# High Tech Wizardry: White or Black Magic....?

# Reliability of Social Media Information

Prepared By

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## I. Introduction

The overwhelming success of social media websites such as Facebook, Twitter, Myspace, and similar internet platforms since the early part of the millennium has contributed to a plethora of personal information being strung out over the web for seemingly any interested party to access. With websites like Facebook listing their mission as giving people the power to share and make the world a more open and connected place, this trend gives no indication of slowing down.[1] As people become more comfortable with documenting and publishing their day-to-day activities to the world, they seem to become less concerned with their online privacy and security. The vast amount of information available and accessible on social media networks has not gone unnoticed in the world of Insurance Litigation. Risk managers must educate themselves with respect to the evidentiary strength and extent to which this information might be used and relied upon in litigation. This paper intends to focus and educate on the following issues:

a. The reliability of social media information in terms of risk assessment and litigation management.

b. The evidentiary strength of information available and accessible on social media.

c. The extent to which such evidence may be used and relied upon in litigation.

[1] *Facebook Mission statement*, online: Facebook <http://www.Facebook.com/facebook?sk=info>.

## II. What is Social Networking Information?

"Social media" is defined by the *Oxford Dictionary* as "websites and applications used for social networking."[2] Furthermore, "Social Networking" is "the use of dedicated websites and applications to communicate with other users, or to find people with similar interests to one's own."[3] Examples of such social networking websites include Facebook, Twitter, Myspace and the recently launched Google+. With over 500 Million users, Facebook is easily the most popular of such websites and consequently, Facebook information is the most commonly sought after social media information as evidence in litigation.[4] Facebook was described in the Ontario decision of *Leduc v. Roman* as a site,

> "for the personal, non-commercial use of its users. Content which users may post on Facebook includes photos, profiles (name, image, likeness), messages, notes, text, information, music, videos, advertisements, listings and other content. The sites' 'Facebook Principles' indicates that a user may set up your personal profile, form relationships, send messages, perform searches and queries, form groups, set up events, add applications, and transmit information through various channels." [5]

## III. Documentary Discovery

### a. General Principles

Each Province has established applicable rules of evidence governing the admissibility of social media information as evidence. In New Brunswick, Rule 31.01 of the *Rules of Court*, N.B. Reg. 82-73, defines document in a similar manner to all other Provinces[6], as follows:

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[2] Oxford Dictionary Online, *"social media"* online: <http://oxforddictionaries.com/definition/social+media>.
[3] Oxford Dictionary Online, "s*ocial networking*", online: <http://oxforddictionaries.com/definition/social+networking>.
[4] *Facebook Advertising*, online: <http://www.facebook.com/advertising/?campaign_id=402047449186&placement=pflo&extra_1=0>.
[5] *Leduc v. Roman,* 308 D.L.R. (4th) 353 (Ont. SC).
[6] Man. Rule 30.01, 31.01; N.W.T. Rule 218; N.S. Rule 14.01, 14.02; Ont. Rule 30.01, 31.01; P.E.I. Rule 30.01, 31.01; Sask. Rule 211; Yukon Rule 25(1)-(2).

> 31.01 *document* includes a film, photograph, video tape, chart, graph, map, plan, survey, book of account, recording of sound, and information recorded or stored by means of any device;

Comparable definitions exist across the country and have been judicially treated to capture information on a computer hard drive, as well as photographs, videos, and other information posted anywhere on a person's social network profile.[7] The concept of a document in Québec is set out at section 3 of the *Act to establish a Legal framework for information technology*[8] (the "*Québec Act*"), which provides that "information inscribed on a medium constitutes a document. The information is delimited and structured, according to the medium used, by tangible or logical features and is intelligible in the form of words, sounds or images. The information may be rendered using any type of writing, including a system of symbols that may be transcribed into words, sounds or images or another system of symbols."

### b. Rules of Evidence

As with any relevant traditional document, social media information that is relevant to a proceeding and is not excluded under any other rule of law or policy is admissible. Traditionally, the "semblance of relevance test" has not been a difficult threshold to meet. For example, "evidence is not irrelevant because it can be interpreted in more than one way, or can support more than one inference. To establish relevance, the proponent need only show that one possible interpretation of the evidence is relevant to an issue at trial. The strength or weight of the evidence is for the trier of fact to decide."[9] In Ontario, the relevance test has been made slightly more stringent by replacing the phrase "relating to any matter in issue in the action" in all rules relating to discovery in the *Rules of Court* with "relevant to any matter in issue in the action". The intent of this change was to discard the "semblance

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[7] *Sparks v. Dubé*, 2011 NBQB 40, *Wice v. Dominion of Canada General Insurance Co.*, [2009] O.J. No. 2946, (Ont. S.C.J.), *Bishop v. Minichiello*, 2009 BCSC 358 upheld by *Bishop v. Minichiello*, 2009 BCCA 555.

[8] *Act to establish a Legal framework for information technology,* RSQ c C-1.1.

[9] *Carter v. Connors*, 2009 NBQB 317.

of relevance" test and replace it with a simple relevance test.[10] The change to a relevance test is meant to signal restraint to the profession, in order to comply with the principle of proportionality with respect to cost and efficiency. The issue of cost and efficiency will be dealt with later in this paper.

In most Provinces, the applicable *Rules of Court*[11] place an obligation on counsel to explain to their client the necessity of making full disclosure of all relevant documents, within their knowledge, to an action. In New Brunswick, subrule 31.03(6)[12] refers to this obligation and requires a solicitor to endorse a certificate confirming that the requirement has been satisfied as follows:

> 31.03(6) The solicitor for a party making an Affidavit of Documents shall endorse it with a certificate that he [she] has explained to the deponent the necessity of making a full disclosure of all relevant documents and that he has no knowledge of any other document which should have been disclosed.

### c. Rules of Documentary Discovery

Social media evidence meeting the relevance requirement is admissible in the same manner as any other relevant document and need not have been prepared by or be addressed to a party in order for their disclosure and production to be required; the only requirement is that a copy of the document in question came into the party's possession, control or power at some point. All documents must be disclosed and produced if they are relevant to any issue in the action, even if the issue in question does not relate to the party who is in possession of the document. The documents need not have been prepared in connection with the incident giving rise to the cause of action. The obligation to disclose and produce documents is said to be continuing throughout a cause of action. In most jurisdictions, where after serving an Affidavit of Documents, a party comes into possession

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[10] Garry D. Watson, Q.C., Michael McGowan, *Ontario Civil Practice – Transition Guide 2009/2010*, Carswell, May 2009.
[11] Alta. Rule (1968) 187, 187.1; Alta. Rule 5.5-5.16; B.C. Rule (1990) 26(1)-(6); Man. Rule 30.03; N.B. Rule 31.03; Nfld. Rule 32.01-32.04; N.W.T. Rule 221; N.S. Rule 15.03, 15.04; N.S. Rule (1972) 20.01; Ont. Rule 30.03; P.E.I. Rule 30.03; Sask. Rule 212; Yukon Rule 25(6)-(8).
[12] *Rules of Court*, N.B. Reg. 82-73.

or control of, or otherwise obtains power over, a document that relates to a matter in issue in the action, and that document is not privileged, that party is required to serve a Supplementary Affidavit specifying the extent to which the Affidavit of Documents requires modification and disclosing any additional documents. An identical obligation is imposed where a party discovers that the Affidavit of Documents is inaccurate or incomplete.

Canadian jurisprudence has shown concern over the tendency of litigant's to not contemplate relevant social media information in the preparation of their Affidavit of Documents at the documentary discovery stage of proceedings. Where postings are not tangible in the sense that they cannot be felt or touched in the form in which they exist on a person's social network profile, a party may innocently overlook their inclusion while including all relevant traditional documents. Across Canada, rules similar to New Brunswick's Rule 31 oblige both counsel and client to proactively search out and disclose every document that "relates to a matter in issue". It is triggered by a simple request for such disclosure by the opposing party.[13] A Defendant should request that a Plaintiff's Affidavit of Documents include relevant contents of their social networking accounts. Where an opposing party has omitted contents of their social media accounts from its productions, verification should be made to ensure that it is because the account does not actually contain relevant information.

Other issues which add to the challenge of accessing and understanding this type of evidence are: a) that it may not be easily identifiable, b) that it may not be recovered, c) that it may be stored in a format requiring conversion and analysis before it can be read, and d) that it may not maintain conveniently or readily available date and time information.[14] Retrieving this type of evidence may require the assistance of a trained forensics practitioner to perform the manual recovery of data or fragments of data that is surrounded by hypertext markup language code (HTML). Evidence in this format will not be readable without a trained practitioner who can understand it. The practitioner "may also corroborate dates and times by analyzing the meta-data of pictures or other evidence that previously

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[13] *Sparks v. Dubé*, *supra* note 7.
[14] Stephanie Giammarco and Jeffrey Leab, *Social Networking Changes Approach to Investigations*, New York Law Journal, Volume 242-No. 112, Dec. 10, 2009.

resided on social networking web pages but are now stored in unallocated or temporary space on the individual's computer hard drive."[15]

## IV. General Principles on Admissibility of Evidence

### a. Admissibility Requirements as per the Rules of Evidence

Evidence must be admissible to be considered by the trier of fact. To meet the admissibility requirement, evidence must be (1) relevant and (2) not subject to exclusion under any other clear rule of law or policy.[16] This principle is affirmed at common law by the New Brunswick decision of *Sparks v. Dubé, supra*. In this decision the Judge stated that, "all evidence is admissible in a proceeding that is logically relevant to a fact in issue and is not otherwise inadmissible because of a particular rule of law or evidence or because it's probative value is exceeded by the prejudicial effect that will result from its admission. Relevance is very much a product of the other evidence and issues in a case."[17]

Lawyers are becoming increasingly focused on accessing information in a party's social media accounts, email accounts and computer hard drives as a way to investigate the backgrounds of parties and witnesses, and to assess their credibility while collaborating or undermining either their party's or the opposing party's case.[18] Where there is evidence that such information exists, insurance defence counsel would likely bring a motion for the disclosure of relevant pictures and messages located in these mediums. Where this information is often accessible by anyone, the court is concerned with the authenticity of the information sought. Section 2840 of the Québec *Civil Code* provides a presumption of integrity with respect to electronic documents by stating:

> It is not necessary to prove that the medium of a document or that the processes, systems or technology used to communicate by means of a document ensure its integrity, unless the person contesting the admission of

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[15] *Ibid.*
[16] John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed (Markham: LexisNexis Canada Inc.).
[17] *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (SCC).
[18] Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook stay on Facebook? Discovery, admissibility, ethics and social media*, Illinois Bar Journal, Vol. 98 No. 7, July 1, 2010.

> the document establishes, upon a preponderance of evidence, that the integrity of the document has been affected. [19]

Furthermore, Sections 6 and 7 of the the *Québec Act*[20] provide a well founded approach to the integrity of these documents which was recently adopted in Québec by the *Landry and Provigo Québec inc. (Maxi & Cie)*[21] (March 9, 2011) decision:

> 6. The integrity of a document is ensured if it is possible to verify that the information it contains has not been altered and has been maintained in its entirety, and that the medium used provides stability and the required perennity to the information.
>
> The integrity of a document must be maintained throughout its life cycle, from creation, in the course of transfer, consultation and transmission, during retention and until archiving or destruction.
>
> To assess the integrity of a document, particular account must be taken of the security measures applied to protect the document throughout its life cycle.
>
> 7. It is not necessary to prove that the medium of a document or that the processes, systems or technology used to communicate by means of a document ensure its integrity, unless the person contesting the admission of the document establishes, upon a preponderance of evidence, that the integrity of the document has been affected.

In all cases where a party files a motion for the preservation or disclosure of another party's social media account, the court will weigh the probative value of the information against the prejudicial effect of the motion on the producing party. In the context of parties in a civil action, "prejudicial effect" refers to the tendency of the evidence to divert the trier of fact from a properly reasoned decision. It does not mean simply to work contrary to the interests of the opponent. The court is concerned with the "proper administration of justice".

For example, where an Insurer provides evidence demonstrating the existence of relevant photographs in the claimant's Facebook profile, from this evidence the trier of fact is able to

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[19] *Civil Code of Québec*, LRQ, c C-1991, s. 2840.

[20] *Act to establish a Legal framework for information technology, supra* note 8.

[21] *Landry and Provigo Québec inc. (Maxi & Cie),* 2011 QCCLP 1802.

draw inferences on the claimant's level of functioning in other areas of their life.[22] Similarly, Québec courts have taken social media information into account to determine whether a Plaintiff's motion is well founded.[23] Where the court is satisfied that the prejudicial effect on the claimant's privacy and other interests is minimized, and the value of production was not outweighed by competing interests such as confidentiality and the expense of producing the documents, it will grant a motion for preservation and disclosure of social network accounts.[24] On the other hand, where the Insurer is unable to provide evidence of the existence of relevant information, a court will not compel the production of an entire Facebook or other social network profile. To ensure fairness, all relevant Facebook postings must be disclosed, and the other party will be permitted to cross examine on an Affidavit of Documents to learn if any relevant documents have been omitted.[25]

Courts have identified the potential for computer memory to be easily "overwritten" with ongoing use, as a risk associated with the use of social media information in litigation as evidence. Typically, the court maintains the evidentiary strength and reliability of this type of information, while at the same time limiting the prejudicial affect on the claimant, by quickly issuing its determination and order in order to preserve the data sought.[26] Practically speaking, the court will not require a party to preserve their account for an extended period of time as this is considered an infringement of their privacy rights. As we will discuss below, courts may also limit any unfair prejudice by limiting the disclosure to only the portions of the social media account that are relevant and by not requiring wall posts or other comments posted by third parties to be disclosed.

## v. Concerns Surrounding the Reliability of Social Media Evidence for Litigation

It is clear that where social media information is relevant and not excluded under any other rule of law or policy, it is admissible in the same manner as any other relevant form of

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[22] *Wice v. Dominion of Canada General Insurance Co. supra* note 7.
[23] *Renaud et Ali Excavation Inc.*, 2009 QCCLP 4133; *Brisindi et STM (Réseau des autobus)*, 2010 QCCLP 4158; *Willis Brazolot & cie inc. et Hugues*, 2010 QCCLP 5704.
[24] *Bishop v. Minichiello*, *supra* note 7.
[25] *Leduc v. Roman*, *supra* note 5.
[26] *Bishop v. Minichiello*, *supra* note 7.

evidence. This is supported in Québec by section 5 of the *Québec Act*[27] which states that, "the legal value of a document, particularly its capacity to produce legal effects and its admissibility as evidence, is neither increased nor diminished solely because of the medium or technology chosen." Understandably, reliability concerns based on the electronic format of the information must be assessed by a court on a case-by-case basis.

### a. Concern of permanent deletion – no electronic trail

A recent New Brunswick decision caused some controversy where *ex parte* relief was granted due to the court's concern over the ease of which Facebook data can be deleted.[28] In the decision, the judge noted the following:

> "the creator of a Facebook account can add to, or delete from, the site without leaving an electronic trail that can be data mined to determine what may have been posted or removed from the site at any given time. Thus a forensic reconstruction of 'dumped' data that might ordinarily be undertaken with respect to a computer hard drive is not an available option without access to the relevant social network computers. The concern over the probative value of the evidence is due to the consequences of deletion rather than the likelihood that the plaintiff would actually delete once put on notice."

Ensuring proper and supervised preservation and downloading is "central to what appears to be one of the most important issues to be determined at trial and crucial to the probative value of the data obtained." In an effort to maintain the integrity of the data posted online, courts have taken the approach of granting a motion requiring the preservation of the evidence or enlisting third party experts to gather the information.[29] From a practical standpoint, this would require the hiring of a third party forensic technologist to take possession of the party's computer and copying from the hard drive any relevant information in its original format as to preserve Meta-data and other hidden information. The third party tech may also be required to interpret this information for the court due to the previously discussed potential for relevant information to be in an unreadable format to the average person.

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[27] *Act to establish a Legal framework for information technology, supra* note 8.
[28] *Sparks v. Dubé*, *supra* note 7; *Rawdon (Municipalité de)* v. *Solo*, 2008 QCCS 3980.
[29] *Ibid.*

### b. Balance vs Convenience of disclosure

Before making an order for the preservation and disclosure of social networking evidence, the court will ensure that the information sought has significant probative value in relation to a matter in issue. Ultimately, the court will make such an order where the value of production is not outweighed by competing interests such as confidentiality and expense of producing the information.[30] Courts have become concerned with the typical "fishing expedition" scenario where a motion is made on the standard practice of requesting the entire Facebook account of an opposing party. This would be considered beyond the threshold of reasonableness and the confidentiality of the Plaintiff would take priority. Although "fishing expeditions" will not be tolerated, it should be noted that a defendant will not be permitted to hide from disclosure by restricting access to information he or she posts on the web to a private group of friends. Practically, where "private" portions of social network accounts are an issue, the court will limit access to that of a third party retrieving only those elements of the account that are relevant (this could be in the form of pictures, videos, messages, text, and meta-data).[31]

### c. Privacy

As discussed above, where a social media profile is divided into public and private portions, all relevant documents, regardless of their location on the profile, are to be outlined in the Affidavit of Documents. Where no documents from a private Facebook account have been listed in the Affidavit of Documents, there must be evidence pointing to relevant documents being withheld, otherwise, the court will respect the privacy rights of the member and will not compel disclosure. The focus of this principle has been expressed as recognition that a Plaintiff has a reasonable expectation of privacy with respect to personal information. The success of an application to retrieve an individual's electronic computer data will depend upon the degree of intrusion into the private lifestyle choices and electronic activity of the internet user, as well as the probative value of the information sought. Third party privacy rights will also be given special attention and respected by the court where the third party is

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[30] *Bishop v. Minichiello*, *supra* note 7.
[31] *Schuster v. Royal & Sun Alliance Insurance Co. of Canada* (2009), 78 C.C.L.I. (4th) 216 (Ont. S.C.J.).

not a party to the proceeding.[32] However, public comments by a third party on a Facebook or other social networking account should not be considered as private information.[33]

### d. Effect of Probative Value through 'Intervening Users'

The argument has been made with respect to social media usage data (i.e. how much time spent on internet sites such as Facebook) that the relevancy of the evidence, from a probative value standpoint, may be unacceptably compromised by other users who have shared the internet account with the producing party.[34] The issue of shared accounts does not merely relate to social media account usage data. Courts should also be aware of the potential for the probative value of social network information to be compromised due to the propensity for multiple users and increased access to a single social network account. The authenticity and nature of information on Facebook accounts must be stringently tested as access to such accounts via mobile and other regularly shared and less secure devices has become more popular. Courts have ruled that an argument on the risk of information being unacceptably compromised by other users is most properly made at trial and weighed by the trier of fact in the event social networking information is admitted as part of the Defendant's case.[35] Where there is a risk of third-party interference with a document, it is imperative that the parties discuss the need to preserve or produce meta-data as early as possible. Other than the testimony of the parties or other witnesses to the alteration of a document, meta-data may be the only hard evidence available that can prove when a document was accessed, from where it was accessed, and ultimately how and by who the document was altered. It is also possible and may be useful for the purpose of litigation to view a document through the use of Meta-data in its historical, pre-alteration form.

Facebook members do not have control over the nature and authenticity of information posted online by other users. For the reason that it can get "geometric" very quickly, Justice McLellan in *Lodge v. Fitzgibbon* prohibited Facebook evidence sought from friends' Facebook accounts and limited social media evidence to whatever was written on the

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[32] *Carter v. Connors*, *supra* note 9.
[33] *Landry et Provigo Québec inc. (Maxi & Cie), supra* note 21.
[34] *Ibid.*
[35] *Ibid.*

Plaintiff's Facebook page.[36] The judge effectively limited what could be viewed to the scope of information written on the Plaintiff's account and was *not willing* to place evidentiary weight in data posted on third-party Facebook accounts. This decision addresses reliability issues surrounding social networking information by limiting the information sought to that which has been posted online by the Plaintiff him/herself, and which can therefore be assessed by the court through the trial process.

### e. Preservation of Evidence

The ease of which social Media information can be manipulated increases the court's concern with the preservation of such evidence compared to the preservation of traditional evidence in the form of documents. A traditional document may be authenticated in many ways, including: calling the writer, calling a witness who saw the document signed, calling a witness who is familiar with the writer's handwriting to make a comparison, by calling an expert, or through an admission by the opposing party.[37] With social media information, these traditional ways of authenticating a document are not necessarily available or as feasible. Understandably, the added difficulty in authenticating such evidence has resulted in the courts increasing concern over preserving social media information as evidence. As outlined above, section 6 of the Québec *Act* relies on the verification that information has not been altered and has been maintained in its entirety throughout its lifecycle to assess the integrity of a document.[38]

Courts have chosen to ensure the protection of this evidence by ordering its supervised preservation and downloading.[39] In the discussed case, to maintain the probative value of the information, *ex parte* relief was granted because of the Court's concern with the ease of which social network data can be deleted.[40] The deletion of social networking evidence, or in more extreme cases, the shutting down of an entire social networking account during legal

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[36] *Lodge v. Fitzgibbon*, 2009 NBQB 332.
[37] David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed (Toronto: Irwin Law Inc., 2008).
[38] *Act to establish a Legal framework for information technology*, *supra* note 8.
[39] *Sparks v. Dubé*, *supra* note 7.
[40] *Ibid.*

proceedings may lead to an adverse inference as to one's credibility. In *Terry v. Mullowney*,[41] the court stated with respect to a plaintiff's disabling of their entire Facebook account, after being confronted with the contents of his public profile in open court, that without Facebook evidence the court:

> "...would have been left with a very different impression of [the plaintiff's] social life. He admitted as much in cross-examination. After he was confronted with this 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. I draw an adverse inference against [the plaintiff] on account of this statement and conclude that the Facebook account which he shut down and some particular messages which he deleted prior to shutting down the account entirely contained information which would have damaged his claim."

It is likely that a court would draw an adverse inference or credibility finding based on the disabling of a social network account or the deletion of contents of a social network profile leading up to, or in anticipation of a discovery request. Based on the above decision, the defendant in a personal injury action should take immediate steps to preserve evidence of the existence of a plaintiff's social networking profiles and contents included therein. Where there is no evidence of relevant information in the social networking account and the plaintiff has not taken steps to disable these types of accounts, the claimant's privacy concerns will outweigh the need for "best evidence" rule. Where a court can, it will limit the interference with the privacy rights of a complainant and still gather relevant evidence.

The *Guidelines for the Discovery of Electronic Documents in Ontario*[42] provides several helpful principles to guide the e-discovery process. One such measure discussed in the *Ontario Guidelines* is to move for the quick preservation of data.

> "Lawyers and the judiciary should also be aware that certain electronic sources, such as internet web-pages or database applications, may be under constant revision as new information is published on the site or added to the system. Unless these documents are located promptly, the available active copy may not reflect what the data actually looked like at the point in the past that is relevant to the litigation. Lawyers should be prepared to question their

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[41] *Terry v. Mullowney,* 2009 NLTD 56.
[42] Ontario, Task Force on the Discovery Process in Ontario, *Guidelines for the Discovery of Electronic Documents in Ontario.*

> clients, to confirm which of the available versions is the best evidence for litigation purposes."[43]

In addition, the *Ontario Guidelines* recommend the preservation of electronically stored documents in their electronic format *rather than* by supervised printing of the documents.

> "Relevant meta-data may exist at the time an electronic document or source is located, but may be altered or lost simply in the process of making a copy of the relevant electronic files for litigation purposes. This again is avoidable, as relatively affordable techniques exist, either to make 'forensic copies' or 'mirror images' that are specifically designed to preserve the integrity of the meta-data, or to capture the relevant meta-data from the original source documents before they are copied [...] Preserving web-site files in electronic form, rather than simply printing them up at a point in time, may enable a party, at minimal cost, to recreate the website electronically in a courtroom, in order to demonstrate dynamically any relevant links, relationships, and special features that characterized the site at the time the litigation arose."[44]

Hidden meta-data and other information related to electronic documents such as social network information should be preserved, predominantly when there is potential for issues of authorship or authenticity with respect to a document to be admitted as evidence.

Contemplated documents under the *Guidelines for the Discovery of Electronic Documents in Ontario* include those created by word processors, databases, spreadsheets, email, and other familiar programs and are the most commonly requested and produced documents in litigation. However, the *Guidelines* also consider documents such as "web-pages, browser history files that track user's movements between web-sites and pages on the internet, cell-phone logs, and many other kinds of information stored on computer based devices in their day-to-day operations."[45] Each of these types of evidence should be considered, as the caselaw suggests that "any data or information that can be readily compiled into viewable form, whether presented on the screen or printed on paper, is potentially within the definition of 'document' under the *Rules of Civil Procedure*." There is no steadfast way to guarantee access to this type of information, but the best practice is to prove the relevance

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[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*

of the information and, where you are admitting publicly available information, be sure to include information which speaks to the authorship and authenticity of said evidence.

## VI. Use of Social Media Evidence in Litigation

### a. Weight Attributed by Courts to Social Media Evidence

"In most cases, the trier of fact is simply invited to apply common sense and human experience to decide whether admissible evidence is credible and to determine what use, if any, to make of it in coming to its finding of fact."[46] To date, the majority of case law on social media evidence concerns its admissibility and is limited in providing further analysis of the weight allocated towards such evidence by the trier of fact.

Where admissible, evidence is considered to some degree by the trier of fact, but there is no requirement that the amount of weight allocated to this evidence in reaching a conclusion be articulated by the court in its decision. To date, where a Plaintiff alleges an interference with his or her everyday enjoyment of life, judges have placed a notable amount of weight on photos from social media websites in determining whether the Plaintiff socializes to a degree that allows for the enjoyment and carrying on of a normal life following their accident.[47] Similarly, videos, verbal notes, messages and comments from social networking sites other than Facebook have been given weight in family, criminal and tort law decisions.[48] Arguments that social network evidence should not be given any evidentiary weight, because such postings are not an accurate reflection of a person's life experiences have been rejected by the court.[49] In one case, a father's assertion that pictures of him engaged in activities which require a source of income did not reflect his day-to-day existence, but rather a 'fantasy life' he had constructed to impress others, the court held

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[46] *The Law of Evidence, supra* note 37.
[47] See *Goodridge v. King (2007)*, 161 A.C.W.S. (3d) 984 (ON S.C.) and *Kourtesis v. Joris*, [2007] O.J. No. 2677 (Ont. S.C.J.).
[48] *R. v. Butler*, 2009 ABQB 97; *S. (M.N.) v. S. (J.T.)*, 2009 BCSC 661; *Weber v. Dyck*, 2007 CarswellOnt 3851 (Sup. Ct. J.).
[49] *(C.M.) v. R. (O.D.),* 2009 NBQB 253.

that he was intentionally unemployed for the purposes of avoiding his child support obligations.[50]

As stated above, the basic rule of evidence is that all relevant and material evidence is admissible where no exclusionary rule applies. Evidence meeting this standard is received, *unless* its probative value is outweighed by the prejudice it may cause if admitted. This is because the prejudicial versus the probative value analysis is the final analysis performed by the court as to the admissibility of evidence. When a party wants physical or real evidence admitted, it must be authentic, and the onus is on the party producing the evidence to prove that it is authentic beyond a reasonable doubt.[51] Simply because evidence is ruled admissible does not mean it will prove useful to the trier of fact. The relevance threshold does not appear to be a difficult threshold to reach. In dealing with social networking information, proving the authenticity of relevant and material evidence is a more difficult task. In an attempt at ensuring the documents are authentic and reflect what they were intended to reflect at the time of its creation (the time the documents were created, the photograph was captured, etc…) the following measures are recommended be taken by the producing party:

- Access and preserve the evidence in its original format as early as possible. This will ensure that the evidence reflects what it looked like at the point in the past that is relevant for litigation.[52]
- Where possible, preserve any meta-data attached to social networking evidence. Meta-data can provide information concerning who created, or when a document was last altered. This can be directly relevant to a documents authenticity and admissibility in an action.[53]
- For the above reasons, avoid producing social networking information as evidence in paper form.[54]

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[50] *Ibid.*
[51] *The Law of Evidence, supra* note 37.
[52] *Guidelines for the Discovery of Electronic Documents in Ontario*, *supra* note 42.
[53] *Ibid.*
[54] *Ibid.*

Recent court decisions have raised legitimate concerns as to the origin and authenticity of social media information where a party to an action attempts to admit printouts of an opposing party's social network profile. The objecting party's counsel has been permitted to conduct examination for discovery regarding the printouts, including questions with respect to their origin and authenticity, and the purpose for which the Defendants might wish to put such profile information into evidence.[55] Examples such as the ease with which a false webpages or accounts can be created in another person's name support the requirement for courts to authenticate social media evidence. Authentication can be achieved through testimony of the person who obtained a webpage confirming when and how it was done as well as that the copy is accurate. Other evidence such as an admission by the author of a document or web page or the testimony of a person that observed the uploading of the document or the creation of a web page could also be helpful in determining authenticity.

### b. Traditional Court Mechanisms for Assessing Probative Value of Evidence

A court determines the "Probative value" of certain evidence by determining: 1) the reliability of the source of the evidence (usually the credibility of the witness offering the evidence), and 2) the strength of the logical inference from the evidence to the conclusion for which it the evidence is offered.[56] Due to the ease with which computer documents may be altered, the potential for compromising internet information appears to be greater than that of traditional documents. Traditional documents were also at risk of compromise and the relative weight to be given to traditional evidence was determined at trial by the trier of fact based on their assessment of witness testimony and cross-examination. Although it is more difficult today, these mechanisms remain available and should be employed to assess the value of social media information as evidence.

A defendant seeking to admit evidence from a Plaintiff's social networking profile should be prepared to divulge the required information to prove its authenticity. This could be in the form of meta-data proving the original author and condition of the information or through the

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[55] *Knight v. Barrett*, 2008 NBQB 8.
[56] *The Law of Evidence, supra* note 37.

testimony of a third party expert that extracted the information or supervised the downloading and preservation of the information. The admissibility of this type of evidence, especially where it is in the form of photographs and video depends on (1) its accuracy in truly representing the facts; (2) the fairness of the evidence and the absence of any intention to mislead and (3) the verification of the evidence on oath by a person capable of doing so. An eyewitness of the scene or events should be sufficient to confirm that the social media evidence is a fair and accurate reproduction.[57]

### c. Court's Assessment of "Posed Photographs"

Regardless of the manner in which social media evidence is gathered, there is a concern that a picture represents a moment in time and although helpful, it may not be an entirely accurate depiction of a person's health or state of mind at that period of their life. According to the decision in *Kourtesis v. Joris*, regardless of the circumstances surrounding pictures, where they were in the control of, and posted online by a party to an action, pictures may be taken at face value by the court.[58] In that case, the Plaintiff had posted pictures depicting a social life which was completely at odds with her testimony. The judge concluded that *even if* the pictures were posed, they were taken in an active social life setting, and the Plaintiff therefore could be said to be enjoying life. Whether or not the court is assessing so-called "posed" photographs or other forms of social networking information as evidence, the relative weight applied to the evidence is determined by the trier of fact. There is no guarantee as to the weight that will be given a particular portion of evidence and counsel should value the costs of producing said evidence against the potential weight to be applied before deciding what course to take at discovery and trial.

## VII. Cost

Costs are an issue in any civil litigation action and will be weighed by the court against the probative value of the information sought. The court may require the seeking party to bear the cost of said request. A number of decisions have rejected requests for social networking

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[57] *Ibid.*

[58] *Kourtesis v. Joris*, [2007] O.J. No. 2677 (Ont. S.C.J.).

information because of the significant costs associated with collating and converting such electronic data into usable form.[59] Competing interests such as confidentiality and the expense associated with the review and production of relevant online documents will be weighed against the potential probative value of the information. The probative value of social media information is determined on a case by case basis and can be analyzed during the discovery process.[60] Where necessary, courts will narrow the scope of a search to ensure that the information requested has both sufficient probative value, and more importantly does not infringe upon the Plaintiff's reasonable expectation of privacy by revealing personal information such as lifestyle and personal choices.[61]

## VIII. Conclusion

The trend and popularity surrounding social networking media suggests that we are at the tip of the iceberg in terms of the magnitude of data and personal information that will be at the public's fingertips in the near future. The legal profession has been slow to react as technology has developed, and although social networking websites have been in existence for over a decade, the caselaw concerning its admissibility as evidence is underdeveloped. Concerns over the reliability and authenticity of this information have come to the forefront in recent years. It is clear that under the right circumstances this evidence is admissible and will be relied upon by the trier of fact in litigation. The extent to which this evidence will be used moving forward will depend on the moving party's ability to verify the authenticity of the data. Counsel must develop their knowledge and skill base in this area to ensure a fair litigation process while properly advocating for their client.

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[59] *Carter v. Connors*, *supra* note 9.
[60] *Bishop v. Minichiello*, *supra* note 7.
[61] *Carter v. Connors*, *supra* note 9.

## Social Media Litigation: Do's and Don'ts

As a helpful summary, the authors suggest the following checklist for the purpose of defending litigation, when one seeks to rely on information gathered and collected on a social media network. It is however cautioned that, the steps identified and itemized below are not intended to reflect an exhaustive list of measures to take and may not necessarily apply in every situation; they are simply intended to serve as a guideline in the use and reliability of the medium of social networks as a source of information:

### 'DO'

- Inform parties that data contained on social media sites is relevant to a legal action.
- Create a pre-trial environment that promotes the disclosure of relevant information. Parties should place each other on notice with respect to preserving electronic documents [with or without meta-data] as early in the process as possible, as electronic documents may be lost in the ordinary course of action.
- Request that a Plaintiff's Affidavit of Documents include relevant contents of their social networking accounts. Where an opposing party has omitted contents of their social media accounts from productions, verify that it is because these profiles and accounts do not contain relevant information.
- Question the Plaintiff about the contents of social media accounts during examination for discovery.
- Request the production of meta-data related to electronic documents if there are issues of authorship or authenticity raised with respect to said document, webpage or any other kind of information stored on a computer-based device.
- Request the preservation of website files in electronic and readable form rather than their printing at a given point in time. This will preserve the relevant meta-data.
- Where deleted, hidden, or residual data is relevant and requires access through forensic means, parties should request its preservation as early as possible to avoid inadvertent deletion or claims of deliberate destruction.
- When requesting disclosure of the private portion of a person's social media account, establish support for the existence of relevant documents based on the public

portion of that account.

- Assure that all social media information collected for the purpose of litigation is strictly used for that purpose.
- Cross-examine the Plaintiff on his/her Affidavit of Documents if there is concern over insufficient disclosure, authenticity, or authorship.
- Be prepared to accept the cost of the other parties' review for the relevance of a potentially substantial amount of discoverable documents from social media evidence.

'DON'T'

- Ambush a party with evidence from their social media accounts.
- Be -"Friend" or enlist a third-party to be-"friend" a claimant or plaintiff in order to view information withheld from the general public on a social media site.
- Do not request, unless necessary, disclosure of the entire social networking site of an opposing party; such a request has been considered by the courts to be far too broad and you risk losing the ground on which you could otherwise have relied for purposes of seeking production of very relevant information.
- Rely on the mere existence of a Facebook or other social media account as evidence that it contains information relevant to a claim or that a Plaintiff has omitted relevant documents from their Affidavit of Documents.