the deponent questions related to the origins and authorship of the blog to establish, on the record, that the blog was written by the deponent. Such questions should offer protection from any arguments opposing counsel might make regarding origin, author and access, but the evidence may still be considered hearsay.[26]

For example, an attorney might ask the following questions regarding blogs, which can also be used with some modification to inquire about Twitter feeds, Facebook and MySpace pages, LinkedIn profiles, etc.:

- Do you have a blog?
- Does this blog have a name or title? Please spell it.
- What is its full web address?
- How long have you kept this blog?
- To view your blog, does a person need a password?
- If so, who has one?

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[22] *Id.* at 222.

[23] Model Rules of Prof'l Conduct 4.2.

[24] Jason Boulette & Tanya DeMent, *Ethical Considerations for Blog-Related Discovery*, 12 J. INTERNET L. 1, 16 (2009).

[25] Chris W. McCarty, *Blogging for Evidence*, 43 TENN. B.J. 26, 27 (2007).

[26] *Id.*

- If not, does that mean anyone may view it?
- To post on your blog, do you need a password?
- Does anyone else have your blog's password?
- Has anyone else ever posted on your blog?
- If something is written on your blog, you wrote it, is that correct?

An attorney might also consider bringing a computer with Internet access to a deposition, and ask about the individual's online conduct and social networking during the deposition. Have the witness log into his/her sites and navigate through the site. From an evidentiary perspective, this is no different from having a deponent produce and go through a written diary.

Because the blog is being offered as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," such evidence is considered hearsay.[27] The attorney should introduce the evidence as an exception to hearsay. Since, "[a] statement is not hearsay if … [t]he statement is offered against a party and is … the party's own statement, in either an individual or a representative capacity."[28] If the attorney takes the time "to establish origin, author and access during the defendant's deposition," the evidence can be qualified as the defendant's "own statement" in an "individual" capacity. This clearly qualifies under the exception to hearsay evidence.[29] Other hearsay exceptions under the Federal Rules of Evidence may also apply to social media evidence. Rule 803(21) provides another viable exception. This rule allows for hearsay evidence when it reflects on "the reputation of a person's character among associates or in the community."[30] Even if a court will not accept social media evidence as an exception to hearsay, the attorney can still use the evidence as a prior inconsistent statement to impeach the credibility of a witness.[31]

Introduction of anonymous social media evidence is more problematic. Some courts require plaintiffs to meet a good faith standard when seeking to unmask an anonymous blogger or poster. The good faith standard requires that the plaintiff establish "(1) that they have a legitimate, good faith basis on which to bring the underlying claim, (2) that the indentifying information sought is directly and materially related to their claim, and (3) that the information cannot be obtained from any other source."[32] Other courts require plaintiffs to meet a summary judgment standard.[33]

C. Attorney Conduct

Attorneys who post online updates of their thoughts, whereabouts, and opinions should ensure that they are not only in compliance with ethical rules regarding client information, but that they don't find themselves in dutch with the judge. For example, in a discussion that has received national attention, Galveston judge Hon. Susan Criss has at least once caught a lawyer in a lie on Facebook. This lawyer asked for a continuance because of the death of her father. However, the lawyer had earlier posted a string of status updates on Facebook, detailing her week of drinking, going out and partying. But in court, in front of Criss, she told a completely different story. Lawyers can also cross ethical lines when they complain about clients and opposing counsel, not to mention the judge. Remember that your audience is not just your friends, but your friends' friends, and your adversaries.

D. Examples of Social Media Use in Litigation

Slander and libel:

• An elected town council member and his wife brought a defamation action against four John Doe defendants based on anonymous statements posted on an internet weblog. The court found that the plaintiff must support the defamation claim with facts sufficient to defeat a summary judgment motion before obtaining the identity of the anonymous defendants through the compulsory discovery process and the defamation plaintiff must, to the extent reasonably practicable under the circumstances, undertake efforts to notify the anonymous defendants that they are the

[27] Fed. R. Evid. 801(c).

[28] *Id.* at 28 (citing Fed. R. Evid. 801(d)(2)(A)).

[29] *Id.*

[30] John S. Wilson, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1231 (2007) (quoting Fed. R. Evid. 803(21)).

[31] McCarty, *supra* at 28.

[32] Cydney Tune & Marley Degner, *Blogging and Social Networking: Current Legal Issues*, Practising Law Institute: Information Technology Law Institute 119 (2009).

[33] *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (holding that the good faith standard is insufficiently protective of the First Amendment right to speak anonymously).

subject of a subpoena or application for order of disclosure. Also, the plaintiff must withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the discovery request. When a case arises in the internet context, the plaintiff must post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the allegedly defamatory statement was originally posted. *Doe v. Cahill*, 884 A.2d 451, 33 Media L. Rep. (BNA) 2441 (Del. 2005)

• A corporate defendant, in this defamation suit against an anonymous user of an internet service provider's bulletin board, was not entitled to an order compelling the ISP to honor a subpoena and disclose the user's identity, where the corporation failed to show that the user's comments about the corporation negatively affected the stock price or inhibited its hiring practices. *Dendrite Intern., Inc. v. Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756, 17 I.E.R. Cas. (BNA) 1336, 29 Media L. Rep. (BNA) 2265 (App. Div. 2001).

• A hospital brought a defamation action against ten John Does alleging they defamed the hospital by posting blog comments on an internet site. The trial court granted the hospital's motion asking that the internet service provider identify the blogger who was named as one of the John Doe defendants. The court found that an appeal from the order requiring the ISP to disclose the identity of the blogger was not an adequate remedy for the blogger, making mandamus relief available to the blogger because if discovery was allowed, then the identity of the blogger would be revealed, the damage would be done, and it could not be rectified, and the blogger's request that his name not be released was based on a possible invasion of personal and constitutional rights. *In re Does 1-10*, 2007 WL 4328204 (Tex. App. Texarkana 2007) (not designated for publication).

Invasion of privacy and intentional infliction of emotional distress:

• After being included in an internet blog operator's detailing of her social and sexual activities, the plaintiff brought an action against the blog operator and another blogger who allegedly posted a link to that blog, alleging two claims of invasion of privacy and intentional infliction of emotional distress. On May 5, 2004, the defendant Jessica Cutler, while working as a staff assistant to United States Senator Mike DeWine, created an internet blog known as the "Washingtonienne." For the following twelve days, Cutler posted various blog entries detailing her social and sexual activities with various men, including the plaintiff Robert Steinbuch. On May 18, 2004, another internet site known as "Wonkette" and written by Ana Marie Cox, posted a link to Cutler's blog, which expanded the audience for Cutler's writings. Plaintiff Steinbuch filed this action on May 16, 2005, against defendant Cutler, alleging two claims of invasion of privacy and one claim of intentional infliction of emotional distress. The case focused on disqualification of counsel, discovery issues, and amendment of the complaint to add a second defendant. The discovery requested, regarding student evaluation forms, went directly to disputing the plaintiff's claim of ongoing harm to his reputation among and relationship with students as a result of the Washingtonienne blog. *Steinbuch v. Cutler*, 463 F. Supp. 2d 4 (D.D.C. 2006)

MySpace, Facebook, YouTube

- In *Hall v. State*, a jury used evidence found on the defendant's Facebook page to refute her defenses' characterization of her as the victim of a sociopath. Hall's Facebook page had quotes by a horror writer glorifying killing. Hall also spoke of her desire to "be more of a horrific person." Hall's conviction of felony tampering with physical evidence and misdemeanor hindering apprehension in a murder/decapitation case was affirmed. *Hall v. State*, 283 S.W. 3d 137 (Tex. App.—Austin 2009, pet. withdrawn).

- In *Munoz v. State*, an expert witness testified that defendant's MySpace page proved that he was a member of a gang because it showed defendant wearing gang-related paraphernalia, and pictured with other gang members throwing gang signs. The court affirmed defendant's conviction of aggravated assault and two counts of engaging in deadly conduct with a punishment enhancement for engaging in organized criminal activity. No. 13-08-00239-CR, 2009 WL 695462 (Tex. App.—Corpus Christi 2009) (mem. op.).

- Myspace postings of a sexual nature were used in conjunction with other evidence to determine that a father was not responsible enough to serve as the parent with the right to choose the child's primary residence. *In the Interest of K.E.L.*, No. 09-08-000014-CV, 2008 WL 5671873 (Tex. App. – Beaumont 2009) (mem. op.).

- Publication of plaintiffs donations of $100 or more to the Yes on 8 campaign resulted in harassment that included boycotts of a plaintiff's business orchestrated through Facebook, a sponsored link to plaintiff's business that cited his support of Prop 8, postings on Yelp.com referencing his donation, and harassing and threatening messages left on other plaintiffs' MySpace and Facebook accounts. Ballot committees and plaintiffs filed action against the state of California's statutory requirement that they disclose the names and other personal information of those contributors of $100 or more. Plaintiffs requested preliminary injunction, arguing that the disclosure requirement restricted free speech. Ballot committees failed to establish a substantial likelihood of success on the merits of their First Amendment challenges. *Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal 2009).

IV. MARKETING USE OF SOCIAL NETWORKING SITES

As a general rule, any lawyer considering starting up a blog, a Twitter account, or engaging in other online conduct with the intent of marketing his or her services should sit down with a big mug of coffee and the Rules in Section VII. The Rules regarding advertising are lengthy and technical, and easy to trip over if you aren't paying attention.

A. Advertising Rules Regarding Websites and Blogs

The Rules treat commercial speech and noncommercial speech differently. First, to determine which is which:

Commercial speech is defined as speech with the purpose to "propose a commercial transaction" or, more broadly, speech "related solely to the economic interests of the speaker and its audience." *See* Texans Against Censorship, Inc. v. State Bar of Texas, 888 F. Supp. 1328, 1342 (E.D. Tex. 1995). If a written communication contains both commercial and noncommercial speech, it will be considered commercial speech, and courts will look to extraneous evidence to infer the purposes of the communication. See George R. Neely v. Commission for Lawyer Discipline, 196 S.W. 3d 174, 184 (Tex. App. – Houston [1st Dist.] 2006).

Essentially, commercial speech is advertising, and with some exceptions (which are found in Rule 7.07(e)), must be filed with the State Bar of Texas' Advertising Review Committee, which can be found on the State Bar's website: www.texasbar.com. Significantly, Rule 7.07 (a) specifically includes digital or electronic solicitation communication.

Key advertising-related provisions for online conduct include:

Rule 7.02 (Communications Concerning a Lawyer's Services) "A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm."

Rule 7.03 (Prohibited Solicitations and Payments) " 'regulated telephone or other electronic contact' means any electronic communication initiated by a lawyer. . .that will result in the person contacting communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm."

Rule 7.04 (Advertisements in the Public Media) "A lawyer who advertiseson the internet must display the statements and disclosures required by Rule 7.04."

Rule 7.05 (Prohibited Written, Electronic or Digital Solicitations), comment 4, (newsletters exempt from advertisement labeling rules, but not other provisions of 7.05)

Rule 7.07 (Filing Requirements for Public Advertisements and Written, Recorded, Electronic, or Other Digital Solutions).

Any lawyer who is considering online conduct for the purposes of marketing should also read and familiarize him/herself with the Interpretative Comment number 17 to Rule 7.07, which specifically deals with Internet Advertising, and is excerpted below:

> "A website on the Internet that describes a lawyer, law firm or legal services rendered by them is an advertisement in the public media. For the purposes of Part VII of the TDRPC, "website" means a single or multiple page file, posted on a computer server, which describes a lawyer or law firm's practice or qualifications, to which public access is provided through publication of a uniform resource locator (URL).
>
> Of the pages of a website subject to these rules, many may be accessible without use of the site's own navigational tools. Of those pages, for the purpose of this Interpretative Comment, the "intended initial access page" is the page of the file on which navigational tools are displayed or, in the case that navigational tools are displayed on several pages, the page which provides the most comprehensive index capability on the site. The intended initial access page of a lawyer or law firm's website shall include:

1) the name of the lawyer or law firm responsible for the content of the site

2) if areas of law are advertised or claims of special competence are made on the intended initial access page or elsewhere on the site, a conspicuously displayed disclaimer regarding such claims in the language prescribed at Rule 7.04(b); and

3) the geographic location (city or town) in which the lawyer or law firm's principal office is located."

Further, a new interpretation regarding video sharing should be noted. Specifically, "Attorney or law firm videos disseminated on video sharing websites such as YouTube, MySpace or Facebook that solicit legal services are considered public media advertisements and are required to be filed with the Advertising Review Committee, unless exempted by Rule 7.07(e). . .".

B. Chat Rooms

Chat rooms are not typically sponsored by any one firm or attorney, but are focused on areas of common interest. However, chat rooms can cause ethics rules violations. For example, at least one state bar ethics opinion has concluded that while in a chat room related to mass-disaster victims, an attorney engaged in a violation of that state's ethics rules pertaining to communications with potential clients. California State Bar Ethics Opinion 2005-166. In that case, while the attorney's communication at issue (identifying herself as a lawyer and offering to answer questions) did not violate the rule prohibiting "solicitation," it did raise issues regarding whether the communication violated other rules regarding the potential sensitive physical, emotional or mental state of the recipient of the communication.

Other states have reviewed this issue as well, with varying results:

1. Florida: Florida Rule of Professional Conduct 4-7.4(a) provides in part that:
"(a) Except as provided in subdivision (b) of this rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person *or otherw ise*, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." (Emphasis added.) See also Florida Bar Ethics Opn. A-00-1 (08/15/2000).

2. Utah, Michigan, Illinois and West Virginia: Utah has determined that chat rooms are the equivalent of "in person" communications. Utah Ethics Advisory Opinion 97-10. See also, Michigan Bar Ethics Opn. RI-276 (07/11/1996); Illinois Bar Ethics Opn. 96-10 (05/16/1997); Virginia Bar Lawyer Advertising Opn. A-0110 (04/14/1998); West Virginia Bar Ethics Opn. 98-03(10/16/1998), which generally have held that lawyers participating in chat rooms implicate their states' rule barring solicitation (usually some variation of Model Rule 7.3(a)).

3. Arizona: Arizona State Bar Association Ethics Opn. 97-04 (4/7/1997) (communications in chat rooms not the same as prohibited in-person and telephonic contacts "because there is not the same element of confrontation/immediacy as with the prohibited mediums").

4. D.C. - The District of Columbia has taken a slightly different approach from these states. Although it has not expressly analogized chat room communication to in-person or telephonic communication, its ethics committee has nevertheless cautioned lawyers that they must be careful that their conduct in a chat room does not violate the proscriptions of D.C. Rule of Professional Conduct 7.1(b). In D.C. Ethics Opn. 316 (2002), after first observing that unlike other states, the D.C. rule does not draw a distinction between in-person and written communications, the committee opined that: "Lawyers communicating about their services in chat rooms therefore must take care not to run afoul of D.C. Rule 7.1(b) (2), which prohibits solicitations that involve the 'use of undue influence,' and D.C. Rule 7.1(b) (3), which prohibits lawyers from seeking employment by a potential client whose 'physical or mental condition' makes rational judgment 'about the selection of an attorney unlikely.'"

C. Testimonials/Social Networking Pages

Most attorneys do not currently use their social networking presence for what is traditionally considered "advertising," sticking instead to the basic contact information and purely social use. However, it is easy to see how a line could be crossed, particularly if the attorney includes professional commentary as a part of his/her status updates on Facebook or MySpace, or allows "referrals" on sites such as LinkedIn.

Although there are currently no ethics opinions addressing whether or not a social network page is an advertisement, conduct on those pages could implicate a state's advertising rules, depending on the content. For example, in LinkedIn, a user's contacts can post referrals, such as "My lawyer is THE go-to guy for noncompete matters and always gets great results!" Many state bars (including Texas) prohibit testimonials

that are not accompanied by an express disclaimer. Allowing testimonials on your LinkedIn page without such disclaimers would violate the rules in many states.

Additionally, the constantly changing nature of a social network page, including comments from others, speedy status updating, and cross-referencing makes it virtually impossible to comply with state rules regarding submission to attorney advertising review boards (and many states in addition to Texas have these), if the content constitutes advertising. Multistate compliance concerns are also an issue – a Facebook profile could easily comply with one state's rules and violate another's.

D. Noncommercial Speech

Noncommercial speech, while not subject to the advertising rules, is still subject to the Rules. For example, if your blog reveals confidential client information, it would violate Rule 1.05. Care should be taken to avoid violations of other Rules, such as not improperly commenting on an ongoing or future court case, making false statements about judges or political candidates, etc.

Attorneys should also add a disclaimer to avoid giving legal advice, creating an attorney-client relationship and creating unintended jurisdictional consequences due to other states' disciplinary rules for advertising. For example, you could include a statement on the blog's home page such as:

> "This blog is a public resource for general information about our firm. This blog and the materials provided herein have been prepared by [FIRM NAME] for informational purposes only and are not legal advice. No client or other reader should rely on or act or refrain from acting on the basis of any matter or information contained in this web site without seeking appropriate legal or other professional advice.
>
> Transmission of the information on this web site is not intended to create, and receipt does not constitute, any attorney-client relationship between [FIRM NAME] and the user or browser of the web site."

Finally, blogs differ from newsletters in one key way: they are interactive. A newsletter is a static communication that will not change in content. A blog, however, enables readers to post comments, which frequently results in responsive comments from the blog's author. It's not hard to imagine how a blog post that starts out as simple, noncommercial speech could evolve into an interactive two (or three, or four) way discussion that could violate a host of rules if not approached with care.

USEFUL RESEARCH SITES AND ONLINE CONDUCT TOOLS

"The Duty to Google"

- **Google**: [name] + [hometown] or [business/occupation] for a general search.
- **Google News**: search to determine if [name] has been the subject of a news story.
- **Local News**: search the local newspaper and/or television website(s) for [name] in news stories which may not have reached Google.
- **Employer/business**: search company website for [name]'s biography.
- **Pipl.com** and **Wink.com**: catch-all searches for [name] in blogs, websites, and social network profiles;
- **Zoominfo.com**: search [name] in this "business information search engine" for announcements and business information.
- **Blogs**: search [name] on www.blogsearch.google.com.
- **Facebook/MySpace**: a search on Facebook should reveal a photo and [name]'s group of friends; a "Find Friends" search on MySpace will reveal [name]'s page.
- **LinkedIn**: a search on LinkedIn will bring up the subject's "public" profile, which will typically include a photo and immediate past employment history
- **"Photo sharing" sites**: do a general or "people search" on YouTube, Shutterfly, Flickr, SmugMug and Photo-bucket.com to see if [name] appears in videos or images.
- **Twitter**: search [name] at www.search.twitter.com. Twitter searches may also be conducted using Twellow.com and tweepsearch.com.