

# ARTICLES

## THE ETHICS OF DISGUISED IDENTITY IN SOCIAL MEDIA

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### ABSTRACT

Social media has become pervasive in today's world. With its rise, social media has brought with it a renewed emphasis on identity on the Internet, as user-created content is explicitly linked to creators and their profiles on the wide variety of social media platforms that exist. In response, there has been a parallel increase in the use of disguised identities in social media, whether through anonymous or pseudonymous Internet use. Combined with the increasing prominence of social media in the legal world, these disguised identities pose a unique set of ethical problems that lawyers must consider when interacting with social media in their practices.

This article explains and analyzes a number of these ethical problems. After presenting background on social media and disguised identity generally, the article collects a variety of examples of the use (or potential use) of disguised identities in

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social media in legally relevant circumstances. Then, the article applies the ABA Model Rules of Professional Conduct to these examples, examining the duties of candor and confidentiality, the need to avoid conflicts of interest, and the duty of competence. As social media use continues to grow and play a more significant role in legal practice, the proper application of these ethical rules will grow in significance, too.

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#### I. INTRODUCTION

In the past decade, social media has grown to become a significant part of the everyday experience of the Internet. While *The New Yorker* once quipped, “On the Internet, nobody knows

you're a dog,"<sup>1</sup> now the Internet has become one of the first resources for anyone looking to find out more about an individual. Rather than being comprised of hordes of passive, anonymous browsers, the Internet has become both more interactive and more explicitly linked with personal identities.<sup>2</sup>

The transition to an identity-based Internet has been especially prominent in the rise of social media.<sup>3</sup> Social media platforms ranging from Facebook and LinkedIn to Twitter and Tumblr have allowed individuals without any technical knowledge to become content creators, not merely content consumers.<sup>4</sup> Today, millions of individuals are posting original pictures, videos, and text on these and other social media sites.<sup>5</sup> The incredible popularity of these sites only underscores their importance.

Social media has helped drive the increased prominence of identity on the Internet through its explicit linking of content to the identities of its creators.<sup>6</sup> Facebook posts are "tagged,"<sup>7</sup> tweets and Vine videos are signed with "@" usernames,<sup>8</sup> and the job of professional blogger has appeared. Prior to social media,

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<sup>1</sup> Peter Steiner, Cartoon, *On the Internet, Nobody Knows You're a Dog*, 69 NEW YORKER, July 5, 1993, at 61.

<sup>2</sup> See discussion *infra* Part II.A.

<sup>3</sup> See *id.* (discussing social media's increasing prevalence and its emphasis on identity). See generally PEW RESEARCH CTR., SOCIAL NETWORKING POPULAR ACROSS GLOBE 1–33 (2012), available at <http://www.pewglobal.org/files/2012/12/Pew-Global-Attitudes-Project-Technology-Report-FINAL-December-12-2012.pdf>. (providing statistical proof of an increase in global usage of social media).

<sup>4</sup> See, e.g., *How to Post & Share*, FACEBOOK, <https://www.facebook.com/help/333140160100643> (last visited Mar. 28, 2014); *Sharing Ideas, Questions, Articles, and Website Links*, LINKEDIN, [http://help.linkedin.com/app/answers/detail/a\\_id/434](http://help.linkedin.com/app/answers/detail/a_id/434) (last visited Mar. 28, 2014); *Posting a Tweet*, TWITTER, <http://support.twitter.com/articles/15367-posting-a-tweet> (last visited Mar. 28, 2014); *How to Use Pages*, TUMBLR, <http://www.tumblr.com/docs/en/pages> (last visited Mar. 28, 2014) (providing instructions for users to create and share content).

<sup>5</sup> See PEW RESEARCH CTR., *supra* note 3, at 1, 4 (presenting data from global social networking usage statistics to illustrate the widespread use of social media).

<sup>6</sup> See *infra* Part II.A (explaining that social media sites are used by creating a profile or username which is then utilized to share content).

<sup>7</sup> *What is Tagging and How Does it Work?*, FACEBOOK, <https://www.facebook.com/help/124970597582337> (last visited Mar. 28, 2014).

<sup>8</sup> *Getting Started with Twitter*, TWITTER, <http://support.twitter.com/articles/215585-getting-started-with-twitter> (last visited Mar. 28, 2014); *FAQs About Vine*, TWITTER, <https://support.twitter.com/articles/20170317-faqs-about-vine> (last visited Mar. 28, 2014).

the primary indication of identity was simply the URL of a website.<sup>9</sup> Now, individuals are cultivating particular online identities in an effort to increase the reach of the content they create, and other users are encouraged to “subscribe” to their created content.<sup>10</sup>

Social media’s emphasis on identity has driven two related phenomena. First, because the construction of a social media identity is explicit, some users have begun providing intentionally false or misleading information, creating fake identities.<sup>11</sup> These fake identities are then used for a wide variety of purposes, from whistleblowing,<sup>12</sup> to undercover investigations,<sup>13</sup> to more nefarious uses such as defamation and harassment.<sup>14</sup> Second, other users are beginning to crave anonymity in at least a portion of their online interactions, and a variety of tools have been developed to enable just that.<sup>15</sup> Whether through anonymity or the pseudo-anonymity of a fake profile, these phenomena represent a desire for an obscured identity online.

Although disguised identities have been around for centuries in the forms of masks, makeup, and double-agents,<sup>16</sup> the significant ethical issues that lawyers face in interacting with disguised identities have recently taken on new prominence as

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<sup>9</sup> See *URL*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/url> (last visited Mar. 28, 2014) (defining Uniform Resource Locator or “URL” as the online “address of a resource” which often contains additional identifying information); Chris McCarthy, *How to Choose a Web Address?*, CLEAR GOAL MEDIA, <http://cleargoalmedia.com/how-to-choose-a-web-address> (last visited Mar. 28, 2014) (recommending that individuals use URLs which are the same as their company names allowing internet users to more easily find their websites).

<sup>10</sup> See, e.g., Zach Rait, *Introducing the Subscribe Button*, FACEBOOK (Sept. 14, 2011, 1:00 PM), <https://www.facebook.com/notes/facebook/introducing-the-subscribe-button/10150280039742131>; *Using Twitter Lists*, TWITTER, <https://support.twitter.com/articles/76460-using-twitter-lists> (last visited Mar. 28, 2014).

<sup>11</sup> See *infra* Part II.B (examining the demand for anonymity and disguised identity).

<sup>12</sup> See *infra* Part III.A.1 (discussing the use of disguised identity by whistleblowers).

<sup>13</sup> See *infra* Part III.A.2 (identifying instances in which police and lawyers have used disguised identity to conduct investigations).

<sup>14</sup> See *infra* Part III.A.1 (noting the use of disguised identity for cyber bullying, harassment and defamation).

<sup>15</sup> See *infra* Part II.B.

<sup>16</sup> See, e.g., WILLIAM SHAKESPEARE, *TWELFTH NIGHT* act 1, sc. 2 (“Conceal me what I am, and be my aid [f]or such disguise as haply shall become [t]he form of my intent.”).

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social media continues to invade the legal realm. Such disguised identities pose numerous, diverse legal ethics questions. Most obviously, to what extent are lawyers permitted to adopt disguises in their own work? Perhaps less obviously but more commonly, what advice should lawyers provide to clients who have chosen to adopt, or are contemplating adopting a disguised identity? Courts and bar associations around the country are just beginning to confront these and related questions.<sup>17</sup>

Before examining the ethical questions lawyers face in connection with disguised identities in social media, this article first provides background about the rise of social media and its connection to identity in Part II. Part III then discusses the broad spectrum of ways in which disguised identities can intersect with the practice of law, both from the perspective of the person who has adopted such an identity and from the perspective of a person interacting with such a disguised identity. Part IV then discusses the ABA Model Rules of Professional Conduct as they apply to these situations and discusses how courts and bar associations around the country have wrestled with these issues.

## II. BACKGROUND ON SOCIAL MEDIA & IDENTITY

Before examining the ethical issues surrounding disguised identities in social media, a basic understanding of social media itself is necessary. This presents its own challenge, as social media platforms come in a wide variety of forms. By examining this variety, however, certain patterns begin to emerge. In particular, social media, unlike previous uses of the Internet, emphasizes the user's identity, explicitly linking that identity to the user's actions and disclosing that connection to other users.<sup>18</sup>

### A. *Social Media's Emphasis on Identity*

The Internet is host to a wide variety of social media platforms.<sup>19</sup> These platforms vary in the services they offer, the

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<sup>17</sup> *Infra* Parts III.B–IV.

<sup>18</sup> See, e.g., *About Facebook*, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited Mar. 28, 2014) (stating Facebook's mission to aid others in being open and connected on the internet and encourage users to "share and express what matters to them").

<sup>19</sup> See *supra* note 4 and accompanying text (providing an overview of available social media platforms including Facebook, Twitter, LinkedIn,

types of social information they collect and present, and the ways users interact.<sup>20</sup> The various social media platforms also vary in their popularity across various cultural and demographic groups.<sup>21</sup> As a result, providing a comprehensive definition of social media presents a significant challenge, although many have attempted to do so.<sup>22</sup> Instead, we follow the common practice of focusing on a number of common aspects of social media platforms.<sup>23</sup>

Within the United States, Facebook<sup>24</sup> is the most well-known social media platform.<sup>25</sup> Founded in 2004, Facebook's self-declared mission "is to give people the power to share and make the world more open and connected."<sup>26</sup> After signing up users are encouraged to provide a variety of information about themselves to create a profile.<sup>27</sup> Facebook then encourages interactivity among users by first suggesting that users "friend" other users, particularly those they know from their pre-existing social circles.<sup>28</sup> Furthermore, users are encouraged to "share" items of interest, including pictures, video, and links to other webpages.<sup>29</sup>

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Tumblr, YouTube, Pinterest, Instagram and Vine).

<sup>20</sup> See Vanessa S. Browne-Barbour, *A Fork in the Road: The Intersection of Virtual Law Practice and Social Media*, 52 WASHBURN L.J. 267, 275 (2013) (noting that there are numerous categories of social media).

<sup>21</sup> See PEW RESEARCH CTR., *supra* note 3, at 1 (including a chart of social media use in different countries).

<sup>22</sup> See, e.g., CAL. LAB. CODE § 980(a) (West, Westlaw through ch. 4 of 2014 Reg. Sess. and all propositions on the June 3, 2014); *Social Media*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Mar. 27, 2014); Browne-Barbour, *supra* note 20, at 275 (defining social media as "a catch phrase that describes technology that facilitates interactive information, user-created content and collaboration") (internal quotations omitted); Dahah M. Boyd & Nicole B. Ellison, *Social Networking Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211, 213-14 (2008).

<sup>23</sup> See *The Sedona Conference Primer on Social Media*, 14 SEDONA CONF. J. 191, 194 (2013).

<sup>24</sup> FACEBOOK, <http://www.facebook.com> (last visited Mar. 27, 2014).

<sup>25</sup> Maeve Duggan & Aaron Smith, *Social Media Update 2013*, PEW RESEARCH CTR. INTERNET PROJECT (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/social-media-update-2013>.

<sup>26</sup> *About Facebook*, *supra* note 18.

<sup>27</sup> See *Get Started*, FACEBOOK, <https://www.facebook.com/help/www/467610326601639> (last visited Mar. 27, 2014) (explaining the steps to create a profile).

<sup>28</sup> See *Finding Friends*, FACEBOOK, <https://www.facebook.com/help/336320879782850> (last visited Mar. 27, 2014) (providing instructions on how to "friend" someone).

<sup>29</sup> *How to Post & Share*, FACEBOOK, <https://www.facebook.com/help/333140160100643> (last visited Mar. 27, 2014).

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These posts are then visible to other users<sup>30</sup> as part of the user's "Timeline."<sup>31</sup> These posts are then collected and presented, depending on the particular privacy setting, when other Facebook users log in to the site.<sup>32</sup>

Another common social media platform is LinkedIn,<sup>33</sup> which describes itself as "the world's largest professional network."<sup>34</sup> Just as with Facebook, LinkedIn users are asked to create an initial profile with information about themselves.<sup>35</sup> Then, users are encouraged to connect with other professionals they know and build their professional network online.<sup>36</sup> In this way, LinkedIn emphasizes a user's workplace identity, bringing those aspects into the online realm.

Although not as often thought of as social media, the plethora of online dating sites<sup>37</sup> also involve many of the same aspects of social media. Again, users are asked to provide information to create a profile.<sup>38</sup> Users then provide additional content in terms of answering questions about their preferences for a romantic partner.<sup>39</sup> Where LinkedIn focused on a user's professional life, these sites focus on dating and romantic life.

Other social media sites, rather than focusing on a particular aspect of a user's life, focus on particular forms of media to be shared with other users. For instance, Twitter allows users to share no more than 140 characters of text in the form of a

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<sup>30</sup> See *id.* (noting how to create posts for others to view).

<sup>31</sup> See generally *What is Facebook Timeline?*, FACEBOOK, <https://www.facebook.com/help/www/133986550032744?rdrhc> (last visited Mar. 27, 2014).

<sup>32</sup> See *How to Post & Share*, *supra* note 29 (providing instruction on when users will view the data on one's timeline).

<sup>33</sup> LINKEDIN, [www.linkedin.com](http://www.linkedin.com) (last visited Mar. 27, 2014).

<sup>34</sup> *What is LinkedIn?*, LINKEDIN, [https://www.linkedin.com/static?key=what\\_is\\_linkedin&trk=hb\\_what](https://www.linkedin.com/static?key=what_is_linkedin&trk=hb_what) (last visited Mar. 27, 2014).

<sup>35</sup> *Your Profile Name*, LINKEDIN, [http://help.linkedin.com/app/safety/answers/detail/a\\_id/37229](http://help.linkedin.com/app/safety/answers/detail/a_id/37229) (last visited Mar. 27, 2014).

<sup>36</sup> *Connecting With LinkedIn Members*, LINKEDIN, [http://help.linkedin.com/app/answers/detail/a\\_id/118](http://help.linkedin.com/app/answers/detail/a_id/118) (last visited May 26, 2014).

<sup>37</sup> See, e.g., MATCH, <http://www.match.com> (last visited Mar. 27, 2014); OKCUPID, <https://www.okcupid.com> (last visited Mar. 27, 2014); EHARMONY, <http://www.eharmony.com> (last visited Mar. 27, 2014).

<sup>38</sup> See, e.g., *How Match.com Online Dating Works*, MATCH, <http://www.match.com/howitworks/index.aspx?lid=4> (last visited Mar. 27, 2014); *Your Profile*, OKCUPID, <http://www.okcupid.com/help/profile> (last visited Mar. 27, 2014); *eHarmony Official Site Tour*, EHARMONY, <http://www.eharmony.com/tour> (last visited Mar. 27, 2014).

<sup>39</sup> See, e.g., *Match Questions*, OKCUPID, <http://www.okcupid.com/help/match-questions> (last visited Mar. 27, 2014).

“tweet.”<sup>40</sup> Other users can respond to the tweet, by “retweeting” it or marking it a “favorite.” Although users select a user name and fill out a small bit of profile information,<sup>41</sup> the emphasis for sites like Twitter is on the content. Nonetheless, each tweet is linked to a particular user, and users are encouraged to “follow” other users so that they are notified when someone they are following tweets.<sup>42</sup> Other users can respond to those tweets, thereby creating the opportunity for real-time dialogue among many users.<sup>43</sup> Thus, identity remains an important facet of even this social media experience.

Other content-focused social media sites are no different. Whereas Twitter content consists of short segments of text, sites like YouTube,<sup>44</sup> Vine,<sup>45</sup> and Vimeo<sup>46</sup> offer users a chance to share videos they have created. Similarly, with sites like Pinterest,<sup>47</sup> Instagram,<sup>48</sup> and Flickr,<sup>49</sup> the user content is pictures they have taken or created. In each instance, the mechanics of linking content with a user’s identity is much the same. A username is selected, a simple profile is created, and other users can then subscribe to be notified when certain other users post new content.<sup>50</sup>

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<sup>40</sup> *Posting a Tweet*, TWITTER, <https://support.twitter.com/articles/15367> (last visited Mar. 21, 2014).

<sup>41</sup> *See Join Twitter Today*, TWITTER, <https://twitter.com/signup> (last visited May 26, 2014); *Editing Your Profile*, TWITTER, <https://support.twitter.com/groups/51-me/topics/206-profile-settings/articles/127871-editing-your-profile> (last visited Mar. 21, 2014) (explaining the process for editing bio, name, location, etc.).

<sup>42</sup> *See Following People on Twitter*, TWITTER, <https://support.twitter.com/groups/52-connect/topics/213-following/articles/162981-following-people-on-twitter> (last visited Mar. 21, 2014) (instructing users how to locate other users to follow).

<sup>43</sup> *See New User FAQs*, TWITTER, <https://support.twitter.com/groups/50-welcome-to-twitter/topics/203-faqs/articles/13920-new-user-faqs> (last visited Mar. 21, 2014) (illustrating the differences between an @reply and a direct message and describing how they allow for communication between users).

<sup>44</sup> YOUTUBE, [www.youtube.com](http://www.youtube.com) (last visited Mar. 22, 2014).

<sup>45</sup> VINE, [www.vine.co](http://www.vine.co) (last visited Mar. 22, 2014).

<sup>46</sup> VIMEO, [www.vimeo.com](http://www.vimeo.com) (last visited Mar. 22, 2014).

<sup>47</sup> PINTEREST, [www.pinterest.com](http://www.pinterest.com) (last visited Mar. 22, 2014).

<sup>48</sup> INSTAGRAM, [www.instagram.com](http://www.instagram.com) (last visited Mar. 22, 2014).

<sup>49</sup> FLICKR, [www.flickr.com](http://www.flickr.com) (last visited Mar. 22, 2014).

<sup>50</sup> *See, e.g., Sign Up with Email*, PINTEREST, <https://www.pinterest.com/join/register/email> (last visited Mar. 22, 2014) (instructing users how to set up a profile on the site); *see also How Do I Set My Photos and Videos to Private so That Only Approved Followers Can See Them?*, INSTAGRAM, <http://help.instagram.com/448523408565555> (last visited Mar. 22, 2014) (describing how all photos are public, and thus are displayed to all users, unless

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Finally, no discussion of social media would be complete without discussing blogging platforms like Tumblr<sup>51</sup> and Blogspot.<sup>52</sup> These platforms allow users to share a much wider array of content than the other social media sites. Blog posts on these sites can include nearly all aspects of the variety of content available throughout the Internet.<sup>53</sup> Whether through RSS<sup>54</sup> or other forms, other Internet users are then encouraged to again subscribe to the content created by a user.<sup>55</sup>

Through these myriad examples, two common themes relating to identity emerge. First, the sign-up process for each site requires users to select and create an identity.<sup>56</sup> While some sites like Facebook and LinkedIn request more information about the user, each requests that users make explicit decisions about an identity to present.<sup>57</sup> At a minimum, all must present a “user name” in some form.

Second, social media sites explicitly ask users to create and share some form of content. For sites like YouTube and Twitter, the content creation is obvious, in the form of video and texts.<sup>58</sup>

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profiles are set to “private”).

<sup>51</sup> TUMBLR, [www.tumblr.com](http://www.tumblr.com) (last visited Mar. 22, 2014).

<sup>52</sup> BLOGGER, [www.blogger.com](http://www.blogger.com) (last visited Mar. 23, 2014).

<sup>53</sup> See TUMBLR, <http://www.tumblr.com/about> (last visited Mar. 22, 2014) (explaining that users can “[p]ost text, photos, quotes, links, music, and videos.”).

<sup>54</sup> See Wendy Boswell, *RSS Feeds*, ABOUT.COM, <http://websearch.about.com/od/rsssocialbookmarks/f/rss.htm> (last visited May 9, 2014) (explaining the subscription process through the use of RSS feeds).

<sup>55</sup> Many social media sites offer functions for users to limit the availability of their content to a subset of the general public. See *generally Privacy*, FACEBOOK, <http://www.facebook.com/help/445588775451827> (last visited Mar. 23, 2014) (providing basic information regarding Facebook’s privacy policies for users); *About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016-about-public-and-protected-tweets> (last visited Mar. 21, 2014) (explaining how Tweets are by default public but may be switched to private); *Controlling Your Visibility*, INSTAGRAM, <http://help.instagram.com/116024195217477> (last visited Mar. 22, 2014) (clarifying how to set videos and photos to private and offering basic information on how to change privacy settings). While relevant to the broader issues about privacy surrounding social media, these features do not significantly alter the ability to use a disguised identity or the ethical issues surrounding that use.

<sup>56</sup> See, e.g., *How do I Sign Up for Facebook?*, FACEBOOK, <https://www.facebook.com/help/188157731232424> (last visited Mar. 23, 2014) (noting that in order to sign up for Facebook users must establish a profile which includes information such as name, gender, and birth date).

<sup>57</sup> See *id.* (requiring users to indicate their name and gender while signing up for the site).

<sup>58</sup> *About YouTube*, YOUTUBE, <https://www.youtube.com/yt/about> (last visited Mar. 22, 2014); *Discover Twitter*, TWITTER, <https://discover.twitter.com> (last

While sites like Facebook and Tumblr are less restrictive in the types of content they encourage users to share, the content creation is nonetheless ever-present.<sup>59</sup> Just as important, this created content is made available for others to view and interact with.

User-defined identity plays a central role in social media because this created content is explicitly linked to the identity the user has provided. Indeed, in each instance, other users are encouraged to locate users who create content they enjoy, and to subscribe to regular updates from those users. Although different social media sites have different terms for this subscription, “friending,”<sup>60</sup> “linking,”<sup>61</sup> “following,”<sup>62</sup> etc., the mechanics are the same. Social media could not function without placing identity at its core.

*B. Social Media’s Rise & the Corresponding  
Demands for Anonymity or Disguised Identity*

Social media’s popularity has skyrocketed in recent years. In the United States, seventy-three percent of online adults now use at least some form of social media.<sup>63</sup> While social media use is highest among younger groups, nearly half of all Internet users over the age of 65 now use Facebook.<sup>64</sup> Worldwide, Facebook reports 1.19 billion monthly active users,<sup>65</sup> and Twitter reports 218 million.<sup>66</sup> The popular Chinese social media platform Weixin

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visited Mar. 21, 2014).

<sup>59</sup> See *Information We Receive and How it is Used*, FACEBOOK, <https://www.facebook.com/about/privacy/your-info> (last visited Mar. 21, 2014) (explaining that some information received from users or posted by third parties may always be public and therefore present on the site); *Privacy Policy*, TUMBLR, <http://www.tumblr.com/policy/en/privacy> (last visited Mar. 22, 2014) (describing how content posted on Tumblr may be reposted or “reblogged” and thus highly unlikely of being removed by the site).

<sup>60</sup> See *Finding Friends*, FACEBOOK, <https://www.facebook.com/help/findingfriends> (last visited Mar. 27, 2014) (describing the process of locating and requesting friends on Facebook).

<sup>61</sup> See *Connecting With LinkedIn Members*, *supra* note 36.

<sup>62</sup> See *Following People on Twitter*, *supra* note 42.

<sup>63</sup> Duggan & Smith, *supra* note 25, at 1, n.1.

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Facebook Reports Third Quarter 2013 Results, Investor Relations*, FACEBOOK (Oct. 30, 2013), <http://investor.fb.com/releasedetail.cfm?ReleaseID=802760>.

<sup>66</sup> Twitter, Inc., Registration Statement (Form S-1) 1 (Oct. 3, 2013), available at <http://www.sec.gov/Archives/edgar/data/1418091/000119312513390321/d564001ds1.htm>.

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has nearly 300 million users.<sup>67</sup> These numbers are all the more remarkable given that most social media sites have been around for less than a decade.

In some respects, even these staggering numbers of users understate the prominence of social media, as users spend significant amounts of time on these sites. Nearly two thirds of Facebook users visit the site at least daily, and forty percent do so multiple times throughout the day.<sup>68</sup> Together, Twitter's users send more than 500 million tweets each day,<sup>69</sup> and YouTube users upload more than 100 hours of video every minute.<sup>70</sup> In other words, not only are large numbers of people using social media, they are doing so for significant portions of their time.

As discussed above, however, issues of identity are central to social media use.<sup>71</sup> Many social media sites have made explicit their decision that the identities of users be their real identities. Most notably, Facebook requires that users provide their real name,<sup>72</sup> and Google+ has a similar policy.<sup>73</sup> As social media usage continues to grow, users are becoming increasingly aware of the many ways in which their identity now appears online.

Unsurprisingly, the rise of social media with its emphasis on identity has triggered a corresponding demand for anonymity or disguised identity. A variety of services have been created to meet this demand. The Onion Router (or "TOR") uses a system of proxies to disguise a user's IP address and permit anonymous use of the Internet.<sup>74</sup> A number of other services offer similar abilities, including DuckDuckGo,<sup>75</sup> ixquick,<sup>76</sup> and Proxify.<sup>77</sup>

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<sup>67</sup> David Barboza, *A Popular Chinese Social Networking App Blazes Its Own Path*, N.Y. TIMES, Jan. 20, 2014, at B1.

<sup>68</sup> Duggan & Smith, *supra* note 25, at 2.

<sup>69</sup> Twitter, Inc., *supra* note 66.

<sup>70</sup> *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited Mar. 27, 2014).

<sup>71</sup> See *supra* Part II.A (discussing social media's emphasis on identity).

<sup>72</sup> *Facebook's Name Policy*, FACEBOOK, <https://www.facebook.com/help/292517374180078> (last visited Mar. 27, 2014).

<sup>73</sup> *Create your Google+ Profile Name*, GOOGLE, <https://support.google.com/plus/answer/1228271?hl=en> (last visited Mar. 27, 2014).

<sup>74</sup> *Tor: Overview*, TOR PROJECT, <https://www.torproject.org/about/overview.html.en> (last visited Mar. 27, 2014).

<sup>75</sup> *Privacy*, DUCKDUCKGO, <https://duckduckgo.com/privacy> (last visited Mar. 27, 2014).

<sup>76</sup> *Our Privacy Policy*, IXQUICK, <https://www.ixquick.com/eng/privacy-policy.html> (last visited Mar. 27, 2014).

<sup>77</sup> *Proxify Services*, PROXIFY, <http://proxify.com/services.shtml> (last visited Mar. 28, 2014).

Anonymous e-mail services, such as GuerrillaMail,<sup>78</sup> are also available. More recently, services offering anonymous online money transfers, such as BitCoin,<sup>79</sup> have garnered media attention.

Social media itself has also seen the rise of tools to promote anonymous use, as exemplified in the popular mobile phone application Snapchat.<sup>80</sup> Marketed for users who wish to share photos and videos without creating a permanent record of such content, Snapchat allows users to set a specific amount of time that their shared content will be viewable.<sup>81</sup> Even Snapchat, however, broadcasts the top users with whom one is sharing pictures, creating a public record of certain aspects of social media interaction.<sup>82</sup> Other social media applications promoting anonymous use, such as Anomo<sup>83</sup> and Spraffl,<sup>84</sup> are also being developed.

Users are also showing a preference for interacting with traditional social media sites through these disguised identities. A recent study suggests that more than eighty-three million Facebook accounts were of disguised identities.<sup>85</sup> Facebook estimates that more than one million of these accounts were created for purposes of avoiding the company's terms of use.<sup>86</sup>

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<sup>78</sup> *About Guerrilla Mail*, GUERRILLAMAIL, <https://www.guerrillamail.com/about> (last visited Mar. 27, 2014).

<sup>79</sup> *Cf. Protect your Privacy*, BITCOIN, <https://bitcoin.org/en/protect-your-privacy> (last visited Mar. 27, 2014) (discussing how Bitcoin is thought to be an anonymous payment network, but in actuality is not since all transactions are linked to Bitcoin addresses and are "public, traceable, and permanently stored in the Bitcoin network," therefore, Bitcoin suggests using a different address each time a transaction is made in order to maintain anonymity).

<sup>80</sup> SNAPCHAT, <http://www.snapchat.com> (last visited Mar. 28, 2014).

<sup>81</sup> *How to create and send Snaps*, SNAPCHAT, <http://support.snapchat.com/a/create> (last visited Mar. 28, 2014). Nonetheless, technically savvy users have found methods of preserving these pictures, such as by taking a screenshot of the Snapchat window. *See Privacy Policy*, SNAPCHAT, <http://www.snapchat.com/privacy> (last visited Mar. 28, 2014) (stating, "[w]e . . . cannot prevent others from making copies of your Snaps (e.g., by taking a screenshot).").

<sup>82</sup> *See* Leslie Meredith, *Snapchat Outs Users' Top Friends*, TECH NEWS DAILY (June 6, 2013, 5:27 PM), <http://www.technewsdaily.com/18283-snapchat-update-outs-users-friends.html>.

<sup>83</sup> ANOMO, <http://www.anomo.com> (last visited Mar. 28, 2014).

<sup>84</sup> SPRAFFL, <http://www.spraffl.com> (last visited Mar. 28, 2014).

<sup>85</sup> Heather Kelly, *83 Million Facebook Accounts are Fakes and Dupes*, CNN.COM, <http://www.cnn.com/2012/08/02/tech/social-media/facebook-fake-accounts/index.html> (last updated Aug. 2, 2012, 8:32 PM) (stating that approximately "8.7% of [Facebook's] 995 million monthly active users worldwide are actually duplicate or false accounts.").

<sup>86</sup> *Id.*

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Although additional statistics are difficult to obtain, these statistics and the examples discussed below<sup>87</sup> show that some users continue to wish to use disguised identities even in these established social media sites.

Legal commentators have also chimed in with suggestions for disconnecting social media use and identity.<sup>88</sup> One prominent proposal is the idea of online-identity “bankruptcy,” where users are entitled and empowered to erase their previous online identifying information.<sup>89</sup> Other commentators suggest that certain individuals should be barred from considering social media information in certain contexts, such as employment.<sup>90</sup> And still others suggest that online-information should come with automatic expiration dates.<sup>91</sup> Still, until these or other proposals gain additional traction, the use of disguised identities remains one of the few available options for dissociating identity and social media use.

With this basic understanding of social media and the potential for disguised identities to play a role on these platforms, the reader should now have a sense of the many ways in which disguised identities can be used. The next part illustrates just how varied these potential uses are, ranging from positive uses such as whistleblowing to far more negative uses.

### III. THE MANY USES OF DISGUISED IDENTITY IN SOCIAL MEDIA

Disguised social media identities arise in a wide variety of situations. For purposes of understanding the legal ethics of these situations, it is conceptually useful to divide these issues according to point of view. Quite simply, the ethical issues for

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<sup>87</sup> See *infra* Part III.

<sup>88</sup> See Karen Majovski, Comment, *Data Expiration, Let the User Decide: Proposed Legislation For Online User-Generated Content*, 47 U.S.F. L. REV. 807, 816–18 (2013) (discussing suggestions proffered by various legal scholars).

<sup>89</sup> See generally JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 228–31 (2008) (discussing the idea of “reputation bankruptcy”).

<sup>90</sup> See, Jeffery Rosen, *The Web Means the End of Forgetting*, NY TIMES (July 21, 2010), <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all> (noting a recent federal case where an employee’s social media posts were not public speech and thus the employee could be subject to adverse employment action).

<sup>91</sup> See e.g., VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 181–82 (2009) (discussing beneficial aspects associated with implementing expiration dates despite being less preferable than “mechanisms guaranteeing information privacy”).

someone adopting a disguised identity are different from the issues that face someone interacting with a disguised identity. Below, we present examples of each, but it is important to remember that there is some overlap, as ethical issues often arise on both sides of an interaction.

#### A. *Assuming a Disguised Identity*

When social media users elect to adopt disguised identities, they can do so to varying degrees. At the narrowest end, a user may simply elect to portray a particular portion of her personality or self within the social media platform.<sup>92</sup> For instance, she may create a Twitter account solely devoted to a particular hobby, interest, or specialty.<sup>93</sup> In electing not to present other aspects of herself, the user is arguably creating a disguised identity, as the single-issue online persona may not be as recognizable as her offline self.

Other uses may elect to go further, providing explicitly false information. In doing so, users can again do so to varying degrees. Users may elect to change minor details about themselves, such as increasing their reported height in an online dating profile.<sup>94</sup> As the amount of false information increases, the profile can result in the creation of an entirely fictitious persona. Importantly, this fictitious persona could be a creation of the user's imagination or the persona of someone other than the user.

In the same way, users may elect to remain anonymous to varying degrees. Some social media sites and profiles are visible even to viewers who have not registered.<sup>95</sup> An unregistered user browsing such information, in many ways, has elected to disguise his identity with a cloak of anonymity. While the user's IP

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<sup>92</sup> See R. Kay Green, *The Social Media Effect: Are You Really Who You Portray Online?*, HUFFINGTON POST (Aug. 7, 2013, 4:32 PM), [http://www.huffingtonpost.com/r-kay-green/the-social-media-effect-a\\_b\\_3721029.html](http://www.huffingtonpost.com/r-kay-green/the-social-media-effect-a_b_3721029.html) (discussing how there are two different aspects to a person, their "ideal self" and "real self" and how through social media both selves interact, allowing the "ideal self" to be actualized).

<sup>93</sup> Madhumita Datta, *Tweet Tweet: Is that the Sound of Change for a Blogger?*, SULEKHA CREATIVE, [http://creative.sulekha.com/tweet-tweet-is-that-the-sound-of-change-for-a-blogger\\_77349\\_blog](http://creative.sulekha.com/tweet-tweet-is-that-the-sound-of-change-for-a-blogger_77349_blog) (last visited Mar. 28, 2014).

<sup>94</sup> See, Christian Rudder, *The Big Lies People Tell In Online Dating*, OKTRENDS (July 7, 2010), <http://blog.okcupid.com/index.php/the-biggest-lies-in-online-dating> (noting that on average, users are two inches shorter than reported).

<sup>95</sup> See, e.g., *Your Profile Name*, *supra* note 35 (explaining how LinkedIn profile names are "publically available information").

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address may nonetheless reveal his identity, this can be disguised (and the user's anonymity increased) with services such as TOR.<sup>96</sup> Where registration is required, a user may elect to create a temporary account with the social media site, providing only random and/or minimal responses to the registration questions.<sup>97</sup> Such a decision also illustrates the blurry line between anonymity and pseudo-anonymity when it comes to social media identity. For this reason, this article treats anonymity and pseudo-anonymity together.

Disguised identities rarely arise by accident; users who create them do so with a purpose in mind. As the examples below illustrate, the choice to adopt a disguised identity is most commonly made because a user fears that disclosure of his full, truthful identity will somehow hinder the purpose for using the social media site. Because the internet, and social media in particular, is fundamentally about the exchange of information,<sup>98</sup> we can divide the uses of disguised identity into cases where the user's goal is to give information and cases where the goal is to receive information.

### 1. Using a Disguised Identity to Give Information

Many disguised identities are adopted for the purposes of providing certain information to others. For a variety of reasons, a user providing information may fear retribution if she became known as the source of the information. Or, a user may feel that the information will be treated differently if she is able to hide the fact that she is the source of the information. In either instance, the goal of adopting a disguised identity is to separate the information provided from the identity of the person providing it. For this reason, the use of anonymous identities is quite common in these situations.

Whistleblowers represent one of the paradigmatic examples of

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<sup>96</sup> *Anonymity Online*, TORPROJECT, <https://www.torproject.org> (last visited Mar. 28, 2014).

<sup>97</sup> See *How to Create a Fake Facebook Profile*, WIKIHOW, <http://www.wikihow.com/Create-a-Fake-Facebook-Profile> (last visited Mar. 28, 2014) (explaining the ease with which users may create temporary or false profiles).

<sup>98</sup> See Nicholas Bramble, *Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection*, 17 MICH. TELECOMM. & TECH. L. REV. 67, 86 (2010) ("The fundamental purpose of providing Internet access is . . . to create an opportunity for an exchange of information between users and content and application providers . . .").

users who may choose to adopt disguised identities. By definition, a whistleblower is providing information that others do not wish to have disclosed.<sup>99</sup> The whistleblower's fear of retaliation in response to the disclosure is therefore well recognized. Indeed, under Sarbanes-Oxley, public companies must offer employees at least one confidential, anonymous method for submitting information or complaints about questionable accounting practices.<sup>100</sup>

Social media is already beginning to see similar practices. The dispute in *Solers, Inc. v. Doe*,<sup>101</sup> arose from just such a circumstance. The Software Information Industry Association had set up a method for anonymous Internet users to report potential software piracy.<sup>102</sup> In March 2005, it received a tip from an anonymous user that Solers, Inc. was using pirated software.<sup>103</sup> Highlighting many of the legal issues surrounding anonymous identities on the Internet, Solers, Inc. then brought suit against the tipster, and sought to compel the Software Information Industry Association to disclose the tipster's identity.<sup>104</sup>

Although also involving the anonymous disclosure of information, Jofi Joseph's termination<sup>105</sup> as a White House staffer presents a very different set of circumstances. Mr. Joseph was a member of the National Security Staff, but for two years had also been the individual behind the otherwise anonymous Twitter account @natsecwonk.<sup>106</sup> Using this account, Mr. Joseph often criticized White House policy and leaked inside information learned from his job.<sup>107</sup> In October 2013, when it became known that Mr. Joseph was behind the @natsecwonk account, he was fired from the White House.<sup>108</sup>

Other users may adopt a disguised identity for a less dramatic reason—a desire to interact online while still retaining their

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<sup>99</sup> *Whistle-blower*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/whistle-blower> (last visited Mar. 28, 2014).

<sup>100</sup> 17 C.F.R. § 240.10A-3(b)(3)(ii) (2014).

<sup>101</sup> *Solers, Inc. v. Doe*, 977 A.2d 941, 946-47 (D.C. 2009).

<sup>102</sup> *Id.* at 945.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 946.

<sup>105</sup> See Josh Rogin, *White House Official Fired For Tweeting Under Fake Name*, THE DAILY BEAST (Oct. 22, 2013), <http://www.thedailybeast.com/articles/2013/10/22/white-house-official-fired-for-tweeting-under-fake-name1.html>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

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personal privacy. For example, the Supreme Court has long acknowledged the importance of the ability to anonymously read and select books.<sup>109</sup> With more and more people choosing e-readers (devices connected to the internet), however, the ability to do so may be disappearing. In addition to laws attempting to restore such privacy,<sup>110</sup> anonymous accounts associated with these services may soon become popular.

Teachers, in particular, have discovered a need for disguised identities in social media, as parents become concerned about students viewing teachers' social media posts or interacting with teachers through social media.<sup>111</sup> A number of teachers have already been disciplined for their social media use, and courts often reject challenges to such adverse employment action.<sup>112</sup> As one commentator has remarked, "[t]he current speech standards may force teachers to the extreme of using fake profiles, fake names, and a cloud of other minor lies"<sup>113</sup>—in other words disguised identities—in order to avoid discovery and adverse employment action.

Other times, individuals will seek to give information under a disguised identity for more nefarious purposes. One of the more common occurrences of this is so-called "astroturfing". Astroturfing involves creating the appearance of public or popular sentiment regarding an issue, company, or product by disguising the identity of the source of information.<sup>114</sup> Although also common in political campaigns,<sup>115</sup> astroturfing is becoming

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<sup>109</sup> See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965); *United States v. Rumely*, 345 U.S. 41, 57 (1953) (Douglas, J., concurring).

<sup>110</sup> Reader Privacy Act, Cal. Civ. Code §1798.90 (West, Westlaw through ch. 4 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot); § 1798.90.05 (West, Westlaw through ch. 4 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot).

<sup>111</sup> See, e.g., Emily McNee, Note, *Disrupting the Pickering Balance: First Amendment Protections for Teachers in the Digital Age*, 97 MINN. L. REV. 1818, 1818–19 (2013) (discussing examples of teachers who have faced negative consequences as a result of posting on social media).

<sup>112</sup> See, e.g., *Richerson v. Beckon*, No. 08-3531, 2009 WL 1975436 (9th Cir. Aug. 27, 2009); *Spanierman v. Hughes*, 576 F.Supp.2d 292, 297–314 (D. Conn. 2008); *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at \*1–5 (E.D. Pa. Dec. 3, 2008).

<sup>113</sup> McNee, *supra* note 111, at 1837 (internal quotation marks and alterations omitted).

<sup>114</sup> Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 361 (2010); see also Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 200 n.32 (2012).

<sup>115</sup> Zellner, *supra* note 114; Hasen, *supra* note 114.

increasingly prominent in the world of online product reviews.<sup>116</sup> Companies posting fake positive reviews of their products know that they must disguise their identities, as users would otherwise be skeptical if they knew the true source of the information.

The Federal Trade Commission (FTC) has taken note of this trend and sued a number of companies for such practices. In 2011, the FTC brought suit against IMM Interactive, Inc., alleging the company had engaged in deceptive advertising by disguising its own statements as objective news articles from third parties.<sup>117</sup> According to the FTC, the company then went further and provided fake responses and comments, also authored by the company, to these supposed news stories.<sup>118</sup> In a stipulated final judgment, the company was required to pay nearly \$1.5 million.<sup>119</sup>

The New York Attorney General has taken similar action, accusing a company called Lifestyle Lift of deceptive advertising practices. The Attorney General concluded that company employees regularly and systematically posted positive stories and reviews online about Lifestyle Lift.<sup>120</sup> The company was forced to pay \$300,000 in penalties for its use of disguised identities.<sup>121</sup>

Separately, the Securities and Exchange Commission (SEC) has warned that disguised identities in social media, among other things, may be used in so-called “pump and dump” schemes.<sup>122</sup> In such a scheme, the owner of the stock of a small

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<sup>116</sup> Kaitlin A. Dohse, Note, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews*, 2013 U. ILL. J.L. TECH. & POL'Y 363, 364–65 (2013).

<sup>117</sup> See Amended Complaint for Permanent Injunction and Other Equitable Relief at paras. 13–15, *FTC v. IMM Interactive, Inc.*, No. 11-cv-2484 (N.D. Ill. Mar. 14, 2013), available at <http://www.ftc.gov/os/caselist/1023232/120321copecastip.pdf>.

<sup>118</sup> *Id.* at para. 14–15.

<sup>119</sup> Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendants IMM Interactive, Inc., et al. at 17, *FTC v. IMM Interactive, Inc.*, No. 11-cv-2484 (N.D. Ill. Mar. 1, 2012), available at <http://www.ftc.gov/os/caselist/1023232/120321copecastip.pdf>.

<sup>120</sup> See *Attorney General Cuomo Secures Settlement with Plastic Surgery Franchise that Flooded Internet with False Positive Reviews*, NEW YORK OFF. ATT'Y GEN. (July 14, 2009), <http://www.ag.ny.gov/press-release/attorney-general-cuomo-secures-settlement-plastic-surgery-franchise-flooded-internet>.

<sup>121</sup> *Id.*

<sup>122</sup> See generally “Pump-and-Dumps” and Market Manipulations, SEC, <https://www.sec.gov/answers/pumpdump.htm> (last visited April 6, 2014) (defining pump-and-dump schemes).

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company will place false positive comments and other information online, in an attempt to drive up the price of the stock.<sup>123</sup> Because disclosure that the provider of such information was also the owner of the company's stock would lead other market participants to be skeptical of such information, disguised identity is a critical element of the scheme.<sup>124</sup> Once the false information comes to light, the stock price drops and unwitting participants can suffer significant losses.<sup>125</sup>

Regrettably, there are additional uses of disguised identities that are potentially even more nefarious. Just recently, a federal court in Louisiana threw out the convictions of a number of police officers charged with abuses during the aftermath of Hurricane Katrina.<sup>126</sup> During the investigation and trial of these officers, members of the U.S. Attorney's Office assumed disguised identities and then made inflammatory statements in the comments sections of news articles about the on-going investigation.<sup>127</sup> After a court-directed investigation revealed the significant extent of this behavior,<sup>128</sup> the Court concluded that the convictions had to be vacated in light of what it found to be "a deliberate and especially egregious' pattern of prosecutorial misconduct."<sup>129</sup>

Finally, disguised identities are inherent in cyber-bullying and related conduct, an issue that has been the subject of much recent legal commentary.<sup>130</sup> Perhaps most notable is the case of Lori Drew. Ms. Drew was accused of harassing and bullying a thirteen-year old girl through a fake MySpace profile she had

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<sup>123</sup> *Id.*

<sup>124</sup> See *Mass-Marketing Fraud*, U.S. DEPARTMENT JUST., <http://www.justice.gov/criminal/fraud/internet> (last visited April 4, 2014) (stating that false and fraudulent information is generated in order to cause dramatic price increases).

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

<sup>126</sup> *United States v. Bowen*, No. 10-204, 2013 WL 5233325 (E.D. La. 2013).

<sup>127</sup> *Id.* at \*6-16.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at \*23.

<sup>130</sup> *E.g.*, Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357 (2013); Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729 (2013); Atticus N. Wegman, *Cyberbullying and California's Response*, 47 U.S.F. L. REV. 737 (2013); Hilary Schronce Blackwood, *Regulating Student Cyberbullying*, 40 RUTGERS L. REC. 153 (2013); Elizabeth M. Jaffe, *Cyberbullies Beware: Reconsidering Vosburg v. Putney in the Internet Age*, 5 CHARLESTON L. REV. 379, 386-88 (2011).

created for a sixteen-year old boy named Josh Evans.<sup>131</sup> The girl ultimately committed suicide after Ms. Drew used the profile to inform the girl that Evans was moving away, no longer liked her, and that “the world would be a better place without her in it.”<sup>132</sup>

Other disguised identities have been used in a similar manner, but targeted at adults. For instance, in *In re Carpenter*, a lawyer created a fake, disparaging profile of a former classmate in anticipation of an upcoming reunion.<sup>133</sup> In *Matot v. CH*, middle school students created an unflattering fake social media profile of their assistant principal.<sup>134</sup> And *Layshock ex rel. Layshock v. Hermitage School District* similarly involved the creation of an unflattering social media account for the high school principal.<sup>135</sup> Many more examples unfortunately exist, but they all underscore the negative ways in which disguised identity can be used in social media networks.

## 2. Using a Disguised Identity to Receive Information

Other times, individuals adopt a disguised identity not because they want to put forth information, but because they want to obtain it for themselves. Disguised identity plays an important role in these circumstances most often because the user believes that the information would not be provided if her true identity were known. Because these users are seeking to obtain information, it is no surprise that most examples of such conduct involve some type of an investigation.

Police are beginning to use social media in their investigations, often adopting disguised identities in the course of doing so. In *United States v. Meregildo*,<sup>136</sup> police sought information from the defendant’s Facebook account. However, the defendant had used the site’s privacy settings so that only those whom he had listed as “friends” could see the information he had posted to his account.<sup>137</sup> Because the contents of the social media account were not public and the police had not yet obtained a warrant,<sup>138</sup> police

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<sup>131</sup> Strictly speaking Ms. Evans was charged with conspiracy to violate the Computer Fraud and Abuse Act, but these events were part of the alleged conspiracy. See *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

<sup>132</sup> *Id.* at 452.

<sup>133</sup> *In re Carpenter*, 95 P.3d 203, 205–06 (Or. 2004).

<sup>134</sup> *Matot v. CH*, No. 6:13-cv-153-MC, 2013 WL 5431586, at \*3 (D. Or. 2013).

<sup>135</sup> *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207–11 (3d Cir. 2011).

<sup>136</sup> *United States v. Meregildo*, 883 F.Supp.2d 523 (S.D.N.Y. 2012).

<sup>137</sup> *Id.* at 525.

<sup>138</sup> Later, the police would obtain a warrant for the contents of the

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instead secured the cooperation of one of the defendant's Facebook "friends," who did have access to the information the defendant had posted.<sup>139</sup> The district court concluded "[w]here Facebook privacy settings allow viewership of postings by 'friends,' the Government may access them through a cooperating witness who is a 'friend' without violating the Fourth Amendment."<sup>140</sup> Information about similar police tactics is appearing across the country.<sup>141</sup>

Lawyers are also turning to the use of disguised identities as part of their investigation into cases. In *In re Gatti*,<sup>142</sup> a lawyer was investigating how a company reviewed medical claims submitted to an insurer.<sup>143</sup> To do so, he called a chiropractor and created the false impression that he, too, was a chiropractor.<sup>144</sup> However, this is not to suggest that all instances of attorneys adopting disguised identities are for purposes of investigation. For example, in *In re Pautler*, a prosecutor claimed to be a criminal defense lawyer in order to induce a defendant to surrender into custody.<sup>145</sup>

Although the *Gatti* and *Pautler* cases did not involve disguised identities in the social media realm, the treasure trove of information available from social media profiles suggests that it is only a matter of time before such conduct occurs. As most lawyers are now aware, discovery disputes regarding social media are now becoming commonplace,<sup>146</sup> as lawyers seek information particularly about mental and emotional wellbeing and the extent of physical injuries.<sup>147</sup> Lawyers consider social

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defendant's Facebook account. *Id.*

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

<sup>140</sup> *Id.* at 526.

<sup>141</sup> See e.g., Dan Solomon, *Police Befriend Facebook, Twitter Users*, CBC NEWS (Oct. 7, 2009, 10:22 AM), <http://www.cbc.ca/news/canada/ottawa/police-befriend-facebook-twitter-users-1.804449>; Dan Solomon, *Police Use Fake Facebook Profile to Bust Underage Drinkers—Is It Legal?*, ASYLUM.COM (Dec. 4, 2009), <http://www.asylum.com/2009/12/04/fake-facebook-profile-helps-police-bust-underage-drinkers-is>.

<sup>142</sup> *In re Gatti*, 8 P.3d 966 (Or. 2000).

<sup>143</sup> *Id.* at 970.

<sup>144</sup> *Id.*

<sup>145</sup> *In re Pautler*, 47 P.3d 1175, 1176 (Colo. 2002).

<sup>146</sup> See, e.g., *Giacchetto v. Patchogue—Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 115 (E.D.N.Y. 2013); *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387 (E.D. Mich. 2012); *In re Air Crash Near Clarence Ctr., N.Y.*, No. 09-md-2085, 2013 WL 6073635 (W.D.N.Y. 2011).

<sup>147</sup> See, e.g., *Reid v. Ingerman Smith LLP*, No. CV 2012-0307(ILG), 2012 WL 6720752, at \*1 (E.D.N.Y. 2012) ("[W]here a plaintiff puts [his] emotional well-

media information so potentially valuable precisely because it is content created by individuals, often under more casual circumstances.<sup>148</sup>

### *B. Interacting with Disguised Identities*

A very different set of issues exists when interacting with third parties who have adopted a disguised identity. The initial challenge, of course, is determining when one is interacting with a disguised identity; most disguises do not come with labels identifying them as such. And even past this initial hurdle, issues of confidentiality and the potential for inappropriate disclosure loom large, as the following examples illustrate.

Fortunately, most courts are aware that online identities bear the possibility of being fake or misleading. As one court wrote, “[t]he identity of who generated the profile may be confounding, because a person observing the online profile of a user with whom the observer is unacquainted has no idea whether the profile is legitimate.”<sup>149</sup> Accordingly, courts often rightly show skepticism when faced with situations involving potential disguised identities.

In some instances, existing rules already account for the potential for disguised identity. For example, the hearsay rules in the Federal Rules of Evidence note that courts often require additional information about reliability when it comes to statements from unknown declarants.<sup>150</sup> In other words, a

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being at issue when asserting claims of . . . discrimination as in this action, some courts have found that ‘Facebook usage depicts a snapshot of the user’s relationships and state of mind at the time of the content’s posting.’”) (quoting *Bass v. Miss Porter’s Sch.*, No. 3:08cv1807 (JBA), 2009 WL 3724968, at \*1 (D. Conn. Oct. 27, 2009); *see also* *Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 3:12-cv-00127-PK, 2012 WL 3763545, at \*2 (D. Or. Aug. 29, 2012) (finding it “reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content . . .”); *Sourdiffe v. Tex. Roadhouse Holdings, LLC*, No. 3:10-CV-0408 (TJM/DEP), 2011 WL 7560647, at \*1 (N.D.N.Y. Oct. 24, 2011) (directing plaintiff to produce social networking information related in any way to her emotional or mental state).

<sup>148</sup> *See* Audra Dial & Chiaman Wang, *The Opportunities and Pitfalls of Social Media in Litigation*, STATE BAR OF GA., TECH. LAW SEC. (May 16, 2012) available at <http://technologybar.org/2012/05/the-opportunities-and-pitfalls-of-social-media-in-litigation> (discussing the benefits associated with attorneys’ use of social media sites to gain such information).

<sup>149</sup> *Griffin v. Maryland*, 19 A.3d 415, 421 (Md. 2011) (internal quotation marks and citation omitted).

<sup>150</sup> *See* Advisory Comm. Notes, FED. R. EVID. 803 (“[w]hen [the] declarant is an unidentified bystander . . . cases indicate hesitancy in upholding the

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declarant seeking to admit a statement by an unidentified individual carries a “heavier burden.”<sup>151</sup> As lawyers continue to seek evidence from a social media site in discovery, issues involving potentially unknown declarants can be expected to appear more frequently.<sup>152</sup>

Correctly identifying an individual is possibly even more important when it comes to issues of notice and service of process. It is no surprise, therefore, that most courts have been reluctant to embrace the use of social media for items such as class action notice or service of process.<sup>153</sup> In the rare instances where courts have endorsed such approaches, there are usually additional indications that the social media account belongs to the person whom it purports to be.<sup>154</sup>

The far more common approach is to require Internet Service Providers or other individuals to disclose the identity of individuals behind potentially disguised identities, in order to permit traditional legal processes to then resume. By now, the courts have routinely applied the standards articulated in the *Dendrite*<sup>155</sup> and *Cahill*<sup>156</sup> cases. These cases, which set forth the commonly applied standard for determining when subpoenas can be properly issued to disclose the identity of an individual with a particular IP address, provide a potent tool for those wishing to unmask someone who has adopted a disguised identity.

*Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*,<sup>157</sup> provides a good, recent example of such a case, although it applies Virginia’s

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statement alone as sufficient . . .”).

<sup>151</sup> United States v. Brown, 254 F.3d 454, 461 (3d Cir. 2001).

<sup>152</sup> See Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 MISS. C. L. REV. 185, 207–08 (2012) (discussing the various approaches that courts have taken to resolve this particular issue of authentication).

<sup>153</sup> See *Jermyn v. Best Buy Stores*, 08 Civ. 00214(CM), 2010 WL 5187746 at \*7 (S.D.N.Y. 2010) (denying class action notice in part via Twitter); see also William Wagner & Joshua R. Castillo, *Friending Due Process: Facebook as a Fair Method of Alternative Service*, 19 WIDENER L. REV. 259, 270–71 (2013) (mentioning the tendency of courts to favor traditional methods of service rather than implementing the use of technologically advanced methods).

<sup>154</sup> See Order for Service by Publication on the Internet, *In re Marriage of Jessica Mpafe v. Clarence Mpafe*, No. 27-FA-11 (Minn. Dist. Ct. May 10, 2011) (approving service of process via social media where plaintiff could confirm identity and owner of social media account).

<sup>155</sup> *Dendrite Int’l. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

<sup>156</sup> *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

<sup>157</sup> *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E.2d 554 (Va. Ct. App. 2014).

statutory test for identifying an anonymous Internet commenter, rather than Dendrite / Cahill.<sup>158</sup> After a number of registered Yelp users created negative reviews of Hadeed Carpet Cleaning on Yelp's website, Hadeed filed suit against the users for defamation.<sup>159</sup> Hadeed then subpoenaed Yelp to identify the users based on their registration information.<sup>160</sup> The state appellate court affirmed a contempt order entered against Yelp for its failure to comply, noting that Hadeed had satisfied the criteria for requiring disclosure of the users' identities.<sup>161</sup>

At other times, the true identity of the user may be known to a small group of individuals. In those circumstances, the disclosure of the individual's true identity can wreak havoc, as shown by the recent revelation that J.K. Rowling had published a detective novel under a pen name.<sup>162</sup> The disclosure of the true identity of the book's author was traced to one of Ms. Rowling's lawyers, and he was fined more than \$1000 for his role in unmasking Ms. Rowling's disguised identity.<sup>163</sup>

Finally, some businesses face specific threats to their business models and practices from those who would adopt a disguised identity. These businesses, more than many, take active steps to try to uncover and prevent such action. As just one example, Ticketmaster secured an injunction against RMG Technologies to prevent RMG from marketing and selling devices that allowed individuals to circumvent Ticketmaster's systems designed to prevent individuals from purchasing large quantities of tickets for resale.<sup>164</sup>

As these many examples make clear, issues involving disguised identities can arise in many different circumstances. As social media continues to permeate more aspects of daily life, incidents such as these are likely to increase in frequency. Moreover, the

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<sup>158</sup> *See id.* at 565.

<sup>159</sup> *Id.* at 558.

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

<sup>161</sup> *Id.* at 566.

<sup>162</sup> *See* Daisy Wyatt, *JK Rowling Lawyer Fined Over Robert Galbraith Cuckoo's Calling Identity Leak*, THE INDEPENDENT (Jan. 2, 2014), <http://www.independent.co.uk/arts-entertainment/books/news/jk-rowling-lawyer-fined-over-robert-galbraith-cuckoos-calling-identity-leak-9034972.html> (discussing the legal implications that JK Rowling's attorney faced for "breaching privacy rules" by revealing the author's use of a pseudonym for her latest book).

<sup>163</sup> *Id.*

<sup>164</sup> *Ticketmaster L.L.C. v. RMG Tech, Inc.*, 507 F.Supp.2d 1096, 1116–17 (C.D. Cal. 2007).

ethical issues that such disguised identities present cannot be avoided simply by choosing not to assume such an identity. Even those who do not do so may find themselves confronting a disguised identity, whether or not they are aware of that fact.

#### IV. ETHICAL CONSIDERATIONS OF DISGUISED IDENTITIES IN SOCIAL MEDIA

It should now be clear that disguised identities in social media are used in many different circumstances. When disguised identities do appear, these circumstances may trigger a number of different rules in legal ethics. We discuss a number of potentially applicable American Bar Association (ABA) Model Rules of Professional Conduct below.

Before doing so, however, a preliminary word is necessary about ABA Model Rules 5.1 through 5.3. Together, these rules generally prohibit lawyers from using intermediaries to perform unethical conduct on their behalf.<sup>165</sup> Most commonly, these rules are triggered when lawyers use investigators or other non-lawyers in the course of preparing their cases. When doing so, Rule 5.3 usually applies, rendering the lawyer responsible for ensuring the non-lawyer's conduct also complies with the rules of legal ethics.<sup>166</sup> Lawyers who do rely on others to assist in their investigations or case preparation should therefore work to inform those with whom they work about the limits on the use of disguised identity that are discussed below.

##### A. *The Duty of Candor*

When discussing the use of disguised identities, Rule 8.4(c) often appears the most directly applicable. This rule states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . .”<sup>167</sup> As many of the circumstances discussed above show, the use of a disguised identity, by its very nature, often can involve a misrepresentation of some sort.

A number of bar organizations have issued opinions directly

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<sup>165</sup> See Peter Geraghty, *Ethical Considerations on Outsourcing Legal Services*, 273-DEC N.J. Law. 44, 44 (2011) (discussing the similarities between the Rule 5.1 and 5.3 of the ABA's Model Rules of Professional Conduct).

<sup>166</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3(b) (2013); see also *id.* at (c) (setting forth circumstances in which a lawyer is responsible for a non-lawyer's conduct).

<sup>167</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013).

applying these rules to a lawyer's use of disguised identities on social media.<sup>168</sup> As noted above, social media can often provide important information to a lawyer's investigation and case preparation.<sup>169</sup> When a lawyer adopts a disguised identity to obtain information as part of his investigation into a client's case, the practice is known as "pretexting."<sup>170</sup> In general, pretexting is regarded as a violation of the rules of professional conduct precisely because of Rule 8.4's prohibition on misrepresentations.<sup>171</sup>

While this appears to be a clear rule, the line is actually somewhat blurry. First, where a lawyer uses his true identity on social media, such conduct may be permitted.<sup>172</sup> However, if a lawyer interposes a third party to "friend" or otherwise view private social media information, the line into unethical conduct may once again be crossed.<sup>173</sup> This is because, despite the use of a true identity, the connection between the request and the lawyer has now been obscured.

Second, although anonymous social media use was discussed above as a potential form of a disguised identity, ethical opinions tend to treat this conduct differently from pretexting involving explicit misrepresentations. A number of bar associations have concluded that viewing publicly available social media information does not violate these ethical rules.<sup>174</sup> In these instances, ethical opinions conclude that public social media information is no different from any other publicly available information about a person, and therefore the investigatory steps are permitted.<sup>175</sup>

Third, the general prohibition on pretexting does not appear to apply to law enforcement. Deception has long been a part of police investigations, whether through undercover agents or informants. With respect to social media, as noted above, law

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<sup>168</sup> See, e.g., Phila. Bar Ass'n Prof'l Guidance Comm., Op. No. 2009-02 (Mar. 2009); N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Op. No. 2010-2 (2010).

<sup>169</sup> See *supra* notes 142–47 and accompanying text.

<sup>170</sup> See generally Steven C. Bennett, *Ethics of "Pretexting" in a Cyber World*, 41 MCGEORGE L. REV. 271, 271 n.2 (2010).

<sup>171</sup> See MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

<sup>172</sup> N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Op. No. 2010-2, at 1.

<sup>173</sup> Phila. Bar Ass'n Prof'l Guidance Comm., Op. No. 2009-02, at 3.

<sup>174</sup> E.g., N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 843, para. 5 (Sept. 10, 2010); Or. State Bar Legal Ethics Comm., Op. No. 2005-164, at 453.

<sup>175</sup> N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 843, para. 5.

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enforcement officials are now using social media accounts as part of their investigations, in particular for investigations involving child exploitation.<sup>176</sup> In such instances, at least one bar opinion has concluded that such conduct does not violate the rules of professional conduct if the “dissemblance” is “limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence.”<sup>177</sup> This opinion, however, is quite limited in scope, authorizing such conduct only for purposes of investigating civil rights or intellectual property offenses.

While these and related rules most obviously apply to a lawyer’s work in the course of representing a client, problems can also arise for lawyers working outside of a representation. Most notably, rules against “puffery” and other regulations about lawyer advertising can be triggered when a lawyer uses social media for promotional or other business purposes.<sup>178</sup> Many forms of social media allow individuals to review, rate, or otherwise comment on business, including law firms.<sup>179</sup> A lawyer, who uses a disguised identity for the purpose of creating misleading reviews or other such content, as some of the non-lawyers discussed above have done, likely violates ethical rules regarding dishonesty and false statements.<sup>180</sup>

Finally, lawyers have a duty of candor to the Court.<sup>181</sup> Just as lawyers are finding that social media can be useful for uncovering the truth behind a litigant’s claims, courts and others are finding that social media information can unmask false representations made by lawyers to the courts. For example, one lawyer was recently sanctioned for requesting a continuance on the grounds of a death in the family, while social media

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<sup>176</sup> See, e.g., *United States v. Brooks*, No. 12-CR-166(RRM), 2012 WL 6562947 (E.D.N.Y. Dec. 17, 2012).

<sup>177</sup> See N.Y. County Lawyers’ Ass’n Comm. on Prof’l Ethics, Op. No. 737, at 1 (May 23, 2007).

<sup>178</sup> See Heather R. Pruger & Saul Ewing, *Social Media: Too powerful to Ignore*, FED. BAR ASS’N (Md) June 2011, available at [http://www.saul.com/sites/default/files/1102\\_PDF\\_2928.pdf](http://www.saul.com/sites/default/files/1102_PDF_2928.pdf) (explaining how social media sites have enabled deceptive advertising practices in the legal world).

<sup>179</sup> See Stuart Reich, *The Ethics of Using Online “Customer Reviews” in Attorney Marketing*, LAW FIRMSUITES (Jan. 7, 2014), <http://lawfirmsuites.com/2014/01/new-york-shared-law-office-ethics-using-online-customer-reviews-attorney-marketing>.

<sup>180</sup> See, e.g., MODEL RULES OF PROF’L CONDUCT R. 7.1 (2013) (prohibiting misleading communications about a lawyer’s services); MODEL RULES OF PROF’L CONDUCT R. 7.3(c) (2013) (requiring disclosure about advertising material).

<sup>181</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3 (2013).

information revealed that he used the time to take a vacation.<sup>182</sup> While disguised identities may complicate the discovery of the false statements, as discussed more below, a competent lawyer should understand the technological limitations that enable most disguised identities to be revealed.<sup>183</sup>

As social media use continues to grow both with respect to the practice of law and more generally, these and other complexities involving the duty of candor will likewise grow in importance and prominence. Whether a lawyer's use of a disguised identity qualifies as a misrepresentation or as mere "dissemblance" is a difficult line to draw, and accordingly, lawyers should exercise significant caution.

### B. *The Duty of Confidentiality*

Even where a lawyer is not the one adopting a disguised identity, ethical landmines abound. Most obviously, where a client has disclosed her use of a disguised identity, the duty of confidentiality<sup>184</sup> may require the lawyer to avoid unmasking the identity in certain circumstances. The violation of this rule is precisely why a lawyer assisting J.K Rowling with the publishing of her book under a pen name was sanctioned.<sup>185</sup>

At the same time, a number of the exceptions to the duty of confidentiality may also apply to issues of disguised identity. For example, lawyers are not prohibited from disclosing client confidences where it is necessary "to prevent the client from committing a crime or fraud," and/or where the client has used the lawyer's service in furtherance of that conduct.<sup>186</sup> Where some of the more nefarious uses of disguised identities are involved, such as cyberbullying or other dishonest conduct, a lawyer should be particularly aware of this exception. Of course, a lawyer may also reveal the true identity behind a disguised

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<sup>182</sup> See John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, at A1; see also Molly McDonough, *Facebooking Judge Catches Lawyer in a Lie, Sees Ethical Breaches #ABACHicago*, ABA JOURNAL (July 31, 2009, 3:16 PM), [http://www.abajournal.com/news/article/facebooking\\_judge\\_catches\\_lawuers\\_in\\_lies\\_crossing\\_ethical\\_lines\\_abac\\_hicago](http://www.abajournal.com/news/article/facebooking_judge_catches_lawuers_in_lies_crossing_ethical_lines_abac_hicago).

<sup>183</sup> See discussion *infra* Part D.2.

<sup>184</sup> See generally MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013) (outlining guidelines for attorneys to follow with regard to the confidentiality in the attorney-client relationship).

<sup>185</sup> See Wyatt, *supra* note 162.

<sup>186</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2),(3) (2013).

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identity when ordered to do so by a court. In these circumstances, application of the Dendrite / Cahill framework operates to provide some comfort that such disclosures are not made without sufficient basis.<sup>187</sup>

Together, the duty of confidentiality and its accompanying exceptions provide a careful line that lawyers must walk when dealing with clients who have chosen to adopt a disguised identity. In general, these identities should not be disclosed and should be treated much like other client confidences. Nonetheless, because disguised identities have a particular potential to enable or further misconduct, the exceptions to the duty of confidentiality play a significant role as well.

### C. *Avoiding Conflicts of Interest*

Conflict of interest rules are one area where knowing a client's true identity is particularly important. Under ABA Model Rule 1.7, a lawyer is prohibited from representing a client where "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."<sup>188</sup> As more lawyers turn to the Internet in their interactions with clients, the possibility of disguised identities can create significant ethical dangers.

As other scholars have noted, interactions with clients or potential clients over the Internet can pose special problems.<sup>189</sup> Most notably, lawyers may be tempted to answer legal questions or provide legal advice in social media forums or chat platforms. In doing so, a lawyer may intentionally or unintentionally create a representational relationship with the individual.<sup>190</sup> Not only is this a potential problem in itself, if the individual's actual identity is unknown, it becomes nearly impossible to properly screen out potential conflicts of interest.

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<sup>187</sup> See *supra* notes 155–56 and accompanying text.

<sup>188</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013).

<sup>189</sup> See generally Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999).

<sup>190</sup> See *id.* at 156 ("The possibility that a lawyer might inadvertently create a conflict of interest by answering legal questions from someone with an interest adverse to a current or former client is particularly troubling in the sometimes-anonymous world of cyberspace.").

Unfortunately, diligence and caution are the only real ways to mitigate this ethical risk. Disguised identities are rarely labeled as such, as discussed above, meaning that a lawyer must be constantly vigilant for the possibility that a person they are interacting with through social media is not who they claim to be. At a minimum, a lawyer should learn the technological limitations and abilities of the social media platforms and other Internet tools he is using. Even then, prior to agreeing to represent any client first encountered through social media, a lawyer should take steps to verify the client's identity.

#### *D. The Duty of Competence*

Finally, and perhaps most importantly, a lawyer has a duty to "provide competent representation to a client."<sup>191</sup> The model rule describing the duty of competence insightfully divides this duty into two components (1) "keep[ing] abreast of changes in the law" and (2) doing the same with respect to the "practice" of law.<sup>192</sup> With respect to the use of disguised identities in social media, the first involves competently understanding courts' treatment of such practices. The second involves competently understanding the technology itself. We discuss each in turn below.

##### 1. Competence Regarding the Law of Social Media

Courts continue to struggle with legal issues regarding social media in a variety of areas of the law. A comprehensive treatment of all of the various ways in which the law interacts with social media would prove far too lengthy for the space of this article.<sup>193</sup> However, a few examples can help illustrate the broad scope of this interaction.

Most directly, a few courts have been called to adjudicate the rights of individuals to use disguised identities online. In 2012, a public official in Germany brought suit against Facebook to permit pseudonymous use of the site.<sup>194</sup> Specifically, Facebook's policy of requiring users to provide their real name was alleged to have violated the German Telemedia Act (TMA), which provides

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<sup>191</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

<sup>192</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013).

<sup>193</sup> For a more comprehensive discussion, see MAYER BROWN LLP, *THE SOCIAL MEDIA REVOLUTION: A LEGAL HANDBOOK* (2012).

<sup>194</sup> Lucian Constantin, *Germany to Sue Facebook Over Facial Recognition*, INFOWORLD (Nov. 11, 2011, 9:31AM), <http://www.infoworld.com/d/the-industry-standard/germany-sue-facebook-over-facial-recognition-178787>.

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that service providers must allow anonymous or pseudonymous use where technically possible and reasonable.<sup>195</sup> Although Facebook ultimately prevailed,<sup>196</sup> this lawsuit illustrates one of the many ways in which the legal world is being compelled to address the issue of disguised identity in social media.

Courts within the United States have also begun to recognize the importance of anonymous or pseudonymous use of the Internet. In *Doe v. Shurtleff*,<sup>197</sup> a convicted sex offender challenged a Utah state law that required him to provide state officials with all of his Internet identifiers and the websites where he used them. The court initially struck down the statute, concluding that the individual “has not forfeited his First Amendment rights, including his right to anonymous online speech.”<sup>198</sup> Although the opinion was later vacated, it nonetheless collects a substantial body of law upholding the right to anonymous Internet use under the First Amendment.<sup>199</sup>

The conclusion that the First Amendment protects disguised identities in social media received further support in the Supreme Court’s recent decision in *United States v. Alvarez*.<sup>200</sup> Although *Alvarez* did not itself involve social media use, it held that the First Amendment protected false statements very similar to those that users might make in creating a disguised identity in the social media realm.<sup>201</sup> At least one court has explicitly noted this analogous application.<sup>202</sup> Although the First Amendment implications of social media use are generally

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<sup>195</sup> Telemediengesetz [Telemedia Act], Feb. 26, 2007, Federal Gazette I at 179, sec. 13(6) (Ger.).

<sup>196</sup> See Moritz Jaeger, *No More Fake Names: German Court Sides with Facebook Over Pseudonym Lawsuit*, ZDNet (Apr. 26, 2013, 2:44PM), <http://www.zdnet.com/no-more-fake-names-german-court-sides-with-facebook-over-pseudonym-lawsuit-7000014539>.

<sup>197</sup> *Doe v. Shurtleff*, No. 1:08-CV-64 TC, 2008 WL 4427594 (D. Utah Sept. 25, 2008), *vacated*, 2009 WL 2601458 (D. Utah Aug. 10, 2009).

<sup>198</sup> *Id.* at \*1.

<sup>199</sup> See *e.g., id.* at \*6 (citing *ACLU of Ga. v. Miller*, 977 F.Supp. 1228, 1230 (N.D. Ga. 1997); *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1092 (W.D. Wash. 2001)).

<sup>200</sup> *United States v. Alvarez*, 132 S.Ct. 2537 (2012).

<sup>201</sup> See *id.* at 2546–47 (“reject[ing] the notion that false speech should be in a general category that is presumptively unprotected.”).

<sup>202</sup> See *Zimmerman v. Bd. of Trustees of Ball State Univ.*, 940 F.Supp.2d 875, 896 (S.D. Ind. 2013) (“The *Alvarez* decision itself, which the Students rely upon for their argument that the creation of the Facebook page and postings on that page are protected speech, establishes the previous uncertainty surrounding the issue of whether false speech is protected by the First Amendment.”).

beyond the scope of this article, lawyers should continue to expect this area of law to develop, particularly as it applies to social media.

More broadly, lawyers interacting with clients who maintain an online presence (as nearly all individuals and businesses today do) should understand the various regulatory rules regarding such use. As the examples discussed above illustrate, online interactions using disguised identities may run afoul of FTC regulations.<sup>203</sup> Other regulatory agencies, such as the Securities and Exchange Commission and even the Food and Drug Administration have similarly issued guidance regarding appropriate (and inappropriate) uses of social media by entities that they regulate.<sup>204</sup>

Social media is also beginning to intersect more directly with legal practice in the courtroom, too. The ongoing debate about service of process discussed above is just the tip of the iceberg. Courts will also be required more often to rule on the admissibility of social media evidence, and to adjudicate disputes about social media interactions and companies' use of social media information. As the recent decision involving the identity of a Yelp reviewer illustrates, these issues continue to be divisive and a lawyer should work to stay up to date on the changing legal landscape regarding these issues.<sup>205</sup>

## 2. Competence Regarding the Technology of Social Media

Separately, the duty of competence requires lawyers to understand the technology behind social media use, both its limits and benefits. Social media provides the opportunity for disguised identities, but also the potential for those disguised identities to be unmasked, whether through the carelessness of the user or the technological limits of the constructed social

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<sup>203</sup> See *supra* notes 117–19 and accompanying text.

<sup>204</sup> See, e.g., FINRA, REGULATORY NOTICE 10-06, SOCIAL MEDIA WEBSITES, at 2 (2010); FDA, GUIDANCE FOR INDUSTRY: FULFILLING REGULATORY REQUIREMENTS FOR POSTMARKETING SUBMISSIONS OF INTERACTIVE PROMOTIONAL MEDIA FOR PRESCRIPTION HUMAN AND ANIMAL DRUGS AND BIOLOGICS (2014), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM381352.pdf>.

<sup>205</sup> See Rich Assmus, *An Outlier In Online Speech Decisions*, LAW360 (Feb. 5, 2014, 11:05AM), <http://www.law360.com/articles/505883/an-outlier-in-online-speech-decisions> (describing the recent Virginia Court of Appeals decision as a reflection of a “new willingness of courts to force companies to reveal user information”).

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media identity. Understanding the technological potential for disguised identities to be unmasked is just as important to providing competent legal advice to clients considering their use.

Recent research has indicated that many social media users are far less anonymous or successfully disguised, as they may believe. Professor Arvind Narayanan and others have recently shown that statistical techniques regarding writing style can be used to unmask otherwise anonymous bloggers.<sup>206</sup> Similar research into so-called “hidden trackers,” technical data used by websites to follow even those users who may have disabled traditional tracking tools such as cookies, shows that this de-anonymity process goes even further.<sup>207</sup> And, as social media use moves increasingly to mobile phones, technology for tracking and de-anonymity users is following along.<sup>208</sup>

Recent stories regarding attacks on various social media and other websites by groups seeking to obtain personally identifiable information reinforce this danger. Most notably, SnapChat, the image sharing social media service discussed above, was the target of a recent attack leading to the disclosure of email addresses for many of its users.<sup>209</sup> Retailers such as Target have also been targeted for similar attacks.<sup>210</sup> These and similar efforts to identify anonymous users underscore the risks of relying too heavily on the strength of a disguised identity.

Understanding the limits of a successful disguised identity is important for a lawyer aiming to provide competent advice to a client. Furthermore, lawyers should not assume that their misconduct can be hidden behind a veil of a disguised identity. As the examples above illustrate, lawyers assuming a disguised identity can and have been sanctioned for such conduct.<sup>211</sup> As

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<sup>206</sup> See Dan Grech, *Those Prying Eyes*, PRINCETON ALUMNI WEEKLY (Jan. 8, 2014), <http://paw.princeton.edu/issues/2014/01/08/pages/2305/index.xml> (discussing the use of “writing style and word choice” comparisons to unmask the identities of anonymous bloggers).

<sup>207</sup> *Id.*

<sup>208</sup> See Elizabeth Dwoskin, *What Secrets Your Phone Is Sharing About You*, WSJ.COM (Jan. 13, 2014, 8:47PM), <http://online.wsj.com/news/articles/SB10001424052702303453004579290632128929194> (discussing companies who are currently at the “forefront of a movement to track consumers who are continuously broadcasting their location from their phones”).

<sup>209</sup> Nicole Perlroth & Jenna Wortham, *Snapchat Breach Exposes Weak Security*, N.Y.TIMES, Jan. 6, 2014, at B5.

<sup>210</sup> See Elizabeth Harris & Nicole Perlroth, *For Target, the Breach Numbers Grow*, N.Y.TIMES, Jan. 11, 2014, at B1 (listing the various forms of personal information stolen from Target customers).

<sup>211</sup> See *supra* Part IV.A; see also Debra Cassens Weiss, *Blogging*

technology continues to develop, both supporting disguised identities and leading to their unmasking, lawyers will need to continue to stay up to date in order to satisfy their duty of competence.

## V. CONCLUSION

Social media has brought the issue of identity back to the forefront of the Internet. Disguised identities have, unsurprisingly, also arisen in social media, taking the form of both anonymous and pseudonymous use. When disguised identities do appear, they can be put to positive uses, such as whistleblowing and protecting privacy, as well as to more negative uses, such as cyber bullying and harassment.

As most lawyers are now aware, social media is also playing an increasing role in the practice of law. When that social media use involves disguised identities, however, a lawyer's ethical obligations play an important role. The inherent tension between the duty of candor and the use of a disguised identity is the most obvious, and lawyers should be careful to avoid misrepresentations to third parties and the court. Lawyers, in particular, should be careful when considering the use of disguised identity.

Even when clients, rather than lawyers, are the ones using disguised identities, ethical dangers still exist. A lawyer's duty of confidentiality can require her to protect the true identity behind a disguised identity when it has been disclosed to her in confidence. Relatedly, disguised identities pose particular challenges for detecting and avoiding conflicts of interest.

To help mitigate or avoid these problems, lawyers must be diligent in exercising their duty of competence. This includes both understanding the law regarding the use and potential misuse of disguised identities in social media, and developing an understanding of the technological limitations and uses of social media. Only by fulfilling the duty of competence and understanding disguised identities in social media can a lawyer begin to safely tread through this ethical minefield.

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*Law Prof Requests Ethics Probe of 'dybbuk' Commenter*, ABA LEGAL ETHICS BLOG (Jan. 7, 2014, 7:13AM), [http://www.abajournal.com/news/article/blogging\\_law\\_prof\\_files\\_ethics\\_complaint\\_against\\_pd\\_after\\_concluding\\_he\\_was](http://www.abajournal.com/news/article/blogging_law_prof_files_ethics_complaint_against_pd_after_concluding_he_was) (discussing a situation in which a law professor requested an ethics investigation into a lawyer she believed to be behind anonymous blog comments targeted at her).