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THE USE OF INVESTIGATORS IN LITIGATION MATTERS

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The Belmont Group, a New York based national investigation firm, was founded by investigative attorney William B. Belmont. Mr. Belmont has over 30 years of experience in the investigation, due diligence and security field. In addition to having worked as a law enforcement officer and trial attorney, Mr. Belmont served as Director of Operations for the New York office of an international investigation and security consulting firm.

Mr. Belmont has overseen the management of thousands of corporate investigations involving fraud, workplace misconduct, brand protection and theft of trade secrets. Additionally, he has managed thousands of investigations for national and international law firms. Also, he has developed and implemented due diligence protocols for dozens of financial institutions to ensure the integrity of their investments. He provides clients with pre-incident consulting, including vulnerability surveys, threat assessments and crisis management plans and procedures. Furthermore, Mr. Belmont provides security consulting services to clients for personal and private events.

Mr. Belmont oversees the implementation of increased security measures for many corporate clients. He serves as a member of crisis management teams, assisting with contingency plans for critical occurrences, such as terrorist attacks, natural disasters, computer network penetrations, business interruptions and incidents of workplace violence. Mr. Belmont is also a frequent speaker on post 9/11 corporate security issues and appeared on Fox News following the World Trade Center attack.

Mr. Belmont has managed numerous litigation investigations for national and international law firms, including: a national identity theft for a Fortune 500 corporation, fraud at a large real estate company, and numerous domestic and international intellectual property investigations.

With a background as a trial attorney and investigative attorney, Belmont has considerable experience investigating civil and criminal matters in a wide range of industries including finance, fashion, entertainment and real estate.

As a trial attorney, Mr. Belmont specialized in fraud, premises liability, labor law and products liability cases. He successfully won defense verdicts on behalf of Greyhound and Allied Security and was responsible for coordinating trial strategies directed at perpetrators of fraud against numerous insurance companies. He was also responsible for coordinating the security program for the Anti-Defamation League and Isaac Mizrahi's international fashion shows

In addition to his experience as an attorney, Mr. Belmont served as a police officer in Mesa, Arizona. He began his college career playing lacrosse at Bucknell University and received his B.A. in criminal justice from The George Washington University and his J.D. from Benjamin N. Cardozo School of Law.

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Neither Friend nor Follower: Ethical Boundaries on the Lawyer's Use of Social Media

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NEITHER FRIEND NOR FOLLOWER: ETHICAL BOUNDARIES ON THE LAWYER'S USE OF SOCIAL MEDIA

*Robert Keeling, Tami Weerasingha-Cote & John Paul Schnapper-Casteras**

A handful of state and local bars have begun to opine on lawyers' use of social media in conducting investigations and informal discovery. Despite the increasing prevalence and diversity of social media, however, these few bar authorities have addressed lawyers' use of social media in ways that are formalistic, limited in their technical explanations and analogies, and even, at times, arbitrary. As a result, the use of social media by litigants and their counsel has been needlessly and baselessly deterred. Rather than trying to address social media by relying on inapposite analogies to the "real world" and grasping at some transient definition of what is "public" vs. "private" information, state and local bars should focus their analyses on the application of the existing Rules of Professional Conduct and the time-tested prohibitions on fraud and deception. Further, the ABA, state bars, and other committees seeking to address the unique ethical questions and challenges raised by lawyers' use of social media information should engage in a careful and informed study of the nature and functionality of social media as a new and distinct method of producing and sharing information before seeking to constrain its use under the existing Rules of Professional Conduct.

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INTRODUCTION

Under the smattering of ethics opinions and secondary guidance that currently exist, intuitive and common uses of popular social media sites by lawyers seeking information through informal discovery are either prohibited or considered ethically questionable enough so as to chill their use. For example, one local bar association has concluded that lawyers may not seek access to non-public information posted by other litigants on Facebook, either because the automatically generated "friend" request message is an ethically impermissible "communication" with a represented party, or because such a message does not explicitly disclose the motives of the request to an unrepresented party.[1] Following this logic, the act of clicking the "follow" button on another party's Twitter page, which normally generates an automatic email notification, could also be ethically impermissible, even though millions of people "follow" public figures and friends on Twitter. Viewing the resumes of friends and strangers alike on a site like LinkedIn is a widely accepted practice in professional circles, yet if a lawyer views a litigant's page, that too generates a notification message which could conceivably constitute an impermissible "communication."

The few ethics opinions addressing the use of social media in informal discovery have focused largely on Facebook and MySpace, and most do not directly address limits on using Twitter, LinkedIn, and other social media platforms. Some practitioners, however, have read these opinions to limit informal discovery of social media information more broadly to public information only.[2] Given the serious consequences of

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[1] San Diego Cnty. Bar Legal Ethics Comm., Op. 2011-2 (2011), *available at* https://www.sdcba.org/index.cfm?pg=LEC2011-2.

[2] *See, e.g.*, PRACTICING LAW INST., SOCIAL MEDIA AND THE LAW § 9:6.2 (Kathryn L. Ossian ed., 2013); Andy Radhakant & Matthew Diskin, *How Social Media Are Transforming Litigation*, LITIG., Spring 2013, at 17.

violating ethical boundaries, this caution is understandable. Despite these concerns, the fact remains that such limitations are overbroad and unworkable.

In the physical world, lawyers routinely seek information about other parties and witnesses outside of formal discovery procedures in order to get a full understanding of the facts, develop appropriate litigation strategies, and craft effective discovery requests. For example, lawyers frequently conduct public record searches and utilize private investigators in order to obtain facts not publicly available. Indeed, courts have recognized the critical importance of such informal discovery in the expeditious processing and resolution of cases.[3] Generally, the rules of professional conduct limit such informal discovery only to the extent that the rules prohibit deceptive and fraudulent conduct, as well as inappropriate communications with represented persons. In the realm of social media, lawyers should be able to seek information just as freely. To the extent several state and local bars seek to limit informal discovery of social media content by likening the use of social media applications to "real-world" communications, this reasoning often reflects a poor understanding of how such applications work, and fails to account for the immense diversity in social application types and functionality. To the extent practitioners are attempting to create clear rules of conduct for social media research by reading existing ethics opinions as creating a bright-line distinction between "public" and "non-public" social media content, such a distinction is vague and impracticable, and will only prove more so as technology develops over time.

Instead of grasping for some hazy definition of what is "public" or trying to force social media usage into the mold of "real-world" communication, bar ethics committees and drafters of model rules should embrace standards that acknowledge the unique nature of social media information. Specifically, we suggest that the use of social media in informal discovery be governed by longstanding principles that censure deception and fraud and we urge a commonsense understanding of what types of virtual contact actually constitute "communication" under the rules of professional conduct. Such standards will better serve plaintiffs, defendants, and judicial administration because they would facilitate the exchange of information, the basis of well-founded formal discovery, and the efficient resolution of cases. Ultimately, rather than fragment and foreclose the social media landscape from informal discovery, the

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[3] *See, e.g.*, Niesig v. Team I, 558 N.E.2d 1030, 1034, 76 N.Y.2d 363, 372 (N.Y. 1990) (describing informal discovery as serving both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes); Muriel Siebert & Co. v. Intuit Inc., 868 N.E.2d 208, 210, 8 N.Y.3d 506, 511 (N.Y. 2007) (explaining that informal discovery could streamline discovery and foster the prompt resolution of claims).

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governing principles should reflect the reality that social media is here to stay. Social media contains increasingly voluminous and relevant information for litigation, and should be usable by litigants within reasonable ethical bounds.

To this end, Part I of this Article details sources of authority and interpretations of the prevailing view that informal discovery of social media information is limited to that which is publicly available. Part II lays out and provides support for our view that, in fact, such discovery is broadly permissible under traditional rules of professional conduct.

I. PREVAILING VIEW: INFORMAL DISCOVERY OF SOCIAL MEDIA ACCOUNTS IS LIMITED TO INFORMATION THAT IS PUBLICLY AVAILABLE

The most authoritative bodies on the ethical obligations of practicing lawyers—the American Bar Association (ABA) and several state bar associations—have provided very little guidance on how lawyers may permissibly seek information from social media sites through informal discovery. Currently, neither the ABA's model rules of professional conduct nor any state version of these rules explicitly addresses social media in any way. A handful of state and local bar ethical opinions applying existing rules to various social media research scenarios provide a few dots on the map, but the only consistent conclusion these few opinions share is that publicly available information is fair game. Practitioners have naturally clung to this rule—that informal discovery of social media accounts is limited to information that is publicly available—as the only clearly demarcated boundary line, and have propagated it accordingly.

A. State and Local Bars

The Model Rules of Professional Conduct and their commentaries do not explicitly address the permissibility of informal discovery of social media information. Several state and local bars, however, have issued ethics opinions that address one or more aspects of this complex issue. Although each opinion applies the relevant rules of professional conduct to different and highly specific factual scenarios, several analytical themes are common to the group of opinions as a whole.

In 2005, the Oregon State Bar issued one of the first bar association opinions on the subject of informal discovery of social media. The opinion addresses whether a lawyer, in anticipation of litigation, may visit the website of a represented party, and whether the lawyer may "communi-

cate via the Web site" with representatives of that party.[4] The opinion identifies the prohibition on a lawyer from communicating with another party known to be represented about the subject of the representation as the applicable rule,[5] noting that "the purpose of the rule is to ensure that represented persons have the benefit of their lawyer's counsel when discussing the subject of the representation with the adverse lawyer."[6] The opinion also takes as its premise that "there is no reason to distinguish between electronic or nonelectronic forms of contact. Both are permitted or both are prohibited."[7] Reasoning that accessing an adverse party's public website is "no different from reading a magazine article or purchasing a book written by that adversary," the opinion concludes that such activities are permissible because "the risks that [the relevant rule] seeks to avoid are not implicated by such activities."[8] As to whether the lawyer may "communicate via the Web site" with representatives of the adverse party, the opinion states that the relevant distinction is whether the individual with whom the lawyer wants to communicate is a "represented person" within the meaning of the rules of professional conduct.[9] The opinion does not specify what type of activity via a website is considered "communication," but concludes that, just as with any other written communications, if the individual contacted is a represented person (e.g., a managerial employee of the adverse party), then the communication is prohibited, but if the individual is a "nonmanagerial employee who is merely a fact witness," then such communication is permissible.[10]

In 2009, the Philadelphia Bar Association Professional Guidance Committee tackled the question of whether an ethical violation occurs if a lawyer, seeking access to the non-public content of a witness's Facebook and MySpace accounts, asks a third person (someone whose name the witness will not recognize) to "friend" the witness and seek

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[4] Or. Bar Ass'n, Formal Op. 2005-164 (2005), *available at* http://www.osbar.org/_docs/ethics/2005-164.pdf.

[5] *Id.* Oregon Rule of Professional Conduct 4.2 provides: "In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless: (a) the lawyer has the prior consent of a lawyer representing such other person; (b) the lawyer is authorized by law or by court order to do so; or (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer." OR. RULES OF PROF'L CONDUCT R. 4.2 (2014). This rule is very similar to Rule 4.2 of the American Bar Association (ABA) Model Rules of Professional Conduct, except that the Model Rule does not apply to lawyers acting in their own interest, and it makes no exception for communications required by written agreements. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013).

[6] Or. Bar Ass'n, *supra* note 4.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

access to this information.[11] In this scenario, the witness was neither a party to the litigation nor represented, and the third person stated only truthful information in the request for access, but did not disclose her relationship with the lawyer.[12] The opinion identifies two rules as relevant to its inquiry: (1) the rule holding lawyers responsible for the conduct of their nonlawyer assistants, and (2) the rule stating that it is professional misconduct for a lawyer to engage in acts involving dishonesty, fraud, deceit, or misrepresentation.[13] Noting that the lawyer would be responsible for the actions of the third person under the first rule, the opinion determines that the proposed course of action would be unethical under the second rule.[14] Although the third person intends to use only truthful information in the request for access, the opinion concludes that the request would still be "deceptive" because it does not disclose the true purpose of the request—gaining access to information that will be shared with, and may be used by, the lawyer in litigation.[15] Recognizing that individuals often grant access to their social media content without knowing the motivations of those seeking access to it, the opinion nonetheless concludes that any deception on the part of other social media users does not change the fact that such deception at the direction of a lawyer is a violation of ethical rules.[16] Interestingly, the opinion explicitly permits the lawyer to ask the witness "forthrightly" for access, although it is not clear whether such a request must include an explicit disclosure that the information is sought for the purposes of litigation, or whether the lawyer could rely on name recognition for the request to be considered "forthright."[17]

In 2010, the New York State Bar Committee on Professional Ethics addressed a question similar to that addressed by the Oregon State Bar: is it permissible for a lawyer representing a client during litigation to access

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[11] Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02, 1 (2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

[12] *Id.*

[13] *Id.* at 2. Pennsylvania Rule of Professional Conduct 5.3 states in pertinent part: "With respect to a nonlawyer employed or retained by or associated with a lawyer: . . . (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." PA. RULES OF PROF'L CONDUCT R. 5.3 (2013). Pennsylvania Rule of Professional Conduct 8.4 states in pertinent part: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation" PA. RULES OF PROF'L CONDUCT R. 8.4 (2013). These rules are essentially identical to Rules 5.3 and 8.4 of the ABA Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3, 8.4 (2013).

[14] Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11, at 3.

[15] *Id.*

[16] *Id.*

[17] *Id.*

the public pages of another party's social networking website, such as Facebook or MySpace?[18] The Committee heavily references the 2009 Philadelphia Bar opinion and seems to agree that the relevant rule is that it is professional misconduct for a lawyer to engage in acts involving dishonesty, fraud, deceit, or misrepresentation.[19] The Committee, however, reasons that the rule against deception is not implicated in the specific scenario addressed in its opinion because "the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network)."[20] Consequently, the opinion concludes that a lawyer "may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so."[21] Although this statement seems to prohibit a lawyer from seeking to "friend" other parties, the opinion explicitly qualifies its conclusion by explaining that it does not address the ethical implications of a lawyer seeking to "friend" a represented party or an unrepresented party. The Committee notes, however, that if a lawyer attempts to "friend" a represented party, such conduct would be governed by the rule prohibiting communication with a represented party without prior consent from that party's lawyer, and that if a lawyer attempts to "friend" an unrepresented party, such conduct would be governed by the rule prohibiting lawyers from implying that they are disinterested and requiring them to correct any misunderstandings about their role.[22]

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[18] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010), *available at* http://www.nysba.org/CustomTemplates/Content.aspx?id=5162.

[19] *Id.* New York Rule of Professional Conduct 8.4 states in pertinent part: "A lawyer or law firms shall not: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N. Y. RULES OF PROF'L CONDUCT R. 8.4 (2013). This rule is essentially the same as Rule 8.4 of the ABA Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 (2013).

[20] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 18.

[21] *Id.*

[22] *Id.* at n.1. New York Rule of Professional Conduct 4.2 states in pertinent part: "In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." N.Y. RULES OF PROF'L CONDUCT R. 4.2 (2013). This rule is substantially the same as Rule 4.2 of the ABA Model Rules of Professional Conduct, except that the Model Rule does not prohibit the lawyer from "causing another to communicate." *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013). New York Rule of Professional Conduct 4.3 states in pertinent part: "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

The New York City Bar Committee on Professional Ethics also issued an opinion in 2010 on the subject of lawyers seeking access to social media content.[23] This opinion addresses "the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds," and particularly focuses on the lawyer's "direct or indirect use of affirmatively 'deceptive' behavior to 'friend' potential witnesses."[24] Consistent with New York's "oft-cited policy in favor of informal discovery," the opinion concludes that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request" and that the ethical boundaries to "friending" are "not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements."[25] A footnote to this conclusion states that the communications of a lawyer and her agents with parties known to be represented by counsel "are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law," but does not explicitly conclude that "friending" a represented party constitutes a communication that would violate the rule.[26]

If the attorney or her agent seeks to "friend" an individual under false pretenses (e.g., by creating a fake profile or using false information in the request), the New York City opinion concludes that such activities would violate both the rule prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and the rule prohibiting lawyers from knowingly making false statements during the course of representation.[27] Although the Committee acknowledges that other ethics opinions have provided "that deception may be permissible in rare instances when it appears that no other option is available to ob-

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N. Y. RULES OF PROF'L CONDUCT R. 4.3 (2013). This rule is nearly identical to Rule 4.3 of the ABA Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT R. 4.3 (2013).

23 N.Y.C. Bar Ass'n, Formal Op. 2010–2 (2010), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites.

24 *Id.*

25 *Id.*

26 *Id.* at n.4.

27 *Id.* New York Rule of Professional Conduct 4.1 provides: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." N. Y. RULES OF PROF'L CONDUCT R. 4.1 (2013). This rule is essentially the same as Rule 4.1(a) of the ABA Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2013).

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tain key evidence," the Committee decides that these limited exceptions are "inapplicable" to social networking websites "because non-deceptive means of communication ordinarily are available to obtain this information" (i.e., the use of formal discovery mechanisms).[28]

In 2011, the San Diego County Bar Legal Ethics Committee issued an opinion explicitly condemning as unethical the act of a sending a "friend" request to parties or witnesses— represented or unrepresented— where the "friend" request contains the lawyer's real name and no other information.[29] The opinion first focuses on the rule prohibiting a lawyer from communicating with a represented party about the subject of the representation.[30] When a lawyer clicks on the "Add as Friend" button on Facebook, the website sends an automated message to the would-be friend stating, "[lawyer's name] wants to be friends with you on Facebook," and gives the option to accept or decline the request.[31] Although this message is generated by the website and not the attorney, the Committee concludes that it is still "at least an indirect ex parte communication with a represented party" for the purposes of the ethical analysis.[32] As to whether this communication is "about the subject of the representation," the Committee reasons that if the communication "is motivated by the quest for information about the subject of the representation, [then] the communication with the represented party is about the subject matter of that representation" and is therefore prohibited.[33]

The opinion next considers the rule prohibiting a lawyer from engaging in deception and concludes that this duty forecloses a lawyer from seeking to "friend" a witness or party, even if they are unrepresented, without disclosing the purpose of the "friend request."[34] The

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[28] N.Y.C. Bar Ass'n, *supra* note 23.

[29] San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

[30] *Id.* California Rule of Professional Conduct 2–100 states, in relevant part: "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." *Id.* (citing CAL. RULES OF PROF'L CONDUCT R. 2–100 (2011)). Under this rule, communications with a public officer, board, committee, or body; communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; and communications otherwise authorized by law are permitted. *Id.* This rule is generally the same as Rule 4.2 of the ABA Model Rules of Professional Conduct, except that the Model Rule does not prohibit indirect communications, and the Model Rule does not create exceptions for communications with public entities or communications initiated by a party. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010).

[31] San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1, at 1.

[32] *Id.*

[33] *Id.* at 1–2.

[34] *Id.* Rule 4.1(a) of the ABA Model Rules of Professional Conduct mandates that in the in course of representing a client, a lawyer "shall not knowingly make a false statement of material fact or law to a third person." MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2013). Model Rule 8.4(c) further prohibits "conduct involving dishonesty, fraud, deceit or misrepre-

opinion relies heavily on the 2009 analysis of the Philadelphia Bar Association Professional Guidance Committee, "notwithstanding the value in informal discovery on which the City of New York Bar Association focused."[35] Interestingly, the opinion notes that "[n]othing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case" on the ground that the target would recognize the sender by name.[36] This point underscores the opinion's conclusion that a "friend request" by the lawyer is deceptive because such a request seeks "to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient."[37]

Two additional opinions shed light on this topic by examining the use of social media by lawyers searching for information on potential and sitting jurors.[38] The first, issued by the New York County Lawyers' Association (NYCLA) Committee on Professional Ethics in 2011, concludes that it is proper and ethical for a lawyer to undertake a pretrial search of a prospective juror's social networking site and to visit the publicly available sites of a sitting juror as long as the lawyer does not "friend" the juror, subscribe to the juror's Twitter accounts, or "otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring."[39] The NYCLA Committee explained that such social media activities are impermissible communications because if a juror becomes aware of a lawyer's efforts to view her social media sites, "it might tend to influence the juror's conduct with respect to the trial."[40] The second opinion, issued by the New York

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sentation." MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013). As the opinion acknowledges, California has not incorporated these provisions of the Model Rules into its Rules of Professional Conduct or its State Bar Act. San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1, at 5. The opinion argues, however, that (1) the duty not to deceive judges (contained in California code) arguably stands for a broader duty not to deceive anyone; (2) there is substantial California case law supporting the proposition that lawyers have a duty not to deceive, even outside of the courtroom; and (3) there is a common law duty not to deceive. *Id.* On this basis, the opinion proceeds from the assumption that lawyers are prohibited from engaging in deception. *Id.*

35 San Diego Cnty. Bar Legal Ethics Comm. 2011-2, *supra* note 1, at 6.

36 *Id.*

37 *Id.*

38 *See, e.g.*, N.Y. Cnty. Law. Ass'n Comm. on Prof'l Ethics, Formal Op. 743 (2011), *available at* http://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf; N.Y.C. Bar Ass'n, Formal Op. 2012-2 (2012), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02. These opinions are focused on the application of rules that forbid communications between lawyers and jurors, which generally embody stricter "no contact" principles because they prohibit *all* communications, not just those "about the subject matter of the representation." *See* MODEL RULES OF PROF'L CONDUCT R. 3.5 (b) (2013). These opinions, however, still provide insight into how bar committees understand the application of professional conduct rules in the social media context.

39 N.Y. Cnty. Law. Ass'n Comm. on Prof'l Ethics, *supra* note 38, at 1.

40 *Id.*

City Bar Committee on Professional Ethics in 2012, similarly concluded that lawyers may use social media websites for juror research "as long as no communication occurs between the lawyer and the juror as a result."[41] This opinion maintains that if a juror receives a "friend" request (or any other type of invitation or notification) or "otherwise learn[s] of the attorney's viewing or attempted viewing of the juror's pages, posts or comments," this constitutes a "prohibited communication."[42] The Committee defines "communication" as the transmission of information from one person to another, and explains that in the social media context, "friend" requests and other such activities at minimum impart to the targeted juror knowledge that he or she is being investigated. The intent of the attorney using social media is irrelevant.[43]

Most recently, in 2014, the Commercial and Federal Litigation Section of the New York State Bar Association issued a more detailed set of social media guidelines, covering a range of scenarios beyond the discovery realm, although these guidelines are not binding on disciplinary proceedings and do not represent the views of the State Bar Association until they are formally adopted as such.[44] The guidelines continue to distinguish between "public" versus "non-public" portions of a social media profile, and state that a "lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer"—including for impeachment purposes.[45] Moreover, the guidelines urge awareness and caution of "unintentional communications," such as LinkedIn notifications that can automatically generate a notice to the person whose profile was viewed.[46] The guidelines recite the normal rule about contact with a represented person, but note in the comments that caution should be used before indirectly accessing social media content, even if the lawyer "rightfully has a right to view it, such as [through] a professional group where both the lawyer and represented person are members or as a result of being a 'friend' of a 'friend' of such represented person."[47] Finally, the guidelines about viewing a represented person's social media profile expressly apply to agents, including "a lawyer's investigator, legal assistant, secretary, or agent and could apply to the lawyer's client as well."[48]

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41 N.Y.C. Bar Ass'n, *supra* note 23.

42 *Id.*

43 *Id.*

44 COMMERCIAL & FED. LITIG. SECTION, N.Y. STATE BAR ASS'N, SOCIAL MEDIA ETHICS GUIDELINES (2014), *available at* https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.

45 *Id.* at 8.

46 *Id.*

47 *Id.* at 9–10.

48 *Id.* at 10.

In considering this group of opinions as a whole, it must first be noted that the opinions are few in number, they come from only a handful of bar associations, and the majority of the bar associations represented are local, not state, associations. The vast majority of state bar associations, including the American Bar Association, have yet to officially weigh in on the subject of informal discovery of social media. Further, there are many points of disagreement amongst this set of opinions. For example, while the New York City Bar considers contact with unrepresented persons by a lawyer or their agent permissible as long as only truthful information is used, the Philadelphia Bar maintains that only direct contact by the lawyer is permissible, while the San Diego County Bar prohibits any such contact.[49] Consequently, one cannot yet rely on these opinions as either comprehensive or authoritative on the question of the ethical permissibility of social media informal discovery.

Several common themes, however, emerge from this set of opinions that may provide insight into how local and state bar associations generally view this issue. First, the opinions generally seem to consider all forms of social media activity to be "communication," although only one opinion explicitly addresses why such activities should be considered "communication" by providing an analytical basis for this conclusion.[50] The remaining opinions appear simply to assume this point. Second, all of the opinions explicitly or implicitly accepted that there is a clear line between "public" and "private" information on social media websites. For example, the Oregon and New York State Bar opinions rely on this distinction by declaring that viewing "public" websites and pages is permissible.[51] The New York City Bar opinion on juror research also relies on this distinction, explaining that "[i]n general, attorneys should only view information that potential jurors intend to be—and make—public."[52] Third, at least three opinions conclude that failure to disclose certain information, such as affiliation with the lawyer or the lawyer's interest in the litigation, constitutes deception, even if only truthful information is provided by the seeker through the use of social media.[53] Only

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[49] *Compare* N.Y.C. Bar Ass'n, *supra* note 23, *with* Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11, *and* San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

[50] *See* N.Y.C. Bar Ass'n, *supra* note 23.

[51] *See* Or. Bar Ass'n, *supra* note 4; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 18.

[52] *See* N.Y.C. Bar Ass'n, *supra* note 23.

[53] *See* Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11; San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 18.

one opinion comes to a different conclusion,[54] while the remaining opinions are silent on this topic.

B. Practitioners

Given the relative paucity of authority on the ethical boundaries of informal discovery of social media information, practitioners and academics have generally concluded that lawyers should take the most conservative approach to such informal discovery—to limit their research to information that is "publicly available" and not require permission from or notification to the target of the research. For example, one of only a few legal treatises focused on social media definitively states:

> An attorney may not use social media to contact or "friend" a juror or a represented adverse party. These prohibitions also apply to those acting on behalf of the attorney. However, attorneys, like the general public, may view the public portions of anyone's social media site. The one major exception to this rule on viewing public portions of a social media site arises when such viewing constitutes contact. This can happen with social media sites that generate automated responses to the account holder.[55]

Although the treatise acknowledges that the situation is "a little less clear when the attorney or her agent wants to contact via social media an unrepresented party that is likely to be called as a witness," it goes on to explain that jurisdictions take different approaches, and some require full disclosure of the reason for the contact.[56] Similarly, a recent article on the role of social media in litigation, authored by two practicing attorneys, cautions:

> Social media sites are ethical minefields that many lawyers are only now beginning to grapple with. We are probably on safe ground when we access information that users have knowingly made available to the public. Unsurprisingly, courts have accepted that there is no reasonable expectation of privacy in that kind of information. However, it is ethically problematic for lawyers to

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[54] *See* N.Y.C. Bar Ass'n, *supra* note 23 (concluding that attorneys or their agent may use their real name and profile to send a "friend" request to obtain information from an unrepresented person's social networking website without also disclosing the reason for the request).

[55] PRACTICING LAW INSTIT., *supra* note 2, § 9:6.2.

[56] *Id.*

> "friend" people just to get access to information in their social media profiles.[57]

Countless other publications have issued similar warnings to lawyers seeking to engage in informal discovery of social media.[58] Limiting informal discovery to only publicly available social media information is a quite conservative approach, considering that none of the existing bar opinions mandate such restrictions. Even the most restrictive opinion—the San Diego County Bar opinion—permits lawyers to "friend" unrepresented persons as long as they disclose their interest in seeking the information.[59] This risk-averse approach is both understandable and wise, however, considering the serious consequences, both professional and personal, that can result from committing an ethical violation. Until the ABA and the state bars issue clear rules and guidance explicitly delineating ethical boundaries for informal discovery of social media, practitioners will likely continue to refrain from all but the most circumspect uses of this valuable source of information.

C. *Courts*

To our knowledge, courts have not directly ruled on the extent to which the rules of professional conduct limit informal discovery of social media information. Some courts have addressed related topics, including the admissibility of evidence gathered through informal discovery of social media sites, the scope of formal discovery of social media information, and the implications of other laws (such as the Stored Communications Act, 18 U.S.C. § 2701 (2002)) on the collection of social media information.[60] These cases, however, do not apply the rules

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57 Radhakant & Diskin, *supra* note 2.

58 *See, e.g.*, Justin P. Murphy & Matthew A. Esworthy, *The ESI Tsunami: A Comprehensive Discussion about Electronically Stored Information in Government Investigations and Criminal Cases*, CRIM. JUST., Spring 2012, at 31, 34 (noting that lawyers "can run afoul of ethics rules when they use social media to gather evidence that is not publicly available"); *Social Networking Sites Are Valuable Tools for Lawyers: But Beware the Potential Ethical Pitfalls*, INTERNET FOR LAWYERS, http://www.netforlawyers.com/content/social-networking-sites-are-valuable-tools-lawyers-beware-potential-ethical-pitfalls (last visited Aug. 22, 2014) (discussing the Philadelphia Bar opinion, and oting that such ethical dilemmas can be avoided by limiting such research to public profiles only, since "there would be no actual contact or exchange with the profile's owner").

59 San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

60 *See, e.g.*, Griffin v. Maryland, 19 A.3d 415, 423–24 (Md. 2011) (holding that trial court abused its discretion by admitting into evidence pages printed from MySpace that were not appropriately authenticated); Tienda v. State, 358 S.W.3d 633, 642, 647 (Tex. Crim. App. 2012) (concluding that because there was sufficient circumstantial evidence to authenticate photographs taken from defendant's MySpace profile, the evidence was properly admitted); Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 977–990 (C.D. Cal. 2010) (analyzing whether social-networking sites "fall within the ambit" of the Stored Communications Act); Romano v. Steelcase, 907 N.Y.S.2d 650 (App. Div. 2010) (considering scope of permissible discovery of social media information).

of professional conduct in a disciplinary context, and it is well established that ethical and evidentiary rulings do not necessarily run parallel to each other. Consequently, although such cases might inform our understanding of the courts' views on the subject, they do not provide a clear answer as to what conduct is ethically permissible.

II. A BETTER VIEW: INFORMAL DISCOVERY OF SOCIAL MEDIA INFORMATION IS BROADLY PERMISSIBLE UNDER THE CURRENT RULES OF PROFESSIONAL CONDUCT

The prevailing view that ethical obligations constrain informal discovery of social media information to that which is publicly available relies on several misconceptions that reflect a poor understanding of both the nature of social media and the underlying purposes of the relevant rules of professional conduct. First, this view rests on a false premise that a clear distinction can be made between what is "public" and what is "private" on any given social media website. In fact, the blurry line between public and private information that exists in most, if not all, social media contexts makes it impossible to rely effectively on this distinction as the basis for a rule lawyers can easily follow. Further, it is unclear how the concept of "privacy" is germane to ethical inquiries under the relevant rules of professional conduct.

Second, the existing bar opinions miscategorize social media activities as "communications" within the meaning of the relevant rules of professional conduct based on partial and ill-fitting analogies to communications in the physical (i.e., non-virtual) world. Social media enable users to share information in novel and unique ways, and consequently, social media activities are not easily transplanted into "real-world" scenarios. To properly analogize social media activities to real-world interactions, the specific function of each type of activity must be understood in the context of the application within which it operates—the existing bar opinions fail to do this.

Third, the existing bar opinions limit their analyses of the relevant rules of professional conduct to determining whether certain social media activities fall under the definitional meaning of specific words within the rules, such as "communication" or "deception." Instead, the bar opinions could analyze whether the social media activity at issue offends the underlying purposes of each relevant rule and tie their conclusions and rulings to these purposes accordingly.

As a result of these misconceptions and analytical missteps, the prevailing view is unnecessarily restrictive. In fact, the existing rules of professional conduct allow for broad and extensive informal discovery of social media information. Properly analyzed and applied, these rules prohibit only the use of explicit fraud and misrepresentation by lawyers

seeking social media information (e.g., creating fake identities or profiles) and direct questioning of targets via social media.

A. *Public vs. Private: How Clear Is the Line and Is it Important?*

As detailed above, the prevailing view pressed by practitioners and bar associations alike relies on a clear distinction between "public" and "private" social media information.[61] Most of the bar opinions and practitioner publications do not explain precisely what the term "public" encompasses, but instead simply presume the term speaks for itself.[62] The few sources that address the meaning of "public" conclude that where attorney conduct moves beyond viewing social media information into contact with the research target, then it is likely the information is "non-public" (or, in other words, "private").[63] This definition does very little in the way of drawing a clear line between public and private social media information—largely because it is impossible to draw such a line due to the intrinsic nature of social media. The sheer number and diversity of social media applications and websites, constant innovations in social media, layers of information sharing possible via social media, transferability of information between social media users, and many other factors contribute to the inherent blurriness between "public" and "private" social media information. The existing bar opinions and treatises assume not only that the public-private divide makes sense, but also that the line between them can be drawn clearly and easily in any social media context.[64] In reality, this line cannot be drawn clearly or easily and should not govern the extent to which informal discovery of social media is ethically permissible. Even if it were possible to draw a clear line between the two, the bar opinions and practitioner publications fail to explain why or how the designation of information as "public" or "private" should be a relevant consideration in the application of the cited rules of professional conduct. This further supports our contention that the ethical rules governing informal discovery of social media information should not rest on the fictitious distinction between public and private.

"Social media" is generally defined as "a group of Internet-based applications . . . that allow the creation and exchange of User Generated Content."[65] The term "social media," therefore, does not refer to a single

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[61] *See supra* Part I.A.

[62] *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 18; Radhakant & Diskin, *supra* note 2, at 17–22.

[63] San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1; N.Y. Cnty. Law. Ass'n Comm. on Prof'l Ethics, *supra* note 38; *see, e.g.*, PRACTICING LAW INST., *supra* note 2, at 9:32–33.

[64] *See, e.g.*, San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

[65] Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of* Social Media, 53 BUS. HORIZONS 59, 61 (2010); *Social Media Definition*,

method of information sharing, but rather encompasses potentially infinite different modes. At present, there are hundreds of social media platforms[66] and more than a billion accounts, or profiles, on Facebook and other websites.[67] As a group of scholars explains, "[t]here currently exists a rich and diverse ecology of social media sites, which vary in terms of their scope and functionality."[68] Each of these thousands of social media websites operate independently and uniquely—governed by their own individual policies for membership, information sharing, privacy, and notification.

This diversity presents the first problem with the practical application of the public-private distinction: how lawyers are supposed to determine which information on any given website is "public" if this designation depends on how each site functions. It is not reasonable to expect lawyers, courts, and bar committees tasked with implementing the rules of professional conduct to know and understand the intricate inner workings of these thousands of social media websites. Under the prevailing view, such knowledge is necessary in order to undertake any informal discovery[69]—otherwise, lawyers will not know if even viewing a profile, such as on LinkedIn, will trigger a notification. Such knowledge would also be necessary for lawyers who intend to object to informal discovery undertaken by the opposition, and for a court or bar committee seeking to enforce ethical rules. The bar opinions on which this prevailing view is based focus their analyses on a few well-known sites—namely, Facebook, MySpace and Twitter. These opinions assume that their Facebook-specific determinations can be easily applied to other social media platforms and websites, and expect lawyers to discern the operational equivalent of "friending" for other websites they may want to explore—an approach that is likely to produce inconsistent results. Even

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OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/social-media (last visited Aug. 22, 2014) (defining social media as "websites and applications that enable users to create and share content or to participate in social networking.").

66 *See* Richard Hanna, Andrew Rohm & Victoria L. Crittenden, *We're All Connected: The Power of the Social Media Ecosystem*, 54 BUS. HORIZONS 265, 266 (2011) (explaining that social media platforms include social networking, text messaging, photo-sharing, podcasts, video-streaming, wikis, blogs, discussion boards, micro-blogging, and location-based tools).

67 *See* Jemima Kiss, *Facebook's 10th Birthday: From College Dorm to 1.23 Billion Users*, THE GUARDIAN, Feb. 3, 2014, http://www.theguardian.com/technology/2014/feb/04/facebook-10-years-mark-zuckerberg; Ingrid Lunden, *Twitter May Have 500M+ Users But Only 170M Are Active, 75% On Twitter's Own Clients*, TECHCRUNCH (July 31, 2012), http://techcrunch.com/2012/07/31/twitter-may-have-500m-users-but-only-170m-are-active-75-on-twitters-own-clients/; *Skype Grows FY Revenues 20%,Reaches 663mln Users*, TELECOMPAPER (Mar. 8, 2011), http://www.telecompaper.com/news/skype-grows-fy-revenues-20-reaches-663-mln-users—790254.

68 Jan H. Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241, 242 (2011).

69 *E.g.*, N.Y.C. Bar Ass'n, *supra* note 23 ("It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research.").

the bar opinions and practitioner publications that seek to provide some broader guidance by defining "private" information, as that which requires some kind of contact, acknowledge the uncertainty implicit in this rule due to confusion or lack of awareness regarding the functionality of social media websites.[70]

This concern could be laid to rest perhaps by adding a corollary to the public-private rule requiring lawyers to learn the operational details of any social media website they intend to use.[71] Even assuming, however, that lawyers *should* be responsible for learning the operational details of every social media website that they or their opponent make use of during a case, the fact that such websites are constantly changing their operations and policies presents another obstacle for lawyers trying to figure out what information is "public."[72] Social media websites are by their very nature innovative—their success or failure depends in large part on their ability to adapt to changing interests and trends. To accurately determine what is "public" social media information, lawyers will have to constantly update their knowledge of social media websites. For example, in its nine-year history, Facebook has made countless changes to many core aspects of the site, including multiple changes to its classification system for personal data, search features, data visibility restrictions, and privacy policies.[73] As a result, the line between public and

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[70] N.Y. Cnty. Law. Ass'n Comm. on Prof'l Ethics, *supra* note 38 ("Moreover, under some circumstances a juror may become aware of a lawyer's visit to the juror's website . . . the contact may well consist of an impermissible communication."); N.Y.C. Bar Ass'n, *supra* note 39 ("Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule."); PRACTICING LAW INST., *supra* note 2, at 9–33 (acknowledging a lack of certainty in the ethical implications of "situations where the attorney was ignorant or unaware of the automatic response procedures" of a social media website).

[71] However, this would not help lawyers with the burden of learning about social media websites used by the opposition. Further, courts and bar committees would still need more comprehensive knowledge in order to have an informed view of what is public and private information.

[72] *See, e.g.*, Joe Nocera, *Facebook's New Rules*, N.Y. TIMES, Oct. 18, 2013, http://www.nytimes.com/2013/10/19/opinion/nocera-facebooks-new-rules.html ("In its short nine-year existence, Facebook has made many changes to its privacy policies . . . .").

[73] *See id.*; *see also* Mandy Gardner, *Facebook Privacy Settings Are Changing Again*, GUARDIAN LIBERTY VOICE (Oct. 30, 2013), http://guardianlv.com/2013/10/facebook-privacy-settings-are-changing-again/ ("Facebook profiles will no longer be invisible to certain people unless they have already been officially blocked by other users. Site administrators say the reason for the Facebook privacy changes is the fact that there are now so many different ways for a profile to be discovered on the site. For example, one's profile might be seen through a tagged photo, group comments or via the new Graph Search feature. When the 'Who can look up your timeline' feature was introduced, a name-search was the only way to find someone's profile. With the modernization of the site, this feature is all but obsolete."); Matt McKeon, *The Evolution of Privacy on Facebook*, MATTMCKEON.COM (April 2010), http://mattmckeon.com/facebook-privacy/ ("Facebook's classification system for personal data has changed significantly over the years" and "Facebook hasn't always managed its users' data well. In the beginning, it restricted the visibility of a user's personal information to just their friends and

private information on Facebook has shifted repeatedly, with specific types and pieces of information changing from private to public and back to private again. The expectation that lawyers will keep up with constant policy changes for dozens if not hundreds of different websites is unrealistic and unreasonably burdensome.

The "gray areas" of social media websites create yet another problem for lawyers trying to identify the line between public and private social media information. Such "gray areas" include methods of accessing information without requesting permission from the subject of the investigation or that do not result in a notification to the subject, but that do require the investigating lawyer to take some active steps to obtain the information.[74] For example, on Facebook, users can join "groups"—pages created within the site that are based around a particular interest, topic, affiliation, or association. By joining the same groups as the research target, an investigating lawyer may be able to view postings made by the target on the group pages, and learn about the target's interactions and relationships with other members of the groups. To join these groups, the lawyer normally would not need to request permission from the target nor would a notification be sent to the target. The target would, however, be able to see that the lawyer was a member of the group by browsing the group's list of members. An investigating lawyer could also gather information about a target by friending the target's friends and family. In so doing, the lawyer would be able to see any postings made by the target on the walls of these friends and family, and see any photos of, or comments to, the target they posted. Again, the lawyer would not need the permission of the target, and the target would not receive any personal notification, though the target would be able to see from any friend or family member's pages that the lawyer had friended them. Such information is neither wholly public, because the lawyer must take action to gain access to it, nor wholly private as to the target of the research, because the target does not control access to it. The New York State Bar Association guidelines on social media, which most directly address methods such as "friend of a friend" network research, consider these methods to be gray areas: the guidelines essen-

their 'network' (college or school). Over the past couple of years, the default privacy settings for a Facebook user's personal information have become more and more permissive. They've also changed how your personal information is classified several times, sometimes in a manner that has been confusing for their users."); Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELECTRONIC FRONTIER FOUNDATION (Apr. 28, 2010), https://www.eff.org/deeplinks/2010/04/facebook-timeline ("Since its incorporation . . . Facebook has undergone a remarkable transformation. When it started, it was a private space for communication with a group of your choice. Soon, it transformed into a platform where much of your information is public by default. Today, it has become a platform where you have no choice but to make certain information public . . . .").

[74] *See* Gardner, *supra* note 73; *see also* McKeon, *supra* note 73.

tially just urge caution and expressly note that—even in the stricter juror context—ethics opinions "have not directly addressed" non-deceptive viewing of putatively private social media information through alumni groups.[75] Overall, the existence of such "gray areas" reveals the fiction of a clear and easy line between public and private social media information and the impracticality of directing lawyers to conform their conduct along it.[76]

Questions surrounding the timing of requests for information also confound the simple labeling of social media information as either public or private. Several bar opinions have determined that it is impermissible to seek social media information via a third party, i.e., a lawyer cannot ask an apparently neutral third party to friend the target on the lawyer's behalf as a way to avoid the alleged "communication" of a direct friend request.[77] Practitioners seem to conclude that by strictly adhering to the public-private rule, they will avoid any potential ethical problems involving third parties. It is unclear, however, what ethical implications arise from requesting information from a third party who is already connected to the research target before the lawyer is aware of or involved in the litigation. For example, the lawyer could ask a third party who is Facebook friends with the target to provide copies of the target's profile and all of their postings, or the lawyer could ask a third party who follows the target on Twitter to provide copies of all of the target's tweets. This information can hardly be considered "public," since access to it is restricted to the target's friends or followers. Neither is this information clearly "private" (as vaguely defined in bar opinions and practitioner publications) since the lawyer has not contacted the target to obtain it and the target has chosen to share it with the third party.[78] This scenario demonstrates the difficulty of definitively labeling social media information as either public or private because the nature of the information may change as it is transferred from user to user. Further, this scenario highlights the confusion inherent in the public-private rule that results in overbroad restrictions on lawyers seeking informal discovery of social

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[75] COMMERCIAL & FED. LITIG. SECTION, N.Y. STATE BAR ASS'N, *supra* note 44, at 10, 15–16.

[76] In addition, commercial data aggregation services that "crawl" the web and cull information from an array of databases and sources, including social media sites, in order to generate reports about persons and companies are now widely available, further blurring the line between public and private social media information. *See* Lori Andrews, *Facebook Is Using You*, N.Y. TIMES, Feb. 4, 2012, http://www.nytimes.com/2012/02/05/opinion/sunday/facebook-is-using-you.html.

[77] *See, e.g.*, Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 18; *see also* COMMERCIAL & FED. LITIG. SECTION, N.Y. STATE BAR ASS'N, *supra* note 44.

[78] *See, e.g.*, PRACTICING LAW INST., *supra* note 2, § 9:6.2; N.Y. Cnty. Law Ass'n Comm. on Prof'l Ethics, *supra* note 38; San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

media information. In other words, by limiting their research to public information only, lawyers yield access to information that while not strictly "public," does not require the supposedly unethical "communication" with the research target that justifies the prohibition on so-called "private" information, and therefore should be accessible to lawyers.

Finally, this examination of the many complexities and uncertainties intrinsic to the prevailing view begs the question: even if one were willing to parse out the specific distinction between public and private social media information for every possible scenario, why does this public-private divide matter and why should it define the limits of permissible informal discovery of social media information? The bar opinions appear to be motivated in part by concern regarding the personal privacy of social media users.[79] This concern is somewhat misplaced. The rules of professional conduct are not concerned with enshrining a robust conception of third-party privacy. Rather, the overarching purpose of the rules of professional conduct is to provide guidance to lawyers as to the responsible practice of law, to protect the interests of clients in the context of engaging the services of a lawyer, and to provide standards for bar discipline.[80] To these ends, each rule is crafted to either promote specific actions or results, or to prohibit certain actions and avoid particular outcomes. The rules at issue in the context of social media informal discovery—the rules prohibiting communicating with represented parties, misleading unrepresented persons to believe one is disinterested, and committing fraud or deceit—are all focused on preventing specific outcomes. An understanding of these purposes should guide any analysis of these rules, as will be discussed in Part II.C below. These rules are aimed at preventing abuse and trickery, not at protecting the privacy of individuals, and therefore consideration of privacy as a factor is inappropriate when applying these rules to the social media informal discovery context. Further, as numerous courts have recognized in the context of formal discovery, the very purpose of social media websites is to share information with others—rendering such information inherently *not* private and concerns over protecting the privacy of social media users even less relevant.[81]

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[79] *See, e.g.*, San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1 (concluding that the Committee's interpretation of the rules of professional conduct "strikes the right balance between allowing unfettered access to what is public on the Internet about the parties without . . . surreptitiously circumventing the privacy even of those who are unrepresented").

[80] *See generally* MODEL RULES OF PROF'L CONDUCT, Preamble & Scope (2012).

[81] *See, e.g.*, *Romano*, 907 N.Y.S.2d 650, 657 (App. Div. 2010) (compelling discovery of plaintiff's Facebook and MySpace accounts despite plaintiff's privacy objections, noting that sharing personal information with others is "the very nature and purpose of these social networking sites" and that "in this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking") (internal quotation marks omitted).

B. Real-World Analogies: What Constitutes "Communication About the Subject of the Representation"?

Central to the bar opinions' reasoning is the idea that social media activities are "communications" within the meaning of, and prohibited by, the relevant rules of professional conduct.[82] In explaining this point, the bar opinions offer various analogies intended to demonstrate that social media activities are such communications. Rather than confirm their reasoning, however, these inapposite analogies undermine the bar opinion analyses by often revealing a poor understanding of the nature of social media. For example, the Philadelphia Bar opinion compares the act of a third party using only truthful information to send a Facebook friend request to a research target on behalf of a lawyer without disclosing the relationship to the lawyer to an individual pretending to be a utility worker in order to place a hidden video camera inside the target's home—an act which is clearly deceptive, and therefore prohibited.[83] This analogy is problematic for several reasons. First, the third party is using only truthful information in their friend request.[84] Although the third party is not disclosing their relationship with the lawyer to the research target, the third party is not hiding nor lying about it either.[85] This conduct seems fairly far removed from wearing a disguise and falsely claiming to be a utility worker. Second, this analogy fails to recognize the difference between installing a hidden camera in a person's home in order to capture information that the research target has no idea that they are sharing, and making a friend request, which, if granted, allows the third party access only to information that the target chooses to share with friends. The former activity is spying and requires a passive target who makes no decision to share information with the third party; the latter activity is observation and requires a target who actively chooses to grant access to the third party and others and actively chooses to post comments, photos, videos, etc. Further, a hidden camera in the home cannot distinguish between the different types of information it may capture. For example, a hidden camera in the living room may capture some information the target intends to share with others (e.g., the target's conversation during a party), or it may capture deeply private information (i.e. things the target says or does when the target believes he or she is completely alone). On Facebook, the third party will only have access to

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82 *See, e.g.*, Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11 (describing the act of a third party sending a Facebook friend request to a potential witness as a "communication"); San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1 (concluding that a Facebook friend request constitutes "an open-ended inquiry to a represented party in cyberspace seeking information about the matter outside the presence of opposing counsel").

83 Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11.

84 *See id.*

85 *Id.*

information that the target intends to share; it is not possible for the third party to access truly private information without the target's knowledge or consent, simply because they are "friends."[86] Third, this analogy overlooks a critical distinction between the types of spaces involved. The law recognizes the home as a sacred space, where one has the right to be free from unwanted intrusions from outsiders.[87] There are few, if any, spaces where privacy is more protected than the home.[88] Obviously, sharing information with and exposing one's private activities to others is not the primary purpose of having a home. In stark contrast, the internet generally, and social networking sites specifically, are not considered sacred or particularly private spaces in any sense. Indeed, the principal reason social networking sites exist is to connect and share information with large numbers of other people. To compare this virtual public forum with a place as private as the home is far-fetched.

The San Diego bar opinion includes several similarly troubling analogies. In attempting to support its conclusion that any social media activity involving a represented party constitutes an impermissible communication about the subject matter of the representation, the Committee draws analogies to two recent federal cases.[89] In *United States v. Sierra Pacific Industries*, an action brought by the government alleging corporate responsibility for a forest fire, counsel representing a corporation attended a Forest Service event open to the public and questioned Forest Service employees about fuel breaks, fire severity, and other related topics.[90] The court rejected the counsel's defense that he was exercising his right to petition the government for redress of grievances, finding instead that he was "attempting to obtain information for use in the litigation," and concluded that his conduct violated the rule prohibiting communication with represented parties about the subject matter of the representation.[91] The Ethics Committee points to this conclusion as evidence that the lawyer's purpose in sending the friend request is critical to the ethical inquiry and because the lawyer "hopes" the friend request will lead to information relevant to the litigation, such communication is "about the subject of the representation" and therefore prohibited.[92] The Committee likens the friend request to any other "open-ended [or] generic question[ ]" asked during the course of litigation to "impel the other side to

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86 *Statement of Rights and Responsibilities*, FACEBOOK (April 12, 2014) https://www.facebook.com/legal/terms.

87 *See, e.g.*, Georgia v. Randolf, 547 U.S. 103, 123–24 (2006) (Stevens, J., concurring) (finding a right "[a]t least since 1604" to exclude governmental officials and others from the home when they do not have a valid warrant).

88 *See id.*

89 San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

90 United States v. Sierra Pacific Indus., 759 F. Supp. 2d 1206, 1208 (E.D. Cal. 2010).

91 *Id.* at 1213–14.

92 San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

disclose information that is richly relevant to the matter."[93] Both this comparison and the analogy to *Sierra Pacific* are inapposite to the friend request scenario. There is an obvious distinction between directing specific questions to the target, and requesting access to postings made at the target's own initiative. In *Sierra Pacific*, the Forest Service employee provided information that he would not have provided otherwise due to the direct questions of the lawyer.[94] In the Facebook scenario, the lawyer is asking only for access to information that has already been posted by the target, and that will be posted regardless of whether the lawyer has access.[95] This scenario is more comparable to the lawyer signing up to attend the Forest Service event, but not speaking or asking questions—activities that neither the *Sierra Pacific* court nor the Committee suggest are impermissible. If the lawyer posted questions or comments on the target's Facebook page, then *Sierra Pacific* might be a suitable analogy. The comparison to other "open-ended" questions is similarly problematic in that it involves asking a question that will elicit information from the target that would not otherwise be provided. Context is also important—asking any question "during litigation" (e.g., during a meeting, deposition, or negotiation) is implicitly about the litigation and is generally likely to elicit information particularly relevant to the litigation. Social media websites, however, are general forums, where individuals provide information on whatever topic they desire and the nature of the information provided is either unaffected by the lawyer's access, or is *less* likely to be about the subject of the litigation because of the lawyer's access.

In the second case referenced by the San Diego Committee, *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, a lawyer sent a private investigator into the opposing party's showroom to question and surreptitiously record their employees talk about their sales volumes and sales practices.[96] The court determined that the lawyer violated the ethical rule prohibiting ex parte communication with represented parties, even though the investigator did not question the employees directly about the litigation, because the questioning related to sales information which may have been relevant to the issue of damages.[97] The Committee considers the lawyer's conduct in this case to be essentially the same as a lawyer attempting to collect information relevant to the litigation by friending the opposing party and condemns both as ethically impermissible.[98] To bolster the point that the lawyer or her agent need not ask

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93 *Id.*

94 *Sierra Pacific Indus.*, 759 F. Supp. 2d at 1208.

95 San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

96 Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 695 (8th Cir. 2003).

97 *See id.* at 699.

98 *See* San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

directly about the litigation for the communication to be "about the subject of the representation," the Committee argues that a defense lawyer asking a plaintiff generally about recent activities during a deposition, in order to obtain evidence relevant to whether that plaintiff failed to mitigate damages, is clearly asking about "the subject of the representation."[99] Concluding that such questioning is "qualitatively no different from an open-ended inquiry to a represented party in cyberspace seeking information about the matter," the Committee determines that the former conduct is appropriate, whereas the lawyer's conduct in *Midwest Motor Sports* and in the Facebook scenario is not because it is outside the presence of opposing counsel and discovery procedures do not sanction it.[100] These comparisons fail for the same reasons that the *Sierra Pacific* analogy fails: (1) both *Midwest Motor Sports* and the hypothetical deposition involve lawyers asking direct questions to obtain information that would not otherwise have been provided—the Facebook scenario does not involve asking this type of question; and (2) even general deposition questions (interactions that would not occur but for the litigation) are implicitly about the subject of the litigation, there is no such implicit connection in a Facebook friend request.[101] Further, the employees in *Midwest Motor Sports* did not consent to being recorded and could not reasonably have expected such conduct by the lawyer.[102] In contrast, a target granting the friend request of a lawyer (or stranger) gives consent and has full knowledge that the lawyer will be able to view and record all of the information on their Facebook page.[103]

These analogies also reveal a worrisome lack of familiarity with social media. Some bar committees erroneously assume that requests for access via social media websites can be simply translated into their "real world" equivalents by imagining the requests as verbal communications between individuals (i.e., the lawyer and the research target).[104] In attempting to force social media interactions into preexisting categories of communication, bar committees fail to consider that social media can provide entirely novel and unique modes of sharing information that do not lend themselves easily to "real world" translations.[105] To begin with, social media users generate information with the primary purpose of sharing this information in a non-specific way with groups, not individu-

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99 *Id.*

100 *Id.*

101 *See id.*

102 *See Midwest Motor Sports*, 347 F.3d at 695.

103 *See* San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

104 *See id.*

105 *See id.*

als.[106] This is unlike any scenario involving "real world" oral or written communications, which generally require the speaker or writer to consciously direct his words to an individual or a selected group of individuals.[107] Although social media users may restrict access to their websites to a certain group of individuals, this is not usually a choice users make with every post, comment, or tweet.[108] Instead, social media users essentially permit others to join their "group" (e.g., as a Facebook friend or a follower on Twitter), and then, in a completely separate act, choose to broadcast information to that group as a whole.[109]

Therefore, the lawyer is not engaging in an interactive, individualized, or dialogue-based communication with the target in seeking access to this information. Rather, the lawyer is requesting permission to join the membership-based public forum in which the target chooses to share information with a group of individuals. Consequently, this type of social media activity is not as much a verbal communication as it is more analogous to conduct such as signing up for a subscription-based newsletter or buying tickets for a speaking event. In these latter scenarios, the lawyer requests access to a limited forum in which the information at issue is promulgated regardless of the lawyer's action. If these activities are ethically permissible—and there is no reason to think they are not[110]—then the analogous social media activity should be similarly permissible.

Finally, to the extent such social media activities can be considered verbal in nature, they are akin to introductions and not general requests for information. Notification messages and access requests simply inform the research target that the lawyer is, or would like to be in, the target's social media space and be able to observe their conduct (e.g., posts, tweets, etc.).[111] In substance, this is no different from a lawyer introducing him or herself to a target and saying nothing further (which is clearly permissible) and is far from a general request for information.[112] This critical distinction arises, again, from the fact that targets produce and publish social media information on their own initiative regardless of the lawyer's access. In the real-world scenarios envisioned by bar committees, no matter how general the question, the target's reply

106 *See, e.g., How Sharing Works*, FACEBOOK, https://www.facebook.com/about/sharing (last visited Sept. 20, 2014); *Learn the Basics*, TWITTER, https://discover.twitter.com/learn-more (last visited Sept. 20, 2014); *Who Can See Your Posts*, GOOGLE+, https://support.google.com/plus/answer/1053543?hl=en (last visited Sept. 20, 2014).

107 *See* San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

108 *See, e.g., How Sharing Works*, *supra* note 106; *Who can See Your Posts*, *supra* note 106.

109 *Id.*

110 *See* San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

111 *Id.*

112 *Id.*

(i.e., the production of the information) is prompted by the lawyer's question.[113] By prohibiting these social media introductions, bar committees expand the ban on ex parte communications to cover all communications, not just those about the subject of the representation, which is clearly outside the scope of the rule.[114] Further, applying such an overbroad restriction to informal discovery of social media information is unreasonable and impractical considering the growing presence and importance of social media in everyday life.[115]

C. *Applying the Rules: What Are the Underlying Purposes of the Relevant Rules of Professional Conduct?*

The various bar opinions that conclude that informal discovery of non-public social media information violates the rules of professional conduct[116] are generally based on the bar committees' application of three particular rules: (1) the rule prohibiting communication with a represented party about the subject matter of the representation outside the presence of that party's counsel; (2) the rule prohibiting lawyers from stating or implying that they are disinterested in the subject matter to an unrepresented person; and (3) the rule prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[117] As discussed extensively in the preceding sections, these bar opinions erroneously limit their analyses of these rules to the definitional meaning of specific words within them, such as "communication" or "deception," by way of inapposite "real world" analogies.[118] As a result, the prevailing view that the rules of professional conduct limit informal discovery of social media information to that which is publicly available is unnecessarily and impracticably restrictive. A close examination of the underlying purposes of each of the three rules and careful consideration of whether the social media activities at issue offend these purposes reveal that, in fact, the existing rules of professional conduct allow for broad and extensive informal discovery of social media information, and prohibit only the use of explicit fraud and misrepresentation in seeking social media information (e.g., creating fake identities or profiles) and direct questioning of targets via social media.

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113 *See, e.g.*, Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11, at 3; San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

114 *See* San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

115 *See, e.g.*, *10 Years of Social Media Mania & The 2014 Statistics*, DUBAI CHRONICLE (March 20, 2014), http://www.dubaichronicle.com/2014/03/20/10-year-social-media-mania-2014-statistics/.

116 *See, e.g.*, Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11, at 3; San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

117 *See supra* Part II.A.

118 *See supra* Part II.A–B.

1. ABA Model Rule of Professional Conduct 4.2

Rule 4.2 of the ABA Model Rules of Professional Conduct[119] states as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[120]

Rule 4.2 serves three primary functions: (1) to protect represented persons from "overreaching by other lawyers who are participating in the matter;"[121] (2) to prevent other lawyers from interfering with and adversely affecting the lawyer-client relationship between represented persons and their chosen counsel;[122] and (3) to reduce the likelihood that represented persons "will disclose privileged or other information that might harm their interests."[123] Rule 4.2 "presumes generally" that represented persons are "not legally sophisticated and should not be put by an opposing lawyer in the position of making uninformed decisions or statements or inadvertent disclosures" that are harmful to their interests.[124] In short, the purpose of Rule 4.2 is "to prevent a skilled advocate from taking advantage of a non-lawyer."[125]

In examining Rule 4.2, courts generally have espoused these rationales.[126] For example, one New York federal court describes the policies behind the rule as preventing "unprincipled attorneys" from "exploiting the disparity in legal skills between attorney and lay people;" "circum-

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119 For purposes of this argument, this Article will analyze the rules of professional conduct as articulated in the ABA Model Rules of Professional Conduct. Although the bar opinions discussed in Part II and referred to in Part III apply the rules of professional conduct of their respective states, these rules are generally modeled on and are often identical to the ABA Model Rules. As of this writing, all fifty states, with the exception of California, the District of Columbia, and the U.S. Virgin Islands have adopted the ABA Model Rules of Professional Conduct in some form. *Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visted Aug. 22, 2014).

120 MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013).

121 *Id.* at cmt. 1.

122 *Id.*; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995).

123 ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 122; *see also*, MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 (2013).

124 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-443 (2006).

125 *Id.*

126 *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROF'L CONDUCT § 4.2 , at 406–407 (Bennett et al. eds., 7th ed. 2011); *see, e.g.*, Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990), Jenkins v. Wal-Mart Stores, Inc., 956 F. Supp. 695, 696 (W.D. La. 1997).

venting opposing counsel to obtain unwise statements from the adversary party;" and "driving a wedge between the opposing attorney and that attorney's client," in addition to protecting against the "inadvertent disclosure of privileged information."[127] Similarly, a Louisiana federal court explains that the "dual purposes behind Rule 4.2 are to prevent disclosure of attorney/client communications, and to protect the party from 'liability-creating' statements elicited by a skilled opposing attorney."[128]

Banning all communications between lawyers and represented persons is explicitly *not* the objective of Rule 4.2. The scope of Rule 4.2 is limited to communications related to the subject matter of the representation, and the rule therefore contemplates a matter that is "defined and specific, such that the communicating lawyer can be placed on notice of the subject of the representation."[129] Consequently, communications concerning matters outside this "defined and specific" representation are perfectly permissible.[130]

Considering these purposes, it is apparent that, under the prevailing view, the social media activities at issue do not run afoul of Rule 4.2. To be clear, the social media activities referred to include requesting permission to access the research target's social media website using the lawyer's real identity and profile (e.g., a Facebook friend request) and automated notifications to the research target that the social media website is being viewed (e.g., a Twitter notification), but do not include any further communications (e.g., posting questions or comments to the target). First, Rule 4.2 is largely focused on preventing lawyers from "eliciting" information from represented persons.[131] In the social media context, no information is being "elicited." Rather, the lawyer is merely asking to view information that the represented person chooses to post at her own initiative for her audience to view, regardless of the lawyer's ability to access this information. Such passive observation is not the type of conduct the rule is aimed at preventing; only active engagement with the represented person triggers the operation of Rule 4.2.[132]

Second, the request for access or automatic notification is the only "communication" being made by the lawyer in this scenario—but such general contacts can hardly be considered to be on the subject of a "de-

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127 *Polycast*, 129 F.R.D.at 625.

128 *Jenkins*, 956 F. Supp. at 696.

129 ABA Comm. on Prof'l Ethics & Responsibility, Formal Op. 95-396 (1995).

130 *See* MODEL RULES OF PROF'L CONDUCT R.4.2 cmt. 4 (2013); *see also* ABA Comm. on Prof'l Ethics & Responsibility, Formal Op. 95-396 (1995), ("[W]here the representation is general . . . the subject matter lacks sufficient specificity to trigger the operation of Rule 4.2.").

131 *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, *supra* note 126, at 406-407, 409.

132 *See id.* at 409.

fined and specific" representation.[133] This conclusion is supported by the ABA's own analysis of this portion of the rule:

> For example, suppose a lawyer represents Defendant on a charge involving crime A. Under Rule 4.2, another lawyer may not, pursuant to a representation, either as prosecutor or as counsel for a co-defendant involving crime A, communicate with Defendant about that crime without leave of Defendant's lawyer. However, if the communicating lawyer represents a client with respect to a separate and distinct crime B and wishes to contact Defendant regarding that crime, the representation by counsel in crime A does not bar communications about crime B. Similarly, the fact that Defendant had been indicted on crime A would not prevent the prosecutor from communicating with Defendant . . . regarding crime B.[134]

Surely if this type of dialogue, which inevitably will include basic questions about the represented person's background, is considered to be "concerning matters outside the subject of the representation," then the social media activities at issue must also be similarly permissible.

Third, in the social media context, there is no real risk that the lawyer's legal skills and qualifications will give him or her an advantage over the represented layperson. Because the lawyer is, at most, triggering an automatically generated request for access or notification message, the lawyer's skill as an advocate and legal expertise simply do not come into play.

Fourth, unlike in a "real-world" interaction (face-to-face or over the phone) or personalized e-mail exchanges, the represented person is no more likely to disclose information via their social media accounts due to the social media connection by the lawyer. If anything, the represented person is *less* likely to disclose information, because of the lawyer's ability to access their social media sites. In the "real-world" scenarios contemplated by the rule, there are concerns that being directly confronted with an opposing lawyer may lead to confusion and intimidation that would result in the inadvertent disclosure of information by the represented person—in other words, the represented person might disclose information that they would not otherwise have chosen to share but for the questions of the lawyer. In the unique context of social media, where the lawyer merely has access to the represented person's sites but takes no steps to further engage in communication with the represented person,

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133 *See* ABA Comm. on Prof'l Ethics & Responsibility, Formal Op. 95-396 (1995).
134 *Id.*

the only information disclosed is that which the represented person volunteers to share in this membership-based public forum—information that would have been shared regardless of the lawyer's ability to view it.[135]

Fifth, the social media activities at issue do not interfere with the represented person's relationship with their counsel. Social media users, including represented persons, decide what information to post and share on their websites and when to share it. A lawyer's request for access or notification message does not prompt the sharing of information, but rather simply informs the represented person that the lawyer wishes to view this information. Consequently, if in sharing information via social media, a represented person chooses to waive lawyer-client privilege, disregard advice of counsel, or make a statement without the benefit of their counsel's advice—that decision is made irrespective of the lawyer's social media activities. The lawyer's activities, therefore, cannot be considered a threat to the privilege or to the lawyer-client relationship. Further, once information is posted on the Internet, privilege is waived and the lawyer may properly obtain the information in any way outside of direct access (e.g., formal discovery, requesting a copy from a third party who already has access). Accordingly, the use of social media *by the represented person* is the real threat to the lawyer-client relationship and privilege, not use by opposing lawyers.

In sum, the purposes of Rule 4.2 are not offended by the lawyer's social media activities, because such activities do not seek to "elicit" information from a represented person, do not interfere with the lawyer-client relationship, and do not increase the likelihood that a represented person will disclose privileged or otherwise harmful information.[136] Such activities, therefore, fall within the realm of permissible ex parte communication that is not prohibited by Rule 4.2, as long as the lawyer

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135 The ABA concludes that the prohibition of Rule 4.2 still applies even where the impermissible communication is initiated by the represented person. *See* ABA Comm. on Prof'l Ethics & Responsibility, *supra* note 123. Further, several courts have held that lawyers violated Rule 4.2 where the represented person initiated contact with the lawyer and the lawyer mostly just "listened to and took notes on the [represented person's] statement." *See, e.g.*, *In re* Howes, 940 P.2d 159, 166 (N.M. 1997); People v. Green, 274 N.W.2d 448 (Mich. 1979); Suarez v. State, 481 So.2d 1201 (Fla. 1985). However, these cases are distinguishable from the social media contacts at issue because in each case, the lawyer engaged in a personal and direct conversation with the represented person. *See In re Howes*, 940 P.2d at 163; *Green*, 274 N.W.2d at 451; *Suarez*, 481 So.2d at 1205. Even if the lawyer did not "overreach" by asking numerous questions, the "influence of the prosecutor's presence is immeasurable." *Green*, 274 N.W.2d at 456. In the social media context, the lawyer has no "presence" with which to intimidate or otherwise manipulate the represented person—the lawyer is just one member of a broad audience. Further, by posting social media information, the represented person is not "initiating communication" directly with the lawyer but rather making statements to a group of persons that includes the lawyer.

136 *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013).

refrains from going beyond simple requests for access or notifications, and is not actively engaging in a direct and personalized dialogue with the represented person.[137]

2. ABA Model Rule of Professional Conduct 4.3

Rule 4.3 of the ABA Model Rules of Professional Conduct states in relevant part as follows:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer shall make reasonable efforts to correct the misunderstanding.[138]

The purpose of this portion of Rule 4.3 is fairly straightforward: to protect unrepresented persons from disclosing information that may be harmful to their interests because they have been misled by a lawyer, with an interest in a matter, to believe that the lawyer is disinterested in the matter.[139] This scenario is of particular concern because an unrepresented person, "particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law."[140] Further, the unrepresented person may believe that they can rely on the lawyer, as a neutral expert on the law, to provide them with legal advice and to protect their interests in the matter.

These concerns, however, are not implicated by the social media activities at issue here. First, the content of automatically generated requests for access and notification messages do not include any information specific to the lawyer, the unrepresented person, or the matter of particular interest to the lawyer. These requests and messages are uniformly produced by social media websites for all users who seek access to another user's site. There is no substantive interaction between the lawyer and the unrepresented person—the lawyer is not offering any information about him or herself to the unrepresented person. Consequently, in no way can the lawyer "state" or "imply" that he or she is disinterested in the matter; to "state" or "imply" requires the lawyer to make some sort of personalized statement.[141] In the social media context, the lawyer is not making a statement, but rather undertaking an action (seeking access to the unrepresented person's social media site).

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137 *Id.* at cmt. 4.
138 MODEL RULES OF PROF'L CONDUCT R. 4.3 (2013).
139 *Id.*
140 *Id.* at cmt. 1.
141 *See* MODEL RULES OF PROF'L CONDUCT R. 4.3 (2013).

This interpretation of Rule 4.3 is borne out by case law. For example, one Louisiana federal court recently held that investigators who failed to identify themselves as working for an attorney when interviewing putative class members did not violate Rule 4.3 because they did not state or imply that they were disinterested, made no misrepresentations, and "did not deliberately foster any impression" that they were on the interviewees side.[142] In contrast, an Illinois federal court concluded that plaintiffs' attorneys violated Rule 4.3 by sending questionnaires to unrepresented employees of defendant, where the cover letter accompanying the questionnaire not only failed to state that the questionnaire was prepared for and distributed on behalf of the attorneys, but also contained misleading information designed to give the impression that the questionnaire was "neutral and unbiased."[143] Specifically, the letter described the questionnaire as an "independent survey" (implying there was no underlying motive in obtaining this information); stated that the employees' names were provided by a government agency (implying that the agency participated in or at least endorsed the survey); and explained that the questions were focused on two specific topics in order "to keep questions to an absolute minimum" (covering up the fact that these topics were the focus of the litigation).[144] As these cases demonstrate, in order to violate Rule 4.3 the lawyer must affirmatively offer information to the unrepresented person that causes them to believe that he or she is disinterested in the matter. The social media activities at issue pose no risk of this.

Second, as discussed extensively in the preceding section, the lawyer is not prompting the unrepresented person to share any information at all, let alone information specific to the matter or against the interests of the unrepresented person in that matter. Instead, the lawyer is simply seeking to view information the unrepresented person decides to post on whatever topic they choose—information that the unrepresented person would share regardless of the lawyer's access. Consequently, there is no need to fear that such social media activities could cause unrepresented people to disclose information harmful to their interests.

Third, similar to Rule 4.2, Rule 4.3 is motivated in part by a concern that a skilled attorney will take advantage of an unrepresented layperson. Again, because the sole "communication" between the lawyer and the unrepresented person is an automatically generated request for access or notification message, there is no danger that the lawyer's legal skills and qualifications will give the lawyer an advantage—practically or psychologically—over the unrepresented layperson. The lawyer's legal exper-

142 *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182 "K" (2), 2008 WL 2066999, *6 (E.D. La. May 14, 2008) (internal quotation marks omitted).

143 *In re* Air Crash Disaster, 909 F. Supp. 1116, 1123 (N.D. Ill. 1995).

144 *Id.*

tise is immaterial and in no way influences the unrepresented person's decisions about what information to share and when to share it.

Fourth, since the lawyer is not communicating with the unrepresented person beyond the initial request or notification, it is impossible for the unrepresented person to believe that the lawyer is providing him with legal advice or advising him of his interests.

Consequently, lawyers seeking informal discovery of social media information do not violate Rule 4.3 as long as they limit their social media activities to initial requests for access or notification messages and take no affirmative action to mislead the unrepresented person into believing that they have no interest in the particular matter. Such activities honor the purposes of Rule 4.3 in that they do not "state" or "imply" that the lawyer is disinterested in the particular matter; do not instigate the sharing of information by the unrepresented person (contrary to their interests or otherwise); do not provide any opportunity for the lawyer to use his legal expertise to gain an advantage over the unrepresented person; and create no risk that the unrepresented person will mistakenly believe the lawyer is advising her of or otherwise protecting her interests in the matter.[145]

3. ABA Model Rule of Professional Conduct 8.4

Rule 8.4 of the ABA Model Rules of Professional Conduct states in relevant part: "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[146] To a certain extent, the purpose of this rule is self-evident—to prevent lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 1.0(d) defines "fraud" as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[147] The Model Rules, however, do not provide specific definitions for "dishonesty," "deceit," or "misrepresentation," and authorities disagree about the distinctions between these terms and whether any or all of these terms require intent.[148] For example, one state's highest court has determined that fraud and deceit require "a false representation to another, with the intent that the other act upon the false representation to his or her damage" and that dishonesty involves "conduct indicating a disposition to lie, cheat or defraud," but that misrepresentation "need not be driven by an improper

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145 *See* MODEL RULES OF PROF'L CONDUCT R. 4.3 (2013).

146 MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013).

147 MODEL RULES OF PROF'L CONDUCT R. 1.0(d) (2013); *see also* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR. ASS'N, *supra* note 126, § 8.4(c), at 613.

148 *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, *supra* note 126, § 8.4(c), at 613–14.

motive. . . . [nor] does it require an intent to deceive or commit fraud."[149] In contrast, another court has concluded that "[dishonesty] includes conduct evincing a lack of honesty, probity, or integrity in principle," but does not necessarily involve conduct legally characterized as fraud, deceit, or misrepresentation.[150] At minimum, however, it appears that courts finding a violation of Rule 8.4(c) generally require some sort of culpable mental state, whether intent, purpose, or recklessness.[151]

Regardless of whether there is a culpable mental state requirement for Rule 8.4(c) violations, social media activities where the lawyer uses her true identity and profile to connect with a research target do not violate this rule. First, if the lawyer is able to gain access to the target's social media information using the lawyer's identity, there is no need (and no intent) to engage in affirmative dishonesty, deceit, fraud, or misrepresentation. Second, provided the lawyer takes no steps to hide her interest in the particular matter and connection to the client, failing to explicitly disclose this information when sending an automated request for access or notification message similarly does not constitute dishonesty, deceit, fraud, or misrepresentation. This point is most directly supported by the Philadelphia and New York City bar opinions. The former explicitly holds that although seeking access to social media information through a third party is a violation of Rule 8.4(c), the lawyer could seek such access herself, and that "would not be deceptive and would of course be permissible."[152] Further support of this interpretation is established by the fact that all but one of the remaining bar opinions do not even invoke Rule 8.4(c) as a justification for their constraints on social media usage, indicating that they consider this rule inapplicable in this scenario.[153] The San Diego Bar opinion alone concludes that failure to disclose the lawyer's interest in the matter constitutes a violation of Rule 8.4(c) because the "only way to gain access [to the target's social media information is] . . . for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the

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[149] *In re* Obert, 89 P.3d 1173, 1177–78 (Or. 2004) (internal quotation marks omitted). Several Oregon Supreme Court cases, including *In re Obert*, further note that misrepresentation can be "simply an omission of a fact that is knowing, false, and material in the sense that, had it been disclosed, the omitted fact would or could have influenced significantly the decision-making process." *Id.* at 1178, *see also In re* Eadie, 36 P.3d 468, 476, 333 Or. 42, 53 (Or. 2001); *In re* Gatti, 8 P.3d 966, 973, 330 Or. 517, 527–28 (Or. 2000). As far as can be determined, no other state embraces such a stringent standard for this rule—holding lawyers accountable for omissions of material fact absent a duty (e.g., to a client) or any intention to mislead.

[150] *In re* Scanio, 919 A.2d 1137, 1143 (D.C. 2007) (internal quotation marks omitted).

[151] *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, *supra* note 126, § 8.4(c), at 614 (collecting cases).

[152] Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11.

[153] *Compare* N.Y.C. Bar Ass'n, *supra* note 23, *and* Phila. Bar Ass'n Prof'l Guidance Comm., *supra* note 11, *with* San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

recipient."[154] Critically, however, this conclusion fails to take into account the fact that social media information is information that is posted to the Internet. Consequently, the attorney has numerous ways to access this information, beyond seeking direct access (e.g., "friending" someone already connected to the target and asking them to provide a copy of all posts). Even more importantly, the target knows (or should know) that any information posted could conceivably be re-posted by others, end up anywhere on the Internet, and ultimately be seen by anyone. It is therefore simply inaccurate to paint basic social media activities as masterful deceptions employed to gain access to secret information.

An ABA opinion examining Rule 8.4(c) in an entirely different context lends further support to the contention that failure to disclose interest in a particular matter when engaging in these basic social media activities does not constitute dishonesty, deceit, fraud, or misrepresentation.[155] In this opinion, the ABA considers the question of whether a lawyer who provides legal assistance to a pro se litigant and helps the litigant prepare written submissions violates Rule 8.4(c), if the lawyer does not disclose or ensure the disclosure of the nature and extent of the assistance provided.[156] The ABA ultimately determines that such conduct does not violate Rule 8.4(c), explaining:

> [W]e do not believe that nondisclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation . . . . Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c).[157]

Although the scenario at issue in this opinion is far removed from the world of social media, the ABA's analysis sheds light on how Rule 8.4(c) is applied more broadly.[158] First, whether a failure to disclose information is considered "dishonest" within the meaning of Rule 8.4(c) depends on whether the other person or entity involved would be "mis-

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154 San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

155 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007).

156 *Id.*

157 *Id.*

158 *Id.*

led" by the failure to disclose.[159] Second, and most critically, a failure to disclose alone is not enough to constitute a Rule 8.4(c) violation—an "affirmative statement" that misleads the other party into believing something that is not true is also required.[160] In the social media context, the lawyer's failure to disclose the lawyer's interest in no way misleads the research target. The request for access or notification message from the lawyer contains the exact same information as those sent by any other social media user, and the target has no less reason to suspect the lawyer of having adverse interests than any other user. Further, these automatically generated messages contain no affirmative statements designed to lure the target into granting access or believing that the lawyer does *not* have adverse interests.

In sum, there is simply no way to construe the basic social media activities at issue here as "conduct involving dishonesty, fraud, deceit or misrepresentation."[161] Where the lawyer seeking social media information uses his or her true identity and real social media profiles in requests for access and notification messages and takes no steps to hide his or her interests in a particular matter, there is no Rule 8.4(c) violation.[162]

CONCLUSION

Contrary to the prevailing view according to state and local bars and practitioners, a close examination of the most relevant rules of professional conduct suggests that informal discovery of social media information is broadly permissible, limited only by prohibitions on outright fraud and deception. As long as lawyers refrain from contact beyond the initial requests for access and notification messages and rely on only their true identities and real social media profiles, it appears that informal discovery of social media information is well within the bounds of these ethical rules.

Despite the strength of this argument, however, in light of the fairly restrictive opinions issued by state and local bars thus far, practicing lawyers have taken a conservative approach to this type of informal discovery rather than risk the violation of ethical rules. Such caution is particularly understandable and advisable, considering that the few existing opinions do not provide consistent rulings and there is a serious lack of clarity regarding the limits of permissible conduct in this area. The unfortunate result of this scant and confusing guidance has been a severe chilling effect on the use of this critical resource by lawyers—an

159 *Id.*

160 *Id.*

161 *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013).

162 *Id.*

outcome that is increasingly impracticable as the prevalence and importance of social media in our society and culture continues to grow.

We, therefore, urge the ABA, state bars, and other committees to undertake a careful and informed study of the nature and functionality of social media as a new and distinct method of producing and sharing information and, further, to clarify that the informal discovery of social media is broadly permissible under the existing rules of professional conduct. With fuller knowledge and understanding of social media, the ABA and state bars will be better able to balance the prolificacy, pervasiveness, and usefulness of this type of information against the purposes and protections established by the rules of professional conduct. This will allow them to provide instructive guidance that can reverse the chilling effect the handful of existing opinions has created. Further, by explicitly addressing the complex nature of social media information and expressly permitting broad informal discovery of this information, such guidance would provide much-needed clarity to lawyers now and in the future, as social media platforms and applications continue to rapidly evolve and grow.

The Ethics of Working with the I.P., P.I.

By Brian S. Faughnan

Long ago, Francis Bacon wrote "knowledge is power." Albert Einstein much more recently said that "information is not knowledge." Yet, transitive properties of equality and inequality notwithstanding, I find it difficult to imagine that either of those two great thinkers in history would argue my conclusion that, in today's world, information is power. Information can be a potent weapon for lawyers generally, litigators particularly, and lawyers handling intellectual property matters especially. Not surprisingly, some people will go to great lengths to try to shield information they do not want others to access, and other people will go to great lengths to try to acquire information others have shielded. Intellectual property lawyers (and often their clients as well) are often both kinds of people.

Such lawyers are often engaged in the art of investigation. The ability of lawyers to seek out and acquire information, or to shield and protect it for that matter, is not just constrained by what is illegal, but also by the rules of ethics that govern our profession. Given that those rules place such importance upon honesty, trustworthiness, and candor, there lurks an obvious, but highly important, question for *Landslide*® magazine readers: Do the ethics rules governing lawyers leave any room for lawyers to be involved in the use of deceptive investigative tactics, including certain types of pretexting activity?

Before plowing forward, it seems advisable to ensure that my reference to "pretexting" is clear. After all, it was but a few years ago that the high profile HP scandal introduced the term "pretexting" to many who may have never heard of it before. While "pretexting" is often carelessly used to mean only certain types of inquiries, like the pretexting for telephone records at the heart of the HP scandal (and that has been a federal crime since Congress passed the Telephone Records and Privacy Protection Act of 2006[1] in direct response to that scandal), the term actually encompasses a much broader array of activities.

"Pretexting" can correctly be used to describe any type of activity in which a person undertakes to gather information by putting forth an outward appearance as to his or her intentions or identity that is false. Some such activities are expressly made unlawful by statute based on the information targeted, like pretexting for phone records is now under federal law and like pretexting for financial records has been since the passage of Gramm-Leach-Bliley in 1999. Yet, there are an infinite number of other deceptive actions that might be employed as an investigative tactic that are not obviously illegal. For example, something as seemingly innocuous as a lawyer visiting her client's competitor's storefront to purchase a product for the purpose of confirming her client's suspicions about infringing activity before filing suit is fairly classified as pretexting activity if the lawyer does not let the competitor know who she is and why she is there.

Not surprisingly, there are examples of lawyers, or others at their behest, using deceptive tactics to further ends that many would agree justify such means. Otherwise legal conduct properly categorized as pretexting historically has been particularly effective at rooting out racial and other forms of insidious discrimination through the use of "testers"—people sent to pretend, for example, to be potential renters or consumers in order to determine whether a person or entity is engaged in discriminatory practices.[2] If these ends justify the means, a number of questions may flow more or less naturally, including shouldn't lawyer deception in the name of protecting intellectual property rights also be deemed acceptable conduct? Yet, at some point, every reader will begin to notice the slipperiness of the slope. After all, wouldn't being able to trick a wrongdoer into letting his guard down and revealing information he might otherwise try to shield be a useful thing for almost any lawyer, pursuing almost any type of case, to have in his arsenal? In the face of such questions, it is an ideal time to discuss the ethical restrictions that matter for lawyers wrestling with whether they can participate in an investigation involving deceptive tactics such as pretexting.

Using the ABA Model Rules as our guide (for the convenience of not getting bogged down in a discussion of state-based variations on the Rules, if for no other reason), six ethics rules are implicated, and potentially transgressed, when a lawyer either engages in deceptive conduct in connection with undertaking an investigation or oversees the investigative efforts of nonlawyers using deceptive conduct. For better compartmentalization, I have grouped those ethics rules into two buckets: (1) those relating to the "how" of the investigation, and (2) those relating to the "who" of the investigation.

There are three rules in our "how" bucket: Model Rules 4.1(a), 4.4(a), and 8.4(c). Rule 4.1(a) prohibits a lawyer "[i]n the course of representing a client" from "knowingly mak[ing] a false statement of material fact or law to a third person." Rule 8.4(c) goes even further by declaring it to be unethical for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Notably, this ethical prohibition is not limited to circumstances when a lawyer is representing a client, does not explicitly impose any requirement of knowledge on the lawyer's part, and does not limit its restriction to "material" statements. Rule 4.4(a) adds into the mix that a lawyer representing a client "shall not . . . use methods of obtaining evidence that violate the legal rights of [a third] person."

Taken together, these three rules (if not Rule 8.4(c) alone) would appear to pose an insurmountable set of ethical obstacles to any attorney personally undertaking an investigation involving deception of any sort. Of course, lawyers are well trained to find ways around problems. So, we might say, since those rules only place shackles upon lawyers (and since we didn't want to do anything that would make us an important fact witness in our client's case anyway), we will simply hire a private detective—Magnum I.P., P.I.—to do the investigation, and let that detective proceed as deceptively as he decides he needs to be.

As we shift our focus to whether having a third party handle the investigative duties obviates the need to be concerned with the rules in our "how" bucket, a discussion of the first of the rules in our "who" bucket is in order.

Model Rule 5.3 addresses the ethical obligations of lawyers supervising, or having control over, the conduct of others who are not themselves lawyers, but who have been "employed or retained by or associated with" the lawyer. This language is broad enough to apply even to Mr. Magnum. Depending on the lawyer's own roles and responsibilities, Rule 5.3 imposes several levels of more or less stringent ethical requirements flowing from Mr. Magnum's activities. For partners in a law firm, or any other lawyer who "possesses comparable managerial authority," Rule 5.3(a) requires such lawyers to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that [Mr. Magnum's] conduct is compatible with the professional obligations of the lawyer." As to a lawyer "having direct supervisory authority over" Mr. Magnum, Rule 5.3(b) mandates the lawyer "shall make reasonable efforts to ensure that [Mr. Magnum's] conduct is compatible with the professional obligations of the lawyer." Finally, Rule 5.3(c) imposes direct responsibility for Mr. Magnum's conduct that would be an ethical violation "if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer [is someone who would fit under Rule 5.3(a) or (b)] and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." The aggregate effect of these requirements should be obvious: Our lawyer still must be concerned with the limitations imposed by Rules 4.1(a), 4.4(a), and 8.4(c), even when she is "merely" involved in the supervision or control of an investigation actually being performed by Mr. Magnum.

There are two other important ethics rules in the "who" bucket about which a lawyer contemplating a pretexting investigation should be aware, and they will likely get lonely if we do not at least make reference to them now. Model Rule 4.2 restricts a lawyer's ability to communicate about a matter with a person known by the lawyer to be represented by another lawyer. The rule requires that if a lawyer wishing to engage in communication with a person "about the subject of the representation" knows that the person is represented by another lawyer "in the matter," then the lawyer may do so only with "the consent of the other lawyer" or when "authorized to do so by law or a court order." Model Rule 4.3 is the yang to Model Rule 4.2's yin. If the person with whom the lawyer wishes to communicate is not represented by counsel, if the lawyer does not know of that representation, or if the communication would not be about the subject of that representation, then the lawyer must adhere to Rule 4.3. That rule prohibits the lawyer "dealing on behalf of a client" from "stat[ing] or imply[ing] that the lawyer is disinterested," and prohibits the lawyer from giving any legal advice ("other than the advice to secure counsel") to the unrepresented person if the lawyer "reasonably should know" that the interests of that person conflict with, "or have a reasonable possibility of" conflicting with, the client's interests. We will now set any further discussion of Rule 4.2 and Rule 4.3 aside for a bit until the subject arises more naturally in our discussion.

If all you knew about the law was the scope of the ethical prohibitions laid out above, then you likely would conclude that lawyers simply cannot condone the use of deceptive tactics in the pursuit of investigations. . . ever. But you know better. Indeed, as observed earlier, certain historical benefits have been achieved through the use of testers in circumstances where lawyers obviously were involved in and aware of the activities. So do those ethical provisions really present any obstacle at all to lawyer involvement in deception when it comes to investigations? The answer is that they certainly do present an obstacle, but how significant of an obstacle is both subject to debate and, as a consequence, far too subjective for intellectual property lawyers to readily draw firm ethical conclusions.

While there is only a smattering of reported cases addressing questions of deceptive behavior by lawyers in connection with intellectual property investigations (and, in fact, there is by no means a wealth of reported cases on the topic outside of the realm of intellectual property), among those courts that have wrestled with the issue, more often than not courts have blessed, or at least not thrown a flag regarding, lawyer involvement in the use of deceptive investigation tactics.

In 1999, the Southern District of New York saw no ethical problem in a lawyer's involvement where an investigator pretended to be a consumer interested in purchasing products and spoke with sales clerks.[3] In *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, during a lull following years of contentious litigation, Gidatex believed that Campaniello was engaged in a "palming off" scheme in which customers were lured into the store using Gidatex's Saporiti Italia trademark and then sold goods that were deceptively represented to be Saporiti Italia. Gidatex's lawyers tasked investigators with persons pretending to be consumers, interacting with Campaniello sales clerks, and secretly recording the communications.

In justifying what would on its face certainly seem to qualify as "deceptive" conduct, the court explained that the enforcement of trademark laws was an important public policy objective and that pretexting can be effective at uncovering anticompetitive activity that might otherwise go undetected. The court also stressed that such conduct was not unethical because the investigators did not "trick [the sales clerks] into making statements they otherwise would not have made."[4] Rather, the court concluded that all that was captured on tape was Campaniello's normal business practices.

In a much more famous intellectual property dispute, the U.S. District Court for the District of New Jersey similarly concluded that there was nothing wrong with a lawyer's involvement in an investigation that used deception to uncover infringing sales activity in violation of a consent order.[5] In *Apple Corps Ltd. v. International Collectors Society*, the plaintiff previously had obtained a consent order prohibiting the defendant from selling certain stamps bearing the image of John Lennon. Suspecting that the defendant was violating that order, at least one attorney, along with private investigators and others working for the plaintiff's counsel, posed as ordinary consumers and telephoned the defendant's sales representatives to see if the sales representatives would

sell the stamps in question. They did. Thereafter, in response to the defendant's motion for sanctions in light of "deceitful" conduct by the plaintiff's attorneys, the court concluded that Rule 8.4(c) "does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes."[6] The court went further in justifying its conclusions: "The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations."[7]

More recently, another New York federal court expressly relied upon both *Apple Corps* and *Gidatex* as persuasive authority in concluding that an undercover investigation involving deception was an accepted practice.[8] In *Cartier v. Symbolix, Inc.*, the famous jeweler suspected that an independent jeweler was adding diamonds to the bezels of less expensive Cartier watches and selling them as if they were more expensive Cartier models. Cartier's counsel hired an investigator to purchase one of the "faked" watches. With that proof in hand, Cartier then sought injunctive relief to stop the sales. The independent jeweler, Symbolix, sought to defend against Cartier's request for an injunction on the basis of Cartier's "unclean hands" in the undercover investigation, but the court echoed the sentiment expressed in *Gidatex* and *Apple Corps* that the "prevailing understanding in the legal profession" is that using an "undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violation by other means."[9]

In addition to cases like *Gidatex*, *Apple Corps*, and *Cartier* where courts expressly addressed such questions, a number of others reflect quite clearly that lawyers were involved with, or aware of, investigators who were acting under pretext in furtherance of obtaining evidence to prove intellectual property violations, but the courts simply said nothing about the issue at all.[10]

There is, however, at least one court that has not looked as favorably on lawyer involvement in pretextual investigations.[11] In *Midwest Motor Sports v. Arctic Cat Sales, Inc.*,[12] the only federal appellate court decision directly addressing this subject, the Eighth Circuit indicated clearly that it was bothered by the role of attorneys in a deceptive investigation which, in many respects, was quite similar to Gidatex's. One of Arctic Cat's former franchise dealers sued on a theory that Arctic Cat had wrongfully terminated its franchise. Arctic Cat's lawyer retained a former FBI agent to visit the former dealer's place of business. The former FBI agent, Mohr, posed as an interested snowmobile buyer in order to gather evidence helpful to defending the lawsuit against Arctic Cat, focusing on things like what products were being promoted in the showroom and what brands were selling best, and secretly recording his conversations about those topics. The court concluded that Arctic Cat's attorneys should be sanctioned for their involvement in the secret recording and that the audiotapes of those conversations should be excluded from evidence.

While that story (other than the outcome) should sound very familiar, there is an important difference in the facts in *Midwest Motor Sports*. Unlike the investigators in *Gidatex*, Mohr spoke not just with low-level sales employees but also with certain management-level employees. Such conduct implicates the two ethics rules in our "who" bucket that we earlier looked at only briefly: Rules 4.2 and 4.3. The communications with management-level employees matters to any Rule 4.2 analysis because under both the Model Rules and many state variations of it, management-level employees often are treated as being represented by the lawyer representing the organization. The court believed that the lawyer's involvement was unethical because Mohr's communications with certain employees was the type that would have violated Rule 4.2 if Mohr had been a lawyer. However, the outcome in *Arctic Cat* cannot be distinguished solely on that basis, as the Eighth Circuit also concluded that the lawyer's conduct ran afoul of Rule 8.4(c) because the duty imposed by that rule "to refrain from conduct that involves deceit or misrepresentation should preclude any attorney from participating in the type of surreptitious conduct that occurred here" and that "[s]uch tactics fall squarely within Model Rule 8.4(c)'s prohibition."[13]

While the case law may indicate that intellectual property lawyers have a good chance of convincing a court that a deceptive investigation was appropriate, disciplinary authorities may also take an interest, and at first blush, reconciling the use of deception in investigations with the language of the ethics rules themselves seems difficult. Nevertheless, at least two ethics opinions, despite finding no support for such a position in the text of the rules, have treated some deceptive investigative activities as ethical.

In 2007, the Alabama State Bar Office of General Counsel opined that "[d]uring pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public."[14] The portions of the Alabama opinion that are not obviously result oriented amount to a model of poor analysis. The opinion's treatment of Rule 8.4(c) was straightforward in its result-oriented approach—declaring that Rule 8.4(c) is not intended to apply to misrepresentations as to identity and purpose when the misrepresentations are used "to detect ongoing violations of the law where it would be difficult to discover those violations by any other means."[15] Beyond that aspect, the opinion ignores altogether the applicability of Rule 4.1, and attempts to brush aside Rule 4.2 and Rule 4.3 concerns by concluding, respectively, that one cannot be a "party" until a lawsuit has actually been filed, and that a lawyer acting as an investigator is not "acting in his capacity as a lawyer—'dealing on behalf of a client.'"[16] Both of those conclusions are, in a word, bizarre.[17]

Another ethics opinion issued in 2007 by another entity—the New York County Lawyers Association Committee on Professional Ethics—suffers not from the type of analytical flaws that pervade the Alabama opinion, but merely from

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the kind of general unhelpfulness that comes from any set of overly-stipulated conduct guidelines.[18] The New York County opinion concluded that it was "generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation," but provided a limited exception permitting such conduct "in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence."[19] That opinion specifically delineated the exceptional circumstances as when (1) the dissemblance is expressly authorized by law or the subject matter of the investigation is a violation of intellectual property rights or civil rights that the lawyer believes in good faith is or imminently will be occurring, and (2) the evidence sought by the investigation is not reasonably available through lawful means. Unfortunately, the committee did not stop there, but went on to muddy the waters by adding that "the lawyer's conduct and the investigator's conduct [must] not otherwise violate the [New York attorney ethics rules] or applicable law" and that "the dissemblance [must] not unlawfully or unethically violate the rights of third parties."[20]

Other, more recent, ethics opinions focusing on a specific type of pretexting activity—the making of a "friend" request on a social media platform for the purpose of gathering information that the user would otherwise only share with certain persons—raise further questions for intellectual property lawyers regarding the ethical propriety of deceptive conduct.

In 2009, the Professional Guidance Committee of the Philadelphia Bar Association opined that it would be a violation of Rule 8.4(c) for a lawyer to have a third party send a MySpace friend request to a witness without affirmatively disclosing to the recipient that the purpose for the friend request was to obtain and share information with the lawyer that could be used to impeach the witness's prior deposition testimony.[21] Just one year later, in 2010, the New York City Bar Association's Committee on Professional and Judicial Ethics offered similar guidance nixing the idea that a lawyer could personally, or through an agent, create a pseudonymous profile on Facebook for the purpose of attempting to "friend" an unrepresented adversary and, thereby, gain access to information that would otherwise be shielded from view.[22] As with the Philadelphia Bar, the New York City Bar opinion cited Rule 8.4's prohibition on deceptive or misleading conduct, but also explicitly referenced Rules 4.1 and 5.3(b).

Whether you find those two conclusions to be a bit Pollyanna-ish and troubling, or you find it troubling that other bodies charged with issuing ethics opinions appear to simply ignore the plain text of the rules governing their analysis to permit deceptive investigative activity, all lawyers should agree that the existence of a rule as overreaching as Rule 8.4(c) plays a large role in creating such troubling outcomes. After all, what sense does it even make to have a rule that we know for certain cannot be extended to its full, literal extent?

For example, assume you see me in the elevator and ask, "How are you?" I know that you likely really only want me to respond consistently with social convention and say, "I'm fine," even if the only honest answer would be for me to say, "I've had a horrible morning and am generally feeling just awful." But no one should ever seriously contend that by responding with "I'm fine," I have committed an ethics violation even though the text of Model Rule 8.4(c) flatly prohibits dishonesty by lawyers and does not tie its prohibition to the representation of a client. Or, if my first example seems unnecessarily convoluted, then think of a lawyer who is also a successful professional poker player or, even closer to home, think of how you have answered questions in the past from children, whether yours or not, regarding the existence of certain holiday gift givers.

The usual answer to such criticism regarding Rule 8.4(c)'s breadth is that, according to the Scope section of the Model Rules, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."[23] Yet, wouldn't it be better to fix the problem more directly? Some states have officially embraced the reality that lawyers can and actually do have involvement with surreptitious investigations that involve deceptive conduct, and have offered a more direct fix by adopting variations in the black letter of their versions of Rule 8.4, or through adoption of comments to that rule, that specifically exempt involvement in legitimate investigative activities from the prohibition on "dishonesty, fraud, deceit or misrepresentation."[24]

Among those approaches, Virginia's is perhaps the most intriguing. Virginia adopted a version of Rule 8.4(c) that adds the modifying clause, "which reflects adversely on the lawyer's fitness to practice law," to limit what types of dishonesty, fraud, deceit, or misrepresentation constitute an ethics violation.[25] Such a rule would appear to have the benefit of allowing lawyers engaged in investigations of intellectual property matters that involve some deceptive conduct to rest a bit easier in terms of being able to justify their conduct and reduce their potential disciplinary exposure, at least as long as it is agreed that dishonesty, deceit, or misrepresentations in that context would not reflect adversely on the lawyer's fitness to practice law. Such a rule better reconciles the plain (and presently extremely expansive) language of such a rule with the reality that a wide variety of conduct, whether it be bluffing in poker, telling children that a magical being descends down the chimney to bring them presents ("Yes, Virginia. Your Rule 8.4(c) specifically lets lawyers say there is a Santa Claus!"), or misrepresenting how you are feeling in an elevator, is dishonest in a technical, definitional sense but ought never be the fodder for a disciplinary complaint.

Of course, any rules-based fix that would focus only on Rule 8.4(c) would not go far enough. Squaring the practical reality of surreptitious investigations with the ethics rules involves a larger fix in the nature of a rule that would say something like: "Notwithstanding Rules 4.1(a), 4.3, 4.4(a), and [8.4], it shall not be professional misconduct for a lawyer in the course of representing a client to advise the client or others about, or to supervise personally or through others, lawful covert activity in the investigation of illegal or unlawful activities, provided that the lawyer's conduct otherwise complies with these rules."[26] Adoption of such a specific rules-based exception allowing lawyer involvement in surreptitious investigation activities offers advantages to both lawyers and to the integrity of the

ethics rules themselves. For lawyers, such a rule would allow for much greater certainty in evaluating potential conduct. As to the integrity of the rules themselves, the rule would treat this issue in a much more straightforward and realistic manner rather than leaving it to courts and others to attempt to fashion public policy-based exceptions to justify certain approaches considered to be acceptable law practice, plain language of the ethics rules notwithstanding.

In the meantime, for lawyers looking for some practical guidance over and above the obvious need to be familiar with the rules, ethics opinions, and case law of note in the jurisdiction in which you are licensed and (if different) of the jurisdiction where a contemplated investigation will occur, the above authorities can be synthesized in a relatively straightforward fashion: If your investigators go beyond employing deception simply as to who they are and why they are asking, and employ deception to cause someone to do or say something they otherwise ordinarily would not have said, then a lawyer can expect that a court or disciplinary counsel will be significantly more likely to find the lawyer's involvement to be problematic. ■

Endnotes

1. 18 U.S.C. § 1039 (2006).
2. *See, e.g.*, Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002).
3. Gidatex, S.r.L. v. Campaniello Imps., Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999).
4. *Id.* at 126.
5. Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456 (D.N.J. 1998).
6. *Id.* at 475.
7. *Id.*
8. Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354 (S.D.N.Y. 2005).
9. *Id.* at 362.
10. *See, e.g.*, Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966 (2d Cir. 1985); Phillip Morris USA Inc. v. Shalabi, 352 F. Supp. 2d 1067 (C.D. Cal. 2004); A.V. by Versace, Inc. v. Gianni Versace, S.p.A., Nos. 96 CIV. 9721PKLTHK, 98 CIV. 0123PKLTHK, 2002 WL 2012618 (S.D.N.Y. Sept. 3, 2002); Nikon, Inc. v. Ikon Corp., 803 F. Supp. 910 (S.D.N.Y. 1992), *aff'd* 987 F.2d 91 (2d Cir. 1993).
11. There are a number of cases outside of the intellectual property arena that should cause lawyers to be very cautious about assuming that they can safely be involved in deceptive conduct even if they believe the ends justify such means. *See, e.g.*, Allen v. Int'l Truck & Engine, No. 1:02-cv-0902-RLY-TAB, 2006 U.S. Dist. LEXIS 63720 (S.D. Ind. Sept. 6, 2006) ("[L]awyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not say or do"); *In re* Pautler, 47 P.3d 1175 (Colo. 2002) (involving prosecutor who impersonated a public defender to secure a murder suspect's surrender); *In re* Ositis, 40 P.3d 500 (Or. 2002) (imposing reprimand on attorney who employed investigator to pose as journalist to glean information from adversary); *In re* Gatti, 8 P.3d 966 (Or. 2000) (rejecting exceptions to permit deception prohibited by the ethics rules even for governmental lawyers or civil rights investigators); *but see In re* Hurley, No. 2007AP478-D (Wis. Feb. 11, 2009) (declining to discipline lawyer involved in deceptive conduct aimed at obtaining exculpatory evidence for a defendant facing child pornography charges).
12. 347 F.3d 693 (8th Cir. 2003).
13. *Id.* at 699–700.
14. Ala. State Bar Office of Gen. Counsel, Formal Op. 2007-05, at 1.
15. *Id.* at 5.
16. *Id.* at 4.
17. Federal courts, for example, have had no difficulty concluding that Model Rule 4.2 applies to communications occurring before a lawsuit was filed. *See, e.g.*, Penda Corp. v. STK, LLC, Nos. Civ.A. 03-5578, Civ.A. 03-6240, 2004 WL 1628907 (E.D. Pa. July 16, 2004) (citing United States v. Grass, 239 F. Supp. 2d 535, 540–41 (M.D. Pa. 2003)).
18. N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 737 (2007).
19. *Id.* at 1.
20. *Id.*
21. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02.
22. N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2.
23. MODEL RULES OF PROFESSIONAL CONDUCT Scope [14] (2010).
24. *See* FLA. RULES OF PROF'L CONDUCT R. 8.4(c); IOWA RULES OF PROF'L CONDUCT R. 8.4 cmt. [6]; OHIO RULES OF PROF'L CONDUCT R. 8.4 cmt. [2A]; OR. RULES OF PROF'L CONDUCT R. 8.4(b); VA. RULES OF PROF'L CONDUCT R. 8.4(c).
25. VA. RULES OF PROF'L CONDUCT R. 8.4(c).
26. DOUGLAS R. RICHMOND, BRIAN S. FAUGHNAN & MICHAEL L. MATULA, PROFESSIONAL RESPONSIBILITY IN LITIGATION 207 (2011).

ETHICAL IMPLICATIONS OF LAWYER PRETEXTING

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I. Introduction

A. Recent headlines have highlighted a number of instances in which lawyers (or others working at their direction such as legal assistants or private investigators) have been accused of unlawful "pretexting." *See, e.g.*, Kevin Paulsen, *First 'Pretexting' Charges Filed Under Law Passed After HP Spy Scandal*, WIRED.COM (Jan. 9, 2009), *available at* http://www.wired.com/threatlevel/2009/01/first-pretextin/; Joan C. Rogers, *Scandals Involving Investigators Ensnare Lawyers*, 22 LAW. MAN. PROF. CONDUCT 501 (2006). Social media sites such as Facebook also raise this issue when lawyers misrepresent their identity or purpose in visiting the site. Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALBANY L. REV. 113 (2009); Tom Mighell, *Avoiding a Grievance in 140 Characters or Less: Ethical Issues in Social Media and Online Activities*, 51 ADVOC. (TEXAS) 8 (2010).

B. Ethical rules have recognized that pretexting or "dissemblance" occurs when a lawyer engages in fraud or deceit or obtains information or evidence for use in litigation or internal investigations through false pretenses or deception. Pretexting by lawyers can take a variety of forms, including:

1. Misrepresenting one's true identity to telephone service providers in order to obtain telephone records for use in internal investigations;

2. Posing as a customer and seeking to purchase goods to support infringement claim; or

3. Instructing investigator to "friend" adverse witness on Facebook to see impeachment evidence.

C. Additional questions about lawyer pretexting may arise during pre-trial and trial proceedings.

1. Can lawyer use social media as tool to assist in jury selection?

2. Can lawyer monitor Internet postings by jurors during trial, seeking evidence of juror misconduct?

3. If lawyer discovers such postings, can lawyer use information on behalf of client or is there obligation to report juror misconduct to court?

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* The opinions expressed herein are those of Ms. Fenton alone and not necessarily those of Jones Day or its clients.

D. In thinking about such activities, it is important for lawyers to understand the larger set of ethical issues presented by pretexting. These issues include:

1. Under what circumstances, if any, are lawyers ethically permitted to engage in pretexting/dissemblance?

2. Under what circumstances is it ethically permissible for lawyers to supervise investigator who engages in pretexting?

3. Do such activities always constitute fraud, deceit or misrepresentation in violation of the rules of professional responsibility?

4. Are ethics rules different for government lawyers who may need to supervise pretexting as part of law enforcement activities?

E. This outline reviews the guidance currently available on lawyer pretexting and identifies associated open issues that require further clarification by courts and ethics bodies.

II. Relevance to Antitrust and Consumer Protection Attorneys

A. Many in-house and outside counsel employed by corporate law firms have given relatively little thought to the ethical issues of pretexting, thinking such practices involve "cloak and dagger" activities far removed from their day-to-day clients. Yet, as recent headlines have demonstrated, there are numerous circumstances in which such activities may arise in a corporate context, including:

1. Investigating alleged employment discrimination;

2. Wiretapping to investigate possible breach of contract;

3. Acquiring evidence of potentially infringing products;

4. Setting up fake web site as part of consumer protection "sting";

5. Seeking impeachment evidence to discredit trial witnesses;

6. Monitoring social media for jury selection; and

7. Monitoring post-trial use by juror of social media to obtain evidence to support new trial application.

B. Indeed, all lawyers may need to consider potentially resorting to such activities as part of their obligation under ABA Model Rule 1.1 to provide zealous and competent representation of their clients. Some commentators have suggested that there may be situations in which zealous representation of a client's interest may require resorting to some form of deception. Monroe H. Freedman, *The Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties,*

III. Ethical Rules Implicated by Pretexting

A. Courts and ethics opinions have found that numerous ethical rules can be implicated by pretexting activities. For example,

1. ABA Model Rule 4.1(a): In the course of representing a client, "a lawyer shall not knowingly. . . make a false statement of material fact or law to a third party."

2. ABA Model Rule 4.2: Lawyer shall not communicate "about the subject matter of a representation with a person who the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

3. ABA Model Rule 8.4(c): It is "professional misconduct" for a lawyer "to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

4. ABA Model Code DR 7-102(A)(5): "A lawyer shall not misrepresent his or her identity while engaged in the practice of law."

B. There are additional ethical considerations that are presented when the pretexting arises during pre-trial and trial proceedings.

1. ABA Model Rule 3.5, Impartiality And Decorum Of The Tribunal, provides that lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) Communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) Communicate with a juror or prospective juror after discharge of the jury if

(i) The communication is prohibited by law or court order

(ii) The juror has made known to the lawyer a desire not to communicate; or

(iii) The communication involves misrepresentation, coercion, duress or harassment; or

(d) Engage in conduct intended to disrupt a tribunal.

C. These rules apply whether the pretexting activities were undertaken directly by lawyer or by another (such as legal assistant or investigator) acting at lawyer's direction. The Rules of Professional Responsibility make clear that using the services of a third party cannot be a means of circumventing the lawyer's personal ethical obligations. *See, e.g.*,

1. ABA Model Rule 5.3: Lawyer is responsible for another person's violation through involvement, knowledge, or supervisory authority if lawyer orders, directs, or ratifies the conduct.

2. ABA Model Rule 8.4(a): Lawyer cannot circumvent ethical prohibitions "through acts of another."

IV. Judicial Decisions and Ethics Opinions Dealing with Pretexting

A. Notwithstanding the relatively short period of time that such issues have been considered, there already are a number of court decisions and ethics opinions that have addressed pretexting issues.

B. Court Decisions

1. *In re Crossan*, 880 N.E. 2d 352 (Mass. 2008) (disbarring two attorneys who conducted false employment interviews with judge's former law clerk in attempt to gain evidence of judicial bias).

2. *In re Paulter*, 47 P.3d 1175 (Colo. 2002) (upholding discipline against deputy district attorney who misrepresented his identity to criminal suspect).

3. *In re Ositis*, 40 P.3d 500 (Or. 2002) (whether or not lawyer actually directed private investigator to pose as journalist and interview party to potential legal dispute, lawyer played major role in scheme and thus bore responsibility for it directly as well as vicariously).

4. *In re Gatti*, 8 P.3d 966 (Or. 2000) (upholding discipline against lawyer who misrepresented his identity to insurance company).

5. *Allen v. International Truck and Engine*, 2006 U.S. Dist. LEXIS 63720 (S.D. Ind. 2006) (attorneys violated Model Rules by directing investigators to pose as employees and question employees about litigation with the company).

6. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (unethical for defense counsel to instruct investigator to pose as plaintiff's customer in order to elicit admissions regarding litigation).

7. *Gidatex S.r.L. v. Companiello Imports Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (lawyer for furniture manufacturer did not violate ex parte contact rule by sending undercover investigators posing as consumers to talk with former distributor's employees to verify whether distributor was infringing on manufacturer's trademark).

8. *Apple Corps Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456 (D.N.J. 1998) (to investigate possible IP infringement, lawyer could pose as customer of alleged infringer).

9. *In re Wood*, 526 N.W.2d 513 (Wis. 1995) (lawyer suing former client violated Rule 8.4(c) by hiring private investigator to obtain copy of client's insurance policy, knowing that only way investigator could do so was by misrepresenting himself to insurance company).

C. Ethics Opinions

1. San Diego County Bar Legal Ethics Op. 2011-2 (May 24, 2011), which found that a lawyer may not send "friend" request to opponent or potential witness with goal of getting inside information for client's matter.

   (a) The opinion considered a hypothetical in which plaintiff's counsel in wrongful discharge actions sent "friends" request to two high-ranking company employees whom his client had identified as being dissatisfied with their employer.

   (b) As "high-ranking employees," it was likely that individuals in question were part of represented corporate party for purposes of Cal. Rule of Prof. Conduct 2-100, which prohibits lawyers from communicating with represented party without consent of party's lawyer. Thus, the social media contact represented an:

      (i) Indirect ex parte communication, and

      (ii) The motivation for "friends" request clearly established its connection to subject matter of representation.

   (c) The opinion also found that "the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request."

2. New York County Ass'n Comm. on Professional Ethics Op. 737 (May 23, 2007) held that "dissemblance" by lawyers could be permitted under

(a) Either (i) the purpose of the investigation is to probe a violation of civil rights or intellectual property rights and the lawyer believes in good faith that the violation is taking place or is imminent, or (ii) the dissemblance is expressly authorized by law;

(b) The evidence sought is not reasonably and readily available through other lawful means;

(c) The conduct of the lawyer and the investigator does not otherwise violate the New York Code of Professional Responsibility or applicable law; and

(d) The dissemblance does not unlawfully or unethically violate the rights of third persons.

(e) In addition, Op. 737 cautioned:

(i) The investigator must be instructed not to elicit information protected by attorney-client privilege; and

(ii) "In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non-attorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available."

3. NYCBA Formal Op. 2010-2 found that lawyer may not attempt to gain access to social networking website under false pretenses, either directly or through agent.

4. NY State Bar Ass'n Opin. 843 (Sept. 10, 2010) approved use of public website information and concluded Rule 8.4 was not implicated because lawyer is not engaging in deception by accessing public portions of network. According to the opinion, this is no different than relying on print media or paid research services.

5. Ala. Op. 2007-05 found that during investigation of possible IP infringement a lawyer may pose as customer under the pretext of seeking services of suspected infringers on the same basis or in the same manner as a member of the general public.

6. Penn. Op. 2009-02 (March 2009) concluded that a lawyer would violate ethical rules by employing investigator to "friend" an adverse witness on Facebook for the collection of impeachment evidence.

7. The ABA expressly has declined to address issue. *See* ABA Formal Op. 01-422 (June 2001).

V. Do the Same Rules Apply to Government Attorneys?

A. There has been significant and ongoing debate as to whether the ethical prohibitions on pretexting should apply with the same force to government attorneys who must engage in or supervise such activities as part of their law enforcement roles.

1. One line of argument emphasizes the importance of ensuring that legitimate law enforcement efforts are not impeded by an unduly restrictive set of ethical concerns and concludes that government attorneys have a greater scope in this regard because of their investigative roles.

2. The opposing school of thought emphasizes that, as public-servants, government attorneys should be held to the highest ethical standards and serve as a model for the rest of the bar. Thus, despite the law enforcement justification, proponents of this approach would apply the same ethical standards to government attorneys.

B. Only a handful of jurisdictions have addressed this question in their ethical rules. The majority expressly permit covert action by government attorneys as part of law enforcement role.

1. *See, e.g.*, Oregon Rule 8.4(b) ("[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.");

2. Florida Rule 4-8.4(e) ("A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation; unless prohibited by law or rule . . . .").

C. Other jurisdictions have issued ethics opinions that address pretexting by government lawyers. *See, e.g.,*

1. D.C. Op. 323 (2004) (lawyers employed by government agencies who act in a non-representational official capacity in manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties);

2. Utah Ethics Op. 02-05 (2002) (government attorney's "lawful participation in a lawful government operation" does not violate Rule 8.4 if deceit is "required in the successful furtherance" of undercover activity);

3. Va. Legal Ethics Op. 1765 (2003) ("When an attorney employed by the federal government uses lawful methods such as the use of 'alias identities' and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore such conduct will not violate the prohibition in Rule 8.4(c).").

VI. How to Resolve Questions Regarding the Appropriateness of Pretexting

A. Only a handful of jurisdictions have attempted to address pretexting by a specific rule and, even in these cases, the rule often addresses only a limited category of activity. *See, e.g.*, Oregon Rule 8.4(b) ("It shall not be professional misconduct for a lawyer to advice clients or others about or to supervise lawful convert activity *in the investigation of violations of civil or criminal law or constitutional rights. . . .*") (emphasis added).

B. In those jurisdictions that do not address undercover investigations and similar activities in their ethics rules, lawyers must rely on public policy arguments embodies in cases refusing to find attorney misconduct in participating in "sting" investigations. *See, e.g.,*

1. *Apple Corps. Ltd. v. International Collectors Soc'y*, 15 Supp. 2d 456 (D.N.J. 1998);

2. *Gidatex S.r.L. v. Companiello Imports Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999);

3. *But see Sequa Corp. v. Lititech Inc.*, 807 F. Supp. 653 (D. Col. 1992) (lawyers in private practice may not use deception to investigate disciplinary violations).

VII. Potential Consequences of Pretexting Violations

A. In addition to possible disciplinary proceedings against the individual lawyer, there are other potential penalties and sanctions resulting from pretexting by lawyers.

B. Depending on the circumstances, penalties and sanctions may include:

1. Criminal and civil liability under

(a) Gramm-Leach-Bliley Act;

(b) Mail / wire fraud statutes;

(c) FTC Act;

(d) State statutes.

2. Waiver of attorney-client privilege (due to crime/fraud exception)

3. Exclusion of evidence in litigation

VIII. Other Considerations Before Using Pretexting in Corporate Investigations

A. Determine whether you are in a jurisdiction where pretexting or similar activities by a lawyer already have been reviewed by local authorities and approved or tolerated. Otherwise, you are potentially breaking new ground and hearing all the risks that entails.

B. In addition to ethics rules, review other statutes possibly affecting legal status of pretexting.

C. Ensure your client is prepared for potential press coverage and public relations fallout if pretexting activities become public.

D. To be safe, pretexting should only be used to obtain objective information available to the general public

IX. Additional Resources

A. Steven C. Bennett, *Ethics of "Pretexting" in a Cyber World*, 41 MCGEORGE L. REV. 271 (2010).

B. Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based v. Status-Based Ethical Analysis*, 32 SEATTLE U.L. REV. 123 (2008).

C. William H. Fortune, *Lawyers, Covert Activity, and Choice of Evils*, 32 J. LEGAL PROF. 99 (2008).

D. Kevin Bank, *Not Telling the Whole Truth: How Much Leeway Do Lawyers or Investigators Working with Them Have to Feign Identity?*, WASH. STATE BAR NEWS, June 2008, *available at* http://www.wsba.org/media/publications/barnews/jun08-bank.htm.

E. Gerald B. Lefcourt, *Fighting Fire with Tire: Private Attorneys Using the Same Investigative Techniques as Government Attorneys: The Ethical and Legal Considerations for Attorneys Conducting Investigations*, 36 HOFSTIA L. REV. 397 (2007).

F. Ray V. Hartwell, III, *Compliance and Ethics in Investigations: Getting it Right*, THE ANTITRUST SOURCE (Dec. 2006), *available at* http://www.abanet.org/antitrust/at-source/06/12/Dec06-Hartwell12=19f.pdf.

G. Robert L. Reibold, *Hidden Dangers of Using Private Investigators*, 17 S.C. LAW 18 (July 2005).

H. David B. Isbell and Lucantonia N. Salvi, *Ethical Responsibilities of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provision Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995).

When You Can Contact Others Who Are or Were Represented by Counsel: Part 1 | New York Legal Ethics Reporter | New York Legal Ethics

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Lawyers sometimes want to contact a person who is connected with an adverse party or formerly connected with an adverse party in a transaction or litigation. It may surprise you to learn that, while you generally cannot do that, you sometimes can. To avoid problems and complaints you need to understand the rules and the limits and spirit of the rules.

This article, which will be published in two parts, provides practical guidance on applicable rules and ethics opinions considering common situations that attorneys encounter. For the most part, it addresses only New York law; but reference in some instances will be made to differing ABA or state ethical rules and the law of other jurisdictions. Part I of the article explains the general "no contact" rule and the consequences of failure to adhere to it. Part II, to follow in another edition of **NYLER,** will explain the applicability *vel non* of the Rule to entities and their current or former employees and the nature of the discussions that may or may not be had.

What Are the Guiding Rules?

The starting point is Rule 4.2(a) of the New York Rules of Professional Conduct (NYRPC). It provides that "a lawyer shall not communicate about the subject of a representation with a party" who the lawyer "knows to be represented by another lawyer in the matter" unless the lawyer has the consent of the other lawyer or the contact is "authorized to do so by law." NYRPC Rule 4.2(a). The Rule is substantially similar to prior N.Y. Disciplinary Rule 7-104(A) NYSBA Comm. Prof. Eth., Op. 904 (2014).

The Rule applies to communications made in connection with both transactional and litigation matters. Indeed, the Rule may apply even before the matter occurs if the communication is made as to a potential matter and the lawyer knows that that the person he/she is seeking to speak to is represented in that matter by counsel. NYSBA Comm. Prof. Eth., Op. 735 (2001). *See, e.g., McHugh v. Fitzgerald,* 280 A.D.2d 771, 772 (NY App. Div. 3d Dept. 2001) ("commencement of the litigation is not the criteria for determining whether communication with an adverse party is in derogation of the cited rule"); *United States v. Jamail,* 707 F.2d 638, 646 (2d Cir. 1983) (the prohibition applies to criminal investigations prior the actual commencement of a proceeding). But, as discussed further below, bar opinions and case law sometimes differentiate between civil and criminal cases and give greater latitude to investigations of possible criminal conduct. NYSBA Comm. Prof. Eth., Op. 884 (2011). *See e.g., Gidatex v. Campaniella Imports Ltd.,* 82 F. Supp. 2d 119, 123 (S.D.N.Y. 1999).

The Rule also applies to all parties in a matter, not only those who are adverse to your client. NYRPC Rule 4.2(a). In other words, when you know another party has counsel in the matter,

absent consent or legal right, you cannot communicate with that other party, regardless of the type of matter involved or the role of that party in the matter. *Id.*

The Rule does not prohibit communications about matters other than "the subject matter" of the transaction or litigation at issue. *Id.* But, a lawyer is well-advised to avoid such communications, particularly a conversation, lest it later raise questions in the mind of a jury or judge as to what was really said. Further, as a practical matter, there would appear to be little need or reason for such a communication on other matters at that time.

Does It Matter That Rule Speaks of 'Parties' Rather Than 'Persons'?

Significantly, the New York rule speaks in terms of a "party." In contrast, the ABA Model Rule, and that of several other states (*e.g.*, New Jersey, Texas, District of Columbia, and others), provides that such communications may not be had with any "person" who is represented by counsel in the matter. Thus, on its face, the New York Rule sets forth a narrower prohibition than that of others. *Id.* As will be explained in Part II of this article, particularly when dealing with an organization or a witness, the New York Rule affords greater latitude than many other jurisdictions. *See infra* Part II. Differently, the other subpart of New York Rule 4.2 (also to be discussed in Part II) speaks in terms of "persons" not merely "parties." *Id.* In this regard, Professor Roy Simon explains that the choice of the word "party" was a purposeful and deliberate change in 2009 from the text originally suggested by those recommending that New York adopt the ABA Model Rules to replace the former Disciplinary Rules and Ethical Considerations. *Simon's Rules of Professional Conduct*, 1187 (2014). Prosecutors had expressed concern that a broad no-contact rule covering non-parties would or could impair their ability to prepare criminal cases. NYSBA Comm. Prof. Eth., Op. 884 (2011).

This distinction can be important. For example, ABA Formal Opinion 07-445 (2007) concluded that, in a civil context, putative class members are not "parties" for purposes of the no-contact rule, and do not become parties until a class including them has been certified. But one must be careful relying on this interpretation; some courts have determined the opposite. *See e.g.*, *Dondore v. NGK Metals Corp.,* 152 F. Supp. 2d 662, 665 (E.D. Pa. 2001); *see also, Gulf Oil Co. v. Bernard,* 452 U.S. 89, 104 (1981).

Apart from situations where special policy reasons may apply, New York courts and others have not always applied the distinction literally, particularly in non-criminal matters. For example, in NYSBA Opinion 607 (1990), the Committee gave the word "party" an "expansive definition" to apply to a potential party in a potential matter. Similarly, in NYSBA Opinion 735 (2001), the Committee concluded that the Rule could apply to an accountant represented by counsel even though not itself a party. Relying on the spirit of the Rule, the Opinion concluded that, regardless of its wording, the Rule applies to "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties" in the matter. *Id.*

As explained in NYSBA Opinion 884 (2011), which traces the history of the language, Rule 4.2 is given a more restrictive interpretation in criminal matters than civil matters. The Committee concluded that counsel for a defendant in a robbery case could contact a non-party witness even

though he knew the witness had an attorney, distinguishing the issue there from contacting a witness in civil cases. *Id.* In addition, the Committee reasoned that such a witness can always insist on including his/her counsel in the communication, even if the witness is contacted directly. *Id.* Further, the Committee explained, counsel for the witness can advise his/her client not to speak to the inquiring lawyer without concern that to do so would violate the prohibitions in New York Rules 3.4(a)(1) and (2) and 8.4(b) and (d) against suppressing evidence and assisting wrongdoing. *Id.*

Does It Matter If You Don't Make Contact Yourself?

Rule 4.2 is clear that it covers not only communications directly between a lawyer and another represented party, but also prohibits a lawyer from "caus[ing] another to communicate" in his/her place. NYRPC Rule 4.2(a). That part of the rule is meant to prevent the use of third persons, including investigators, to ferret out information from represented parties on a lawyer's behalf; and it is given a broad interpretation. *Id.* For example, in *United States v. Hammad,* 858 F.2d 834, 836 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1989), the Rule was found applicable to a supplier of the target of a Medicaid fraud investigation whom the prosecutor used to obtain an admission of wrongdoing from the target. The court concluded that the supplier was the "alter ego" of the prosecutor in that instance. *Id.*

Similar "alter ego" analysis would lead to the same conclusion as to other persons in a lawyer's firm, whether attorneys or other employees such as paralegals or staff persons. *See,* NYC Bar Assn. Comm. Prof. Jud. Eth., Formal Op. 1995-11 (1995) (lawyers are responsible for the acts of non-lawyers under their supervision). *See also,* former N.Y. DR 1-104(A); *In re* Bonanno, 617 NYS2d 584, 584 (3d Dept. 1994) (censure of attorney for insufficient supervision of legal assistant). This analysis is consistent with the prohibition in New York Rule 8.4(a) that "[a] lawyer or law firm shall not violate" any of the Rules or "do so through the acts of another." NYRPC Rule 4.2(a). New York Rule 5.3 also imposes a duty on lawyers to supervise those working for them, including non-lawyers. Thus, in simplest terms, lawyers are advised to honor the spirt of the Rule, and not look for loopholes or try to "lawyer" around it.

There are, however, some exceptions to the Rule. These exceptions are discussed below and will be further amplified in Part II.

What If the Person's Lawyer Doesn't Respond?

The Rule creates an exception if a party's counsel consents to a lawyer directly contacting the party. On the other hand, what does a lawyer do if counsel for a party simply ignores her request or otherwise fails to respond to it?

Early ethics opinions tied the lawyer's hands in this situation, concluding that contact is not possible in that instance unless there has been an affirmative indication of a termination of the attorney-client relationship between the silent lawyer and the person you want to contact. *See*

e.g., N.Y. Cty. Law. Assn., Op. 625 (1974); NYC Bar Assn. Comm. Prof. Jud. Eth., Informal Op. 827 (1965). More recently, NYSBA Opinion 663 (1994) took a more practical view, concluding that "[a]fter sending a series of letters [to counsel for the person], including ... one that warns of a consequence of a failure to respond, ... the lawyer justifiably can conclude that she does not 'know' that the [person to be contacted] is represented by counsel." In that instance, the lawyer may therefore proceed to contact that person directly. Nevertheless, the opinion cautions that, when contact is made, the lawyer must advise the person that, if indeed he/she is represented by counsel, he/she should refer the communication to that counsel. *Id.*

What If the Other Party Initiates Contact with You?

The Rule applies regardless of how the possible communication arises. It does not matter if the other party initiates it, requests it, consents to it or tells the lawyer he/she does not feel the need to have his lawyer included. As Comment 3 to the New York Rule provides, "[a] lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by the Rule."

More complex is when someone whom the lawyer does not know to be a party or who was formerly connected to a party contacts the lawyer unsolicited with an offer of information about the matter in which the lawyer is involved. NYSBA Opinion 700 (1997) cautions the lawyer to proceed carefully and conservatively in that situation, lest they unintentionally get information (such as privileged information or work product) to which they are not entitled. There, an attorney prosecuting an administrative proceeding received an unsolicited telephone call from a person who said he was former non-lawyer employee of the law firm representing the respondent and had important information that thought the lawyer should know. *Id.* The lawyer sought guidance regarding how he should proceed. *Id.* The Committee advised that, although the contact was unsolicited, the lawyer still had the duties articulated in the predecessor of Rule 4.2 and related rules, particularly not to seek or obtain confidential information where disclosure might breach obligations to the other side. *Id.* Therefore, the Committee agreed that it was appropriate and advisable to seek guidance from "the tribunal [in which the matter is pending] or other appropriate authority" (such as another court) before accepting and reviewing the proffered information; so that the informer's status and the nature of the information could first be effectively and properly determined. *Id.*

As Opinion 700 indicates and as will be discussed further in Part II of this article, the desire to protect against unwarranted disclosure and use of privileged and confidential information is at the heart of Rule 4.2. *Id.* That is consistent with the rules and the majority of case law that generally require a lawyer who has received privileged or confidential information that he/she should not have been sent to advise the other party involved and not use the information without consent. *See e.g.*, NYRPC Rule 4.2(b); Fed. R. Civ. P. 26(b)(5)(B).

But, some other opinions do not necessarily apply Rule 4.4 when the information is unsolicited and the disclosure does not appear to be the result of inadvertence. For example, ABA Formal Opinion 06-440 (2006) cautions that Rule 4.4(b) applies only to documents inadvertently sent to a lawyer. Thus, Opinion 06-440 concludes that a lawyer who has received materials or information

which were "not the result of the sender's inadvertence" is "not required to notify another party or that party's lawyer." *Id.* Rather, that Opinion concludes, consistent with NYSBA Opinion 700, what action the lawyer should take is "a matter of law beyond the scope" of ethics rules (indeed one of "substantive law, at least in the first instance") for a court. NYSBA Comm. Prof. Eth., Op. 700 (1997).

When Is Contact 'Authorized ... by the Law'?

The phrase "unless authorized ... by the law" in Rule 4.2 does not conceal a secret key or otherwise hidden exception. NYRPC Rule 4.2. Rather, it is intended to clear the way for contacts such as lawful service of process, taking of a deposition or requesting documents, and other communications sanctioned or ordered by the court. *Id.* It also allows, in criminal matters, undercover operations and other such investigations. *Id.*

Even with such matters, lawyers should use care to avoid an improper conversation if the person involved is known to be represented by counsel. For example, in NYSBA Opinion 894 (2011), the Committee cautioned that, while Rule 4.2(a) is not intended to prevent service of an eviction notice by a landlord, the person doing so (and particularly one who is not a professional process server) should not use the occasion to engage in conversation that would otherwise be barred by the Rule. That means not discussing anything of substance related to the legal matter involved beyond confirming that the person being served is the one intended to be served. *Id.*

An interesting recent opinion of the New York County Lawyers Association, Opinion 745 (2013), discussed further in Part II, noted that lawyers are increasingly using the "unless authorized by law" exception to seek court-ordered access to password protected social media of parties and others whom they wish to contact. *See infra* Part II.

Does Lawyer Have Duty to Inquire Whether Person Has Counsel?

Rule 4.2 prohibits contact when a lawyer "knows" that a person is represented by counsel. NYRPC Rule 4.2. It does not say "has reason to know;" and Rule 1.0(k) defines knowledge as "actual knowledge of the fact in question." NYRPC Rule 1.0(k). But, Rule 1.0(k) adds that "knowledge may be inferred from the circumstances." *Id.*; *see also,* NYRPC Rule 4.2 cmt. 8. Thus, as a general proposition, a lawyer does not have a duty to inquire as to whether a person to be contacted is represented by counsel; but the lawyer cannot "turn a blind eye" to that question. As explained in NYSBA Opinion 728 (2000), "in some circumstances, a lawyer must confirm that an individual is not represented by counsel in the particular matter before communicating directly with the individual." For example, if the person was known to have been represented previously, and it's reasonable to think that may still be the case, inquiry should be made. *Id.*

Other situations might exist where a lawyer knows that the person had counsel on a similar or even unrelated matter or is someone who generally deals with legal matters through or with

counsel. There, a lawyer has reason to believe the person may have counsel in the current instance. *See, e.g.*, NYSBA Comm. Prof. Eth., Op. 904 (2012) (possible civil action against person who was represented by counsel in criminal fraud investigation concerning the same situation.) More troublesome is what the lawyer must or can do if it becomes apparent *during* the conversation that the person is represented by counsel or may want to be. If that occurs, the lawyer should ask if the person wishes to continue to speak with her or would prefer to do that through her counsel.

Communicating with unrepresented persons poses a further set of issues. This is addressed in New York Rule 4.3 and the Comments to that Rule. Essentially, they require that the lawyer properly identify himself, and take care to ensure that the person does not incorrectly believe he is disinterested, or otherwise misunderstands or miscomprehends his role, and what he is asking. *Id.*; *see also,* N.Y. Cty. Law. Assn., Op. 708 (1995). The Rule also prohibits the lawyer from giving legal advice to an unrepresented person, although that too is subject to exceptions. [NYRPC Rule 4.3.] For example, the lawyer may have the responsibility in some instances, to advise the person to consider getting legal counsel. *See,* NYC Bar Assn. Comm. Prof. Jud. Eth., Op. 2009-2 (2009) for guidance in that regard. "[T]he general rationale" of the no-contact rules is that "[t]the legal system in its broadest sense functions best when persons in need of legal assistance or advice are represented by their own counsel." NYSBA Comm. Prof. Eth., Op. 728 (2000), quoting Ethical Consideration 7-18).

Therefore, a lawyer is well-advised to keep in mind not only the letter of the Rule but also its purpose and spirit whenever considering whether he can or should communicate with someone who is not represented by counsel. For example, in *In re Winiarsky,* 104 A.D.3d 1, 9-10 (N.Y. 1st Dept. 2012), the court censured counsel for obtaining affidavits from potential witnesses who contacted him and asked if they could give testimony without having to appear in court. The court there was troubled that the witnesses may not have understood that they didn't have to give testimony at all or that they could answer only some questions and not others *Id.* at 4. To better understand these rules and limitations, *see,* "Simon's Overview of Rule 4.3" in *Simon's Rules of Professional Conduct*, 1230 (2014).

What Are the Consequences If a Lawyer Violates the Rule?

Failure to adhere to the no-contact rule can have serious consequences for counsel, as well as for her client. Disciplinary authorities have full power to act in response as they deem warranted by the nature and extent of the violation of Rules of Professional Conduct. *See, e.g., In re Matthew B. Murray,* 2013 WL 5630414, No. 11-070-088405, at *1 (2013); *Winiarsky*, 104 A.D.3d at 9-10. In addition, courts may impose their own sanctions. *See,* NYSBA Comm. Prof. Eth., Op. 700 (1997); *Maldonado v. New Jersey,* 225 F.R.D. 120, 133 (D. N.J. 2004). Counsel and his/her law firm may also be disqualified from continuing in the matter. *See, e.g., Acacia Patent Acquisition, LLC v. Superior Ct.,* 2015 WL 851517, No. G050226, at *1 (Cal. Ct. App. 2/27/2015). Or short of that, the court may suppress evidence that might otherwise be admitted if properly obtained, or otherwise limit and restrict what may be said about it. *See, e.g., Fayemi v. Hambrecht & Quist Inc.*, 174 F.R.D. 319, 323-25 (S.D.N.Y. 1997); *U.S. v. Hammad,* 858 F.2d 834,

840 (2d Cir. 1988).

Also, as explained above, counsel may unwittingly have created her own attorney-client relationship with the person involved, with all the attendant duties and responsibilities that entails. Even without that, counsel may have assumed unwanted duties of non-disclosure.

Recognizing these consequences, an attorney should understand what the Rule expressly prohibits, as well as the purpose of the Rule. Depending on the circumstances, the reach of the rule may be unclear.

As noted, Part II of this article will address other aspects and application of the no-contact rule and some situations that lawyers often encounter. That discussion will attempt to provide further practical guidance on how lawyers can avoid running afoul of the Rule.

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2018 WL 828101

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

Kelly FORMAN, Respondent,

v.

Mark HENKIN, Appellant.

No. 1

Decided February 13, 2018

Synopsis

Background: Horseback rider, who fell from horse and allegedly suffered spinal and traumatic brain injuries, brought personal injury action against owner of horse. The Supreme Court, New York County, Lucy Billings, J., 2014 WL 1162201, granted owner's motion to compel discovery with respect to rider's private posts, including photographs, on social networking website. Rider appealed. The Supreme Court, Appellate Division, 134 A.D.3d 529, 22 N.Y.S.3d 178, affirmed as modified. Owner appealed.

Holdings: The Court of Appeals, DiFiore, Chief Judge, held that:

[1] pre-accident and post-accident photographs privately posted on rider's social networking website account were discoverable, and

[2] data revealing timing and number of characters in post-accident messages privately posted on rider's account was discoverable.

Reversed.

West Headnotes (25)

[1] **Appeal and Error**
Scope of Inquiry

A review of a Supreme Court, Appellate Division order by the Court of Appeals is limited to those parts of the order that have been appealed and that aggrieve the appealing party.

Cases that cite this headnote

[2] **Pretrial Procedure**
Relevancy and materiality

A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is material and necessary, i.e., relevant, regardless of whether discovery is sought from another party or a nonparty. N.Y. CPLR §§ 3101(a)(1), 3101(a)(4).

Cases that cite this headnote

[3] **Pretrial Procedure**
Discovering truth, narrowing issues, and eliminating surprise

Pretrial Procedure
Liberality in allowance of remedy

The statute governing the scope of discovery embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[4] **Pretrial Procedure**
Scope of Discovery

The right to disclosure under the statute governing the scope of discovery, although broad, is not unlimited. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[5] **Pretrial Procedure**
Work-product privilege

Privileged Communications and Confidentiality

Privileged Communications and Confidentiality

The rule governing the scope of discovery establishes three categories of protected materials, also supported by policy considerations: privileged matter, which is absolutely immune from discovery; attorney's work product, which is also absolutely immune; and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship. N.Y. CPLR §§ 3101(b), 3101(c), 3101(d)

Cases that cite this headnote

[6] **Pretrial Procedure**
Objections and protective orders

Privileged Communications and Confidentiality
Construction in general

Privileged Communications and Confidentiality
Presumptions and burden of proof

The burden of establishing a right to protection from disclosure under the privileged matter, attorney work product, and trial preparation materials provisions of the rule governing the scope of discovery is with the party asserting it; the protection claimed must be narrowly construed, and its application must be consistent with the purposes underlying the immunity. N.Y. CPLR §§ 3101(b), 3101(c), 3101(d).

Cases that cite this headnote

[7] **Pretrial Procedure**
Control by court in general

Pretrial Procedure
Scope of Discovery

When resolving a discovery dispute, competing interests must always be balanced, and the need for discovery must be weighed against any special burden to be borne by the opposing party. N.Y. CPLR §§ 3101, 3103(a).

Cases that cite this headnote

[8] **Pretrial Procedure**
Control by court in general

Pretrial Procedure
Scope of Discovery

When a court is called upon to resolve a discovery dispute, discovery requests must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure.

Cases that cite this headnote

[9] **Pretrial Procedure**
Control by court in general

While the courts have the authority to oversee disclosure during discovery, by design, the process often can be managed by the parties without judicial intervention.

Cases that cite this headnote

[10] **Attorney and Client**
Nature and term of office

Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process during discovery.

Cases that cite this headnote

[11] **Appeal and Error**
Depositions, affidavits, or discovery

Absent an error of law or an abuse of discretion, the Court of Appeals will not disturb a determination resolving a discovery dispute.

Cases that cite this headnote

[12] **Appeal and Error**
Power to Review

Appeal and Error
Abuse of discretion

The Appellate Division has the power to exercise independent discretion, that is, to substitute its discretion for that of the trial court, even when it concludes the trial court's order was merely improvident and not an abuse of discretion, and when it does so applying the proper legal principles, the Court of Appeals will review the resulting Appellate Division order under the deferential abuse of discretion standard.

Cases that cite this headnote

[13] **Pretrial Procedure**
Relevancy and materiality

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[14] **Pretrial Procedure**
Relevancy and materiality

The purpose of discovery is to determine if material relevant to a claim or defense exists; in many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[15] **Pretrial Procedure**
Documents, papers, and books in general

An account holder's privacy settings do not govern the scope of disclosure of materials posted on a social networking website. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[16] **Pretrial Procedure**
Documents, papers, and books in general

The commencement of a personal injury action does not render a party's entire social networking website account automatically discoverable. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[17] **Pretrial Procedure**
Scope of Discovery

Even under New York's broad disclosure paradigm, litigants are protected from unnecessarily onerous application of the discovery statutes.

Cases that cite this headnote

[18] **Pretrial Procedure**
Determination

A court addressing a dispute over the scope of discovery of materials on a social networking website should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the social networking website account. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[19] **Pretrial Procedure**
Determination

Pretrial Procedure
Order

A court addressing a dispute over the scope of discovery of materials on a social networking website should balance the potential utility of the information sought against any specific privacy or other concerns raised by the account holder, and the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[20] **Pretrial Procedure**
Determination

In resolving a discovery dispute over material on a social networking website in a personal injury case, it is appropriate for the court to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[21] **Pretrial Procedure**
Relevancy and materiality

Private materials may be subject to discovery if they are relevant. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[22] **Privileged Communications and Confidentiality**
Acts constituting waiver

When a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records, including the physician-patient privilege, are waived. N.Y. CPLR § 4504.

Cases that cite this headnote

[23] **Pretrial Procedure**
Relevancy and materiality

For purposes of disclosure during discovery, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[24] **Pretrial Procedure**
Photographs;X rays;sound recordings

Pre-accident photographs privately posted on horseback rider's social networking website account that she intended to introduce at trial and all privately posted post-accident photographs of rider that did not depict nudity or romantic encounters were discoverable, in personal injury action by rider, who fell from horse and allegedly suffered spinal and traumatic brain injuries, against owner of horse, even if only publicly-available photograph on account was not relevant, since rider had tendency to privately post photographs that were representative of her activities, and subject photographs were relevant to rider's assertions that she could no longer engage in pre-accident activities she had enjoyed and that she had become reclusive. N.Y. CPLR § 3101(a).

Cases that cite this headnote

[25] **Pretrial Procedure**
Relevancy and materiality

Data revealing timing and number of characters in post-accident messages privately posted on horseback rider's social networking website account was discoverable, in personal injury action against owner of horse by rider, who fell from horse and allegedly suffered spinal and traumatic brain injuries, since such data was relevant to rider's claim that she suffered cognitive injuries that caused her to have difficulty writing and using a computer, particularly her claim that she was painstakingly slow in crafting messages. N.Y. CPLR § 3101(a).

Cases that cite this headnote

Attorneys and Law Firms

Michael A. Bono, for appellant.

Kenneth J. Gorman, for respondent.

Defense Association of New York, Inc., amicus curiae.

Opinion

OPINION

DIFIORE, Chief Judge:

*1 In this personal injury action, we are asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook account.

Plaintiff alleges that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation. At her deposition, plaintiff stated that she previously had a Facebook account on which she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages. In that regard, plaintiff produced a document she wrote that contained misspelled words and faulty grammar in which she represented that she could no longer express herself the way she did before the accident. She contended, in particular, that a simple email could take hours to write because she had to go over written material several times to make sure it made sense.

Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account, contending the photographs and written postings would be material and necessary to his defense of the action under CPLR 3101(a). When plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel, asserting that the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing, as relevant here, that defendant failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account, nor allege that any specific material located therein, although potentially relevant, was privileged or should be shielded from disclosure on privacy grounds. At oral argument on the motion, defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there is a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

*2 Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Supreme Court did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident.

[1] Although defendant was denied much of the disclosure sought in the motion to compel, only plaintiff appealed to the Appellate Division.[1] On that appeal, the court modified by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed. Two Justices dissented, concluding defendant was entitled to broader access to plaintiff's Facebook account and calling for reconsideration of that court's recent precedent addressing disclosure of social media information as unduly restrictive and inconsistent with New York's policy of open discovery. The Appellate Division granted defendant leave to appeal to this Court, asking whether its

order was properly made. We reverse, reinstate Supreme Court's order and answer that question in the negative.

[2] [3] Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: "[t]here shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof." We have emphasized that "[t]he words 'material and necessary,' ... are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430 [1968], *see also Andon v. 302–304 Mott St. Assoc.*, 94 N.Y.2d 740, 746, 709 N.Y.S.2d 873, 731 N.E.2d 589 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary"—i.e., relevant—regardless of whether discovery is sought from another party (*see* CPLR 3101[a][1]) or a nonparty (CPLR 3101[a][4]; *see e.g. Matter of Kapon v. Koch*, 23 N.Y.3d 32, 988 N.Y.S.2d 559, 11 N.E.3d 709 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 376, 575 N.Y.S.2d 809, 581 N.E.2d 1055 [1991]).

[4] [5] [6] The right to disclosure, although broad, is not unlimited. CPLR 3101 itself "establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune (CPLR 3101[c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship" (*Spectrum, supra*, at 377, 575 N.Y.S.2d 809, 581 N.E.2d 1055). The burden of establishing a right to protection under these provisions is with the party asserting it—"the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (*id.*).

*3 [7] [8] [9] [10] [11] [12] In addition to these restrictions, this Court has recognized that "litigants are not without protection against unnecessarily onerous application of the disclosure statutes. Under our discovery statutes and case law competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954, 683 N.Y.S.2d 156, 705 N.E.2d 1197 [1998] [citations and internal quotation marks omitted]; *see* CPLR 3103[a]). Thus, when courts are called upon to resolve a dispute,[2] discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure ... Absent an [error of law or an] abuse of discretion, this Court will not disturb such a determination (*Andon, supra*, 94 N.Y.2d at 747, 709 N.Y.S.2d 873, 731 N.E.2d 589; *see Kavanagh, supra*, 92 N.Y.2d at 954, 683 N.Y.S.2d 156, 705 N.E.2d 1197).[3]

Here, we apply these general principles in the context of a dispute over disclosure of social media materials. Facebook is a social networking website "where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking" (*Romano v. Steelcase Inc.*, 30 Misc.3d 426, 907 N.Y.S.2d 650 [Sup. Ct. Suffolk County 2010]). Users create unique personal profiles, make connections with new and old "friends" and may "set privacy levels to control with whom they share their information" (*id.*). Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder—in fact, the viewer need not even be a fellow Facebook account holder (*see* Facebook Help: What audiences can I choose from when I share? https://www.facebook.com/help/211513702214269?helpref=faq_content [last accessed January 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (*id.*). While Facebook and sites like it—offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

*4 On appeal in this Court, invoking New York's history of liberal discovery, defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. Although it is unclear

precisely what standard the Appellate Division applied, it cited its prior decision in *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, 958 N.Y.S.2d 392 [1st Dept. 2013]), which stated: "To warrant discovery, defendants must establish a factual predicate for their request *by identifying relevant information in plaintiff's Facebook account*—that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims' " (*id.* at 620, 958 N.Y.S.2d 392 [emphasis added]). Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (*see e.g. Spearin v. Linmar*, 129 A.D.3d 528, 11 N.Y.S.3d 156 [1st Dept. 2015]; *Nieves v. 30 Ellwood Realty LLC*, 39 Misc.3d 63, 966 N.Y.S.2d 808 [App. Term. 2013]; *Pereira v. City of New York*, 40 Misc.3d 1210[A], 2013 WL 3497615 [Sup. Ct. Queens County 2013]; *Romano, supra*, 30 Misc.3d 426, 907 N.Y.S.2d 650). Plaintiff invoked this precedent when arguing, in opposition to the motion to compel, that defendant failed to meet the minimum threshold permitting discovery of any Facebook materials.

Before discovery has occurred—and unless the parties are already Facebook "friends"—the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account.[4] Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible—and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action" (*see* CPLR 3101[a]).

[13] [14] [15] New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

[16] [17] That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable (*see e.g. Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 [4th Dept. 2012] [rejecting motion to compel disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; *Giacchetto, supra*, 293 F.R.D. 112, 115; *Kennedy v. Contract Pharmacal Corp.*, 2013 WL 1966219, *2 [E.D.N.Y. 2013]). Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation—such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from "unnecessarily onerous application of the discovery statutes" (*Kavanagh, supra*, 92 N.Y.2d at 954, 683 N.Y.S.2d 156, 705 N.E.2d 1197).

*5 [18] [19] [20] Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules—there is no need for a specialized or heightened factual predicate to avoid improper "fishing expeditions." In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate—for example, the court should

consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (*see* CPLR 3103[a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

[21] [22] [23] Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. We assume for purposes of resolving the narrow issue before us that some materials on a Facebook account may fairly be characterized as private. [5] But even private materials may be subject to discovery if they are relevant. For example, medical records enjoy protection in many contexts under the physician-patient privilege (*see* CPLR 4504). But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records—including the physician-patient privilege—are waived (*see Arons v. Jutkowitz*, 9 N.Y.3d 393, 409, 880 N.Y.S.2d 345, 880 N.E.2d 831 [2007]; *Dillenbeck v. Hess*, 73 N.Y.2d 278, 287, 539 N.Y.S.2d 707, 536 N.E.2d 1126 [1989]). For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.

[24] Applying these principles here, the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial. [6] With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.

*6 [25] In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiff's claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. Because Supreme Court provided defendant no access to the content of any messages on the Facebook account (an aspect of the order we cannot review given defendant's failure to appeal to the Appellate Division), we have no occasion to further address whether defendant made a showing sufficient to obtain disclosure of such content and, if so, how the order could have been tailored, in light of the facts and circumstances of this case, to avoid discovery of nonrelevant materials. [7]

In sum, the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence "material and necessary" to the litigation. A remittal is not necessary here because, in opposition to the motion, plaintiff neither made a claim of statutory privilege, nor offered any other specific reason—beyond the general assertion that defendant did not meet his threshold burden—why any of those materials should be shielded from disclosure.

Accordingly, the Appellate Division order insofar as appealed from should be reversed, with costs, the Supreme Court order reinstated and the certified question answered in the negative.

Order insofar as appealed from reversed, with costs, order of Supreme Court, New York County, reinstated and certified question answered in the negative.

Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

All Citations

--- N.E.3d ----, 2018 WL 828101, 2018 N.Y. Slip Op. 01015

Footnotes

1 Defendant's failure to appeal Supreme Court's order impacts the scope of his appeal in this Court. "Our review of [an] Appellate Division order is 'limited to those parts of the [order] that have been appealed and that aggrieve the appealing party' " (*Hain v. Jamison*, 28 N.Y.3d 524, 534, 46 N.Y.S.3d 502, 68 N.E.3d 1233 [2016], quoting *Hecht v. City of New York*, 60 N.Y.2d 57, 467 N.Y.S.2d 187, 454 N.E.2d 527 [1983]). Because defendant did not cross-appeal and, thus, sought no affirmative relief from the Appellate Division, he is aggrieved by the Appellate Division order only to the extent it further limited Supreme Court's disclosure order.

2 While courts have the authority to oversee disclosure, by design the process often can be managed by the parties without judicial intervention. If the party seeking disclosure makes a targeted demand for relevant, non-privileged materials (see CPLR 3120[1][i], [2] [permitting a demand for items within the other party's "possession, custody or control," which "shall describe each item and category with reasonable particularity"]), counsel for the responding party—after examining any potentially responsive materials—should be able to identify and turn over items complying with the demand. Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process. When the process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.

3 Further, the Appellate Division has the power to exercise independent discretion—to substitute its discretion for that of Supreme Court, even when it concludes Supreme Court's order was merely improvident and not an abuse of discretion—and when it does so applying the proper legal principles, this Court will review the resulting Appellate Division order under the deferential "abuse of discretion" standard (*see e.g. Andon, supra*; *Kavanagh, supra*; *see generally Kapon, supra*).

4 This rule has been appropriately criticized by other courts. As one federal court explained, "[t]his approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her **Facebook** profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section ... Furthermore, this approach shields from discovery the information of **Facebook** users who do not share any information publicly" (*Giacchetto v. Patchogue–Medford Union Free School Dist.*, 293 F.R.D. 112, 114 [E.D.N.Y. 2013]).

5 There is significant controversy on that question. Views range from the position taken by plaintiff that anything shielded by privacy settings is private, to the position taken by one commentator that "anything contained in a social media website is not 'private' ... [S]ocial media exists to facilitate social behavior and is not intended to serve as a personal journal shielded from others or a database for storing thoughts and photos" (McPeak, The **Facebook** Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data, 48 Wake Forest L Rev 887, 929 [2013]).

6 Because plaintiff would be unlikely to offer at trial any photographs tending to contradict her claimed injuries or her version of the facts surrounding the accident, by limiting disclosure in this fashion the Appellate Division effectively denied disclosure of any evidence potentially relevant to the defense. To the extent the order may also contravene CPLR 3101(i), we note that neither party cited that provision in Supreme Court and we therefore have no occasion to further address its applicability, if any, to this dispute.

7 At oral argument, Supreme Court indicated that, depending on what the data ordered to be disclosed revealed concerning the frequency of plaintiff's post-accident messages, defendant could possibly pursue a follow-up request for disclosure of the content. We express no views with respect to any such future application.