THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

TWEETERS, POSTERS AND GRAMMERS BEWARE: DISCOVERY AND SOCIAL MEDIA EVIDENCE

10th INFORMATION GOVERNANCE & EDISCOVERY SUMMIT

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Introduction

1. I would like to begin by respectfully acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders, past and present.

2. Today I will speak about the interaction between discovery and social media evidence. In doing so, I have given myself a difficult task. First, I have to try to talk about discovery in a way that avoids the tendency of judges to sound like they are giving a dressing-down to the profession. Second, I have to pretend that I know something about social media, something that I, until relatively recently, thought referred to the gossip columns in the Daily Telegraph. Third, I have to make my address more interesting than posting, tweeting, gramming or snapping on your smartphones.

3. While I will endeavour to avoid lecturing you on discovery and making egregious errors in speaking about social media, I cannot assure you that I will be more exciting than looking at cat videos, surfing through memes, playing candy crush saga or face swapping.

4. If however, you are inclined to use social media while listening to my address, I would personally recommend, without any bias, that you visit the Supreme Court's Twitter and Facebook pages. Our handle is @NSWSupCt.

* I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

5. On a more serious note, the advent of social media and the increasing amount of information on social media sites has important implications for litigation.

6. As of the first quarter of 2016, Facebook has 1.65 billion active monthly users, i.e. users who have logged in to Facebook in the last 30 days.[1] Out of those, approximately 15 million are Australian users. This means that 62.5% of the Australian population now have a Facebook account and almost 50% access social media every day. Australian users are some of the most prolific users of social media, spending an average of 8.5 hours per week on the site, 24% of them 'checking in' more than 5 times a day.[2]

7. Social media sites contain a wealth of information that would previously have been considered private, such as information on users' location, daily activities, personal relationships and opinions. As you can imagine, this information has been described as "the stuff of discovery dreams".[3]

8. However, there are many features of social media evidence that create issues in regard to discovery. I will discuss some of these issues today. I will first talk on the discoverability of social media evidence, including discussing issues surrounding relevance and limiting social media discovery requests. I will then discuss issues relating to the destruction of social media records and the responsibilities of legal professionals in this respect. Despite the use of social media evidence in a range of cases, there has been little discussion in Australia of these issues. That being said, in my view, the existing discovery framework is flexible enough to cope with this new form of evidence.

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[1] Statista, 'Number of monthly active Facebook users worldwide as of 1st quarter 2016 (in millions)', available at <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>.

[2] Sensis, 'Sensis Social Media Report May 2015: How Australian people and businesses are using social media', available at <https://www.sensis.com.au/assets/PDFdirectory/Sensis_Social_Media_Report_2015.pdf>.

[3] Steven S Gensler, 'Special Rules for Social Media Discovery?' (2012) 65 *Arkensas Law Review* 7.

What is 'Social-Media'?

9. Before I begin talking about the discoverability of social media records, let me say something briefly about the features and functions of social media that I will be referring to today, if only for the people like me in the audience who are not social media gurus. I will trust to the lettered generations in the audience, i.e. those from Gen X, Y, Z or 'I', to correct my more egregious errors – gently – during the refreshments and networking break following my talk.

10. Social media refers to a variety of online platforms which are centred on social interaction. These platforms defy the traditional one-way model of distribution and consumption in other forms of media. In traditional models, such as print, TV and radio, content is created at a central source and distributed to consumers in a one-way, usually dead-end direction. Letters to the editor and talk back radio are limited exceptions within this traditional model. With social media, content is not merely consumed by users, it is also created, organised and distributed by them. Social media platforms thereby create a dialogue between different people, allowing them to communicate and share information.

11. Facebook, the most common social media platform, is an online social networking service that allows users to create a profile, add other users as 'friends', share information through status updates, upload photos, join common interest groups, and send private messages.[4] Twitter, another commonly used social media platform, allows users to post 140 character 'tweets', follow other users and reply to 'tweets'. Other social media platforms include Instagram, for sharing photos, Snapchat, for sending temporary images and videos, LinkedIn, for sharing employment information, and hundreds of others such as Pinterest, GooglePlus, MySpace and Youtube.

12. Social media platforms are interactive and enable users to communicate with the public at large and with other users. These communications can incorporate text, graphics and videos, can be reports on daily activities,

[4] See A Blackham and G Williams, 'Australian Courts and Social Media' (2013) 38 *Alternative Law Journal* 170.

blog posts, conversations via private or publically viewable messages, the sharing of content such as video clips and news articles, the joining of groups, the planning of events, advertising, or any other virtual interactions between users and the platform itself.

13. Most social media sites enable users to set various privacy controls that limit who they can interact with and who can see their personal information. Users can set different levels of privacy based on the status of the communication. For example, depending on privacy settings, users' status updates on Facebook may be public and accessible to all web users, or may only be accessible to a select audience. The capacity for users to limit the audience of their communications can encourage them to divulge informal, frank, and often highly personal information.

14. The average social media profile contains a range of information which may be relevant to litigation such as "a person's hometown, date of birth, address, occupation, ethnicity, height, relationship status, income, education, associations, 'likes', and an array of comments, messages, photographs, and videos."[5] As stated by one commentator,

> "users can share ... tasteless jokes, updates on their love lives, poignant reminiscences, business successes, petty complaints, party photographs, news about their children, or anything else they choose to disclose. ... Facebook and its ilk allow an individual to self-report a more or less permanent record of ... daily activities, and ... thoughts. ... [T]hese thoughts are often unfiltered, since they are intended only for 'friends', and the idiom for social-networking posts seems to encourage sarcasm, humour, cynicism, or anger, none of which translate well into other contexts."[6]

[5] Michael Legg and Lara Dopson, 'Discovery in the Information Age: The Interaction of ESI, Cloud Computing and Social Media with Discovery, Depositions and Privilege' [2012] UNSWLRS 11.
[6] Bruce E Boyden, 'Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law' (2012) 65 *Arkansas Law Review* 39.

The Discoverability of Social Media Information

15. The threshold question that I will consider today is whether the information contained on social media sites is discoverable. In answering this question, it is important to keep in mind that the discovery regime is not tied to any particular type of information. The definition of 'documents' in New South Wales refers to "any record of information".[7] This clearly includes information contained on social media sites. However, there are a number of aspects of the discovery regime that raise interesting questions in regard to social media. Before I discuss these, I will provide a brief overview of the discovery regime in New South Wales and at the Federal level.

16. In both the Supreme Court and Federal Court, orders for discovery are not made "as a matter of course" and can only be made by court order.[8] In the Federal Court, the practice note on discovery states that an order will only be made if "necessary for the determination of issues in the proceeding".[9] The onus is on the applicant to demonstrate that discovery will "facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible".[10] The Court will fashion an order for discovery to suit the issues in the case and the purposes of discovery. In considering whether to make an order,

> "the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely benefit of discovery and the likely cost of discovery and whether that cost is proportionate to the nature and complexity of the proceeding".[11]

In a similar vein, in New South Wales, the Equity Division General Practice Note states that the court will not make an order for discovery unless such

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[7] *Evidence Act 1995* (NSW) Dictionary; *Supreme Court Rules 1970* (NSW) r 1.8.
[8] See Federal Court of Australia, *Practice Note CM5 – Discovery,* 1 August 2011 ('*Practice Note CM5*'); *Uniform Civil Procedure Rules 2005* (NSW) ('*UCPR*') r 21.2.
[9] *Practice Note CM5*.
[10] *Federal Court Rules 2011* (Cth) r 20.11.
[11] *Practice Note CM5*.

an order "is necessary for the resolution of the real issues in dispute in the proceedings".[12]

17. The baseline determinant of discoverable information is relevance. In New South Wales, the court can only order discovery in respect of documents which are "relevant to a fact in issue", i.e., those which could "rationally affect the assessment of the probability of the existence of that fact".[13] In the Federal Court, in general, discovery orders can only be made in respect of documents that are "directly relevant to the issues raised by the pleadings or in the affidavits".[14] These documents must also adversely affect or support one of the party's arguments.[15]

18. Therefore, in order to be discoverable, social media evidence must first be relevant to the specific issues in dispute. It is clear from a number of cases in Australia that social media evidence can satisfy this requirement. Indeed, social media evidence can often be crucial to the outcome of a case.

19. In personal injury cases, social media evidence may be relevant if photos or posts reveal a plaintiff engaging in activities that belie their claims of incapacity, loss of enjoyment or emotional-distress.

20. For example, in *Frost v Kourouche*,[16] heard last year in the New South Wales Court of Appeal, a pedestrian, Ms Kourouche, a community leader and speaker, had brought a claim for damages for psychological injury against a driver, Ms Frost, who had collided with her. In making the claim, she stated that she had not done any public speaking and had "no social activities with friends or relatives" since the collision.[17] Unfortunately for her, evidence from her Facebook and Twitter accounts revealed that she had taken a holiday, attended a public forum, had a "great night with friends" and presented a paper for International Women's Day.[18]

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[12] Supreme Court of New South Wales, *Practice Note No SC Eq 11 – Disclosure in the Equity Division,* 22 March 2012.
[13] *UCPR* r 21.1.
[14] *Federal Court Rules* r 20.11.
[15] *Federal Court Rules* r 20.14.
[16] [2014] NSWCA 39; 86 NSWLR 214.
[17] Ibid at [11].
[18] Ibid at [11].

21. In another case, the Victorian Court of Appeal held that "evidence of the appellant's active engagement on social media", including her engagement in "prolific conversations", as well as surveillance films depicting her socialising and walking without a limp, could have led a jury to conclude that this was inconsistent with her claims regarding her alleged acquired brain injury and depression.[19]

22. Social media evidence may also be relevant in family law proceedings, to prove infidelity or misconduct. Family law practitioners have reported that litigants are increasingly asking their former partners to disclose their Facebook and Twitter accounts as well as to disclose account passwords for instant messaging services such as iMessage and WhatsApp.[20] For example, in *Marbow v Marbow,*[21] a case where the court was tasked with determining the best interests of children, private Facebook messages were examined to determine whether, and in what circumstances, the children should spend time with their mother.

23. Social media information may also be relevant to a wide variety of other cases such as criminal cases or discrimination cases. In *Ramazan Acar v The Queen*,[22] a case involving the murder of an infant daughter by her father, the father's Facebook page and messages were examined by the court in determining whether the offending was connected to a personality disorder. In *Glen Stutsel v Linfox*,[23] concerning an unfair dismissal claim, the applicant was dismissed for posting a number of racially derogatory, discriminatory and harassing comments about his managers on Facebook. The finding was made despite the fact that the applicant maintained that his Facebook account was created with maximum privacy restrictions.

24. It is clear from these cases that social media records have the potential to be relevant to a number of different types of disputes. However, it ought to be kept in mind that even if documents are relevant, courts can nonetheless

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[19] *Munday v Court* [2013] VSCA 279; 65 MVR 251 at [15], [38].
[20] Ross Bowler, 'Social Media, Evidence and Family Law Litigation', 5 April 2014, available at <http://www.bbal.com.au/social-media-evidence-family-law-litigation/>; C Keller, 'Facebook Used in One of Five Family Court Cases', *The Advertiser (Australia)*, 22 April 2012.
[21] [2012] FAMCA 24.
[22] [2012] VSCA 8.
[23] *Glen Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444.

use their discretion to refuse to make an order for discovery if such an order is not necessary or proportionate. Both the New South Wales and Federal Court rules make it clear that orders for discovery will only be made in limited circumstances. A court will balance the time, cost and burden of providing discovery against the theoretical possibility that the order will yield relevant information.[24] Electronically stored information, such as that contained on social media sites, will not be discoverable if it is unlikely to contain information beyond that which is "merely formal or insignificant".[25] Moreover, where compliance with an order for discovery would be overly burdensome, there is some authority in New South Wales that discovery must be necessary to prove a particular fact.[26]

25. The potentially voluminous nature of social media records makes it important for courts to exercise their case management powers to limit the scope of discovery. This is particularly the case if lawyers attempt to engage in fishing expeditions by seeking orders for discovery of all of the information contained in a party's social media account.

26. In other jurisdictions, judges appear to be limiting such requests. As an example, in the United States case of *Mackelprang*,[27] the plaintiff sued her former employer for sexual harassment. Her employer subsequently obtained public information from two MySpace accounts that were allegedly run by the plaintiff, one indicating that she was single with no intention of having children, the other indicating that she had six children.[28] The employer sought discovery of all of the private messages sent via the MySpace accounts. He argued that the messages could contain admissions and may establish that the Plaintiff's alleged severe emotional distress was caused by factors outside of his misconduct.[29]

27. The District Court of Nevada held that the plaintiff could not be compelled to produce all of her private MySpace messages, as this would result in the

[24] *Slick v Westpac Banking Corporation (CAN 007 457 141)(No 2)* [2006] FCA 1712 at [41], [43].
[25] *NT Power Generation Pty Ltd v Power & Water Authority* [1999] FCA 1669 at [17].
[26] *New Cap Reinsurance Corporation Ltd (In Liq) & 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [67].
[27] *Mackelprang v Fidelity National Title Agency of Nevada, Inc* 2007 WL 119149.
[28] Ibid at 2.
[29] Ibid at 6.

defendant obtaining irrelevant information.[30] However, the court indicated that the defendant would be able to pursue a more limited discovery request to determine whether the accounts belonged to the Plaintiff and other information directly relevant to the sexual harassment claim.[31]

28. In another case, *EEOC v Simply Storage,* two plaintiffs sought damages from their employer for emotional distress caused by sexual harassment. The employer stated that the entire content of the plaintiffs' social media accounts was relevant, both in terms of what communications were made, and what communications were not made. The court rejected this argument and ordered that the plaintiffs only needed to produce actual entries related to their mental state.[32]

29. I expect that this trend of limiting discovery requests for entire social media accounts will be followed in Australia, particularly given the increased focus in recent years on case management and limiting discovery. As one United States Court held, allowing complete access to a plaintiff's social media accounts "would permit [the] defendant to cast too wide a net. … [The] [d]efendant is no more entitled to such unfettered access to plaintiff's personal email and social networking communications than it is to rummage through the desk drawers and closets in [a] plaintiff's home."[33]

30. However, that is not to say that the entirety or most of a party's social media account can never be wholly relevant or subject to an order for discovery. In another United States case, parents brought a claim of breach of contract, breach of fiduciary duty and negligence against their daughter's former high school after the high school expelled her for cheating.[34] The parents alleged that the school allowed their daughter to be bullied to such a great degree that she was driven to cheat. It was alleged that the student had been taunted via text messages and on Facebook. As a preliminary matter, the defendants sought discovery of all information in the student's former Facebook account related to the teasing and taunting and all

[30] Ibid at 7.
[31] Ibid at 8.
[32] *EEOC v Simply Storage Management, LLC* 270 FRD 430 (2010) ('*Simply Storage*') at 434-436.
[33] *Ogden v All-State Career School No. 2 13CV406*, 2014 WL 1646934 (2014) at 4.
[34] *Bass ex rel. Bass v Miss Porter's School* 738 F.Supp.2d 307 (2010).

communications related to the allegations.[35] The parents subsequently served a subpoena on Facebook to retrieve records of their daughter's former Facebook account. Following an in-camera review of the records, the District Court of Connecticut determined that the entirety of the Facebook record, which included "750 pages of wall postings, messages, and pictures" contained information relevant to the subject matter of the litigation, and was thus discoverable by the defendants.[36]

31. These cases demonstrate that ultimately, the extent to which social media records will be discoverable is a matter for the court. Courts in Australia will fashion orders for discovery to suit the particular issues in the case at hand and the purposes of discovery. While the discovery of social media records is unique, the existing rules provide the courts with the discretion to take into account the complexities of social media evidence. The social media context does not eliminate the need to prove that all of the information sought will be relevant to the facts in issue in a dispute. As stated in the *Simply Storage* case, "the difficulty of drawing sharp lines of relevance is not a difficulty unique to the subject matter of this litigation or to social networking communications."[37] Indeed, courts in Australia have "endorse[d] a flexible rather than prescriptive approach to discovery to facilitate the making of orders to best suit each case."[38]

32. In order to assist the court and facilitate the just, quick and cheap resolution of proceedings, before a request is made for discovery of information contained on social media, parties themselves should consider the best way to limit such requests. Both the New South Wales and Federal Courts encourage pre-discovery conferences, whereby parties 'meet and confer' to reach agreement about the protocols for the electronic exchange of documents and to resolve issues regarding document management, such

[35] *Bass ex rel. Bass v Miss Porter's School* 2009 WL 3724968 at 1.
[36] Ibid at 1-2.
[37] *Simply Storage* at 436.
[38] Supreme Court of New South Wales, *Practice Note No SC Eq 3 – Supreme Court Equity Division – Commercial List and Technology and Construction List,* 12 October 2008 (*'Commercial and Technology Lists Practice Note'*).

as data preservation and privileges.[39] In the Equity Division of the Supreme Court, a practice note sets out that lawyers on opposing sides must meet at an early stage of the proceedings in order to reach an agreement as to the nature and extent of discovery.[40] These conferences enable parties to narrow the scope of discovery and support more effective electronic discovery management by the courts. As stated by the Victorian Law Reform Commission,

> "while the Court can encourage certain practices through case management, the parties are the only ones in a position to know the extent of documentation in particular areas, and where limiting discovery will produce real cost savings."[41]

33. As such, courts should encourage parties to limit discovery requests for social media evidence so that only information which is directly relevant to the facts in issue and is necessary to resolving the particular dispute is subject to a discovery request.

34. One subsidiary issue that has arisen in other jurisdictions is whether social media evidence can be considered to be within a party's possession, custody, power or control. A document must satisfy one of these definitions in order to be discoverable.[42]

35. Like information contained in the cloud, the information on social media sites such as Facebook and Twitter is not stored on an individual user's computer. Instead, this information is stored on the site's servers. This means that individuals may not be the custodians of the records produced on such sites. However, the obligation to provide discovery extends to documents over which a party has 'custody' or 'power', even in absence of a legal right to possession of documents. For the purposes of discovery, 'custody' means the mere actual physical or corporeal holding of a

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[39] See Supreme Court of New South Wales, *Practice Note SC Gen 7 – Use of Technology,* 9 July 2008 at [12]; Federal Court of Australia, *Practice Note CM6 – Electronic Technology in Litigation,* 1 August 2011.
[40] *Commercial and Technology Lists Practice Note*.
[41] Victorian Law Reform Commission, 'Civil Justice Review' (Report 14, 2008) p 459.
[42] *Federal Court Rules* r 20.14(1)(c), Dictionary; *UCPR* r 21.3, Dictionary; *Civil Procedure Act 2005* (NSW) s 3.

document, regardless of who has legal possession.[43] 'Power' means an enforceable right to inspect or obtain possession or control of a document from the person with custody over it.[44]

36. Individuals have an actual and immediate ability to examine the information contained on their own social media pages and have the power to obtain information stored on their own social media accounts, even if they do not have ownership of this information. As one commentator in the United States has argued,

> "[i]n the context of access-limited social networking content, users have the ability – and arguably the legal right – to obtain third-party information posted to friends' profiles. The 'legal right to obtain' … standard likely encompasses all manner of third-party social-networking content, including relevant photos, wall posts, and status messages."[45]

Another commentator has noted that "[a]lmost without exception, the [social media] information sought by parties to civil litigation is in the possession of, and readily accessible to, a party to the litigation".[46]

37. As much is recognised by Facebook's Statement of Rights and Responsibilities, which states that "[y]ou own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings."[47]

38. While there does not appear to be any specific cases on this issue, it would seem that the same rules should apply to information stored on other websites. In the United States copyright case of *Netbula v Chordiant Software,*[48] the defendant sought production of the plaintiff's webpages, which had automatically been archived by a data storage service referred to

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[43] See *Roux v Australian Broadcasting Commission* [1992] 2 VR 577; *Commissioner of Taxation (Cth) v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499; *Reid v Langlois* (1849) 1 Mac & G 627; 41 ER 1408.
[44] See *Supreme Court Civil Rules 2006* (SA) r 4; *B v B* [1978] Fam 181; [1979] 1 All ER 801; *Psalidis v Norwich Union Life Australia Ltd* (2009) 29 VR 123.
[45] Evan E North, 'Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites' (2010) 58 *University of Kansas Law Review* 1279, 1279.
[46] John G Browning, 'Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites' (2011) 14 *SMU Science and Technology Law Review* 465, 473.
[47] Facebook, 'Statement of Rights and Responsibilities', 30 January 2015, available at <https://www.facebook.com/legal/terms>.
[48] *Netbula, LLC v Chordiant Spftware Inc, No C08-00019*, 2009 WL 335288 (2009).

as ‘the Wayback Machine’. Not to be confused with the famous Delorium from Back to the Future, this service allows users to access former versions of webpages from the past; the company has not yet developed capabilities to allow access to future versions of webpages, but Michael J Fox is said to be encouraging the effort.

39. The plaintiff argued that copies of its old webpages were not in its possession or control, and were thus not discoverable. However, the Court found that the plaintiff had “a legal right to obtain the documents on demand” and only needed to disable one function on its website to enable the defendant to access the old version of the webpage on file in the ‘Wayback Machine’.[49]

The Destruction of Social Media Information

40. Let me now move on to discuss the destruction of social media evidence. Under the common law, if a party destroys discoverable material, this can constitute contempt, particularly if litigation is already on foot. In Australia, courts have the power to stay and or dismiss proceedings, in whole or in part, where a party has deliberately destroyed discoverable material.[50]

41. Parties facing litigation might understandably be tempted to delete potentially adverse material on their social media accounts. While deleting a Facebook image, deleting a tweet, editing a status update or removing a ‘like’ may seem less illicit than shredding or burning paper documents, the reality is that in this day and age the two may amount to the same thing.

42. While there seems to be a dearth of cases dealing with the destruction of social media evidence, there have been cases on the destruction of other electronically stored evidence. It should be assumed that as social media evidence can be relevant and discoverable, it should be treated the same as other electronically stored information.

43. In two cases involving a Ms Palavi, the New South Wales Court of Appeal held that the court can sanction a plaintiff who destroys relevant evidence,

[49] Ibid at 2.
[50] *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264; *Arrow Nominees Inc v Blackledge* [2000] EWCA Civ 200; [2000] All ER (D) 854.

including photos and text messages on an iPhone, if such destruction constitutes an attempt to pervert the course of justice.[51]

44. In the first case, Ms Palavi had sued Radio 2UE for defamation for imputing that she ran a brothel and arranged sexual liaisons between NRL players and underage girls.[52] Radio 2UE alleged that Ms Palavi's mobile phones contained evidence relevant to its defence of truth, as they were used to send and receive sexually explicit text messages and were the means by which Ms Palavi organised sexual liaisons. It also alleged that her Facebook account contained relevant evidence, as she had publicised her relationship with footballers on Facebook.

45. Despite being warned that her mobile phones, Facebook and MySpace pages would be the subject of a discovery request, and being asked not to destroy any material,[53] Ms Palavi publically broadcasted on her Facebook account her intention to delete relevant images. Evidence from her Facebook account revealed that soon after being warned, she posted the following question, "this is gonna sound stupid but how do I get pics off my iPhone that I don't want? Like ones that have synced from computer?".[54] Ms Palavi subsequently disposed of two of her mobile phones and deleted images on another iPhone. Her Facebook post was used in evidence to support the conclusion that she had deliberately deleted the images.[55]

46. As a result, the trial judge struck out two of the imputations in the defamation claim. The Court of Appeal upheld the trial judge's findings. Justice Allsop stated that:

> "The deliberate destruction of discoverable material in knowing defiance of discovery obligations that produces the real risk of impairment to the case of the other side may lead to restrictions on what points litigants can run or to the striking out of all or parts of their claims.

[51] *Palavi v Radio 2UE Sydney*; *Palavi v Queensland Newspapers Pty Ltd* [2012] NSWCA 182.
[52] *Palavi v Radio 2UE Sydney*.
[53] Ibid at [21].
[54] Ibid at [33].
[55] Ibid at [82].

> Here the fairness of the trial was put in jeopardy by the deliberate … destruction of evidence central to the case rendering further proceedings unsatisfactory in that they would be unfair and unjust to the respondent. [56]

47. As an interesting side note, highlighting the potential difference between public and private communications, Justice McColl dissented and found that on the balance, the information on the mobile phones was not relevant to the inferences in the defamation claim. Justice McColl highlighted the private nature of communications on mobile phones. She stated that the imputations were that Ms Palavi "'publicised her role as a facilitator of sexual liaisons between women and NRL footballers'. That proposition was clearly directed to public communications, not private conversations/communications on mobile phones."[57]

48. Ms Palavi also brought defamation proceedings against Queensland Newspapers. Queensland Newspapers also applied for an application to strike out the case due to Ms Palavi's destruction of one iPhone and communications and images on another iPhone, which were allegedly sexually explicit and relevant to the case. As in her case against Radio 2UE, the Court found that Ms Palavi's conduct in destroying relevant material "was conduct that had the tendency to impair the court … from determining the matter on the basis of the 'true circumstances of the case'". [58]

49. In the *Palavi* litigation, the plaintiff had clearly been put on notice that the evidence on her mobile phones and social media accounts might be relevant to the litigation. It is an interesting question as to whether the same result would have followed if she did not have notice that the information was potentially discoverable. The informal and vast nature of social media information makes it highly ephemeral. Pictures and comments are put online and deleted frequently, often without any effort or thought. Courts must strike a balance between the significant interest in preserving evidence that may be relevant to litigation and reducing the burdens

[56] Ibid at [93]-[94].
[57] Ibid at [192].
[58] *Palavi v Queensland* Newspapers at [56].

associated with preserving electronic evidence of this nature. Sanctions should only be considered where conduct amounts to an attempt to pervert the course of justice.[59]

50. Related to a party's duty not to destroy discoverable evidence is a lawyer's obligation to instruct clients to preserve all potentially relevant information. Solicitors should ensure that their clients understand the nature and extent of their discovery obligations and have a duty to ensure that full and proper disclosure of documents is made.[60] Section 177(1) of the now repealed New South Wales Legal Profession Regulations stated that lawyers could not advise clients to destroy documents in their possession or control if they were aware that "it [was] likely that legal proceedings [would] be commenced in relation to which the document may be required".[61] While this provision does not appear in the Uniform Solicitor's Conduct Rules,[62] it seems patent that such advice would be in breach of a solicitor's paramount duty to the court and responsibility to advise clients about disclosure obligations.[63]

51. Clients can often be unaware of their duties in regard to disclosure and preserving evidence. Indeed, many clients may be tempted to destroy, delete or remove documents unfavourable to their case. As information contained on social media may be discoverable, legal practitioners should be particularly careful to advise clients not to destroy information that may be relevant to their case. As demonstrated by the *Palavi* cases, the destruction of such evidence may lead to the striking out of claims and other adverse consequences for clients.

52. Even more importantly, solicitors should never advise clients to 'clean up' their social media accounts in preparation for litigation. An extreme example of how this can go wrong is illustrated in the United States case of

[59] Ibid at [55]; *British American Tobacco Australia Services Ltd v Cowell (Representing the Estate of McCabe (Deceased))* [2002] VSCA 197; (2002) 7 VR 524.
[60] *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 2 All ER 98; [1968] 1 WLR 693.
[61] *Legal Profession Regulation 2005* (NSW) s 177(1).
[62] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).
[63] See *McCabe v British American Tobacco Australia Service Ltd* [2002] VSC 73.

Lester v Allied Concrete.[64] In that case, Mr Lester sought compensation for the wrongful death of his wife. The defendant served Mr Lester with a discovery request for screenshots of his Facebook page, including pictures, his profile, his message board, status updates and all messages sent or received. Attached to the request was a copy of a photo on Mr Lester's account depicting him with a beer can in hand and wearing a t-shirt emblazoned with 'I ♥ hotmoms'. This was said to be relevant to Lester's state of mind following his wife's death.

53. After receiving the discovery request, Mr Lester's lawyer instructed him to "clean up" his Facebook and MySpace pages as, "[w]e don't want any blow-ups of this stuff at trial". Consistent with his lawyer's instructions, Mr Lester deleted his page and informed the defendant that he did not have a Facebook account. Subsequently, after receiving a motion to compel discovery, he reactivated his page and deleted 16 photos. Subpoena's issued by the defendant and expert evidence revealed that the photos had been deleted and revealed the email chain between lawyer and client, which the lawyer had attempted to conceal.

54. The court found that not only was Mr Lester in breach of his duty to disclose and produce the social media evidence, but his lawyer was in breach of his obligations under the court's rules. The lawyer was ordered to pay $542,000 in fees and expenses and was referred to the bar association for consideration of disciplinary action. Mr Lester was also ordered to pay $180,000 in fees and expenses.[65]

55. The lawyer in *Lester* paid a high price for the breach of his duties. If similar circumstances arose in this jurisdiction, it seems highly likely that a solicitor would be subject to disciplinary action for failing to adhere to their paramount duty to the court and the administration of justice.

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[64] *Allied Concrete Company v Lester* No 120074, 120122 (Sup Ct Virginia, 10 January 2013).
[65] *Lester v Allied Concrete Co,* Case No CL08-150, CL09-223 (Circ Ct Charlottesville), available at <http://www.x1.com/download/Lester_v_Allied_Concrete_Final_Order.pdf>.

Conclusion

56. There are many other interesting issues which arise in regard to social media evidence. For example, courts in the United States have had to grapple with questions regarding the right to privacy. In the United States, courts have generally found that users do not have a reasonable expectation of privacy with respect to information on social media platforms. In the case of *Romano v Steelcase,* where the defendant in a personal injury claim sought access to the plaintiff's current and historical Facebook and MySpace pages and accounts, the Court noted that "as neither Facebook nor MySpace guarantee complete privacy, [the] plaintiff has no legitimate reasonable expectation of privacy … MySpace warns users … that their profiles and MySpace forums are public spaces, and Facebook's privacy policy set[s] forth … that '[y]ou post User Content … on the Site at your own risk … [I]f you disclose personal information … this … may become publically available.'"[66]

57. Interesting legal issues also arise when parties attempt to subpoena social media documents from Internet Service Providers and social media sites themselves, many of which are located overseas. I will not discuss these issues today. However, what I will say is that the growth of the amount of information contained on social media and the increasing amount of recorded information is likely to create new and unforeseeable challenges for the legal profession. Like it always has, the law will have to evolve to meet these challenges. As stated by one commentator, "[t]hough I do not think we are there yet, the day cannot be far off when a lawyer who does not understand social-media discovery will struggle to achieve discovery competency."[67]

58. You know better than me about the difficulties presented by technology in civil litigation. I practiced at a time when I received small briefs tied with red tape and when discoverable information was found by sorting through manila folders and filing cabinets. I was also under the impression for a good part of my life that the word 'cloud' solely referred to "a visible mass of

[66] *Romano v Steelcase Inc* 907 N.Y.S.2d 650, 656 (Sup Ct. 2010).
[67] Gensler, above n 3, 9.

condensed watery vapour floating in the atmosphere".[68] Now, with electronic communication over email and social media virtually overtaking written communication, the factual matrix of a dispute can lie buried in hundreds or even thousands of records of electronically stored information.

59. With all that being said, in my view, the issues that I have discussed today in regard to the discoverability of social media evidence and the destruction of such evidence do not necessarily call for the creation of new rules. Courts need not overcompensate for technological change when the fact that a particular communication has occurred over social media, for example, in the form of a private Facebook message, as opposed to in written form, is not of any significance. The existing rules of procedure and evidence can be applied. While social media may be a brave new world for judges and practitioners, our existing rules on discovery are flexible enough to deal with this evolving communication platform.

60. The fact that social media sites have created a new paradigm for social interaction does not alter the discoverability of this information. It simply means that both courts and parties should take account of the unique features of social media evidence when devising appropriate orders for discovery.

61. With that, I will conclude my address. If you happened to miss anything while you were busy updating your Facebook statuses and looking at cat videos, please note that the address will soon be condensed to a convenient 140 character tweet.

[68] Oxford Dictionary Definition of 'Cloud', available at <www.oxforddictionaries.com/definition/english/cloud>.