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ETHICAL CONSIDERATIONS FOR BLOG-RELATED DISCOVERY

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Abstract

The rise in blogs (short for "Web-logs") has spawned a new world of considerations for lawyers and clients. At their foundation, blogs are Web sites that serve as online diaries and sounding boards. Blogs typically consist of posts, pictures, images, links, and other entries that run the gambit of subjects from politics to sports to literature to personal materials. The exponential rise in blogging stems from improvements in technology, the increasing sophistication of Internet users, and the low cost of creating and maintaining blogs. In the last several years, blogs have mushroomed in number and have achieved a measure of legitimacy and legal protection. At the same time, blogging is also creating its own unique brand of legal issues. Of specific concern to lawyers are the ethical issues surrounding a lawyer's use of blogs, particularly as blog-based discovery becomes more and more common. This article will provide an overview of a lawyer's obligations under the Model Rules of Professional Conduct and the corresponding Washington Rules of Professional Conduct with respect to blog-based discovery.

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INTRODUCTION

<1>The recent rise in blogs (short for “Web-logs”) has spawned a new world of considerations for lawyers and clients. At their foundation, blogs are Web sites that serve as online diaries and sounding boards. Blogs typically consist of posts, pictures, images, links, and other entries that can run the gambit of subjects from politics to sports to literature to personal materials. Blogging’s exponential rise stems from improvements in technology, the increasing sophistication of Internet users, and the low cost of creating and maintaining blogs. In the last several years, blogs have mushroomed in number and have achieved a measure of legitimacy and legal protection.² Indeed, the increased use of blogs by news services, political commentators, and candidates has catapulted blogs into the national consciousness. The companies using blogs range from Google³ to General Motors⁴ to Southwest Airlines.⁵

<2>Of course, blogging is also creating its own unique brand of legal issues. Of specific concern to lawyers are the ethical issues surrounding a lawyer’s use of blogs, particularly as blog-based discovery becomes more and more common. Lawyers may utilize blogs through informal methods of discovery, such as monitoring a party’s blog, or through the traditional methods of discovery under the Rules of Civil Procedure, such as requesting information relating to blogs and bloggers. This article will provide an overview of a lawyer’s obligations under the Model Rules of Professional Conduct (“Model Rules”)—and the Washington Rules of Professional Conduct (“Washington Rules”), which largely adopt the Model Rules—with respect to blog-based discovery.⁶

Use of Blogs in Formal Discovery

<3>Parties have begun to see blogs as a potential source of discovery in litigation. Starbucks, for example, sought blog-related discovery in connection with its defense against a Fair Labor Standards Act collective action.⁷ More specifically, Starbucks sought discovery of any “Internet handles” used by any of the plaintiffs in making any postings about Starbucks.⁸ Starbucks argued such information would lead to the discovery of Internet postings it believed the plaintiffs had made regarding the number of hours they worked and the nature of their

duties. The court denied the request until such time as Starbucks has established that the plaintiffs had made such postings.¹⁰ As the popularity of blogging continues to rise, it appears inevitable that discovery will increasingly involve investigation of Internet postings on blogs.¹¹ To the extent such discovery occurs within the boundaries of the applicable Rules of Civil Procedure, there is likely little risk that use of blogs in this context will run afoul of the Model Rules or the Washington Rules.

Use of Blogs in Informal Discovery

<4>In addition to being a potential source of formal discovery, blogs are also emerging as fertile ground for informal discovery.¹² Some examples of potential uses of blogs for informal discovery purposes include monitoring an opposing party's blog for useful tidbits of information or searching for potential witnesses to support a case.¹³

<5>It is in this context that questions under Rules 4.2 and 4.3 of the Model Rules and Washington Rules arise. In particular, the use of blogs in this fashion raises the issues of whether blogging constitutes a "communication" for purposes of the Model Rules and Washington Rules and, if so, whether that communication runs afoul of the rules for communicating with a represented or unrepresented party.

THE RULES

<6>According to the American Bar Association, forty-seven states have rules of professional conduct relating to lawyers that follow the format of the Model Rules.¹⁴ In addition, thirty-nine states have generally adopted the comments to the Model Rules.¹⁵ Thus analysis under the Model Rules can serve as a useful guideline in addressing questions of lawyers' ethical responsibilities.¹⁶

<7>The Model Rules and Washington Rules include two rules that generally govern communications by lawyers with persons other than their clients or potential clients. The first, Rule 4.2, 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.¹⁷

<8>The second, Rule 4.3, 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 person are or have a reasonable possibility of being in conflict with the interests of the client.¹⁸

<9>In other contexts, courts have indicated that the rules regarding professional conduct of attorneys apply to online activity.¹⁹ With the background of these professional standards of conduct in mind, this article addresses application of these standards to issues that arise in blog-related discovery.

Determining Whether Blogging Constitutes a "Communication"

<10>Use of blogs by a lawyer for informal discovery could take several forms. A lawyer may make use of an opposing party's blog for the purpose of gathering information about the party or the subject matter at hand by passively reviewing the party's blog. Alternatively, the lawyer could take a more active role by posting content on a blog, initiating an original post, or posting a response to another post. These posts might be on the lawyer's blog or someone else's blog. As discussed below, these different uses of blogs in informal discovery raise different issues under the Model Rules and Washington Rules.

Passive Review

<11>Rule 4.2 states that a lawyer shall not "communicate" about the subject of his or her representation with a person the lawyer knows to be represented. Although there is not yet law on the subject, a passive review of a party's blog seems to be less like a "communication," because there is no direct interaction between the blogger who posted the information and the lawyer reviewing it. This use of a blog seems to be more comparable to

a review of an unprivileged document voluntarily produced by the party.

Affirmative Posting

<12>By contrast, an attorney who affirmatively and independently posts content on a blog related to a represented party in an attempt to gather information relevant to the subject matter of the party's representation is likely to be in serious risk of violating Rule 4.2. Among other things, it is important to consider whether the affirmative post by the attorney is: (1) an original post; or (2) a response to pre-existing post. It is also important to consider whether the post by the attorney is on the attorney's blog or on someone else's blog.

<13>First, in contrast to a passive review of blog postings, an attorney who initiates an original post seeking to elicit a response from a represented party appears to fall squarely within the Rule's prohibition against communicating with a represented party about the subject matter of representation without the consent of opposing counsel. While there is not yet law on this subject, the initiation of an original post by an attorney appears to be a "communication" with the represented party.²⁰ Consider the following hypothetical. A plaintiff's lawyer posts to a blog related to a company-defendant in search of current employees of the company-defendant who might be able to corroborate the plaintiff's version of events—thereby circumventing the company's lawyers. This active, affirmative act of posting in a forum known to be frequented by representatives of the employer-defendant (including managerial representatives) is likely to run afoul of Rule 4.2 because (1) a lawyer (2) is initiating communication with persons who may be representatives of the company, (3) requesting information about the subject matter of his representation, (4) with knowledge that the company is represented in the matter, and (5) without the permission of opposing counsel.²¹

<14>Second, if passive review appears to fall outside the scope of Rule 4.2, and an original posting appears to fall within the scope of Rule 4.2, the question of whether a responsive posting triggers Rule 4.2 remains. Comment 3 to Rule 4.2 of the Model Rules and the Washington Rules states:

The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom

communication is not permitted by this Rule.²²

<15> According to Comment 3, Rule 4.2 governs all communications with represented parties, whether initiated by the lawyer or not. Stated differently, according to the comment, Rule 4.2 applies any time the lawyer knows the party is represented by counsel.²³

<16> Notwithstanding Comment 3 to Model Rule 4.2, some jurisdictions draw a distinction between a communication initiated by an attorney and a communication initiated by a represented party. For example, although the Texas Rules of Disciplinary Procedure (“Texas Rules”) are modeled after the Model Rules,²⁴ the Texas rules do not include a comment similar to Comment 3 of the Model Rules.²⁵ In this regard, it is noteworthy that the Fifth Circuit Court of Appeals held that a communication initiated by a represented criminal defendant to counsel for a co-defendant did not violate the Texas Rules, because the represented criminal defendant initiated the communication.²⁶

<17> In jurisdictions such as Texas, an attorney posting a *response* to a represented-party’s post may be able to argue the communication was not prohibited by the applicable disciplinary rules, because the “conversation” was initiated by the represented party.²⁷ Obviously, this argument will have greater force if the post by the represented party was on the lawyer’s blog, such that there is little doubt that the represented party knew that he or she was initiating a conversation with the attorney. By contrast, if the attorney is responding to the represented party’s post on his or her own blog or on a third-party blog, the argument loses considerable force, because the individual may not have intended to “initiate” a conversation with counsel for his or her opponent. This is particularly true if the attorney does not clearly disclose his or her identity in his or her responsive post.²⁸

Determining Whether the Lawyer “Knows” a Blogger Is Represented

<18> Even if an attorney’s post constitutes a “communication,” there may yet be a question about whether the lawyer knew the party was represented.²⁹ Consider the question of a corporate-defendant:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning

the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.³⁰

<19> Given the inherently indeterminate scope of a corporate party, an attorney-blogger must be careful to ensure that his or her post does not solicit responses from an employee of the corporate party who “supervises, directs or regularly consults with the organization’s lawyer concerning the matter” or “has authority to obligate the organization with respect to the matter” or “whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”³¹ Without such safeguards, the attorney runs the risk of violating Rule 4.2 if any such person responds to the post. This is particularly true with respect to the Model Rule and the Washington Rule, which do not draw a distinction between communications initiated by the attorney and communications initiated by the represented party.³² It is noteworthy, however, that neither the Model Rule nor the Washington Rule requires the consent of the organization for communications with *former* employees of the organization.³³

<20> Even if the attorney-blogger is careful to ensure that no one who constitutes a corporate “party” under the Rules responds, the attorney-blogger is still required to follow certain procedures in communicating with unrepresented parties. More specifically, Rule 4.3 requires that the attorney: (1) not state or imply that he is disinterested in the matter; (2) make reasonable efforts to correct any misunderstanding by the person about the lawyer’s role in the matter; and (3) refrain from giving legal advice if he knows the person’s interests are in conflict with the interests of his client.³⁴

CONCLUSION

<21> While formal discovery of blog-related information will inevitably increase as litigants and courts recognize the value of tapping into this new source of information, lawyers should proceed with caution in using blogs as a source of informal discovery about adverse parties and their claims. At the very least, lawyers should avoid initiating posts likely to be reviewed and responded to by represented parties and should always make their identity and connection to the matter at issue clear in all of their online communications.

1. Jason Boulette is a partner at Boulette & Golden L.L.P. in Austin, Texas. Tanya DeMent is an associate at Boulette & Golden L.L.P. in Austin, Texas.
2. *Cf.* Krinsky v. Doe 6, 159 Cal. App. 4th 1154, 1168-73 (2008) (requiring plaintiff to make a prima facie showing of libel before enforcing a subpoena seeking the identity of an Internet blogger); Bynog v. SL Green Realty Corp., No. 05 Civ. 0305 WHP, 2005 WL 3497821, at *11 (S.D.N.Y. Dec. 22, 2005) (denying application for preliminary injunction to prevent blogger from posting allegedly defamatory information as impermissible prior restraint on free speech); Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc., No. 0425, 2006 WL 37020, at *10 (Pa. Com. Pl. Jan. 4, 2006) (collecting cases) (affording First Amendment protection to the identity of anonymous bloggers sued for defamation); Apple Computer, Inc. v. Doe 1, No. 1-04-CV-032178, 2005 WL 578641, *5, 7 (Cal. Super. Ct. Mar. 11, 2005) (considering, without deciding, whether a “blogger” may be entitled to the protections afforded to “journalists”). *But see* Richerson v. Beckon, No. C07-5590 JKA, 2008 WL 833076, at *4 (W.D. Wash. Mar. 27, 2008) (finding that speech on an employee blog about a school administrator was not of “public concern” and was not protected).
3. The Official Google Blog, <http://googleblog.blogspot.com> (last visited Aug. 11, 2008).
4. GM Fastlane Blog, <http://fastlane.gmblogs.com> (last visited Aug. 11, 2008).
5. BlogSouthwest, <http://www.blogsouthwest.com> (last visited Aug. 11, 2008).
6. MODEL RULES OF PROF'L CONDUCT (1983), *available at* http://www.abanet.org/cpr/mrpc/model_rules.html. The Model Rules of Professional Conduct were developed by the American Bar Association and were adopted by the ABA House of Delegates in 1983. These Model Rules were intended to serve as models for the ethics rules of most states.
7. See Pendlebury v. Starbucks Coffee Co., No. 04-80521-CIV, 2005 WL 2105024 (S.D. Fla. Aug. 29,

2005).

8. *Id.* at *3.
9. *Id.*
10. *Id.*
11. Investigation of Internet postings on blogs and their authors is particularly on the rise in defamation cases. More specifically, plaintiffs are increasingly using third-party subpoenas to seek the identity of anonymous bloggers who post allegedly defamatory statements. *See, e.g., Krinsky*, 159 Cal. App. 4th at 1168-73; *In re Does 1-10*, 242 S.W.3d 805, 810 (Tex. Ct. App. 2007); *Klehr*, 2006 WL 37020, at *10 (collecting cases).
12. *See, e.g., Goupil v. Cattell*, No. 07-cv-058-SM, 2007 WL 1041117 (D.N.H. Apr. 2, 2007) (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*, No. 1:06-CV-114, 2007 WL 1004169, at *6-8 (E.D. Tenn. Mar. 30, 2007) (analyzing whether blog postings, among other things, provided sufficient basis for exercise of jurisdiction); *Healix Infusion Therapy, Inc. v. Helix Health LLC*, No. H-08-0337, 2008 WL 1883546 (S.D. Tex. Apr. 25, 2008) (same); *Pitbull Prod., Inc. v. Universal Netmedia, Inc.*, No. 07 Civ. 1784, 2008 WL 1700196, at *6 (S.D.N.Y. Apr. 4, 2008) (same). *Cf. Lorraine v. Markel American Ins. Co.*, No. PWG-06-1893, 2007 WL 1300739, at *39-55 (D. Md. May 4, 2007) (analyzing a variety of hearsay exceptions as they relate to blogs and other electronically stored utterances).
13. *See, e.g., X17, Inc. v. Lavandeira*, No. CV06-7608-VBF(JCX), 2007 WL 790061, at *4 (C.D. Cal. March 8, 2007) (excluding as hearsay blog entries identifying defendant as the source of allegedly infringing photographs); *Cingular Wireless, LLC v. Hispanic Solutions, Inc.*, No. 106-cv-2695-WSD, 2006 WL 3490802, at *1 (N.D. Ga. Dec. 1, 2006) (providing an example of a plaintiff's reliance 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) (requesting consideration of an anonymous blog entry from someone claiming the President shot him the bird at a rally in Pennsylvania in a suit alleging nationwide conspiracy to suppress dissent).

14. MODEL RULES OF PROF'L CONDUCT (1983), *available at* http://www.abanet.org/cpr/mrpc/model_rules.html. The states that have not adopted the Model Rules are California, Maine, and New York. American Bar Association, Center for Professional Responsibility, ABA Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Aug. 28, 2008).
15. State Adoption of Comments to Model Rules of Professional Conduct, <http://www.abanet.org/cpr/jclr/comments.pdf> (last visited Aug. 28, 2008) (Washington has adopted the comments to the Model Rules).
16. Despite the adoption of a 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, reference to the applicable state's version of the rules of professional conduct should be consulted in reviewing questions pertaining to any particular situation.
17. MODEL RULES OF PROF'L CONDUCT R. 4.2; WASH. RULES OF PROF'L CONDUCT R. 4.2 (2006).
18. MODEL RULES OF PROF'L CONDUCT R. 4.3; WASH. RULES OF PROF'L CONDUCT R. 4.3.
19. *See, e.g.,* United States v. Khan, 538 F. Supp. 2d 929, 936 (E.D.N.Y. 2007). In *Khan*, the court cautioned an attorney to review the postings on his Web site in light of New York's Disciplinary Rules and to "comport himself in a manner that adheres to these rules." In addition, the court commented that the attorney's online postings also may be subject to the codes of professional conduct of other states. *Id.*
20. *See* David Hricik, *The Ethics of Blogging, Blawging, Chatting, List-Serving and Just Kabitzing in Public Places*, p. 11-13 (2006), *available at* <http://ssrn.com/abstract=917180> (discussing whether communication occurring on a blog is covered by Model Rules 4.2 and 4.3).

21. See MODEL RULES OF PROF'L CONDUCT R. 4.2.
22. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 3; WASH. RULES OF PROF'L CONDUCT R. 4.2 cmt. 3.
23. *Id.*
24. Dates of Adoption of the Model Rules of Professional Conduct,
http://www.abanet.org/cpr/mrpc/alpha_states.html
(last visited Aug. 28, 2008) (listing Texas as a state that has adopted the Model Rules).
25. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02 cmts. (1989).
26. In re Medrano, 956 F.2d 101, 103-05 (5th Cir. 1992). *Cf.* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02(b) (allowing a party to initiate direct communication with an opposing party, even if the opposing party is represented, provided the attorney is not the one orchestrating the communication).
27. *Compare Medrano*, 956 F.2d at 103-05 (no violation of Texas Disciplinary Rule of Professional Conduct 4.02 where represented party initiated contact with attorney) *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02(b) (allowing a party to initiate direct communication with an opposing party, even if the opposing party is represented, provided the attorney is not the one orchestrating the communication).
28. *Compare* MODEL RULES OF PROF'L CONDUCT R 4.2 cmt. 1 ("This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.") *with* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02 cmt. 1 ("Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel.").
29. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (prohibiting only communication with a person known to be represented). See *also* WASH. RULES OF PROF'L CONDUCT R. 4.2 cmt. 8 ("The prohibition on communication

with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances.”).

30. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7. The comment to the Washington Rule, although somewhat differently worded, is largely the same. WASH. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (“In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter”). Nevertheless, this comment has been the subject of widely varying interpretations. See David Hricik, *The Ethics of Blogging, Blawging, Chatting, List-Serving and Just Kabitzing in Public Places* 4-6 (2006), available at <http://ssrn.com/abstract=917180>. It should also be noted that, where a state’s rule and the Model Rule differ, a federal court may attempt to apply a “national” ethics standard by analyzing the issue under both the applicable state rule *and* the Model Rule in an attempt to harmonize the two. See *id.* at 6.
31. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7.
32. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 3; WASH. RULES OF PROF'L CONDUCT R.4.2 cmt. 3.
33. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7; WASH. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7.
34. MODEL RULES OF PROF'L CONDUCT R. 4.3; WASH. RULES OF PROF'L CONDUCT R. 4.3. See *a/so* MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 1 (“In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer’s client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.”); MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (1983) (“In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that

the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); David Hricik, *The Ethics of Blogging, Blawging, Chatting, List-Serving and Just Kabitzing in Public Places* 10 (2006), available at <http://ssrn.com/abstract=917180> (discussing application of Rule 4.3 to Internet communications).