

Ethical and Legal Issues in E-Discovery of Facebook Evidence in Civil Litigation

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1. INTRODUCTION

With some two billion monthly active users in the second quarter of 2017, Facebook is undisputedly the most active and popular social network worldwide.¹ This popularity makes Facebook, as a social media platform, a veritable source for evidentiary discovery in civil litigation. Increasing numbers of litigants and litigating counsel are consulting Facebook for important evidentiary information about opposing parties in family, labour, tort and other actions. However, the novelty of social media platforms as sources of evidence in civil litigation comes with ethical and legal challenges which must be addressed. These challenges include the ethical obligations of legal counsel involved in social media electronic discovery (e-discovery), as well as the process for discovering,

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¹ “Number of monthly active Facebook users worldwide as of 2nd quarter 2017 (in millions)”, *Statista* (Accessed 22 August 2017), online: <<https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>> .

preserving and collecting relevant social media evidence in the course of litigation.

This paper examines ethical and legal issues in social media e-discovery in the course of civil litigation with focus on personal injury litigation. The paper begins with a general overview of Facebook as a social media platform, then it proceeds to examine the ethical issues involved in social media e-discovery by counsel in light of the Federation of Law Societies of Canada's *Model Code of Professional Conduct*. The paper concludes with an examination of how case law across selected jurisdictions in Canada has sought to address the legal issues arising from e-discovery of Facebook evidence in civil litigation. While this paper focuses on Facebook (the most popular social media platform), the issues raised and discussed also apply to other social media platforms.

2. FACEBOOK — THE GOLDMINE OF PERSONAL INFORMATION

From humble beginnings as a social media platform for Harvard students, Facebook has grown to become the social media network with the highest concentration of users across the globe. With this mass of people comes a mass of personal information.² Strangely but factually, information that people are traditionally protective of and unwilling to share with strangers are now almost freely available to similar strangers now represented as “friends” on Facebook. Facebook evidence is of particular interest in e-discovery because it exists in electronic format. In other words, it is electronically stored information (ESI).

Creating a Facebook account is relatively easy. With a functional email account, anyone at least 13 years of age can sign up for an account.³ Once an account is created, the user now has a Facebook profile in which the user can upload personal information like age, contact information, city and country of residence, work and educational history, relationship status, etc. The user can then build a personal Facebook network by requesting to be “friends” with other users, as well as accepting similar requests from other users on Facebook. These “friends” may include people actually known to the user as well as total strangers.

A user could also establish relationships with other members of the network by opting to “Follow” them. When you “follow” other users, you subscribe to having their posts appear on your News Feed.⁴ The user may also “Like” the

² See Pamela D. Pengelley, “Fessing Up Facebook: Recent Trends in the Use of Social Network Websites for Insurance Litigation” (2009) 7 *Canadian Journal of Law & Technology* 319. Pengelley noted that the vast amount of information users voluntarily upload on Facebook can be a goldmine or smoking gun depending on what the lawyer decides to do with such information.

³ Domestic laws in South Korea and Spain set the age higher, at 14 years. See “How do I report a child under the age of 14 in South Korea or Spain?”, *Facebook* (Accessed 22 August 2017), online: <<https://www.facebook.com/help/100532533374396?helpref=related>> .

⁴ “What does it mean to follow someone or a Page?”, *Facebook* (Accessed 22 August

Facebook pages of businesses, organizations, or brand profiles. This feature enables the “liked” pages to post updates on the user’s “Timeline”.⁵

Perhaps the most important evidential features on Facebook (in the context of personal injury litigation) are the features that allow users to upload digital photographs and videos to their profile to be viewed (subject to predetermined restrictions if any) by other users and the public. Also important is the feature that allows users to post comments on personal pages or walls, as well as those of other users. As we shall see later, these photographs, videos and wall posts are often the subject matter of e-discovery by litigants in civil litigation.

i. Privacy Settings

Facebook privacy settings allows users to determine the audience they would like to share their information with. Thus, a user could restrict the information or part thereof to a customized group of individuals, all “friends”, members of a group, or the public.⁶ To this effect, Facebook users usually have public and private aspects of their profile.

a. Public profile

A user’s public profile will usually include basic information which by default are made accessible to the public such as name, profile picture and cover photo, gender, network (*e.g.*, school or work), unique user account number, etc.⁷ Other information that could be found in a Facebook user’s public profile includes information posted by the user on other Facebook pages or in public groups. Also, some information not originally made public by a Facebook user could be made public by the user’s Facebook “friends”. Information shared privately with “friends” could be made public by the “friends”, or accessible to their audience depending on the friends’ privacy settings.⁸ If during the posting of any information on Facebook, the user is not prompted or given the option to select his audience or privacy setting, such information will be public and hence part of the user’s public profile. A user could also decide to make information contained in his private profile public by adjusting the privacy setting of such information from private to public. A search of a user’s profile on the internet would generally reveal the public profile of the user.

2017), online: < https://www.facebook.com/help/279614732052951?helpref=about_content > .

⁵ *Ibid.*

⁶ See “Data Policy”, *Facebook* (Accessed 22 August 2017), online: < https://www.facebook.com/full_data_use_policy > .

⁷ See “What is Public Information?”, *Facebook* (Accessed 22 August 2017), online: < <https://www.facebook.com/help/203805466323736?helpref=related> > .

⁸ For example, if User B is tagged on a picture uploaded in User A’s private profile, such picture may be accessible to User B’s “friends” or the public depending on User B’s privacy settings.

b. Private profile

Information contained in a user's private profile is information which by default is not publicly accessible by anyone other than the user,⁹ as well as information which the user has deliberately opted to restrict to a certain group of people. There is no clear intention to share such information with the public. Hence there is to some extent a reasonable expectation of privacy by the user in respect of this information. Information in the private profile of a Facebook user will generally include photographs, videos, or wall postings that the user had opted to share with a defined group. Such information is not usually accessible to the public without express permission by the user. Access to the private profile would usually require request for "friendship" with the user. While the grant of such request would imply a consent by the user to share certain information on the private profile, it should be noted that access to some information on the private profile may require further authorization by the user.

Facebook also provides a medium for communication between users. Facebook's messaging application allows users to send private messages to other users on Facebook. Such messages are part of the user's private profile and are accessible only by the recipient(s). Thus, it has been noted that the personal information stored in a user's Facebook profile goes beyond the information created by the user for the purpose of sharing with the public to "information the user shielded from others through the website's privacy settings or that was compiled or created by the website."¹⁰

Facebook as a social media platform is built on the concept of openness and the sharing of information. It provides a forum for people to share with others, information about how they live their social lives.¹¹ Thus, it should not come as a surprise when people become "friends" online with total strangers and share with them detailed personal information that they ordinarily would not even share with real friends in the real world. While joining a platform built on openness and sharing does not amount to a total waiver of privacy, the extent to which privacy considerations apply or should be applied to evidential information from social media, especially in the context of civil litigation, is debatable.

⁹ For example, log-in history and information.

¹⁰ Agnieszka A. McPeak, "The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data" (2013) 48 Wake Forest Law Review 101 at 122.

¹¹ See *Leduc v. Roman*, 2009 CarswellOnt 843, 73 C.P.C. (6th) 323 (Ont. S.C.J.) at para. 31 [*Leduc*] where Browne J. noted that, "Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail."

3. THE CONCEPT OF E-DISCOVERY IN CIVIL LITIGATION

In the context of civil litigation, e-discovery can be defined as an aspect of litigation practice that involves the identification, preservation, and collection of electronically stored information related to litigation. Electronic discovery is part of the broader concept of discovery in civil litigation, though e-discovery is specifically limited to electronically stored information. All rules that apply in discovery, to the extent that they are applicable to electronic documents, will apply in e-discovery. Discovery in civil litigation is governed by *Rules of Court* or *Rules of Civil Procedure* (as applicable) in the various provinces. In Ontario, these rules include Rule 30 (documentary discovery), and Rule 31 (oral discovery).¹² The purpose of discovery in civil litigation is to enable the parties to know what case they will have to meet at trial and thus prevent surprises, and to narrow issues in contention.

There are professional and legal obligations imposed on litigating counsel with respect to discovery in civil litigation. In the province of Ontario, these obligations are found in the *Rules of Professional Conduct*¹³ and *Rules of Civil Procedure*.¹⁴ Rule 30.02(1) and (2) of the *Rules of Civil Procedure* imposes a positive obligation on litigating parties to disclose “[e]very document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action”.¹⁵ Where a party is represented by a lawyer, the lawyer has a legal obligation to certify on an affidavit that he or she has explained to the client: “(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.”¹⁶

This obligation on the part of the lawyer is further reinforced by the Law Society of Upper Canada’s *Rules of Professional Conduct* which provide:

Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

- (a) shall explain to their client
 - (i) the necessity of making full disclosure of all documents relating to any matter in issue, and
 - (ii) the duty to answer to the best of their knowledge, information, and belief,
 any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal;

¹² Ontario, *Rules of Civil Procedure*, r. 30-31 [Ontario RCP]. See also Ontario RCP, r. 32, r. 33 and r. 35 (inspection of property, medical examination and written discovery, respectively).

¹³ See Law Society of Upper Canada, *Rules of Professional Conduct*, online: <http://www.lsuc.on.ca/with.aspx?id=2147502061#ch1_sec1_citation> .

¹⁴ Ontario RCP, *supra* note 12.

¹⁵ *Ibid*, r. 30.02(1)-(2).

¹⁶ *Ibid*, r. 30.03(4).

- (b) shall assist the client in fulfilling their obligations to make full disclosure; and
- (c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.¹⁷

Having briefly highlighted the discovery obligations of lawyers in civil litigation, it is important to now turn our attention to the discovery obligations of parties to the litigation. Rule 30 imposes dual obligations on litigating parties — an obligation to *disclose* and *produce* a “document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action”.¹⁸ Thus, a party has an obligation to disclose or inform the other party of the existence of all documents the disclosing party deems to be relevant to any issue in the action. Similarly, the party has an obligation to *produce* all document that the party has disclosed as being relevant to any issue in the action. This latter obligation is subject to a claim of privilege. Hence, while a party must disclose the existence of all documents that it thinks are relevant (even if the documents are privileged), it is not obligated to *produce* relevant documents for which it asserts a valid claim of privilege.

Compliance with the obligation to disclose and produce relevant documents is a vital aspect of the civil litigation process. Hence Browne J. noted in *Leduc v. Roman*¹⁹ that “[p]roper compliance with this obligation is so critical to the functioning of our civil system of justice that each party must produce a sworn affidavit identifying relevant documents.”²⁰

It is important to note that while the Rule vests the party in possession of the document with the onus of determining relevance and privilege (at the initial stage), there is the possibility that a party may try to whittle down the relevancy with respect to some documents, or improperly assert privilege over documents. Hence, an opposing party could bring a motion under Rule 30.06 to show that potentially relevant documents have not been disclosed, or that privilege has been improperly asserted over some relevant documents. Such an application must be based on evidence as opposed to mere speculation. However, in determining the level of evidence required, it is necessary for the court to take into consideration the fact that the party with the burden of proof is not the party in possession of the documents.²¹

Vital to the understanding of this rule in the context of e-discovery is the meaning of “document”. Rule 30.01 defines “document” in the context of documentary disclosure to include “a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and *data and*

¹⁷ *Ibid*, r. 5.1-3.1.

¹⁸ See r. 30.02(1)-(2), *ibid*: The obligation to disclose is subject to any claim of privilege in respect of the document.

¹⁹ *Leduc*, *supra* note 11.

²⁰ *Ibid* at para. 12.

²¹ *RCP Inc. v. Wilding*, 2002 CarswellOnt 2275, [2002] O.J. No. 2752 (Ont. S.C.J.).

information in electronic form".²² This definition is broad enough to cover not just all information on social media platforms but also 'metadata', or information relating to a user's activity on the platform such as log-in information and usage history, as well as time spent on the platform.²³ The Ontario Superior Court of Justice has long held that posted materials from online social networking sites like Facebook are "data and information in electronic form" and qualify for production under the *Rules of Civil Procedure* as "documents".²⁴ In the light of the growing use of social media platforms like Facebook, as well as the continuous volumes of potentially relevant information posted on social media, a lawyer's legal and professional obligation has now expanded to include explanation to the client that information posted on social media sites may be relevant to an issue in the litigation and hence liable for disclosure and production.

In many cases though, rather than rely on the opposing party to self-disclose relevant documents in its "possession, control or power", lawyers embark on a proactive investigative search and collection of relevant evidence about the opposing party. In the context of informal discovery²⁵, this may involve a surreptitious search for, and collection of, electronic information about the opposing party on online social media platforms like Facebook. A lawyer's professional responsibility may indeed impose an obligation to conduct such a search, but as we shall see later, there are ethical issues that a lawyer must take into consideration when doing so.

4. Facebook Evidence in Civil Litigation

Electronic information from Facebook accounts is fast becoming a very powerful source of evidence for lawyers in civil litigation. Cases in which the defendant initially appeared to have very little chance of success have been won by the defendant, discontinued by the plaintiff, or settled for a fraction of the original claim as a result of "smoking gun" evidence obtained from a search of the opposing party's Facebook profile. The important role of social media in modern litigation was noted in the New York State Bar Association's Social Media Ethics Guidelines. According to the guidelines, "[o]ne of the best ways for lawyers to investigate and obtain information about a party, witness, juror or

²² Ontario RCP, *supra* note 12 r. 30.01 (emphasis added).

²³ See *Bishop (Litigation Guardian of) v. Minichiello*, 2009 BCSC 358 (B.C. S.C.), leave to appeal B.C.C.A. refused 2009 BCCA 555; *Conrod v. Caverley*, 2014 NSSC 35, 2014 CarswellNS 49 (N.S. S.C.) [*Conrod*].

²⁴ *Leduc*, *supra* note 11 at para. 27.

²⁵ The term "informal discovery" is used in this paper to refer to informal investigative searching by a party to discover evidence relating to the opposing party (and relevant to the litigation) without any involvement of the opposing party. Unlike formal discovery which is mandated and guided by the applicable rules of the court or rules of civil procedure, there is no legal rule mandating informal discovery. At best, such informal discovery is required and guided by ethical rules especially those relating to competence.

another person, without having to engage in formal discovery, is to review that person's social media account, profile, or posts."²⁶

Cases from various provincial courts in Canada highlight the vital role of social media evidence in the administration of civil justice. In *Terry v. Mullooney*,²⁷ the plaintiff initially seemed to have a very good case, until evidence from his Facebook account turned the case on its head. Even the presiding judge in that case noted the strength of the Facebook evidence when he stated:

“[w]ithout this evidence, I would have been left with a very different impression of Mr. Terry's [plaintiff's] social life. He admitted as much in cross-examination. After he was confronted with this [Facebook] information which is publicly accessible, he shut down his Facebook account saying he did it because he didn't want “any incriminating information” in Court.”²⁸

Similarly, in *Cikojevic v. Timm*,²⁹ where the defendant in a motor vehicle accident had admitted liability, the plaintiff sought an advance for damages pending trial to assist in funding the cost of rehabilitation and treatment recommended by her experts. The request was based on the fact that her family did not have the resources to fund the treatment. In refusing to order for the payment in advance for damages, Master Keighley noted the lack of evidence to show anything remarkable about the plaintiff's financial circumstances. His decision was based in part on review of some 600 photographs from the plaintiff's Facebook profile which “show her participating in golf, snowboarding, rock-climbing, travel and other social activities all of which have a cost.”³⁰

Thus, the potential for Facebook profiles to house “smoking gun” evidence especially in personal injury cases has made it a go-to place for defence lawyers in personal injury litigation.³¹ Some lawyers have adopted genius and ingenious

²⁶ New York State Bar Association, *Social Media Ethics Guidelines*, Commercial and Federal Litigation Section (New York: NYSBA, 11 May 2017), online: <<http://www.nysba.org/socialmediaguidelines17/>> [NYSBA Guidelines].

²⁷ 2009 NLTD 56, 2009 CarswellNfld 85 (N.L. T.D.) [*Terry*].

²⁸ *Ibid*, at para. 105.

²⁹ 2008 BCSC 74, 2008 CarswellBC 76, [2008] B.C.J. No. 72 (B.C. S.C.) [*Cikojevic*].

³⁰ *Ibid*, at para. 47. See also *Kourtesis v. Joris*, 2007 CarswellOnt 5962, [2007] O.J. No. 3606 (Ont. S.C.J.), where the plaintiff who was injured in a motor vehicle accident claimed damages for future loss of income and permanent loss of enjoyment of life. She claimed to suffer from chronic pain resulting in diminished social life. Facebook evidence emerged during the trial and after the plaintiff had already given evidence. The judge allowed the defence request to introduce the plaintiff's Facebook photographs which were discovered by the defence counsel. Browne J. stated that “[i]t is clear that the Facebook photographs were an important element of the case.” (para. 6) The Facebook evidence was instrumental in reducing the damages awarded to the plaintiff.

³¹ Christopher J. Edwards and Michael D. Swindley, “The Use and Abuse of Social Media in Civil Litigation: Facebook, Twitter, The Rules of Civil Procedure and The Rules of Professional Conduct” (2011) 38 Adv Q 19.

means to search for and discover the classic social media or Facebook evidence that may be instrumental in the successful prosecution or defence of their case. However, this practice comes with ethical concerns which will now be examined.

5. ETHICAL ISSUES IN INFORMAL DISCOVERY OF FACEBOOK EVIDENCE IN CIVIL LITIGATION

Lawyers play a very partisan role in our adversarial civil litigation system. The partisan nature of the adversarial system requires that litigation be conducted by the lawyer with the primary goal of advancing the interests of their client. This obligation to the client could sometimes result in conflict with the lawyer's sense of what is right. An extreme view of the lawyer's duty to the client was expressed by Lord Brougham when he asserted that a lawyer "in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others."³²

A more moderate view of the lawyer's partisan role in adversarial litigation was expressed by Chief Justice Gibson who was of the view that it is a gross mistake to assert that a lawyer owes fidelity only to his client.³³ Justice Gibson saw the lawyer as a public officer with a duty to the public and the court, in addition to the client. He noted that "[t]he high and honorable office of a counsel would be degraded to that of a mercenary were [the lawyer] compelled to do the biddings of his client against the dictates of his conscience."³⁴ The need for ethical standards to guide lawyers in resolving any conflicting interests between the public, the court and the client gave rise to the need for ethical rules in the legal profession.³⁵ These ethical standards seek to balance (among others things) lawyers' zealous advocacy for their clients with their responsibility to the court and the public.

The primary device used to establish the framework for ethical conduct in the legal profession in Canada is the *Model Code of Professional Conduct*.³⁶ The Code imposes standards for professional practice, the compliance with which is

³² The Trial At Large of Her Majesty, Caroline Amelia Elizabeth, Queen of Great Britain; In The House of Lords, On Charges Of Adulterous Intercourse (London: Printed for T. Kelly, 1821).

³³ *Rush v. Cavanaugh*, 2 Pa. 187 at 189 (1845).

³⁴ *Ibid.*

³⁵ Russell G. Pearce, "Rediscovering the Republican Origins of the Legal Ethics Codes" (1992) 6 Geo J Leg Ethics 241 at 241-282.

³⁶ See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, As amended 10 March 2016 (Ottawa: FLSC, 2016), online: <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/federation-model-code-of-professional-conduct/>> [Model Code].

mandatory to qualify for practice in the profession. It also seeks to address ethical and professional issues lawyers encounter or are likely to encounter in the course of their practice. While these ethical rules tend to evolve at a very slow pace, some aspects of legal practice, especially those related to new technologies, evolve at a much faster speed, resulting in the ethical rules being outdated or unresponsive to novel and emerging situations that were not contemplated when the code was drafted.

New technologies like social media continue to present a serious challenge with regards to ethical conduct of lawyers in these novel situations. Thus, the legal profession is left with the difficult choice of either adopting new rules, or adapting the existing rules to meet these challenges. Of the two choices, the latter seems to be the easy (though not the most efficient) way out.

Informal discovery of social media evidence in civil litigation is one area where lawyers face ethical issues arising from new technologies. Some legal writers have identified and discussed ethical issues that may arise from the use of social media by lawyers in practice. According to Weltge and McKenzie-Harris,³⁷ the use of social media by lawyers gives rise to ethical issues arising from the following duties: first, the duty of competence, which can be interpreted as imposing an obligation on a lawyer to acquire knowledge about technological changes (including social media platforms) and how they affect legal practice; second, the duty of diligence, which will require the use of social media in the performance of the lawyer's duty to the client, including the investigation and collection of relevant information to prosecute or defend the case; thirdly, the duty of confidentiality, which raises the potential risk of disclosing the client's confidential information in social media; and lastly, the lawyer's ethical duty of supervision which could arise when social media activities are delegated to other personnel in the firm.

While Weltge and McKenzie-Harris and other authors³⁸ seems to focus generally on the ethical issues that arise from the use of social media by lawyers in the course of their legal practice, McPeak on the other hand focuses on the ethical issues that specifically arise from the use of social media as a tool for

³⁷ Jessica Weltge and Myra McKenzie-Harris, "The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology" (American Bar Association Section of Labor and Employment Law Ethics & Professional Responsibility Committee Midwinter Meeting, 24 March 2017).

³⁸ See also Christina Vassiliou Harvey, Mac R. McCoy & Brook Sneath, "10 Tips for Avoiding Ethical Lapses When Using Social Media", *Business Law Today* (January 2014), online: <https://www.americanbar.org/publications/blt/2014/01/03_harvey.html>; Susan Cartier Liebel, "12 Social Media Ethics Issues for Lawyers", *Solo Practice University* (11 March 2010), online: <<http://solopracticeuniversity.com/2010/03/11/a-dozen-social-media-ethics-issues-for-lawyers/>>; Phil Brown and David Whelan, "The Ethics of Social Media for Lawyers", (The Canadian Institute 18th Annual Advertising and Marketing Law Conference, 2012); Christina Parajon Skinner, "The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short" (2012) 63 SCL Rev 241 at 241 — 283 (online: <<https://ssrn.com/abstract=1850741>>).

informal discovery by lawyers in litigation. To this effect, McPeak identified three areas in social media discovery where ethical issues might arise for lawyers: the duty of a lawyer to investigate facts in social media related to the litigation, the duty to preserve social media evidence related to litigation, and the rule prohibiting contact with a represented party.³⁹ Going further, this paper will examine these ethical issues in the context of the *Model Code of Professional Conduct*.⁴⁰

i. The duty of a lawyer to investigate facts in social media

It is important to state that the ethical duty of a lawyer in social media e-discovery arises at both the formal and informal stage of the discovery process.⁴¹ Informal discovery refers to the stage in pre-litigation or during litigation when a lawyer embarks on an informal online search for information and evidence in support of or in defence of their client's case. This is different from the formal discovery process in the litigation wherein the parties are obligated by the rules of the court to disclose all relevant evidence in their possession or control to the opposing party.

Rule 3.1 of the *Model Code of Professional Conduct* sets the standard of competence in the performance of legal services undertaken by a lawyer on the client's behalf.⁴² A competent lawyer is defined in the Rules as "a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client."⁴³ The lawyer possesses not just knowledge of legal principles and procedures in the areas of law in which the lawyer practises, but also relevant knowledge, skills and attributes necessary for "*investigating facts*, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action".⁴⁴ The commentary to this rule goes further to state that membership of the legal profession comes with a representation that the lawyer has the requisite knowledge, skill and capability in the practice of law, and the client is entitled to enjoy the benefit of this representation.

Rule 5 outlines the lawyer's duty as an advocate in the administration of justice. Accordingly, "[w]hen acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect." The commentary to this

³⁹ Agnieszka McPeak, "Social Media Snooping and Its Ethical Bounds" (2014), *Ariz St LJ* 845 at 847 [McPeak, Social Media].

⁴⁰ *Model Code*, *supra* note 36.

⁴¹ The rules in the Code tend to apply more during the informal discovery process. While the formal discovery process is to some extent guided by the Code and the Rules of the Courts, the latter rarely applies in the informal discovery process thus allowing the *Code* to prevail.

⁴² See *Model Code*, *supra* note 36, r. 3.1.

⁴³ *Ibid*, r. 3.1-1.

⁴⁴ See also *ibid*, r. 3.1-1(b).

Rule goes further to state that a lawyer acting as counsel in litigation has a duty to raise any issue and advance any argument which in the opinion of the lawyer will advance the client's case. The Rule also imposes a duty on the lawyer to raise any "defence authorized by law." Thus, as noted earlier, a lawyer's position in litigation is zealously partisan. The lawyer has a duty to always protect and promote the interest of their client within the ambit of the Rules and the law.⁴⁵ That notwithstanding, this duty to the client is limited by the lawyer's duty to be honest, as well as their duty to the court and the legal profession. Hutchinson noted:

[i]f the adversary system is to have any chance of working, the court must be able to rely on the fact that it is not being fed out-and-out lies. As advocates, lawyers are under a duty to use tactics that are legal, honest, and respectful of the courts and other tribunals. They must be courteous to the court and the opposing party. In particular, they ought not to employ strategies that are intended to mislead the court or to influence decisions by anything other than open persuasion.⁴⁶

Hence, a lawyer's partisanship does not extend to assisting or permitting the client to engage in dishonest or dishonourable acts or conduct,⁴⁷ nor does partisanship extend to deliberately attempting to influence the outcome of litigation by misstating facts or suppressing facts that ought to be disclosed,⁴⁸ or "knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence."⁴⁹ Therefore, before asserting claims on behalf of their client, the lawyer has a duty to thoroughly investigate facts upon which the claims are founded. This duty goes beyond merely accepting as true all information provided by the client without further inquiry. It is common for plaintiffs in personal injury litigation to exaggerate the extent of their injury so as to claim damages to which they may not be entitled. While a competent lawyer may rely on medical records or opinions from medical experts in asserting a claim in personal injury litigation, the lawyer should also be conscious of the fact that even medical reports could be flawed especially where they are based on exaggerated information provided by a client.⁵⁰

Considering the growing use of social media evidence in personal injury litigation, a competent plaintiff lawyer may need to investigate social media

⁴⁵ This duty applies at all stage of the litigation including the discovery stage of the litigation. See *Royal Bank of Canada v. Bodanis*, 2016 ONSC 2929, 2016 CarswellOnt 6923 (Ont. S.C.J.).

⁴⁶ Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 2006) at 107.

⁴⁷ Model Code, *supra* note 36, r. 5.1-2(b).

⁴⁸ *Ibid*, r. 5.1-2(e).

⁴⁹ *Ibid*, r. 5.1-2(g).

⁵⁰ *Tambosso v. Holmes*, 2015 BCSC 359, 2015 CarswellBC 600 (B.C. S.C.), additional reasons 2015 BCSC 1502, 2015 CarswellBC 2426 (B.C. S.C.), revd 2016 BCCA 373, 2016 CarswellBC 2535, 91 B.C.L.R. (5th) 331 (B.C. C.A.)

evidence or data, especially those relating to their client for the purpose of ascertaining that the claims in the litigation are well-founded. Where the social media evidence clearly contradicts any of the client's claims, the lawyer has a duty not to deliberately influence the outcome of litigation by misstating facts, or knowingly asserting as true a fact which is clearly contradicted by evidence. The lawyer should not advise the client to destroy the evidence. That would amount to advising the client to engage in a dishonest and dishonourable act or conduct contrary to the rules of the profession.

On the part of the defence lawyer, the duty of competence imposes an obligation to investigate facts for the purpose of raising any defence or advancing any argument that will promote the client's case. An increasing number of defence lawyers in personal injury litigation are resorting to informal discovery in social media platforms like Facebook to obtain evidence which in many cases has provided the best defence for their clients. Thus, in investigating every defence open to their client, it is important for the competent lawyer to familiarize themselves with how social media works. Ignorance of how social media works is not an excuse for a lawyer practising law in the age of social media. In fact, competence to practice law in the digital age demands some knowledge of modern technology. For a personal injury lawyer, that entails knowledge of both the formal and informal discovery of social media evidence. To this effect, lawyers cannot afford to be Luddites. Lack of such knowledge comes with an obligation to inform oneself, or consult with another lawyer who possesses such knowledge.⁵¹

ii. Duty to preserve social media evidence related to litigation

Spoliation occurs when a party destroys, mutilates, alters, or conceals evidence, usually documents (electronic or paper), relevant to litigation.⁵² Parties to litigation have a duty at common law to preserve evidence related to the litigation. The duty could also be imposed statutorily when a statute or

⁵¹ In early 2017, the Federation of Law Societies of Canada began a consultation with a view to amending the Model Code provision relating to competence by lawyers. The amendment would add commentary 5A to Rule 3.1-2 (Competence). The proposed commentary 5A would read thus: "To maintain the required level of competence, a lawyer should develop and maintain a facility with technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3". Federation of Law Societies of Canada, *Model Code of Professional Conduct: Consultation Report* (Ottawa: FLSC, 31 January 2017), online: < <http://flsc.ca/wp-content/uploads/2014/10/Consultation-Report-Draft-Model-Code-Amendments-for-web-Jan2017-FINAL.pdf> >; See also Guideline No. 1.A of the New York State Bar's Social Media Ethics Guideline, "A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation" (*supra* note 26) (emphasis added).

⁵² Brian A. Garner, ed., *Black's Law Dictionary*, 7th ed. (West Group, 1999).

regulatory requirement imposes an obligation on the party to preserve such information. The duty to preserve evidence is triggered when a party “reasonably anticipates litigation”⁵³ or should have known that the evidence may be relevant to future litigation.”⁵⁴ The duty is clearly triggered where a party is served with a preservation or litigation hold notice. The party served with such notice has an obligation to preserve the information within the scope of the notice, for example information in its social media account. Even in the absence of such express notice, a lawyer has an ethical obligation to advise their clients to take reasonable steps to preserve evidence related to a pending or anticipated litigation. This duty could be implied from the lawyer’s duty not to knowingly suppress or otherwise assist in suppressing facts which ought to be disclosed.⁵⁵

Furthermore, if in the course of investigating social media evidence relating to a client’s case the lawyer discovers evidence in the client’s social media account which clearly contradicts the client’s claim or defence, the lawyer has an ethical duty to advise the client of their obligation to preserve the evidence. The lawyer cannot and should not advise the client to destroy the evidence in order to proceed with the claim or defence. Doing so would amount to encouraging spoliation.

Advising a client to commit spoliation is unlawful and unethical conduct that attracts serious consequences from the court and may give rise to disciplinary action by the profession.⁵⁶ In the American case of *Lester v. Allied Concrete Co.*,⁵⁷ the plaintiff lawyer instructed his client to “clean up” his Facebook page so as to destroy evidence detrimental to their claim in the case. The lawyer also came up with a plan to deactivate the plaintiff’s Facebook account so that he could respond negatively to any question at examination for discovery regarding his ownership of any Facebook account. The Virginia court awarded a historic \$722,000 in sanction against the lawyer and his client. The sum of \$542,000 was awarded against the lawyer, and \$180,000 against the plaintiff for an “extensive pattern of deceptive and obstructionist conduct.”⁵⁸ In addition, the plaintiff lawyer was suspended from practice for five years because of his role in the spoliation of the Facebook evidence.⁵⁹

⁵³ *The Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC et al.*, 685 F. Supp. (2d.) 456 at 466 (S.D.N.Y. 2010).

⁵⁴ *Fujitsu Ltd. v. Federal Express Corp.*, 247 F (3d.) 423 at 436 (2d. Cir. 2001).

⁵⁵ See Model Code, *supra* note 36, r. 5.1-2(e).

⁵⁶ *Allied Concrete Co. v. Lester*, 736 S.E. (2d.) 699 (2013) (Va. Sup. Ct.).

⁵⁷ *Ibid.*

⁵⁸ *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223 (Va. Cir. Ct. 21 October 2011). See also *Terry*, *supra* note 27.

⁵⁹ See Debra Cassens Weiss, “Lawyer agrees to five-year suspension for advising client to clean up his Facebook photos”, *ABA Journal* (7 August 2013), online: <http://www.abajournal.com/news/article/lawyer_agrees_to_five-year_suspension_for_advising_client_to_clean_up_his_f> .

iii. Informal discovery of Facebook evidence and the rule prohibiting contact with a represented person

While the *Model Code of Professional Conduct* does not prohibit a lawyer from searching the public social media profile of an opposing party and collecting evidence relevant to the prosecution of a case, there are ethical boundaries that must be observed by partisan lawyers seeking to advance the interests of their clients in civil litigation. Rule 7.2-6 of the *Model Code of Professional Conduct* provides ethical guidelines with respect to communication with a person who is represented by a legal practitioner in a proceeding. The rule is to the effect that where a person is represented by a legal practitioner in a proceeding, the opposing lawyer is generally prohibited from “approaching or communicating or dealing with the person on the matter” except through or with the consent of the party’s lawyer.⁶⁰

The essence of this rule is to preserve the sanctity of the solicitor-client relationship and to restrict any element (or what may appear to a reasonable person to be an element) of impropriety in the administration of justice. This is in line with Rule 2.1 and its commentary which requires a lawyer to act with honesty and integrity, and to inspire the confidence, respect and trust of clients and of the community, and avoid any conduct that may give rise to an appearance of impropriety.⁶¹

Although Rule 7.2-6 clearly prohibits a lawyer from communicating with a represented person on the matter which is the subject of a proceeding, when this rule is read in line with Rule 2.1 and its commentary, it appears that any communications with a represented person which may give rise to an appearance of impropriety are prohibited, even if such communication falls outside the subject matter of the litigation. Such a situation may arise where the lawyer uses misrepresentation or deceptive means to communicate with the represented person, e.g. posing as a different person. What is important here is how a fair-minded, reasonably informed member of public would perceive such communication.

Although Rule 7.2-6 expressly applies where a person “is represented by a legal practitioner”, in *Lundy v. VIA Rail Canada Inc.*,⁶² Perell J. was of the view that the rule may also apply to a potential lawyer-and-client relationship.⁶³ Thus

⁶⁰ Guideline No. 4.C of the New York State Bar’s Social Media Ethics Guideline expressly prohibits a lawyer from contacting a represented person or seeking access to the person’s private social media profile unless express consent has been furnished by the person’s counsel (NYSBA Guidelines, *supra* note 26).

⁶¹ See Model Code, *supra* note 36, r. 2.1. In *Everingham v. Ontario*, 1992 CarswellOnt 421, 8 O.R. (3d) 121 (Ont. Div. Ct.), a lawyer was prevented from acting in a proceeding against a party he had privately communicated with without the knowledge and presence of party’s counsel. See also *Malkov v. Stovichek-Malkov*, 2015 ONSC 4836, 2015 CarswellOnt 11553 (Ont. S.C.J.).

⁶² 2012 ONSC 4152, 2012 CarswellOnt 9152 (Ont. S.C.J.) [*Lundy*].

⁶³ *Lundy*, *ibid* at para. 31.

even where a proceeding has not yet commenced but the facts show a high likelihood of legal proceeding resulting, or a potential solicitor-client relationship arising, there may be need for a lawyer to take steps to avoid communications that may impact on the potential relationship.⁶⁴

The rule prohibiting contact with a represented person is not a rigid “no-contact” rule. While some exceptions exist in the Model Code,⁶⁵ there are other exceptions which, though not expressly stated in the Code nevertheless commonsensically cannot be held to be in breach of the Code. One such exception which has been recognized under a similar rule in the American Bar Association *Rules of Professional Conduct* is the “observation exception”.⁶⁶ According to Ostolaza and Pellafone,⁶⁷ this exception confers on the lawyer the same status as any member of the public, thus enabling the lawyer to observe the represented person just like any member of the public. A lawyer can monitor the activity of a represented person while in a public setting. For example, electronically recording the activities of a personal injury plaintiff in public for the purpose of determining if the personal injury asserted in a claim actually exists.⁶⁸ Such information could be collected by any member of the public. The fact that the same information is collected by the lawyer does not give rise to any element of impropriety.

⁶⁴ Guideline No. 4.B of the New York State Bar’s Social Media Ethics Guideline permits a lawyer to request access to an unrepresented person’s private social media profile. However, the lawyer must use its real identity and not a fake profile. If the unrepresented person asks for additional information from the lawyer regarding the request, the lawyer must either provide the additional information requested or discontinue further communication and withdraw the request (NYSBA Guidelines, *supra* note 26). While the New York guideline does not require initial disclosure of lawyer’s intention unless requested, some other states in the US require that the “friend” request by the lawyer, aside from being devoid of any deception, must be accompanied by additional information to appraise the unrepresented person of the true intention or association with the litigation. See e.g. New Hampshire Bar Association Ethics Committee, Advisory Opinion #2012-13/05 (2012); Massachusetts Bar Association Committee on Professional Ethics, Advisory Opinion #2014-5 (2014); San Diego County Bar Association Legal Ethics Committee, Opinion #2011-2 (2011); Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-2 (2009).

⁶⁵ See Model Code, *supra* note 36, r. 7.2-6A, 7.2-7.

⁶⁶ The American Bar Association, *Rules of Professional Conduct* (ABA, 2016), online: < https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html >, r. 4.2 provides that, “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

⁶⁷ See Yvette Ostolaza & Ricardo Pellafone, “Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites” (2010) 11 *Journal of High Technology Law* 56 at 79 [Ostolaza & Pellafone].

⁶⁸ *Ibid*, at 79.

Similarly, in the business context, a lawyer may enter a business premises open to the public and interact with employees as a customer would for the purpose of collecting general information relevant to their case.⁶⁹ These exceptions apply to the lawyer as well as third parties hired by the lawyer to engage in similar acts. The limit of the observation exception applicable to the lawyer also applies to third parties hired by the lawyer.

Another exception to the “no contact” rule relates to acts by represented persons themselves or their agents, independent of the lawyer. The rules in the *Model Code of Professional Conduct* apply to lawyers but not their clients. Hence Perell J. in *Lundy v. VIA Rail Canada Inc.* held that communication by the defendants to putative class members in a class action lawsuit was not a breach of the rule prohibiting communication with represented persons as the defendants are not subject to the regulation of the Law Society.⁷⁰ While the lawyer is not professionally responsible for the acts of the clients and the clients’ agents, the lawyer cannot procure or instruct the parties or their agents to engage in conduct in which the lawyer is prohibited from engaging. Thus, a lawyer cannot use their clients to circumvent professional obligations.⁷¹

The rule prohibiting communication with represented persons also applies in the online world, especially in relation to communication via social media platforms like Facebook. In various ways, informal discovery of Facebook evidence comes with risks of ethical misconduct which a lawyer should be careful to avoid. Facebook as a social media platform provides a forum through which a lawyer could “approach or communicate or deal with” a represented person. Hence in applying the “observation exception” to the rule stated above, there is nothing unethical where a lawyer engages in informal discovery of publicly accessible evidence from the public profile of a represented person’s Facebook account. Such conduct clearly falls under the “observation exception” discussed above.

However, ethical problems may arise where a lawyer seeks access to information in the private profile. As this information is not available to the public, attempts to gain access to them will require the lawyer “approaching or communicating” with the represented person.⁷² This would usually take the form of sending a “friend” request to the owner of the Facebook account. This may occur in any of three ways. First, the lawyer could send a “friend” request using his real identity, i.e. the lawyer’s personal or business Facebook profile. Secondly, the lawyer could create a Facebook account using a fake identity so as to conceal their true identity from the represented person. This is also known as

⁶⁹ Ostaloza & Pellafone, *ibid*, at 80.

⁷⁰ *Lundy*, *supra* note 62 at para. 25.

⁷¹ *Ibid*.

⁷² The New York State Bar’s Social Media Ethics Guideline expressly prohibits a lawyer from contacting a represented person or seeking access to the person’s private social media profile unless express consent has been furnished by the person’s counsel. See NYSBA Guidelines, *supra* note 26, no. 4.C.

“pretexting”. Thirdly, the lawyer could instruct a third party to use any of the two methods above to access the information.

In any of the three cases above, there is a clear violation of ethical rules. While a lawyer would indeed be acting honestly in using his real identity to initiate a Facebook friendship with a represented person, the fact is that by initiating the request, the lawyer is clearly “approaching or communicating” with the represented person. If the purpose of initiating such communication is related to gaining information on the matter in the proceeding, then it is a flagrant breach of the Code. But even if the ‘honest’ lawyer just wants to be a “friend” and genuinely does not intend to deal with the represented person cum prospective Facebook “friend” on the matter in the proceeding, the fact of a lawyer ‘friending’ a represented person adverse in interest in an ongoing proceeding will give rise to elements of impropriety. It may also adversely impact the lawyer’s relationship with their own client. For example, a party in an acrimonious proceeding will definitely not be pleased to notice that their lawyer is a Facebook “friend” with the opposing party.

Secondly, seeking to gain access to information on a represented person’s private Facebook profile using a fake identity or “pretexting”, not only violates the “no contact” rule but also Rule 2.1-1 relating to integrity in the practice of law. Such dishonourable and questionable conduct has the tendency to reflect adversely upon the integrity of the legal profession and the administration of justice.⁷³ Pretexting has also been noted as deceitful and misleading “because the lawyer, in essence, is resorting to trickery to infiltrate a private social media page.”⁷⁴

Thirdly, while access to information on a party’s public Facebook profile through a third party is not prohibited, attempts to gain access to the private Facebook profile of a represented party by procuring a third party to “friend” the represented person by using his real or fake identity is prohibited. Basically, rules of professional conduct that apply to a lawyer also apply to persons acting under the instructions of the lawyer. These include paralegals, legal assistants, as well as investigators hired by the lawyer. Thus, as a rule, a lawyer cannot engage in prohibited conduct by merely hiding behind a third party.⁷⁵

Another issue that merits ethical consideration is whether a lawyer can obtain information from the private profile of a represented person through third parties who are already “friends” of the represented person and who have access to the private profile of the represented person. While there is no clear ethical rule addressing this situation, there does not appear to be a breach of the ethics rule if the lawyer obtains evidentiary information about a represented person by “friending” and thus accessing information on the private profile of third parties

⁷³ Model Code, *supra* note 36, r. 2.1-1.

⁷⁴ McPeak, Social Media, *supra* note 39 at 39-40.

⁷⁵ Guideline No. 4.D of the New York State Bar’s Social Media Ethics Guideline prohibits a lawyer from using an agent to engage in a conduct which if engaged in by the lawyer would violate any ethics rule (NYSBA Guidelines, *supra* note 26).

who are already Facebook “friends” with the represented party. The position of such third party “friends” of the represented person is comparable to those of potential witnesses in the proceeding. A lawyer (in a real world) can ethically approach and communicate with friends of a litigant for the purpose of investigating and gathering information relevant to the litigation. Such conduct does not amount to ‘approaching or communicating or dealing’ with the *represented person*. In *Schuster v. Royal & Sun Alliance Insurance Company of Canada*,⁷⁶ the law firm retained by the defendant insurer was able to access and obtain evidential information relating to the plaintiff through the plaintiff’s mother-in-law’s Facebook account.⁷⁷ The mother-in-law was a friend of the plaintiff on Facebook. The evidence obtained was used in an affidavit in support of a motion in the course of the proceeding, and there was no imputation of professional or ethical misconduct on the part of the lawyer with regards to how the evidence was obtained.

Since the *Model Code of Professional Conduct* does not apply to the clients, a lawyer incurs no ethical responsibility with regards to the conduct of their clients acting independent of the lawyer’s instruction. Thus, a client can use any discovery technique not prohibited by law (no matter how unethical it might appear) to gather evidence from a party’s Facebook account relevant to the litigation.⁷⁸ If such evidence is admissible under the relevant Rules of Civil Procedure or law of evidence, there is no ethical rule which prevents the lawyer from using the evidence in the course of the proceeding.⁷⁹

It is obvious from the discussion so far that many ethical issues arise from the informal discovery of information in the private Facebook profile of represented persons in the course of civil proceedings. Where such ethical issues cannot be overcome, there may be a need for the lawyer to resort to formal e-discovery of the evidence. Going further, this paper will conduct a legal analysis of the formal e-discovery of Facebook evidence, especially regarding information from a party’s private profile.

6. LEGAL ISSUES IN FORMAL E-DISCOVERY OF FACEBOOK EVIDENCE IN CIVIL LITIGATION

As previously stated, ethical rules limit a lawyer’s ability to electronically discover evidence in the private Facebook profile of an opposing party in litigation especially where that party is represented by a lawyer. In situations

⁷⁶ 2009 CarswellOnt 6586, 78 C.C.L.I. (4th) 216 [*Schuster*].

⁷⁷ *Schuster*, *ibid* at para. 9.

⁷⁸ In the case of a corporate client, its choice of discovery technique may be guided by its corporate policy. Hence, the desire to maintain a good corporate image may restrict its choice of discovery technique that may appear legal but unethical from the viewpoint of reasonable members of the public.

⁷⁹ McPeak, Social Media, *supra* note 39 at 45.

where such ethical rules prevail, access to such private information can only be undertaken through formal e-discovery involving a legal process.

In the Province of Ontario, Rule 30 of the *Rules of Civil Procedure* imposes an obligation on litigants to *disclose* and *produce* “[e]very document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action”.⁸⁰ Sometimes parties to a proceeding may deliberately or unknowingly omit to disclose relevant information in their possession as required by the Rules. Thus, where a lawyer’s informal discovery reveals the existence or likely existence of relevant information in a party’s private Facebook profile, or evidence at examination for discovery seems to suggest the existence of relevant information in the private Facebook profile, and this relevant information was not disclosed by the party in its affidavit of documents, formal e-discovery steps may be initiated. This will involve a legal process.

The appropriate step to take will depend on the stage of the legal proceeding. If an examination for discovery has not taken place, the appropriate step would be to confront the party at examination for discovery with questions relating to relevant information in its Facebook account.⁸¹ A request may be made for an undertaking by the party at the examination for discovery to produce all, or at least the relevant portion of the Facebook account for which privilege is not asserted. If the party fails to give an undertaking to this effect, then the next step would be to bring a motion before the court for an order to compel preservation and production of the relevant Facebook profile.

In *Ottenhof v. Ross*,⁸² the plaintiff brought an action claiming \$5 million in damages for assault by an officer. The defendants discovered the existence of the plaintiff’s Facebook profile through an online social media search. The plaintiff was confronted with this information at the examination for discovery and a request was made for production of a complete copy of the Facebook profile. The plaintiff refused the request, prompting the defendants to bring a “motion to compel refusal on an examination for discovery.” Ray J. noted that the mere existence of a Facebook account does not, without more, give rise to a request for production on discovery. He went further to state that even if the existence of the Facebook account is not listed in a party’s affidavit of documents, the

⁸⁰ See Ontario RCP, *supra* note 12, r. 30.02(1) and (2) (the obligation to disclose is subject to any claim of privilege in respect of the document).

⁸¹ However, where there is risk of spoliation, immediate steps should be taken to preserve the evidence. In *Sparks v. Dubé*, 2011 NBQB 40, 2011 CarswellNB 876 (N.B. Q.B.) [*Sparks*], evidence of the Facebook account was discovered through an investigation by the lawyer prior to examination for discovery. The evidence was omitted from the affidavit of documents by the plaintiff. Rather than wait until the examination for discovery, the defendant brought an *ex parte* motion requesting among other things, an order for the preservation. Thus, where there is likelihood that the evidence may be altered or destroyed before examination for discovery, an order for preservation should be sought.

⁸² 2011 ONSC 1430, 2011 CarswellOnt 1370 (Ont. S.C.J.) [*Ottenhof*].

responding party is entitled to cross-examine whether a Facebook account does exist, whether it contains any relevant documents, and to request production of the relevant content for which privilege is not asserted.⁸³

Thus, even if the lawyer does not have any evidence of the opposing party's ownership of a Facebook account, or has evidence of the existence of the Facebook account, but accessible information in the public profile does not reveal the existence of any relevant information, the lawyer is not precluded from inquiring into the existence of the Facebook account, or the existence of relevant information in the private profile of the account (as the case may be), during the examination for discovery. However, if the party denies the existence of an account or the existence of any relevant information in the private profile at the examination for discovery, that may be the end of the matter, unless the lawyer can lead evidence to contradict the denial. This was illustrated by the decision of the Ontario Superior Court of Justice in *Young v. Comay*.⁸⁴ At the examination for discovery in that case, the plaintiff acknowledged ownership of a Facebook account which she uses to keep in touch with her family. She also admitted to the existence of family photographs in the account but asserts that the photographs are not related to her personal injury claim arising from the vehicular accident. Broad J. refused to order production of the plaintiff's Facebook profile because the defendant failed to lead any evidence to contradict or rebut the plaintiff's testimony.

Similarly, in *Schuster v. Royal & Sun Alliance Insurance Company of Canada*, Price J. was of the view that the plaintiff's failure to list her Facebook account in her affidavit of documents raises a presumption that the Facebook document does not contain any relevant information. He further stated that the defendant in such a situation should be given the opportunity to rebut the presumption at examination for discovery by cross-examining the plaintiff about their affidavit of documents. Thus, it would appear that failure to rebut this presumption at the cross-examination would bring the Facebook discovery process to an end.⁸⁵

The next step in the formal e-discovery process will arise in the following situations: first, where the evidence at examination for discovery reveals the existence of a Facebook account by the opposing party but the party refuses to produce the Facebook information, either on the ground of privacy⁸⁶ or disagreement as to relevancy;⁸⁷ secondly, where examination for discovery has

⁸³ *Ottenhof*, *ibid* at para. 3.

⁸⁴ 2013 ONSC 7552, 2013 CarswellOnt 17214 (Ont. S.C.J.), additional reasons 2014 ONSC 565, 2014 CarswellOnt 921 (Ont. S.C.J.) [*Young*].

⁸⁵ *Young*, *ibid* at para. 40.

⁸⁶ See generally Teresa Scassa, "Social Networking, Privacy and Civil Litigation: Recent Developments Canada Law" (2011) 8:8 Canadian Privacy Law Review 77.

⁸⁷ See *Fric v. Gershman*, 2012 BCSC 614, 2012 CarswellBC 1177 (B.C. S.C.) [*Fric*]; *Garacci v. Ross*, 2013 ONSC 5627, 2013 CarswellOnt 12479 (Ont. S.C.J.) [*Garacci*]. There should be evidence to suggest the existence of relevant information on the private profile, e.g. the evidence in cross examination or information available on the public profile, or where at

ended and evidence emerges of the opposing party's ownership of a Facebook account, and there is evidence to infer the existence of relevant information in the private profile which was not disclosed in the affidavit of documents.⁸⁸

In each of these situations above, the party may bring a motion before the court for an order to compel preservation and production of the relevant Facebook information. A review of cases across Canadian jurisdictions highlights courts' approaches to motions for preservation and production of such information. These cases seem to suggest that the provincial courts in Canada tend to adopt the factual predicate approach applied in some US court decisions.⁸⁹ The factual predicate approach aims to limit reckless e-discovery (often referred to as fishing expedition) of Facebook evidence by imposing an obligation on the party seeking discovery to show evidence from which a reasonable inference could be made as to the existence and relevancy of the electronic information for which discovery is sought. This would require the party to show that (1) publicly accessible information on the Facebook profile hints to the existence and relevancy of information hidden in the private profile,⁹⁰ or (2) information admitted to exist in the private profile would be relevant evidence because of the nature of the claim being asserted, or the facts which the opposing party has put in issue.⁹¹

In *Schuster v. Royal & Sun Alliance Insurance Company of Canada*, the Ontario Superior Court was of the view that the presence of photographs on a publicly accessible Facebook profile could lead to a reasonable inference that the private profile of the party's Facebook account also contains similar photographs. Similarly, in *Frangione v. Vandongen et al.*,⁹² the plaintiff brought a personal injury action arising from vehicular accident. The plaintiff, having produced materials from his public Facebook profile, refused access to the private profile, asserting privacy concerns. Ruling on the defendant's motion to compel production of all materials contained in the plaintiff's Facebook profile, Master Pope held that having reviewed the photographs on the plaintiff's public Facebook profile and, finding them relevant to the action, "it is likely his privately-accessed Facebook site contains similar relevant documents."⁹³

the examination for discovery, the party has given evidence which may lead to an inference that the Facebook account contains relevant information.

⁸⁸ *Schuster*, *supra* note 76 at paras. 7, 9; *Leduc*, *supra* note 11 at paras. 3, 5.

⁸⁹ McPeak, Social Media, *supra* note 39 at 33. See also *Romano v. Steelcase Inc.*, 907 N.Y.S. (2d) 650 at 654 (N.Y. Sup. Ct. 2010). See e.g. *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387 at 388 (E.D. Mich. 2012).

⁹⁰ The problem with this approach is that it may prove unworkable where the privacy setting is adjusted to limit to the minimum extent information available on the public profile of the Facebook account.

⁹¹ McPeak, Social Media. *supra* note 39 at 33.

⁹² 2010 ONSC 2823, 2010 CarswellOnt 5639 (Ont. S.C.J.) [*Frangione*].

⁹³ *Frangione*, *ibid* at para. 36.

These decisions can be contrasted with the decision of McDougall J. of the Supreme Court of Nova Scotia in *Conrod v. Caverley*.⁹⁴ There, the plaintiff in a personal injury action admitted at her examination for discovery to ownership of a Facebook account which she used before and after the accident. However, she refused to give an undertaking for production. Photographs from her public Facebook profile were filed in support of the motion for production. McDougall J. refused to order production because he was not satisfied that evidence from the public profile contained any relevant information. In the absence of any relevant information in the public profile, the court declined to make any inference that the private portion likely contained any relevant information.

This was similar to the position earlier adopted by the Court of Queen's Bench for Saskatchewan in *Wesaquate v. Stevens Webb*.⁹⁵ In *Wesaquate*, the defendant filed a copy of the publicly accessible profile in the Facebook account which contained the plaintiff's profile picture and a list of some of her Facebook "friends". There was no evidence in the examination for discovery to suggest that the Facebook profile (private or public) contained any relevant material. McLellan J. ruled that to order production, there must be some evidence before the court, as opposed to a mere speculation, that potentially relevant evidence exists.

The analysis above shows that the courts often require evidence of relevant information in the public profile of a Facebook account before the court can infer the existence of similar evidence in the private profile of the same account. But as will be seen from the cases considered below, the test for relevancy here is very narrow and differs from the general test of relevancy in discovery. The general test for relevancy in discovery is whether the document supports the claim or defence of the parties. Under the factual predicate approach, the test for relevancy (for the purpose making an inference) appears to be whether the evidence or information on the public profile is inconsistent with the claims or evidence advanced by the party. In cases where the evidence in the public profile is consistent with the plaintiff's claim, the court has often declined to rely on such consistent information for the purpose of making the inference required to order production to the opposing party. Consistent information is also not considered relevant for making any inference on the existence of relevant information on the private profile. Two cases from Ontario and New Brunswick illustrate these points.

In *Garacci v. Ross*⁹⁶ the plaintiff brought a personal injury action before the Ontario Superior Court of Justice. At her examination for discovery, the plaintiff testified to participating in activities such as swimming, attending concerts, traveling and going to the gym, among other things. The defendant thereafter

⁹⁴ *Conrod*, *supra* note 23.

⁹⁵ 2012 SKQB 2, 2012 CarswellSask 13 (Sask. Q.B.), leave to appeal refused 2012 SKCA 13, 2012 CarswellSask 117 (Sask. C.A. [In Chambers]).

⁹⁶ *Garacci*, *supra* note 87.

brought an application for an order to compel the plaintiff to produce some 1100 photographs posted in the private portion of her Facebook profile. In support of the application, the defendant pointed to 12 publicly accessible photographs in the plaintiff's public Facebook profile which showed the plaintiff socializing with friends, having dinner, climbing a tree, etc. The defendant sought to use the factual predicate approach to show that the 12 publicly accessible Facebook photographs supported an inference as to the existence of relevant evidence among the 1100 photographs in the private profile. The plaintiff opposed the application on the ground that the photographs are not relevant and the request for production amounts to an invasion of privacy. It was held that the publicly accessible photographs which showed the plaintiff socializing with friends were consistent with her evidence at discovery. The fact that these photographs are consistent with the plaintiff's evidence dispenses with their relevance to the defence in defending the claim. Ruling on the application, Master Muir referred to the defendant's request as "nothing more than a high tech fishing expedition."⁹⁷

This can be contrasted with the decision of the Court of Queen's Bench of New Brunswick in *Sparks v. Dubé*.⁹⁸ The plaintiff in that case alleged chronic health issues arising from a motor vehicle accident. She claimed that the enduring nature of the injury severely limited her physical ability to engage in many activities such as studying, lifting objects such as groceries, difficulty in travelling in a vehicle for more than one hour, etc. The defendant challenged the alleged enduring nature of the injuries. Photographs obtained from the plaintiff's public Facebook profile showed her engaged in vacation travel and various social and recreational activities after the accident. Of particular interest were colour photographs of the plaintiff "engaging in what appears to be strenuous physical activity while suspended on a 'Zip Line' by a body harness". Ruling on the relevancy of the photographs, the Court stated:

There are two aspects to the evidence gathered from the public space of Ms. Sparks' Profile that combine to meet the relevancy requirement. First, the photographs set out in colour at p. 109 and pp. 111-113 of the Record on Motion depict the Plaintiff engaging in what appears to be strenuous physical activity while suspended on a "Zip Line" by a body harness. Second, the rest of the photographs set out show Ms. Sparks engaging in various sorts of social and recreational activities including laying on a beach in the U.S. Virgin Islands in 2010, carrying beer bottles in a social setting and shopping in what appears to be a flea market while on a southern vacation. These latter photographs are significant because they establish that Ms. Sparks is inclined to post photographs of her engaging in social and recreational activities

⁹⁷ *Ibid* at para. 9. See also *Stewart v. Kempster*, 2012 ONSC 7236, 2012 CarswellOnt 16567 (Ont. S.C.J.).

⁹⁸ *Sparks*, *supra* note 81.

although they do not illuminate her physical capabilities nearly as well as the “Zip Line” photographs do.⁹⁹

Citing the Ontario Superior Court of Justice decisions in *Leduc v. Roman* and *Schuster v. Sun Alliance Insurance Co. of Canada*, the New Brunswick court held that the evidence on the plaintiff’s public Facebook profile, “make it reasonable to infer that behind her privacy settings there are other photographs, visible only to those people who are her “friends”, that have “a semblance of relevance” to the issue of her medium and long term recovery from the accident.”¹⁰⁰ Thus the photographs in the plaintiff’s public Facebook profile appeared to be inconsistent with her claim of limited physical activity. This satisfies both the general and narrow test for relevancy.

Thus, information in the public profile will be considered relevant if it is inconsistent with the plaintiff’s claim in the action or evidence given at examination for discovery. Where the information on the public profile is consistent with the plaintiff’s claim or evidence, the court should refuse to make any inference that would warrant intrusion into the party’s private profile. Such an intrusion would be detrimental to the party’s reasonable expectation of privacy in its private profile, and information obtained would be of limited (if any) utility to the requesting party. In addition, the court should, in the interest of justice, deter unnecessary discovery requests that may amount to or foster ‘fishing expeditions’.

However, in situations where such inferences are rightly made, and the responding party attempts to challenge production on the basis of privacy concerns, the court should strive to balance the plaintiff’s privacy interests with the defendant’s disclosure interests. Proper administration of justice would require that the court set appropriate limits on the invasion of the plaintiff’s privacy, while at the same time allowing the defendant access to evidence relevant to defend the claim against it. The British Columbia Court of Appeal in *M.(A.) v. Ryan* stated the rationale for the balance thus:

On the one hand, a person who has been injured by the tort . . . ought not to be driven from the judgment seat by fear of unwarranted disclosure - a sort of blackmail by legal process. If such a thing were to happen, the injured person would be twice a victim. But, on the other hand, a defendant ought not to be deprived of an assessment of the loss he actually caused, founded on all relevant evidence. It would be as much a miscarriage of justice for him to be ordered to pay a million dollars when, if all the relevant evidence were before the court, the award would be for one-tenth that sum. . .¹⁰¹

⁹⁹ *Sparks, ibid* at para. 47.

¹⁰⁰ *Ibid* at para. 48.

¹⁰¹ *M. (A.) v. Ryan*, 1994 CarswellBC 455, 98 B.C.L.R. (2d) 1 (B.C. C.A.), affirmed [1997] 1 S.C.R. 157, 29 B.C.L.R. (3d) 133 (S.C.C.) , at paras. 46-47. affd *M. (A.) v. Ryan*, 1997 CarswellBC 100, 1997 CarswellBC 99, [1997] 1 S.C.R. 157 (S.C.C.). Similarly, in *Leduc (supra* note 11 at para. 35), Browne J. of the Ontario Superior Court of Justice noted

Thus in considering the privacy concerns raised by a party opposing the production of private electronic information from a Facebook account, the court should determine whether the probative value of the information sought is such that its disclosure would not infringe upon the party's reasonable expectation of privacy, or whether the information is so personal in nature that "most right thinking Canadians would expect a reasonable expectation of privacy."¹⁰² The court may also take into consideration the privacy interest of third parties who are not parties to the litigation.¹⁰³

The problem with the application of a factual predicate approach in the situations discussed above is that the approach may be unworkable or of limited utility where the privacy setting in a party's Facebook account places limits resulting in the barest minimum of information available on the public profile from which an inference could be made. Where this is the case, the defendant may have to use the examination for discovery to cross-examine the plaintiff with a view to getting as much information as possible about the plaintiff's private Facebook profile. Admissions or evidence obtained in the process of such cross examination could be the most useful piece of evidence to support a motion for production of evidence in the private profile.

Further to that, the absence of relevant evidence in a party's public profile from which an inference could be made may not necessarily prevent the application of the factual predicate approach. There may be situations where the nature of the claim, the fact that the plaintiff has put his physical or mental condition in issue, coupled with evidence admitted by the plaintiff, may justify the application of the factual predicate approach. Two provincial court decisions in Canada support this assertion. In *McDonnell v. Levie*,¹⁰⁴ a personal injury action before the Ontario Superior Court of Justice, the plaintiff alleged that injuries sustained in a motor vehicle accident resulted in permanent loss of physical, mental and psychological functions, and thus permanently diminished her enjoyment of life. At the examination for discovery, the plaintiff confirmed ownership of a Facebook account where she posted pictures of herself. When prompted, she testified that she could not immediately recollect whether the pictures in her Facebook account would show her engaged in physical activities prior to the accident, but asserted that the injuries from the accident had continued to limit her physical activities. The issue in this motion was whether a

"[t]o permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial."

¹⁰² *Carter v. Connors*, 2009 NBQB 317, 2009 CarswellNB 728, 2009 CarswellNB 632 (N.B. Q.B.), at para. 38. See also *Conrod*, *supra* note 23.

¹⁰³ In *Fric*, *supra* note 87, the Supreme Court of British Columbia ordered production of photographs on the plaintiff's Facebook profile with an instruction that the plaintiff may edit the photographs to protect the privacy of third parties appearing in the photographs.

¹⁰⁴ 2011 ONSC 7151, 2011 CarswellOnt 15142 (Ont. S.C.J.) [*McDonnell*].

production order should be issued against the plaintiff for the production of pictures from her Facebook account documenting her engagement in physical activities. The defence took the position that they are entitled to production of the pictures as they are relevant and probative. The plaintiff on the other hand opposed the motion on the ground that the defence had failed to show that there were relevant pictures on the Facebook account, and that the privacy of her Facebook account outweighed any probative value. Ruling on the motion, Arrell J. stated:

“Where the plaintiff puts her social enjoyment of life in issue and alleges various activities that she is unable to do then photographs of her social life and activities, before and after the alleged trauma, which she concedes are on her Facebook account, are produceable as having some semblance of relevance and should be part of her Affidavit of Documents. Whether they are ultimately produceable at trial will be a determination made by the trial judge.”¹⁰⁵

A similar approach was adopted by the Supreme Court of British Columbia in *Fric v. Gershman*.¹⁰⁶ The plaintiff in that case, a recent law school graduate and articling student at the time, sued for damages arising from a motor vehicle accident which occurred in November, 2008 when she was in her first year of law school. At her examination for discovery, she testified to her participation in her law school’s social and sport event “Law Games” in December 2008 and that her participation was limited due to injuries from the accident. She also admitted to ownership of a Facebook account where she posted photographs, including those taken during her participation in the Law Games shortly after the accident. The plaintiff’s public Facebook profile did not contain any photographs from the Law Games or any other relevant information from which an inference could be made about the content of the information in the private profile. In the absence of any relevant information from the public profile from which an inference could be made, the issue before the motion judge was whether to order production of the photographs on the private profile. Master Bouck examined case law on similar matters from other jurisdictions.¹⁰⁷ He noted that the plaintiff had put in issue her ability to participate in certain sports or recreational activities. Hence, photographs of the plaintiff’s activities at the Law Games posted on the private portion of her Facebook profile were deemed relevant to the claim of physical impairment and social withdrawal which were in issue. Master Bouck ruled that the photographs ought to be disclosed.

It is interesting to note that the British Columbia court made the production order in *Fric v. Gershman* even in the absence of any information in the public Facebook profile warranting an inference. The decision was based on the fact

¹⁰⁵ *McDonnell, ibid* at para. 15.

¹⁰⁶ *Fric, supra* note 87.

¹⁰⁷ *Leduc, supra* note 11; *Cikojevic, supra* note 29; *Morabito v. DiLorenzo*, 2011 ONSC 7379, 2011 CarswellOnt 14825 (Ont. S.C.J.).

that the plaintiff had put her physical activities in issue, coupled with fact of her evidence at discovery which seems to suggest or warrant an inference as to the existence of relevant evidence in her private Facebook profile.

This part of the paper has examined case law from provincial courts in Canada where various aspects of the factual predicate approach have been applied in one form or the other. The approach generally requires the existence of relevant evidence from the public Facebook profile to warrant an inference that there are relevant materials in the private profile. The factual predicate approach may also apply where the nature of the claim, the fact that the plaintiff has put his/her physical or mental condition in issue, coupled with evidence admitted by the plaintiff at examination for discovery support an inference of relevancy.

7. CONCLUSION

Many ethical and legal issues arise in both formal and informal electronic discovery of Facebook evidence in civil litigation. Electronic discovery of Facebook evidence in civil litigation will continue to grow as the numbers of users of this social media platform continues to rise. Social media is constantly changing, and lawyers will continue to encounter challenging issues in applying existing rules of professional conduct to addressing existing and novel ethical issues relating to social media discovery.

It would be unrealistic to expect that extant ethical rules predating the advent of social media can adequately address the current ethical concerns arising from the practice of law in the age of social media. It is imperative that professional and regulatory bodies like the Canadian Bar Association and the Federation of Law Societies of Canada take adequate steps to comprehensively address these novel ethical issues through model social medial ethical guidelines for legal professionals.¹⁰⁸ This has been the approach in some jurisdictions in the United States.¹⁰⁹ In formulating these model guides, it is important to bear in mind that

¹⁰⁸ The Lawyers' Insurance Association of Nova Scotia (LIANS) which administers professional liability insurance for lawyers in the Province of Nova Scotia recently published a social media ethical standard for lawyers in family law practice titled "Family Law Standard #15: Electronic Information and Social Media". It states in part "[a] lawyer must be aware of the ethical considerations involved with the use of social media, including but not limited to Facebook accounts and text messages and must advise a client not to do anything that a lawyer would consider dishonest or dishonourable, including secretly obtaining text messages and/or private Facebook information." (Lawyers' Insurance Association of Nova Scotia, "Family Law Standard #15: Electronic Information and Social Media" (LIANS, 28 April 2017), online: < <http://www.lians.ca/standards/family-law-standards/15-electronic-information-and-social-media> > .

¹⁰⁹ See American Bar Association Section of State and Local Government Law, "Attorney Ethics and Social Media" (Paper delivered at the 2015 ABA Annual Meeting 30 July — 2 August 2015, Westin River North, Chicago IL); California Bar Commission on Professional Responsibility & Conduct, Formal Opinion #2004-166 (2004); Philadelphia Bar Association Commission on Legal Ethics & Professional Responsibility, Opinion

the scope of social media is broad. Hence, the model guide should be broad enough to encompass the diverse ethical concerns related to the use of social media by legal professionals in the course of their practice.

With the growing interest in social media and its benefits in civil litigation, lawyers must learn to educate themselves on the benefits as well as ethical concerns that arise from social media. Lawyers (especially personal injury lawyers) who fail to incorporate social media searches and investigation into their legal practice are actually doing a disservice to their clients, and may run afoul of competency rules. On the other hand, lawyers who incorporate the use of social media in their practice must be careful to consider ethical implications of their social media use. To meet these ethical challenges, lawyers must educate themselves on how social media works.

With respect to the legal issues related to e-discovery of Facebook evidence, the factual predicate approach seems to present a viable process for limiting reckless discovery or ‘fishing expeditions’ of social media evidence in litigation. While the factual predicate approach may be used to limit reckless discovery or ‘fishing expeditions’, it appears that the approach may be of limited use in *bona fide* discovery where the privacy setting in the opposing party’s Facebook account is adjusted in such a way that very limited or minimal information is available on the public profile. In this case, examination for discovery may present the appropriate forum for the party to obtain information relating to any relevant evidence in the private profile of the opposing party.

#2009-02 (March 2009); San Diego County Bar Legal Ethics Committee, Opinion #2011-2 (24 May 2011); New York City Bar Association Committee on Professional & Judicial Ethics, Opinion #2010-02 (September 2010).