SOCIAL MEDIA SNOOPING AND ITS ETHICAL BOUNDS

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ABSTRACT

Social media has entered the mainstream as a go-to source for personal information about others, and many litigators have taken notice. Yet, despite the increased use of social media in informal civil discovery, little guidance exists as to the ethical duties—and limitations—that govern social media snooping. Even further, the peculiar challenges created by social media amplify ambiguities in the existing framework of ethics rules and highlight the need for additional guidance for the bench and bar.

This article offers an in-depth analysis of the soundness and shortcomings of the existing legal ethics framework, including the 2013 revisions to the American Bar Association's model rules, when dealing with novel issues surrounding informal social media discovery. It analyzes three predominant ethics issues that arise: (1) the duty to investigate facts on social media, (2) the no-contact rule and prohibitions against deception, and (3) the duty to preserve social media evidence. While the first two issues can be adequately addressed under the existing framework, the rules fall short in dealing with the third issue, preservation duties. Further, even though the existing ethics rules can suffice for the most part, non-binding, supplemental guidelines, or "best practices," should be created to help practitioners and judges navigate the ethical issues created by new technology like social media.

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I. INTRODUCTION

Lawyers have long recognized the benefits of informal research in the pre-trial or even pre-filing phases of litigation. Indeed, the informal discovery process is favored by many courts as an affordable and effective way to narrow issues in litigation, obtain important facts to guide formal discovery, and find evidence to use at trial.[2] Informal discovery may involve interviewing witnesses, searching records, observing public movements, or performing web searches before undergoing the formal discovery process. Because informal discovery costs very little in comparison to formal means, it becomes even more crucial in the age of e-discovery, where voluminous production is common—and costs can easily skyrocket.[3] As a result, informal discovery continues to grow in importance in a variety of litigation matters.[4]

But as social media technology morphs and develops at an astonishing rate, the rules defining its ethical bounds evolve at a snail's pace. As a result, the advent of new technology like social media tests the adequacy of the existing legal ethics rules. In particular, three predominant ethical duties must be defined in relation to informal discovery of social media data: (1) the duty to affirmatively consider social media data when determining if claims or defenses are well-grounded in fact, or otherwise performing factual investigations; (2) the duty to refrain from contacting represented parties or from engaging in misleading or deceptive conduct to gain access to private social media content; and (3) the duty to consult clients on their own social media usage and to preserve evidence. Legal ethics rules do not expressly address these three major ethical concerns, legal scholars have not fully addressed these ethics issues in relation to informal social media discovery, and the few on-point ethics opinions issued by various bar associations are inconsistent or short-sighted.

The American Bar Association (ABA) recently amended the Model Rules of Professional Conduct to address the challenges of technology and the globalization of the legal profession,[5] but concluded that no revisions were

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2. *See* FED. R. CIV. P. 26–37; Hickman v. Taylor, 329 U.S. 495, 500–01 (1947).

3. INST. FOR THE ADVANCEMENT OF THE LEGAL SYS., FINAL REPORT ON JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 19 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008 (discussing the prohibitive expense and inefficiency of e-discovery).

4. *See, e.g.*, Niesig v. Team I, 558 N.E.2d 1030, 1034 (N.Y. 1990) (emphasizing policies favoring informal discovery).

5. *See ABA Commission on Ethics 20/20*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Sept. 23, 2014).

needed to address technology specifically.[6] At the same time, commentators continue to question the function and purpose of the Model Rules and criticize the system of parallel laws that have emerged to regulate attorney conduct. Scholars note that the Model Rules have evolved from a code of broader moral principles to a more specific regulatory scheme that functions much like black-letter law.[7] Additionally, even though the Model Rules serve as the template for most state-enacted ethics codes, other laws now also dictate attorney conduct, such as state tort law, federal laws, and court and agency rules.[8] This web of parallel laws creates some ambiguity and inconsistency in the law and complicates the moral decision-making process for attorneys trying to act ethically.

But even in light of criticisms of the existing legal ethics landscape, the unique issues arising from social media investigation, at their core, are not new. Instead, in keeping with the conclusions of the Ethics 20/20 Commission, the existing law can resolve many of the issues that arise in this novel context.

This article clarifies how the specific ethical issues surrounding informal discovery of social media should be addressed under the existing landscape of legal ethics rules. Further, it identifies one area where reform is needed to address social media in particular: spoliation and preservation duties. It also proposes a "best practices" framework as the most efficient means to otherwise guide lawyers in their quest for staying within ethical bounds when navigating the new frontier of social media.

Part II of this article examines the historical development of legal ethics rules and the current debate as to their role and purpose. Part III explains how the existing ethics rules apply to informal discovery in general and lays the groundwork for how the law treats the underlying ethical concerns in non-social media contexts. Part IV lays out the specific framework for how the law should be applied to informal discovery of social media data. Specifically, Part IV focuses on the three major ethics concerns of adequate

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6. Letter from Jamie S. Gorelick & Michael Traynor to Am. Bar Ass'n, Summary of Actions by the ABA Commission on Ethics 20/20 (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 [hereinafter Letter].

7. *See, e.g.*, Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241–42 (1991); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 206–08 (2002) (noting the sharp increase in regulation of the legal profession); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 341 (1994) (characterizing the state legal ethics schemes as "splintered" one decade after the controversial Model Rules were first adopted by the ABA).

8. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1(b) (2000).

pre-trial factual investigation, restrictions under the no-contact rule and rule prohibiting misleading conduct, and duties to preserve evidence. First, the duties of competence and of adequate pre-filing factual investigation create an affirmative duty to expressly search social media content. Second, even though a duty to search social media exists, lawyers must avoid contacting represented parties via social media and cannot use pretexting to gain access to private social media content. Even direct requests for private access, using the attorney's real name but without additional disclosures, should be prohibited because they are inherently misleading and deceptive. Lastly, lawyers have an affirmative duty to advise clients as to social media, including a duty to preserve social media data and avoid spoliation. The scope of that preservation duty, however, is difficult to define in the current scheme of legal ethics rules. Revision and clarification in this area of parallel rules is therefore necessary. Lastly, Part V notes that a "best practices" approach to supplement the existing rules may provide the needed clarity for addressing many of the emerging and nuanced ethics issues arising from new technology like social media.

II. THE PURPOSE AND FUNCTION OF LEGAL ETHICS RULES

The ethical boundaries of informal investigation must strike a balance between policies favoring liberal discovery and those protecting the legal profession and the public.[9] On the one hand, state and federal courts favor broad discovery, including informal investigation, in order to promote fairness, avoid surprise in the adversarial process, and narrow the issues before trial.[10] On the other hand, modern-day lawyering involves zealous advocacy and attorney self-interest, which must be tempered by ethical obligations to the court, the client, or the public at large.[11] Because the practice of law has evolved into a competitive enterprise, ethical limits on attorneys are imposed to ensure fairness in the context of civil discovery, and otherwise.[12]

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9. *See generally* David A. Green, *Balancing Ethical Concerns Against Liberal Discovery: The Case of Rule 4.2 and the Problem of Loophole Lawyering*, 8 GEO. J. LEGAL ETHICS 283 (1995).

10. *See* FED. R. CIV. P. 26–37; Hickman v. Taylor, 329 U.S. 495, 507 (1947).

11. Some commentators disagree, noting that zealous advocacy should not be stifled by ethical constraints in some instances. *See, e.g.*, MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004). *But see* Andrew M. Perlman, *Moving Beyond Zeal in the Rulemaking Process: A Reply to Professor Monroe Freedman*, 14 GEO. MASON L. REV. 185, 191 (2006).

12. At the turn of the twentieth century, the legal profession was criticized, most notably by then-president Theodore Roosevelt, for adopting an overly competitive approach to the practice

These limits have been codified to varying degrees in state and federal laws, often paralleling or drawing on the principles contained in the existing Model Rules of Professional Conduct, as promulgated by the ABA.[13] But the adequacy of the existing framework of legal ethics rules is often tested when the rules must be applied to novel contexts, such as social media and new technology.

A. Historical Development—and its Critics

In order to understand how the ethical issues arising out of informal social media discovery fit within the existing ethics framework, one must first examine the historical development of legal ethics rules in general. The term "ethics rules" itself encompasses numerous sources of law. One source is the general or common law, which sometimes regulates attorney conduct and provides equitable or legal remedies.[14] Federal law has also evolved to include express rules regulating attorney conduct.[15] Another source is the disciplinary rules themselves, which directly regulate the legal profession. Together, these numerous sources of law form parallel legal schemes that interact with each other, influence each other, and at times even contradict each other.

The general or common law includes both state and federal law that encompasses concepts from agency law, tort law, evidence law, and civil procedure rules.[16] For example, state tort law dictates what conduct rises to the level of an actionable tort,[17] while specific state courts or agencies may also promulgate their own rules of conduct for proceedings before particular tribunals.[18] The American Law Institute created another resource, the

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of law. James M. Altman, *Considering the ABA's 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2404–05 (2003). Unlike purely capitalistic ventures, the practice of law should be seen as involving special obligations to the court, to the administration of justice, and to the public good. *Id.* at 2442–43. These principles, coupled with the increasing disdain with which the profession was viewed, fueled the drive to regulate lawyers through a canon of ethics. *Id.* at 2409.

13. MODEL RULES OF PROF'L CONDUCT R. 1.0–8.5 (2012).

14. Susan R. Martyn, *Back to the Future: Fiduciary Duty Then and Now*, *in* A CENTURY OF LEGAL ETHICS 3, 4 (Lawrence J. Fox et al. eds., 2009); SUSAN R. MARTYN, LAWRENCE J. FOX & W. BRADLEY WENDEL, THE LAW GOVERNING LAWYERS 1 (2013); SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 17–21 (2008).

15. *See, e.g.*, FED. R. CIV. P. 11.

16. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1(b) (2000).

17. *See generally id.* at §§ 14–33.

18. MODEL RULES OF PROF'L CONDUCT, pmbl. & scope ¶ 15 (2012) ("The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and

Restatement of Law Governing Lawyers, to summarize and capture the legal principles contained in general or common law.[19] But the very fact that a Restatement must draw from so many areas of law to summarize the laws governing lawyers demonstrates the broad swath of substantive law that may apply to lawyer conduct.

As for disciplinary rules, unique codes regulating the legal profession developed out of the common law in the last century.[20] Regulating the legal profession predominantly falls on states, and each state has adopted some form of an ethics code that governs attorney discipline. Most states base their codes on a version of the ABA's model ethics rules, with state-specific variation in some instances.[21]

The ABA's Model Rules of Professional Conduct[22] serve as the leading model code of legal ethics, and have evolved in their scope and purpose over the past century. This evolution has caused some uncertainty about their function and proper role in regulating lawyer conduct. The first set of ABA ethics rules was adopted in 1908, known as the Canon of Ethics.[23] In response to the perceived greed and lack of professionalism among lawyers, the Canon of Ethics emphasized the need to temper zealous advocacy with one's personal moral responsibilities to the court and the public good.[24] The Canon of Ethics remained in place, with some additions and amendments, for sixty years, and was adopted by almost every state.[25] In 1969, the Canon of Ethics was replaced by the Model Code of Professional Responsibility, which transformed the model code into a more regulatory framework of disciplinary

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procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.").

19. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, introductory note (2000).

20. Susan R. Martyn, *Back to the Future: Fiduciary Duty Then and Now*, *in* A CENTURY OF LEGAL ETHICS 3, 4 (Lawrence J. Fox et al. eds., 2009); SUSAN R. MARTYN, LAWRENCE J. FOX & W. BRADLEY WENDEL, THE LAW GOVERNING LAWYERS 1 (2013); SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 17–21 (2008).

21. *See State Adoption of ABA Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Sept. 23, 2014).

22. The Model Rules, in some incarnation, form the basis of every state's code, therefore making them relevant to state regulations of the bar. *See id.* But, as one scholar notes, Rule 11 is actually binding on attorney conduct and serves as a disciplinary tool, while the Model Rules themselves merely serve as persuasive authority. *See* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959, 971 n.58 (1991).

23. For a detailed history of how the Canon of Ethics were developed, see Altman, *supra* note 12, at 2395–96.

24. *See id.*

25. *Id.*

rules.[26] The 1969 Model Code used a unique tripartite format consisting of binding disciplinary rules, aspirational canons, and ethical considerations.[27] However, the aspirational portions of the Model Code were treated as binding rules in some jurisdictions, leading to criticism of the tripartite format.[28]

The 1969 Model Code was substantially changed to create the 1983 Model Rules of Professional Conduct—changes which further increased the rules' regulatory function.[29] In addition to substantive revisions, the 1983 Model Rules also abandoned the tripartite format in favor of a restatement format. Thus, the Model Rules are organized as black-letter rules accompanied by non-binding comments.[30] Since 1983, the Model Rules have undergone several revisions, notably with the Ethics 2000 Commission[31] and the most recent Ethics 20/20 Commission.[32]

Federal law has also entered the domain of regulating lawyer conduct more directly. In general, federal courts have an inherent power to sanction lawyers.[33] But Rule 11 of the Federal Rules of Civil Procedure further defines unacceptable lawyer conduct by requiring that any paper filed in a federal court be well-grounded in fact, reasonably based in the law (or based on a good-faith argument as to extending or modifying the law), and not interposed for an improper purpose.[34]

Since Rule 11 was amended in 1983 to add affirmative certification duties, some commentators have criticized the Federal Rules' entrée into the realm of attorney ethics.[35] Although Rule 11 only grants a federal court more power

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26. Wolfram, *supra* note 7, at 217–18.

27. CTR. FOR PROF'L RESPONSIBILITY, A.B.A., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at xii–xiii (2006).

28. *Id.* at xii–xiv; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, 58 n.60 (1986) (summarizing cases in which tribunals gave binding effect to the Canons or Ethical Considerations of the 1969 Model Code).

29. CTR. FOR PROF'L RESPONSIBILITY, *supra* note 27, at xii–xiv.

30. *Id.*

31. *See* Margaret Colgate Love, *The Revised A.B.A. Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441 (2002).

32. Letter, *supra* note 6.

33. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764–66 (1980) (recognizing inherent power to impose sanction on attorneys).

34. FED. R. CIV. P. 11.

35. *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 961 (2009) (predicting that the federalization of ethics rules will continue, resulting in a nationwide standard tailored to specialty); McMorrow, *supra* note 22, at 960. *But see* Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965, 1966 (2011) (arguing that Model Rules should cede to Federal Rules in some areas); A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2019–34 (2011) (arguing that federal rules should be looked to for a uniform spoliation standard).

to punish attorneys that appear before it, the practical effect of Rule 11 is that it dictates how lawyers should act more broadly.[36] In essence, Rule 11 federalizes rules regulating lawyer conduct and marks a shift from state-centric regulation.[37]

Additionally, other Federal Rules, such as Rules 26 and 37, also regulate attorney conduct by imposing duties of preservation and permitting court sanctions for spoliation of evidence.[38] Many individual federal courts and agencies also set their own standards, sometimes in conflict with the ABA Model Rules.[39] Federal courts interpret these provisions as well, adding judicial opinions to the list of legal sources defining an attorney's ethical duties. The result is that federal law has become increasingly important in regulating the legal profession, further complicating the ethics analysis attorneys must employ.[40]

Scholars debate the role and function of the parallel sources of legal ethics rules, and much of that debate hinges on the level of specificity that should be included within the rules themselves.[41] While general ethics principles underlie the ABA Model Rules, the rules themselves have taken a more specific, legislative-type appearance in recent revisions.[42] At the same time,

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36. *See generally* McMorrow, *supra* note 22.

37. *Id.*

38. FED. R. CIV. P. 26, 37.

39. Notably, Rule 11 came into existence around the same time as the Model Rules of Professional Conduct and generally parallels Model Rule 3.1's prohibition on filing frivolous claims. But some federal ethics rules, such as those promulgated by federal agencies, may conflict with the Model Rules. *See* Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1248–56 (2003).

40. Professor Perlman also notes that the Federal Rules have more bite than state ethics codes, which may not be enforced by courts when they contradict with the parallel federal law. *See* Perlman, *supra* note 35; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2 (2000); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 60–61 (2005) (discussing cases in which federal courts have contradicted state ethics rules); W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation"*, 44 S. TEX. L. REV. 53, 79 (2002) (noting the challenges lawyers face in navigating an increasingly complicated and ever-changing legal ethics landscape).

41. Perlman, *supra* note 35; *see also* Benjamin P. Cooper, *Taking Rules Seriously: The Rise of Lawyer Rules As Substantive Law and the Public Policy Exception in Contract Law*, 35 CARDOZO L. REV. 267, 272–74 (2013) (noting the lack of clarity in how rules governing lawyers impact substantive law); Zacharias & Green, *supra* note 40, at 60–61. *See generally* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 293–95 (1993) [hereinafter *Specificity*].

42. *See* Wolfram, *supra* note 7, at 217–18; *see also* Zacharias, *Specificity*, *supra* note 41, at 240–41 (noting that some of the debate surrounding the role of the ABA Model Ethics Rules is informed by the general debate surrounding standards versus rules).

the ABA Model Rules continue to hover outside of substantive laws that are becoming more intricate and specific.

Three major criticisms of the current legal ethics rules help inform the analysis of informal social media discovery. Commentators maintain that the current legal ethics scheme is ineffective because (1) the Model Rules function too much like black-letter law, which invites overly narrow application; (2) the Model Rules distance lawyers from the broader moral obligations that underlie legal ethics rules; and (3) the parallel sources of law cloud the legal ethics landscape and at times are inconsistent with each other.

First, commentators criticize the Model Rules for functioning too much like black-letter law, thereby inviting overly narrow interpretations. Indeed, the evolution of legal ethics rules over the past century has been marked by greater specificity in codified rules.[43] But legal ethics rules run the risk of being ineffective when codified like black-letter law, as this shift invites lawyers to find "loopholes" in the language of the rules.[44] Ethics rules, by their very nature, are built on moral underpinnings that are open to interpretation, yet that interpretation is often made by self-interested lawyers.[45] Overly specific rules in particular undermine the effectiveness of legal ethics rules by ignoring underlying moral obligations in exchange for a narrow reading of the rules' express terms.[46] Thus, according to some critics, codifying legal ethics in a black-letter law format makes them overly specific and ineffective.[47]

Second, commentators point out that, because legal ethics encompasses moral obligations that exist outside of a set of precise rules, attempts to codify legal ethics merely distance lawyers from the underlying principles governing attorney conduct.[48] Thus, codified legal ethics rules inadvertently

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43. *See, e.g.*, Hazard, Jr., *supra* note 7, at 1241–42; Wolfram, *supra* note 7, at 206–08 (noting the sharp increase in regulation of the legal profession); Zacharias, *supra* note 7, at 341 (characterizing the state legal ethics schemes as "splintered" one decade after the controversial Model Rules were first adopted by the ABA). *But see* Perlman, supra note 35, at 1967 (arguing that the Model Rules have devolved from being rule-like to a "more complicated and lamentable mix of rules and aspirational norms that too often lack disciplinary bite").

44. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 643 (1981) ("Rules are less likely to influence behavior the more they mandate conduct opposed to self-interest and then create loopholes for those intent on evasion . . . .").

45. *Id*. at 643–44.

46. Green, *supra* note 9, at 293. For example, in many other contexts, lawyers are taxed with finding an argument around the law, such as a loophole that maximizes the outcome for the client (and lawyer) without "technically" breaking the law. *See id*. at 293–94. As a result of this approach in other contexts, legal codes in general are often analyzed as narrow boundaries of proscribed conduct, so that anything falling outside of their precise scope is permitted. *Id*.

47. *Id.*

48. Even the Model Rules themselves acknowledge that an attorney's duties derive from more than just the rules themselves:

separate lawyers from moral responsibility for their actions.[49] Legal ethics issues are subject to discretion and deliberate decision-making by lawyers, and any ethics code must foster an analysis of the underlying principles as applied to each unique situation.[50] Failure to allow for this deep analysis may lead to a positivist view of ethics rules that enable lawyers to distance themselves from morally repugnant acts.[51]

Third, others have noted that substantive laws are creating inconsistency by regulating lawyers in areas already addressed by the Model Rules.[52] As federal rules, tribunal rules, or even tort law encroach further on regulating the legal profession, the Model Rules lose their disciplinary function.[53] As a result, some scholars argue that the Model Rules in fact should be crafted to mimic black-letter law in order to maintain meaningful disciplinary purpose.[54] Further, some scholars urge that the Model Rules should concede that, at least for certain ethical obligations, other sources of law supplant them.[55] This third criticism highlights the fact that the regulatory landscape has become increasingly complex, and lawyers can face court sanctions, formal bar discipline, and even tort liability arising out of the same incident of misconduct.[56]

> Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

MODEL RULES OF PROF'L CONDUCT, pmbl. (2012).

49. Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 29–30 (2000) (summing up arguments of others).

50. *See* Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 24 (2003) (examining the various critiques of codified ethics rules and proposing a "Deliberative Model" that mandates "careful ethical deliberation prior to the exercise of discretion"); *see also* Eric C. Chaffee, *The Death and Rebirth of Codes of Legal Ethics: The Role of Neuroscentific Evidence of Intuition and Emotion in Moral Decision Making in Regulating the Practice of Law*, 27 GEO. J. LEGAL ETHICS (forthcoming 2014) (advocating for a dual process approach to legal ethics rules, which promotes both analytic reason and moral decision making similar to that facilitated by the Model Code of Professional Responsibility).

51. Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 902 (1995).

52. *See, e.g.*, Perlman, *supra* note 35, at 1973.

53. *Id.* at 1976.

54. *See, e.g.*, *id.* at 1983–84.

55. *See, e.g.*, *id.*

56. *See* Wolfram, *supra* note 7, at 206–08.

Ultimately, the evolution of the Model Rules' structure and purpose, coupled with the existence of other, parallel sources of attorney regulation, creates ambiguity for attorneys trying to act ethically.[57] This ambiguity is amplified by new technology like social media, which requires these legal ethics rules to be applied to novel contexts. And the rules themselves have been slow to evolve to address new, technology-like social media.[58]

B. Evolution of the Model Rules to Address New Technology

Generally, ethics rules evolve over time to specifically cover new issues arising from changes in the practice of law. Scholars often debate whether rule changes are needed to expressly address new technology like social media.[59] Most recently, the ABA recognized that technology is having a profound impact on the practice of law, and made efforts to modernize the Model Rules to address the ethics issues arising from technology.[60] Those efforts, however, resulted in few substantive changes to the Model Rules themselves.

The latest revisions to the Model Rules resulted from the work of the Commission on Ethics 20/20 (Commission).[61] This Commission was formed in 2009 to modernize the ABA Model Rules in light of "advances in technology and global legal practice developments."[62] As one component of its work, the Commission contemplated the changing ways technology is

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57. *See, e.g.*, Perlman, *supra* note 35, at 1984.

58. *See infra* note 57.

59. The internet and social media have spawned many debates as to whether rules must be expressly amended or supplemented to account for the advent of new technology. *Compare* Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 10 (2012) (explaining why special rules for social media discovery are not feasible or necessary) *and* Liesa L. Richter, *Don't Just Do Something!: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1670–74 (2012) (arguing that the existing evidence rules can account for the peculiar challenges that social media and the internet creates), *with* Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 366 (2012) (proposing amendments to the hearsay doctrine to deal with social media communications) *and* Allison L. Pannozzo, Note, *Uploading Guilt: Adding A Virtual Records Exception to the Federal Rules of Evidence*, 44 CONN. L. REV. 1695, 1715–22 (2012) (proposing special evidence rules to address virtual records).

60. *See About the Commission*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited September 8, 2014).

61. *See* AM. BAR ASS'N COMMISSION ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 4 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf.

62. *About the Commission*, *supra* note 60.

being used in case investigation and research.[63] Because 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."[64]

Although this need for technological proficiency was acknowledged by the Commission, the Rules themselves contain no express language addressing this concern. Instead, a comment was added to Model Rule 1.1 noting that some degree of technological proficiency is required as part of one's duty of competence. Newly added Comment 8 to Model Rule 1.1 states that "a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology* . . . ."[65] This comment marks a major shift, as it is the first time technology has been expressly included within the scope of an attorney's duty of competence under the Model Rules.

Aside from Comment 8 to Rule 1.1, the Commission refrained from making other substantive changes relating to technological proficiency or the use of technology in civil discovery. And the revised Model Rules make no mention at all of social media. Rather, the Commission determined that no such changes were necessary, finding that the existing rules can be applied to the specific, novel issues arising out of new technology:

> In general, we have found that the principles underlying our current Model Rules are applicable to these new developments. 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.[66]

Thus, the Commission itself ultimately revised the Model Rules as to globalization of legal practice, confidentiality, and client development, but refrained from codifying specific rules about the ethics of using new technology in the civil discovery process.[67] Rather, the Commission

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63. AM. BAR ASS'N COMMISSION ON ETHICS 20/20, *supra* note 61, at 4.

64. *Id.* 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. *See id*. at 3.

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

66. Letter, *supra* note 6, at 2.

67. *See* 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, 258–59 (2013).

determined that the existing rules can adequately address the ethical issues arising out of new technology.

Some commentators have noted that express provisions covering new technology issues should be written into other laws.[68] But it may be that no precise framework of legal ethics rules can effectively address specific scenarios surrounding new technology like social media, as technological advances move more quickly than any rule-making process.[69] Nonetheless, the changes adopted by the Commission signal an important shift towards requiring technological proficiency among lawyers. Even though the express language of the Model Rules remains the same, the work of the Commission highlights the fact that ethical issues surrounding technology cannot be ignored.[70]

C. The Delaware Approach: Supplemental Guidelines to Address New Technology

After the Ethics 20/20 Commission declined to amend the Model Rules to address new technology specifically, at least one state identified the need for further clarification on the lawyer's ethical duties relating to technology. Delaware adopted the revised Model Rules, including Comment 8, in 2013[71] and created a special Commission on Law and Technology (Delaware Commission) to provide guidance on technology-related issues to practitioners.[72] The Delaware Commission expressly stated that the duty of competence encompasses staying "abreast of changes in law and its practice,

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68. *See, e.g.*, Allison Clemency, *"Friending," "Following," and "Digging" Up Evidentiary Dirt: The Ethical Implications of Investigating Information on Social Media Websites*, 43 ARIZ. ST. L.J. 1021, 1044–46 (2011) (suggesting that supplemental rules are needed); Tom Mighell, *Avoiding a Grievance in 140 Characters or Less: Ethical Issues in Social Media and Online Activities*, 52 ADVOC. 8, 8 (2010) (noting that special rules may be necessary). *But see* Browning, *supra* note 67, at 259 (arguing that the existing rules can account for ethical issues arising out of social media).

69. The work of the Ethics 20/20 Commission illustrates the time it takes to amend ethics rules. The Commission was formed in 2009, and the Model Rules were ultimately amended in 2013. *See* Letter, *supra* note 6. Now, state legislatures will consider and possibly adopt the revisions in whole or in part, which may take years.

70. *See* Gensler, *supra* note 59, at 33–34.

71. *See* Order Amending Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 of the Delaware Lawyers' Rules of Professional Conduct (2013), *available at* http://courts.state.de.us/rules/dlrpc2013rulechange.pdf (Delaware Supreme Court adopted recommendations of Ethics 20/20 Commission).

72. *See* Press Release, Del. Supreme Court, Delaware Supreme Court Creates New Arm of Court—Commission on Law and Technology (July 5, 2013), *available at* http://www.courts.delaware.gov/forms/download.aspx?id=69618.

including the benefits and risks associated with relevant technology."[73] "Further, the Delaware Commission's purpose is to provide "sufficient guidance and education in the aspects of technology and the practice of law so as to facilitate compliance with the Delaware Lawyers Rules of Professional Responsibility."[74] Delaware therefore expressly recognizes that the Rules of Professional Responsibility now require technological proficiency, and intends to offer further guidance to its lawyers for meeting this ethical obligation.[75]

The Delaware Commission will issue "best practices" or other supplemental guidelines as a reference for lawyers.[76] Further, it will offer a "Knowledge Bank" to members of its bar that compiles opinions and articles on technology-related ethics issues.[77] It will also sponsor educational programs and offer guidance to the courts on technology matters.[78] Notably, the Rules of the Commission make clear that its Guidelines and Best Practices are not intended to bind lawyers:

> The purpose of these guidelines and best practices is to assist members of the Delaware Bar and not to create a threat or risk of any kind. The failure of an attorney to comply with a published guideline or best practice is not admissible for any purpose in a civil action in any court.[79]

Thus, Delaware expressly prohibits its best practices or guidelines from being used as evidence in civil cases, which should minimize the risk of these aspirational norms being treated as binding rules.

In sum, the Model Rules have not been adapted to specifically address new technology issues, and some jurisdictions, like Delaware, recognize the need for additional guidance.

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73. Order In Re: Commission on Law and Technology, 1 (2013), *available at* http://www.courts.state.de.us/declt/docs/CommissionOnLawTechnologyOrder.pdf.

74. *Id.* at 2.

75. Some commentators criticize the creation of supplemental "best practices" or other guides, noting that courts may place too much emphasis on such guides when applying ethics rules in disciplinary proceedings or otherwise. *See, e.g.*, Love, *supra* note 31, at 443. But Delaware's approach is not new, as ABA sections, tribunals, and other groups have issued optional standards to supplement the Model Rules before. *See* Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839, 839–40 (2001) (noting that voluntary standards can be an effective supplement to the Model Rules).

76. RULES OF THE DEL. COMM'N OF LAW & TECHNOLOGY 4 (2013), *available at* http://courts.state.de.us/declt/docs/CommissionOnLawTechnologyRules.pdf.

77. *Id.* R. 5.

78. *Id.* R. 6–7.

79. *Id.* R 4.

III. THE ETHICS OF INFORMAL DISCOVERY GENERALLY

Three major ethical issues arise with informal discovery of social media: (1) the duty to investigate facts; (2) the no-contact rule and duty to refrain from deceptive tactics; and (3) the duty to preserve evidence and avoid spoliation. Each of these issues has arisen in non-social media contexts, and the law as to informal discovery in general helps inform the analysis of social media discovery specifically.

A. Duty to Investigate Facts

Both the Model Rules and Federal Rule 11 create a duty to investigate facts. First, attorneys must perform adequate investigation in order to meet the ethical standards of basic competence and diligence under the Model Rules. Additionally, litigants must avoid filing frivolous claims and are required to ascertain the facts underlying the case in order to comply with Rule 11. Together, these rules make clear that lawyers must affirmatively inquire into the facts underlying claims or defenses, even before a lawsuit is initiated.

The Model Rules contemplate pretrial factual investigation as a necessary step in case preparation. Model Rule 1.1, which requires competency, expressly states that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[80] The comments to Model Rule 1.1 explain that thoroughness and preparation encompass inquiry into factual elements.[81] Further, Model Rule 1.3 expressly requires reasonable diligence and zealous advocacy, which also encompasses factual investigation.[82] The degree of investigation necessary is based on the specific circumstances of each case.[83] But the duty of competence requires an attorney to at least "discover[] and present *readily available* evidence."[84]

Additionally, both the Model Rules and Federal Rule 11 prohibit frivolous claims. Under Model Rule 3.1, attorneys must make reasonable efforts to

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

81. *Id.* cmt. 5.

82. *Id.* R. 1.3; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (2000) (duty of diligence encompasses "appropriate factual research").

83. For example, an attorney facing a statute of limitations 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).

84. People v. Boyle, 942 P.2d 1199, 1201 (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").

investigate claims before bringing suit.[85] This investigation duty is an ongoing one, making it necessary for attorneys to consistently inquire into facts and ensure that they have an adequate basis for filing suit that continues to exist as the suit progresses.[86] Ethics violations may occur if the attorney knew, or should have known, that factual or legal support was lacking.[87]

Federal Rule 11 requires that an attorney sign all pleadings, representing that factual assertions are supported, or will be supported after further discovery.[88] This representation does not require factual certainty or evidentiary support for all claims,[89] but it does mean that the attorney performed "an appropriate investigation into the facts that is reasonable under the circumstances . . . ."[90] Pleading "on information and belief" does not relieve attorneys of their duties to perform reasonable investigation before making an assertion in a pleading.[91]

Attorneys cannot hide behind their ignorance of facts or law to avoid ethical violations or sanctions. Rather, the duty to investigate facts requires more than mere reliance on the facts as stated by the client. For example, in *Hunt v. Dresie*,[92] an attorney committed legal malpractice claims by failing to investigate the facts underlying a breach of fiduciary duty claim.[93] The Kansas Supreme Court noted that clients rightfully look to counsel to reasonably investigate the facts underlying a case.[94] Therefore, the lawyer is

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85. MODEL RULES OF PROF'L CONDUCT R. 3.1; *see also* FED. R. CIV. P. 11.

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

87. *See, e.g.*, Jiminez v. Madison Area Technical Coll., 321 F.3d 652, 655 (7th Cir. 2003) (attorney cannot rely on obviously fraudulent documents).

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

89. *See* FED. R. CIV. P. 11(b)–(c) advisory committee's notes to 1993 amendment.

90. *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 (Wis. Ct. App. 2004).

91. FED R. CIV. P. 11(b)–(c) advisory committee's notes to 1993 amendment.

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

93. *Id.* at 1048.

94. *Id.* at 1053.

obligated to search for the "true facts," especially in cases where the litigants may be motivated by personal animosity.[95]

Additionally, a lawyer needs to independently investigate allegations of serious misconduct in particular.[96] While relying on the client may be reasonable, the attorney must critically assess the trustworthiness of what the client says, and cannot "accept the client's version of the facts on faith alone."[97] It is the lawyer's role to objectively pursue facts and advise the clients after adequate factual inquiry and analysis.[98]

These principles defining the duty to investigate facts have been applied in the context of online legal and factual research. For example, in awarding attorney's fees and costs, at least one federal appellate court has stated that computer-aided legal research is recognized as essential to contemporary law practice.[99] Other courts have noted that inability to locate a lead case is inexcusable, particularly when a simple internet search would have discovered it.[100] Courts also will not excuse a lawyer for failing to locate simple facts that are readily available in an internet search.[101] For example, in *Weatherly v. Optimum Asset Management, Inc.*,[102] a Louisiana court annulled a tax sale for failing to provide adequate notice.[103] There, the court performed its own internet search and quickly located the out-of-state property owner.[104] Other courts have recognized a similar "duty to Google" and do not excuse failure to locate readily available facts on the internet.[105]

Thus, the legal ethics rules impose a duty on lawyers to use reasonable efforts to investigate facts and to avoid frivolous claims, even with computer-aided legal and factual research.

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95. *Id.*

96. Wis. Chiropractic Ass'n v. Wis. Chiropractic Examining Bd., 676 N.W.2d 580, 589 (Wis. Ct. App. 2004).

97. *Id.*

98. Hunt v. Dresie, 740 P.2d 1046, 1053 (Kan. 1987).

99. *See, e.g.*, Wehr v. Burroughs Corp., 619 F.2d 276, 284 (3d Cir. 1980).

100. Massey v. Prince George's Cnty., 918 F. Supp. 905, 908 (D. Md. 1996).

101. 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 AMERICAN JURISPRUDENCE PROOF OF FACTS §§ 18–19 (3d ed. 2011).

102. Weatherly v. Optimum Asset Mgmt., Inc., 928 So. 2d 118, 123 (La. Ct. App. 2005).

103. *Id.* at 119.

104. *Id.*

105. *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).

B. No-Contact Rule and Duty to Avoid Deception

Several Model Rules, when read together, create a general duty to avoid unauthorized contact or deceptive tactics when dealing with litigants or third parties. By imposing an obligation of fairness to others, these Model Rules serve as a counter-balance to the duties of loyalty to one's client and of zealous advocacy.

Lawyers face the most restrictions when dealing with represented persons, as Model Rule 4.2 expressly prohibits direct contact by an attorney with a person represented by counsel.[106] Additionally, several Model Rules require truthfulness and fairness to unrepresented persons or third parties.[107] These rules apply not only in the context of litigation, but in any dealings an attorney has with others on his own behalf or on behalf of a client.[108]

First, as to represented persons, Model Rule 4.2 contains an express no-contact provision, which prohibits an attorney from directly contacting a person represented in relation to the matter, relating to the subject of the representation.[109] It protects a represented party or witness from overreaching by other lawyers and preserves the sanctity of the attorney-client relationship.[110] But despite its legitimate purpose, the practical effect of the no-contact rule is to substantially limit the scope of informal investigation, preventing lawyers from inquiring into even non-privileged information. Thus, the no-contact rule broadly restricts attorneys' ability to glean potentially harmful facts in informal discovery, which may result in increased effort and costs.[111] Further, some ambiguity exists as to when the no-contact obligation begins, such as in pre-trial or pre-filing contexts, who is bound by

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106. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983).

107. *See id.* 4.1 (no false statements of material fact to third persons); *Id.* R. 4.3 (no implying disinterest to unrepresented third parties); *Id.* R. 4.4 (limitations on lawyer's use of tactics that embarrass, delay or burden third parties). Additionally, other rules also require honesty in other contexts, such as Rule 3.3 (no false statements of fact to the tribunal or offering evidence that is known to be false) and Rule 3.4 (obligations to opposing party and counsel).

108. *See, e.g.*, *In re* Levin, 709 S.E.2d 808, 809 (Ga. 2011), *reinstatement granted*, 744 S.E.2d 797 (Ga. 2013) (attorney who was convicted of misdemeanor of distributing obscene material disciplined because crime goes to his moral turpitude and fitness to practice law); Disciplinary Counsel v. Robinson, 933 N.E.2d 1095, 1103 (Ohio 2010), *reinstatement granted*, 957 N.E.2d 295 (Ohio 2011) (Rule 3.4 applies to both personal and professional conduct); Lawyer Disciplinary Bd. v. Markins, 663 S.E.2d 614, 622 (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).

109. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983).

110. *Id.* R. 4.2 cmt. 1.

111. Green, *supra* note 9, at 285, 301 (noting that informal interview of a represented party is less costly than a formal deposition); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 803, 805 (2009); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b (2000).

it, and who counts as "represented" under the rule.[112] Nonetheless, electronic forms of contact suffice to violate the no-contact rule.[113]

Notably, the no-contact rule is subject to an "observation exception" which permits a lawyer to act as a general member of the public and observe the activities of a represented person.[114] Examples of this exception include sitting in a car and videotaping a person's public movements or, with a business entity, shopping in a business' store and engaging in typical interactions as if a customer.[115] This exception may not apply to observing private conduct, however.[116]

Beyond the no-contact rule, lawyers also cannot engage in deceptive conduct when dealing with others. Dishonesty is identified by many as the most detrimental trait a lawyer can have, as it undermines the public trust and perception of the profession.[117] Not surprisingly, several legal ethics rules incorporate a prohibition on dishonest conduct in some form.[118]

At least four Model Rules guard against dishonesty in the civil discovery context. Model Rule 4.1 requires truthfulness in statements to third parties in the course of representing a client.[119] Model Rule 4.3 specifically applies to dealings with unrepresented persons and prohibits lawyers from making misleading statements or implying disinterest.[120] Additionally, Model Rule 8.4 prohibits lawyers from engaging in conduct that involves "dishonesty, fraud, [or] deceit" in any context.[121] Lastly, Model Rule 5.3 prohibits lawyers

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112. Green, *supra* note 9, at 298 (addressing the ambiguity of the no-contact rule as it applies to contact with corporate party's current or former employees); Hazard & Irwin, *supra* note 111, at 806 (discussing some unclear or unjust applications of the no-contact rule).

113. *See, e.g.*, Iowa Supreme Court Att'y Disciplinary Bd. v. Stowers, 823 N.W.2d 1, 9 (Iowa 2012) (no-contact rule violated by sending direct email to represented person).

114. MODEL RULES PROF'L CONDUCT R. 4.2 (ann. 2011) ("Observing versus Communication" annotation); *see, e.g.*, Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 878–80 (N.D. Ill. 2002); State *ex rel.* State Farm Fire & Cas. Co. v. Madden, 451 S.E.2d 721, 730 (W. Va. 1994).

115. *See* Yvette Ostolaza & Ricardo Pellafone, *Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites*, 11 J. HIGH TECH L. 56, 79 (2010). The rationale behind the observation exception is that lawyers should not be denied access to information that an ordinary member of the public can obtain in the normal course of a business transaction, for example. *See id.*

116. *See id.*

117. *See, e.g.*, *In re* Kalil's Case, 773 A.2d 647, 648 (N.H. 2001) ("'[N]o single transgression reflects more negatively on the legal profession than a lie . . . .'") (internal citations omitted).

118. *See generally* MODEL RULES OF PROF'L CONDUCT (2014). In addition to the Model Rules, other legal ethics rules prohibit dishonest conduct. 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.

119. MODEL RULES OF PROF'L CONDUCT R. 4.1; R. 4.1 cmt. 1 (2014).

120. *Id.* R. 4.3.

121. *See id.* R. 8.4.

from using third parties to perform tasks on their behalf that otherwise would amount to a rule violation.[122]

Taken as a whole, the Model Rules prohibit dishonesty both in the form of affirmative misleading statements as well as concealing the truth or omitting material information. First, as to overt misleading statements, courts do not allow pretexting, which involves using misrepresentation or deception to gain access to facts.[123] One of the most common circumstances of pretexting involves the attorney posing as someone else in order to glean information. For example, the Oregon Supreme Court in In Re *Conduct of Gatti* disciplined an attorney who posed as a doctor in phone conversations in order to obtain facts pertaining to an anticipated lawsuit by his client.[124] Similarly, an attorney was disciplined for posing as the cousin of an injured driver in a phone call to a potential party to a personal injury suit.[125] There, the court reasoned that Model Rule 8.4 was violated because the attorney failed to put the party on notice of the "adversarial nature of the conversation."[126]

Additionally, the duty to avoid misleading conduct encompasses indirect deception, such as concealing or omitting material facts once some sort of representation has been made. Under Model Rule 4.1, misrepresentation includes omission: "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."[127] Model Rule 4.3 also prohibits lawyers from implying they are

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122. *Id.* R. 5.3. Other Model Rules also encompass duties of honesty, including Candor to the Tribunal, *id.* R. 3.3; Fairness to Opposing Party and Counsel, *id.* R. 3.4; Advertising, *id.* R. 7.2; and Responsibilities of a Partner or Supervisory Lawyer, *id.* R. 5.1.

123. *See* Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (pretexting involves concealing one's true identity to gather information); 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); Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 578 (2005) (referring to "surreptitious discovery" and "covert investigations"); 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).

124. 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. *Id*. He surreptitiously recorded both phone calls. *Id*.; *see also* Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003); *In re* Pautler, 47 P. 3d 1175 (Colo. 2002).

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

126. *Id.*

127. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2014). 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.

disinterested when dealing with unrepresented persons.[128] If lawyers know or should know that the party misunderstands the lawyer's role or purpose, they have a duty to correct it.[129] As a result, 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."[130]

Although jurisdictions vary as to their definitions of "misrepresentation," several state courts also broadly define misrepresentation to include mere omission of material facts. The *Gatti* case, for example, notes that half-truths, silence, or non-disclosure of material facts can all amount to a misrepresentation.[131] Other courts have also held that misleading conduct need not be willful or intentional to violate the Model Rules.[132] Rather, dishonesty can result simply from not being straightforward about facts.[133]

Notably, however, three major exceptions to the misrepresentation rule have been carved out by state legal ethics rules or by courts. First, government lawyers have more leeway with using covert investigations and pretexting, under the rationale that public lawyers have a duty to advance the public interest.[134] Second, covert investigations that are likely to weed out unlawful

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128. *Id.* R. 4.3.

129. *Id.*

130. *Id.* R. 4.3 cmt. 1.

131. *In re* Conduct of Gatti, 8 P.3d 966, 973 (Or. 2000) (internal citations omitted); *see, e.g.*, Ky. Bar Ass'n v. Geisler, 938 S.W.2d 578, 581 (Ky. 1997) (disciplining a lawyer because she failed to disclose to the opposing party the fact that her client died); *see also* Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Visser, 629 N.W.2d 376, 383 (Iowa 2001) (disciplining an attorney for making a half-true statement to the press about a court ruling because a half-truth still amounts to a misleading statement)

132. *See, e.g.*, Disciplinary Counsel v. McCord, 905 N.E.2d 1182, 1188 (Ohio 2009) ("[T]he only relevant consideration 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, 1223 (Conn. App. Ct. 2005) (intent not required in order to find unethical misleading conduct).

133. Att'y Grievance Comm'n of Md. v. Reinhardt, 892 A.2d 533, 540 (Md. 2006). In *Reinhardt*, for example, a lawyer was disciplined for telling his client he is working on the case, when in fact he lost the file. *Id.* 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.*

134. *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 v. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123, 164 (2008); Isbell & Salvi, *supra* note 123, at 804 (arguing 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).

activities may be permitted when such activity would go undetected otherwise.[135] Third, undercover operations have been allowed in some specific types of cases, such as trademark cases in which investigators pose as customers at public businesses[136] or the use of discrimination testers in housing or employment discrimination cases.[137] Even though all three of these exceptions implicate Model Rules 4.1, 8.4, and 5.3, courts have permitted covert activities under these scenarios.[138]

Further, covert investigations and pretexting often involve the use of third parties, such as private investigators. The scope of conduct for the third-party investigator is generally the same as the lawyer: Model Rule 5.3 mandates that a lawyer cannot use a third party to violate the legal ethics rules.[139] Thus, the same analysis as to contact with represented parties and acts of deception applies regardless of whether the actor is the lawyer directly or someone acting at the direction of the lawyer. But this analysis also means that the three major exceptions to the misrepresentation rule can be applied when a third-party investigator is used. Nonetheless, the lawyer is not responsible for the acts of third parties that were hired by the client or otherwise not acting at the behest of the lawyer.[140] Therefore, the relationship between the third party and the lawyer and the instructions provided may dictate whether ethics rules were violated by proxy.

As a whole, the legal ethics rules restrict an attorney's ability to contact represented persons altogether and substantially limit investigation tactics.

C. Preservation and Spoliation of Evidence

The third major issue with informal discovery is the duty to preserve evidence. While the first two issues deal with offensive tactics to gather information, this third issue involves defensive missteps. Specifically,

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135. *See, e.g.*, OR. CODE OF PROF'L RESPONSIBILITY DR 1-102(D) (2004); *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 v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 126 (S.D.N.Y. 1999); Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (use of private investigators to discover violations of the law is generally permitted).

136. *See, e.g.*, *Apple Corps Ltd.*, 15 F. Supp. 2d at 475–76.

137. *See* Isbell & Salvi, *supra* note 123, at 793.

138. *Id.* at 793–94, 801–02 (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).

139. MODEL RULES OF PROF'L CONDUCT R. 5.3 (2014). Similarly, a supervising attorney is also responsible for the actions of junior attorneys or paralegals. *Id.* R. 5.1.

140. *See id.* R. 8.4 cmt. 1.

attorneys must be cautious when advising clients as to their own retention practices, particularly as to deleting or destroying content. Indeed, attorneys not only must refrain from advising a client to delete potential evidence, the duty to preserve goes even further by imposing an affirmative duty to ensure evidence is preserved.

The general duty to preserve evidence stems from the Model Rules,[141] state and federal procedural rules,[142] and even tort and criminal law.[143] Further, cases in different jurisdictions may interpret the preservation duties under statutory law and use their inherent power to sanction attorneys who fail to meet their preservation duties.[144] Because so many sources of law regulate an attorney's duty to preserve evidence, the duty itself can be difficult to define. And, when taken together, these rules present lawyers with numerous provisions to consider and reconcile in order to determine the scope and timing of their preservation duties.

Model Rule 3.4 recognizes a duty to preserve in the litigation context but, in doing so, refers directly to applicable procedural or other sources of substantive law. Rule 3.4 states that an attorney cannot "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[145] It also prohibits falsifying evidence, and more generally requires compliance with the tribunal's rules by stating that an attorney cannot "knowingly disobey an obligation under the rules of a tribunal."[146] Thus, as written, Model Rule 3.4 does not define what constitutes preservation or when the duty kicks in; rather, it refers to and incorporates substantive law.

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141. *Id.* R. 3.4.

142. *See* FED. R. CIV. P. 26, 37. These rules, along with Rules 16, 33, 34, and 45 were amended in 2006 to specifically address electronically stored information. Notably, proposed amendments to the Federal Rules of Civil Procedure would change some of the safe harbors for destruction of electronic evidence. Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Advisory Committee on Civil Rules, 1, 1 (May 8, 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf (proposing amendments to civil rules to clarify and limit scope of electronic discovery).

143. *See* Eric M. Larsson, *Cause of Action for Spoliation of Evidence*, *in* 40 CAUSES OF ACTION §§ 42–56 (2d ed. 2009) (summarizing the states that have recognized an independent tort for spoliation of evidence).

144. *See* John G. Browning, *Burn after Reading: Preservation and Spoliation of Evidence in the Age of Facebook*, 16 SMU SCI. & TECH. L. REV. 273, 277–85 (2013).

145. MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2014). According to the comments, this provision also applies to "computerized information." *See id.* R. 3.4 cmt. 2; *see also* Disciplinary Counsel v. Robinson, 933 N.E.2d 1095, 1097 (Ohio 2010), *reinstatement granted*, 957 N.E.2d 295 (2011) (noting that Rule 3.4 applies to acts done in both personal and professional capacity).

146. MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2014).

The Federal Rules and related case law are a major source of this substantive law. Preservation duties are created by Federal Rules 26 and 37, which require lawyers to ensure potentially relevant evidence is preserved when litigation is pending or reasonably anticipated.[147] When this duty starts is somewhat unclear, and courts have tried to define the parameters of "reasonably anticipated."[148] This determination is fact-specific and varies based on the nature of the case but, generally, the duty exists "when a party should have known that the evidence may be relevant to future litigation."[149] Certainly express notice of an existing lawsuit suffices, but pre-litigation hold letters or other correspondence may trigger the duty.[150] A general concern over potential litigation may not trigger the duty to preserve, however.[151] Further, courts may examine the degree of knowledge of the potential claim, the risk of losing evidence, and the impact that loss would have on the litigation to determine if a duty to preserve existed.[152] This analysis is also impacted by whether the party is a litigant or merely a third party to the potential or pending litigation.[153]

Even if a duty to preserve is triggered, the scope of the duty must also be defined. Preservation does not mean that every scrap of content or duplicate sources of evidence be preserved.[154] Rather, the duty to preserve is limited to potentially relevant content.[155] Nonetheless, the lawyer cannot simply defer to the client on preservation issues, and must provide guidance as to what may fall within the definition of relevance.[156]

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147. FED. R. CIV. P. 26, 37.

148. *See, e.g.*, Zubulake v. UBS Warburg L.L.C. (*Zubulake IV*), 220 F.R.D. 212, 216–17 (S.D.N.Y. 2003).

149. *Id.* at 216.

150. *See* Wiginton v. CB Richard Ellis, 229 F.R.D. 568 (N.D. Ill. 2004). Just as the duty to preserve kicks in even before litigation is pending, the Federal Rules appear to front-load discovery to the earlier phases of litigation through broader Rule 26 initial disclosure requirements. *See* Stephen S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 522–23, 531–32 (2009). Overall, the e-discovery amendments tend to require earlier assessments of discovery matters. *Id.* at 522–23.

151. Realnetworks, Inc. v. DVD Copy Control Ass'n, 264 F.R.D. 517, 526 (N.D. Cal. 2009).

152. *See, e.g.*, Willard v. Caterpillar, Inc., 40 Cal. App. 4th 892 (Cal. Ct. App. 1995); *see also* THE SEDONA CONFERENCE WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD. (WG1), THE SEDONA COMMENTARY ON LEGAL HOLDS: THE TRIGGER AND THE PROCESS 1 (2007), *available at* https://thesedonaconference.org/download-pub/77.

153. *See generally Zubulake IV*, 220 F.R.D. 212.

154. *See* Carole S. Gailor, *In-Depth Examination of the Law Regarding Spoliation in State and Federal Courts*, 23 J. AM. ACAD. MATRIM. LAW 71, 77 (2010).

155. *Id.*

156. *See* Qualcomm, Inc. v. Broadcom, Corp., No. 05CV1958-RMB(BLM), 2008 WL 638108, at *3 (S.D. Cal. Mar. 5, 2008) (attorney cannot rely on the client's unsubstantiated assertions as to adequacy of ESI search); Cache La Poudre Feeds, L.L.C. v. Land O'Lakes, Inc., 244 F.R.D. 614, 629–30 (D. Colo. 2007) (violated preservation duties in part by leaving the

Unfortunately, courts are inconsistent about the scope of what must be preserved[157] and commentators have noted the need for proportionality[158] and reasonableness.[159] Nonetheless, it remains difficult for an attorney to determine which jurisdiction's rule may apply to potential litigation and how that jurisdiction defines the preservation duty.[160]

Electronic discovery has complicated the rules defining the scope of preservation duties. The 2006 amendments to the Federal Rules specifically address electronically stored information, or ESI, and generally contemplate collaboration between the parties as one facet for addressing the complexity of electronic discovery.[161] But ESI is dynamic, voluminous, and changes frequently, making it difficult to identify the parameters of what must be preserved.[162] The Federal Rules themselves acknowledge this, creating a different standard for obtaining discovery for ESI when it is not easily accessible due to undue burden or cost.[163]

Nonetheless, preservation duties still apply to inaccessible ESI. The advisory committee notes state that an attorney who identifies an inaccessible source of ESI is still subject to "common-law or statutory duties to preserve evidence."[164] Further, attorneys may be held to a duty to preserve "unsearched

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determination of what ESI is related to the litigation to non-lawyer employees of the client); Zubulake v. UBS Warburg L.L.C., 229 F.R.D. 422, 432–34 (S.D.N.Y. 2004) (defining an attorney's duty to identify and preserve potentially relevant ESI).

157. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 522 (D. Md. 2010).

158. *See, e.g.*, *id.* at 523 (noting a proportionality requirement under Rule 26's provisions on ESI); C.J. Paul W. Grimm et. al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 405 (2008).

159. *See, e.g.*, Procter & Gamble v. Haugen, 427 F.3d 727, 739, 741 (10th Cir. 2005) (considering the degree of prejudice suffered by lacking access to electronic information, the whole of which would have cost $30 million to access); Jones v. Bremen High Sch. Dist. 228, 08 C 3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010) (requiring reasonableness, but noting that the lawyer must take concrete actions that ensure preservation of relevant materials).

160. *See* Grimm, *supra* note 158, at 388–90.

161. FED. R. CIV. P. 26(f). In light of this spirit of collaboration, some litigants enter into preservation agreements with opposing counsel to help define duties on their own. *See* Brent R. Austin, *ESI, E-Discovery, and Ethics: Managing Pre-Trial Litigation in the Age of Electronically Stored Information*, *in* ETHICS IN E-DISCOVERY 1, 9 (2012).

162. Commentators have noted that traditional principles of preservation and spoliation cannot adequately address the unique issues that arise with electronic discovery. *See* Michael R. Nelson & Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 14, at 1–2 (2006); Grimm, *supra* note 158, at 393–94.

163. The Federal Rules create a presumption against discovery of inaccessible ESI, thus requiring good cause to overcome this presumption. *See* FED. R. CIV. P. 26. As stated in the advisory notes, several factors are considered before discovery of inaccessible data is permitted, including an examination of how important the information sought is. FED. R. CIV. P. 26 advisory committee's note (2006 Amendment).

164. FED. R. CIV. P. 26 advisory committee's note (2006 Amendment).

sources of potentially responsive information that it believes are not reasonably accessible" depending on the particular circumstances of the case.[165] Notably, collaboration and discussion is also suggested here: "It is often useful for the parties to discuss this issue early in discovery."[166]

When a document is not properly preserved, sanctions for spoliation of evidence may be warranted. The concept of spoliation of evidence encompasses both deliberate and inadvertent destruction of evidence.[167] However, Federal Rule 37(e) provides some protection when ESI is lost due to "routine, good-faith operation of an electronic information system."[168] Nonetheless, even unintentional loss of ESI can be sanctioned,[169] and much ambiguity still exists about the scope of federally created duties to preserve evidence. One circuit has even created a pilot program to outline the specific parameters of these duties, and other groups seek to provide much-needed clarity on preservation issues with ESI.[170]

Under the Federal Rules, courts have recognized numerous types of sanctions that can be imposed for e-discovery preservation violations, including additional discovery, adverse inferences, cost-shifting, payment of fees and costs, other fines, and even default judgment.[171] Some form of sanctions is being used with increased frequency in all types of civil litigation.[172] At the same time, conduct that is sanctionable under the Federal Rules may also form the basis of a disciplinary action by the state under its

165. *Id.*

166. *Id.* Notably, the cost-benefit analysis of Federal Rule 26 does not apply before litigation commences, even though preservation duties may already exist. Austin, *supra* note 161, at 1.

167. *See generally* STEVEN GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY (2014).

168. *Id.*

169. *See id.*

170. *See* SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, FINAL REPORT ON PHASE TWO 6 (2010–11), *available at* http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf; THOMAS Y. ALLMAN, THE SEDONA PRINCIPLES AFTER THE FEDERAL AMENDMENTS 1–2 (2007), *available at* https://thesedonaconference.org/download-pub/78; ADVISORY COMMITTEE ON RULES OF FEDERAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 1–2 (2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf (proposing amendments to civil rules to clarify and limit scope of electronic discovery).

171. *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010).

172. Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790 (2010).

ethics rules.[173] Tort or criminal liability may also result from spoliation of evidence.[174]

Thus, the ethics landscape for preservation and spoliation rules is complicated and ever-evolving in light of the boom in electronic discovery. Attorneys may be subject to several rules, some inconsistent with each other, that warrant multiple forms of consequences for the same instance of spoliation. The unique way ESI is created and stored further complicates the preservation analysis.

IV. APPLYING THE EXISTING LEGAL ETHICS RULES TO INFORMAL SOCIAL MEDIA DISCOVERY

Informal investigation of social media is subject to the same ethical constraints that apply to informal discovery generally. Defining the parameters of ethical conduct with informal social media discovery is crucial, however, as many lawyers rely on social media as a key resource for pretrial investigation. With social media, attorneys can access helpful content without resorting to formal discovery. But the act of investigating cases on social media, particularly as to privacy-setting protected content, poses three unique ethical considerations.

First, social media searches must fall within the duty of competence and of prefiling factual investigation. Second, lawyers investigating witnesses on social media may run afoul of the no-contact rule or rules against deceptive tactics, particularly if the lawyer attempts to gain access to privacy-protected social media content. Lastly, preservation of social media data should be a major concern for lawyers, as multiple laws may require the lawyer to expressly consider social media preservation issues, even before suit is filed.

As a preliminary matter, however, the unique functionality of social media must be explained before discussing the specific ethical concerns it raises.

A. How Social Media Works

Social media or social networking websites are interactive, user-driven programs that may contain a comprehensive archive of the account-holder's

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173. *See* State *ex rel.* Okla. Bar Ass'n v. Braswell, 975 P.2d 401, 408 (Okla. 1998) (attorney's refusal to pay sanctions violated rules of the tribunal and warranted discipline by the bar under the state's rules of professional conduct).

174. *See* Wolfram, *supra* note 7, at 206–08; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 (2000) (summarizing potential criminal and civil liability for spoliation of evidence, including negligent spoliation).

thoughts, feelings, actions, and associations.[175] Users create a social media page by inputting varying levels of personal data into a web form, such as hometown, date of birth, relationship status, political views, religious beliefs, and employment information.[176] Additionally, users can post regular updates to their page, including videos, photos, links, or comments.[177] Users might even include websites or articles they like, physical locations they have visited, or events they have attended.[178]

One key social media feature is the ability to use privacy settings to limit the audience for certain content. The privacy settings contained in a social media account can be complicated and fluid, but most social media websites create some distinction between public and private content.[179] Public content is visible to anyone who accesses the social media site.[180] It does not require any special access beyond simply visiting the user's page.[181] Private content, on the other hand, is visible only to a smaller group of approved users.[182]For example, Facebook lets users create Friend relationships that allow access to privacy-protected social media content.[183]

In the most basic sense, an approved Friend sees content that is otherwise shielded from public view. But Facebook's privacy settings are nuanced and detailed, so users can further limit some content to subgroups of Friends.[184] These detailed settings can vary as to each individual post.[185] Further, a user can adjust past settings for posts at any time.[186]

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175. *See Facebook Timeline: Get Started*, FACEBOOK.COM, https://www.facebook.com/help/467610326601639/ (last visited Sept. 11, 2014) (providing instructions and features of Timeline).

176. *Id.*

177. *See id.*

178. *See Facebook Locations: Location Basics*, FACEBOOK.COM, https://www.facebook.com/help/337244676357509/ (last visited Sept. 11, 2014) (describing the addition of story locations to maps).

179. *See Facebook Timeline: Timeline Privacy*, FACEBOOK.COM, https://www.facebook.com/help/393920637330807/ (last visited Sept. 11, 2014).

180. *See id.* Some social media websites require everyone who visits a social media page to log in before seeing the publicly available content. But creating a social media account is quick, easy, and free. *See Facebook Signing Up: Create an Account*, FACEBOOK.COM, https://www.facebook.com/help/345121355559712/ (last visited Sept. 11, 2014).

181. *See Facebook Timeline: Timeline Privacy*, *supra* note 179.

182. *Id.*

183. *See id.*

184. *See id.*

185. *Id.*

186. *See id.* The public/private content distinction is significant for other social media websites as well. *See Twitter Privacy Policy*, TWITTER.COM, https://twitter.com/privacy (last visited Sept. 11, 2014). Twitter, for example, is a leading social media microblogging site that enables users to post 140-character messages called "tweets." *See About Twitter*, TWITTER.COM , https://twitter.com/about (last visited Sept. 11, 2014). By default, Twitter accounts are public, but

Social media, at its core, facilitates communication among users. Users interact via the site through posting public or private comments on each other's pages,[187] mentioning or tagging users in posts,[188] sending direct messages like email,[189] or engaging in instant chat communications.[190] In addition to these online interactions among users, other social media features result in some sort of notification being sent to a target user. For example, Twitter allows one user to follow a target user's public Twitter account automatically.[191] But by clicking "Follow," the user causes Twitter to send a notice to the target user.[192] Facebook also sends Friend Requests or notices to target users.[193] Thus, even simple clicks can result in a communication.

Further, social media is not static, as content is constantly added and removed by users. In this way, social media remains dynamic and interactive, and generates layers of information that changes often. Social media accounts enable users to remove individual posts or even delete the entire account. Deactivation is also an option for some social media sites. In Facebook, for example, deactivation makes an account dormant without destroying any content—the user can reactivate the account within a certain period of time and still have access to all of the account contents.[194] Deletion, on the other hand, permanently removes the account and all of its content and may amount

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private account options also exist. *Id.* Similar to Facebook and Twitter, the professional networking site LinkedIn also allows users to limit the visibility of their account content. *See LinkedIn Overview*, LINKEDIN.COM, http://www.linkedin.com/company/linkedin (last visited Sept. 11, 2014). It enables users to form relationships called "Connections" with other professionals, and that relationship may dictate who sees what information on a user's profile. *See LinkedIn Help Center: Controlling Who Sees Your Connections List*, LINKEDIN.COM, http://help.linkedin.com/app/answers/detail/a_id/52 (last visited Sept. 11, 2014).

187. *See Facebook Help: Getting Started on Facebook, How to Post & Share*, FACEBOOK.COM, https://www.facebook.com/help/333140160100643/ (last visited Oct. 30, 2014).

188. *See Facebook: What is Tagging and How Does It Work*, FACEBOOK.COM, http://www.facebook.com/help/124970597582337/ (last visited Sept. 11, 2014).

189. *See Facebook Help: Messaging, Sending a Message*, FACEBOOK.COM, https://www.facebook.com/help/326534794098501/ (last visited Oct. 30, 2014).

190. *See Facebook Chat: Chat Basics*, FACEBOOK.COM, https://www.facebook.com/help/332952696782239/ (last visited Sept. 11, 2014).

191. *See Twitter Help Center: FAQs about following*, TWITTER.COM, https://support.twitter.com/groups/52-connect/topics/213-following/articles/14019-faqs-about-following (last visited Sept. 11, 2014).

192. 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." *See id.*

193. *See Facebook Help: Connecting: Adding Friends & Friend Requests*, FACEBOOK.COM, https://www.facebook.com/help/360212094049906 (last visited Oct. 30, 2014).

194. *See Deactivating, Deleting, & Memorializing Accounts*, FACEBOOK.COM, https://www.facebook.com/help/214376678584711 (last visited Sept. 11, 2014).

to spoliation.[195] Other social media applications, like Snapchat, specialize in anonymous or ephemeral communications that automatically delete content.[196]

These basic social media features, particularly the distinction between public and private social media content and the ability to remove or delete content, are crucial in understanding the ethics issues of informal discovery of social media data.

B. Duty to Investigate Facts on Social Media

The existing ethics rules should be read to affirmatively include social media content as part of the duty to investigate facts. Model Rules and the Federal Rules of Civil Procedure mandate that attorneys perform an adequate amount of factual investigation outside of the formal discovery process.[197] This duty to investigate already includes *online* legal and factual research in some contexts.[198] It follows that this duty should also extend to performing social media searches in informal discovery.

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195. *See id.* Notably, even deleted content on sites like Facebook may linger on servers or otherwise be accessible even after deletion. *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, 905 (2013).

196. *See Snapchat Support: How to Create and Send Snaps*, SNAPCHAT.COM, http://support.snapchat.com/a/create (last visited Sept. 11, 2014). But even ephemeral apps like Snapchat do not guarantee total deletion of content. In 2014, the Federal Trade Commission charged Snapchat for false promises that messages sent via the app "disappear forever." Complaint, In the Matter of Snapchat, Inc., No. 132-3078, *Federal Trade Commission*, at *4 (2014), *available at* http://www.ftc.gov/system/files/documents/cases/140508snapchatcmpt.pdf. Rather, as noted in the FTC complaint, the Snapchat app itself, third-party apps outside of the Snapchat, or screen capture technology on mobile devices allow messages to be accessed even after they "disappeared forever" from Snapshat's user interface. *Id.* at *3–4. Snapchat and the FTC settled the charges. *See* Press Release, Fed. Trade Comm'n, Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False (May 8, 2014), *available at* http://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were.

197. MODEL RULES OF PROF'L CONDUCT R. 1.3; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. d (duty of diligence encompasses "appropriate factual research"); FED. R. CIV. P. 11.

198. Some lawyers may be overlooking social media as a tool for case investigation. According to the 2012 ABA Legal Technology Survey Report, 95.7% of lawyers surveyed use a social network for personal, non-professional reasons, yet only 43.7% use social networks for case investigation. *See* A.B.A. Legal Tech. Research Ctr., 2012 American Bar Association Legal Technology Survey, Part IV at 40, 47 (2012). Although this percentage is a substantial increase over the 2011 survey, which had 16% of responding lawyers using social media for case investigation, it nonetheless demonstrates that the majority of lawyers are neglecting social media as a potential source of facts, even though they have familiarity with social media from their personal use of it. *See id.*; A.B.A. Legal Tech. Research Ctr., 2011 American Bar Association

Social media searches should be considered a part of the duty to investigate facts for four reasons. First, lawyers cannot merely assume that social media content will be obtained in formal discovery, as informal social media search results may dictate what private social media content is discoverable. Second, the duty of competence and rules requiring adequate factual investigation support an affirmative duty to perform social media searches, such as to confirm that pleadings are well-grounded in fact. Third, courts reject lack of technological proficiency as an excuse for failing to comply with ethics rules and should reject arguments that lawyers need not utilize new technology like social media. Lastly, social media searches are a cost-effective and simple way to investigate facts, making it a reasonable step to require of lawyers.

First, informal social media investigation may determine the outcome of formal discovery disputes. Courts in some cases resolve social media discovery disputes by using a "factual predicate" approach.[199] Under the factual predicate approach, 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.[200] In other words, the basis for seeking formal discovery of private social media data may very well rely on publicly available social media content obtained through informal investigation.

Two cases help illustrate the factual predicate approach and importance of informal investigation. In the first case, *Romano v. Steelcase, Inc.*,[201] the plaintiff was seen on vacation in Florida participating in physical activities instead of being bed-ridden and immobile, as alleged in her complaint.[202] The *Romano* court granted broad access to the private portions of the account because the publicly available photos—located informally by defense counsel—created the requisite factual predicate to support formal discovery.[203] However, in *Tompkins v. Detroit Metropolitan Airport*,[204] the plaintiff was allegedly injured in a slip-and-fall accident at an airport, and defense counsel found a public photo on Facebook showing the plaintiff at a picnic holding a small dog.[205] Using a factual predicate approach similar to

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Legal Technology Survey, Part IV at 32 (2011). Ironically, a lawyer who avoids social media altogether because of potential ethical issues may be violating the duty to perform online research and fact investigation.

199. *See, e.g.*, Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012); Romano v. Steelcase, Inc., 907 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 2010).

200. *See Tompkins*, 278 F.R.D. at 388–89.

201. *Romano*, 907 N.Y.S.2d at 650–53.

202. *Id.* at 653.

203. *Id.* at 654.

204. 278 F.R.D. at 387–89.

205. *Id.*

Romano, the *Tompkins* court held that the publicly available image was not inconsistent with plaintiff's purported injuries.[206] As a result, the *Tompkins* court denied discovery of private social media content.[207] Both the *Romano* and *Tompkins* cases illustrate how informal discovery of social media is practically mandated in many civil cases.[208]

Second, the legal ethics rules support a conclusion that social media investigation is required in most cases. Model Rule 1.1's newly added Comment 8 expressly requires advising one's clients about relevant technology.[209] This duty should specifically include the attorney identifying the need to perform social media searches in most cases.[210] Additionally, some courts have recognized a requirement to perform computer-aided legal and factual research in some instances as well.[211] By extension, that duty should encompass social media searches.

Indeed, others have already hinted that basic searches on social media websites should be necessary as part of an attorney's duty of competence. In *Griffin v. Maryland*,[212] a criminal case, the court quoted a bar journal article with approval, stating that "[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."[213] Several commentators also argue that lawyers are now expected to look at the public portions of social media pages for impeachment or other

206. *Id.*

207. *Id.*

208. The *Tompkins* case also illustrates the flaws with a requirement to predicate social media discovery on public content from the social media page. For a complete discussion, see McPeak, *supra* note 195, at 943–44.

209. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013).

210. N.H. Bar Ass'n, Ethics Comm. Advisory Op. 2012-13/05 (2013) ("[C]ounsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation."); Browning, *supra* note 67, at 259; *see also* Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179, 183 (2011) (arguing that knowledge of social media is required under both Model Rule 1.1's competence requirement and Model Rule 1.3's diligence requirement).

211. *See, e.g.*, Weatherly v. Optimum Asset Mgmt., Inc., 928 So. 2d 118, 121 (La. Ct. App. 2005).

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

213. *Id.* at 801 (citing Seth P. Berman et. al., *Web 2.0: What's Evidence Between "Friends"?*, BOSTON B.J., January/February 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).

evidence in the course of litigation, even beyond cases in which social media is the basis of a claim.[214]

Further, nothing in the Model Rules prohibits searches of public social media content. The New York State Bar Association issued a formal opinion stating that a lawyer may access public social media content to find impeachment or other evidence in pending litigation.[215] The opinion makes clear that attorneys can access content available to any member of the network that does not necessitate any special relationship.[216] Similarly, the Oregon Bar Association issued an opinion expressly permitting discovery of public social media searches in informal discovery.[217] In that opinion, the bar association analogized public social media content to a magazine or book written by the adversary and noted that public searches are permissible as to any person, including adversaries in litigation and transactional matters.[218] Thus, informal investigation of social media does not run afoul of the Model Rules and the Federal Rules of Civil Procedure. To the contrary, social media searches are a necessary component of the affirmative duty of competence and pretrial fact investigation.

Third, a lack of technological knowledge will not be excused under civil procedure rules that require all pleadings to be well-grounded in fact and law. In one key social media spoliation case, *Lester v. Allied Concrete Co.*,[219] a Virginia state court sanctioned an attorney under a state law equivalent to Federal Rule 11 after he made baseless "hacking" accusations.[220] There, defense counsel sought discovery of the plaintiff's Facebook account, attaching to the request an unflattering Facebook photo of the plaintiff holding a beer and wearing a shirt that read "I [love] hot moms."[221] In

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214. *See, e.g.*, Browning, *supra* note 67; 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); 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, 467–68 (2014).

215. N.Y. State Bar Ass'n, 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 (2012) (suggesting that collecting data on public portions of social media pages for use in litigation may violate the website's terms of use).

216. *Id.*

217. Or. State Bar Ass'n, Formal Op. 189 (2013), *available at* http://www.osbar.org/_docs/ethics/2013-189.pdf.

218. *Id.* The opinion also permits social media searches as to jurors, but cautions against communicating or making any contact with jurors via social media. *Id.*

219. Interim Order (*Lester I*), No. CL08-150, 80 Va. Cir. 454 (May 27, 2010).

220. *Id.*

221. *Id.* at *1.

response, the plaintiff's attorney repeatedly asserted that defense counsel "hacked" plaintiff's Facebook account to obtain the unflattering picture.[222] The hacking accusations were largely based on the attorney's perception that defense counsel lacked permission to access the photo, and thereby used some unauthorized means to obtain it.[223] But the plaintiff's attorney further admitted that he had no factual or legal basis for this assertion: he lacked knowledge of Facebook's default security settings and offered no explanation how the "hacking" occurred. Rather, the only support he offered was his client's affidavit, which stated that the client did not believe he granted defense counsel access or permission to see the photograph.[224]

The *Lester* court held that plaintiff's attorney violated the state rules on certifying discovery responses, which ensures papers signed by counsel are well grounded in fact and law, and requiring candor to the tribunal.[225] The court noted that "reasonable inquiry by Plaintiff's counsel would have revealed that there was no reasonable ground for such charges based on the facts available to him."[226] The court further noted that the attorney cannot rely on the "bare, unsubstantiated assertions of his client."[227] As a result, plaintiff's attorney was sanctioned for his baseless "hacking" assertions.[228]

The lesson of the failed "hacking" accusation in *Lester* is two-fold: first, ignorance of social media will not be tolerated by courts and, second, reliance on base assertions by clients as to their perceived social media activities will not suffice either. Plaintiff's attorney, who admittedly knew nothing about social media before the case,[229] deferred to the basic beliefs and statements of his much younger client. Instead, the attorney was expected to educate himself about the relevant technology directly, and inquire further into the underlying facts and law.

Lastly, social media searches are free and simple to perform, which may be a relevant factor for determining the reasonableness of pre-trial factual inquiry. In determining whether failure to independently investigate facts is reasonable, courts look at the cost and burden of the investigation.[230] One court noted that the standard for filing a frivolous claim considers in part the cost-benefit of performing pre-suit investigation: "[w]hile the investigation

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222. *Id.*
223. *Id.*
224. *Id.*
225. *Lester I*, 80 Va. Cir. 454.
226. *Id.* at *6.
227. *Id.*
228. *Id.*
229. *Id.*
230. *See, e.g.*, Wis. Chiropractic Ass'n, v. Wis. Chiropractic Examining Bd. 676 N.W.2d 580, 590 (2004).

need not be to the point of certainty to be reasonable and need not involve steps that are not cost-justified or are unlikely to produce results, the signer must explore readily available avenues of factual inquiry rather than simply taking a client's word."[231] Membership is free for most social media websites, and any user can search publicly available content on the site.[232] Thus, social media is a cost-effective tool, costing only the time it takes to perform a search. As such, courts are likely to consider it unreasonable to omit performing social media searches before filing suit.

In sum, social media investigation should be seen as part of the affirmative duty to investigate facts. As is, the existing legal ethics rules contemplate adequate factual research, which includes online research, as part of the duty of competence. It follows that social media research will become more crucial to meeting one's duty of competence. Further, a lack of social media knowledge can be detrimental, as ignorance of new technology is no excuse, and sanctions are possible for failing to adequately substantiate the factual basis for claims.

C. No-Contact Rule and Ban on Using Deception to Access Private Social Media Content

Although lawyers should, as a matter of professional competence, search social media in informal discovery, they must also be aware of the ethical limitations of doing so. Social media searches can violate the ethics rules in two major ways. First, social media is, at its core, a communication tool. As such, attorneys must be careful not to contact represented persons through social media. Second, attorneys are held to a general duty to avoid false statements or deceitful and misleading conduct. Attempts to gain access to private portions of social media pages may violate this duty.

1. Social Media's Potential for No-Contact Rule Violations

Social media exists as a way to connect and communicate with others, and its numerous communication functions can lead to violations of Model Rule 4.2's ban on contact with represented parties. Some scholars and ethics opinions already make clear that social media communications generally can count as contact.[233] Indeed, several social media functions generate some sort

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231. *Id.*

232. *See, e.g.*, *LinkedIn Free and Upgraded Premium Accounts*, LINKEDIN.COM, http://help.linkedin.com/app/answers/detail/a_id/71 (last visited Sep. 7, 2014).

233. *See generally* Ostolaza and Pellafone, *supra* note 115; *see, e.g.*, San Diego Cnty. Bar Ass'n, Legal Ethics Op. 2011-2 (2011).

of communication, such as direct messages or chats, posts to another's page, or mentions or tags in a post. Further, the no-contact rule should be read to require that attorneys refrain from requesting access to a represented person's private social media content, as the simple act of requesting access causes a message to be sent to the target user.[234] If the target user is a represented party and the purpose of the request is to gather facts relating to the subject matter of the representation, even a simple one-click request may violate the no-contact rule.[235] As a whole, because social media makes communication easy and at times automated, it can lead to violations of the no-contact rule.

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234. Facebook, for example, enables a user to send a Friend request to another user, which generates a notification to the target user and allows the target user to accept or reject the request. *See Adding Friends & Friend Requests*, FACEBOOK.COM, https://www.facebook.com/help/360212094049906/ (last visited Sep. 7, 2014). Similarly, LinkedIn users can send a Connect request to certain other users. *See LinkedIn Free and Upgraded Premium Accounts*, LINKEDIN.COM, http://help.linkedin.com/app/answers/detail/a_id/71 (last visited Sep. 7, 2014). Twitter accounts that are set to "private" also allow a similar relationship between two users when the target user accepts a Follow request from another user. *See About public and protected Tweets*, TWITTER.COM, https://support.twitter.com/articles/14016-about-public-and-protected-tweets (last visited Sept. 7 2014).

Other forms of social media interactions send a notification but require no further action by the target user. For example, the Facebook and Twitter Follow features cause the social media site to send an email, generate a pop-up mobile message, or populate a list of updates on the target user's page. *See id.*; *Follow*, FACEBOOK.COM, https://www.facebook.com/about/follow (last visited Sept. 7, 2014). It is unclear whether the notification generated by features like "Follow" constitute contact under Model Rule 4.2. At least one bar association's ethics advisory opinion notes that a Twitter "follow" is not a communication for the purposes of Rule 4.2, as long as the content accessed was public and not private. *See* New Hampshire Bar Ass'n, Ethics Comm., Advisory Op. 2012-13/05 (2013) ("In the view of the Committee, simply viewing a Facebook user's page or 'following' a Twitter user is not a 'communication' with that person, as contemplated by Rules 4.2 and 4.3, *if* the pages and accounts are viewable or otherwise open to all members of the same social media site.").

235. Although one-click violations may occur with features like Facebook's "Friend Request" or "Follow," not every notification in social media should count as "contact" for the purposes of Rule 4.2. For example, under LinkedIn's "Who's Viewed Your Profile" section, users can see who has observed their profile in the past 90 days. Thus, represented parties would receive notification if an opposing attorney viewed their LinkedIn profiles. *Who's Viewed Your Profile – Frequently Asked Questions*, LINKEDIN.COM, http://help.linkedin.com/app/answers/detail/a_id/42 (last visited Sept. 7, 2014). Notably, users can amend their privacy settings, allowing them to show up as "anonymous" when viewing someone else's profile. *See id.* But a mere record, visible to a user, that a profile was viewed should not constitute "contact" for the purposes of an ethics violation. Rather, this passive and unintentional record, created operation of the social media site alone, lacks an affirmative act by the lawyer to cause a notice or other communication to be sent to the user.

The ABA's Standing Committee on Ethics and Professional Responsibility recently issued an advisory opinion stating that, in the context of searching for jurors online, a lawyer does not commit an ethics violation when viewing public social media content and the social media site sends a notification to the juror. *See* ABA Comm. On Ethics & Prof'l Responsibility, Formal Op.

2. Attempts to Gain Access to an Unrepresented Party's Private Content

Another limitation on social media informal investigation arises when attorneys attempt to access the private social media content of unrepresented or other third parties. 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 content from public view via self-selected privacy settings. This temptation is even greater when it is obvious a user has hundreds of friends and likely gives little consideration to who sees private content.

Attempts to gain access to private social media content could take several forms, each of which has different ethical implications. First, attorneys could attempt to create fake online identities in order to mimic the user's interests and background. This task may not be difficult to accomplish if the user leaves certain information public, such as hometown, schools attended, and interests. From the public data, a fake profile could be created that increases the likelihood that the user will accept the request. Second, attorneys could send a direct request from their own accounts, but without disclosure of the purpose for the request. This request would be sent using the attorney's real name and biographical data, to the extent that data is inputted and made available by the attorney. Third, attorneys could attempt to gain access through a third party.

All three of these approaches may be unethical under the existing state or local bar opinions interpreting the Model Rules. The first approach, pretextual requests through fake profiles, is a clear violation of the prohibition against false statements or deceitful and misleading conduct. The second approach, direct requests through the attorney, should be prohibited without further disclosures, though different jurisdictions present inconsistent opinions on this practice. The last approach, obtaining content through a third party, also may violate the Model Rules if the attorney solicits the information rather than merely acquires it.

a. Fake Profiles to Gain Access

First, creating a fake profile in order to gain access to private content is not permissible in civil discovery. Pretexting violates the Model Rules prohibiting false statements or deceitful or misleading conduct because the lawyer, in essence, is resorting to trickery to infiltrate a private social media

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466 (2014) ("The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b)."). A similar conclusion should be reached under Rule 4.2 and searches of represented persons' public social media content.

page.[236] Such overt trickery runs against the ethics principles underlying the legal profession and violates the Model Rules.[237]

Several ethics opinions already expressly prohibit pretextual requests for private access. For example, the New York City Bar Association forbade such activity under New York's version of Model Rule 4.1, which prohibits false statements of fact or law to third parties in the course of representing a client, and Model Rule 8.4, which bans conduct involving dishonesty, fraud, deceit, or misrepresentation.[238] Although the opinion notes that informal discovery of social media is not only permitted, but favored, under no circumstances is deceit warranted for gaining access to private content.[239] The Oregon, San Diego, Philadelphia, and New Hampshire Bar Associations also expressly prohibit pretextual requests.[240]

Deceptive tactics to gain access to social media content are particularly abusive given the nature of social media itself and must be shunned under the Model Rules. Social media mimics real-world interactions in many ways, but differs from in-person or other communication in its casual and informal nature.[241] That is, social media users may give less thought to permitting access to private content online than they would in their homes, for example. The ease of sharing also makes social media unique. Quite simply, deception via social media is easier to achieve than in other, real-world scenarios. Pretextual requests capitalize on the casual and informal nature of social media and hinge on misrepresentation.[242] As a result, the ethics opinions

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236. *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 terms of use of the social media site, which may even lead to civil or criminal liability. *See, e.g.*, Paul F. Wellborn, *"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, violating the legal rights of a third party is prohibited by the Model Rules. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2013).

237. 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).

238. N.Y.C. Bar Ass'n, Formal Op. 2010-2 (2010), *available at* http://www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf

239. *Id.*

240. Or. State Bar Ass'n, Formal Op. 189 (2013); San Diego Cnty. Bar Ass'n., Formal Op 2011-2 (2011); Phila. Bar Ass'n. Prof'l Guidance Comm., Formal Op. 2009-02 (2009), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf; N.H. Bar Ass'n Ethics Comm. Advisory, Formal Op. 2012-13/05 (2013).

241. *See* Bennett, *supra*, note 236, at 272.

242. For example, Facebook's terms of use require that account-holders use their real names. Not only do fake profiles violate this policy, Facebook users may be less likely question profiles

correctly interpret the Model Rules as prohibiting lawyers from creating fake profiles or otherwise engaging in pretextual conduct and deceit to trick a user into accepting a private-access request.

b. Direct Requests by the Lawyer

As to the second approach, direct requests by the lawyer, the Model Rules support a duty by the requesting lawyer to affirmatively disclose the purpose and nature of the private-access request at the time the request is made. But no judicial opinions address the issue of "truthful" requests, and the few bar associations that have considered it are inconsistent in their opinions. Some bar associations permit direct requests, absent an affirmative misrepresentation.[243] Others maintain that even direct requests using the lawyer's real name, without further disclosure as to the purpose for the request, are deceptive because they contain a material misrepresentation.[244] This latter requirement of additional disclosures is the soundest conclusion and is supported by the existing Model Rules.

The New York City and Oregon Bar Associations permit direct requests in most instances. For example, the same New York City Bar opinion that prohibits pretexting favors truthful requests, noting that lawyers should resort to legitimate informal discovery methods "such as the truthful 'friending' of unrepresented parties . . . ."[245] The Oregon Bar also permits truthful requests, with the caveat that the attorney cannot make an affirmative representation of disinterest:[246] "[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."[247]

Similarly, under the Oregon approach, the account-holder is expected to employ diligence before accepting requests, and should inquire further about the purpose of a request from a lawyer.[248] Nonetheless, the opinion makes clear that the lawyer has a duty to correct any misunderstanding the user has

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that appear legitimate on their face. *See Facebook's Name Policy*, FACEBOOK.COM, https://www.facebook.com/help/292517374180078 (last visited Sept. 7, 2014).

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

244. San Diego Cnty. Bar Ass'n, Legal Ethics Op. 2011-2 (2011); Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009); N.H. Bar Ass'n, Ethics Comm. Advisory Op. 2012-13/05 (2013).

245. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2010-2 (2010).

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

247. *Id.*

248. *Id.*

as to the lawyer's purpose or role.[249] This duty seems to apply even if the user asks no follow-up questions: "if 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."[250] Thus, the lawyer is responsible for preventing the account-holder from operating under a false impression, a standard that may be difficult to apply and affords little protection to account-holders.

Other jurisdictions are less permissive as to direct requests by lawyers, citing how easily someone can be deceived in the informal and casual environment of social media. According to the Philadelphia Bar Association, a direct request to a witness may still omit a key material fact: namely, that the requesting party is seeking evidence to use in pending or potential litigation.[251] That opinion primarily discusses truthful requests by third parties who are associated with the lawyer, but that do not disclose their association when making the request.[252] Nonetheless, even as to direct requests by the lawyer, the opinion seems to require an additional statement disclosing the lawyer's role and intent.[253]

Similarly, the San Diego Bar Association prohibits direct requests by lawyers unless they expressly disclose the purpose and intent of the request. There, the Association interpreted various California legal principles that create an affirmative duty not to deceive, similar to the duty found in the Model Rules.[254] 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 disclosing his affiliation and the purpose for the request*."[255] Thus, direct requests by the lawyer—without further disclosures—still amount to deceitful and misleading conduct.

In essence, the opinions that require affirmative disclosures assume that requests for private access by a lawyer are misleading on their own, thereby

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249. *Id.*

250. *Id.* (emphasis added).

251. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02.

252. *Id.*

253. *Id.*

254. San Diego Cnty. Bar Ass'n, Legal Ethics Op 2011-2 (2011).

255. *Id.* (emphasis added). Similarly, the New Hampshire Bar Association requires affirmative disclosures, allowing requests only when "the request identifies the lawyer by name as a lawyer and also identifies the client and the matter in the litigation. This information serves to correct any reasonable misimpression the witness might have regarding the role of the lawyer." N.H. Bar Ass'n, Ethics Comm. Advisory Op. 2012-13/05 (2013).

necessitating further disclosures. In contrast, the New York City and Oregon Bar Associations assume that the request, on its own, is not misleading, given that the lawyer's real name is used. Thus, the onus is on the account-holder to perform additional research or inquire further into the purpose of the request.

The affirmative disclosure requirement presents the soundest approach. Even though the account-holder should be responsible for ascertaining the merits of a request, direct requests by lawyers nonetheless should require an affirmative disclosure as to purpose or intent. Social media as a platform invites casual and informal interaction, and does not encourage much scrutiny or research before accepting a request.[256] Although the degree of the requester's personal information visible to the target user varies based on what social network and account settings are used, the target user may only see the requester's name and an image without any identifiable biographical information.[257] Certainly, a requesting lawyer's role in a particular case may not be apparent from the request on its own, as it provides very little context or explanation as to why the target user has been contacted.

Rather, a typical "Friend" request by itself 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, or attend the same local events. In this way, the personal profile information visible to the target user not only ineffectively informs the user about the lawyer's role, it may have the opposite effect by creating a false sense of social connection. Because social media exists to promote social contact, the target user may simply assume common shared interests prompted the request, not a drive to gather damaging evidence to use against the target user in litigation.

Thus, affirmative disclosures should accompany truthful social media access requests. The very nature of a casual request for private access implicates the caveat presented by the Oregon opinion, which states that more information is needed "if Lawyer has some other reason to believe that the person misunderstands her role."[258] Any lawyer seeking private access to an unrepresented person's social media page for the purposes of gathering information to use in litigation should assume the target misunderstands the lawyer's intent, purpose, and role. The basic information transmitted in such

256. 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 and the requesting user's name. *See* CAROLYN ABRAM, FACEBOOK FOR DUMMIES, 108–09 (5th ed. 2013). No other personal information about the requesting party is provided in the Friend request notification, and 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. *See id.*

257. *Id.*

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

a request offers too few clues as to the professional purpose of the requesting lawyer, and as such necessarily misleads the target by omission. Therefore, an affirmative disclosure should be required instead.[259]

The affirmative disclosure approach is also in line with the principles underlying Model Rule 8.4, which prohibits deception.[260] One of the reasons lawyers want to be exempt from a disclosure requirement when requesting private access is because they fear, on some level, the target users would not allow access if they knew the real reason for it. This very attitude elevates zealous advocacy above the lawyer's underlying moral obligations to be honest and to avoid trickery, thereby going against the intent behind the Model Rules.

Further, other policies underlying the Model Rules support an affirmative disclosure requirement. Specifically, the disclosure requirement is meant to put the potential witness on notice of the importance of the conversation.[261] This policy is especially important in the social media context, as social media communications invite casual, social contact and provide no notice that an attorney is gathering evidence to use in a court of law. Although account-holders should be diligent to protect their personal information, lawyers should not be encouraged to disregard the barrier created by user-selected privacy settings. Permitting requests without further disclosures is intrusive and hinges on misrepresentation, thus undermining the lawyer's important duties to refrain from deceitful conduct and failing to put the target on notice of the interaction's importance.

Even though social media websites promote casual interaction, the mere fact that users give little thought to what they share should not alter the meaning and purpose of the Model Rules. While lawyers should be

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259. Few commentators have addressed the issue of direct Friend requests by lawyers, but those who have are inconsistent in their approaches. For example, some argue that a direct Friend request to an unrepresented party is permitted under Model Rule 8.4 because no outward misrepresentation is being made. *See, e.g.*, DOUGLAS S. RICHMOND, BRIAN S. FAUGHMN, & MICHAEL L. MATULA, PROFESSIONAL RESPONSIBILITY IN LITIGATION 186 (2011). Instead, the onus is on the account-holder to inquire further into the purpose of the request before accepting it. *Id.* Overall, however, commentators warn that no courts or disciplinary boards have directly addressed the issue, and lawyers faced with this ethical dilemma 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; 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. ON LEGAL MALPRACTICE & ETHICS 204, 231 (2013) (noting that social media as a platform makes deception easier than in-person contact); 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 an exception to the misrepresentation rules is recognized in that jurisdiction and clearly applies).

260. MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983).

261. *See* Anonymous Member of the S.C. Bar, 322 S.E.2d 667, 669 (S.C. 1984).

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

c. Access through a Third Party

The last approach, obtaining private social media content through a third party, raises its own ethical concerns. If the third party is acting under the direction of the lawyer, the same prohibitions on pretexting and deception apply.[262] Thus, a third party, like a private investigator, cannot create a fake profile to access private content. And, even more so than with direct requests from attorneys, third parties are more likely to deceive the target user if they send requests under their real names without disclosing their purpose, intent, or affiliation. The capacity to mislead is far greater when seemingly unaffiliated non-lawyers send the requests. Thus, direct requests using third parties or private investigators should also require further disclosures.

Nonetheless, the ethical soundness of obtaining social media content through third parties hinges on whether the third party is instructed by the lawyer to perform tasks that violate the Model Rules. Clients are free to hire private investigators on their own initiative and pass on content to the lawyer. Additionally, lawyers who obtain information from the client are not barred by the ethics rules from using it.[263] If the client already has direct access to the witness' private social media page, nothing prevents the client from printing or downloading materials.[264]

In sum, the ethics rules governing contact with unrepresented parties provide adequate guidance for the unique scenarios that arise in the context of informal social media discovery.

D. Duty to Advise Clients about Social Media and Spoliation Issues

Lawyers face three major considerations relating to their client's own social media usage. First, lawyers have an affirmative duty to advise the client about past, present, and future social media use. Second, they must

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262. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983).

263. Even if the evidence was obtained illegally, the attorney still may be able to use it. David H. Taylor, *Should It Take A Thief?: Rethinking the Admission of Illegally Obtained Evidence in Civil Cases*, 22 REV. LITIG. 625, 629 (2003).

264. Browning, *supra* note 67, at 264; N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05 (2013) (noting that rules do not prohibit clients from sharing with their lawyers information gleaned from witness' social media pages, but a lawyer cannot direct a client to "friend" a witness for litigation purposes).

understand the consequences of spoliation, and, third, they need to assess the scope of preservation duties to which they are held in each particular case.

1. Advising Clients on Social Media Usage

Lawyers should be required to advise their clients about their current and future social media use. Not only does Model Rule 1.1 contemplate advising one's client about relevant technology,[265] but at least one ethics opinion expressly outlines the attorney's duty to advise clients on social media. According to the New York County Bar Association, the duty of competence "give[s] rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media."[266] Specifically, lawyers must find out if their clients use social media and to what extent. Clients who tend to overshare online may need to be advised to cease use of social media altogether. At the very least, users should limit the audience for future posts, and future posts should be made with the understanding that social media content may very well be used in the case against the client.

The lawyer's role in advising about past social media content is more difficult. With pre-existing social media content, the lawyer must also consider preservation and spoliation issues. Social media data is fluid, interactive, and multi-faceted, and users have the option of deleting or changing security settings for individual posts made in the past.[267] In the course of normal use, users change biographical data, block or remove posts made by others, grant or revoke access, or otherwise modify content.[268] Lawyers must be aware of how social media works and must advise clients on what steps are needed to meet preservation duties.

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265. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (1983).

266. N.Y. Cnty. Lawyers' Ass'n, Ethics Op. 745 (2013); *see also* N.H. Bar Ass'n, Ethics Comm., Advisory Op. 2012-13/05 (2013).

267. *See Facebook Profile & Timeline Privacy: How do I control who can see what's on my profile and Timeline?*, FACEBOOK.COM, https:www.facebook.com/help/325807937506242/ (last visited, Sept. 9, 2014).

268. When it comes to an entire Facebook account, for example, a lawyer can advise a client to deactivate the account, but cannot allow a client to delete the entire account. *See Facebook Manage My Account: What's the difference between deactivating and deleting my account?*, FACEBOOK.COM, https://www.facebook.com/help/125338004213029 (last visited Sept. 9, 2014); *see also* Gatto v. United Air Lines, Inc., 10-CV-1090-ES-SCM, 2013 WL 1285285, at *4 (D.N.J. Mar. 25, 2013). One option is to download a client's entire social media account prior to deactivation or at regular intervals, especially at the moment when preservation duties arise. *See Facebook Help: Downloading Your Info*, https://www.facebook.com/help/131112897028467 (last visited Sept. 9, 2014).

Thus, the key issue becomes the attorney's duty to preserve evidence and prevent spoliation of social media content. Even though social media is not a static data collection, it is still an electronic compilation of information. As a result, a failure to preserve social media accounts, or even individual posts, can lead to sanctions and other discipline.

2. Consequences of Social Media Spoliation

Before attempting to define preservation duties, it is helpful to first understand how courts have sanctioned attorneys for a failure to preserve social media data. The most notable example of social media spoliation sanctions is *Lester v. Allied Concrete Co.*[269] There, the plaintiff and his attorney committed several missteps in handling discovery requests for plaintiff's Facebook page, resulting in over $700,000 in sanctions.[270] Mr. Lester, the plaintiff, was a young widower whose wife was tragically killed when her car collided with a concrete truck.[271] At some point during the litigation, Lester sent defense counsel a "message" on Facebook, after which defense counsel downloaded some content on Lester's page.[272] Defense counsel then sent a discovery request for Lester's entire Facebook account, attaching to the request a photo of Lester after the accident wearing an "I [heart] Hot Moms" t-shirt and holding a beer.[273]

Plaintiff's counsel, Mr. Murray, reacted to the discovery request with a torrent of unethical steps. First, as already discussed in Part IV.B., Murray accused defense counsel of "hacking" Lester's account in order to obtain the photo.[274] Second, Murray told his paralegal to call Lester and have him "clean up his Facebook page."[275] Although Murray did not expressly instruct the paralegal to tell Lester to "delete" the page, the paralegal then sent an email to Lester stating that he was to remove content from Facebook.[276] In response, Lester deleted several photos and apparently deleted the entire account.[277] Third, Murray later instructed the paralegal to get rid of the "stink bomb"

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269. Lester v. Allied Concrete Co. (*Lester II*), Nos. CL08-150, CL09-223, 2011 WL 9688369, at *1 (Va. Cir. Ct. Oct. 21, 2011) (Trial Order), *rev'd*, 285 Va. 295, 736 S.E.2d 699 (2013).

270. *Id.*

271. *Id.*

272. It is unclear from the opinions what Facebook feature or setting allowed defense counsel to access the photograph on Lester's private page. *Id.* at 301, 736 S.E.2d at 702.

273. *Id*.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 302–03, 736 S.E.2d at 702.

email telling Lester to delete content, and withheld from production correspondence between himself, the paralegal, and Lester about the account.[278] Fourth, he told Lester to lie about the incident in deposition, which Lester did unsuccessfully.[279] And finally, Murray himself lied about the deletion instruction in his own deposition.[280] Defense counsel's forensic expert was able to determine that Lester deleted sixteen photos, but recovered most of them.[281] And defense counsel ultimately uncovered the correspondence and lies surrounding the series of events leading to the spoliation.[282]

All told, what may have started as a misunderstanding by Murray as to the nature of social media evidence led to intentional steps to conceal spoliation of evidence. Ultimately, Lester received a favorable verdict and the largest damage award in any Virginia personal injury suit to date.[283] Yet, that victory was substantially undermined by the court's award of sanctions, totaling over $700,000.[284] State disciplinary proceedings were also brought against Murray in Virginia, resulting in a five-year suspension of his law license.[285]

While the *Lester* case is an extreme example of willful misconduct surrounding the destruction of Facebook evidence, other courts have ordered sanctions in cases involving less egregious facts. *Gatto v. United Air Lines, Inc.*,[286] for example, involved less deliberate spoliation of an entire Facebook account. There, the court ordered broad discovery of plaintiff's account and ordered the plaintiff to change his Facebook password to a court-assigned one.[287] Counsel for one defendant then used the password to access the plaintiff's social media account directly and to print some of the account content.[288] Because counsel accessed the account from a new computer,

278. *Id.* at 302, n.2, 736 S.E.2d at 702, n.2.

279. *Id.* at 303, 736 S.E.2d at 703.

280. *Id.*

281. *Id.* Fifteen photos were recovered, presumably from the computer Lester used to access Facebook. *Id.* The other photo was likely one already produced. *Id.* It is unclear whether any other account data was restored or otherwise located in this process. *See id.*

282. *Id.*

283. *See* Rick Shapiro, *VA Wrongful Death Defendant Hit With $10.6 Million Verdict Seeks New Trial Over Facebook Photo*, THE LEGAL EXAMINER (July 26, 2011, 12:11 AM), http://norfolk.legalexaminer.com/automobile-accidents/va-wrongful-death-defendant-hit-with-106-million-verdict-seeks-new-trial-over-facebook-photo/.

284. *Lester II*, 2011 WL 9688369.

285. *See* Va. State Bar Disciplinary Bd. Mem. Order, In the Matter of Matthew B. Murray, Nos. 11-070-088405 and 11-070-088422 (July 17, 2013).

286. Gatto v. United Air Lines, Inc., 10-CV-1090-ES-SCM, 2013 WL 1285285, at *2 (D.N.J. Mar. 25, 2013).

287. *Id.*

288. *Id.* The parties dispute whether the forced password change was for the purpose of direct access by defense counsel. *Id.* Nonetheless, several courts have taken the ill-advised step of

Facebook sent a message to the plaintiff noting a possible security breach.[289] In response, plaintiff then caused the account to be permanently deleted.[290] The *Gatto* court held that spoliation occurred, noting that a duty to preserve the account clearly existed.[291] Further, the court did not accept Plaintiff's arguments that the deletion was inadvertent. Rather, the court noted that the "deactivation" was intentional, leading to the permanent loss of data, regardless of what the Plaintiff ultimately thought "deactivation" meant.[292] Thus, the court allowed an adverse inference but did not impose costs and fees.[293]

Spoliation of social media evidence can occur when only some account contents are destroyed. For example, in *Patel v. Havana Bar, Restaurant, and Catering*,[294] the plaintiff was injured in a bar after falling from a balcony at his sister's engagement party.[295] The sister sent a Facebook message to party attendees asking for their statements confirming that her brother was not drunk and fell (rather than jumped) from the balcony.[296] Two years later, the sister sent another message to party attendees, this time asking for statements that the brother was in fact drunk and over-served by the bar.[297] Neither the Facebook requests nor any of the witness responses were received by

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forcing litigants to hand over social media passwords, in order for opposing counsel to login as user and peruse all content without any restrictions. *See, e.g.*, Gallion v. Gallion, No. FA114116955S, 2011 WL 4953451, at *1 (Conn. Super. Ct. Sept. 30, 2011); McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD, 2010 WL 4403285, at *8 (Pa. Ct. Com. Pl. Sept. 9, 2010) (Trial Order).

289. *Gatto*, 2013 WL 1285285, at *2.

290. Plaintiff claimed that he deactivated the account instead of deleting it, but ultimately the content of the account was completely lost. *Gatto*, 2013 WL 1285285, at *2. The court, in a footnote, states that deactivation and deletion are the same for spoliation purposes in this instance because the account content was ultimately deleted. *Id.* at *2 n.1. But this footnote should not be read to mean that deactivation is spoliation: instead, because the court handled discovery through direct access to the account, deactivation has the same effect of making the account content inaccessible. *Id.* This footnote must be read in light of the facts of the particular case, as the suggestion that mere deactivation is the same as total deletion lacks merit.

291. *Id.* at *4.

292. *Id.* Plaintiff likely deleted rather than merely deactivated the account. *See Facebook Manage My Account: What's the difference between deactivating and deleting my account?*, FACEBOOK.COM, https://www.facebook.com/help/125338004213029 (last visited Sept. 25, 2014).

293. *Gatto*, 2013 WL 1285285, at *5.

294. Patel v. Havana Bar, Rest. & Catering, No. 10-1383, 2011 WL 6029983, at *1 (E.D. Pa. Dec. 5, 2011).

295. *Id.*

296. *Id.* at *2.

297. *Id.* at *3.

defendants in discovery.[298] Rather, defense counsel learned about the sister's inconsistent Facebook messages in a deposition, after a witness mentioned she had provided the sister with a written statement.[299] The court held that spoliation had occurred, and ordered that several witnesses be re-deposed at plaintiff's expense.[300] Further, the court allowed an adverse inference instruction and ordered plaintiff to pay costs and fees estimated at $20,000.[301] Thus, failure to preserve these two Facebook messages and responses constituted grounds for sanctions.[302]

All told, deletion of all or part of a social media account can form the basis of severe spoliation sanctions, highlighting the importance of defining social media preservation duties.

3. Defining Social Media Preservation Duties

The law defining preservation duties is complex and unclear, making it inadequate for addressing social media content. Model Rule 3.4 acknowledges the existence of several sources of law on preservation, referencing and incorporating substantive law. But, on its own, Model Rule 3.4 provides no meaningful parameters for social media preservation duties.

Despite the dire consequences of advising a client to "clean up" a Facebook page, as shown in the *Lester* case, at least one local bar association opinion states that removal of content from social media generally is permitted under state ethics rules. The New York County Bar Association advised that state ethics rules are not violated when an attorney tells a client to "take down" social media content, *provided that* no other rules are implicated by the removal.[303] Specifically, the Committee noted that the state equivalent to Model Rule 3.4 prohibits suppression of evidence when the lawyer is required to reveal that evidence in an adversarial proceeding.[304] But the opinion also notes that "substantive" law contains a broader duty to preserve evidence, even before an adversarial proceeding is commenced.[305] Citing to cases applying state civil procedure rules, the Committee

298. *Id.* at *4. It appears that some witnesses responded via Facebook, and the sister pasted those responses into a Word document. *Id.* Neither the Word document nor the original Facebook messages were produced. *Id.*

299. *Id.* at *4.

300. *Id.* at *7, *10.

301. *Id.* at *10.

302. *Id.*

303. N.Y. CNTY. BAR ASS'N., ETHICS OP. 745, 1, 3 (2013), *available at* https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

304. *Id.* at 3.

305. *Id.* at 3–4.

recognized that a duty to preserve evidence may exist when litigation is merely contemplated or anticipated.[306]

Ultimately, the Committee concluded that, in some circumstances, a lawyer is not prohibited from advising a client to remove content from a social media page.[307] Thus, the ethics rules in general contain no express prohibition against taking down social media content outside of Model Rule 3.4's ban on suppressing or concealing evidence.[308]

While the New York County Bar Association's conclusion is sound, it nonetheless highlights the perils of the current landscape of legal ethics laws. The notion that the Model Rules allow a lawyer to tell a client to "take down" social media content opens the door to confusion or, worse, willful destruction for some litigators.[309] Many legal representations commence as a result of contemplated or anticipated litigation. But lawyers face a difficult task determining what substantive law may apply and, under that law, defining the scope and start date of the duty to preserve. To even suggest that lawyers can advise clients to take down content in a pre-litigation context under Model Rule 3.4 underestimates the challenges lawyers face in assessing the substantive law expressly referenced in that Model Rule.[310]

The Model Rules offer incomplete guidance on the issue of preservation of social media data in the context of pending or anticipated litigation and they offer no guidance on the scope of preservation needed for a unique, new medium like social media. The Model Rules contain no prohibition on advising clients to take down social media content outside the litigation context, while substantive law likely imposes an affirmative duty to preserve evidence more broadly. Violations of that duty can result in serious consequences, including an adverse inference or sanctions.[311] Thus, the scope of preservation and spoliation duties presents the most complicated ethical issue arising from social media content, and the Model Rules fall short in addressing these issues.

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306. *Id.* at 3.

307. *Id.* at 4.

308. *Id.*

309. *See* Green, *supra* note 9; *see also* THE SEDONA CONFERENCE, *supra* note 115, at 37 (noting the ways social media data, unlike other ESI, poses peculiar challenges of preserving and authenticating content).

310. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4 (2013).

311. The inconsistency between the Model Rules' duty to preserve and that of state or federal procedural rules serves as an example of substantive law having more bite than state ethics rules. *See* Perlman, *supra* note 35. In some ways, the context of spoliation and preservation is one in which the Model Rules should cede to the substantive law, instead of creating ambiguity as to the scope of the lawyer's obligation to preserve in the pre-litigation context. *See id.*

V. ADAPTING THE EXISTING ETHICS FRAMEWORK TO ADDRESS THE UNIQUE CHALLENGES CREATED BY SOCIAL MEDIA DISCOVERY

While the Model Rules and substantive law on spoliation and preservation duties need to be streamlined to clarify social media-specific issues, the existing scheme of legal ethics rules otherwise encompasses most of the questions that arise from informal discovery of social media content. Nonetheless, given the complex and ever-changing nature of new technology, a "best practices" or supplemental guideline approach is needed.

In general, the Ethics 20/20 Commission correctly observed that substantive changes to the Model Rules are not necessary to address most new technology ethics issues.[312] Indeed, creating more specific ethics rules dealing with social media would run the risk of becoming obsolete quickly or too narrowly focused.[313] But practitioners nonetheless need additional guidance to navigate the current landscape of parallel laws and the ever-changing and complex nature of new technology. Thus, in addition to streamlining the law on preservation and spoliation duties, supplemental guidelines should be created. Like the Delaware approach,[314] other jurisdictions or the ABA itself should create non-binding "best practices" that provide clarity without rigidity.[315]

This best practices approach is superior for three main reasons: it is non-binding, flexible, and targeted. First, best practices do not contravene other ethics rules because they are non-binding, supplemental guidelines. They should work within the existing enacted law without contradicting it. Like in Delaware, best practices can be deemed inadmissible in any tribunal to prevent them from supplanting binding law.[316] Unlike the 1969 Model Code, which contained aspirational Canons and Ethical Considerations that were

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312. *See* Gorelick & Traynor, *supra* note 6.

313. *See* Zacharias, *supra* note 40, at 293-95; Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873 (2002); *see also* Carolyn Elefant, *Why New York's Recent Ethics Opinion on LinkedIn Shows the Folly of Regulating the Minutia of Social Media*, MYSHINGLE.COM (Aug. 30, 2013), http://myshingle.com/2013/08/articles/ethics-malpractice-issues/why-new-yorks-recent-ethics-opinion-on-linkedin-shows-the-folly-of-regulating-the-minutia-of-social-media/ (explaining how New York State Bar Association Ethics Opinion 972 on lawyers listing of "specialties" in one social media site, LinkedIn, became obsolete almost immediately because the social media site altered that particular function).

314. *See supra* Part II.C.

315. *See* Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 734–36 (2001) (suggesting that law firms Section should adopt their own ethics guidelines to aide its lawyers in complying with ethics rules); *see* Crystal, *supra* note 75, at 841 (noting that voluntary standards must supplement and not contradict or repeat the Model Rules).

316. *See* DEL. SUP. CT. COMM'N ON LAW & TECH. R. 4, *available at* http://courts.state.de.us/declt/docs/CommissionOnLawTechnologyRules.pdf .

given too much weight by courts, best practices can be banned as evidence with a proactive rule that prevents this potential harm.

Second, the best practices approach allows for flexibility and timeliness. A jurisdiction can use best practices to avoid overly specific or parallel regulatory schemes, while still elaborating on how general ethics standards translate to new technology landscapes. Because the rule-making process is too slow to react to the ever-changing and quickly evolving nature of new technology, a best practices approach is needed to promptly address nuanced technological advancements. Further, best practices can be modified quickly when technology inevitably evolves.

Third, best practices can be customized and targeted for each jurisdiction based on local needs. Like Delaware's approach, these supplemental guidelines can draw on local practices and a diverse array of local bar members. Participants in the drafting process can design best practices based on the identified needs of a local region or tribunal. Additionally, localized best practices can extend beyond the narrow subjects of typical advisory opinions. And, with local input and interest, the bar will be vested in making the best practices it creates influential and relevant.[317]

The lack of guidance in navigating ethical challenges arising from social media necessitates additional resources for lawyers. While the Model Rules themselves should not specifically address nuanced technological issues, a supplemental guideline approach can clarify much of the confusion that practitioners face.

VI. CONCLUSION

The existing legal ethics rules, though imperfect, can be applied to most of the novel contexts created by informal social media discovery. In particular, the duties and boundaries of using social media in informal factual investigation can be gleaned from the existing rules, though supplemental guidelines are needed to help lawyers keep pace with technological changes. Spoliation and preservation duties, however, are inadequately addressed under the existing rules.

First, by logical extension, the duty to investigate facts should encompass an affirmative duty to search social media websites. The existing rules already require adequate factual inquiry, even via online searches. Thus, social media searches, which are simple and affordable, should fall within this duty as well.

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317. *See* Crystal, *supra* note 75, at 854.

Second, the existing law on contacting represented parties and engaging in deceptive and misleading tactics can be applied to social media searches. In the simplest sense, social media communications still count as contact, though the forms of contact possible via social media are more varied and complex. Even though social media may make violations of the no-contact rule easier to commit, the existing legal framework still provides adequate guidance. Similarly, the rules prohibiting pretexting equally apply to prohibit use of fake profiles to gain access to private social media content. Further, in light of the underlying rationale against deceptive tactics, the Model Rules also should be read to require further disclosures as to purpose and intent for truthful requests for access to private content. Disclosures are necessary because the casual and informal nature of social media communication makes potential witnesses more likely to misunderstand the nature of the request. Finally, the complex laws on spoliation and preservation are inadequate to deal with the dynamic and fluid nature of social media content and the ease with which it can be altered or destroyed. Clarity and consistency are needed in this area.

Beyond substantive revision of preservation rules, other guidance in the form of best practices should be created to address novel technology issues specifically. The complexity of new technology and speed with which it develops necessitates further guidance to practitioners, which should take the form of non-binding supplemental guidelines. With some sort of supplemental guidance, most of the unique challenges created by informal discovery of social media content can be clarified.