

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

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*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.<sup>1</sup> 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.<sup>2</sup> Given the serious consequences of

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

<sup>2</sup> 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.<sup>3</sup> 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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<sup>3</sup> 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).

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.<sup>4</sup> 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,<sup>5</sup> 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.”<sup>6</sup> 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.”<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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

<sup>5</sup> *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).

<sup>6</sup> Or. Bar Ass’n, *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

access to this information.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.”<sup>17</sup>

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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<sup>11</sup> Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2009-02, 1 (2009), *available at* [http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> *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).

<sup>14</sup> Phila. Bar Ass’n Prof’l Guidance Comm., *supra* note 11, at 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

the public pages of another party's social networking website, such as Facebook or MySpace?<sup>18</sup> 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.<sup>19</sup> 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)."<sup>20</sup> 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."<sup>21</sup> 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.<sup>22</sup>

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<sup>18</sup> 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>.

<sup>19</sup> *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).

<sup>20</sup> N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *supra* note 18.

<sup>21</sup> *Id.*

<sup>22</sup> *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.<sup>23</sup> 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.”<sup>24</sup> 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.”<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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).

<sup>23</sup> 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>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at n.4.

<sup>27</sup> *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).



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).<sup>28</sup>

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.<sup>29</sup> The opinion first focuses on the rule prohibiting a lawyer from communicating with a represented party about the subject of the representation.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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.”<sup>34</sup> The

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<sup>28</sup> N.Y.C. Bar Ass’n, *supra* note 23.

<sup>29</sup> San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

<sup>30</sup> *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).

<sup>31</sup> San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1, at 1.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1–2.

<sup>34</sup> *Id.* Rule 4.1(a) of the ABA Model Rules of Professional Conduct mandates that in the 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.”<sup>35</sup> 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.<sup>36</sup> 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.”<sup>37</sup>

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.<sup>38</sup> 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.”<sup>39</sup> 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.”<sup>40</sup> 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.*

<sup>35</sup> San Diego Cnty. Bar Legal Ethics Comm. 2011–2, *supra* note 1, at 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 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](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.

<sup>39</sup> N.Y. Cnty. Law. Ass’n Comm. on Prof’l Ethics, *supra* note 38, at 1.

<sup>40</sup> *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.”<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.”<sup>47</sup> 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.”<sup>48</sup>

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<sup>41</sup> N.Y.C. Bar Ass’n, *supra* note 23.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 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](https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html).

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 9–10.

<sup>48</sup> *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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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.”<sup>52</sup> 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.<sup>53</sup> Only

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<sup>49</sup> 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.

<sup>50</sup> See N.Y.C. Bar Ass’n, *supra* note 23.

<sup>51</sup> See Or. Bar Ass’n, *supra* note 4; N.Y. State Bar Ass’n Comm. on Prof’l Ethics, *supra* note 18.

<sup>52</sup> See N.Y.C. Bar Ass’n, *supra* note 23.

<sup>53</sup> 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,<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> 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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<sup>54</sup> 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).

<sup>55</sup> PRACTICING LAW INSTIT., *supra* note 2, § 9:6.2.

<sup>56</sup> *Id.*

“friend” people just to get access to information in their social media profiles.<sup>57</sup>

Countless other publications have issued similar warnings to lawyers seeking to engage in informal discovery of social media.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> These cases, however, do not apply the rules

<sup>57</sup> Radhakant & Diskin, *supra* note 2.

<sup>58</sup> 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 noting 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”).

<sup>59</sup> San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> 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”).<sup>63</sup> 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.<sup>64</sup> 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.”<sup>65</sup> The term “social media,” therefore, does not refer to a single

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<sup>61</sup> See *supra* Part I.A.

<sup>62</sup> 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.

<sup>63</sup> 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.

<sup>64</sup> See, e.g., San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

<sup>65</sup> 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<sup>66</sup> and more than a billion accounts, or profiles, on Facebook and other websites.<sup>67</sup> 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.”<sup>68</sup> 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<sup>69</sup>—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](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.”).

<sup>66</sup> 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).

<sup>67</sup> 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-twiters-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>.

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

<sup>69</sup> 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.<sup>70</sup>

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.<sup>71</sup> 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.”<sup>72</sup> 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.<sup>73</sup> As a result, the line between public and

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<sup>70</sup> 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).

<sup>71</sup> 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.

<sup>72</sup> 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 . . .”).

<sup>73</sup> 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.<sup>74</sup> 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-

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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 . . .”).

<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup> 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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<sup>75</sup> COMMERCIAL & FED. LITIG. SECTION, N.Y. STATE BAR ASS’N, *supra* note 44, at 10, 15–16.

<sup>76</sup> 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>.

<sup>77</sup> 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.

<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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<sup>79</sup> 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”).

<sup>80</sup> See generally MODEL RULES OF PROF’L CONDUCT, Preamble & Scope (2012).

<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> This analogy is problematic for several reasons. First, the third party is using only truthful information in their friend request.<sup>84</sup> 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.<sup>85</sup> 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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<sup>82</sup> 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”).

<sup>83</sup> Phila. Bar Ass’n Prof’l Guidance Comm., *supra* note 11.

<sup>84</sup> See *id.*

<sup>85</sup> *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."<sup>86</sup> 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.<sup>87</sup> There are few, if any, spaces where privacy is more protected than the home.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> 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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<sup>86</sup> *Statement of Rights and Responsibilities*, FACEBOOK (April 12, 2014) <https://www.facebook.com/legal/terms>.

<sup>87</sup> *See, e.g.*, *Georgia v. Randolph*, 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).

<sup>88</sup> *See id.*

<sup>89</sup> San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

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

<sup>91</sup> *Id.* at 1213–14.

<sup>92</sup> San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

disclose information that is richly relevant to the matter.”<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> To bolster the point that the lawyer or her agent need not ask

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<sup>93</sup> *Id.*

<sup>94</sup> *Sierra Pacific Indus.*, 759 F. Supp. 2d at 1208.

<sup>95</sup> San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

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

<sup>97</sup> *See id.* at 699.

<sup>98</sup> *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.”<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> Further, the employees in *Midwest Motor Sports* did not consent to being recorded and could not reasonably have expected such conduct by the lawyer.<sup>102</sup> 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.<sup>103</sup>

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).<sup>104</sup> 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.<sup>105</sup> 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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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See Midwest Motor Sports*, 347 F.3d at 695.

<sup>103</sup> *See San Diego Cnty. Bar Legal Ethics Comm.*, *supra* note 1.

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

als.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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<sup>110</sup>—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.).<sup>111</sup> 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.<sup>112</sup> 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

<sup>106</sup> 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).

<sup>107</sup> See San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

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

<sup>109</sup> *Id.*

<sup>110</sup> See San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

(i.e., the production of the information) is prompted by the lawyer's question.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup>

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<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> 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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<sup>113</sup> 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.

<sup>114</sup> See San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

<sup>115</sup> 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/>.

<sup>116</sup> 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.

<sup>117</sup> See *supra* Part II.A.

<sup>118</sup> 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<sup>119</sup> 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.<sup>120</sup>

Rule 4.2 serves three primary functions: (1) to protect represented persons from “overreaching by other lawyers who are participating in the matter;”<sup>121</sup> (2) to prevent other lawyers from interfering with and adversely affecting the lawyer-client relationship between represented persons and their chosen counsel;<sup>122</sup> and (3) to reduce the likelihood that represented persons “will disclose privileged or other information that might harm their interests.”<sup>123</sup> 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.<sup>124</sup> In short, the purpose of Rule 4.2 is “to prevent a skilled advocate from taking advantage of a non-lawyer.”<sup>125</sup>

In examining Rule 4.2, courts generally have espoused these rationales.<sup>126</sup> 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-

<sup>119</sup> 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](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Aug. 22, 2014).

<sup>120</sup> MODEL RULES OF PROF’L CONDUCT R. 4.2 (2013).

<sup>121</sup> *Id.* at cmt. 1.

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

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

<sup>124</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-443 (2006).

<sup>125</sup> *Id.*

<sup>126</sup> 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.”<sup>127</sup> 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.”<sup>128</sup>

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.”<sup>129</sup> Consequently, communications concerning matters outside this “defined and specific” representation are perfectly permissible.<sup>130</sup>

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.<sup>131</sup> 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.<sup>132</sup>

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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<sup>127</sup> *Polycast*, 129 F.R.D. at 625.

<sup>128</sup> *Jenkins*, 956 F. Supp. at 696.

<sup>129</sup> ABA Comm. on Prof’l Ethics & Responsibility, Formal Op. 95-396 (1995).

<sup>130</sup> 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.”).

<sup>131</sup> See CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, *supra* note 126, at 406–407, 409.

<sup>132</sup> See *id.* at 409.

financed and specific” representation.<sup>133</sup> 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.<sup>134</sup>

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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<sup>133</sup> See ABA Comm. on Prof’l Ethics & Responsibility, Formal Op. 95-396 (1995).

<sup>134</sup> *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.<sup>135</sup>

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.<sup>136</sup> 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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<sup>135</sup> 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.

<sup>136</sup> 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.<sup>137</sup>

## 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.<sup>138</sup>

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.<sup>139</sup> 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.”<sup>140</sup> 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.<sup>141</sup> 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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<sup>137</sup> *Id.* at cmt. 4.

<sup>138</sup> MODEL RULES OF PROF’L CONDUCT R. 4.3 (2013).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at cmt. 1.

<sup>141</sup> *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.<sup>142</sup> 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.”<sup>143</sup> 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).<sup>144</sup> 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-

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<sup>142</sup> *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).

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

<sup>144</sup> *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.<sup>145</sup>

### 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."<sup>146</sup> 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."<sup>147</sup> 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.<sup>148</sup> 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

<sup>145</sup> See MODEL RULES OF PROF'L CONDUCT R. 4.3 (2013).

<sup>146</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013).

<sup>147</sup> 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.

<sup>148</sup> 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.”<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup>

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.”<sup>152</sup> 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.<sup>153</sup> 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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<sup>149</sup> *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.

<sup>150</sup> *In re Scanio*, 919 A.2d 1137, 1143 (D.C. 2007) (internal quotation marks omitted).

<sup>151</sup> *See* CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, *supra* note 126, § 8.4(c), at 614 (collecting cases).

<sup>152</sup> Phila. Bar Ass’n Prof’l Guidance Comm., *supra* note 11.

<sup>153</sup> *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.”<sup>154</sup> 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.<sup>155</sup> 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.<sup>156</sup> 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).<sup>157</sup>

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.<sup>158</sup> 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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<sup>154</sup> San Diego Cnty. Bar Legal Ethics Comm., *supra* note 1.

<sup>155</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446 (2007).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

led” by the failure to disclose.<sup>159</sup> 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.<sup>160</sup> 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.”<sup>161</sup> 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.<sup>162</sup>

#### 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

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2013).

<sup>162</sup> *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.