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Avoiding Misrepresentation in Informal Social Media Discovery

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ABSTRACT

Social media data is changing the face of civil discovery in many cases, and informal discovery of social media content on sites such as Facebook can prove extremely valuable for litigants. But the process of performing informal searches of social media content tests the boundaries of ethics rules, particularly those dealing with misrepresentation. Social media websites shield some content from public view, and lawyers may run afoul of the ethics rules if they use improper tactics to gain access to private information.

This essay explores the current ethical boundaries of informal discovery as they apply to the social media data of unrepresented persons in particular. It addresses how informal searches of social media are not only permitted, but are *required* in some cases. Further, this essay suggests that the proper approach to avoiding misrepresentation is to require affirmative disclosures when attempting to access private online content in informal discovery. Such disclosures are supported by the American Bar Association's Model Rules of Professional Conduct and by the need to safeguard against abuses because of the casual and informal nature of social media.

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I. INTRODUCTION

The digital age has revolutionized how we communicate online, and one of the most profound developments is the growth of social media. Social media platforms like Facebook and Twitter are a major part of daily life for many people. These social media websites catalogue detailed personal information—including one's associations, physical activities, thoughts, and feelings—and allow users to share these intimate details with a selected audience. Naturally, social media has piqued the interest of litigators and many include social media research as part of their case investigation and discovery. Yet little guidance exists as to the ethical duties—and limitations—that govern informal social media investigation. Although the ethics rules allow lawyers to search public social media content, social media websites create the risk of "one-click" ethics violations once lawyers attempt to gain access to privacy-setting protected portions of a social media account.

This essay focuses on the ethical boundaries of informal discovery of social media data, particularly lawyers' attempts to gain access to private content of unrepresented persons. First, the ethics rules should be read to require social media searches as part of the duty of competence in many cases. Second, the Model Rules prohibit pretextual or "fake" profiles as a means of tricking the social media user into granting private access. But jurisdictions are mixed as to whether "truthful" requests—those that properly identify the lawyer—require an additional disclosure as to the purpose of the request.[1] This essay concludes that even truthful requests for private access may violate the Model Rules' prohibition against misrepresentation, absent further disclosures. This conclusion is supported by the protections against deceit embodied in the Model Rules and the informal, casual nature of social media itself. Even though social media users must be diligent in screening private access requests, the platform itself implies disinterest and amplifies the ability to deceive. Thus, additional disclosures should be required under the Model Rules.

II. INFORMAL DISCOVERY OF SOCIAL MEDIA

Informal discovery is a major part of civil litigation, and lawyers have long recognized the benefits of informal fact research. Many courts favor it

1. *See, e.g.*, John G. Browning, *Facebook, Twitter, and Linkedin – Oh My! The ABA Ethics 20/20 Commission and Evolving Ethical Issues in the Use of Social Media*, 40 N. KY. L. REV. 255, 259 (2013); *see generally* Hope A. Comisky & William M. Taylor, *Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media In Three Important Areas – Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL & CIV. RTS. L. REV. 297 (2011); *see generally* Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring A New Mandate for Competence in the Practice of Law*, 68 U. MIAMI L. REV. 445 (2014).

as an affordable and effective pretrial tool.[2] These informal discovery tools include observing public movements, interviewing witnesses, searching records, and performing web searches before resorting to formal discovery.[3] The means of employing many of these tools now exist for free, through social media.[4] Because social media websites compile and aggregate personal data, they not only increase the scope of information that may be available about litigants and witnesses, but also make it cheap and easy to access.

At least some social media content can be gathered by informal searches because portions of social media accounts are public.[5] But the ethical boundaries of informal social media discovery have yet to be clearly defined. In particular, clarity is needed as to the duty to affirmatively search social media and to avoid using misleading or deceptive conduct to gain access to private social media content.

A. Social Media's Public/Private Distinction

In the last decade, the internet has morphed into an interactive, user-driven platform that enables individuals to create and manage their own content.[6] This shift is significant because individuals now have an easy way to create an online identity, which often includes substantial amounts of personal information. Sites like Facebook and Twitter maintain a comprehensive archive of the accountholder's thoughts, feelings, actions, and associations.[7] When users join a social media site, they create their own page or profile by inputting varying levels of personal data into a web form. This information

2. *See* Hickman v. Taylor, 329 U.S. 495, 500 (1947); *see, e.g.*, Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990) (emphasizing policies favoring informal discovery in line with Federal Rules of Civil Procedure 26–36).

3. *See Niesig*, 558 N.E.2d at 1034; Comisky & Taylor, *supra* note 2.

4. *See* John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 466–68 (2011).

5. *See, e.g.*, *Profile & Timeline Privacy*, FACEBOOK, https://www.facebook.com/help/393920637330807 (last visited Apr. 3, 2015) (Facebook allows users to set their privacy settings so that only approved "Friends" can see private content. Further, inline audience selectors allow the user to select a subgroup of Friends for an individual post); *see also LinkedIn Help Center: Controlling Who Sees Your Connections List*, LINKEDIN, http://help.linkedin.com/app/answers/detail/a_id/52 (last visited Apr. 3, 2015); *New User FAQs*, TWITTER, https://support.twitter.com/groups/50-welcome-to-twitter/topics/203-faqs/articles/13920-new-user-faqs (last visited Apr. 3, 2015) (By default, Twitter accounts are public, but private account options also exist).

6. *See, e.g.*, KRISHNA SANKAR & SUSAN A. BOUCHARD, ENTERPRISE WEB 2.0 FUNDAMENTALS 4, 5 (2009) (describing origins of an interactive internet).

7. *See Get Started: Facebook Help Center*, FACEBOOK, https://www.facebook.com/help/467610326601639 (last visited Apr. 3, 2015) (providing instructions and features of Timeline).

can include hometown, employment information, date of birth, relationship status, political views, and even religious beliefs.[8] Additionally, users can post regular updates on their own page or on others' pages, including videos, photos, links, or comments.[9] Geolocating features may track the physical locations users have visited, including events they have attended.[10] Social reader apps may display the news articles they read and links they share.[11]

Many social media sites contain another unique feature: user-controlled privacy settings.[12] With privacy settings, users can make some content public, so that it is visible to anyone who accesses the site.[13] Content the user makes "private," on the other hand, is visible only to a smaller group of approved users.[14]

The fact that some social media content is shielded from public view creates an ethical dilemma for lawyers engaging in informal discovery. Attempts to gain private access to social media content may result in some sort of notification being sent to a target user.[15] For example, Facebook requires a user to send a "Friend" request to another user before granting private access, which the user can then accept or reject.[16] Twitter and Facebook have a "Follow" feature that allows a user to receive public updates from another user's account.[17] "Friend" and "Follow" requests trigger a notice to the target user.[18] Thus, even simple clicks can result in a form of communication, and that communication may contain little or no identifying information about the sender or about the purpose of the communication.

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8. *See id.*

9. *See id.*

10. *See Facebook Locations: Location Basics*, FACEBOOK, https://www.facebook.com/help/337244676357509 (last visited Apr. 3, 2015) (describing the addition of story locations to maps).

11. *See* Mark Myerson, *10 Smart Social Reading and News Apps*, ANDROID APPSTORM (Dec. 26, 2013), http://android.appstorm.net/roundups/lifestyle-roundups/10-smart-social-reading-and-news-apps.

12. *See supra* note 5 and accompanying text.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See FAQs About Following*, TWITTER, https://support.twitter.com/articles/14019-faqs-about-following (last visited Apr. 3, 2015).

18. *See id.* (This notification may be sent via email, appear as a pop-up mobile message, and display on the target user's Twitter page under "Followers" or "Connect.").

B. Duty to Search Social Media

While some lawyers seem to recognize the enormous value of performing informal searches for social media content, others seem to avoid social media altogether, likely in an effort to prevent ethical missteps. Ironically, avoidance may be an ethical misstep. The ethics rules are evolving to affirmatively require informal discovery of social media in many cases.

Take for example a lawyer who refuses to learn about social media and improperly blocks discovery of his own client's Facebook information. In this example, the lawyer represents a plaintiff in a wrongful death suit and is served with a Request for Production for any relevant content in the plaintiff's Facebook account. Defense counsel had performed informal searches of social media content before sending the request. Thus, he has attached to the request a photograph of the plaintiff drinking at a bar and wearing a lewd t-shirt, which purportedly contradicts the plaintiff's claims that he's a grieving widower.

Upon receiving the request and photo, the plaintiff's lawyer asks his client how defense counsel obtained the picture. The plaintiff immediately answers that he thinks the photo is a private Facebook photo and has no idea how it got into defense counsel's hands. On this information, the plaintiff's lawyer opposes the discovery attempts and in a motion for protective order before the court accuses defense counsel of "hacking" his client's Facebook page. In reality, defense counsel found the photo through a simple search of public Facebook information and has every right to seek other relevant social media content in formal discovery. As a result, the court sanctions the plaintiff's lawyer for making baseless "hacking" accusations in his motion and for failing to educate himself about how Facebook works. Additionally, the court notes that plaintiff's lawyer had a duty to independently investigate facts and law, but instead relied too heavily on his client's incomplete understanding of the circumstances. Ultimately, the plaintiff's lawyer has to pay for failing to understand the relevant technology before he made baseless hacking allegations and for refusing to comply with valid discovery requests for social media content.[19]

In the example above, the plaintiff's lawyer had an affirmative duty to understand social media and its relevance to the matter. By avoiding social media altogether, or by failing to learn about it when needed, he violated his ethical duties and failed to serve his client's interests.

The ethics rules contemplate knowledge of relevant technology as part of a lawyer's duty of competence.[20] Lawyers cannot ignore social media, and the ethics rules and advisory opinions to date make clear that searching for

19. *See generally* Lester v. Allied Concrete Co., 80 Va. Cir. 454 (Va. Cir. Ct. 2010), *aff'd* 285 Va. 295 (2013) (The example is loosely based on this case).

20. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

public social media content is not only permitted, but may even be required under some circumstances.[21]

Further, nothing in the Model Rules prohibits searches of public social media content. According to the New York State Bar Association, a lawyer may access public social media content to find impeachment or other evidence in pending litigation.[22] Specifically, the ethics rules allow attorneys to access content available to any member of the network that does not necessitate a special relationship.[23] Similarly, the Oregon Bar Association expressly permits discovery of public social media searches in informal discovery, analogizing public social media content to a magazine or book written by the adversary or witness.[24] That advisory opinion also notes that public searches are permissible as to any person, including adversaries in litigation and transactional matters.[25]

Although, to date, no cases create an affirmative requirement to search public social media profiles in informal discovery, other cases make clear that online factual research may be required.[26] Several ethics rules and Federal Rule 11 support the use of online factual research, like that performed on a social media site, as part of the attorney's duty.[27]

Lawyers should assume they have an *affirmative duty* to include public social media searches in some civil cases. First, ABA Model Rule 1.1 requires lawyers to provide competent representation, which includes thor-

21. *See* N.Y. State Bar Ass'n, Formal Op. 843 (2010), *available at* http://www.nysba.org/AM/Template.cfm?Section=home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208. *But see* The Sedona Conference, Primer on Social Media, 36 (Oct. 2012) (on file with author), *available at* https://thesedonaconference.org/publication/Primer%20on%20Social%20Media (suggesting that collecting data on public portions of social media pages for use in litigation may violate the website's terms of use).

22. *See* N.Y. State Bar Ass'n, Formal Op. 843 (2010), *available at* http://www.nysba.org/AM/Template.cfm?Section=home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208.

23. *See id.*

24. *See* Or. Bar Ass'n., Formal Op. 2013-189, 577 (2013), *available at* https://www.osbar.org/_docs/ethics/2013-189.pdf.

25. *Id.* at 578 n.2 (The opinion also permits social media searches as to jurors, but cautions against communicating or making any contact with jurors via social media. Further, the no-contact rule contains an "observation" exception.); *see, e.g.*, Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002); *see also* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013) ("Observing versus Communication" annotation); State *ex rel.* State Farm Fire & Cas. Co. v. Madden, 451 S.E.2d 721, 730 (W. Va. 1994).

26. *See* Hickman v. Taylor, 329 U.S. 495, 500 (1947); *see, e.g.*, Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990) (emphasizing policies favoring informal discovery in line with Federal Rules of Civil Procedure 26–36).

27. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

oughness and preparation.[28] This duty encompasses technological proficiency as well.[29] The American Bar Association recently amended the Model Rules of Professional Conduct to address the challenges of technology and the globalization of the legal profession,[30] but concluded that no specific revisions were needed to address technology.[31] Specifically, the Commission on Ethics 20/20, formed in 2009 to modernize the ABA Model Rules in light of "advances in technology and global legal practice," contemplated the changing ways technology is being used in case investigation and research.[32] Acknowledging that electronic discovery permeates modern litigation, the Commission expressly noted that lawyers must "have a firm grasp on how electronic information is created, stored, and retrieved" and are expected to "advise their clients regarding electronic discovery obligations."[33]

However, the rules themselves contain no express language addressing new technology. Instead, Model Rule 1.1 contains only one new comment stating "a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology* . . . ."[34] Notably, this comment is the first and only time technology is expressly included within the scope of one's duty of competence under the Model Rules. But the Commission otherwise refrained from making any substantive additions relating to the technological proficiency or the use of technology in civil discovery.[35] Nonetheless, this comment, adopted by the Ethics 20/20

28. *See id.* at cmt. 5.

29. *See id.* at cmt. 8.

30. *See* ABA, *Center for Professional Responsibility: ABA Commission on Ethics 20/20*, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Apr. 3, 2015).

31. *See* Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs ABA Comm'n on Ethics 20/20 to ABA Entities, Courts, Bar Ass'ns (state, local, specialty, & Int'l), Law Schs., & Individuals (Dec. 28, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111228_summary_of_ethics_20_20_commission_actions_december_2011_final.authcheckdam.pdf.

32. *Id.*; *see also* ABA, *supra* note 30.

33. *See* ABA COMM'N ON ETHICS 20/20, *Commission Report, ABA Commission Ethics 20/20: Introduction and Overview*, at 3–4 (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf (Specifically, revisions to the Model Rules considered two major trends: first, the fundamental changes to how lawyers practice due to new technology tools and the disaggregation of legal services and, second, globalization of legal practice including issues with outsourcing and lawyer mobility.).

34. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013) (emphasis added).

35. Gorelick & Traynor, *supra* note 31 ("In general, we have found that the principles underlying our current Model Rules are applicable to these new develop-

Commission, signals an important shift towards recognizing the need for technological proficiency among lawyers.[36] It highlights the fact that ethical issues surrounding technology cannot be ignored.

Second, Model Rule 1.3 requires zealous representation and diligence, including factual investigation.[37] The degree of investigation necessary is based on the specific circumstances of each case.[38] Yet the duty of competence requires an attorney to at least "discover[ ] and present *readily available* evidence."[39]

Third, Federal Rule of Civil Procedure 11 also imposes a duty of adequate factual investigation. In particular, litigants must avoid filing frivolous claims. Rule 11 requires attorneys to ascertain the facts underlying the case and requires them to sign all pleadings, representing that factual assertions are or will be supported after further discovery.[40] Although this representation does not require factual or evidentiary support for all claims,[41] it does signify that the attorney performed "an appropriate investigation into the facts that is reasonable under the circumstances."[42] Similarly, under Model Rule 3.1, attorneys must make reasonable efforts to investigate claims before

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ments. As a result, many of our recommendations involve clarifications and expansions of existing Rules and policies rather than an overhaul. In sum, our goal has been to apply the core values of the profession to 21st century challenges.").

36. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013); *see also* Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 33–34 (2012).

37. MODEL RULES OF PROF'L CONDUCT R. 1.3; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (2000) (duty of diligence encompasses "appropriate factual research").

38. For example, an attorney facing a statute of limitation may avoid sanctions because no time remained for further investigation. *See, e.g.*, Sanchez v. Liberty Lloyds, 672 So. 2d 268, 273 (La. Ct. App. 1996).

39. People v. Boyle, 942 P.2d 1199 (Colo. 1997) (emphasis added) (attorney disciplined for not adequately preparing for hearing on asylum petition when he "failed to discover and present readily available evidence").

40. FED. R. CIV. P. 11(b)(3).

41. *See* FED. R. CIV. P. 11, (b)-(c) advisory committee's notes (1993).

42. *Id.* The Wisconsin Supreme Court, applying a state law similar to Federal Rule 11, identified some of the factors considered: "whether the signer of the documents had sufficient time for investigation; the extent to which the attorney had to rely on his or other client for the factual foundation underlying the pleading, motion or other paper; whether the case was accepted from another attorney; the complexity of the facts and the attorney's ability to do a sufficient pre-filing investigation and whether discovery would have been beneficial to the development of the underlying facts." Wis. Chiropractic Ass'n v. Wis. Chiropractic Examining Bd., 676 N.W.2d 580, 589 (Wisc. 2004).

bringing any suit.[43] The duty of investigation is ongoing; attorneys must consistently evaluate the facts and ensure that they have an adequate basis for filing suit.[44] Ethics violations may occur if the attorney knew, or should have known, that factual or legal support was lacking for a claim.[45]

When read together, these rules suggest that informal factual research is a mandatory obligation for attorneys in many cases. Attorneys cannot hide behind their ignorance of facts or law to avoid sanctions or discipline for a violation of the rules. For example, in *Hunt v. Dresie*,[46] an attorney faced legal malpractice claims for failing to investigate the facts underlying a breach of fiduciary duty claim.[47] The Kansas Supreme Court held that clients rightfully look to counsel to make a reasonable investigation into the facts underlying a case.[48] Therefore, the lawyer is obligated to search for the "true facts," especially in cases where the litigants may be motivated by personal animosity.[49] Quite simply, it is the lawyer's role to objectively pursue facts and provide advice premised on an adequate factual inquiry and analysis.[50]

Not only is factual research necessary to meet ethical obligations, *online* factual research may also be required. Courts will not excuse a lawyer for failing to locate simple facts that are readily available in an internet search.[51] For example, in *Weatherly v. Optimum Asset Management, Inc.*,[52] a Louisiana court annulled a tax sale for failing to provide adequate notice after the court performed its own internet search and quickly located the out-of-state property owner.[53] Other courts have recognized a similar requirement to per-

43. MODEL RULES OF PROF'L CONDUCT R. 3.1; FED. R. CIV. P. 11.

44. *In re* Caranchini, 956 S.W.2d 910, 916 (Mo. 1997); Petrano v. Nationwide Mut. Fire Ins. Co., No. 1:12-cv-86-SPM-GRJ, 2013 WL 1325201 (Feb. 4, 2013).

45. *See, e.g.*, Jiminez v. Madison Area Technical Coll., 321 F.3d 652 (7th Cir. 2003) (attorney cannot rely on obviously fraudulent documents).

46. Hunt v. Dresie, 740 P.2d 1046 (Kan. 1987).

47. *Id.* at 1048.

48. *Id.* at 1054.

49. *Id.*

50. *Id.*

51. Some practitioner guides emphasize that, with the advent of e-discovery generally and social media specifically, attorneys are expected to maintain the necessary level of technical knowledge for performing discovery and addressing related legal issues. *See, e.g.*, 121 AM. JUR. 3D *Proof of Facts* §§ 18–19 (2011).

52. Weatherly v. Optimum Asset Mgmt., Inc., 928 So. 2d 118, 121 (La. Ct. App. 2009).

53. *Id.*

form online research, almost a "duty to Google," and have not excused a failure to locate readily available facts on the internet.[54]

Notably, at least one court has indicated social media searches may now be part of one's duty of competence. In *Griffin v. Maryland*,[55] a criminal case, the court quoted a bar journal article with approval, stating "it should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."[56] The New Hampshire Bar Association has also noted that the duty of diligence may include informal investigation via social media.[57] Several commentators argue that lawyers are now expected to look at the public portions of social media pages for impeachment or other evidence in the course of litigation, even beyond cases in which social media is the basis of a claim.[58]

Indeed, as noted in the "hacking" example above, courts will not excuse lawyers from their duty of diligence just because the lawyer lacks social media familiarity. A Virginia state court in *Lester v. Allied Concrete Co.*[59] sanctioned an attorney under a state law equivalent to Federal Rule 11 after he made baseless Facebook hacking accusations in relation to a motion to compel discovery.[60] The court noted that the lawyer cannot avoid his obligations simply because he failed to familiarize himself with the relevant technology.[61]

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54. *See* Munster v. Groce, 829 N.E.2d 52, 61 (Ind. Ct. App. 2005) (failure to Google absent defendant demonstrates lack of diligence); Dubois v. Butler *ex rel.* Butler, 901 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 2005) (attorney's use of directory assistance as only attempt to locate missing defendant criticized by court); *see also* Johnson v. McCullough, 306 S.W.3d 551, 559 (Mo. 2010) (recognizing a duty to perform online research during the jury voir dire process).

55. Griffin v. State, 995 A.2d 791 (Md. Ct. Spec. App. 2010), *rev'd on other grounds*, Griffin v. State, 19 A.3d 415 (Md. 2011) (overturned on grounds of admissibility and authentication of MySpace page contents).

56. *Id.* at 801 (citing Seth P. Berman et. al., *Web 2.0: What's Evidence Between "Friends"?*, BOSTON B.J., Jan./Feb. 2009, at 5, 6); Cannedy v. Adams, No. ED CV 08-1230-CJC(E), 2009 WL 3711958, at *29 (C.D. Cal. Nov. 4, 2009) (failure by attorney to investigate social media evidence of victim recanting story may constitute ineffective assistance of counsel).

57. *See* New Hampshire Bar Op. 2012-13/05.

58. *See, e.g.*, Browning, *Facebook, Twitter, and LinkedIn*, *supra* note 1; Cominsky & Taylor, *supra* note 1; Jacobowitz & Singer, *supra* note 1.

59. Lester v. Allied Concrete Co., No. CL08-150, 2011 Va. Cir. LEXIS 245 (Va. Cir. Ct. Sept. 6, 2011).

60. *Id.*

61. *Id.*

Last, formal discovery of social media content may also hinge on what was found informally.[62] Thus, a failure to check public social media content may hinder the formal discovery process. Online research also is cost-effective and affordable, making it reasonable to require lawyers to do it.[63] Membership is free for most social media websites and any user can search publicly available content on the site.[64] Thus, social media is an affordable tool, costing only the time it takes to perform a search. As such, courts are likely to consider it unreasonable to omit searching social media before filing suit.

Therefore, lawyers are allowed to perform informal discovery searches on social media, and may even be required to do so. But ethical boundaries place limits on how far lawyers can go to gain access to social media content.

C. Duty to Avoid Misrepresentation Generally

Misrepresentation is a major risk when performing informal social media discovery. The Model Rules, when read together, impose an obligation of fairness and create a general duty to avoid deceptive tactics when dealing with litigants or third parties.[65] They apply both in the litigation context and in any attorney dealings with others, whether on the attorney's or the client's behalf.[66] At their core, the rules prevent dishonesty, which many identify as

62. *See, e.g.*, Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010); Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387 (E.D. Mich. 2012) (courts require the party seeking discovery to show how public content from the social media account supports an argument that private data may be relevant too). For a complete discussion of approaches courts take to formal discovery, see Agnieszka McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 903–07 (2013).

63. *See, e.g.*, Wisc. Chiropractic Ass'n v. Wis. Chiropractic Examining Bd., 676 N.W.2d 580, 590 (Wisc. 2004).

64. *See, e.g.*, LinkedIn Help Center, *LinkedIn Free and Upgraded Premium Accounts*, LINKEDIN, http://help.linkedin.com/app/answers/detail/a_id/71 (last visited Oct. 29, 2014).

65. *See, e.g.*, Iowa Supreme Court Attorney Disciplinary Bd. v. Stowers, 823 N.W.2d 1 (Iowa 2012) (no-contact rule violated by sending direct email to represented person); *see* MODEL RULES OF PROF'L CONDUCT R. 3.3–3.4, 4.1–4.4; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b (2000); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 803, 805-06 (2009) (discussing some unclear or unjust applications of the no-contact rule).

66. *See, e.g.*, Disciplinary Counsel v. Robinson, 933 N.E.2d 1095, 1097 (Ohio 2010), *reinstatement granted*, 957 N.E.2d 295 (Ohio 2011) (Rule 3.4 applies to both personal and professional conduct); *In re* Levin, 709 S.E.2d 808 (Ga. 2011), *reinstatement granted*, 744 S.E.2d 797 (Ga. 2011) (attorney who was convicted of misdemeanor for distributing obscene material disciplined because

the most detrimental trait a lawyer can have as it undermines the public trust and perception of the profession.[67]

Informal discovery tactics may implicate at least four Model Rules. First, Model Rule 4.1 requires truthfulness in statements to third parties in the course of representing a client.[68] Second, Model Rule 4.3 specifically applies to dealings with unrepresented persons and prohibits lawyers from making misleading statements or implying disinterest.[69] Third, Model Rule 8.4 prohibits lawyers from engaging in conduct that involves "dishonesty, fraud or deceit" in any context.[70] Lastly, Model Rules 5.3 and 8.4 prohibit lawyers from using third parties to perform tasks on their behalf that would otherwise amount to a rule violation.[71]

The rules, therefore, prohibit dishonesty in the form of affirmative, misleading statements as well as concealing the truth or omitting material information. As to affirmative statements, lawyers cannot use "pretexting," which is misrepresentation or deception to gain access to facts.[72] For example, an attorney may not pose as someone else to gather information. In *In Re Con-*

crime goes to his moral turpitude and fitness to practice law); Lawyer Disciplinary Bd. v. Markins, 663 S.E.2d 614 (W. Va. 2008) (lawyer disciplined for unauthorized access to wife's email and those of others at her law firm, even though reasons for doing so were personal and not related to client).

67. *See, e.g., In re* Kalil's Case, 773 A.2d 647, 648 (N.H. 2001) ("no single transgression reflects more negatively on the legal profession than a lie"). In addition to the Model Rules, other legal ethics rules prohibit dishonest conduct. For example, Federal Rule 11 requires that all papers signed by the lawyer are well grounded in fact and law, a rule that necessarily prohibits dishonesty and deception by the lawyer. FED. R. CIV. P. 11.

68. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1.

69. *Id.* R. 4.3.

70. *See id.* R. 8.4.

71. *Id.* R. 5.3(c), R. 8.4(a). Other Model Rules also encompass duties of honesty, including Candor to the Tribunal (R. 3.3), Fairness to Opposing Party and Counsel (R. 3.4), Advertising Legal Services (R. 7.2), and Responsibilities of a Partner or Supervisory Lawyer (R. 5.1).

72. *See* Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 474–75 (D.N.J. 1998) (pretexting involves concealing one's true identity to gather information); Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 578 (2005) (referring to "surreptitious discovery" and "covert investigations"); David J. Dance, *Pretexting: A Necessary Means to a Necessary End?*, 56 DRAKE L. REV. 791, 792 (2008) (noting that pretexting is defined as using deception to gather private facts); David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 792–93 (1995) (pretexting described as using misrepresentations about one's identity in order to obtain facts).

duct of Gatti, the Oregon Supreme Court disciplined an attorney who posed as a doctor in phone conversations to obtain facts pertaining to an anticipated lawsuit by his client.[73] Similarly, the South Carolina Supreme Court disciplined an attorney for posing as the cousin of an injured driver in a phone call with a potential party to a personal injury suit.[74] In that instance, Model Rule 8.4 was violated because the attorney failed to put the party on notice of the "adversarial nature of the conversation."[75]

Additionally, misrepresentation may occur by mere omission. Under Model Rule 4.1, "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."[76] Further, under Model Rule 4.3, lawyers cannot imply they are disinterested in dealings with unrepresented persons.[77] Thus, if lawyers know or should know that the party misunderstands the lawyers' role or purpose, they have a duty to correct that misunderstanding.[78] Comment one to this rule makes it clear that lawyers may need to make affirmative disclosures about their intent and purpose in certain circumstances: "In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."[79] Moreover, half-truths, silence, or non-disclosure of material facts also may amount to misrepresentation.[80]

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73. *In re* Conduct of Gatti, 8 P.3d 966, 970 (Or. 2000) (Gatti posed as a doctor and conducted a phone interview with one chiropractor and called the vice president of a medical review company implying that he was a doctor interested in working with the company. He surreptitiously recorded both phone calls); *see also* Midwest Motor Sports v. Arctic Cat Sales, Inc.; 347 F.3d 693 (8th Cir. 2003); People v. Pautler, 47 P.3d 1175 (Colo. 2002).

74. *In re* Anonymous Member of S.C. Bar, 322 S.E.2d 667, 669 (S.C. 1984).

75. *Id.*

76. MODEL RULES OF PROF'L CONDUCT R. 4.1. Notably, Model Rule 4.1's requirement of truthfulness in statement to others does not extend to all factual statements to opposing counsel. *Id.* R. 4.1 cmt. 1.

77. *Id.* R. 4.3.

78. *Id.*

79. *Id.* R. 4.3 cmt. 1.

80. *In re* Conduct of Gatti, 8 P.3d at 973 (internal citations omitted); *see, e.g.*, Ky. Bar Ass'n v. Geisler, 938 S.W.2d 578 (Ky. 1997) (lawyer disciplined because he failed to disclose to opposing party the fact that his client died); *see also* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Visser, 629 N.W.2d 376, 383 (Iowa 2001) (attorney disciplined for making half-true statement to press about court ruling because a half-truth still amounts to a misleading statement). Other courts have also held that misleading conduct need not be willful or intentional to violate the Model Rules. Rather, dishonesty can result simply from not being straightforward about facts. *See, e.g.*, Disciplinary Counsel v. McCord, 905 N.E.2d 1182, 1188 (Ohio 2009) (stating "the only relevant con-

Nonetheless, courts and state ethics committees have carved out three major exceptions to the rules prohibiting misrepresentation. First, government lawyers may be allowed to use covert investigations and pretexting under the rationale that government lawyers serve the public good and have a duty to advance the public interest.[81] Second, covert investigations may be permitted when they are likely to expose unlawful activities that otherwise go undetected.[82] Third, certain types of cases allow for undercover operations, such as trademark cases, cases where investigators pose as customers of public businesses,[83] or housing or employment discrimination cases that use undisclosed discrimination testers.[84] Even though all three of these exceptions implicate dishonesty under the Model Rules, courts permit such covert activities.[85]

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sideration is whether respondent performed the unethical acts; his subjective intent in doing so does not change the analysis"); Ansell v. Statewide Grievance Comm., 865 A.2d 1215 (2005) (intent not required in order to find unethical misleading conduct); Attorney Grievance Com'n of Md. v. Reinhardt, 892 A.2d 533, 540 (Md. 2006). In *Reinhardt*, a lawyer was disciplined for telling his client he is working on the case, when in fact he lost the file. The court stated that, "[i]n dealing with his client, respondent exhibited a lack of probity, integrity and straightforwardness, and, therefore, his actions were dishonest in that sense." *Id.*

81. *See, e.g.*, Gerald B. Lefcourt, *Fighting Fire with Fire: Private Attorneys Using the Same Investigative Techniques As Government Attorneys: The Ethical and Legal Considerations for Attorneys Conducting Investigations*, 36 HOFSTRA L. REV. 397, 398 (2007). Notably, commentators question the rationale for permitting greater deception by government lawyers over private ones. *See, e.g.*, Barry Temkin, *Deception in Undercover Investigations: Conduct Based vs. Status Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123 (2008); Isbell & Salvi, *supra* note 72, at 804–05 (ethics rules on misrepresentation should not turn on the perceived worthiness of the lawyer's goal or on the mere distinction between private and public lawyers).

82. *See, e.g.*, OR. CODE OF PROF'L RESPONSIBILITY DR 1-102(D) (2002); *see* N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 737, at 6 (2007), *available at* http://www.nycla.org/siteFiles/Publications/Publications519_0.pdf; *see also* Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 126 (S.D.N.Y. 1999); Apple Corps Ltd. v. Int'l Collectors Soc., 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (holding the use of private investigators to discovery violations of the law is generally permitted).

83. *See, e.g., Apple Corps*, 15 F. Supp. 2d at 456.

84. *See* Isbell & Salvi, *supra* note 72, at 793.

85. *Id.* (noting that discrimination testers are generally acceptable because courts have widely accepted them by both private and public lawyers, the testers engage in no illegal tactics, enforcement of the law is a noble goal, and testers may detect violations that may otherwise evade discovery).

Lastly, Model Rules 5.3 and 8.4 prohibit a lawyer from using a third party to violate the legal ethics rules.[86] Thus, the analysis regarding acts of deception applies regardless of whether the actor is a lawyer or someone acting for a lawyer. However, a lawyer is not responsible for the acts of third parties hired by a client or otherwise not acting at the behest of the lawyer.[87]

In sum, the Model Rules limit a lawyer's tactics in informal discovery by prohibiting deceptive and misleading conduct in the form of affirmative misrepresentations or, in some instances, omissions.

D. Misrepresentation in Attempts to Access Private Social Media Content

Although lawyers should, as a matter of professional competence, search social media during informal discovery in many cases, these searches can violate ethics rules if lawyers make false statements or engage in deceitful and misleading conduct. Attorneys viewing public profiles may be tempted to seek access to the private portions of a social media page, knowing that the user is shielding some content behind self-selected privacy settings. This temptation is even greater when the user has hundreds of "Friends" and likely gives little consideration before accepting a "Friend" request.

For example, a defendant's lawyer searches Facebook for facts that may help his client's tort suit. He locates a Facebook page for one of plaintiff's key witnesses, a young woman who has direct knowledge about the underlying incident. On the public portions of the Facebook page, the lawyer sees pictures of the witness at parties and notices comments about how she drinks heavily and has alcohol-related memory loss on occasion. The lawyer also notices that the witness has over 900 Facebook friends and likely gives little thought to what requests she accepts.

Intrigued by what useful information may exist in the private portions of the witness's Facebook page, the lawyer considers his options for obtaining that content. First, he knows enough about the witness from her public Facebook content to glean the types of Friend requests she generally accepts. The lawyer believes he could create a fake profile that matches a lot of the witness's biographical data, such as hometown, high school, and favorite places. With these details, the lawyer could easily craft a fake profile that would lure the witness into accepting the request.

Alternatively, the lawyer thinks the witness might accept a request using the lawyer's real name. After all, the lawyer is from a nearby town and is not much older than the witness. The lawyer also likes a lot of the same restaurants and sports teams as the witness. Nothing on the lawyer's Facebook

86. MODEL RULES OF PROF'L CONDUCT R. 5.3(c), R.8.4(a) (2013); *see also* MODEL RULES OF PROF'L CONDUCT R. 5.1 (Similarly, a supervising attorney is responsible for the actions of junior attorneys and paralegals).

87. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1 (2013).

page indicates that he is a lawyer representing the defendant in the pending case. Perhaps his truthful biographical data would be enough to lure the witness into accepting the request, provided that the witness does not ask for more information, and fails to Google the lawyer's name to deduce his profession and relationship to the defendant or the pending case. At the very least, the lawyer believes he could get the witness to accept a fake or truthful request sent by his private investigator or his paralegal.

As the above example illustrates, there are three different approaches for attempting to gain access to private social media content by informal discovery means: (1) fake profiles to gain access, (2) truthful requests for access, and (3) access through third parties. All three of these approaches may be unethical under existing state or local bar opinions interpreting the Model Rules.

i. Fake Profiles to Gain Access

First, creating a fake profile to gain access to private content is generally forbidden.[88] Attorneys may be tempted to create fake online identities by mimicking the user's interests and background. This task is simple to accomplish when the user leaves certain information public, such as hometown, schools attended, and interests. From the user's public data, an attorney could create a fake profile that increases the likelihood that the user will accept the request. But doing so is an unethical use of pretexting.[89]

Pretexting violates the Model Rules that prohibit false statements or deceitful or misleading conduct because the lawyer is resorting to trickery to infiltrate a private social media page.[90] Several ethics opinions already expressly prohibit pretextual requests for private access to social media content. For example, the New York City Bar Association forbids such activity under New York's version of Model Rule 8.4, which bans conduct involving dishonesty, fraud, deceit, or misrepresentation.[91] The Oregon, San Diego, New

88. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

89. *Id.*

90. *See, e.g.*, Steven C. Bennett, *Ethics of "Pretexting" in a Cyber World*, 41 MCGEORGE L. REV. 271, 272 (2010). Fake profiles may also violate the social media site's use terms, which may even lead to civil or criminal liability. *See, e.g.*, Paul F. Wellborn III, *"Undercover Teachers" Beware: How That Fake Profile on Facebook Could Land You in the Pokey*, 63 MERCER L. REV. 697, 713 (2012) (noting how fake profiles can lead to liability under computer fraud or anti-trespass statutes). Additionally, the Model Rules prohibits violations against the third party's legal rights. MODEL RULES OF PROF'L CONDUCT R. 4.4(a); Jeannette Braun, *A Lose-Lose Situation: Analyzing the Implications of Investigatory Pretexting Under the Rules of Professional Responsibility*, 61 CASE W. RES. L. REV. 355, 358 (2010).

91. N.Y.C. Bar Ass'n, Formal Op. 2010-2 (2010), http://www2.nycbar.org/Ethics/eth2010.htm (last visited Apr. 3, 2015).

Hampshire, and Philadelphia Bar Associations also expressly prohibit pretextual requests.[92]

Deceptive tactics to gain access to social media content are particularly abusive given the nature of social media. Although social media mimics real-world interactions in many ways, it differs from in-person or other communication because of its casual and informal nature.[93] Social media users may give less thought to permitting access to private content online than they would, for example, in a face-to-face meeting or phone call. Because deception via social media is easier to achieve than in other real-world scenarios, a lawyer's pretextual request unfairly capitalizes on the casual and informal nature of social media.[94] As a result, the ethics opinions correctly interpret the Model Rules as prohibiting lawyers from creating fake profiles or otherwise engaging in pretextual conduct or deceit to trick a user into accepting a private access request. Thus, lawyers cannot use fake profiles as an informal discovery tactic.

ii. The Lawyer's Direct Request

The second approach involves a truthful request that the lawyer sends using the lawyer's real name and biographical data. Even though these requests avoid outright pretexting, the Model Rules should nonetheless prohibit truthful requests when, upon sending the request, the lawyer fails to affirmatively disclose the request's purpose and nature.

Bar Associations that have addressed the ethics of direct requests disagree as to whether additional disclosures should be required. Some advisory opinions state that truthful, direct requests that have no affirmative misrepresentation are permitted.[95] Others maintain that even truthful requests that give no further disclosure as to their purpose are deceptive because they contain a material misrepresentation.[96] Apart from the fact that requiring further disclosures is the soundest approach, the existing Model Rules support it.

However, the New York City and Oregon Bar Associations permit direct requests without disclosures at all. In an advisory opinion, the New York

92. Or. Bar Ass'n, Formal Op. 2013-189 (2013), https://www.osbar.org/_docs/ethics/2013-189.pdf (last visited Apr. 3, 2015); *see also* N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05 (2012).

93. *See* Bennett, *supra* note 90.

94. For example, Facebook's terms of use require that account holders use "the names they use in real life." Not only do fake profiles violate this policy, Facebook users may be less likely to question profiles that appear legitimate on their face. *See Facebook's Name Policy*, FACEBOOK, https://www.facebook.com/help/292517374180078 (last visited Apr. 3, 2015).

95. *See, e.g.*, Or. Bar Ass'n, Formal Op. 2013-189 (2013); N.Y.C. Bar Ass'n, Formal Op. 2010-2 (2010).

96. *See, e.g.*, San Diego Bar Ass'n, Legal Ethics Op. 2011-2 (2011); Phila. Bar Ass'n, Prof'l Guidance Comm. Op. 2009-02 (2009).

City Bar Association noted that pretexting is prohibited, but that truthful requests to unrepresented persons are legitimate, informal discovery tactics.[97] The Oregon Bar also permits truthful requests without disclosures: "A simple request to access nonpublic information does not imply that Lawyer is 'disinterested' in the pending legal matter. On the contrary, it suggests that Lawyer is interested in the person's social networking information, although for an unidentified purpose."[98]

Under the Oregon approach, the account holder needs to be diligent before accepting requests by inquiring about the request's purpose.[99] Nonetheless, the lawyer has a duty to correct any misunderstanding the user might have as to the lawyer's purpose or role: "[I]f the holder of the account asks for additional information to identify Lawyer, *or if Lawyer has some other reason to believe that the person misunderstands her role*, Lawyer must provide the additional information or withdraw the request."[100] Thus, the lawyer is still responsible for preventing the account holder from operating under a false impression, a standard that may be difficult to apply in the social media context.

By contrast, at least three bar associations expressly require the requesting lawyer's affirmative disclosures. For example, a Philadelphia Bar Association opinion notes that a direct request to a witness may still omit a key material fact: that the requesting party is seeking evidence to use in pending or potential litigation.[101] Thus, even when the lawyer makes direct requests, this opinion seems to require an additional statement disclosing the lawyer's role and intent.[102] Similarly, the San Diego Bar Association expressly prohibits lawyers' direct requests that fail to disclose the request's purpose and intent. In its advisory opinion, the San Diego Bar Association interpreted various California legal principles that create an affirmative duty not to deceive that is similar to the Model Rules' duty.[103] Citing with approval to the Philadelphia Bar Association opinion, the San Diego Bar Association concluded that "[e]ven where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained *without*

97. *See* N.Y.C. Bar Ass'n, Formal Op. 2010-2, at 4.

98. Or. Bar Ass'n, Formal Op. 2013-189, at 580.

99. *Id.*

100. *Id.* (emphasis added).

101. *See* Phila. Bar Ass'n, Prof'l Guidance Comm. Op. 2009-02 (discussing truthful requests by third parties who are associated with the lawyer, but fail to disclose their association when making the request); *see also* N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05 (2012).

102. *See* Phila. Bar Ass'n, Prof'l Guidance Comm. Op. 2009-02.

103. *See* San Diego Bar Ass'n, Legal Ethics Op. 2011-2.

disclosing his affiliation and the purpose for the request."[104] Thus, the lawyer's direct requests—without further disclosures—still amount to deceitful and misleading conduct. Similarly, in New Hampshire, lawyers can only send a request for private access to a social media user if "the request identifies the lawyer by name as a lawyer and also identifies the client and the matter in litigation. This information serves to correct any reasonable misimpression the witness might have regarding the role of the lawyer."[105]

In essence, the Philadelphia, San Diego, and New Hampshire Bar Associations assume that a lawyer's requests for private access are misleading on their own, thereby necessitating further disclosures. In contrast, the New York City and Oregon Bar Associations assume that the requests are not misleading since they disclose the lawyer's real name. Thus, the New York City and Oregon Bar Associations place the onus of performing additional research or inquiring into the request's purpose on the account holder, while the Philadelphia, San Diego, and New Hampshire approach recognizes the inherently misleading nature of such a request.

The soundest approach is the one taken in the Philadelphia, San Diego, and New Hampshire advisory opinions. Even though the account holder should be diligent when screening requests, lawyers should nonetheless be required to include an affirmative disclosure. As noted in the New Hampshire opinion, the affirmative disclosure should include the name of the lawyer, the client, and the litigation. Social media as a platform invites casual and informal interaction, but it fails to encourage careful scrutiny or research before accepting a request.[106] The request itself may contain few details from which to glean the lawyer's real motive. Beyond that, the request may contain very little, if any, identifiable biographical information. Thus, even if the user can see the lawyer's real name, the request itself offers no information about the lawyer's role in a particular case or the request's purpose.

Rather, a typical request may outwardly deceive the target user. In many cases, the lawyer may live in the same city as the target user, root for the same sports teams, frequent the same restaurants, know some of the same people, or attend the same local events. Not only does the request ineffectively inform the user about the lawyer's role, it might have the opposite effect by creating a false sense of social connection. Because social media

104. *Id.* (emphasis added).

105. N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05 (2012).

106. For example, a friend request on Facebook contains minimal information and provides little context for assessing its merit. Rather, the friend request simply appears as a small profile photo with the requesting user's name. *See* Abram Carolyn, *How to Accept a Facebook Friend Request*, FOR DUMMIES, http://www.dummies.com/how-to/content/how-to-accept-a-friend-request-on-facebook.html (last visited Apr. 3, 2015) (The friend request notification fails to provide any other personal information about the requesting party. If users click on the requesting lawyer's name before accepting a friend request, they are taken to the lawyer's public Facebook page only).

exists to promote social contact, the target user may simply assume that shared interests prompted the request, as opposed to a drive to gather damaging evidence to use against the target user in litigation. The casual request's very nature implicates the caveat that the Oregon opinion notes by stating that more information is necessary "if Lawyer has some other reason to believe that the person misunderstands her role."[107] Any lawyer seeking private access to an unrepresented person's social media page to gather information to use in litigation should assume the target misunderstands the lawyer's intent, purpose, and role.[108] Thus, lawyers should be required to provide affirmative disclosures with truthful social media access requests.

Further, other policies underlying the Model Rules support an affirmative disclosure requirement. One of the reasons lawyers want to be exempt from a disclosure requirement when requesting private access is because on some level they fear that the target users would deny access if they knew the request's real motive. This reasoning elevates zealous advocacy above the lawyer's underlying obligations to be honest and to avoid trickery, thereby circumventing the protections against deceit that the Model Rules prescribe. Potential witnesses also must be put on notice of the importance of the conversation they are about to have with a lawyer.[109] The notice requirement is especially important in the social media context, as social media communications invite casual contact and provide no notice that an attorney is gathering evidence to use in a court of law.

Lawyers should be encouraged to heed the barrier that the user creates via user-selected privacy settings. Even though social media websites promote casual interaction, the mere fact that users give little thought to what they share should not alter the Model Rules' meaning and purpose. While

107. Or. Bar Ass'n, Formal Op. 2013-189 (2013).

108. Few commentators have addressed the lawyers' direct friend requests issue, but those who have are inconsistent in their approaches. For example, some argue that Model Rule of Professional Conduct 8.4 allows a direct friend request to an unrepresented party because no outward misrepresentation is involved. *See, e.g.*, BRIAN SHANNON FAUGHNAN ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 186 (2012). Instead, the account holder has to inquire into the request's purpose before accepting it. *Id.* Overall, however, commentators warn that no court or disciplinary board has directly addressed the issue, and lawyers who face it in practice must analyze the issue for themselves and weigh the risks of an ethical violation or improper discovery tactic against the belief that no deception is involved in direct friend requests. *See id.* at 187; Jaclyn S. Millner & Gregory M. Duhl, *Social Networking and Workers' Compensation Law at the Crossroads*, 31 PACE L. REV. 1, 38 (2011) (cautioning against direct requests unless a jurisdiction recognizes and applies an exception to the misrepresentation rules); John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. LEGAL MAL. & ETHICS 204, 231 (2013) (noting that social media as a platform makes deception easier than in-person contact).

109. *See In re* Anonymous Member of S.C. Bar, 322 S.E.2d 667, 669 (S.C. 1984).

lawyers should be encouraged to conduct witness interviews and other informal discovery, lawyers' direct requests should contain additional disclosures because the platform itself implies disinterest and permits users to be easily misled.

iii. Access Through a Third Party

The last approach is obtaining private social media content through a third party. While some third-party access is permitted, restrictions similar to lawyers' truthful direct access requests may apply. For example, if the third party is acting under the lawyer's direction, the same prohibitions on pretexting and deception limit what the third party can do.[110] Thus, a third party, such as a private investigator or paralegal, cannot create a fake profile to access private content under the attorney's instruction. Additionally, the third party's direct requests should include express disclosures as to the request's affiliation and purpose. The third party's request is even more likely to deceive the target user because the third party's real name likely presents no clue as to the requester's purpose, intent, or affiliation. Thus, the capacity to mislead is even greater when seemingly unaffiliated non-lawyers send the truthful request.

However, if the third party is not acting under the lawyer's direction, fewer limitations exist. For example, clients are free to hire private investigators on their own initiative and pass on content to the lawyer. Additionally, the ethics rules generally fail to bar lawyers from using the information that the client may obtain.[111] If the client or a third party already has direct access to the witness' private social media page, nothing likely prevents them from forwarding private social media content to the lawyer.[112]

In sum, the ethics rules restrict each of the three ways by which lawyers may attempt to gain access to private social media accounts. While pretexting is generally prohibited, truthful requests are permitted but should be accompanied by affirmative disclosures. Further, third-party attempts initiated at the lawyer's behest face the same ethical limits.

III. Conclusion

Lawyers have an affirmative duty to include social media in their discovery plans, including in informal investigative steps. Failure to do so may amount to an ethics violation. But lawyers may also violate ethics rules when they attempt to access private social media content. Lawyers must refrain from pretexting or misrepresentation, which can occur when the lawyer cre-

110. *See* Model Rules of Prof'l Conduct R. 5.3 (2013).

111. *See* David H. Taylor, *Should It Take a Thief?: Rethinking the Admission of Illegally Obtained Evidence in Civil Cases*, 22 Rev. Litig. 625, 629 (2003); *see also* N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05 (2012) ("no rule prohibits the client from sharing with the lawyer information gained").

112. Browning, *Keep Your "Friends" Close*, *supra* note 108, at 231.

ates a fake profile in an attempt to gain access to a user's private social media account. Truthful requests also may run afoul of the ethics rules because they lack adequate details to put the user on notice of the lawyer's role, affiliation, and purpose. Even though users must be cautious in allowing access to their private social media content, the social media interactions' casual and informal nature make it easier to deceive an unsuspecting user who receives a lawyer's truthful request (or that of a third party acting at the lawyer's behest). Quite simply, absent affirmative disclosures, misrepresentation still exists. Thus, to comply with the ethics rules, lawyers should accompany a private access request with a statement about the lawyer's role and purpose. With proper disclosure, lawyers can meet their obligations of competence and diligence while also avoiding misrepresentation.