STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

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FALL 2010, VOLUME 52

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EDITOR'S COMMENTS

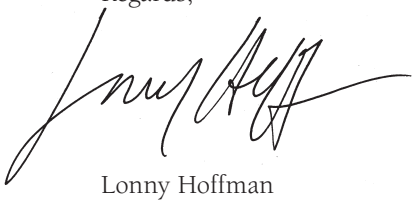
LONNY S. HOFFMAN

OUR FOCUS IN THIS ISSUE IS ON MANY OF THE WAYS in which the internet is impacting law practice. We begin by looking at the uses of social media and online activities to enhance law practices and consider what ethical issues flow out of these uses. In this same connection, the symposium examines the State Bar's adoption of internal interpretive comments to the Texas Disciplinary Rules of Professional Conduct. Other articles explore internet-based discovery uses, including utilizing informal discovery through the internet, operating document managing systems on line, and the admissibility of web-based evidence. Another article tackles the thorny problems that arise when jurors have access to the internet in the courtroom. Still others provide practical advice, with many specific web recommendations, about using the internet for and in your law practice. Finally, several of the articles examine doctrinal issues implicated by the internet's uses in legal contexts.

The subjects we have chosen to cover are far-reaching. No doubt, we could have filled another volume on entirely different topics. What I can say is that in organizing this symposium our goal was to address thoughtfully and rigorously the subjects chosen for this volume.

In addition to the main symposium, you will also find here the procedure and evidence updates from Rob Ramsey and Luke Soules, to whom we are always grateful for their contribution. I welcome your comments or questions. My email is lhoffman@central.uh.edu.

Regards,



Lonny Hoffman
Editor in Chief

CHAIR'S REPORT

Litigation Section Orientation

WALKER C. FRIEDMAN

ELIZABETH MACK, FORMER CHAIR OF THIS SECTION, had a good idea for helping new members to the Litigation Council: a short orientation session explaining what the Litigation Council does and how it does it. As incoming chair, I procrastinated too long to assign the task to someone else. But in preparing this report, I realized that it might not be a bad idea for the entire Section membership to have an understanding of the same things. So here's the information.

A. Overview of the Section.
The Litigation Section is the largest section of the State Bar, with over 7,400 members at last count.

The Section's Mission Statement succinctly describes its purpose:

> The Litigation Section of the State Bar of Texas is dedicated to the enhancement and improvement of our system of justice and the delivery of quality legal to the clients and the public. The Section strives to promote excellence in the profession through service to our members, through education of our members, and by ensuring equal justice to our honorable system of adversarial justice for all persons and entities regardless of station.

Under our Bylaws, any member in good standing with the State Bar is eligible to be a Litigation Section member. Annual dues are currently $30.

B. The Council.
The Section is governed by the Litigation Council, which consists of 15 regular voting members, six officers, and three non-voting sustaining members. At the Section's annual meeting, which coincides with the State Bar Annual Meeting, the Section membership elects three new members of the Council for three-year terms. At the same time the Council elects officers for one-year terms.

The Council meets quarterly and acts through a majority vote.

All Council members serve on committees, which perform most of the Council's work and of which there are currently 19. Section members who are not on the Council also serve on committees.

Beyond administrative matters, the Council's primary functions fall within these five broad topics:

1. Continuing Legal Education
The Litigation Update is an annual seminar devoted to keeping litigation attorneys current on the major cases, legislative activities, and changes that affect our clients and our profession. It is presented each January in either Austin or San Antonio. This seminar continually hosts some of the State's best lawyers and speakers, and is particularly helpful to experienced lawyers. This year's co-chairs are Paula Hinton and Carlos Cardenas.

For a number of years the Litigation Section has arranged for and underwritten the luncheon speakers at the State Bar's Annual Meeting, which is held each June. Whether in the form of a debate or just one or more speakers, these luncheons have been consistently thought-provoking and entertaining. Linda McDonald and Craig Enoch are in charge of the Section's Annual Meeting Committee for this year.

2. Publications
The Advocate – Lonny Hoffman of the University of Houston Law School and his editorial board have elevated this quarterly periodical into a wonderful tool for trial lawyers. Three of the four editions are symposium issues dedicated

to different aspects of a single topic; the fourth issue compiles the best articles from the Litigation Update seminar. Under Lonny's leadership, and due to the editorial board's hard work, *The Advocate* is a great resource.

News for the Bar – Found on the Litigation Section website, our online quarterly newsletter is published by Geoff Gannaway and his editorial board. It provides helpful updates, useful tips from trial lawyers, interviews with judges, news articles, and essays.

Litigation Section Website – Tom Kurth has chaired this committee since the website became a consistent functioning reality a few years ago. It is not only home for *News for the Bar* but is also a repository for past issues of *The Advocate*, general information about the Section, and numerous features including *Hot Topics for Trial Lawyers* and *Arbitrary and Capricious*. The Section's calendar is also here, along with information about CLE, charitable efforts, and special projects. If you haven't visited the website, please give it a try: www.litigationsection.com.

LS Snap – During the 2009 legislative session, the Section began keeping our members informed about potential and actual legislative efforts affecting the courts, court administration, and the litigation process. Pat Long Weaver undertook this task as chair and published LS Snap, a periodic blast email to our members during the session. LS Snap will continue during the upcoming 2011 session.

3. Charitable Endeavors

Grants – Each year the Section sets aside funds for grants to charitable organizations in our field. Last year the Section contributed $26,000 to a number of different organizations. The Grants Committee, chaired by Rose Reyna, receives grant requests and recommends allocations to the Council.

Pro Bono – The Section also funds summer internships with pro bono legal organizations. Historically, the Section has funded six to eight such positions at $4,000 each. Paula Hinton continues to serve as chair of this committee.

4. Mentoring

Law School Ethics – The Section presents ethics programs at different law schools each year. We plan to present programs at Texas Wesleyan University Law School and Baylor Law School this fall. These programs consist of interactive sessions between law students and local attorneys working through ethical issues. Michael Smith chairs this committee.

Law School Mentoring – This program solicits and provides speakers to the Texas law schools to discuss with students what trial work consists of. Our goal is to provide one such speaker at each of the law schools this year. Nina Perales chairs this committee.

5. Recognition

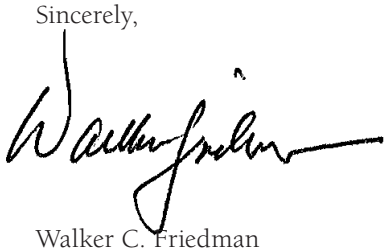
Luke Soules Award – Each year we select a lawyer who exemplifies the best of the profession. If you are reading this magazine, you already know the list of qualities. Named after a former Council chair and a great lawyer, we present this award at the Litigation Update in January. Ken Wise will chair the selection committee this year.

Texas Legends – For years, many people lamented that the observable qualities that make great trial lawyers great are lost to history once those lawyers pass on. The Section, through the tireless efforts of Chairman Wes Christian, undertook to videotape some of the great ones before it is too late. The library is growing and will soon be available on our website.

These are the primary activities of the Litigation Section and, through the Council and its committees, the people who will be primarily responsible for ensuring their success.

If you have any ideas about how to improve the Section or its activities, please let me hear from you at wcf@fsclaw.com.

Sincerely,



Walker C. Friedman

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SYMPOSIUM ON
THE INTERNET
AND THE LAW

THE INTERNET AND THE LAW

AVOIDING A GRIEVANCE IN 140 CHARACTERS OR LESS: ETHICAL ISSUES IN SOCIAL MEDIA AND ONLINE ACTIVITIES

BY TOM MIGHELL

SOCIAL MEDIA IS DEFINITELY THE "IT" TECHNOLOGY of the moment. It seems that everywhere a lawyer turns nowadays, someone is telling us that if we *don't* use social media to enhance our practice, we are likely to be left behind. So lawyers are now flocking in droves to tools like LinkedIn, Facebook, and even Twitter, in search of new networks and potential business.

There's no question social media has the potential to revolutionize the ways we attract, cultivate, and interact with clients. But to paraphrase a famous saying, with great technology comes great responsibility. As technology - and online technology in particular – advances, the steps necessary to keep a client's information confidential are necessarily evolving. This article will cover some of the issues a lawyer may want to consider when establishing an online presence using social media and other tools.

What's all the Fuss? It's not surprising that lawyers would want to expand their business development opportunities online, especially when you consider the number of people currently using social media tools. As of this writing, Facebook has more than 400 million members, with MySpace a distant second at 126 million. Twitter has attracted over 100 million users, while professional networking site LinkedIn is home to a mere 65 million. Then there are the recent social networking sites for lawyers, like Martindale-Hubbell Connected, Legal OnRamp or Avvo. A recent Martindale-Hubbell-commissioned survey found that "more than 70 percent of lawyers are members of an online social network - up nearly 25 percent over the past year - with 30 percent growth reported among lawyers aged 46 and over."[1]

And those sites are just the tip of the iceberg. Social media also includes blogs, which enable the blogger and his or her readers to engage and develop a dialogue on different issues. There are well over 3,000 law-related blogs, dispensing daily wisdom on matters important to clients and other lawyers. Blogs and other social media tools have turned the Internet from a unidirectional communication medium (like articles found on firm websites), to a two-way street, where lawyers expect to engage in conversation and debate.

But does this new online world require lawyers to act any differently than they might in the physical, analog world? Some would argue there is no difference between online networking and meeting someone on the golf course, at a conference or industry meeting, and thus there is no reason for "special" rules.[2] One difference, however, is that in-person networking leaves no digital trail, and the written word can be used in many ways for years after it is published. Further, a simple Google search can uncover a great deal of information about a given lawyer's online activities. A tweet or post about confidential information would have a much larger audience and scope, and could potentially be more damaging to the client than an offhand remark made on the golf course.

It is an interesting fact that today's new lawyers have grown up with different expectations of privacy, and as a result have different reactions to how information is communicated online; state bars will need to take this generational shift in thinking into account when considering whether new rules are necessary to cover the brave new world of social media.

More important is that lawyers must consider that the strengths of social media – encouraging open, frequent, and broad communications in an online environment – actually increase the risk that client confidences may be breached, or some other ethical violation will occur. Common sense should prevail when engaging in online activities. But for some reason, social media (and all technology, really) causes some lawyers to lose the discretion they may follow as a matter of course when dealing with people outside of the virtual world.

So are special rules necessary? Maybe. Maybe not. Let's consider the rules that might cover a lawyer's use of social media. Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct concerns the duty of "competence." Does that duty extend to social media? In other words, should a lawyer be have an understanding of social media technology before using it as part of a law practice? The lawyers in Maine think they should have an understanding of technology in general:

> we also do not believe it reasonable for an attorney today to be ignorant of the standard features and capabilities of word processing and other software used by that attorney . . . .[3]

The Canadian Bar Association agrees:

> Lawyers must be able to recognize when the use of a technology may be necessary to perform a legal service on the client's behalf, and must use the technology responsibly and ethically.[4]

These opinions do not apply specifically to social media, and such rules have yet to spread across the country. But it's not hard to imagine to imagine the day when courts and grievance committees nationwide will be considering such issues. It is difficult nowadays to provide competent representation to clients *without* the use of technology, and online technology is a big part of this new reality. Lawyers must recognize this fact and be prepared.

Confidentiality. Other ethical rules have implications with technology (Conflicts of Interest, TDRPC Rules 1.06-1.09; Diligent Representation, TDRPC 1.01), but the rule that deserves the most attention is TDRPC 1.05, the Duty of Confidentiality. The rule applies to any communication of client information: verbal, written or electronic. It applies to both intentional and accidental disclosures of such information, not only to the attorney but also the rest of the law office staff. From a technology standpoint, this rule deals with communications between a lawyer and client as well as the steps a lawyer takes to protect the client's confidential information residing on the firm's computer systems. And it particularly applies to communications made online, through social media and other means.

For those of us who have the common sense not to disclose confidential information in public, the key is to be aware of the particular technology we are using, and whether it has the potential to inadvertently disclose client information.

Fortunately, it doesn't take much special knowledge of technology to keep communications confidential online. The same rules of common sense apply to online confidentiality as they do in the physical or analog world: just as you wouldn't divulge client information in a brochure or letter to opposing counsel, you shouldn't even think of discussing client information in a chat room, Facebook status post, or in a tweet. Nevertheless, some lawyers lack the wisdom to know the difference. In 2009 an Illinois public defender was charged with improper disclosure of confidential client information after she disclosed first and last names as well as the jail identification numbers of some of her clients.[5]

For those of us who have the common sense not to disclose confidential information in public, the key is to be aware of the particular technology we are using, and whether it has the potential to inadvertently disclose client information.

Consider, for example, one of the oldest forms of social networking: the listserv, or online discussion forum. Litigators have used mailing lists and other discussion groups to talk about the latest news, get feedback on trial techniques, and share war stories. A lawyer may be tempted to include a client's confidential information when asking hypothetical questions to his or her peers; indeed, most such listservs have questions like this several times a week. Great care should be taken when using this form of communication.

However, emerging technologies have the potential to breach a client's confidentiality in new and interesting ways. Location-based services like FourSquare, Gowalla, or Google Latitude allow you to "check in" to wherever you happen to be – a restaurant, business, movie theater – wherever. These services use the GPS device located in your smartphone to pinpoint your exact location. What if you used one of these tools to "check in" to a hotel right next to your big corporate client, who is preparing to settle in a huge class action case? By giving away your location you may not be divulging specific client confidences, but you may be tipping your hand to the competition, who is now able to track your movements online.

Another emerging feature of social media tools is interoperability, where things you post on one site might automatically show up on another. Nowadays, I can "tweet" my status update on Twitter, and have that status automatically updated on Facebook, LinkedIn, and several other services. It can get confusing understanding which information is going to which audience, and it is especially troubling when you are talking about legal issues. Understanding how each tool works and where it feeds your information will help you make the right choices about using them as part of your practice.

You will also want to be wary of sites that are still in "beta," which for the purposes of this discussion could mean "the bugs are still being ironed out." One great example of a tool that wasn't quite ready for prime time when it launched is Google Buzz, a service that allowed you to share stories with

friends and colleagues. Google made it incredibly simple to use, with no setup necessary. However, to do this Google made the user's contacts list visible to anyone who wanted to see it. Suddenly lawyers and doctors who use Gmail as their primary mail service found listings of their clients available on the Internet. Google corrected this issue quickly, but the lesson was apparent: before using a new social media tool, make sure you have taken appropriate steps to protect any confidential information that could be inadvertently exposed.

Even better, refrain completely from writing about your clients unless you have their express written consent.

Social Media and Texas Advertising Rules. One of the most important issues to consider when using social media in law practice is whether any of your online activities violate the State Bar's advertising rules. Although Texas has not adopted full-blown social media advertising rules, it recently issued an Interpretive Comment titled "The Internet and Similar Services Including Home Pages."[6] Under "Social Media Sites," the Comment states that

> Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements. Where access is limited to existing clients and personal friends, filing with the Advertising Review Department is not required.[7]

What does this rule mean in terms of the three sites listed? In this author's opinion, it depends on what the Advertising Review Department defines as "the public." On Facebook, lawyers can have their own personal pages, and can limit access on those pages to people considered clients and friends. A lawyer can also create a Facebook Fan Page, which would be open to everyone – friends and non-friends alike – to view; this would arguably be covered by the new advertising rules. LinkedIn is similar in that lawyers can great a "group" page to advertise their law practice, and keep a more private profile for clients and friends. However, LinkedIn users who want to use the service for client development or even job hunting will want potential clients or recruiters to be able to view their profiles as well. This also may give rise to a filing requirement.

Another feature of LinkedIn and lawyer directories like Avvo is the Recommendation. Anyone can post a comment, good or bad, about anyone on Avvo, and LinkedIn users frequently use Recommendations to build their resume. Although Texas does not prohibit the presence of such testimonials on lawyer profiles, the content of those testimonials must still meet the requirements of the advertising rules. For example, if one of your clients states that you have never lost a products liability trial, you had better be prepared to substantiate that statement, or ask your client to revise his or her post.

Your LinkedIn profile can also create advertising issues in other ways. The Answers area is a great way for lawyers to demonstrate their knowledge on particular legal subjects. Users vote on your answers to designate the "best" answer for a particular question. Earn enough "best answer" votes, and LinkedIn will designate you an "expert" in that area – a designation that is prohibited by Rule 7.04(b)(2) of the Advertising Rules.

You can always answer questions in the discussion groups you join without becoming an expert, but it's probably best to avoid the Answers area if you're a Texas lawyer.[8] In fact, some would argue that answering online questions at all is a bad idea, recommending that instead lawyers offer offline contact information to follow up on legal issues and provide additional information.

What about blogs? The advertising rules state:

> Blogs or status updates considered to be educational or informational in nature are not required to be filed with the Advertising Review Department. However, attorneys should be careful to ensure that such postings do not meet the definition of an advertisement subject to the filing requirements.[9]

I find that blogs with educational or informative posts are much more useful than those that ask "have you been injured? Call a lawyer who'll fight for your rights!" But in a sense, providing helpful information to potential clients, current clients, referring lawyers, and others could be considered "advertising" – by demonstrating your knowledge on a particular legal subject, you are advertising your skills and abilities to represent potential clients in those areas. Nevertheless, it is wise to follow the advice of the Advertising Review Department and examine your blog posts regularly to make sure they do not contain language that could be construed as advertising.

One instance where a blog post was neither educational nor informative came in 2009, when a Florida lawyer posted that a judge was an "evil, unfair witch" on his blog. The Florida State Bar fined the lawyer $1,200 for the conduct.[10]

No matter what type of information the lawyer retains online, that info should be regularly updated and its accuracy confirmed. It may not be an ethical violation to keep outdated information online, but it certainly does nothing for a firm's reputation to have older articles and other information posted online.

This article does not even consider whether a Texas lawyer's social media profiles are regulated by the ethics rules of other state bars. If you are licensed in another state, the ethics rules of that state certainly do – but if your profile could be construed as an advertisement to potential clients in states where you are not licensed, you could find yourself on the receiving end of an unauthorized practice of law complaint.

Ex Parte Communications. Social media makes it very easy for people to "Friend," "Follow," or "Connect" with each other, including judges and lawyers. Have you connected with any judge you appear before, or vice versa if you're a judge? It happened in North Carolina in 2008, when a family court judge friended defense counsel during a custody case, and discussed the case online while it was pending. Needless to say, the judge was reprimanded for his actions – although it is unclear what happened to the offending lawyer.[11] Think *very* carefully about even the appearance of impropriety before friending that judge or lawyer who may appear in your court.

Pretexting/Improper Investigation. Social networks like Facebook and MySpace are veritable goldmines for evidence in all types of litigation. Users of these services persist in the belief that what they post online cannot be seen by anyone but their friends, and often experience rude awakenings when confronted with pictures of that drunken beer bash or even photographic evidence of criminal activity posted online. Simply because the information is seemingly out there for the taking does not mean, however, that the rules have changed about obtaining that information.

Typically known as "pretexting," lawyers may not lie about who they are or their intentions in order to friend someone on a social network and gain access to their personal information. It is also likely improper to hire a P.I. or some other person to make the same misrepresentations in order to gain access to the person's online profile. If you want information on someone's social network profile, obtain it the right way and subpoena the files.

By the same token, if your own client has posted something damaging on his or her social network profile, do not advise the client to remove the bad content. Evidence is evidence, and parties are required to preserve all relevant information without destroying it. You can (and should) certainly advise your client to stop posting incriminating photos online, but what's already there must stay.

Lack of Candor to the Court. It should go without saying that lawyers should be mindful of the statements they make online, because you never know who is reading them. That's why lawyers should not tell a judge they cannot attend a hearing or trial due to another court commitment, and then post a Facebook or Twitter update telling everyone how excited you are to be heading off to that last-minute ski trip. If anyone catches that indiscretion online, it could result in a very unpleasant hearing with the judge.

In-Person Solicitation. The real-time nature of the web makes it possible to have nearly "in-person" communications with others. So it's important to know the rules regarding solicitation, and understand how they might be implicated on social media sites. On Twitter, for example, you may see a post asking "anybody know a good employment litigator in Lubbock?" You may very well be a great employment litigator in Lubbock, but is replying to that Tweet considered solicitation? Perhaps. Better to send the enquirer a link to your website than boldly state your qualifications in a tweet; that way you'll give the potential client the opportunity to contact you, instead of the other way around.

Tips for Managing Your Social Media. The following are some helpful tips on navigating the social media landscape without jeopardizing your law license:

- Understand the privacy rules. Privacy is a continually evolving notion on the Internet, and many sites change their privacy policies as often as we change our socks. Make sure you are aware of the information you are sharing in your online profiles, and that client confidentiality is protected.
- Before writing that blog post about a particular case, company or individual, make sure that your firm doesn't already represent them. Run a conflicts check to determine whether the firm is involved with the topic you want to discuss.
- Presume *everything* you do or say online will eventually become public. This is perhaps the easiest guideline to understand, and yet some lawyers forget this when disclosing information on social media sites.

Many consider the potential ethical issues surrounding social media to require "special" rules, but this may be so simply because technology is involved, which many lawyers do not fully understand or appreciate. A common-sense approach to using social media tools will go a long way towards behaving responsibly when using them as part of an online marketing or business development strategy.

Tom Mighell is a Senior Consultant with Contoural, Inc., providing records management and electronic discovery services to corporations. ★

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1 Mary Jenkins, *A Primer on Social Networking*, CBA Report 13 (April 2010), *available at* http://www.CincyBar.org.

2 Kevin O'Keefe, "*New Legal Ethics Rules Not Required for Social Networking and Social Media*," December 30, 2009, at http://bit.ly/6cbZoB.

3 Maine Ethics Opinion No. 196 (October 2008).

4 *Guidelines for Practicing Ethically with New Information Technologies*, Canadian Bar Association, September 2008.

5 Illinois Attorney Registration and Disciplinary Commission Complaint, located at http://www.iardc.org/09CH0089CM.html.

6 *State Bar of Texas Advertising Rules, Interpretive Comment No. 17 (March 1996, revised; May 2003, revised; March 2010, revised)* (hereinafter, "Interpretive Comment 17").

7 Interpretive Comment 17.C.

8 "Ethically Navigating the Social Media Landscape," Debra Bruce, Texas Bar Journal, Volume 73, No. 3, Page 198 (March 2010).

9 Interpretive Comment 17.D.

10 "*Florida Supreme Court Upholds Sanction Against Lawyer Who Called Judge a 'Witch' on a Blog,*" Jonathan Turley's blog at http://bit.ly/7Kwf1.

11 North Carolina Judicial Standards Commission, http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

THE STATE BAR OF TEXAS PROVIDES NEW GUIDANCE TO ATTORNEYS REGARDING THE PROPER USE OF SOCIAL MEDIA AND BLOGS FOR ADVERTISING PURPOSES

BY DUSTIN B. BENHAM

ONCE UPON A TIME, LAWYERS ADVERTISED their services through telephone books, billboards, and television commercials. During this bygone era (also referred to as the 1990s), the ethical rules governing lawyer advertising were relatively straightforward. At the very least, we could all basically agree on what an "advertisement" was. My, how times have changed. In the past decade, human communication has been drastically changed by the constantly evolving Internet, most recently through the near-ubiquitous adoption of social media like Facebook and Twitter as a communication tool. With internet access, a lawyer has a virtually cost-free global podium to speak from, potentially reaching millions of people with every post, tweet, or status update. Indeed, if the Internet revolutionized communication in the late 1990s, social media sites on the Internet have done it again. This reality and its impact on lawyer advertising were the focus of the State Bar of Texas Advertising Review Committee when it recently adopted revisions to its internal advertising guideline, Interpretive Comment No. 17.[1] This paper analyzes these revisions and their potential impact on lawyer advertising.

Is a Facebook or LinkedIn page an advertisement in the public media subject to the State Bar's advertising and communication rules? The answer from the State Bar Advertising Review Committee is yes if the page "addresses the availability of your services as a lawyer" and is "generally available to the public."[2] This means that your Facebook or LinkedIn page, if generally available to the public, could potentially get you in hot water with the State Bar's ethical enforcement division if it is out of compliance with the Texas Disciplinary Rules of Professional Conduct.[3] But before turning to potential concerns about specific forms of social media and web postings, it might be helpful to take a brief look at how the rules govern information about legal services generally.[4]

The State Bar of Texas regulates lawyer advertising through a system of rules and a special department devoted to the review and approval of advertisements.[5] Part seven of the Texas Disciplinary Rules of Professional Conduct governs "information about legal services," including lawyer advertising. These rules permissibly restrict lawyer advertising as a form of "commercial speech."[6] Although not the focus of this article, there is an important First Amendment distinction between "commercial speech" and other forms of speech protected by the Constitution.[7] "Commercial speech" in this context includes speech by attorneys as it relates to obtaining employment as an attorney.[8] It does not include communications that are educational, political in nature, or otherwise receive greater protection under the First Amendment.[9] When considering a lawyer advertising or communication issue, it is always a good idea to determine what level of protection the communication is entitled to under the First Amendment.[10]

Assuming that the First Amendment allows the Bar to regulate the lawyer communication at issue, Part VII of the Texas Disciplinary Rules of Professional Conduct imposes significant restrictions on lawyer communication and advertising. Among other restrictions, a lawyer may not communicate deceptively, provide false or incomplete information about past successes, or provide inaccurate or misleading information about specialization.[11] To ensure compliance with these restrictions, Rule 7.07 requires lawyers to file advertisements with the State Bar Advertising Review Committee prior to or at the same time as publication or dissemination.[12] In particular, "a "websites"" that describes a lawyer's practice or qualifications must be filed with the committee "no later than its first posting on the internet."[13] After filing, the committee evaluates the advertisement for compliance with the various applicable ethical rules.[14]

Despite the filing requirement, the Rules do allow lawyers to advertise, on the internet and elsewhere, certain basic information about themselves and their practices without first filing with the committee.[15] This information includes basic biographical and location information like name, addresses, phone numbers, date of admission to the bar, practice area, and other information that has traditionally been referred to as "tombstone" advertising.[16] But beyond this limited scope

of information, the Rules require filing and evaluation by the committee.[17]

The ethical rules, however, do not deem every communication by a lawyer an advertisement in the public media subject to submission, review, and compliance provisions. Indeed, some communications may not be advertisements because they are not available in the public media, or the communication may not relate to obtaining employment.[18] Drawing these distinctions is particularly difficult in the online arena because the forms of e-communication have constantly and rapidly evolved.[19] To assist lawyers who are trying to determine whether a particular communication complies with the rules, the State Bar Advertising Review Committee has adopted "internal interpretive comments."[20] "The Interpretive Comments are designed to establish objective means for [advertising department] staff members to review advertisements . . . and to determine whether they comply with Part 7 of the Texas Disciplinary Rules of Professional Conduct."[21] If the advertisements comply with the Interpretive Comments, the staff can approve them as being in compliance with the applicable rules.[22] Thus, although the Interpretive Comments do not have the same binding effect as the Rules, they do provide lawyers with valuable guidance on how the Advertising Review Committee will enforce the Rules.

The ethical rules, however, do not deem every communication by a lawyer an advertisement in the public media subject to submission, review, and compliance provisions.

Originally promulgated in 1996 and first revised in 2003, Interpretive Comment No. 17, titled "The Internet and Similar Services Including Homepages," explicitly recognizes that "information disseminated digitally via the Internet" is subject to the rules of professional conduct that govern information about legal services, including lawyer advertising.[23] Specifically, a "digitally transmitted message" is an advertisement in the public media, subject to the rules governing lawyer advertising when the message 1) "addresses the availability of a Texas lawyer's services; and 2) is "published to the Internet."[24] Under the standard existing from 2003 to today, a wide swath of activity appears to be within the scope of the advertising rules.[25] But between the original 2003 revisions to the comment and today, communication on the Internet has drastically changed. In an apparent recognition that social media and blogging presented new compliance questions, the Advertising Review Committee revised Interpretive Comment No. 17 earlier this year.[26] While leaving the language quoted above in place, the 2010 revision attempts to provide much-needed guidance to lawyers communicating or advertising on the internet through the new forms of internet communication.[27]

The Advertising Review Committee made two major revisions to Interpretive Comment No. 17. First, the committee added a section to specifically address social media sites, like Facebook, Twitter, and LinkedIn.[28] Second, the committee added a section to deal with blogs.[29]

A. Social Media Sites

Social media sites offer a huge platform to anyone who wants to get a message out. Facebook reports that it has over 400 million registered users.[30] A social networking site named "LinkedIn," popular with attorneys and other professionals, reports that over 65 million "professionals" use the site.[31] Twitter, a site that allows users to send 140 character messages to "followers" or the world at-large, has around 105 million registered users.[32] Through these sites, attorneys can potentially communicate with a large number of people at low cost (or no cost). For example, a lawyer in Dallas has the ability to create a Facebook page that mentions that she specializes in pharmaceutical litigation. The page is free, and once it is posted to the Internet, could potentially come up in the Internet search results of an injured person in Austin who is looking for a lawyer. The lawyer has "reached" the potential consumer of her services for little or no cost. This cheap, statewide reach is attractive to attorneys but has also attracted the attention of the State Bar Advertising Review Committee.

The latest revisions to Interpretive Comment No. 17 specifically address social media sites:

> "C. Social Media Sites
> Landing pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements. Where access is limited to existing clients and personal friends, filing with the Advertising Review Department is not required."

This change recognizes that most social media sites have privacy settings that can be managed by the user.[33] These settings can be configured to allow the general public to access the user's "landing" page (the page that displays substantive information about the user) or can be set to restrict public

access to the landing page.[34] Facebook pages that are setup to allow public access are treated differently by the Advertising Review Committee than those that restrict access to a lawyer's "existing clients and personal friends."[35]

When the existing provisions of Interpretive Comment No. 17 are read together with the new revisions, it appears that a "digitally transmitted message" posted on a site like Facebook that addresses the availability of a Texas lawyer's services must be submitted to the Advertising Review Committee, at or before the time it is posted, if the page the message appears on is generally available to the public.[36] This has significant implications for lawyers using social media sites – especially if they have their profile (or "landing") pages configured for general public access. A lawyer with a Facebook page that is available to the general public may very well be required to submit that page to the Advertising Review Committee at or before posting the page to the network.[37] In large part, the submission requirement depends on the content of the Facebook page. For instance, if the lawyer's page does not relate to obtaining employment or the availability of a lawyer's services, the page may be exempt from submission.[38] Lawyers should proceed cautiously, however, because simple statements on the page that relate to the lawyer's practice could be found to relate to the availability of a lawyer's services.

A lawyer with a Facebook page that is available to the general public may very well be required to submit that page to the Advertising Review Committee at or before posting the page to the network.

Even if the page relates to the availability of the lawyer's services, if all that is displayed is what has traditionally been described as "tombstone" information, the page may be exempt from the submission and approval requirements of the rules.[39] This basic information may include, among other things, the name of the lawyer or firm, the particular areas of law in which the lawyer specializes or possesses special competence, and the date of admission to various jurisdictions' bar associations.[40] But even though the submission and approval requirements may not apply if a lawyer keeps it simple, the Facebook page must still comply with the requirements of the other rules governing advertisements in the public media (i.e. representations about past results).[41] This puts the onus on the posting attorney to make sure her page complies with the ethical rules, with the risk of possible sanction if it does not.

Neither the new interpretive comment, nor the rules, makes the dynamic, daily use of a public Facebook page simple. For example, most users of Facebook regularly post status updates to their own Facebook page and post messages on the "wall" of other Facebook users. These messages could potentially implicate the rules governing lawyer advertising, including mandatory review of the updates.[42] For instance, if a lawyer with a public Facebook profile page won a jury trial and posted a status message on her Facebook page that said "$10 million verdict, let's all celebrate," the lawyer would apparently be under an ethical duty to submit that page containing the message to the Advertising Review Committee at or before the time it was posted.[43] The landing page would then be subjected to the review process.[44] The content of the message -- $10 million victory – would likely implicate Rule 7.02(2) which governs advertising about past successes or results.[45] Unless it complied with all applicable rules, the lawyer could face a possible sanction if the status message was posted in real-time, without prior approval.

Interestingly, Interpretive Comment No. 17 makes specific reference to "status updates" in the section of the comment that deals with blogs.[46] The comment states that status updates "considered to be educational or informational in nature" are not required to be submitted to the advertising review process.[47] But the rule goes on to warn that "attorneys should be careful to ensure that such postings do not meet the definition of an advertisement subject to the filing requirements."[48] So the burden appears to be on the posting attorney, with every status update, to be sure that the content is not related to the availability of the lawyer's services and is purely educational.[49] This line is often difficult to draw and leaves the attorney in the tenuous position of submitting every post related to her practice to the Advertising Review Committee or making judgment calls at the risk of a possible ethical sanction.

The lessons of the interpretive comments for lawyers using Facebook or LinkedIn boil down to a simple piece of advice: Keep your Facebook page set to private if you are going to discuss your practice to any extent beyond basic, "tombstone," information.[50] The same is true for lawyers utilizing any other social media site. To do otherwise, you risk subjecting yourself to onerous submission requirements and possible ethical sanctions. Of course, communications made via a private social media page (i.e. a page limited to existing clients and personal friends) may still be subject to many of the rules governing lawyer communication and

rules pertaining to information about legal services that is not an advertisement in the public media.

A. Blogs

Many lawyers and law firms utilize blogs to disseminate information to the public. These blogs may provide information regarding a particular lawyer's practice or practice area. Some blogs address the happenings in a particular court or jurisdiction. These blogs often contain information that is helpful and educational to the public and the profession generally. Accordingly, First Amendment concerns are implicated when the State Bar attempts to regulate the use of blogs because they often contain speech that receives significant Constitutional protection.[51] The latest revisions to Interpretive Comment No. 17 reflect the State Bar's apparent sensitivity to these issues:

> "D. Blogs
> Blog . . . updates considered to be educational or informational in nature are not required to be filed with the Advertising Review Department. However, attorneys should be careful to ensure that such postings do not meet the definition of an advertisement subject to the filing requirements."

This comment is consistent with the First Amendment principle allowing lawyers significant leeway when publishing material of serious educational value.[52] The comment, however, also puts the burden on lawyers to be "careful" when determining if the material is educational or an advertisement, subject to the filing requirements.[53]

The recent amendments to Interpretive Comment No. 17 make clear that the Advertising Review Committee recognizes the changing nature of the internet and social media. Despite this recognition, the committee appears to take an enforcement strategy that significantly limits lawyers' ability to use public social media pages to discuss their practices unless the discussion is limited to "tombstone" information. And while the committee allows lawyers to publish educational blogs, it appears to place the burden squarely on the lawyer to be "careful" not to cross the line into advertising on a blog. The enforcement of the ethical rules governing advertising in the ever-changing internet environment is undoubtedly a challenging task, and compliance with the current advertising rules remains a challenge for Texas lawyers.

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1 State Bar Advertising Committee Interpretive Comment No. 17(A)-(I) (hereinafter referred to as Interpretive Comment No. 17). The author is a licensed Texas attorney but is not affiliated with the State Bar of Texas in any way. Thus, this article does not constitute legal advice or a legal opinion, is for educational purposes only, and does not represent the views of the State Bar of Texas.

2 Interpretive Comment No. 17 (Revised March 2010).

3 *Id.*

4 This article focuses on recent changes to the interpretive comments related to the enforcement of the Texas Disciplinary Rules of Professional Conduct in the context of Internet advertising. Beyond the advertising rules, communicating on the Internet may implicate many other ethics issues (i.e. client communication, confidentiality, and communication with the Court). This paper does not attempt to address every issue that might be raised by communication on the Internet.

5 *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT, Part VII.

6 *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1342 (E.D. Tex. 1995); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.02 cmt. 1-2.

7 *See e.g.*, *Texans Against Censorship, Inc.*, 888 F. Supp. at 1342-43.

8 *Id.*

9 *See id.*

10 For a discussion of the First Amendment in the context of online advertising in Texas, *see e.g.*, Ellen Pitluk, *Ethical Issues for Lawyers Involving the Internet*, State Bar of Texas, Emerging Ethical Issues Involving the Internet (November 13, 2009).

11 TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.02(a)(1)-(7) & (c).

12 *Id.* § 7.07.

13 *Id.* § 7.07(c).

14 *Id.* § 7.07 cmt. 3-4.

15 *Id.* § 7.07(e).

16 *See id* § 7.04 cmt. 6.

17 *Id.* § 7.07(e).

18 *Id.* § 7.04(a) & cmt. 2.

19 *See, e.g.*, Laura Merritt, *Social Media Concerns for Litigators: How Facebook, Twitter, LinkedIn, and Other Social Networking Sites Can Impact Your Case*, State Bar of Texas, Business Torts Institute (Dallas, TX, October 29-30, 2009).

20 Interpretive Comments Nos. 1-28 (prefatory statement, available at www.texasbar.com).

21 *Id.*

22 *See id.*

23 Interpretive Comment No. 17.

24 *Id.* Note that Interpretive Comment No. 17 states that any digitally transmitted message that addresses the availability of a Texas lawyer's services is a "communication subject to Rule 7.02." Rule 7.02 imposes certain restrictions on lawyer communications whether or not they are ever published.

25 *See id.*

26 *Id.* (revised March 2010).

27 *Id.*

[28] *Id.* § (C).

[29] *Id.* § (D). In addition to these two critical changes and several other changes, the committee made a small but significant change to the section addressing required disclaimers on traditional websites. *Id.* § (A). The disclaimers required by TEX. DISCIPLINARY R. PROF'L CONDUCT 7.04(b) (lawyer responsible for content and specialization information) cannot be "displayed" by link to a separate page. Interpretive Comment No. 17(A).

[30] http://www.facebook.com/press/info.php?statistics.

[31] www.linkedin.com/home.

[32] http://tweet-house.com/2010/how-many-registered-users-does-twitter-have/.

[33] http://www.facebook.com/policy.php.

[34] *Id.*

[35] Interpretive Comment No. 17.

[36] *See id.*; TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.04-7.07.

[37] *Id.*

[38] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.04(a); Interpretive Comment No. 17.

[39] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.07(e).

[40] *Id.* § 7.07(e)(1).

[41] *Id.* § 7.07(e).

[42] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.04-7.07.

[43] The lawyer may have the additional duty to retain a copy of the Facebook page for four years after its last dissemination. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.04(f).

[44] *Id.* § 7.07.

[45] *Id.* § 7.02(2).

[46] Interpretive Comment No. 17(D).

[47] *Id.*

[48] *Id.*

[49] *See id.*

[50] Although a lawyer may control what is on his Facebook page to a certain extent, the dynamic nature of Facebook pages makes it possible that a "friend" could post a message related to the lawyer's practice on the lawyer's wall. Imagine a message from a friend that said "Congratulations on the $10,000,000 victory. More clients should bring their cases to your talented firm." It is possible that this posting by a third party could put a public Facebook page in violation of several ethical rules. *See e.g.* TEX. DISCIPLINARY R. PROF'L CONDUCT 7.02(2).

[51] *See Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1342 (E.D. Tex. 1995).

[52] *See Texans Against Censorship, Inc*, 888 F. Supp. at 1342-43.

[53] Interpretive Comment No. 17(D).

INTERNET-BASED DOCUMENT MANAGEMENT SYSTEMS

BY DENNIS KENNEDY & TOM MIGHELL

DOCUMENT CREATION AND MANAGEMENT are literally the life blood of the practice of law. Every day, lawyers draft pleadings, discovery, contracts, wills, orders, judgments, and a bevy of other legal documents. Through the years, document creation tools have evolved from the typewriter to the computer and WordPerfect or Word. Those firms that use document management systems have them installed in-house, where they are safely behind a secure firewall.

With the explosion of "Web 2.0,"[1] lawyers are now able not only to create documents online, but also store and manage them there as well. In this article, we will take a look at the phenomenon of online document creation and management, discuss some of the tools currently available, and offer tips on getting started with an online document management strategy.

Internet-Based Document Creation

In June 2010, Microsoft debuted its free online version of Microsoft Office. This came several years after Google Docs went online with its free online word processing, spreadsheet and presentation tools that are part of Google Apps. Several other services, including Zoho, ThinkFree, and Buzzword offer document creation and collaboration services. All of these tools allow you to create a document, spreadsheet or presentation within your web browser, and collaborate on these documents with others in real time.

The increasing popularity of Google Docs (and, we assume Microsoft Office on Windows Live) demonstrates a clear trend where documents can and will be created and edited using online tools in addition to or in the place of our familiar office suite software. You will sometimes see this trend described as "cloud computing" or "cloud-based" document creation. For the purposes of this article, we are simply going to call it internet-based document creation and its counterpart, internet-based document management.

With these internet-based tools, you use your access to the internet and your web browser to complete tasks traditionally accomplished by software programs installed on your PC or your internal network server. With your internet browser, an online account, a user name and password, you can access, create, edit, collaborate and otherwise work on any type of document.

Some of the document creation tools we like the most include:

- **Google Docs**[2] is the giant in this field, having offered free online document creation for many years. Google now offers a complete **Google Apps**[3] suite, with Google Docs, Gmail, Google Calendar, Google Groups, Google Sites, and much more. Google Apps costs $50 per user, per year. One law firm recently made the move to an "all Google Apps" environment, and they are now using all Google Apps for their practice needs.[4]
- **Microsoft/Windows Live**[5] is a newcomer in this space, but hopefully it will be a strong competitor to Google Docs, given the widespread use of Microsoft Word in law firms. The online Office tools are currently free for all users.
- **Zoho Office**[6] has been around longer than all of these services, and offers a much broader range of tools, including planners, project management tools, web conference services, a CRM product, and more, in addition to its office products. All Zoho products are free for personal use, with monthly pricing per user for corporate implementation.

The benefits of internet-based document creation are many. You get anywhere, anytime access to all of your documents (even from your smartphone), the ability for several people to collaborate and work on the same document, and in most cases without the need to install any new software on your computer. In fact, because the software is web-based, it is upgraded behind the scenes, so you get the benefit of the new features without having to install them yourself. Most of these online services are free or quite inexpensive.

There are a couple of drawbacks to online document creation tools, in our opinion. The first is that the feature set of the tools mentioned above is not as rich as you might find with Word or even WordPerfect. If you want to add a Table of Authorities, you're out of luck with Google Docs or the others. We used to say that Google Docs was a little bit like WordPad, but nowadays it is quite a bit more powerful. It just does not quite match the features of the well-established desktop software versions.

One other major feature lacking in theonline documentation tools is a robust "track changes" feature. Track Changes in Word is how most people collaborate on documents, and it allows users to see changes and comments made by other authors, and then accept or reject those changes in an orderly way. Although Google Docs and the others have Revision History functionality, they do not come close to matching the power of Word's Track changes features, or those of other track changes software manufacturers. Hopefully these sites will begin to offer better tools in this area in the near future.

There are also important due diligence issues to be considered when deciding to implement an internet-based document creation strategy. Security and confidentiality are probably the issues most important to lawyers, and with good reason; before storing your confidential client communications online, you will want to make sure the provider's service offers sufficient security to protect your documents. The truth is that companies like Google and others in this space have Fort Knox-like security, but you will still want to do your due diligence when evaluating document creation services. Backup of data and permissible service levels are other issues that you will want to evaluate before deciding on an internet-based document creation tool.

We are already seeing the use of these online tools in a number of areas—document collaboration, creating simple first drafts, remote accessibility, making large files available outside of email and other uses where giving anywhere, anytime access to documents can be valuable. In fact, we used Google Docs to collaborate on our book,[7] and it was tremendously useful in going back and forth with various chapters that we were writing.

With that introduction to document creation, which we expect only to get more popular in the next few years, let's move to the main topic of this article—the actual online management of these documents.

Internet-Based Document Management

First, a short primer on the subject of managing documents. Once you create a document, you are faced with a number of basic questions that fall into the broader category of document management:

- How do we find the document again?
- How do we name the document and should we use certain naming conventions?
- How do we determine if we have the current version?
- Can we add information about a document (traditionally called "metadata") that will help us in the future to find useful or relevant documents or tell us who created or worked on a document?

As the volume of documents we create increases, we need to find ways to organize documents—for example, by client or matter. Without technology, document management can become an overwhelming task in short order.

Traditionally, lawyers take one of four main approaches to document management.

1. Chaos. Chaos describes more the end state than the actual approach. A lawyer might start with some kind of system that they do by hand, but at some point it gets overwhelmed. There's sort of a system, but it's difficult to locate documents, especially in a shared environment. Not recommended.

2. Disciplined Folder and Naming Conventions, Rigorously Used and Enforced. Many lawyers and firms have successfully developed and maintained systems built on naming conventions (e.g., Date-Type of Document) and folder choices (e.g., Client-matter-year).Increased volume, turnover and other factors can strain this type of system, but for some practices where people can stay disciplined, this approach seems to work, especially when supplemented as described in approach #4 below. If you have a record retention schedule for your firm, this system can be difficult to manage.

3. Document Management Tools. There have long been specific tools for handling document management in law firms. WorldDox, DocsOpen and iManage are well-known names in the universe of document management systems, especially in medium-sized and large law firms. These are powerful tools that force users to fill out information about documents, make it easy to sort, file, locate and manage versions of documents, and provide full-scale management of documents. Some firms also use case management systems for document management, and programs such as Microsoft SharePoint, have some document management features. With a document management program, you have the ability to set retention periods on the specific types of documents you create, thereby enabling you to defensibly dispose of those documents when they reach the end of their required retention.

4. Desktop Search. Search capabilities are built into the document management tools. If you do not have a DM system, you should be using a desktop search tool (Copernic[8], Google Desktop Search[9], and others) that essentially works as a search engine for documents on your PC or network. These tools index your documents and allow you to do keyword and other searches. If you use approach #1 or #2 above, a desktop search tool can supplement what you are doing and make your system much more useful and effective.

Litigators who work with online document repositories or other online e-discovery tools will find that these programs have built-in features that let you work with and manage large numbers of documents.

With that background, we'll turn to the idea of internet-based document management. In a sense, it's really as simple as moving the four basic approaches discussed above to the internet. However, this movement can happen in several different ways. We want to highlight four primary forms of internet-based document management:

- Enabling internet-based features of your existing document management system;
- Enabling document management systems of online tools;
- Using document management in internet-based document creation tools; and
- Using new cloud-based document management systems.

Let's take a closer look at each of these different forms.

Internet-based features of existing document management systems. In simplest terms, you can open up your internal document management system to external access in controlled and secure ways. This will allow lawyers and staff to access the system and documents from home or even provide limited access to clients and others.

If you are using one of the standard document management tools (Worldox[10], DocsOpen[11], and Autonomy iManage[12], for example), you should be able to customize each internet-based access with high degrees of control and customization. You may also be able to access internet-based document management features of case management or other software tools that you use.

Even if you are using no document management software, you can enable a basic internet-based document management system simply by using remote access tools like GotoMyPC[13] or LogMeIn,[14] so users can access files in your named folders.

Document management components of other online tools. Another approach is to enable the document management features of online tools you already use for other purposes. Litigators who work with online document repositories or other online e-discovery tools will find that these programs have built-in features that let you work with and manage large numbers of documents. The systems that exist to carry out these tasks are essentially document management systems with very specific goals.

Examples of these products include online case management tools like Clio[15] or Rocket Matter,[16] which have basic document management capabilities. Also, online project management tools like BaseCamp[17] are able to store and manage a certain volume of documents. Microsoft's SharePoint[18] was originally designed as a collaboration tool, but so many companies found its document management features so useful, Microsoft decided to build more of that functionality into SharePoint 2010. There are even online services that allow you to share large files (Dropbox[19] and YouSendIt[20] are two examples), and are at their most basic a form of online document management.

Document management in internet-based document creation tools. In this approach, we consider document management features that may exist within internet-based document creation tools. In other words, if you use the online version of Microsoft Office or Google Docs to create word processing documents, how can you manage those documents that are created on the internet and continue to live on the internet?

We first ran into this issue when writing our book. We wrote the first draft of the book on Google Docs, and we ended up with separate documents for each chapter and other book-related documents. We had more than forty documents within Google Docs.

At the time, Google Docs provided a single folder of documents listed in reverse chronological order, based on the date it was last edited. We were often forced to scroll through the documents to find the one we wanted. Even with only forty

documents, such a simple approach to document management was cumbersome and unwieldy. Today, Google Docs gives you many more organizational options and search capability, but still nothing close to the full feature set of a dedicated document management tool. We understand that in their move to Google Apps, the Bradford & Barthel law firm will eventually be using a Google-based document management system; we are interested to see what that will look like.

Google Docs is a good example of the benefits of an internet-based document management system. While letting you manage documents stored online, the online services tend to improve their features over time without requiring you to buy and install new versions of software.
It's also fair to say that document management in internet-based document creation tools is still at an early stage. You are likely to be relying on folder systems, naming conventions and simple search tools, but that's not all that different from what many lawyers are doing now on their own internal systems.

New Cloud-Based Document Management. A few companies have begun to introduce pure cloud-based document management systems, not systems that have another purpose but have incidental document management capability. A couple of these systems include Knowledge Tree,[21] NetDocuments,[22] and the newly-released Litera Live.[23] Like Google Docs, these services allow you to share files, collaborate on them, and even integrate with Microsoft Office Desktop tools, but with the added benefit of the structure of a fully-functional document management system.

As with all cloud-based products, it is important to ask the right questions before entrusting your most precious asset—your work product and confidential client data—to an online environment. Here are just a few of the questions that should be asked.

- How does the vendor safeguard the privacy/confidentiality of stored data?
- How often and how is the user's data backed up?
- What is the history of the vendor? Are they stable financially?
- Can I get my data "off" their servers for my own offline use?
- Does the vendor's Terms of Service or Service Level Agreement address confidentiality and security?
- What happens to my data if I don't pay my bill on time?
- What happens to my data if you go out of business?

Other good questions to ask Software-as-a-Service (SaaS) vendors can be found at the ABA's Legal Technology Resource Center.[24]

It's interesting to see that lawyers are already pointing to the lack of document management tools as a major reservation to using internet-based document creation tools. Ironically, if you talk to document management software vendors, they can give you a long list of the reasons lawyers give for not moving to document management tools. Taking a closer look at what is available and how it compares to what you actually use now will help you better assess how document management in online document-creation tools might work for you.

Practical Tips.

How might internet-based document management work for you? Here are some practical tips to consider.

1. Understand how you really manage your documents today. It could very well be that your existing document management approach or system will allow you to move your documents to an online platform.

2. Consider the use(s) you want to make of online services. The classic use of an online document tool is for collaborating on documents. However, you may only need a tool that can provide remote access, the secure transfer of large files or limited access to certain documents. Understanding what use you want to make, and the potential benefits, will help you make a better decision. A limited approach might be much more valuable for you than trying to implement a broad solution.

3. Identify your preferred use of online document management from the four options listed above. Each approach is different, and identifying the category you want to address will help you look at the right tools and make a better, more targeted decision.

4. Determine what tool fits your needs. If your document management or case management software already has online capabilities that you have not activated, it just makes good economic sense to take a hard look at whether that's the best route to take. Similarly, if you are using an online case management or project management tool, you will want to

see if you can use existing document management features as your online system and adapt your practices to these tools rather create another silo of records and information. Target the actual need you have rather than looking for a full-blown, all-inclusive solution.

5. Watch for developments. Software companies continue to add collaboration and online features to upgrades of their products. Online services also add new features, often on a weekly basis. A tool that does not have the feature you want now might well have those features, and more, in a few months. Keep your eyes open.

Looking at the Future

"Cloud computing" is a big buzzword in technology today. We are seeing more and more traditional software tools move from software installed on your PC to services accessed over the Internet. The recent online version of Microsoft Office and the early competition between Google, Microsoft and others in online document-creation is likely to hasten this trend. As we stated earlier, document management follows closely behind document creation. When you consider the many ways you want to access your documents as well as the ways you, your clients and others want you to create and keep documents online, it's a perfect time to get yourself ready for internet-based document management and be prepared for this trend.

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1 http://en.wikipedia.org/wiki/Web_2.0
2 http://docs.google.com
3 http://www.google.com/apps
4 *In Their Own Words: Law Firm Innovators Bradford & Barthel's "Operation Google Apps,"* at http://bit.ly/brmit1, and *In Their Own Words: Bradford & Barthel Responds to Questions from Legal Tech Experts About Their Move to the Cloud*, at http://bit.ly/bCAb1i.
5 http://office.live.com
6 http://www.zoho.com
7 *The Lawyer's Guide to Collaboration Tools and Technologies – Smart Ways to Work Together,* http://amzn.to/BlDbJ.
8 http://www.copernic.com
9 http://desktop.google.com
10 http://www.worldox.com
11 http://www.opentext.com
12 http://www.interwoven.com
13 http://www.gotomypc.com
14 http://www.logmein.com
15 http://www.goclio.com
16 http://www.rocketmatter.com
17 http://basecamphq.com
18 http://sharepoint.microsoft.com
19 http://www.dropbox.com
20 http://www.yousendit.com
21 http://www.knowledgetree.com
22 http://www.netdocuments.com
23 http://www.literalive.com
24 *FYI: Software as a Service (SaaS) for Lawyers*, http://www.abanet.org/tech/ltrc/fyidocs/saas.html

INFORMAL DISCOVERY ON THE INTERNET

BY TODD B. BAKER

THE INTERNET HAS ALREADY CHANGED the way lawyers practice. E-mail, firm websites, and online legal research sites are commonly used by practitioners. If your practice is anything like mine, you know full well the power of the internet in reaching out to others—sometimes in the form of hundreds of e-mails per day. Embracing these technologies is vital, and their effective use can make or break a case. Aside from the traditional uses of the internet, lawyers can use the internet to build a case through informal discovery. Informal discovery includes anything other than the types of discovery set forth in civil procedure rules. This article focuses on one particular type of informal discovery—the internet—and common uses of the internet in the informal discovery context: finding people, entities, and assets.

Everything from civil and criminal court records, company financial statements, driver's license records, and sex offender databases are out there just waiting to be found. As you will see, many of the resources discussed below can be used for numerous purposes, and the only way to get comfortable with these resources is to use them.

A. Finding People

1. Search Engines

A search engine helps you locate things on the Internet. You type in one or more words describing what you are looking for, and the search engine shows you a "hit list" of web pages which contain those words. Search engines come in all shapes and colors. Google is far and away the most visited search engine on the internet,[1] and is commonly used for research, news gathering, and settling the all important trivia dispute. Google is constantly updating its site and adding features to its standard search engine. However, Google is not alone. The recent introduction of Bing, as well as old stand-bys such as Yahoo!, provide several options for finding information. Beware, not all search engines are the same, and it takes a little time to figure out which search engine works the best for you.

Tips On Using Internet Search Engines:

- When searching for information on a person or a phrase use quotation marks ("John Smith") around the person's name or phrase.
- Try alternate spellings of the person's name or the subject you are interested in.
- There is no uniformity between search engines. This chart demonstrates the differences in various search engines.

Please see chart on page 24.

- Use Boolean Connectors just like you would in Westlaw or LEXIS. See chart above on limitations of respective engines. For example, if you want the phrase you are searching for to include common words such as "a" or "the" include "+ the" which will force Google to include that word. The same is true if you want to exclude certain words. In that case, include "- " in your search.
- If you want to search within a site for something, use the "site:" command. For example, if you would like to search within Haynes and Boone's website, type site:www.haynesboone.com and the keyword. That command directs Google to search for the keyword in that website only.
- Never just do one search on one search engine and assume that you have conducted a comprehensive search. Do several searches on different search engines.
- There is no single definitive search engine. You will find one that you like better than others, but do not discount the others and familiarize yourself with as many of them as you can.

i. Super Search Engines

There are also "super" search engines that run internet searches across the leading search engines, such as Google, Yahoo!, and Bing. WebCrawler[2] and Dogpile[3] both offer search results from major search engines, and can be a good place to start if you simply have no idea where to begin.

ii. The Wayback Machine

A final word about search engines. The Wayback Machine is an internet archive that, according to its website (http://

Selected Internet Search Engines

Search Engine	Database	Advanced/Boolean	Other Search Options	Miscellaneous
Google **google.com** Advanced Search. Ranks based on popularity (# of pages linked to).	Full text of web pages and other documents on the web. **Plus:** News (4500 sources); Images; Groups (*Usenet posts 1981)*-, Local (maps, businesses), Products (shopping), Scholar (articles), Book Search, Video Search, Blog Search, and more	AND *(default)* OR *(capitalized)* - to remove words or phrases. + to include common words	* wildcard to replace word(s) **(to * or *)** No truncation. Quotes for phrase. Stems some words (+ to turn off). **Fields:** intitle:, site:, inurl:, filetype: more. US Gov Srch **Similar pages** - *finds related sites.*	Language translations. ~ searches synonyms (**~food**) define: finds definitions **Tools:** math/equivalents calculator, maps, stocks.- more
Bing **bing.com** Advanced Search	Full text of web pages and other documents on the web. Type up to 150 characters, including spaces, in the search box. **Plus:** Images, Videos, Shopping, News, Maps, Travel.	AND *(default)* OR *(capitalized)* *NOT (capitalized)* to exclude words.	No truncation. Quotes for phrase. For dates, type the name of the month instead of the calendar number.	Left panel, suggests related searches and shows search history. Translates similar to Google. Use Instant Answers for easy field searching.
Yahoo! search **search.yahoo.com** Advanced Search. Yahoo! Directory. Ranks based on relevancy (occurrence of terms).	Full text of web pages and other documents on the web (also huge), Some content pay-for-position or from Yahoo! community. **Plus:** News (7000 sources), Images, Maps, People, Local, Travel, Shopping, Video, Audio, and more.	AND *(default)* OR *(capitalized)* - to remove words or phrases. + to include common words.	No truncation. Quotes for phrase. Limit by date, language, domain, file type, and country in Adv Srch. **Fields:** intitle:, inurl:, link:, site:, hostname:	Translates similar to Google. **Shortcuts** give quick access to topics. **Creative Commons** search in Adv. Srch.
Ask Kids **www.askkids.com**	Good answers for simple questions. Also safe, entertaining games for kids; news by age groups.	Natural language questions, not Boolean searches.	Left sidebar offers links to narrowed, broadened and related search results.	Provides links to other resources (Schoolhouse, Movies, Games, Video, Images).

Courtesy of http://www.infopeople.org/search/chart.html.

www.archive.org/web/web.php), "allows institutions to build and preserve their own web archive of born digital content, through a user friendly web application, without requiring any technical expertise or hosting facilities."[4] Essentially, the Wayback Machine is a website that archives websites as they exist at different times, and this information can be very useful to lawyers. Intellectual Property lawyers use the Wayback Machine in connection with various types of cases. In domain name disputes, the Wayback Machine is typically used to determine the uses of the disputed domain. In the patent context, lawyers use the Wayback Machine to search for prior art in connection with invalidity studies. Similarly, lawyers use the Wayback Machine to search for evidence of the improper use of trademarks. In short, any time the content of a web page at a particular time is at issue, you should use the Wayback Machine.

2. Social Networking Sites

Social Networking Sites ("SNS") have been defined as: "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and

(3) view and traverse their list of connections and those made by others within the system."[5] In other words, SNSs are online communities where users can swap pictures, discuss issues, or, as we will later see, embarrass themselves. The use of SNSs has exploded in recent years. As of this writing, Facebook has over 400 million world-wide users, [6] and Myspace boasts over 100 million world-wide users.[7] Twitter.com has over 75 million users world-wide.[8]

For the first time since 2007, Google was knocked off its perch as the most visited website of the week Facebook in March 2010.[9] Interestingly, Google overtook MySpace in 2007 before its stranglehold was broken by Facebook.[10] The use of SNSs is so pervasive that many branches of the government require applicants to disclose any social networking sites used. Private employers, including law firms, also look for applicants on these sites, just to get a better picture of applicants when their guard is down. SNSs "create a potentially permanent record of personal information that becomes a virtual information bonanza about a litigant's private life and state of mind."[11] Failing to take advantage of the information users willingly post on these websites can put you, and more importantly, your client, at a disadvantage.

Private employers, including law firms, also look for applicants on these sites, just to get a better picture of applicants when their guard is down.

Finding people on Social Networking Sites can be easy. Although each user can set their security level and keep pages private, many users maintain public pages, allowing anyone with access to the internet a look at photos, blog posts, as well as other personal information. But that's not where it ends, because users often post photos of friends, family, etc. who may not even belong to an SNS. Think about that. There is a chance that your photo is on the internet and you may know nothing about it.

While several high-profile scandals involving SNSs have been in the news, including the forced resignation of an aide to a New York public official following criticism of President Obama on Facebook,[12] evidence from SNSs has been used in the legal system for a couple of years.

a. Use in Criminal Proceedings

Prosecutors have already successfully used SNS posts as evidence for sentencing. In 2006, a 20 year-old Rhode Island man was charged in a drunk driving crash that left a woman seriously injured. The Prosecutor was tipped to pictures posted on Facebook showing the man, two weeks after being charged, wearing an orange jumpsuit stenciled "JAIL BIRD" over a black and white striped shirt. When the Prosecutor showed the pictures at sentencing, the Judge called the pictures "depraved" and sentenced the man to prison for two years.[13] Similarly, after a fatal drunk driving crash in Santa Barbara County, California, prosecutors used photos downloaded from a woman's MySpace page depicting her holding a glass of wine and joking about drinking—after the crash but before sentencing.[14] The prosecutor, who was willing to recommend probation, sought a jail sentence and the woman was sentenced to two years in prison. These stories are more and more common and illustrate how the use of information from SNSs is being used in the legal system.

b. Use in Civil Proceedings

In the civil context, SNS research can supplement or even supersede the role of the classic private investigator following a personal injury plaintiff in the hopes of snapping photos of a healthy person, thereby undermining the plaintiff's case. But, SNSs contain a lot more than photos. Users and their "friends" or "followers" post comments about any topic you can imagine. While the availability of this information is great for the party doing the searching, it is a wise practitioner who advises a client to take down an SNS page at the outset of an engagement, as many unfortunate attorneys have learned.

That said, it is becoming more common for SNS posts to be the subject of lawsuits. Several recent suits have spawned from defamatory posts on SNSs such as Twitter and My Space.[15] SNS evidence is also being increasingly used in traditional civil litigation matters. For example, the Fayetteville Arkansas School District and one of its school administrators were sued by the parents of a student who was beaten and harassed due to his perceived sexual preference.[16] The suit alleged that the administrator failed to take steps to protect the student, even after the student's parents informed the administrator of numerous threats and a Facebook group entitled "Everybody Hates [Student]." The group was created by fellow students and included statements like "[Student] is a little b***h."[17] While the case ended in a defense verdict, Facebook posts from both parties were introduced at trial.[18]

i. Ethical Considerations.

Although this article does not discuss in detail the ethical considerations related to SNS discovery, it is worth noting that there are limitations. Most SNSs, like Facebook and MySpace allow users to "friend" other users, thereby giving access to otherwise private information. In a 2009 Ethics

Opinion, the Philadelphia Bar Association found that it was improper for an attorney to use a third party to send a friend request to an adverse witness' private Facebook profile in an effort to discover impeaching evidence. The Bar Association stated that an attorney must disclose his or her true intentions when contacting an adverse witness.[19]

For more analysis of the legal and ethical issues associated with SNSs, see the March 2010 issue of the Texas Bar Journal, which devotes significant space to the topic.[20]

3. Blogs

Blogs have been described as everything from personal diaries to memos to the world.[21] In short, blogs are web pages where users post their thoughts on any and all things. The use of blogs is nearly as pervasive as SNSs. For example, BlogPulse, a Nielsen company, tracks over 126 million blogs in the United States.[22] In other words, lots of people publish their own words on the internet each day, and similar to SNSs, searching blogs can provide priceless information about a witness or adverse party, often for free. There are many different ways to find blogs. Google maintains a blog search engine,[23] while companies such as BlogPulse[24] and Technorati[25] offer many blog related searches.

4. Personal Data

In addition to the information available through search engines, SNSs, blogs and the like, there are numerous websites that function as online databases. Criminal records, court records, phone numbers, and addresses are just a few clicks away, sometimes for free. Below is a summary survey of websites that can help you in your quest to discover personal information about individuals. Note, asterisks (*) denote subscriber-only websites.

Black Book Online
www.blackbookonline.info
Black Book Online was designed for private investigators, and people in the legal, insurance, collection, or journalistic fields. It is not a database in itself, rather it has links to numerous sites that provide certain types of information. For example, typing a person's name into the search box will not yield results, but typing "texas criminal" will lead you to a list of links to websites where such information appears. Black Book requires no membership, though many of the links do require a subscription.

Switchboard
www.switchboard.com
Switchboard is basically the yellow and white pages online. If you know a person's name, you can often find their name and address. The only drawback is the fact that Switchboard doesn't know which John Smith you are looking for. That said, practitioners use websites such as Switchboard as a starting point for locating witnesses, as well as retrieving physical addresses for service of process.

Knowx *
www.knowx.com
Knowx is a subscriber-only website providing access to public records, including licenses, real property, and corporate information from almost every state.

PublicData.com *
PublicData.com is another subscriber-only website providing information from Texas driver license records, voter registration, sex offenders, and criminal records.

Reverse Phone Directory
www.reversephonedirectory.com/
Reverse Phone Directory "helps you find people by their name or their phone number."[26] Any time phone records are at issue in a case, this website can be a useful starting place.

Unlisted Phones *
www.phonesearches.com
Another website where, for a fee, unlisted telephone numbers can be traced.

Texas Department of Public Safety *
www.txdps.state.tx.us/onserv.htm
For a fee, subscribers have easy access to Texas criminal history information. The Texas DPS website provides sex offender listings for free (at www.records.txdps.state.tx.us/DPS_WEB/Sor/index.aspx), including names, addresses, and offenses. If you want to scare yourself to death, type your address into the fields, and see the number of sex offenders in your neighborhood.

Intelius *
www.intelius.com
Intelius provides telephone numbers, addresses, e-mail addresses for a fee. If you've ever looked for e-mail addresses online, the results can be discouraging. However, my colleagues have had the most success tracking personal e-mail addresses through this site.

5. Online Court Records

Another resource for information about people and entities are the courts themselves. If you practice in Federal Court, you are undoubtedly familiar with PACER, the federal electronic case filing system. Many states now have similar information available online as well, although Texas State Courts do not post documents online at this time.

PACER *

All Courts: pacer.uspci.uscourts.gov/
Federal cases and judgments can be found through PACER, also has information regarding bankruptcies. A great aspect of PACER is that, for more recent cases, documents can be downloaded directly from a court's PACER website. Clicking the link above will take you to a listing of every Federal Court. PACER websites are also available through a particular court's website, such as http://www.txnd.uscourts.gov/index.html for the Northern District of Texas.

Texas Office of Court Administration

www.courts.state.tx.us/oca/
Search by party, attorney, or court. While Texas Courts do not post documents online, users can quickly find out if an adverse party or witness is or was involved in litigation in Texas. Several Texas counties, including Dallas and Harris County, have websites with various search fields.[27]

Dallas County Court Records Online

courts.dallascounty.org/default.aspx

All Texas District Courts

Includes links to the individual Courts' websites if they are online.
dm.courts.state.tx.us/OCA/DirectorySearch.aspx

B. Finding an Individual's Assets

Attorneys are often asked about the probability of recovery on a judgment, or even whether a successful lawsuit will bear fruit in the end. Experienced attorneys know that judgment debtors will go to great lengths to avoid judgment collection. The websites listed in this section provide information regarding property, including real property, personal property, and property the subject of and UCC filings.

Real Property in Texas

The Texas County Appraisal Districts are a great resource for finding real property records quickly and easily. Texascad.com contains the links to the Texas counties with real, business and personal property records on-line. Common uses of the "cads" include locating information for service of process and collection of judgments.
www.texascad.com

Texas County Appraisal Districts

The website www.txcountydata.com provides links to the websites of appraisal districts for the following Texas counties: Aransas, Atacosa, Bastrop, Bosque, Coleman, Fort Bend, Grimes, Hays, Hunt, Jackson, Limestone, Lubbock, Montgomery, Newton, Nueces, Rockwall, Waller, and Washington. Most counties now publish this information on their own websites. For example, Dallas County records are available at www.dallascad.org.

Dallas County Online
www.dallascounty.org/pars2/
This link allows you to search criminal background, probate, marriage information, assumed name and UCC information.

Dallas County Public Records Search
www.realestate.countyclerk.dallascounty.org/search.aspx?cabinet=opr
This site allows you to search and review documents on file with Dallas County, including liens, abstracts of judgment, filed leases, receivers, assignments, bills of sale, deeds, dissolutions of partnership, financing statements, and lis pendens. You may view the documents for free, but must pay in order to receive documents that do not have "Unofficial document" as a watermark.

TitleX.com
www.titlex.com
This site also provides information about real property records in certain counties in Texas and Washington.

UCC Filings
www.coordinatedlegal.com/SecretaryOfState.html
This site has links to all of the Secretary of State sites, along with UCC information.

C. Finding Information About Entities

It is easier than ever to find information about entities. There are numerous websites operated by governmental entities as well as private companies. For example, the Securitas Exchange Commission has required public disclosure of forms and documents since 1934. In 1984 EDGAR began collecting

electronic documents "to help investors get information."[28] But, there are other uses of this information besides investing. EDGAR is by no means new, yet many young and not so young attorneys are not aware of the information available. You can search information collected by the SEC several ways:[29]

- Company or fund name, ticker symbol, CIK (Central Index Key), file number, state, country, or SIC (Standard Industrial Classification)
- Most recent filings
- Full text (past four years)
- Boolean and advanced searching, including addresses
- Key mutual fund disclosures
- Mutual fund voting records
- Mutual fund name, ticker, or SEC key (since Feb. 2006)
- Variable insurance products (since Feb. 2006) Financial statements and press releases are available, for free, for public companies going back many years.

Below is a listing of the websites for EDGAR as well as several others where you can locate information about entities. Some websites even offer to do the research for you and e-mail you when new information is available.

SEC EDGAR Database
www.sec.gov/edgar/searchedgar/webusers.htm
The Securities & Exchange Commission's web site for SEC filings, will pull up all filings on a particular company. You can also find corporate affiliations, financial statements, SEC investigations and enforcement actions, and news releases. Be sure to follow instructions on how to search for filings to achieve best results. Can also link to EDGAR form definitions.

Annual Reports Library
www.zpub.com/sf/arl/
Has a collection of over 1.5 million original reports and proxies from corporations, foundations, banks, mutual funds, and public institutions.

Texas Records and Information Locator (TRAIL)
http://www2.tsl.state.tx.us/apps/lrs/agencies/
The Texas State Library and Archives Commission operates a website with links to each Texas state agency. A useful starting point for investigation.

Federal Agencies
www.firstgov.gov
Similar to TRAIL, the federal government also has a website with links to more than 400 federal agencies.

CEO Express
www.ceoexpress.com
Also a good starting point for locating a variety of information on businesses. Can link to newspapers, business magazines and journals, quotes, etc. Also has many good links to government sites, health law, reference sources, etc.

Company Sleuth
www.companysleuth.com
Company Sleuth searches the Internet for news, quotes, trademark and patent registrations on companies. Can also receive daily e-mails on companies of choice. Why not let someone else do the research for you?

Corptech
www.corptech.com
This site offers a database of over 50,000 American technology manufacturers and developers, includes both private and public companies. Research can be done by either company name or stock symbol.

Corporate Information
www.corporateinformation.com/
Offers company profiles and research reports on domestic and foreign companies. Searchable by industry, country, or company name, profiles include a brief description, stock chart, officers, and address. Research reports provide more in-depth information such as sales trends and profitability. Also has links to other corporate information sites.

Dun & Bradstreet *
www.dnb.com
As a subscription service, provides a business information report on all public companies, banks, and financial institutions. The basic report gives credit rating, description of company, biographical information on officers and directors, and any public filings such as UCCs, and suits. Can also determine subsidiaries and parent companies.

Forbes
www.forbes.com
This site has a searchable engine, which allows user to find articles that have been written in Forbes relating to a company.

Hoover's
www.hoovers.com/free/
Based in Austin, free capsules of information are provided on many companies. For a fee, can access additional information such as financial information, company profiles, stock histories, and reports.

Offshore Business News & Research *
www.offshorebusiness.com
This interesting website provides offshore business information on companies and individuals operating in: Bermuda, the Cayman Islands, the Bahamas, the British Virgin Islands, the Turks & Caicos Islands, Antigua, Nevis.

Public Register Annual Report Service
www.annualreportservice.com
From this site can view or download for free a company's annual report. May also request a free hard copy.

Texas Comptroller's Taxpayer Search
ecpa.cpa.state.tx.us/coa/Index.html
This search engine will allow you to enter a company name and then will give company address, status, registered agent, state of incorporation, corporate status and more. Also has a link to said company's board of directors. This information is based on franchise tax certification.

Texas Secretary of State *
direct.sos.state.tx.us/acct-login.asp
Provides corporate and UCC forms on line. Corporate information is fee based.

The Virtual Chases Company Information on the Web
www.virtualchase.com
Gives links and guides or steps on how to search for company information such as news stories, filings, lawsuits, etc. Also provides a variety of links and guides on how to do research over the Internet.

D. Locating Entity Assets

Once you've found a company, how do you know if a lawsuit will be worth the trouble? The websites below can provide information about the registered assets of many companies.

Patents, Trademarks & Copyrights
The federal government controls copyrights & patents, and the US Patent and Trademark Office (USPTO) website provides access to intellectual property. The USPTO website has good search features, allowing a user to cast a wide net or make a rifle shot.
www.uspto.gov/

Who's Suing Whom: Patent, Trademark, and Copyright *
www.tlc-i.com/texis/tmp/litcases3
This site can give you information about patent, trademark, and copyright cases pending in federal courts. You can get some of the same information from PACER.

Real Property in Texas
www.texascad.com
This site has collected the links to the Texas counties with real, business and personal property records on-line.

Texas County Appraisal Districts
www.txcountydata.com
This is a link to the appraisal districts for the following Texas counties; Anderson, Angelina, Aransas, Atacosa, Austin, Bastrop, Blanco, Bosque, Brazoria, Brazos, Brown, Burleson, Burnet, Caldwell, Calhoun, Coleman, Comanche, Deaf Smith, Denton, Fannin, Fayette, Fort Bend, Gillespie, Grimes, Hays, Hunt, Jones, Kendall, Kerr, Kimble, Lamb, Liberty, Limestone, Llano, Lubbock, Madison, Maverick, Milam, Montgomery, Neuton, Rockwall, San Jacinto, Somervell, Swisher, Upshur, Victoria, Waller, Washington, Wharton, Wilson and Wood.

UCC Filings
www.coordinatedlegal.com/SecretaryOfState.html
This site has links to all of the Secretary of State sites, along with UCC information.

E. Things to Remember When Looking for Records

1. Not all records are online. Some agencies still use paper, microfiche, and old ledger books. A big part of Internet research is not just finding information online, but locating the information itself.

2. Validate information that you get online if there is a question on when the last time the website and information was updated. Feel free to call an agency about their website. Most people you contact are very helpful if you have questions.

3. Keep phone numbers, links and logs of how you ultimately achieved getting the information you were looking for.

4. Be clear and concise on what you are looking for and when you are talking with people, especially over the phone.

5. NEVER GET DISCOURAGED !!!! You may find volumes of information on one subject or person and little or nothing on someone or something else.

F. Conclusion

The information discussed above is by no means a complete list of the seemingly infinite number of online resources. While internet mastery is not a prerequisite to becoming a good lawyer, knowing how to use the internet to perform informal discovery is an invaluable skill. The only way to develop this skill is just like anything else, practice!

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[1] http://www.trafficestimate.com/top-sites.html?p=1; http://weblogs.hitwise.com/heather-dougherty/2010/03/facebook_reaches_top_ranking_i.html.

[2] http://www.webcrawler.com/

[3] http://www.dogpile.com/

[4] http://www.archive.org/web/web.php (5/20/2010).

[5] http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html

[6] http://www.facebook.com/press/info.php?statistics, visited May 24, 2010.

[7] http://www.myspace.com/pressroom?url=/fact+sheet/, visited May 24, 2010.

[8] http://www.computerworld.com/s/article/9148878/Twitter_now_has_75M_users_most_asleep_at_the_mouse, visited May 24, 2010.

[9] http://blogs.wsj.com/digits/2010/03/15/facebook-tops-google-as-most-visited-site-in-the-us/.

[10] Id.

[11] Ronald J. Levine and Susan L. Swatski-Lebson, "Are Social Networking Sites Discoverable?" Law.com (11/13/08), available at http://www.law.com.

[12] http://abcnews.go.com/Technology/AheadoftheCurve/story?id=8201190&page=1

[13] http://www.foxnews.com/story/0,2933,386241,00.html (7/21/2008).

[14] Id.

[15] *Internet Defamation*, Alyssa J. Long, 73 Tex. B.J. 202, March 2010

[16] http://bowtielaw.wordpress.com/2009/03/03/social-networking-sites-in-litigation-or-the-status-message-of-a-lawsuit/

[17] *Wolfe v. Fayetteville*, 2009 U.S. Dist. LEXIS 15182 (W.D. Ark. Feb. 26, 2009).

[18] http://www.morelaw.com/verdicts/case.asp?n=5:08-cv-05205-RTD&s=AR&d=43746

[19] *Savvy Use of Social Networking Sites*, New York Law Journal, Special Section, Sept. 8, 2009, available at http://www.jdsupra.com/post/documentViewer.aspx?fid=0b6e8c46-2d38-4b0f-b339-6b6c355f27b5.

[20] 73 Tex. B.J. 1, March 2010

[21] http://www.blogger.com/tour_start.g.

[22] http://www.blogpulse.com/

[23] http://blogsearch.google.com/

[24] http://www.blogpulse.com/

[25] http://technorati.com/

[26] http://www.reversephonedirectory.com/.

[27] courts.dallascounty.org/default.aspx; http://www.cclerk.hctx.net/.

[28] http://www.sec.gov/edgar/searchedgar/webusers.htm

[29] Id.

ADMISSIBILITY OF WEB-BASED DATA

BY HON. RANDY WILSON

FOR HUNDREDS OF YEARS, TRIAL EXHIBITS were on paper. Frequently, exhibits came from government or private entities that generated reports, compilations, projections, or summaries. These documents were verified and authenticated through tried and true methods: certified copies would be obtained to authenticate governmental records and affidavits or testimony would be used to authenticate and prove up private documents. Increasingly, however, there are no paper documents. Governmental entities and corporations will often only release information on their web sites in electronic form. Efforts to obtain certified copies of government reports are often met with blank stares and a well-rehearsed response: "that document is only available on the web."

Surprisingly, it wasn't that long ago that Judge Kent expressed his now infamous skepticism for anything obtained on the internet:

> Plaintiff's electronic "evidence" is totally insufficient to withstand Defendant's Motion to Dismiss. While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing . . .
>
> Instead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form . . . .[1]

At first blush, the decades-old evidence rules would seem ill-suited for the task of establishing admissibility of electronic evidence. Yet, these rules have proven to be surprisingly flexible in meeting twenty-first century evidentiary challenges.

This paper will discuss the practical issues encountered with authentication and hearsay with respect to government reports and private records available on the web. Others have written more extensively on this and other issues encountered with admissibility of electronic evidence generally.[2]

I. Authentication

The threshold issue in determining whether web-derived data is admissible is authentication, *i.e.*, is the evidence what it purports to be?[3] However, the authentication hurdle is low. Courts insist that "the burden of proof for authentication is slight. All that is required is a foundation from which the fact-finder could legitimately infer that that the evidence is what the proponent claims it to be."[4] The trial judge has considerable discretion in determining authentication. The rules do not require precise authentication. The test is whether the jury could reasonably conclude the evidence is authentic. The trial court does not abuse its discretion so long as the judge believes that a reasonable juror could find that the evidence has been authenticated or identified.[5]

Authentication of Government Materials. Authentication of government materials is no longer a problem. Rule 902(5) provides that "[b]ooks, pamphlets, or other publications purporting to be issued by public authority" are self-authenticating, *i.e.*, extrinsic evidence of authenticity as a condition precedent to admissibility is not required.[6] Rule 902(5) has been applied in a variety of situations to authenticate documents found on government websites:

- Documents downloaded from Securities and Exchange Commission web address, showing the date and title of each document, and the date and time the document was accessed and downloaded;[7]
- Table of data from website of United States Census Bureau;[8]
- Printout from federal court PACER system showing multiple suits filed by plaintiff;[9]
- FTC press releases;[10]

- Materials from California Secretary of State web site describing voting systems and voting machines;[11] and
- Press release issued by congressman.[12]

In short, any issue concerning authenticity of materials from a government web site appears to be settled.

Authentication of Materials from Private Web Sites. Unlike government publications, materials taken from private web sites are not self-authenticating and thus require a showing of authentication.[13] "To authenticate printouts from a website, the proponent must present evidence from a witness with personal knowledge of the website at issue stating that the printout accurately reflects the content of the website and the image of the page on the computer at which the printout was made."[14]

Perhaps the most straightforward way to authenticate a private web site is with testimony from a witness that the evidence accurately reflects what was on the web site at the time in question.[15] At one time, courts appeared to require that only the website owner could properly authenticate a site.[16] The majority of courts now appear to permit any user to authenticate materials on a website.[17]

To authenticate printouts from a website, the proponent must present evidence from a witness with personal knowledge of the website at issue stating that the printout accurately reflects the content of the website and the image of the page on the computer at which the printout was made.

The courts are inconsistent on the type of evidence needed to authenticate a webpage. Some courts will merely permit an affidavit stating that the attached is a true and correct copy of X's website.[18] Other courts, however, require more. In *Burnett Ranches v. Cano Petroleum, Inc.*, plaintiff's counsel attempted to authenticate a page from defendant's web site by attesting that it was a "true and correct copy of Cano Petroleum's Environmental Overview printed from its website."[19] The Court ruled this was insufficient. "The affiant here did not establish that the website from which he secured the document was actually that of Cano. Indeed, most anyone with knowledge of the internet may be able to create a website. And, while it may be arguable that most information found on the internet is what it purports to be, we cannot simply assume that all of it is."[20]

There are many ways a website may be authenticated. Rule 901 provides many illustrations of how to authenticate evidence, several of which would be applicable to websites. First, is testimony of a witness with knowledge under Rule 901(b)(1): "Testimony that a matter is what it is claimed to be."[21] This, however, would appear to require testimony from the owner of the website.

Second, and perhaps easiest, is 901(b)(4): "*Distinctive characteristics and the like*. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."[22] This provision is often cited to authenticate web pages.[23]

Of course, all of these problems can be solved with simple discovery tools such as requests for admissions or questions in depositions. For example, a request for admission that asks, "Admit that www.abc.com is your domain name" or "Admit that Ex. 1 attached came from your webpage" would solve all these problems. Similarly, you could ask any witness during a deposition whether www.abc.com is his employer's web page. If these questions are answered affirmatively, authentication should be easy.

In the end, authentication could be accomplished by an affidavit or testimony as follows: "Attached as Ex. 1 is a true and correct copy of a page copied from ABC's webpage. On [date], I typed 'www.abc.com' into my web browser and this page appeared. I have personal knowledge that this is ABC's web page because (a) I have visited this domain address many times in the past; (b) it contains ABC's logo and thus contains distinctive characteristics of ABC; (c) contact information contained within www.abc.com directs the viewer to the address and telephone number of ABC corporation; and (d) links contained within www.abc.com direct the viewer to email addresses of ABC employees. These email addresses are the same as addresses contained in emails produced by ABC during discovery." Since the authentication burden is said to be "slight," and only what is necessary for a reasonable juror to find that the evidence is what it purports to be, this testimony should be sufficient.

Authentication, however, is only half the battle. Even if you've established that the document is what it purports to be, you still have to cross the hurdle of hearsay to get it admitted.

II. Hearsay

Hearsay, of course, is an out of court statement offered for the truth of the matter asserted.[24] Assuming that the web page is

being offered for its truth, how do you either establish it is not hearsay or that it fits within an exception to the hearsay rule?

Government Materials. Materials contained on a government web site should be relatively easy to admit as an exception to the hearsay rule. Assuming the materials are properly authenticated, then 803(8) provides that the following is not hearsay:

> **(8) Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
>
> (A) the activities of the office or agency;
>
> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or
>
> (C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law;
>
> unless the sources of information or other circumstances indicate lack of trustworthiness.[25]

Rule 803(8) has been used to admit many different types of reports printed from government websites:

- Pages from Georgia and Tennessee state websites;[26]
- Secretary of State report on human rights practices;[27]
- Inspector General report;[28]
- U.S. Post Office print out confirming delivery confirmation;[29] and
- USDA website showing lumber classification.[30]

Indeed, as one court stated, since public records are self-authenticating and are covered by Rule 803(8), "official publications posted on government agency websites should be admitted into evidence easily."[31]

Private Website Materials. Once private website materials are properly authenticated, they are treated as any other material and analyzed under traditional hearsay rules. The easiest way to admit materials from a private website is, of course, as an admission if the materials were generated by a party opponent. Courts have routinely admitted such materials.[32]

Material from third-party websites, however, is trickier. Many parties attempt to introduce third party website information as business records. Rule 803(6) provides that records of a regularly conducted activity are not hearsay provided they are:

- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses
- made at or near the time
- by, or from information transmitted by, a person with knowledge
- if kept in the course of a regularly conducted business activity
- and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation
- all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10)
- unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.[33]

Certainly, a representative or custodian of the entity maintaining the website could properly attest to the business record criteria. If the materials are otherwise properly authenticated, courts have admitted information downloaded from websites as business records.[34] However, if there is no witness who can attest to the elements of a business record, a mere screen shot of a web page is inadmissible.[35] Of course, website postings are not business records of the internet service provider, since the ISPs are merely "conduits" of the information of others.[36]

At the end of the day, the best way to admit a third party web page as a business record is the tried and true method: take a deposition of the administrator or "custodian" of the site and ask questions which will establish the necessary elements. As one commentator stated, the case law on admitting materials downloaded from a company's website remains "sparse" and "while nothing in the rules automatically renders the business records exception inapplicable to materials downloaded from a business's website, much of what appears on a business's website is unlikely to meet the requirements of the business records exception. Courts, therefore, will have to resolve such admissibility questions on a case-by-case basis."[37]

III. Conclusion

The internet is a contradiction. It remains, as Judge Kent stated, a catalyst for rumor, innuendo, and misinformation. Yet, it is also the only place where vast amounts of information can be found. The courthouse doors cannot and have not been closed to such a storehouse of evidence. However, care must be taken by the lawyer to think through the admissibility issues and not merely take a screen shot of the web page, hand it to the judge, and hope for the best.

The Honorable Randy Wilson is judge of Harris County's 157th District Court. ★

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1 *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp.2d 773, 774-75 (S.D. Tex. 1999).

2 *See, e.g.*, Steven Goode, *The Admissibility of Electronic Evidence*, 29 REVIEW OF LITIGATION 1 (Fall 2009). *See also Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007). In *Lorraine*, Magistrate Judge Grimm wrote a 56 page opinion on admissibility of electronically stored information generally to provide "guidance to the bar regarding this subject" because there is no "comprehensive analysis of the many interrelated evidentiary issues associated with electronic evidence."

3 TEX. R. EVID. 901 ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims").

4 *Link v. Mercedes-Benz of N. Amer., Inc.*, 788 F.2d 918, 927 (3d Cir. 1986) (*quoting McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1986).

5 *Mendoza v. State*, 69 S.W.3d 628, 631 (Tex. App.—Corpus Christi 2002); *Coleman v. State*, 833 S.W.2d 286, 289 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd).

6 TEX. R. EVID. 902(5).

7 *Weingartner Lumber & Supply Co., Inc. v. Kadant Composites, LLC*, 2010 WL 996473 (E.D. Ky. 2010) ("In this internet, tech-savvy age, accessing official records from government websites is commonplace. Publicly maintained records downloaded from a government website would likely be self-authenticating under Fed.R.Evid. 902(5)).

8 *EEOC v. E.I. DuPont de Nemours & Co.*, 65 Fed. R. Evid. Serv. 706, 2004 WL 2347559 (E.D. La. 2004) (authentication satisfied by showing internet domain address from which the table was printed, and the date on which it was printed. The Court accessed the website using the domain address and verified that the webpage existed at that location).

9 *Adams v. Carey*, 2009 WL 4895545 (E.D. Cal. 2009) (self-authenticated under 902(5)).

10 *Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 WL 33313134 (S.D. Ohio 1999).

11 *Paralyzed Veterans of America v. McPherson*, 2008 WL 4183981 (N.D. Cal. 2008).

12 *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp.2d 389 (D. Conn. 2008).

13 *Toytrackerz LLC v. Koehler*, 2009 WL 2591329 (D. Kan. 2009) ("printouts from non-government websites are not self-authenticating"); *Sun Protection Factory, Inc. v. Tender Corp.*, 2005 WL 2484710 n.4 (M.D. Fla. 2005); *In re Homestead.com, Inc. Securities Lit.*, 347 F. Supp. 2d 769, 782 (C.D. Cal. 2004) (Printouts from a web site do not bear the indicia of reliability demanded for other self-authenticating documents under Fed. R. Civ. P. 902. To be authenticated, some statement or affidavit from someone with knowledge is required).

14 *Id. See also Nightlight Sys., Inc. v. Nitelites Franchise Sys., Inc.*, 2007 WL 4563875, at *5-6 (N.D. Ga. 2007) ("In addition to a witness with personal knowledge of the web page at issue, to authenticate a printout from a web page, the proponent must present evidence from a percipient witness stating that the printout accurately reflects the content of the page and the image of the page on the computer at which the printout was made.").

15 *Id.*

16 *See, e.g., Costa v. Keppel Signmarine Dockyard PTE, Ltd.*, 2003 WL 24242419, n. 74 (C.D. Cal. 2003); *Novak v. Tucows, Inc.*, 2007 WL 922306 (E.D.N.Y. 2007) (plaintiff "lacks the personal knowledge required to set forth with any certainty that the documents obtained via third-party websites are, in fact, what he proclaims them to be.").

17 *See, e.g., Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707 (Tex. App.—Austin 2000) (affidavit properly authenticated material from Daimler-Benz web sites by stating that they were true and correct copies of the originals); *Jarritos, Inc. v. Los Jarritos*, 2007 WL 1302506 (N.D. Cal. 2007) (counsel authenticated by stating that he personally typed in www.losjarritos.com into his Web browser, accessed Defendants' website and printed the page); *Kohler v. Kindred Nursing Centers West, LLC*, 2010 WL 709182, at *6 (Cal. App. 2010) ("We agree that the person who created a website is not the only person who can establish the authenticity of the website information").

18 See cases cited in footnote 16, *supra*.

19 289 S.W.3d 862, 871 (Tex. App.—Amarillo 2009).

20 *Id.; see also Kohler v. Kindred Nursing Centers West, LLC*, 2010 WL 709182 at *6 (Cal. App. 2010) ("Counsel's conclusory statement that the printouts were 'from Kindred Healthcare Inc.'s website' was insufficient to show that he had any personal knowledge to support counsel's assertion").

21 TEX. R. EVID. 901(b)(1).

22 TEX. R. EVID. 901(b)(4).

23 *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1153-54 (C.D. Cal. 2002).

24 TEX. R. EVID. 801(d).

25 Tex. R. Evid. 803(8).

26 *Owens v. Alabama Dept. of Mental Health and Mental Retardation*, 2008 WL 4701189 (M.D. Ala. 2008).

27 *In re Compania de Alimentos Fargo, S.A.*, 376 B.R. 427, 436 (Bankr. S.D.N.Y. 2007).

28 *Estate of Gonzales v. Hickman*, 2007 WL 3237727 (C.D. Cal. 2007).

[29] *Chapman v. San Francisco Newspaper Agency*, 2002 WL 31119944 (N.D. Cal. 2002).

[30] *Rainbow Play Systems, Inc. v. Backyard Adventure, Inc.*, 2009 WL 3150984 (D. S.D. 2009).

[31] *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 551 (D. Md. 2007).

[32] *Van Westrienen v. Americontental Collection Corp.*, 94 F. Supp. 1087, 1109 (D. Or. 2000); *Telewizja Polska USA v. Echostar Satellite Corp.*, 2004 WL 2367740 (N.D. Ill. 2004); *Florida Conference Ass'n of Seventh-Day Adventists v. Kyriakides*, 151 F. Supp. 2d 1223 (C.D. Cal. 2001).

[33] TEX. R. CIV. EVID. 803(6).

[34] *People v. Robbins*, 2005 WL 668462 (N.D. Ill. 2000); *Doctors Medical Center of Modesto v. Global Excel Management, Inc.*, 2009 WL 2500546 (E.D. Cal. 2009).

[35] *Montagne v. Safeco Ins. Co. of Illinois*, 2009 WL 113776 (D. Alaska 2009).

[36] *United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000).

[37] Steven Goode, *The Admissibility of Electronic Evidence*, 29 REVIEW OF LITIGATION 1, 53 (Fall 2009).

Is Your Jury Panel Googling During the Trial?

BY TRICIA R. DELEON & JANELLE S. FORTEZA

CAN YOU ANSWER YES TO ANY OF THE FOLLOWING QUESTIONS?

1. Do you tweet on Twitter?
2. Have you ever MySpaced a person?
3. Do you blog?
4. Are you connected to other professionals on Linked-In?
5. Do you update your status on a Facebook account?
6. Do you own an iPhone or Smart phone?
7. Have you ever used your iPhone, Smart phone or BlackBerry while inside a Texas courtroom?

Chances are you, or someone in your family, can answer yes to almost all of these questions. The chances will be even greater that almost all of the members of your next jury panel will own an iPhone, Smart phone or BlackBerry that can access social media and the internet. According to a study done by ComScore, 45.4 million United States citizens owned smart phones which can access the world wide web as of February 2010. This becomes a problem if the Court does not specifically instruct the jury panel to refrain from using information at their fingertips to research parties, the attorneys, witnesses, evidence that may be excluded at trial, or even communicate with the outside world about jury deliberations.

What Harm Can a Juror Do By Using the Internet and Social Media During a Trial?

Courts generally will instruct jurors not to discuss the trial with anyone, including family, friends and co-workers. Courts should also instruct jurors not to conduct independent research about the case, the parties or witnesses during the trial. Not all courts, however, specifically prohibit jurors from using their cell phones or BlackBerries during the trial. Without such a specific instruction, jury members may think they can use the internet or social media to learn more about the case or the parties involved. Consider the following cases from around the country which demonstrate the harm some jurors have done by accessing the internet or utilizing social media while serving on a jury.

Courts should also instruct jurors not to conduct independent research about the case, the parties or witnesses during the trial.

A. Should Jurors Research parties and Share Such Results During Deliberations?

In *Russo v. Takata Corp.*, 2009 SD 83 (S.D. 2009), a juror, Shawn Flynn, Googled the defendant seatbelt manufacturer after seeing its name on a juror summons, but before voir dire. During deliberations, jurors wondered whether the seatbelt manufacturer had ever been sued for the same alleged defect. *Id.* at 446. Flynn informed three other jurors that he had done a Google search before trial and learned that the defendant manufactured seatbelts and airbags, but had not found any prior lawsuits in his search. *Id.* Nineteen days later, the plaintiffs filed a Motion for New Trial alleging jury misconduct because the jury had deliberated approximately one-half hour after Flynn's disclosure before reaching a verdict in favor of the defendant on plaintiff's claim. *Id.* at 446. The trial court determined that a new trial was warranted and South Dakota's Supreme Court upheld the granting of a new trial. *Id.* at 454.

B. Should a juror be permitted to tweet during jury deliberations?

On February 26, 2009, an Arkansas jury entered a $12.6 million verdict against a building materials company, Stoam Holdings and its owner, Russell Wright. Stoam and Wright sought a Motion for New Trial when they discovered that one of the jurors, Jonathan Powell, a 29 year old manager at a Walmart photolab, had posted eight messages and/or "tweets" about the trial on Twitter. Several of the Twitter messages were sent during voir dire. Powell sent the following message shortly before the verdict was announced, "Ooh and don't buy Stoam. It's bad mojo. And they'll probably cease to exist now that their wallet is 12 m lighter." In another tweet, Powell said, "I just gave away TWELVE MILLION DOLLARS of somebody else's money." Stoam and Wright's lawyers argued that the Twitter messages demonstrated not only that Powell failed to act as an impartial juror, but that he had conducted outside research about the issues in the case and he was predisposed toward giving a verdict that would impress his audience. Powell's conduct was actually not punished. The Motion for New Trial was denied noting that Arkansas law requires the movants to prove that outside information found its way into the jury

room and influenced the verdict, not that the information from the jury panel made its way out. Further, the court held that the Twitter messages did not demonstrate any evidence of Powell being partial to either side.

A few months later, in May 2009, NBC's Today Show weatherman, Al Roker, started sending Twitter messages when he was serving on jury duty in Manhattan criminal court. He used his iPhone to take pictures from the jury assembly room and posted them to his Twitter account in countervention of the courthouse rules. One of Roker's photos showed the potential jurors from the back, but in another, a potential juror's face could be seen. Once discovered, Roker acknowledged making a mistake, but said that it was inadvertent. *See* Dareh Gregorian, *Oh What a Twit: Tweeting Roker Sorry for Taking Juror Pix,* THE NEW YORK POST, May 29, 2009, *available at* http://www.nypost.com/p/news/.

C. Should a Trial Attendee Be Permitted to Blog About the Pending Trial?

In November 2007, Citco Petroleum was in a lawsuit brought by the United States of America. 2007 US Dist. LEXIS 85341 (S.D. Tex. Nov. 19, 2007). Suzanna Canales, a reporter and frequent trial attendee, watched the trial and blogged: (1) "I wish I could have shared with the stunned people what I have been hearing in the jury box during the trial and what I have heard in the deliberation room ….", and (2) "Now Citco has not asked for a new trial. This is not the smartest thing they have ever done, but, as far as we know and in all fairness, Citco didn't have the opportunity to eavesdrop on the jury box and listen in on the deliberations as I did." *Id.* at *2. These excerpts were extracted from a blog dated August 17, 2007. *Id.* The government argued that Citco took Canales' statements out of context and that a Motion for Leave to Depose Suzanna Canales was not warranted. To support the government's position, it furnished several additional entries from Canales' blog including an earlier entry dated July 25, 2007, where she stated that an "anonymous source" informed her about the jury's vote of guilty of 10 to 2. Several days later, Canales blogged the following: "There are times when most of us have wished we could be a fly on the wall in a room not open to us, like the jury deliberation room during the first Citco criminal trial." The United States District Judge found that a full blown evidentiary hearing was not warranted, that Canales' blog entries appeared to incorporate fantasy, and did not credibly support a likelihood of jury tampering; however, the Court believed that further investigation was justified. Therefore, Citco's Motion for Leave to Depose Ms. Canales was granted. *Id.*

D. Should Jurors Be Permitted to Retain and Use Cell Phones While Serving on a Jury?

The Indiana Supreme Court in June 2009 decided whether the appellant's Motion for Juror Misconduct was warranted because, among other things, a juror during deliberations of a rape trial accepted a telephone call. *Henri v. Curto*, 908 N.E.2d 196 (Ind. 2009). The Indiana Supreme Court held that a new trial was not warranted. *Id.* The court said in a claim of juror misconduct the challenger "must show that the misconduct was gross and probably harmed" the challenging party. *Id.* at 202, citing *Godbey v. State*, 736 N.E.2d 252, 256 (Ind. 2000). The court, however, relayed a stern warning to other courts in permitting jurors to retain or access mobile phones during jury service.

> "Permitting jurors, other trial participants, and observers to retain or access mobile telephones or other electronic communication devices, while undoubtedly often helpful and convenient, is fraught with significant potential problems impacting the fair administration of justice. These include the disclosure of confidential proceedings or deliberation; a juror's receiving improper information or otherwise being influenced; and a witness's or juror's distraction or preoccupation with family, employment, school, or business concerns. These and other detrimental factors are magnified due to swift advances in technology that may enable a cell phone user to engage in text messaging, social networking, web access, voice recording, and photo and video camera capabilities, among others. The best practice is for trial courts to discourage, restrict, prohibit, or prevent access to mobile electronic communication devices by all persons except officers of the court during all trial proceedings, and particularly by jurors during jury deliberation."

E. What is the Harm in Jurors Sending E-Mail Messages During Jury Service?

It seems that courts have even dealt with problems concerning e-mail messages. In May 2001, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Juisty*, 434 Mass. 245 (Mass. 2001), had to consider whether a juror's e-mail messages to a list serve stating that the defendant was guilty caused harm. In that case, the juror's statement "just say he's guilty and let's get on with our lives" was not one that involved an extraneous matter that raised a "serious question of possible prejudice" according to the court. The juror e-mailed that she was "stuck in a seven day long jury trial rape/assault case … missing important time in the gym, working more hours

and getting less pay because of it! Just say he's guilty and let's get on with our lives." The e-mail message was posted on a list serve where approximately 900 people subscribed to the mailing list and would have received the juror's message. At the time the message was posted, the State had only presented three of its six witnesses.

What is the Solution?

A. Give More Specific Jury Instructions

In Florida, for example, the standard jury instruction tells jurors they cannot obtain any information about the trial, including from the Internet. The instruction states: "You cannot obtain any information on your own about the case or about anyone involved in the case, from any source whatsoever, including the Internet...." FLA. STD. J. INST. 1.1. In California, the California Jury Instruction 100 states:

> Before we begin, I need to explain how you must conduct yourselves during the trial. Do not allow anything that happens outside this courtroom to affect your decision. During the trial, do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and co-workers, spiritual leaders, advisors, or therapists. Do not post any information about the trial or your jury service on the Internet in any form. Do not send or accept any messages, including e-mail or text messages, to or from anyone concerning the trial or your service. You may say you are on a jury and how long the trial may take, but that is all." CACI Instruction 100.

In Michigan, an administrative order issued June 30, 2009 orders trial judges, beginning September 1, 2009, to tell jurors not to improperly use electronic devices during an ongoing trial. MCR 2.511.

Likewise in Multnomah County, Oregon, the court provides a jury instruction that makes explicit reference to certain electronic devices and activities. The court tells jurors: "Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. 'No discussion' also means no emailing, text messaging, tweeting, blogging or any other form of communication."

In Missouri, a court instructed jurors that:

> You are not permitted to communicate, use a cell phone, record, photograph, video, e-mail, blog, tweet, text, or post anything about this trial or your thoughts or opinions about any issue in this case to any other person or to the Internet, "facebook", "myspace", "twitter", or any other personal or public web site during the course of this trial or at any time before the formal acceptance of your verdict by [me] at the end of the case.

In re Revisions to Mai-Civil, 2009 Mo. LEXIS 544, *5-6 (Mo. Nov. 23, 2009).

B. Ban Smart Phones From the Courtrooms

Because jurors can use cell phones, BlackBerries, iPhones and other smart phones to access the Internet and social networking sites, some courts have banned these devices from the courtroom. The following states include counties with such a ban: Michigan, Chicago, Delaware, Florida, Indiana, New Mexico, North Carolina (devices must be turned off), and Ohio.

Michigan permitted a compromise. Its 2009 administrative order, referenced above requires trial courts to instruct jurors that until their jury service is concluded, they shall not "use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation." However, such "devices may be used during breaks or recesses," as long as they are not used to "obtain or disclose" information about the case.

How Are Texas Courts Dealing With the Jurors' Desire to Access the Internet and Use Social Networking During Trial?

Texas judges are diligently watching for jurors who access outside information during trial. Judge Gena Slaughter, who presides over the 191st Judicial District Court in Dallas County, Texas, has noticed that jurors are quick to do independent research on parties, lawyers, and witnesses. Judge Slaughter stated:

> …when I ask them [the jurors], how many of you would have gone home tonight and put the Plaintiff's name into Google or Facebook?, it's stunning how many say they would. There's a total disconnect, they don't think of it as research. Facebook is becoming so prevalent and widely used.

Most Texas judges interviewed did not think that banning cell phones from the courtroom is the answer. In fact, the Honorable Dan Patterson, judge of Dallas County Criminal Court No. 1, stated that banning cell phones is "a little extreme in this day and age." Judge Jeff Rosenfield of the

Dallas County Court of Criminal Appeals No. 2 agrees that this is not the answer. Judge Rosenfield fears you risk making the jury "aggravated and angry because they use them during downtimes and while waiting for the trial to begin." And the Honorable Mike Miller, judge of the 11th Civil District Court in Harris County, doesn't think banning phones is the answer, because if they want to conduct independent research they will find a way. "It doesn't make sense to me, that's like not allowing them to go home because I don't trust them to not talk about the case at home. I'm not going to be that intrusive, I'm going to treat them like adults."

Some Texas judges are already independently giving oral instructions to jurors prohibiting outside research. Most of the judges agree that a specific instruction is needed. Judge Charles A. Stephens, II the presiding Judge in New Braunfels County Court at Law No. 2, thinks that "[a] lot of people don't make the connection between the instruction to not discuss with other people and posting on social media sites, so the instruction seems to be helpful." For this reason, Judge Stephens gives a specific instruction at the beginning of trial which includes an "instruction to not post information on social networking sites, such as Twitter and Facebook." Judge Al Bennett of the 61st Civil District Court in Harris County, specifically instructs jurors when they are being dismissed for a lunch or break that "they're not to get on their BlackBerries or iPhones or the Internet and do any independent research whatsoever." The Honorable Debbie Mantooth Stricklin of the 180th Criminal District Court in Harris County, also gives an oral instruction to jurors—"no research, whether in person, newspaper, on the internet, no talking about the case in any shape or form." Judge Rhonda Hurley, presiding over the 98th Judicial District Civil Court, Travis County also gives a two part instruction-"one is don't research and one is don't communicate," she also lists specific methods that are prohibited "including iPhones and the internet." Judge Carlos Cortez of the 44th Judicial District in Dallas County, Texas, gives a specific instruction to jurors about independently researching cases:

> I've always taken the precaution to give additional instructions since I've taken the bench. One of the things that was lacking was an instruction to the jury that under no circumstances should they get on the internet, Google. I've tried to be proactive since I took the bench in January of '07 to tell them not to do any research on the web. Do not look up the facts, the parties involved, the witnesses, do not Google anyone. It's something that needs to be revised.

Texas judges acknowledged it is the courts' responsibility for managing jurors, not the attorneys' responsibility. But Judge Craig Smith, who presides over the 192nd Judicial District Court in Dallas County, Texas, thinks that attorneys should be encouraged to "ask questions about potential juror's use of the Internet, including participating in networking sites like Twitter and Facebook."

Overall, Texas judges understand the problems that come with the ease of access to outside information. Many jurors do not intentionally access the Internet or social media to conduct independent research; however, without specific prohibitions against accessing the Internet or social media for research related to the trial, jurors may be tempted to try it or think they can without violating the instructions. Although Texas has not enacted a uniform instruction, most judges are already addressing the jury on this issue. With these types of specific instructions, Texas courts should have more control over jurors and eliminate future problems.

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AVOIDING THE "GOTCHAS" WITH LAW FIRM WEBSITES: THE DOS AND DON'TS OF YOUR INTERNET PRESENCE

BY NANCY SLOME, STEPHAN ROUSSAN & PAT PURDY

A STRONG WEB PRESENCE IS NO LONGER AN OPTION for a law firm. Creating and maintaining "presence" on the Internet is a requirement for all successful businesses. It would be nice if the Internet were only a reflection of our better selves; unfortunately, this is not the case. The same shortcomings of human nature that impact our real communities also affect our online communities.

Does that mean that we retreat from the medium? Of course not. Just as we do in our daily lives as we conduct our business, we take precautions to protect ourselves from those who may not have our best interests in mind. So, let's look at the best practices, strategies for success and the pitfalls to avoid with your firm's website

Content Presentation Strategy

It is refreshing to see how much more effort firms have put into regularly publishing new Web content, as compared to a few years ago. Yet, "Put it on the website" can become a mantra with little regard to the firm's strategy. Content lands on the home page because there's no time to debate a story's value (from the audience's perspective), or no one is empowered to tell the managing partner that her recent article lacks tangible business development value.

Many defend a cluttered home page as intentional; lots of new content right up front means the firm is successful and busy. Or, a "newsy" look makes the firm look "cool." But a crowded home page does neither, and it is an opportunity lost. For every visitor that arrives at your website, there is an opportunity to capture attention, engage interest, and deliberately guide them on a path through the site that leads to a desired call to action: contact the firm for services, submit a resume, bookmark a collection of resources, etc.

Information density must be weighed carefully throughout a website's life cycle. It's not how much you say (quantitative); it's what you choose to say (qualitative), that ultimately makes a positive impression. News outlets have a responsibility to report all the news, all the time; your law firm does not.

Let's review a few words you should avoid in your site text. Although different jurisdictions provide some exceptions (particularly applicable to those who practice before the USPTO), protect yourself from a bar sanction and find a different way to deliver certain messages.

No-no words	Exceptions	Suggested alternatives
Expert, expertise Specialist, specializes	If attorney is a bona fide *expert* witness If the area being described is outside the legal profession, such as a Forensic Accountant Specialist.	• John has deep experience in __ " • "Sandy's practice focuses on __" • "Tony is a skilled litigator, with ten years' experience…" • "Eleanor is recognized for her work in…"

Trend Spotting: Condensed Bios

The trend toward shortened biographies is beneficial for the more junior practitioners who do not yet have an extensive track record. We can't expect every seasoned attorney to embrace the idea of reducing his or her three-page bio to three paragraphs, but remember the condensed bio offers the reader a kinder and gentler Web experience. Visitors to your website are often bombarded with content and suffer the equivalent of attention deficit disorder via the Internet. Frequently, your website visitors will spend less than three minutes on your site. No one is likely to read a three-page bio unless he's looking to find something negative. Keep your bios pithy, consistent and relevant.

Attorney Photos

Anyone who works on law firm websites knows that their attorneys' bios are *the most frequently accessed pages* on their firm's site. And while attorneys will modify the copy throughout the year, scant attention is paid to the attorneys' photos. Seriously consider replacing bio photos, especially if:

- **You no longer look like the person in the photo.**

It's embarrassing when your clients don't recognize you when you finally meet.

- **The quality or style of your photo doesn't match your firm's website.** A firm whose brand and culture is bold, modern and nimble shouldn't present their lawyers in a different manner.
- **You're a professional and your photo looks anything but.** Law firms that feature unflattering, under- or over-lit photos taken for the building's security pass have no place on the firm's website.

The time, effort and budget on professional photography shoots for larger firms can be considerable, but given the power of a picture, it is well worth the investment.

Bio Copy

One law firm is considering removing the verdicts and settlement amounts from their attorneys' bios, because of several reported instances of jurors Googling bios during trial. While this may be extreme, it's always important to consider the different audiences visiting your website.

One law firm is considering removing the verdicts and settlement amounts from their attorneys' bios, because of several reported instances of jurors Googling bios during trial.

Likewise, it's critical to secure client approval before naming their matter or deal on your firm's website. Veiled descriptions can be useful, but take care that your veiled description isn't too revealing as in this example: "Our client, a leading soda manufacturer, based in the Southern United States . . ."

General Copy

If we really believe that "No one really reads anything on the Web," then why do we fuss over every word? For firms with solid reputations within a specific industry or practice area, it's much easier to write copy that is authoritative and authentic. But for many law firm websites, the copy is generic and relies on hackneyed and interchangeable phrases like, "What sets us apart," and "Our commitment to excellence." Most clients would have a hard time identifying the firm were it not for the firm's logo and name appearing on the website. Conversely, firms that venture too far afield have been subjected to public ridicule in the popular law business blogs.

Design Presentation Strategy

Your website should be a part of your integrated corporate identity. To begin the process of patterning how your website should look and the tone of the copy presented to your visitors, start by answering these questions:

- Who are you?
- What are you about?
- What are your principles?
- How do you work with your clients?
- How do you work with each other?
- What sets you apart from other firms?
- What is the feeling you have as a member of the firm?

Don't Just Focus on the Flagship Product; Focus on the Whole Line

In most industries, when a company has an underperforming product or service, management assesses the product or service's viability and will then kill it outright, or develop a strategy to improve performance.

Law firms rarely do this. Usually, due to deep-rooted cultural reasons, lawyers tend to focus on their own areas of practice and leave the improvement of other practices to someone else. There are the politics of perpetuating what a firm has become "known for" in the marketplace, and a deeply vested interest in keeping that perception just as it is.

However, perpetuating that old mindset is short-sighted. Improving the visibility of one practice does not require diluting the reputation of another. If a group is underperforming, there is money and growth being left on the table for the firm as a whole. Leaders of different groups should step forward to share ideas about what has worked and what hasn't, and explore ideas on how to market all the firm's offerings to reach their full business potential.

Protect Yourself

It is no longer possible to fly under the radar. Computer hacking has been an epidemic for decades, and the Web has provided a plethora of targets for the incalculable numbers of hackers operating worldwide. Machine-based intrusion techniques scan millions of public targets (websites) daily in search of easy prey. Much like the inescapability of unsolicited e-mail, no website now goes untouched by hack attempts.

Much of this malicious traffic is incidental; the individual or group doesn't necessarily mean to single out your firm, it's just that your website's IP address happens to be on today's hit list. Or, you're in a hacker's crosshairs simply because yours is a US-based organization. Yet, you may be singled

out as a target for specific reasons, some examples of which might include:

- The firm does pro bono work for a controversial cause,
- The firm employs attorneys who are also public figures, or
- The firm represents a client engaged in business in a part of the world where their activities are unpopular.

It is important to consider that at some point or another any organization is likely to have enemies, whether active or passive. Your work and your public profile may provoke unexpected animosity. As such, it is important to consider your website as a potential target. Make sure your website is:

- As isolated from your internal networks as it can be;
- As hardened as it can be at both the server level and at the application level;
- Secured with robust passwords that are changed periodically; and
- Backed up with contingency plans that allow a full and rapid recovery after a worst-case scenario.

In the next five years, your Web presence will be much more attorney focused than firm focused. You'll see many more blogs and micro-sites. Social media will become an intrinsic part of our (virtual) world.

As you examine ways to create or enhance content on your firm's website, the following "immutable laws" are important considerations in the process.

The partners are not the intended audience for the site; your clients, current and prospective, are.
Be clear that the site is designed to appeal to and inform the firm's clients, prospects and recruits. And done right, the site should compel visitors to choose *your* firm over the competition.

No one likes a braggart. What was true on the playground is true today. Sure, clients want to know that they're working with a top firm, and it's okay for your firm to brag – every now and again. But there's got to be some balance when it comes to your website postings.

Take a look at your firm's home page, and if all the press releases, case studies and home page items resemble the examples below, you probably need to make some changes.

- "Law Firm (Name) is Number One!" And its sibling, "Law Firm (Name) is Number One – Two Years in a Row!"
- "Law Firm (Name) Opens Office in Timbuktu" (Not bragging, if Timbuktu is important to the majority of your website audience)
- "Law Firm (Name) Takes Top Honors"

How to achieve a healthy balance:

- If you must mention the firm's name in the title of your press release, have your PR folks mix it up a little. Ask that they avoid mentioning your firm's name at the start of each release.
- When it comes to writing case studies, focus on *how your firm helped the client.* Or, *how your client achieved results.* Granted, it's tough to take a client-focused point of view when writing about deals.
- If your client's successful transaction or case is mentioned in a leading publication, try an article abstract with the emphasis on the client's issue.

Just say "no" to generic law firm websites. Website design and maintenance can be quite expensive. Yet, in the end, many firm sites end up looking just like their neighbors. So here are a few quick tips to help you avoid the generic trap:

- **Test drive your site text.** Find a few folks who can spare ten minutes. They can be in-or-out of the business; doesn't matter. Just hand them copies of the "About Us" section from several law firms' sites, including yours. Ask them to point to your firm. If your volunteers cannot easily distinguish your site text from the firm down the street, a rewrite is in order.
- **Don't be lazy with the graphics.** It's high time to bury the predictable imagery in the legal market – stock photos of gavels, marble columns and dusty law books. How about the metaphoric shots? The relay racers passing batons or the overhead shots of crew races on the Schuylkill?
- **Step away from the tagline.** Speaking of generic, how memorable is your firm's tagline? When was the last time you compared your firm's tagline with its culture and values? Have you asked your clients if the firm's tagline is descriptive of their experiences?

New site + old copy = lipstick on a pig. That's what you get when you rebrand the firm, redesign the website and yet, serve up the same ol' Web copy written during the last

decade. It's perfectly understandable how this happens: Typically, the new site launch is one of the first milestones of a law firm's rebranding effort and everyone is eager to "go live." But you're still awaiting copy approvals for some of the main sections. So you launch the site with a lot of the old copy, promising to swap out content when it's ready, and pray no one notices. Here are two compelling reasons why it pays to wait for the new copy:

- **Unintended consequences.** You can count on the legal tabloid blogs pouncing whenever biglaw rolls out a new logo or website.
- **Search optimization.** Google favors Web pages that are frequently updated. When was the description for that esoteric practice written?

If you build it they will come. Maybe, maybe not. But they are likelier to find your firm if the website has been properly optimized for search. Many Web development firms offer search engine optimization (SEO) services, but all too often, SEO is an afterthought. So all those fabulous client alerts and updates probably aren't showing up in Google searches.

Here are two simple, albeit labor intensive fixes that can be handled in-house, without engaging a consultant to improve your firm's rankings on Google, Yahoo and Bing.

- **Re-name every PDF posted on your firm's site.** Here's a great example: A well-known firm recently posted an alert to their website entitled, "UK Takeover Code Makes Changes Related to Management Incentives." And the title of the PDF on the site? "Private Equity Alert_March_10.pdf." It's unlikely someone would be using terms like "private equity alert" in a Google search when looking for info about the UK Takeover Code. If you want to see better rankings, ask the junior associate (who probably helped research the article) to provide the Web team a more descriptive title containing relevant terms. Rename the PDF and repeat this step 500 times.
- **Encourage links into your site.** So the next time the conference event planner asks, "Is it okay for the conference site to link back to the speaker's (attorney's) bio?" Your answer should be "Yes, please!"

Times Square just called, and they want their homepage back. Hard to believe, but there are law firm websites out there that have not just one – but ALL of these items on their homepage:

- A scrolling news ticker showing the latest press releases;
- Three equally weighted areas devoted to "Top Stories," "Important Cases" and "Major Deals;" and
- Large portraits of the firm's attorneys, rotating every five seconds.

Q: Where do you go first, when every section screams "Look at me! Look at me!"
A: To another law firm's site.

Step back and look at your site with a critical eye – the eye of a prospective client. Compare the various components against the list of "gotchas" presented here, and be prepared to make some changes.

Nancy Slome is a marketing technology consultant for One to One Interactive, providing practical online marketing strategies and solutions for law firms. She is a recognized subject matter expert, published author and speaker at industry conferences.

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Pat Purdy is the Marketing Technology Manager for Pillsbury Winthrop Shaw Pittman. Pat plays a unique role as a liaison and translator for the IT and Marketing departments and is responsible for all the firm's technology tools used by the Marketing Department, including the firm's websites, blogs, client relationship management database, experience database, proposal generation, surveys and electronic distribution. ✭

TOP 10 WEBSITES/CATEGORIES FOR LITIGATORS (OR SOME SEMBLANCE THEREOF)

BY MARK I. UNGER

LET'S PRETEND IT'S 2010. The practice of law has transformed itself 'virtually.' It's virtual component now includes things such as practice management, research, and virtual communication with clients, parties, opposing counsel and Judges. The common thread amongst us and within this new practice is what we are increasingly referring to as the 'cloud.' While cloud computing is beyond the scope of this paper, it's impact on the internet, is now not only commonplace, but along with smart phones, has now become a necessity. These sites, some of which are referenced below, are becoming more and more important in a litigator's stable of tools and practice itself. As there cannot possibly be a Top 10 Sites list, there can be, arguably a Top 10 Categories of Sites. These are some, but not all of my top categories and sites. Please feel free to let me know yours.

I. Research

A. Cornell University School of Law (**www.law.cornell.edu**): It's just a giant and has been for a long, long time. I'm not sure, but I think you may be able to get anywhere legally from here.

B. TYLA's Judicial Directory (**http://www.tyla.org/default/judicialdirectory**).

C. Fastcase (**www.fastcase.com**): The newest little brother of the free/lowcost legal research tools on the net, this one was one of the first to get into the iPhone/iPad Market and as such, seems to enjoy some 'flash-du-jour' appeal.

D. Google Scholar (www.scholar.google.com): While a little less in depth, this labs grad, though still technically in Beta at the time of writing, includes legal opinions, journals and patent searches).

E. TexasBar.com and **CaseMaker** (**www.texasbarcle.com/CLE/home.asp**): Free legal Research (good for Caselaw and some Rules, not for Statutes; see Texas Legislative portal for those).

F. Texas Legislative Site for Statutes and Codes (**www.statutes.legis.state.tx.us**): *Res Ipsa Loquitur.*

II. Client Management (similar to Practice Management below, just a little different from my perspective)

Basecamp (**http://basecamphq.com**): They call it project management. To me, however, this is a client extranet portal, personalizable and customizable. In other words, I've branded the portal/site with my own logo, created Terms of Service (TOS) built into the client contracts and created categories of documents (pleadings, statements, client communication, opposing attorney communication, etc...). I've been using this for about two and a half years now and, while some of the ABA Techshow speakers panned it in favor of a few of the entries specifically designed for the legal market (and listed below), I still believe it has substantial capabilities and will remain relevant for a long while.

III. Practice Management

New and upcoming in the 'atmosphere,' this is one of the most exciting areas to me and, in my opinion, the one that will change, grow and revolutionize the practice of law. The two to watch (which made huge respective splashes at this year's ABA Techshow) are:

A. Clio (**www.goclio.com**): Web-based, document management, scheduling, time tracking and billing.

B. Rocket Matter (**www.rocketmatter.com**): Similar and competitive, this product includes contact management, conflict checking and tagging.

IV. E-Discovery

The last symposium issue of The Advocate (Volume 51, Summer 2010) was devoted to E-Discovery. In it you will find many valuable contributions from some of the leading people in the country on the subject. I strongly recommend it to you.

As I'm not a huge E-discovery guru, I rely on people like Sharon Nelson, John Simek and Craig Ball to fill me in. Many thanks to Sharon (see their site listed below) for most of these top picks:

A. K&L Gates, E-Discovery Blog: (http://www.ediscoverylaw.com/articles/case-summaries/): Great for case law updates and summaries.

B. Craig Ball's Site (www.craigball.com): Craig has been a great friend and resource to all of us and the Section. His site was the first, in my opinion, to hit on all fours and now remains as one of the unprecedented and cumulative sites to grok the e-discovery wiki, so to speak.

C. E-Discovery Team (Ralph Losey) (http://e-discovery-team.com/): E-Discovery blog by lawyer Ralph Losey.

D. Bow Tie Law Blog (http://bowtielaw.wordpress.com/): E-discovery law blog by California attorney Joshua Gilliland.

V. Blogs

Given that there are a jillion legal blogs out there, it is impossible to ignore the possible translation that some blogs would make the legal top 10. Some of my favorites are:

A. Tom Mighell's Facebook page (**www.facebook.com/tom.mighell**): As crazy as it sounds and while technically not his blog, Tom obsessively posts what seems to interest him, but more importantly hammers on a broad spectrum of what we, as litigators need to pay attention to – I often can't keep up, which makes me feel a bit inadequate, but I always know where to go to be redirected to other sites, posts and articles that will make me feel smarter.

B. Ride The Lightening (**http://ridethelightning.senseient.com)**: Sharon Nelson and John Simek's Ediscovery Law Blog is as relevant as ever and their expertise in this area should not be lost on anyone keeping up with the day to day and everchanging needs of ediscovery, especially as it moves into State Court after *Weekley* and those decisions that have followed.

VI. Private Aggregators

Howard Nation's Site (**http://www.howardnation.com/lawlinks/)**: It's just a massive resource.

VII. Document Management

A. DropBox (**www.dropbox.com**): Inserts an icon directly onto your desktop toolbar) and **Box.net** (www.box.net)

B. Evernote (**www.evernote.com**): With an iphone app, this site will allow you to post anything you want in your own searchable cloud, send or share any of your evernotes to others and access them anywhere.

C. Google Docs (www.docs.google.com) and **Google Apps** (**www.google.com/apps**): Personalizable email, calendaring, and document management, all with permission/sharing capability and shared editing if desired. I'm not sure how not to list it in the possibles for litigators wishing to collaborate on any of the items listed above; And it's free.

D. Files Anywhere (**www.filesanywhere.com**): Another player in the game; free up to 25 mb; $ thereafter.

E. See also Document Management modules in Practice Management above.

VIII. Evidence on People

A. Accurint (**www.accurint.com**): Purchased by Lexis several years ago, and while they increased the prices (surprise), they are still reasonable when searching for a person, their history, convictions, lawsuits, etc.

B. Intellius (**www.intelius.com**): Another player in the game.

C. KnowX (**www.knowx.com**): And still another.

D. PublicData.com (**www.publicdata.com**): Lower priced long-time kid on the block; allows you batch pricing on "lookups" (pretty good for searching just basic information on the 'cheap."

E. Social Media – A growing and ever-changing category, this category will be significantly important to litigators due the mere fact of possible evidence. In my family law practice, it is possibly there in a majority of the cases. In addition, many attorneys and law firms are taking advantage of the below (a full discussion of which is beyond the scope of this paper) for marketing or 'social marketing,' as I call it. For your own t-shirt, delineating the 'inter-existence' of same, I reccomend the "social media venn diagram" shirt, available at www.despair.com/somevedi.html.

1) Facebook (**www.facebook.com**): With about 500 million users, fifty percent of whom log on in any given day and each user with an average of 130 friends, it is no wonder, given the demographics of the users, that evidence on any person can possibly be found on Facebook. Whether that continues to be the trend, whether their amorphous policies regarding privacy and controls continue to exist or drive their user base and whether they are even the social media site du jour,

even at the time of this article's publication, remains to be seen. However, given its size and growth, its impact on potential available evidence.

2) Twitter (www.twitter.com): 140 characters or less, this service allows you to follow others and vice versa. Self promotion here has its limits.

3) LinkedIn (www.linkedin.com): The "professional" linking site with bio and introduction capabilities.

4) Avvo (www.avvo.com): Good SEO gets this site a lot of hits and for attorneys, possibly a lot of referrals. As it's been said, a referral site on steroids, your credentials can be posted by category.

5) Justia (www.justia.com): Similar to Avvo, this legal directory has been making headway, as these two seek to displace referral/directory sites like law.com and Martindale Hubbell.

IX. Resource Pages

If you need a place to go to get information on being a litigation practice, this one is my pick.

A. ABA Law Practice Management section's site (**www.abanet.org/lpm**): Aside from news, CLE and LPM events, this site boasts a massive number of articles on Marketing, Management, Technology and Finance. Many of these are derivitives and reworks from the "Best of TechShow" series, which hails from the ABA TechShow, put on annually in Chicago. This is just a phenominal conglomeration of nationally known lawyers and legal professionals presenting on the spectrum of small law issues we face.

B. The Mac Lawyer (**www.themaclawyer.com**): As we are a slightly different breed, we almost have need of a slightly different set of sites to feed ourselves**.** Ben Stevens' site about all that is Mac in lawyering.

X. Miscellaneous

Because my New Years' Resolution was to merge my mediums and, while I take my cases seriously, I need to take myself less so. A few miscellaneous to get us coloring outside the lines.

A. Tablet Legal (**www.tabletlegal.com**): My newest obsession, the ipad, I believe will be a 'game-changer' (don't be a hater, I know people hate the term). I do believe, however that this will usher the era of the true tablet, one that will follow two previous attempts by computer makers in the last decade and which have largely been unsuccessful.

B. iPhoneJD (**www.iphonejd.com**): Jeff Richardson's blog about the obvious and not so obvious; along with Ben Stevens, my two current favorites for mac lawyer op-eds.

C. Acrobat for Legal Professionals (**http://blogs.adobe.com/acrolaw/**): Rick Boorstein's blog to publicize and educate for the company, but well worth the trip. It's my opinion that Ross Kodner's pdf-first philosophy has now taken hold. If you want to work with them, you have to understand them. For those of you who would like to know how to do this on the ipad/iphone, please feel free to contact me.

As it's the journey not the destination that matters, don't get too comfortable in this life. As a means to the maturity, if there be such, I hope this has been helpful. Many thanks goes to fellow council members and technologist-lawyers who helped with the suggestions herein.

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MULTIJURISDICTIONAL PRACTICE, UNREGULATED ADVERTISING, AND THE UNAUTHORIZED PRACTICE OF LAW

BY BRYCE BENJET

IN RECENT YEARS, ATTORNEY ADVERTISING has become commonplace, especially in the context of personal injury and large environmental and products liability cases. Flipping through the channels on TV, consumers are frequently asked if they or a family member might have sustained a birth injury or have been exposed to asbestos or some other some product or pharmaceutical that may cause injury. These ads often give only the name of a law firm and a 1-800 number for consumers to call for legal advice. If any other information about the firm is provided, it is generally small boilerplate flashed on the screen for 1-2 seconds at the end of the ad. Often, the lawyers are not licensed in Texas, even though that firm is soliciting clients and entering into fee agreements to pursue claims on behalf of Texas consumers in Texas courts for injuries that occurred in Texas. The web provides an even more efficient tool for lawyers to solicit business in other states.[1] In many cases, the out-of-state firm that paid for the advertisement does not actually litigate the case; instead referring it to a Texas firm with which it will share fees.

These advertisements, and the representations they solicit, exploit an ambiguous exception to Texas's otherwise strict control over attorney advertising. And they raise other concerns about how multijurisdictional practice in tort cases may often cross the line into the unauthorized practice of law.

A. Texas regulations on advertising and the problem of advertisements by out-of-state lawyers.

Texas has not fallen short in regulating advertising by its own lawyers, but it has left an important loophole that allows out-of-state lawyers to ignore its advertising rules, and even solicit clients knowing that they will ultimately be referred back to Texas lawyers. An examination of how advertising of Texas lawyers is regulated highlights this disparity.

Texas has not fallen short in regulating advertising by its own lawyers, but it has left an important loophole that allows out-of-state lawyers to ignore its advertising rules, and even solicit clients knowing that they will ultimately be referred back to Texas lawyers.

Lawyer advertising is primarily governed by the Texas Disciplinary Rules of Professional Conduct. The touchstone of all regulation of advertising is to prohibit "false or misleading communication about the qualifications or the services of any lawyer or firm."[2] Importantly, the rule explains that statements that are facially truthful can be misleading by omitting relevant information.[3] Rule 7.04 contains detailed regulations on advertisements in the media. Among the many requirements of this rule, the ad must:

- identify one lawyer who is responsible for the content of the ad;[4]
- be reviewed by a lawyer in the firm;[5]
- be kept on file by the lawyer for four years after its last dissemination;[6]
- disclose the geographic location, by city or town, of the lawyer's or firm's principal office;[7]
- disclose the name of the lawyer who finances the ad;[8] and
- disclose if the advertising lawyer knows or should know that a case or matter will likely be referred to another attorney.[9]

With regard to the disclosure of geographic area and the likelihood of referral of the case, the comments to the rules explain that these provisions:

> jointly address the problem of advertising that experience has shown misleads the public concerning fees that will be charged, the location where the services will be provided, or the attorney who will be performing these services. Together they prohibit the same sort of "bait and switch" advertising tactics by lawyers that are universally condemned.[10]

To the extent that an advertisement makes any disclosures,

disclaimers, or provides any qualifying information to avoid misleading the public, the rules require that these disclaimers be "presented in the same manner as the communication with prominence equal to that of the matter to which it refers."[11] To ensure compliance with these detailed requirements, the rules require lawyers to file all non-exempt advertisements with the State Bar Advertising Review Committee.[12]

While these regulations have proven generally effective in protecting the public from false and misleading advertising by Texas lawyers, the Disciplinary Rules of Professional Conduct apply only to members to the State Bar of Texas, and not out-of-state lawyers.[13] Thus, an out-of-state attorney may not be obligated to follow them.[14] In fact, a recent Oklahoma Supreme Court decision considering an Oklahoma lawyer's work in Texas noted the absence of Texas law on the subject, stating that "guidance as to what constitutes an improper practice by an out-of-state practitioner is lacking."[15] The Supreme Court of Texas Professional Ethics Committee has also identified this uncertainty.[16]

The limits of placing Texas's advertising regulations in the Disciplinary Rules of Professional Conduct are twofold. First, the inapplicability of these rules to out-of-state lawyers means that these unlicensed attorneys can say whatever they want in advertisements directed towards Texas consumers. At the very least, these ads mislead consumers into believing that they are contacting a lawyer who is qualified to represent them in matters that presumably arise in Texas.[17]

Furthermore, it is commonplace that out-of-state attorneys will refer clients, once recruited, to Texas attorneys. In this way, Texas lawyers benefit directly from these unregulated advertisements, and consumers remain victims of the sort of "bait and switch" that section 7.04 of the Disciplinary Rules of Professional Conduct were intended to prevent.[18]

B. Unregulated out-of-state advertisements may constitute the unauthorized practice of law in Texas.

While there has not been a significant effort in Texas to control advertising by out-of-state attorneys, out-of-state lawyers that retain clients through these ads may well be engaged in the unauthorized practice of law. Comments to the Disciplinary Rules explain that:

> Courts generally have prohibited the unauthorized practice of law because of a perceived need to protect individuals and the public from the mistakes of the untrained and the schemes of the unscrupulous, who are not subject to the judicially imposed disciplinary standards of competence, responsibility, and accountability.[19]

The practice of law in Texas is generally restricted to members of the State Bar.[20] The practice of law is defined by statute as follows:

> In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[21]

However, this definition is not exclusive of the inherent power of the courts to define the practice of law. In *Brown v. Unauthorized Practice of Law Committee*, the Dallas Court of Appeals held the following activities constitute the practice of law:

> (1) Contracting with persons to represent them with regard to their personal causes of action for property damages or personal injury.
>
> (2) Advising persons as to their rights and the advisability of making claims for personal injuries or property damages.
>
> (3) Advising persons whether to accept an offered sum of money in settlement of claims for personal injuries or property damages.
>
> (4) Entering into contracts with persons to represent them in their personal injury or property damage matters on a contingent fee together with an attempted assignment of a portion of the person's cause of action.
>
> (5) Entering into contracts with third persons which purport to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.
>
> (6) Advising clients of their legal rights, duties and privileges under the law.[22]

Under this definition, the advertisement itself may not constitute the practice of law, but any communications with consumers made pursuant to that ad would appear to involve the unauthorized practice of law that could be enjoined by the courts.[23]

An action for injunctive relief to prohibit the unauthorized practice of law can be brought by the Unauthorized Practice of Law Committee; grievance committees, local bar associations, and even groups of private attorneys.[24] These civil actions for injunctive relief are based on the broad, judicially controlled definition of the practice of law, and are distinct from the more limited civil remedy for unauthorized practice found in Chapter 83 of the Government Code.[25]

C. Potential Criminal Liability.

Advertisements and subsequent contact with consumers by an out-of-state lawyer may also constitute the felony offense of Falsely Holding Oneself Out as a Lawyer under section 38.122 of the Texas Penal Code or the misdemeanor offense of Unauthorized Practice of Law pursuant to section 38.123. Under section 38.122, it is an offense to:

> With the intent to obtain an economic benefit for himself or herself, the person holds himself or herself out as a lawyer, unless he or she is currently licensed to practice law in this state, another state, or a foreign country and is in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.[26]

Under this statute, a person can only hold themselves out as a lawyer in soliciting clients if:

(1) they are licensed to practice law in some jurisdiction;

(2) they are in good standing with the State Bar of Texas; and

(3) they are in good standing with the state bar or licensing authority of any and all other states and foreign countries where licensed.

By requiring any person holding themselves out as a lawyer to be "in good standing with the State Bar of Texas" ***and*** in their home jurisdiction, the law can be construed to require, at a minimum, admission pro hac vice before an out-of-state attorney can hold himself out as a lawyer in Texas.

The offense of Unauthorized Practice of Law makes it an offense to do any of the activities enumerated in *Brown* as the practice of law.[27] As with the prior section prohibiting falsely holding oneself out as a lawyer, it is criminal unauthorized practice if an out-of-state lawyer is not in good standing with his own jurisdiction ***and*** the State Bar of Texas.[28] Although the authors are unaware of any criminal prosecutions for multijurisdictional advertising and resulting practice, the plain language of the statute certainly raises the possibility of serious criminal liability.

D. Other jurisdictions prohibit advertisements by out-of-state lawyers.

Texas law prohibiting out-of-state advertisements is consistent with the law in other jurisdictions. For example the ABA Model Rules expressly prohibit advertisements by out-of-state attorneys:

> No Solicitation. An out-of-state lawyer rendering services in this state in compliance with this Rule [concerning pro hac vice admission] or here for other reasons is not authorized by anything in this to hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. ***Nothing in this Rule authorizes out-of-state lawyers to solicit, advertise, or otherwise hold themselves out in publications as available to assist in litigation in this state.***[29]

The Illinois State Bar has issued an advisory opinion that out-of-state attorney advertisements constitute the unauthorized practice of law:

> the letter constitutes at least a tentative offer to provide legal services within Illinois for an Illinois resident. We believe that its transmission into this state constitutes the practice of law within this state. The lack of response is irrelevant.[30]

A letter from the New York State Trial Lawyers Association to the Office of Court Administration concerning revisions to the New York advertising rules confirms that state's view of out-of-state ads as unauthorized practice:

> Some of the money should be used to pursue out-of-state law firms, not licensed in New York, who broker the cases they attract [from advertisements] to some in-state law firms. The disciplinary com-

> mittees should seek to identify such firms, and refer cases against them for unauthorized practice to the Attorney General's Office.[31]

Likewise, the Mississippi Legislature enacted a limited statutory prohibition on out-of-state advertisements:

> An attorney who is not admitted to The Mississippi Bar shall not advertise his legal services in this state for the purpose of soliciting prospective clients for commencement of any civil action in this state, or for the purpose of soliciting clients for any civil action already commenced or pending in this state, unless the attorney who is not a member of The Mississippi Bar has associated an attorney who (a) is a member of The Mississippi Bar; and (b) will be associated and actively working on substantial aspects in any civil action filed on behalf of a client solicited as a result of the advertisement.[32]

By requiring the association of local counsel who will actually work on the case, this statutory provision essentially negates the concerns that consumers will be misled into hiring a lawyer who is not authorized to practice law in the jurisdiction. However, the lack of a requirement to disclose local counsel is troubling because the risk of the "bait and switch" identified in the Texas professional conduct rules remains.[33]

E. Texas lawyers who accept referrals arising from out-of-state lawyer advertisements may also be subject to discipline or criminal liability.

Texas Disciplinary Rule of Professional Conduct 5.05(b) states that a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." The Professional Ethics Committee recently noted that "the contours of the term 'unauthorized practice of law' in Texas Disciplinary Rule 5.5(b) as applied to multijurisdictional practice is not currently well defined."[34] In light of this uncertainty, Texas lawyers should be cautious in accepting referrals of Texas clients from out-of-state attorneys.[35]

As discussed above, the screening of a case and entering into a fee agreement with a client constitutes the practice of law.[36] If an out-of-state lawyer engages in these activities with a Texas consumer, that lawyer has presumably committed both civil and criminal unauthorized practice of law as well as the felony offense of falsely holding himself out as a lawyer.[37] Where a Texas lawyer knows that the out-of-state lawyer engaged a referred client through an advertisement or even has an arrangement in advance with the out-of-state lawyer to accept referrals, such conduct could easily be viewed as "assisting" the unauthorized practice of law in violation of Rule 5.05(b). Moreover, there could even be criminal liability under these circumstances as an accomplice or for conspiracy.[38]

F. Recommendations

As in many areas of the law, the problem with out-of-state advertising is made worse by the recognized uncertainty in the law.[39] This uncertainty can be resolved by either clarifying the law through legislation and amendments to the rules, or obtaining judicial construction through greater prosecution of out-of-state advertisers and in-state lawyers who benefit from these advertisements.

To clarify the law and to remedy the current problem of out-of-state advertising, Texas should consider:

- enacting a statutory bar on out-of-state advertising akin to Mississippi law;[40] or
- codifying the State Bar advertising rules or otherwise making them applicable to all advertisements aired or disseminated in Texas regardless of bar membership.[41]

But the law will not be clarified unless complaints about these advertisements are made to the Unauthorized Practice of Law Committee or other authorities that can bring civil or criminal action to stop these practices.

Alternatively, Texas lawyers, regulators, and the public must be more vigilant in enforcing the laws that are already on the books. It appears that existing law can be construed as an absolute bar on out-of-state advertising and that Texas lawyers who benefit from such advertisements through referrals may be subject to discipline or even criminal liability. But the law will not be clarified unless complaints about these advertisements are made to the Unauthorized Practice of Law Committee or other authorities that can bring civil or criminal action to stop these practices. There is no question that a felony prosecution of a lawyer for placing an advertisement would have a huge impact on the status quo.

G. Conclusion

If we are to retain the jurisdictional limits on attorney practice

embodied in State Bar membership, then out-of-state advertising must be addressed. These advertisements necessarily lead to an out-of-state lawyer providing preliminary advice to a client about potential claims and are aimed at securing a contract with the consumer to provide legal services. This is, at its core, the practice of law and should be regulated.

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[1] The recent oil spill in the Gulf of Mexico has provided a perfect example of out-of-state lawyer advertising. For example, the website http://www.gulfoilspilllitigationgroup.com/ invites consumers on the Gulf Coast to contact a Tennessee-licensed lawyer working for a San Francisco based firm to "advise of your legal rights and true value of your claim." Another website sponsored by a New York law firm that hired Erin Brockovitch as a consultant offers a "Free Case Review" and tells Gulf Coast consumers, "you may have a case for Erin." See http://www.erinonyourside.com/. No individual lawyer is identified, and only a small notation at the bottom of the site states that the firm is "Licensed in New York." These weblinks were active as of July 2010. Copies of website pages are on file with the authors.

[2] Tex. Disciplinary R. Prof'l Conduct 7.02(a).

[3] *Id.* § 7.02 cmt.3.

[4] *Id.* § 7.04(b)(1).

[5] *Id.* § 7.04(e).

[6] *Id.* § 7.04(f).

[7] *Id.* § 7.04(j).

[8] *Id.* § 7.04(k).

[9] *Id.* § 7.04(l).

[10] *Id.* § 7.04 cmt.14.

[11] *Id.* § 7.04 cmt.20.

[12] *Id.* §7.07.

[13] State Bar R. art. II § 3 ("These Rules are adopted for the operation, maintenance, and conduct of the State Bar and for the disciplining of its members.").

[14] *See Unauthorized Practice of Law Committee v. American Home Assurance, Co.*, 261 S.W.3d 24, 53 (Tex. 2008) (Johnson, J., dissenting) (noting that unlicensed management at insurance company not constrained by attorney professional ethics rules).

[15] *Reinstatement of Mooreland-Rucker*, --- P.3d. ---, 2010 WL 2280824 (Okla. June 8, 2010).

[16] *See* Op. Tex. Ethics Comm'n No. 597 (May 2010).

[17] The misleading nature of out-of-state ads is discussed in the case law of various jurisdictions. *See, e.g., Gould v. Harkness*, 470 F. Supp. 2d 1357, 1364 (S.D. Fla. 2006); *Haymond v. Statewide Grievance Committee*, 723 A.2d 821 (Conn. App. Ct. 1997); *Florida Bar v. Kaiser*, 397 So. 2d 1132, 1133 (Fla. 1981).

[18] The New Jersey Supreme Court prohibited a similar end-around of its regulation on attorney advertising through the use of out-of-state attorneys:

> This Court recognizes, however, that television advertising by New Jersey lawyers is banned, while New York attorneys have been permitted to advertise on the broadcast media. Jacoby & Meyers has legally used television ads in New York which are regularly beamed to New Jersey on interstate channels. The extent and intensity of such advertising is not in the record, and we have no way of knowing how substantial or influential it is. We do know that if petitioner were allowed to use its firm name in New Jersey in *any* form its television advertising could give it a substantial competitive advantage.

On Petition for Review of Opinion 475 of Advisory Committee on Professional Ethics, 444 A.2d 1092, 1099 (N.J. 1982).

[19] Tex. Disciplinary R. Prof'l Conduct 5.5 cmt.1.

[20] *See* Tex. Gov't Code § 81.02.

[21] *Id.* § 81.101(a).

[22] 732 S.W.2d 34, 39 (Tex. App.—Dallas 1987, writ denied); *Green v. Unauthorized Practice of Law Committee*, 883 S.W.2d 293, 298 (Tex. App.—Dallas, no writ).

[23] *See In re Nolo Press/Folklaw Inc.*, 991 S.W.2d 768, 771 (Tex. 1999).

[24] *Id.* at 773.

[25] Unauthorized practice under Chapter 83 of the Government Code is limited to preparation of documents relating to real property. *See* Tex. Gov't Code § 83.001. However, the Legislature made clear that this remedy was cumulative of the broader action to enjoin all unauthorized practice. *See id.* § 83.004.

[26] Tex. Pen. Code § 38.122.

[27] *Compare* Tex. Pen. Code § 38.123(a) *with Brown*, 732 S.W.2d at 39.

[28] Tex. Pen. Code § 38.123(b).

[29] ABA Model Rule on Pro Hac Vice Admission II(G) (August 2002).

[30] IL. Adv. Op. 94-02, 1994 WL 904175 (July 1994).

[31] Letter from New York State Trial Lawyers Association to Office of Court Administration dated October 20, 2006 (copy on file with author).

[32] Miss. Code Ann. § 11-1-8. The Mississippi Legislature explained that such a prohibition was needed because:

> attorneys should be licensed by the State of Mississippi before engaging in any solicitation of clients in this state. Such licensing of attorneys protects the people of Mississippi in that The Mississippi Bar has direct jurisdiction over attorneys licensed by it. The Mississippi Supreme Court can act against such licensed attorneys in the event that such licensed attorneys commit violations of Mississippi law, court rules and rules of ethics for attorneys. The Legislature finds that this section is necessary for the protection of the people of Mississippi.

Id.

[33] An Arizona State Bar ethics opinion discusses this problem in determining that a joint advertisement distributed by an Arizona

firm and a California firm that was not licensed in Arizona would be misleading unless it disclosed that the California firm was not licensed to practice in the state. Arizona State Bar Ethics Opinion 85-9 (November 15, 1985).

[34] Op. Tex. Ethics Comm'n No. 597 (May 2010).

[35] Importantly, Rule 5.05(a) prohibits Texas lawyers from engaging in the unauthorized practice of law in other jurisdictions. Thus, a Texas lawyer advertising in a jurisdiction where he is not licensed would likely be subject to disciplinary action by the Texas State Bar.

[36] *See Brown*, 732 S.W.2d at 39.

[37] *See supra* Part B & C.

[38] Tex. Pen. Code § 7.02 (accessory); Tex. Pen. Code 15.02 (criminal conspiracy); *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006) ("An accomplice is an individual who participates with a defendant before, during, or after the commission of the crime and acts with the requisite culpable mental state.").

[39] *See* Op. Tex. Ethics Comm'n No. 597; *Reinstatement of Mooreland-Rucker*, 2010 WL 2280824.

[40] *See* Miss. Code Ann. § 11-1-8.

[41] Although this would not prohibit out-of-state advertising, it would regulate such advertising and generally prevent most deceptive advertising by out-of-state attorneys. For example, out-of-state lawyers would presumably have to prominently disclose that they are not licensed in Texas, that they do not have an office in Texas, that their principal office is out-of-state, and that they plan to refer any case accepted to a Texas local counsel. *See* Tex. Disciplinary R. Prof'l Conduct 7.02, 7.04.

RETHINKING PERSONAL JURISDICTION OVER THE WORLD-WIDE WEB

BY CHARLES W. "ROCKY" RHODES

I HAVE A CONFESSION TO MAKE. No, it's not that I have committed a crime, some unethical practice, or a sin (at least not a sin I'll confess here). It's just that—perhaps this will be tougher than I thought. But I should persevere—after all, they say confession is good for the soul. Okay, then, here it goes—I have a problem, or at least I would think most people think it's a problem. I happen to find the topic of personal jurisdiction fascinating (my son believes this is evidence that I'm a nerd, but, hey, he's sixteen).

I'm happy to report, however, that my affliction has had an upside—due to my interest, I've noticed recent decisions from the Supreme Court of Texas that have brought some needed (and welcomed) clarity to a doctrine I previously described as an incoherent mess.[1] These decisions have properly distinguished general and specific personal jurisdiction, have emphasized the difficulty in establishing general jurisdiction, and, at the same time, have properly authorized the more limited jurisdictional power inherent in specific jurisdiction in additional contexts.[2]

As a quick review for those who do not share my peculiar affliction, two types of jurisdictional relationships satisfy the minimum contacts required for the exercise of personal jurisdiction to comport with traditional notions of fair play and substantial justice. One is specific jurisdiction, which grants a limited jurisdictional authority only over causes of action that are sufficiently related to the defendant's purposeful forum contacts. So, if a New York corporation is subject to specific jurisdiction in Texas solely because of a long-term contractual relationship with a Texas business, this provides the Texas courts with jurisdiction only to resolve claims substantially related to that contract. In contrast, general jurisdiction is a global adjudicatory jurisdiction that is dispute-blind—i.e., it does not depend on the causes of action asserted against the defendant. If general jurisdiction is appropriate over a New York corporation in Texas, that means the New York corporation can be sued in Texas *for anything*, including an employment discrimination case filed by a New York employee, a products liability suit brought by a Mississippi resident, or a breach of contract action filed by a California corporation.

Although this has not always been the case,[3] the Texas Supreme Court's recent decisions properly recognize this important distinction between general and specific jurisdiction. General jurisdiction, according to the court, is based solely on the defendant's contacts with the forum irrespective of the cause of action asserted, requiring a "more demanding minimum contacts analysis" of longstanding in-state business activities.[4] In contrast, specific jurisdiction focuses on the relationship among the nonresident defendant, the forum, and the litigation.[5] This relationship satisfies the constraints of due process when the defendant has purposefully established contacts with the forum state for some benefit, profit, or other advantage, and there is a substantial connection between those contacts and the operative facts of the litigation.[6] This can be met, for instance, if a foreign manufacturer sells products in Texas through a Texas distributor, or if an out-of-state company allegedly violates the Uniform Fraudulent Transfer Act by accepting a transfer of Texas oil and gas interests.[7]

Despite these welcome clarifications, one area of Texas jurisdictional doctrine is still in disarray—jurisdiction as a result of an Internet presence. The problem is that, rather than properly evaluating the two types of jurisdictional relationships in light of the Texas Supreme Court's recent pronouncements, many Texas lower courts have continued to default to a mechanical sliding-scale test borrowed from an early federal district court decision, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[8]

As I'll show in this paper, *Zippo* itself illustrates the error of the Texas appellate courts in extending the Internet sliding scale to cover general jurisdiction. In addition, indiscriminately employing the sliding scale to every specific jurisdiction query creates its own set of difficulties.

Blame It On Zippo?

Zippo Manufacturing, a Pennsylvania corporation making such products as "Zippo" tobacco lighters, sued the California corporation Zippo Dot Com in Pennsylvania, alleging that Dot Com's Internet news domain site, which had 3,000 paying subscribers in Pennsylvania, infringed upon Manufacturing's trademark. To resolve the purposeful availment query necessary for specific jurisdiction, the federal district court

constructed the now-familiar sliding scale that categorized Internet usage into a continuum with three zones. At one end, the defendant uses the transmission of computer files over the Internet to enter into contracts with residents of the forum state, subjecting the defendant to specific jurisdiction. At the other end of the spectrum, the defendant establishes a mere passive website that does nothing more than advertise, which is not sufficient for specific jurisdiction. In between these two extremes are those websites allowing the exchange of information over the Internet, in which jurisdiction "is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[9] Using this scale, the *Zippo* court held that, because Dot Com was purposefully availing itself of the benefits and protections of the Pennsylvania's laws by engaging in electronic commerce with 3,000 Pennsylvania residents, it was amenable to specific jurisdiction.

Zippo reached the right result—specific jurisdiction was undoubtedly appropriate over Dot Com in Pennsylvania where Dot Com was allegedly profiting by infringing upon Manufacturing's trademark. The sliding scale *Zippo* constructed is also a useful analytical device, designed to comport "with well developed personal jurisdiction principles."[10] But the problem has been the overemphasis of this scale in subsequent decisions, some going so far as to view the scale as the *sine qua non* of personal jurisdiction over the Internet, even in general jurisdiction cases.

General Jurisdiction and the World-Wide Web

The *Zippo* standard, though, has little relevance to general jurisdiction. It was never intended for use in this context. Zippo Manufacturing in fact conceded that general jurisdiction was inappropriate as a result of Dot Com's electronic commerce over its website with forum residents, and proceeded entirely on a specific jurisdiction theory.[11] The *Zippo* court even dismissed certain authorities relied upon by the defendant Dot Com because the cases involved the higher quality and quantity of contacts required for general jurisdiction rather than specific jurisdiction.[12] Yet despite the fact that *Zippo* recognized that its sliding scale should not apply to general jurisdiction, numerous Texas courts have employed the sliding scale to analyze whether the "substantial" contacts necessary for general jurisdiction exist.[13]

Some Texas courts have even concluded that the maintenance of an interactive website accessible to residents of the forum is a factor supporting the exercise of general jurisdiction, with one court suggesting that completing transactions with Texas residents over a website alone may even be sufficient for general jurisdiction.[14] But neither the interactivity of a website nor commercial activity standing alone—concepts *Zippo* only applied to the purposeful availment prong of a specific jurisdiction analysis—should have any bearing on whether the "very different," "more demanding," and "substantially higher" threshold required for general jurisdiction has been satisfied.[15]

Interactive websites and commercial activities over the Internet are now the norm. As a result, numerous businesses would be subject to the general jurisdiction of the Texas courts (not to mention the jurisdiction of every other state in the nation) if the sliding scale controlled general jurisdiction queries. But the Internet should not eviscerate our traditional jurisdictional model. Although technological change may increase to some extent the scope of a state court's adjudicative jurisdiction, such change cannot herald "the eventual demise of all restrictions on the personal jurisdiction of state courts."[16] Instead, the guiding principles should be the nature, quality, and quantity of the transactions with forum residents occurring over the website, not merely the website's characteristics. Only if the nonresident defendant is actually using the Internet to engage in transactions in a similar manner to an in-state business should general jurisdiction be appropriate as a result of Internet activities.

Although technological change may increase to some extent the scope of a state court's adjudicative jurisdiction, such change cannot herald "the eventual demise of all restrictions on the personal jurisdiction of state courts."

To be fair to the Texas state courts, they weren't the first to make the error of employing the sliding scale to general jurisdiction queries. Texas federal district courts, and later the Fifth Circuit itself, actually started the trend.[17] Almost all the early Texas state decisions on web-based jurisdiction relied on these federal decisions as support.[18] But the Fifth Circuit has since retreated from its earlier pronouncements.

The Fifth Circuit acknowledged in *Revell v. Lidov* that the *Zippo* sliding scale "is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction."[19] Instead, *Revell* highlighted that an appropriate analysis examines whether the

nonresident defendant conducted the required "substantial" forum activity necessary for general jurisdiction.[20] The mere fact that the nonresident defendant could be doing business with Texas residents, the Fifth Circuit explained, is not the same as the defendant actually conducting the necessary business within the state to be subject to the jurisdiction of Texas courts for any lawsuit arising anywhere in the world.[21] Other federal circuit courts are in accord—the maintenance of a public Internet website, even an interactive one or one that allows electronic commerce, is not sufficient to establish general jurisdiction.[22] Instead, the analysis should depend on the qualitative and quantitative nature of the defendant's commercial activities within the forum.

In other words, the medium employed to conduct the business is not what is controlling, but rather the nature of the transactions themselves and their connection with the forum state. As the Texas Supreme Court pronounced, general jurisdiction at least requires "'long-standing business in the forum state, such as marketing or shipping products, or performing services or maintaining one or more offices there.'"[23] A website that is interactive or has the *capability* of engaging in economic commerce is not the same as *actually conducting* the requisite "long-standing business" within the forum necessary for general jurisdiction. The sliding scale only examines the characteristics of the website—it does not address the proper question for general jurisdiction, i.e., whether the nonresident defendant uses the website to act comparably to a forum business.

As the Texas Supreme Court pronounced, general jurisdiction at least requires "'long-standing business in the forum state, such as marketing or shipping products, or performing services or maintaining one or more offices there.'"

Some Texas decisions have recognized this principle and refused to give weight to the characteristics of a website when addressing general jurisdiction queries.[24] Still other decisions from Texas courts, especially recent decisions from the Dallas Court of Appeals, have implicitly demonstrated the same understanding by not conducting any analysis of the interactivity of a website in addressing general jurisdiction, instead focusing exclusively on the extent of the business actually performed in the state.[25] The remaining Texas courts need to follow suit in order to ensure compliance with the appropriate strictures of general jurisdiction.

Specific Jurisdiction Based on Internet Activities

Zippo originally formulated the sliding scale in the specific jurisdiction context where its application is more appropriate. As the Texas Supreme Court noted, certain marketing "activities over the Internet" undertaken in the hope of soliciting sales in Texas may satisfy the purposeful availment requirement for specific jurisdiction.[26] Nonetheless, while the sliding scale is an appropriate consideration in a specific jurisdiction analysis, it should not be the only method for evaluating jurisdiction over the web.

No one standard is capable of evaluating the appropriateness of all jurisdictional assertions over the Internet. After all, the Internet is, at its core, a mode of communication. Like other modes of communication, a singular conception of the appropriateness of jurisdiction is not feasible. Just as the jurisdictional effect of sending a letter to the forum state may differ based on the content of the letter and its context, the jurisdictional consequences of the operation of a website will depend on all the circumstances of the website, not merely the level of interactivity of the website. The key is, as it is with all purposeful availment issues, whether the defendant intentionally directed its conduct toward the forum to obtain some benefit in a manner that implicates the forum state's sovereign interests and ensures that litigation within the forum is not undue.[27]

This may be satisfied, as *Zippo* held, if the defendant uses the Internet to sell or directly market its products to residents of the forum state. Such activity is merely the most contemporary and technologically advanced means to serve the market in the forum. Or the transmission of computer files over the Internet may result in contracts with residents of the forum state, which will authorize jurisdiction when the contract has a substantial relationship with the forum.[28] Another alternative is that information posted to the Internet may give rise to jurisdiction under the so-called "effects" test,[29] which allows the forum to exercise jurisdiction over a nonresident defendant intentionally aiming tortious conduct at the forum state with the knowledge that the brunt of the harm would be suffered in the forum.[30] It's thus not always the level of interactivity of the website that should control the jurisdictional query, but the full consideration of that website's use in conjunction with the defendant's purposeful availment of the benefits and protections of the state's laws.

The sliding scale thus provides guidance for the purposeful

availment inquiry, but it is not dispositive. Under the sliding scale, for instance, a website that is only a passive form of advertising would be insufficient to demonstrate the purposeful availment necessary for specific jurisdiction.[31] Yet a passive website may still be relevant to the jurisdictional analysis. As an illustration, in *Spir Star AG v. Kimich*, the Texas Supreme Court appropriately relied on statements on a foreign corporation's website as evidence of the corporation's intent to purposefully obtain benefits from serving the Texas market.[32] The court did not focus on the interactivity of the website, but instead viewed the website as merely another indicia of the company's overall activities that were designed to obtain business advantages from Texas. This was undoubtedly appropriate, irrespective of the website's relative location along the sliding scale.

Those courts that default to the *Zippo* sliding scale to govern any assertion of specific personal jurisdiction over the Internet need to widen their focus.[33] The courts must not be constrained by the elusive quest for a comprehensive standard, but instead should appraise the nonresident defendant's activity in accord with the competing individual and state interests at stake. The sliding scale is, along with other aides to the jurisdictional query (such as the effects test and the contracting standard), just a facet of the appropriate minimum contacts analysis, and must be considered in light of the defendant's overall forum activities.[34]

Conclusion

I have no quarrel with employing the sliding scale as a helpful analytical device when considering whether Internet activities satisfy the purposeful availment requirement for specific personal jurisdiction. Yet it should not be viewed, as Texas courts sometimes do, as the *sine qua non* of jurisdiction. The potential for economic commerce through, and the interactivity of, a website may be important factors for purposeful availment, but they are not the only considerations.

Even more importantly, though, the sliding scale is not at all appropriate for general jurisdiction queries because it focuses on the wrong question—the *potential* for engaging in forum business rather than the *actual conduct* of such business activities. Texas courts should accordingly stop applying *Zippo* to dispute-blind queries, as some Texas courts have already begun to do. Not only would that bring additional clarity to Texas jurisdictional doctrine, it might just be the cure for my peculiar affliction. After all, if jurisdictional doctrine truly became predictable, I might not find it nearly as fascinating (unless, perhaps, my son is right and I really am a nerd).[35]

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1 Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 136-41 (2005).

2 *See infra* notes 4-7 and accompanying text.

3 Rhodes, *Predictability Principle*, 57 BAYLOR L. REV. at 151-61.

4 *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168-69 (Tex. 2007). I've previously argued that this standard is only met if the defendant engages in forum state activities similar in frequency and nature to the activities of a local business. Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 811 (2004).

5 *See, e.g.*, *Zinc Nacional , S.A. v. Bouché Trucking, Inc.*, 308 S.W.3d 395, 397 (Tex. 2010); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575-76 (Tex. 2007). *See also* E. Thomas Bishop & Alexander N. Beard, *Finding the "Texas Nexus" for Specific Jurisdiction:* Moki Mac River Expeditions v. Drugg, 41 THE ADVOC. 63 (Winter 2007).

6 *See, e.g.*, *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009); *Moki Mac*, 221 S.W.3d at 584-85; *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784-85 (Tex. 2005).

7 *Spir Star AG v. Kimich*, 53 Tex. Sup. Ct. J. 423, 425-29 (March 12, 2010); *Retamco*, 278 S.W.3d at 339-41. Other recent decisions from the court have held that specific jurisdiction was not appropriate over a non-resident defendant under the presented circumstances. *See, e.g.*, *Zinc Nacional*, 308 S.W.3d at 397-98 (foreign defendant not subject to jurisdiction based on its decision to ship goods with a third party that traveled through Texas on the way to New Mexico); *Kelly v. General Interior Construction, Inc.*, 301 S.W.3d 653, 659-60 (Tex. 2010) (holding plaintiffs had not alleged sufficient facts for purposeful availment); *IRA Resources, Inc. v. Grieco*, 221 S.W.3d 592, 597-99 (Tex. 2007) (defendant had not purposefully availed itself of privilege of conducting activities within Texas); *Moki Mac*, 221 S.W.3d at 585-88 (holding nonresident defendant's forum marketing activities were not substantially connected to the operative facts of the litigation); *Michiana*, 168 S.W.3d at 788-92 (holding no purposeful availment from out-of-state sale of RV). *See also* Gregory J. Lensing, *Personal Jurisdiction Doctrine in Texas*, 72 TEX. B. J. 348, 350-51 (May 2009) (detailing 10 to 15 year trend in the Texas Supreme Court of favoring nonresident defendants in personal jurisdiction cases). My own view is that the court essentially reached the right result (even though I disagree in some cases

with the rationale) in the personal jurisdiction cases it's decided since 2005, although I believe several of its pre-2005 decisions are erroneous, as I explain in greater detail in Rhodes, *Predictability Principle*, 57 BAYLOR L. REV. at 151, 155-56, 193-93, & 205-08.

[8] 952 F. Supp. 1119 (W.D. Pa. 1997).

[9] *Id.* at 1124.

[10] *Id.*

[11] *Id.* at 1122.

[12] *Id.* at 1126 n.7.

[13] *See, e.g.*, *All Star Enterprise, Inc. v. Buchanan*, 298 S.W.3d 404, 327-28 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (listing authorities applying sliding scale to determine whether an Internet website supported general jurisdiction, but concluding that the defendant's website in that case was too passive to support jurisdiction).

[14] *See, e.g.*, *Hitachi Shin Din Cable, Ltd. v. Cain*, 106 S.W.3d 776, 787 (Tex. App.—Texarkana 2003, no pet.) (opining a defendant's completed transactions over the Internet with Texas residents would "strongly support the trial court's exercise of general personal jurisdiction over a foreign corporation."); *Experimental Aircraft Ass'n, Inc. v. Doctor*, 76 S.W.3d 496, 506-07 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (viewing website allowing anyone to become a member of the nonresident defendant association or buy its products "a significant factor in support of [general] personal jurisdiction."); *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 725 (Tex. App.—Austin 2000, pet. dism'd w.o.j.) (concluding website merely allowing Texas residents to submit comments and questions to representatives of German corporation was a factor supporting general jurisdiction, although it might not have been sufficient standing alone to support jurisdiction); *Jones v. Beech Aircraft Corp.*, 995 S.W.2d 767, 772-73 (Tex. App.—San Antonio 1999, pet. dism'd w.o.j.) (reasoning "somewhat interactive" website merely allowing users to locate nearest sales representative was a factor supporting general jurisdiction), *disapproved on other grounds*, *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 n.1 (Tex. 2002).

[15] *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007).

[16] *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

[17] *See, e.g.*, *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999); *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 742 (W.D. Tex. 1998); *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782, 786 (E.D. Tex. 1998).

[18] *See, e.g.*, *Townsend v. Univ. Hosp.-Univ. of Colo.*, 83 S.W.3d 913, 922 (Tex. App.—Texarkana 2002, pet. denied) (citing *Mink*, 190 F.3d at 336-37); *Experimental Aircraft*, 76 S.W.3d at 506-07 (citing *Mink*, 190 F.3d at 336-37); *Michel v. Rocket Eng'g Corp.*, 45 S.W.3d 658, 677-78 (Tex. App.—Fort Worth 2001, no pet.) (analogizing to *Mink*, 190 F.3d at 336-37); *Riviera Operating Corp. v. Dawson*, 29 S.W.3d 905, 911 (Tex. App.—Beaumont 2000, pet. denied) (discussing *Mink*); *Jones*, 995 S.W.2d at 772-73 (citing *Origins Instruments Corp. v. Adaptive Computer Sys., Inc.*, No. CIV.A.397CV2595-L, 1999 WL 76794, *3 (N.D. Tex. Feb. 3, 1999); *Thompson*, 998 F. Supp. at 742; *Mieczkowski*, 997 F. Supp. at 786).

[19] 317 F.3d 467, 471 (5th Cir. 2002).

[20] *Id.*

[21] *Id.*

[22] *See, e.g.*, *Tamburo v. Dworkin*, 601 F.3d 693, 701 (7th Cir. 2010); *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002); *Paolino v. Argyl Equities, LLC*, 401 F. Supp. 2d 712, 723 (W.D. Tex. 2005).

[23] *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168 (Tex. 2007) (quoting 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067.5 (2007)).

[24] *See, e.g.*, *AmQuip Corp. v. Cloud*, 73 S.W.3d 380, 388 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (concluding that creating and maintaining a website does not weigh in favor of general jurisdiction).

[25] *See, e.g.*, *Wet-A-Line, L.L.C. v. Amazon Tours, Inc.*, 315 S.W.3d 180, 186-87 (Tex. App.—Dallas 2010, no pet. h.) (omitting any discussion of the interactivity of nonresident defendant's website in holding that general personal jurisdiction was inappropriate); *Moki Mac River Expeditions v. Drugg*, 270 S.W.3d 799, 803-04 (Tex. App.—Dallas 2008, no pet.) (same).

[26] *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005). *Michiana* cited *Reiff v. Roy*, 115 S.W.3d 700 (Tex. App.—Dallas 2003, pet. denied) as support for this proposition, even though *Reiff* applied the sliding scale to a general jurisdiction query rather than the specific jurisdiction analysis that was at issue in *Michiana*.

[27] *See* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 633-39 (2007) (explaining the precedential and theoretical support for this proposition).

[28] *Burger King v. Rudzewicz*, 471 U.S. 462, 478-82 (1985). *Burger King* upheld the exercise of jurisdiction in Florida over a Michigan franchisee for breaching a franchise agreement, even though the franchisee did not travel to Florida, but instead solely communicated with the franchisor by mail and wire. *Id.* at 476-80. Today, it is not uncommon for contracts to be formed in a similar manner via Internet communications.

[29] *See, e.g.*, *Tamburo v. Dworkin*, 601 F.3d 693, 703-07 (7th Cir. 2010); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1075-78 (10th Cir. 2008); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321-22 (9th Cir. 1998). The Fifth Circuit in *Revell v. Lidov*, 317 F.3d 467, 471-72 (5th Cir. 2002), opined that the *Zippo* scale was not "in tension with the 'effects' test." But the court proceeded in the manner suggested in this paper by considering not only the interactivity of the website in the specific jurisdiction analysis, but also whether the allegedly defamatory statements had been directed at Texas with the brunt of the injury knowingly suffered here. *Id.* at 472-76.

[30] *Calder v. Jones*, 465 U.S. 783 (1984). *Calder* involved a lawsuit filed in California by actress and entertainer Shirley Jones against the *National Enquirer* and two Florida residents, the writer and editor of an allegedly libelous article that appeared in the *Enquirer.* The Supreme Court upheld California's assertion of jurisdiction against the writer and editor, reasoning that they "expressly aimed" an article they knew would have a "potentially devastating" impact on

Jones in California, where Jones lived and worked and the *Enquirer* had its largest circulation. *Id.* at 789-90.

[31] *Cf. Jackson v. Hoffman*, 312 S.W.2d 146, 154-55 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (determining nonresident defendant's website was a passive form of advertising not rising to the level of interactivity necessary under *Zippo* for purposeful availment); *Exito Electronics, Co. v. Trejo*, 166 S.W.3d 839, 858 (Tex. App.—Corpus Christi 2005, no pet.) (same).

[32] 53 Tex. Sup. Ct. J. 423, 429 (March 12, 2010) (relying on website content, including statements regarding the foreign corporation's use of a Houston distributor to serve the market in North America, as support for existence of specific personal jurisdiction).

[33] *See, e.g.*, *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172, 177-78 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (examining the degree of interaction between parties to analyze specific jurisdiction and general jurisdiction only after determining that the website at issue fell in the middle of the sliding scale); *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. App.—Dallas 2006, no pet.) (same).

[34] *Cf. Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (noting "the 'effects' test is but one facet of the ordinary minimum contacts analysis, to be considered as part of the full range of the defendant's contacts with the forum").

[35] *See* Charles W. "Rocky" Rhodes, *Civil Procedure, Fifth Circuit Survey, June 2001-May 2002*, 34 TEX. TECH L. REV. 571, 571-72 (2003) (explaining my fascination with civil procedure generally).

INTERNET LIBEL – THE ANONYMOUS WRITER AND THE ONLINE PUBLISHER

BY PETE KENNEDY

DEFAMATION IS AN OLD TORT, designed to redress damage caused by disparaging words, recognized at common law long before Shakespeare had Iago speak these famous lines:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.[1]

Under common law, libel (written defamation) and slander (oral) were unforgiving torts. The common law presumed a defamatory statement – one that tends to harm reputation – was false unless the speaker proved it to be true. The law presumed a reputation was harmed simply because the words were uttered and heard, regardless of whether they were believed. The jury had almost unbridled discretion to award damages regardless of evidence of actual injury or economic loss. Repeating a libel was as bad as originating it, even if accurately attributed. Liability was strict; it made no difference if the speaker was careful or believed what he said was true. Libel could even be a crime. Under common law, the balance tipped strongly toward protecting Iago's good name.

> The Internet is the ultimate printing press, enabling virtually any person to speak to a potentially worldwide audience, instantaneously, and anonymously.

Over time, common law and constitutional privileges developed to protect defamatory speech under certain circumstances, such as fair reports of government proceedings or statements made between people sharing sufficient "common interests." These developments followed social and political events, such as passage of the Alien & Sedition Acts, bursts of anonymous political pamphleteering, and periodic evangelical religious revivals. For instance, the Civil Rights era saw crushingly expensive libel suits filed by segregationists against activists and sympathetic newspapers, culminating in 1964 in *New York Times v. Sullivan*, which established key constitutionally-based minimum standards of proof in libel suits by public officials (later extended to public figures). Public officials and figures must now prove falsity by clear and convincing evidence; there are no presumed damages for statements on matters of public concern; jury verdicts – liability and damages – are carefully scrutinized by trial and appellate judges. The balance shifted away from Iago.

New Communication technologies also put pressure on libel law. Printing presses, in particular, exacerbated two significant issues:

> Since books, articles and pamphlets could be printed and distributed broadly without attribution, what legal protection was available for anonymous speakers?
>
> And with the concomitant growth of a commercial press, how should the law treat publishers who circulate the speech of others, often not knowing (or able to know) with certainty whether the speech is true?

The Internet has upped the ante on both questions. The Internet is the ultimate printing press, enabling virtually any person to speak to a worldwide audience, instantaneously and anonymously. Has libel law treated these two issues the same for Internet as print? Has the balance shifted back towards Iago? Two recent Texas cases give excellent illustrations of where the balance is falling.

Unmasking the anonymous defamer. Forums for defamatory speech abound – blogs, social networks, consumer gripe websites, news website comment sections, etc. Search engines make Internet speech easy to find, and archives give even casual comments a long shelf-life. And anonymous or pseudonymous Internet speech is common, even the norm. Anonymity can breed courage to speak – emboldening both whistleblowers and the occasional malicious liar.

You must first find the person at the keyboard who has written a truly libelous screed before you can sue him. Can you? Every Internet author relies on third parties: a local

telecommunication carrier that provides Internet access; an internet service provider (ISP) who provides a free email account or blog site; a company that hosts an interactive website that permits user comments. Each will have account and access data that may help identify an anonymous author. Will the law compel these third parties to turn over their account information, and if so, when? A Texas case recently addressed a series of issues raised by a quest to unmask an anonymous Internet speaker.

Complaining of "many scurrilous comments" made on an anonymous blog about its employees and doctors, a hospital in Paris, Texas, filed a "Doe" libel suit against the blogger and breach of contract claims against others. After a non-evidentiary hearing, the hospital obtained an order requiring the blogger's ISP to disclose the name and address of its subscriber. In a detailed opinion, the Texarkana Court of Appeals in *In re Does 1-10*,[2] granted mandamus and vacated the order, reaching several important procedural and constitutional issues along the way.

The Court first held that mandamus was an available remedy from the discovery order, because "[i]f discovery is allowed, then the identity of the blogger is revealed, the damage is done, and it cannot be rectified" by appeal.[3] Next, the Court held that the blogger had standing to seek mandamus, although he had not yet been served or appeared in the underlying lawsuit, because the Texas Rules of Civil Procedure grant standing to "any person 'from whom discovery is sought, and any other person affected by the discovery request . . . .'"[4]

The hospital had not invoked any discovery process recognized under the Texas Rules of Civil Procedure, so the Court next had to consider under what authority, if any, the district court could have issued the discovery order compelling disclosure of the anonymous blogger. It noted that Texas courts generally do not have "inherent power" to order discovery and rejected both grounds proffered by the hospital. First, the Court rejected the hospital's interpretation of a provision in Cable Communications Policy Act of 1984 (CCPA) as giving courts the power to compel discovery from a cable operator. Siding with the majority of courts, the Texarkana court held that the provision at issue, 47 U.S.C. § 551(c), "provides a sanctuary for cable operators who disclosure personal information to private parties pursuant to a valid court order," but "is not a procedural vehicle for obtaining such a court order . . . ."[5] The Court also refused to construe the hospital's discovery motion as a "bill of discovery," holding that after the adoption of the modern Rules of Civil Procedure, equitable discovery tools were unavailable because "the discovery process in Texas is now thoroughly controlled by specific rules."[6] Given that no valid discovery tool was used to obtain the discovery order, the Court found it to be without basis in law and therefore an abuse of discretion subject to correction by mandamus.[7]

Anticipating further proceedings below, the Court of Appeals addressed the blogger's constitutional claim that, even if the hospital used a valid discovery tool, the First Amendment protected his identity from compelled disclosure. The Court understood that "[t]he First Amendment protects anonymous speech," that "[a]nonymity is a shield from the tyranny of the majority," and that there is no exception to these principles for speech on the Internet.[8] The Court recognized a "national interest in not inappropriately restricting the free flow of thought and discussion by unsupported threats of litigation."[9] But, because "the right to speak anonymously is not absolute," the question becomes at what point has a party made a sufficient showing to be entitled to learn the identity of an anonymous speaker? Curiosity is not enough; there must be a sufficient countervailing legal right at stake in order to compel discovery. Where to strike the balance?

This standard provides considerable protection to the anonymous writer, given the numerous common law, statutory and constitutional privileges protecting speech from libel claims, and essentially creates the potential for a mini-summary judgment proceeding at the outset of any case involving anonymous Internet speech.

The Court looked at a number of cases that had faced the same issue, noting that different standards had been required – from little more than meeting the pleading rules to proffering admissible evidence sufficient to defeat summary judgment.[10] The Court sided with the majority trend – "[t]o obtain discovery of an anonymous defendant's identity, a defamation plaintiff . . . must introduce evidence creating a genuine issue of material fact for all elements of a defamation claim *within the plaintiff's control*."[11] (The italicized qualifier is necessary because one libel element – the speaker's state of mind, *i.e.*, actual malice or negligence – cannot be shown without knowing the speaker's identity.)

This standard provides considerable protection to the anonymous writer, given the numerous common law, statutory and

constitutional privileges protecting speech from libel claims, and essentially creates the opportunity for a mini-summary judgment proceeding at the outset of any case involving anonymous Internet speech.[12]

Suing the messenger.

If you can't find, drag into a local court, and extract compensation from the writer of a libelous statement, can you sue the messenger – the telecom, ISP or other company delivering or hosting a libelous statement? Here, the Internet *is* treated differently than other media. Again, a recent Texas case, *Milo v. Martin*,[13] nicely illustrates the issue.

Like the hospital in the Paris, Texas, "Doe" case, Walter Milo and Anthony Shelton were unhappy about anonymous derogatory comments made about them on the Internet, this time on the "Guest Book" of a community newsletter's website, The Watchdog. Unlike the hospital, they sued the publishers of The Watchdog rather than the author of the comments – and ran straight into Section 230 of the Communications Decency Act (CDA).

The CDA has an interesting history. Congress wanted a law criminalizing indecent communications on the Internet and encouraging ISPs to police and remove inappropriate content posted by their subscribers. ISPs worried that doing so would make them liable for their subscribers' content under an early online libel case, *Stratton Oakmont v. Prodigy*,[14] which held that the operator of an electronic bulletin board that undertook to supervise the content of subscribers' postings became the "publisher" of any material it did not remove, simply by virtue of operating the forum. So Congress made a trade – it banned indecent speech from the Internet, but provided ISPs a shelter from liability by preventing state law from treating the ISP as the "publisher" of online content posted by third parties in 47 U.S.C. § 230. The CDA's indecency ban was struck down,[15] but Section 230 remains in place, providing a powerful defense for online (and online only) "publishers" of other persons' speech.

Under Section 230, Mr. Milo and Mr. Shelton's only chance was to show that The Watchdog was not just the host or transmitter of the electronic speech, but that it was itself the "information content provider," that is, that it was responsible, in whole or in part, for creation or development of the particular offending online content.[16] They had no proof that The Watchdog or its agents had written the anonymous postings, but they argued that The Watchdog failed to verify the truth of the comments. This was not enough; given the volume of third-party content, no online publisher could possibly verify the accuracy of every communication.[17] They also tried to argue that The Watchdog had "vouched for" the truth of the comments, because the newsletter claimed to provide "The unfiltered truth about Conroe politics and your tax dollars."[18] Again, this was not enough, because The Watchdog carried "both favorable and unfavorable posts about The Watchdog's content," so that a reasonable reader of the site would not conclude that the posts constituted views endorsed by the newsletter, but rather were the views of the authors.[19]

While expressing concern over the harm that may be caused by defamatory speech (and particularly the lack of a provision to compel removal of defamatory speech even if liability is not otherwise imposed), the Court recognized that Congress had made a choice to tip the balance in favor of fostering free speech on the Internet – leaving Iago to track down the original filch of his good name.[20]

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1 Othello, Act 3, Scene 3.

2 242 S.W.3d 805 (Tex. App. – Texarkana 2009, orig. proceeding).

3 *Id.* at 811-12.

4 *Id.* at 812 (quoting Tex. R. Civ. P. 192.6(a)).

5 *Id.* at 814.

6 *Id.* at 817.

7 *Id.* at 818-19. The correct practice would have been to issue a subpoena for documents and/or a deposition to the ISP under Rule 205.

8 *Id.* at 819-20 (citing *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999) & quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995)).

9 *Id.* at 821.

10 *Id.* at 821-22. *See, e.g.*, *Alvis Coatings Inc. v. John Does One Through Ten*, No. 3:04CV374-H, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (mere allegation of libel enough); *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (requiring evidence sufficient to create issues that would preclude summary judgment).

11 *Id.* at 822 (citing *Cahill*, 884 A.2d at 465) (emphasis in original).

12 Interestingly, this is consistent with the Texas Legislature's conclusion that media entities – both print and electronic – should be afforded an interlocutory appeal from summary judgment rulings in cases involving First Amendment claims or defenses. *See* Tex. Civ. Prac. & Rem. Code § 51.0014.

13 311 S.W.3d 210 (Tex. App. – Beaumont 2010, no pet. h.).

14 1995 WL 323710, 1995 N.Y. Misc. LEXIS 229, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. May 26, 1995).

15 *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).
16 *See* 47 U.S.C. § 230(f)(3).
17 *See* 311 S.W.3d at 216.
18 *Id.*
19 *Id.* at 217.
20 *Id.* at 217-18. Justice Gaultney authored a concurrence in *Milo v. Martin* that is worth reading, although the author believes its analysis is not consistent with the majority of cases or the structure of the federal immunity. Justice Gaultney locates Section 230's immunity in § 230(c)(2)(A), which protects the information content provider from liability for taking good faith actions to restrict access to material on its site, and he therefore concludes that an interactive computer service that edits a posting not "in good faith" loses that immunity. The author believes that section is directed at protecting the service from claims by its subscribers whose content is removed, not by third parties, and that the Section 230 immunity from libel claims arises out of § 230(c)(1), which precludes state law from treating an interactive computer service as "the publisher of speaker" of information provided by another, and that only when the service itself becomes an "information content provider" does it fall outside of Section 230 immunity. So, rather than turn on subjective intent, Section 230 immunity depends on the service's objective actions with regard to the offending content – did it materially contribute to the actionable nature of the material? *See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008).

POLITICAL CAMPAIGNS AND THE INTERNET: BEST PRACTICES FOR COMPLIANCE WITH ANALOG REGULATIONS IN A DIGITAL WORLD

BY JAMES E. DAVIS & GARDNER PATE

THE INTERNET HAS DEVELOPED INTO A NEW and dynamic platform for politics over the past decade. Initially, a few candidates used websites as a low-cost supplement to traditional methods for communicating their message. Political campaigns across the county fully embraced the Internet after a few early pioneers tapped into an unexpected reservoir of campaign contributions. Savvy consultants soon learned to use websites and blogs to broadcast rapid responses to developing campaign issues, contributing to the quickening pace of political campaigns. Equally savvy political activists have used the same tools as an effective mechanism to challenge candidates and to raise awareness of specific issues. Campaigns and activists are now experimenting in the relatively uncharted territory of *Facebook*, *Twitter*, and other social media.

The problem for political campaigns and political groups, however, is complying with Byzantine campaign finance regulations created for a pre-digital world. Mistakes can be costly beyond the voter box. The Texas Election Code subjects candidates, contributors, political committees, and others to potential civil lawsuits, administrative fines, and even criminal charges for insufficient political disclaimers, improper fundraising, illegal expenditures, and incorrect or incomplete campaign finance reporting.

The problem for political campaigns and political groups, however, is complying with Byzantine campaign finance regulations created for a pre-digital world.

This article discusses a variety of current Texas campaign finance issues as applied to common uses of the Internet by those involved in, with, and against political campaigns. While this article focuses on Texas campaign finance laws, candidates and contributors alike should consider related implications for elections governed by federal law, other states' laws, and, in some instances, local regulations. Further, while this article is addressed primarily towards candidates, many of the same rules apply to non-candidates engaging in political campaign and election issues.

Money Matters

In 2004, strategic use of the Internet significantly contributed to former Vermont Governor Howard Dean's meteoric rise in the race for President. In 2008, online campaigning allowed a relatively obscure Texas Congressman, Ron Paul, to become a viable candidate for President. At the same time, first term U.S. Senator Barack Obama's Internet strategies contributed to his ability to raise more money than any prior Presidential candidate. In September 2009, within days after shouting "You Lie!" during President Obama's address to Congress, Congressman Joe Wilson raised over one million dollars from 18,859 donations.[1] The spontaneous fundraising was accomplished through online donations to the campaign and fueled by online conservative blogs promoting Wilson's cause. Notably, Joe Wilson's opponent in the campaign also quickly received a similar amount of campaign contributions in response to the outburst.[2] The strategic and serendipitous effects of online contributions have cemented the use of the Internet as a significant campaign fundraising tool.

However, raising money online presents potential legal pitfalls, driven in large part by the relative anonymity of the donor. In Texas, political campaigns may only accept money from certain persons. Specifically, Texas campaigns may only accept contributions from individuals who are either U.S. citizens or are foreign nationals with a green card, entities that are not incorporated and have no incorporated owners, or political committees.[3] In light the recent U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, some mistakenly assume that corporations are now free to participate fully in the election process. The Texas Ethics Commission, on the other hand, concludes that corporations are still prohibited from making direct contributions to a campaign under Texas law.[4] The scope of authorized corporate involvement in political campaigns is discussed more fully below.

When a campaign receives a contribution in the form of a check, it is relatively easy to determine whether the contribution comes from a permissible source. If the check is from an individual, the campaign need only determine if the individual is a U.S. citizen or if he or she has a green card. If the check is from an entity that is not a PAC, the campaign need only determine if the entity itself is incorporated or if the owners of the entity themselves are incorporated. Finally, if the check is from a political committee, the campaign need only determine whether the contribution came from a Texas political committee or an out-of-state political committee.

When a campaign receives a contribution by credit card on the Internet, however, the verification process is more difficult. Because the transaction itself does not convey sufficient information to identify the contributor, campaigns must adopt other procedures to screen out unacceptable funds. While the consequences for accepting an illegal contribution are well established in Texas law, the procedures for determining whether an online contribution is legal are not. Despite the lack of regulatory guidance, campaigns can adopt the following steps as best practices for compliance with Texas law when accepting online contributions.

As a starting point, the website should clearly state the restrictions on who may legally make a contribution on the same page where contributions can be made. Additionally, campaigns should implement procedures to require the contributor to affirmatively mark boxes on the contribution page indicating qualities that allow a lawful contribution. If the contributor does not satisfy the verification procedures, the site should not process the contribution.

For example, an individual contributor could be required to affirm that the contribution is made from the contributor's personal credit card, represents personal funds, and is not from funds maintained by or reimbursed by a corporation, partnership, or any other type of business entity. Similarly, a non-corporate business contributor could affirm that the contribution is made from the contributor's business credit card, represents the entity's own funds, that the entity is not a corporation, and that the entity does not have any direct or indirect corporate owners. A PAC could be required to verify similar information, and then affirmatively state whether it is registered with the Texas Ethics Commission and, if not, provide the relevant information required by Texas law.

In addition to verifying the source of an online contribution of funds, a campaign is also obligated to affirmatively seek information regarding the contributor in some circumstances. For example, a Texas statewide or legislative political campaign must obtain an individual contributor's occupation and employer if the individual contributes $500 or more in a single reporting period.[5] For judicial candidates accepting over $50 from a contributor during a single reporting period, the candidate must obtain the principal occupation, job title, and employer name of the contributor and the contributor's spouse.[6] A campaign website should be programmed to reject any contribution that requires employment information when the information is not provided. Moreover, campaigns should affirmatively disclose this campaign finance requirement in any solicitation, which includes contribution page on a website.

Finally, campaigns accepting online contributions should consider issues related to the processing of credit card transactions. There are many different companies who process credit cards online, both for businesses and for political campaigns. Generally, it does not matter who processes the contributions. However, campaigns should obtain regular statements from the processing company to ensure funds are being deposited correctly and timely. In addition, campaigns should establish an internal record keeping process so that contribution information can be easily imported into the campaign's fundraising database and into campaign finance reports filed periodically with the Texas Ethics Commission.

While the consequences for accepting an illegal contribution are well established in Texas law, the procedures for determining whether an online contribution is legal are not.

These best practices are designed to accomplish compliance with regulations that are not specifically tailored to online contributions. There are no court decisions or Texas Ethics Commission opinions that provide any specific safe harbors for campaigns. Accepting a contribution from an unauthorized donor can generate various legal problems for a campaign. For example, the Texas Election Code provides a private cause of action for an opposing candidate to recover damages in the amount of two times any illegal contribution.[7] Because Texas has no limit on the amount of a contribution in a non-judicial campaign, the exposure to a campaign can be significant.[8] Lawsuits in this context are filed in virtually every election cycle, typically after the election when campaigns lack sufficient funds to effectively defend themselves. And, as if the threat of significant civil penalties is not enough, the Texas Election Code provides

criminal penalties in some circumstances, although successful criminal prosecutions have been rare.[9]

Intellectual Property Issues

In recent years, web videos have been added to the "rapid response" arsenal of politicians. With the decline in production costs, more campaigns produce their own videos and spread them through the online community. The obvious benefit to web videos, such as those found on *YouTube*, is that distribution costs are virtually nothing, and supporters, through the use of email, *Facebook*, *Twitter*, and similar methods are able to spread them far and wide in a relatively short period of time. In addition, campaigns commonly post articles from newspapers, magazines, and other periodicals on their websites. Campaigns may also be tempted to borrow recognizable phrases, logos, or color schemes. In the tumult of political battle, many campaigns overlook potential copyright, trademark, trade dress or other intellectual property issues.

The most common problems campaigns face involve copyright issues. Generally, copyright laws protect artists from having their works reproduced without their prior permission.[10] Many recognizable images, music, television and film clips, and logos that may resonate with voters are protected by copyright. Many campaigns are under the false assumption that they may use these items without limitation. Whether the use of another's work constitutes "fair use" or other allowable use of copyrighted information should be carefully considered before a campaign releases a web video that borrows from another's work.

Campaigns can access online resources to investigate the general boundaries of copyright law. For example, The Center for Social Media publishes a helpful online reference on the "fair use" doctrine, available at www.centerforsocialmedia.org. Alternatively, a proactive campaign can seek advance permission or obtain a license to use copyrighted material. However, in light of the various pitfalls associated with using intellectual property, a campaign would be well advised to seek professional advice before using another's work.

Political Advertising

In Texas, "political advertising" covers a broad range of communications that support or oppose a candidate for public office. In addition to traditional television and radio commercials, billboards, and yard signs, a communication supporting or opposing a candidate for public office that appears on an Internet website constitutes political advertising. On the other hand, the definition of political advertising does not currently include e-mail communication or spoken communications, such as a phone call.[11]

Under Texas law, all political advertising must contain a political advertising disclaimer. The disclaimer must state that the item is political advertising, and include the name of the person who paid for it or the candidate or political committee who authorized the expenditure.[12] Texas judicial campaigns may also include a statement that they are voluntarily complying with the Judicial Campaign Fairness Act, if they are in fact doing so. A Texas judicial campaign that has rejected the Judicial Campaign Fairness Act must include a statement of its non-compliance in its disclaimer.[13]

Websites

Campaign websites must include a political advertising disclaimer on the website itself. It should appear on every page of the website. There is no exception for websites operated by a third party under the control of the campaign, even if the campaign gets those sites for free. For example, if a campaign operates a *Facebook* page, it must have the required political advertising disclaimer. Similarly, if the campaign is operating a *Twitter* account, the *Twitter* page must have the political advertising disclaimer.

Online Advertising

Many campaigns have begun using online advertising to raise money, draw visitors to their websites, or otherwise promote the campaign. All of those advertisements must include the required political advertising disclaimer statement. In some instances, the amount of text allowed in an online ad would mean the disclaimer statement itself would either not fit or would take up too much space, rendering the ad useless. This is particularly true of *Facebook* ads, where the advertiser is given less than 200 characters of text for the ad. In such circumstances, a campaign may simply include the phrase "PolAd" in the text of the advertising, and then ensure the advertising itself links to a page where the full disclaimer appears.[14]

YouTube

While most campaigns know the requirement of including the political advertising disclaimer on campaign ads broadcast by radio or television, some campaigns forget the disclaimer is still required for online videos, such as those found on *YouTube*. When a campaign makes an online video, it must include the political advertising disclaimer. Most campaigns comply with this requirement by including a subtitle at some point during the web video that includes the political advertising disclaimer.

Blogs

Blogs are popular tools in the current political environment. In its most basic form, a blog is a forum for someone to post thoughts. Many blogs are free for any interested reader, though some require a subscription. During election season, blogs commonly include discussion about a political issue or campaign, including a recommendation to vote for or against a particular candidate. It is an open question under Texas law whether such a blog would ever be required to include a political disclaimer. However, while it may not be required, an appropriate disclosure may be wise if the blog's primary purpose is to advocate for or against a candidate. In addition, a blog maintained and operated by a political campaign, or a political candidate, should always contain a disclaimer, if for no other reason that to avoid the appearance of inappropriate or unregulated behavior.

Corporate Participation in the Election Process

As with most other jurisdictions, the Texas Election Code, as written, prohibits corporations from making campaign contributions or independent campaign expenditures. Various prohibitions on corporate participation in the election process have been successfully challenged on constitutional grounds. As a result, certain prohibitions on corporations are no longer enforceable and many others are in serious doubt.

Most recently, the U.S. Supreme Court overturned certain restrictions on corporations in *Citizens United v. Federal Election Commission*. In previous decisions, the Court overturned restrictions that prevented corporations from producing independent political advertisements that do not expressly advocate for the election or defeat of specific candidate.[15] Lower courts subsequently struggled to determine the scope of what constitutes "express advocacy", resulting in a variety of opinions.[16] In *Citizens United*, the Court held that the First Amendment bars any prohibition on a corporation using its treasury funds independent of a candidate or campaign to advocate for or against a political candidate.[17]

The full impact of the ruling is hotly debated. However, the Texas Ethics Commission recently adopted an advisory opinion applying the holding in *Citizens United* to Texas campaign finance laws.[18] The Ethics Commission determined that while corporations and other persons may make unlimited direct campaign expenditures (expenditures made without the prior consent or approval of a candidate), they must report those expenditures if the expenditure amount exceeds $100.[19] Further, the Ethics Commission concluded that those expenditures, if they contain political advertising, are subject to the same political advertising disclaimer requirements as all other political advertising.[20] Finally, the Commission flatly stated that a corporation may not make a political contribution, including an in-kind contribution, to any candidate.[21] Left unanswered is whether a corporation may work in concert with another person to make these expenditures.

What this means, in practical terms, is that a corporation may include information on its own website, or may establish another website, that supports or opposes candidates. However, the corporation must comply with the applicable reporting requirements for those expenditures, and may not make the expenditures with the prior consent or approval of the candidate the expenditure benefits. Finally, at this time, corporations do not have a legal "safe harbor" allowing them to operate in conjunction with another person, whether that person is an individual or a corporation, in making the expenditure.

Conclusion

The Internet provides political campaigns significant opportunities in terms of fundraising, message distribution, and advertising. However, online campaign activity is still governed by state and federal laws created to regulate more traditional campaign practices. Campaigns should carefully evaluate their ongoing compliance with governing laws and strategize with their legal counsel to adopt appropriate risk management tools in their Internet activities.

About Locke Lord Bissell & Liddell LLP

Locke Lord has experience working with campaign finance laws and regulations, ranging everywhere from local and state-wide political campaigns to groups providing pure issue advertising. The firm currently represents political campaigns, political committees, and prominent consultants and lobbyists. In addition to working with our clients to comply with the campaign finance laws, Locke Lord also monitors activities at the Texas Ethics Commission to keep our clients updated on proposed rules. During the legislative session, Locke Lord monitors campaign finance legislation, letting our clients know of potential statutory changes they may wish to comment on.

James E. Davis is a partner in Locke Lord's Litigation department in the Austin office. Mr. Davis has broad experience in government, political and commercial litigation matters. He has substantial experience in representing businesses in disputes with state and local government entities.

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has extensive experience in the areas of Texas campaign finance laws and Texas lobbyist regulations, and consults clients ranging from local and state-wide political campaigns and political committees to political consultants and trade groups. ★

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[1] *See* Politico, "Source: Wilson breaks $1 million", at http://www.politico.com/blogs/bensmith/0909/Wilson_campaign_Fundraising_breaks_1_million_passes_Miller.html, September 12, 2009.

[2] CNN Politics, "'You lie' equals $4.4 million cash haul" at http://politicalticker.blogs.cnn.com/2009/10/16/you-lie-equals-4-4-million-cash-haul, December 16, 2009.

[3] *See* Tex. Elec. Code § 253.094; 1 Tex. Admin. Code § 22.31 (Tex. Ethics Comm'n., Restrictions on Foreign Nationals); Op. Tex. Ethics Comm'n. No. 383 (1997).

[4] *See* Op. Tex. Ethics Comm'n. No. 489 (2010).

[5] *See* Tex. Elec. Code §§ 254.0612, 254.1212.

[6] *See* Tex. Elec. Code § 254.0611.

[7] *See* Tex. Elec. Code §254.231

[8] See Houston Chronicle, "Perry Paid $426,000 settlement to Bell over donation lawsuit", July 16, 2010, at http://www.chron.com/disp/story.mpl/metropolitan/7112429.html.

[9] *See* Tex. Elec. Code §254.041

[10] See 15 U.S.C. § 1121, 17 U.S.C. § 501, 28 U.S.C. § 1338(a), and 28 U.S.C. § 1331.

[11] *See* 1 Tex. Admin. Code § 20.01(13) (Tex. Ethics Comm'n., Definitions).

[12] *See* Tex. Elec. Code § 255.001.

[13] *See id*. § 255.008.

[14] *See* Op. Tex. Ethics Comm'n. No. 491 (2010).

[15] *See Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *Osterberg v. Peca*, 12 S.W.3d 31, 50 (Tex. 2000).

[16] See e.g., *Osterberg v. Peca*, 12 S.W.3d 31, 50 (Tex. 2000); *Chamber of Commerce of the United States of America v. Moore*, 288 F.3d 187, 190 (5th Cir. 2002), *cert. denied*, 537 U.S. 1018; *Perry v. Bartlett*, 231 F.3d 155, 159-61 (4th Cir. 2000).

[17] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. ____ (2010)

[18] *See* Op. Tex. Ethics Comm'n. No. 489 (2010).

[19] *See* Op. Tex. Ethics Comm'n. No. 489 (2010).

[20] *See* Op. Tex. Ethics Comm'n. No. 489 (2010).

[21] *See* Op. Tex. Ethics Comm'n. No. 489 (2010).

EVIDENCE & PROCEDURE UPDATES

UPDATES ON CASE LAW pertaining to procedure and evidence as compiled by Luther H. Soules III, of Soules & Wallace and Robinson C. Ramsey, of Langley & Banack, Inc.

THE INTERNET AND THE LAW

EVIDENCE UPDATE

BY LUTHER H. SOULES III & ROBINSON C. RAMSEY

RULE 201: JUDICIAL NOTICE

In re C.L., 304 S.W.3d 512, 515, 516 (Tex. App.—Waco 2009, no pet. h.) "A court may take judicial notice of appropriate matters sua sponte. But when the court does so, it must at some point notify the parties that it has done so and give them an opportunity to challenge that decision."

Here, the appellee "did not ask the trial court to take judicial notice of any prior orders in its file or of any other matters. The court did not announce in open court that it was taking judicial notice, nor did it recite in the … decree that it had done so." Therefore, the court of appeals held that the trial court "did not take judicial notice."

RULE 702: EXPERT TESTIMONY

Valence Operating Co. v. Anadarko Petroleum Corp., 303 S.W.3d 435, 443–44 (Tex. App.—Texarkana 2010, no pet. h.) In this joint operating agreement case, the appellant complained of the trial court's refusal to exclude the testimony of the appellee's expert witness, whom the appellee called "to testify to the common understanding of the phrase 'commence work on a proposed operation' in the oil and gas industry." In its *Daubert* motion, the appellant urged that the witness "was not qualified to give his testimony, and that his testimony was unreliable because it was not based on scientific principles and accepted scientific research."

The witness, "a certified professional landman who ha[d] worked in the oil and gas industry for over thirty-two years," had been "an instructor for the American Association of Professional Landmen teaching landmen about oil and gas leases, joint operating agreements and related agreements, as well as standard practices in the oil and gas business." He had also taught "a review course for the professional landman certification examination addressing similar language to that at issue in this case." During his employment with Getty Oil Company, he had reviewed joint operating agreements, some of which he himself had prepared. Furthermore, he testified that he was "well acquainted with the common understanding of 'commencement of operation' requirements of oil and gas leases and joint operating agreements."

The appellant argued that, because the witness was a landman, not a driller, "he was not qualified to give testimony as to the meaning of 'commence operations' as used in the oil and gas business, and his testimony was unreliable because it was not based on accepted and tested scientific theory or actual experience." The court of appeals disagreed, holding that the trial court did not abuse its discretion in allowing the testimony because it "was not about science or scientific causation, as involved in *Daubert* and similar cases, but rather was about actual practice and the general understanding in the oil and gas industry as to what constitutes commencement of operations." Therefore, although the witness was not a driller, his experience as a landman qualified him to testify about "the practices in the industry with which he was familiar."

Estorque v. Schafer, 302 S.W.3d 19, 26–27 (Tex. App.—Fort Worth 2009, no pet. h.)

"To be qualified under Rule 702, an expert witness must have 'knowledge, skill, experience, training, or education' regarding the specific issue before the court. …A physician does not need to be a practitioner in the same speciality as the defendant to qualify as an expert. The proper inquiry in assessing a doctor's qualifications to submit an expert report is not his area of expertise but his familiarity with the issues involved in the claim before the court. A physician who is not of the same school of medicine may be competent if he has practical knowledge of what is usually and customarily done by a practitioner under circumstances similar to those confronting the defendant."

In this medical malpractice case, the appellants argued that the appellee's expert witness "did not have sufficient qualifications in the specialities of nephrology, urology, and gynecology to render opinions on the causal relationship between the physicians' failure to refer and the resulting kidney disorders and gynecological cysts."

"To establish his qualifications, [the expert] was required to demonstrate his knowledge, skill, experience, training, or education regarding the *specific issue* raised by the [plaintiffs]' claim that would qualify him to give an opinion on that subject." (Emphasis in original). Here, the plaintiffs' pleadings "indicate[d] that their negligence issue relate[d] to [the] alleged injuries resulting from both doctors' conduct in their diagnosis, treatment, and lack of referral for … exhibited abdominal pain, rather than any injury from a specialized

treatment or surgery performed by [the defendants]. The specialized branches of nephrology, urology, and gynecology [were] not implicated by the physician's alleged negligence in failing to refer [the plaintiff] to other specialists for the renal and ovarian problems revealed in the CT scan."

The expert testified that "he had experience treating patients with symptoms similar to the symptoms [the plaintiff] exhibited," and that "the standards for treating patients with similar signs, symptoms, and conditions [were] 'national standards of care' and 'apply to all physicians.'" He also stated that he was "familiar with the causes of abdominal pain, kidney stones, ureteral obstruction, and ovarian masses," as well as with "complications arising from the referenced medical conditions and that he participated in the development and use of protocols, policies, and procedures for patients with similar conditions." Furthermore, he "kn[e]w the accepted standards of care, the breaches and violations of the standards of care, and the causation link between the breaches and violations of the standard of care as they appl[ied] to [the defendants], on the basis of [his] education, knowledge, training, and experience."

The witness had "acquired his 'education, knowledge, training, and experience' through attending classes that taught the evaluation, treatment, diagnosis, and care of patients with the same or similar conditions as [the plaintiff]. He had also acquired knowledge of the plaintiff's conditions "through practical experience, medical conferences, technical works published in textbooks and journals, consultations with other physicians, communications with hospital nurses, staff and residents, lectures personally given in conferences, participation in hospital committees, and observation of the nurses and supervising residents that care and treat patients with the same or similar medical conditions as [the plaintiff]."

"Based on his knowledge, skill, experience, training, and education," the court of appeals concluded that the witness was "qualified to opine about causation as to both [defendants]" and that the trial court "did not abuse its discretion in overruling Appellants' objections … concerning [the expert]'s qualifications to opine on causation."

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PROCEDURE UPDATE

BY LUTHER H. SOULES III & ROBINSON C. RAMSEY

SPECIAL APPEARANCE

IRN Realty Corp. v. Hernandez, 300 S.W.3d 900, 902–03 (Tex. App.—Eastland 2009, no pet. h.) Rule 120a(2) provides that "any motion to challenge jurisdiction '*shall* be heard and determined before a motion to transfer venue or any other plea or pleading may be heard" (emphasis added in opinion). Though Rule 120a(2) mandates that a hearing on the special appearance be heard and determined before any other plea or pleading, some discovery disputes may be resolved prior to a ruling on a special appearance without violating that mandate."

"Although Rule 120a indicates that depositions may be conducted prior to a ruling on a special appearance … the rule specifically provides for the means to obtain a continuance of the special appearance so that a deposition may be conducted: affidavits of the party opposing the special appearance." Here, the appellee "did not file any such affidavit stating that she could not present facts essential to justify her opposition to the special appearance or that she needed to depose [the appellant]'s representative regarding jurisdiction." In her motion to compel, she "merely asserted she had been prevented 'from discovering facts necessary to pursue her causes in this action.'" Consequently, the court of appeals held that "the trial court abused its discretion in abating the hearing on the special appearance." Therefore, "the trial court's actions in granting the motion to compel, which was not limited to jurisdictional discovery; awarding sanctions; striking [the appellant]'s pleadings; and ultimately entering a default judgment constituted an abuse of discretion."

DISMISSAL

Woods v. Schoenhofen, 302 S.W.3d 576, 578–79 (Tex. App.—Amarillo 2009, no pet. h.) "Through its inherent power to manage its docket, a trial court may dismiss any case a plaintiff fails to prosecute with due diligence." However, "a party must be provided with notice and an opportunity to be heard before a court may dismiss a case for want of prosecution under … its inherent authority." In addition, "a trial court's notice of potential dismissal must advise the recipient party of the basis for dismissal."

Here, the order "[did] not fix a date and time for a dismissal hearing, nor did the trial court conduct a dismissal hearing." Therefore, the court of appeals concluded that "dismissing the case for want of prosecution without a hearing was an abuse of discretion," which called for a reversal of the trial court's dismissal order.

Hutchinson v. Hutchinson, 299 S.W.3d 840, 841–43 (Tex. App.—Dallas 2009, no pet. h.) "Trial courts have authority to dismiss for want of prosecution under either rule of civil procedure 165a or the court's inherent power. A party must be given notice and an opportunity to be heard before the trial court may dismiss on either basis. The notice must advise the party of the basis for the potential dismissal. Notice that the court is considering dismissal under rule 165a does not constitute adequate notice that the court may exercise its inherent authority to dismiss the case for want of prosecution."

Here, the trial court sent the appellant notice of a dismissal hearing, in which the judge advised the appellant that the court "would dismiss the action for want of prosecution under rule of procedure 165a unless there was good cause to maintain the case on the docket. Appellant was advised he could write or e-mail the court within ten days prior to the hearing to request the case be retained on the docket. The trial court's notice stated that to retain the case on the docket, appellant must appear before the court at the dismissal hearing."

The appellant filed a motion to retain the case on the docket because "he was incarcerated and could not appear personally before the court at the dismissal hearing absent a bench warrant from the court to procure his attendance." On that same date he also filed a motion for a bench warrant, or, in the alternative, a request "to attend the hearing by telephone, video conference, or affidavit testimony."

Thereafter, an associate judge signed an order dismissing the case for want of prosecution and further ordering that "all pending motions in the case were dismissed for want of prosecution."

The record showed that the appellant "could not physically appear in court and, being indigent, he could not retain the services of an attorney to appear on his behalf," and that he "informed the trial court of these facts in his motions and

filings." He also "moved for the effective alternative means of appearing by the affidavit filed with the trial court."

Under these circumstances, the court of appeals concluded that "[b]y requiring appellant to appear at a hearing and denying his motion to appear by his filed affidavit, the trial court effectively closed the courthouse doors to appellant." Therefore, the court of appeals held that "the trial court abused its discretion in dismissing the case for want of prosecution."

Oliphant Financial, LLC v. Galaviz, 299 S.W.3d 829, 839–40 (Tex. App.—Dallas 2009, no pet. h.) "A trial court's authority to dismiss a case for want of prosecution stems from two sources: (1) Texas Rule of Civil Procedure 165a, and (2) the trial court's inherent power. A trial court may dismiss a case under rule 165a on 'failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice' or when a case is 'not disposed of within the time standards promulgated' by the supreme court. In addition, the common law vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute its case with due diligence.

A trial court may dismiss a case under rule 165a on 'failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice' or when a case is 'not disposed of within the time standards promulgated' by the supreme court.

"In determining whether a party has demonstrated a lack of diligence in prosecuting a claim, a trial court may consider the entire history of the case, including the length of time the case was on file, the extent of activity in the case, whether a trial setting was requested, and the existence of reasonable excuses for delay. No single factor is dispositive."

The stated reason here for dismissal was "failure to take action after notice of intent to dismiss for want of prosecution," in accordance with the court's "rule 165a letter." A trial court "may dismiss a case under rule 165a on 'failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice' or when a case is 'not disposed of within the time standards promulgated' by the supreme court."

Although the dismissal order here listed "'failure to appear for a hearing or trial of which notice was had' as a reason for dismissal, the trial court did not check this reason for dismissal." Furthermore, this case had not been pending "beyond the time standards set by the supreme court," nor did the record show a lack of diligence in prosecuting the claim. Therefore, the court of appeals concluded that "the trial court abused its discretion in dismissing this case."

DISCOVERY

In re Exmark Mfg. Co., Inc., 299 S.W.3d 519, 523–26 (Tex. App.—Corpus Christi 2009, orig. proceeding) "The scope of discovery is a matter devoted to the trial court's discretion. However, a writ may issue where the trial court's order improperly restricts the scope of discovery as defined by the Texas Rules of Civil Procedure. Similarly, mandamus relief may be available when the trial court compels production beyond the permissible bounds of discovery."

"The party objecting to discovery must present any evidence necessary to support its objections. Evidence is not always required to support an objection or claim of privilege. For example, when a request is overly broad as a matter of law, the presentation of evidence is unnecessary to decide the matter." Therefore, "there are circumstances where a discovery order might be so overbroad that an objection to the overbreadth is self-evident from the order itself when considered in light of the issues raised in the pleadings. However, this is not always the case." It was not the case here.

"When it is not self-evident that the discovery order is overly broad, the party resisting the discovery bears the burden of offering evidence to prove its objections. …This burden has been applied to objections that discovery requests are overly broad or unduly burdensome." Here, "the alleged overbreadth of the trial court's order [was] not self-evident and the order itself [was] not overly broad as a matter of law when compared to the issues raised in the pleadings." Therefore, the relator "had the burden to produce any evidence necessary to support its objections." Because it did not meet this burden, the court of appeals declined to "second-guess the scope of the trial court's discovery order."

AMENDED PLEADINGS

Air Products and Chemicals, Inc. v. Odfjell Seachem, A/S, 305 S.W.3d 87, 92–93, 94–95 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) "A trial court's decision on whether to allow the amendment of pleadings is reviewed under an abuse-of-discretion standard. A trial court has no discretion to

refuse the amendment unless (1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment. The party opposing the amendment generally has the burden to show prejudice or surprise. However, the trial court may conclude that the amendment is, on its face, calculated to surprise or that the amendment would reshape the cause of action, prejudicing the opposing party and unnecessarily delaying the trial. In that situation, the opposing party's objection is sufficient to show surprise."

Here, the scheduling order, set a deadline to amend pleadings in November 2007, and the jury trial began on April 16, 2008. At the time the trial began, the plaintiff had pleaded only a general negligence cause of action; however, "five days after the jury trial commenced, [the plaintiff], with its motion to amend its pleadings, sought to insert a theory of negligence per se based upon purported violations of specific …regulations."

The court of appeals held that the trial court could reasonably have concluded that the plaintiff's negligence per se theory "was distinct from the other theories that [it] had presented in its live petition, which were based upon [the defendant]'s alleged failure to exercise reasonable care and general negligence in the 'line-alignment, loading, segregation, handling, and/or storage' of the products at issue." In particular, the court of appeals pointed out that the plaintiff "proposed a specific jury question that would have asked the jury to determine whether [the defendant] had violated the subject regulations, not whether [its] negligence … in loading or handling the products, had proximately caused the contamination."

The defendant objected to the proposed amendment and argued "it was surprised by the amendment and would be prejudiced." It complained that "if the trial court allowed the amendment, it would need to designate additional witnesses to testify as to the cited regulations and that it would need to conduct additional discovery related to [the plaintiff]'s newly asserted claims that [the defendant]'s alleged violations of these specific regulations established negligence as a matter of law."

Under these circumstances, the court of appeals held that "the trial court could have reasonably concluded that the amended pleadings, including the negligence per se allegations, would have reshaped the litigation, prejudicing [the defendant] and possibly delaying the trial, and, thus, the trial court did not abuse its discretion by striking [the plaintiff]'s amended petition … [and] denying [the plaintiff]'s motion to amend its pleadings."

JURY SELECTION

McKenna v. W & W Services, Inc., 301 S.W.3d 336, 340–45 (Tex. App.—Tyler 2009, pet. stricken) "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids a party from challenging potential jurors on the basis of their gender. The discriminatory use of peremptory challenges denies a party the equal protection of the laws guaranteed by the U.S. Constitution. Moreover, the discriminatory use of peremptory challenges denies equal protection of the laws to the potential jurors."

"A trial court follows a three step process to evaluate a claim that a party has exercised a peremptory strike based on gender. First, the party challenging the strike must make a prima facie showing that the other party has used a peremptory challenge to remove a potential juror on the basis of gender. A prima facie case may be established by relying solely on evidence concerning the other party's exercise of peremptory challenges. However, it must also be shown that these facts and any other relevant circumstances raise an inference that the other party used that practice to exclude the potential juror on the basis of gender."

"Second, if the prima facie showing has been made, the party who challenged the potential juror must come forward with a gender neutral explanation. A neutral explanation means that the challenge was based on something other than the juror's gender. The appellate court does not consider at the second step whether the explanation is persuasive or even plausible. The issue for the trial court at this juncture is the facial validity of the explanation. In evaluating whether the explanation offered is gender neutral, a court must determine whether the peremptory challenge violates the Equal Protection Clause as a matter of law, assuming the reasons for the peremptory challenge are true. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed gender neutral for purposes of the analysis at step two. It is only upon reaching the third step that the persuasiveness of the justification for the challenge becomes relevant."

"At the third step, the trial court must determine if the party challenging the strike has proven purposeful discrimination, and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge. As part of that third step, the party challenging the strike must be afforded the opportunity to rebut the explanation for the strike. Thus, the party challenging the strike must attack

the other party's gender neutral reasons as being contrived or pretextual to conceal discriminatory intent. The credibility of the other party's reasons for disparate striking of potential jurors can be measured by 'the [other party's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' However, the ultimate burden of persuasion remains with the party challenging the strike. Once a party has offered a gender neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the party had made a prima facie showing becomes moot."

Here, the court of appeals concluded that all of the appellee's proffered reasons for its strikes were "facially gender neutral." Therefore, "when the reasons are assumed to be true, it cannot be said as a matter of law that there has been a violation of the Equal Protection Clause." Accordingly, the trial court moved on to step three of the analysis.

After the appellee's attorney testified, the trial court allowed the appellant "an opportunity to develop a record to demonstrate that the reasons given for the peremptory strikes were pretextual." Instead, the appellant "simply reiterated that [the appellee] struck six females, and stated that 'we think that's not something that would normally occur if it hadn't been for the fact that the woman and-the plaintiff is a woman.'" However, "[a]n expression of disbelief is not enough to show that a peremptory challenge is pretextual to conceal discriminatory intent."

In conducting its review, the court of appeals recognized that it "must examine all relevant factors bearing upon the trial court's decision." One of those factors here was that "[b]ecause of the high number of females within the strike zone," the court of appeals could not say "without more, that the disparity in [the appellee]'s use of its peremptory strikes [was] attributable to something other than 'happenstance.'" Although a "disproportionate use of peremptory challenges" supported the appellant's "ultimate burden of persuasion," it "[did] does not alone establish that [the appellee]'s explanations of its strikes were pretextual."

The court of appeals also noted that neither party "elicited detailed information about the jurors during voir dire. Moreover, neither party introduced the potential jurors' questionnaires, the jury list, or the strikes of either party into evidence or requested the inclusion of any of these items in the appellate record." Therefore, the court of appeals could not conduct "a comparative juror analysis."

Furthermore, nothing in the record indicated that the appellee had asked for a jury shuffle, even though "the percentage of females in the jury strike zone was unusually high," nor did the appellee's voir dire examination "[did] not show that it asked males and females contrasting questions on the same subject."

There was also "no evidence in the record that [the appellee] had a history of systematically excluding females from juries." Moreover, the reasons the appellee gave for making the strikes were "facially gender neutral when measured by 'how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'"

Under these circumstances, based on its review of the entire record, "and giving the required deference to the trial court's ruling," the court of appeals concluded that the appellee "provided facially gender neutral explanations for its use of peremptory challenges, and that [the appellant] failed to carry her burden to show that the stated reasons were pretextual." Therefore, "the trial court's decision to deny [the appellant]'s *Batson* challenge was not an abuse of discretion."

JURY CHARGE

Fath v. CSFB 1999-C1 Rockhaven Place Ltd. Partnership, 303 S.W.3d 1, 8–9 (Tex. App.—Dallas 2009, pet. filed) In this breach of guaranty case, the appellant complained of the trial court's submitting to the jury a broad-form liability question "because it contained both valid and invalid theories of liability." In particular, he objected to submitting the theory of fraud along with gross negligence on the ground that there was no evidence to support the fraud submission. The court of appeals agreed: "Because there was no evidence of fraud, it was an invalid theory. Thus, the inclusion of fraud as a ground for breach of guaranty commingled an invalid theory."

The appellee argued that the jury "quickly and assuredly" found that the appellant breached the guaranty on the basis of gross negligence, rather than fraud "because it quickly returned a unanimous verdict on liability." But the court of appeals rejected this argument on the basis that "[i]t is impossible to know from the jury's answer to question one whether it answered yes on the basis of fraud, an invalid theory."

"When a trial court submits a broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is necessary when the appellate court is unable

to determine whether the jury based its answer on an invalid theory." Because the court of appeals found it impossible to conclude that "the jury's answer to the breach of guaranty question was not based on the improperly submitted theory of fraud," the court held the charge to be erroneous and presumed that the error was harmful.

JURY ARGUMENT

Showbiz Multimedia, LLC v. Mountain States Mortgage Centers, Inc., 303 S.W.3d 769, 770, 772 (Tex. App.—Houston [1st Dist.] 2009, no pet. h.) The issue in this appeal was "whether arguing that a South Asian-American plaintiff committed 'judicial terrorism' and extortion constitute[d] incurable jury argument." The court of appeals held that it did.

"Just as the horrible events of World War II still evoke deep passion and emotion," the court noted, "the ongoing War on Terror colors the interpretation of the word 'terrorism.' It is not a word to be used lightly in the context of a formal proceeding in court. …The subject matter of this case—a commercial lending dispute—does not support this inflammatory sort of appeal to a jury."

"The judiciary must at a minimum ensure that a trial is free from improper appeals to race or nationalism that the introduction of the words 'terrorism' and 'extortion'" the court of appeals warned. "[T]his type of argument strikes at the heart of the jury trial system and was incurable. Courts must guard against such conduct and correct it sua sponte. Because the trial court did not, we sustain issue one."

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