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Editor: Karen L. Dyck,
Loss Prevention Coordinator

c/o 250 Yonge Street
Suite 2900
Toronto, Ontario
M5B 2L7
Email: karen.l.dyck@gmail.com

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■ Bulletin # 188 Acting as an Escrow Agent

Are you holding money or property for a client in an escrow arrangement or have you been approached by a client to do so?

If so, you ought to consider whether your professional liability insurance would cover you in this activity if an error is made. In many cases, the answer is no. Unless you are providing escrow services that are incidental to your professional services (for example, if you are holding funds on a short term basis pending the closing of a transaction in which you have been retained to provide legal services) your activities likely fall outside the scope of coverage of your professional liability insurance policy.

Your CLIA policy provides you with coverage for errors that occur in the rendering of professional services. Professional services include services normally provided by a lawyer within the ambit of the lawyer-client relationship, as well as services provided incidental to such services, but do not include ancillary activities. Ancillary activities are defined as those services provided by an insured lawyer for compensation or personal benefit that are of a quasi-legal or non-legal nature and are provided independent of the practice of law. Examples of ancillary activities include (but are not limited to) financial, investment and accounting services, brokerage services or real estate development and appraisal services. If you are acting solely in the capacity of an escrow agent, your services likely fall within the definition of ancillary activities and therefore would not be covered under your liability insurance policy.

In considering whether to take on responsibilities under an escrow agreement, you should also refer to your local law society's trust accounting rules. Only money you have received on behalf of a client and in connection with your legal practice can be held in your pooled trust account. If you are not providing legal services and are rather just holding the funds, in the way that a bank or trust company would, those funds must be held outside your

trust account. In those circumstances, also keep in mind that when client monies are not held in trust, your client is not protected by the provisions of your law society's compensation or defalcation fund.

For more information on this topic see also:

- CLIA Loss Prevention Bulletin No. 9, Bulletin 50: *Risks for lawyers as escrow agents, stakeholders and trustees*
- Law Society of Manitoba Communiqué, January 2009, *Escrow Agents* by Tana Christianson

■ Bulletin # 189 Do you use Facebook?

While materials proliferate on the use of new media and social networking tools by lawyers, relatively little has been said about lawyer's developing responsibility to consider and use tools such as Facebook in the course of conducting litigation.

In the past year, the Ontario Superior Court has twice issued decisions requiring a party to disclose, preserve and produce their personal Facebook profile. In *Wice v. Dominion of Canada General Insurance Company*, 2009 CanLII 36310 (ON S.C.) the court ordered production of a further and better Affidavit of Documents by the plaintiff disclosing all documents posted on his Facebook profile and also ordered preservation of the information contained in his Facebook profile for the duration of the litigation. In coming to this decision, the court relied upon its earlier decision in *Leduc v. Roman*, 2009 CanLII 6838 (ON S.C.) which confirmed that an individual's Facebook profile pages, whether publicly available or open only to "friends" meet the definition of documents under the applicable Ontario Rules of Civil Procedure and as such ought to be disclosed and preserved for discovery. The court in *Leduc* also stated that:

The Rules of Civil Procedure also impose an obligation on a party's counsel to certify that he has explained to the deponent of an affidavit of documents "what kinds of documents are likely to be relevant to the allegations in the pleadings": Rule 30.03(4). Given the pervasive use of Facebook and the

large volume of photographs typically posted on Facebook sites, it is now incumbent on a party's counsel to explain to the client, in appropriate cases, that documents posted on the party's Facebook profile may be relevant to allegations made in the pleadings.

More recently, the Ontario Superior Court declined, on an ex parte motion, to require a plaintiff to preserve her Facebook profile, absent evidence that the contents were relevant to the litigation. The plaintiff, in *Schuster v. Royal & Sun Alliance Insurance Company of Canada*, 2009 CanLII 58971 (ON S.C.), had restricted full access to her profile to "friends only" and the defendant was not therefore able to access the information without her consent. The court stated that it could not, under the Rules, require the plaintiff to provide the defendant with access to her profile, although the defendant had not asked for that access, and went on to say that:

I do not regard the mere nature of Facebook as a social networking platform or the fact that the Plaintiff possesses a Facebook account as evidence that it contains information relevant to her claim or that she has omitted relevant documents from her Affidavit of Documents. The photographs that the Defendant has obtained from the Plaintiff's account in the present case do not appear, on their face, to be relevant.

The Superior Court of Newfoundland has made negative inferences as to a plaintiff's credibility on the basis of the plaintiff's responses when confronted by the defence with printouts of information from his publically available Facebook profile. In *Terry v. Mullooney & Terry v. Sinclair*, 2009 NLTD 56 (CANLII), the court held that:

While not getting into the details of these excerpts, they convince me that Mr. Terry (at least in the few months just prior to his testimony in Court recorded on Facebook) had a rather full and active social life.... Without this evidence, I would have been left with a very different impression of Mr. Terry'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 Mr. Terry 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.

And, in Alberta, a Master of the Court of Queen's Bench made an order for service of documents that included a

requirement to post notice on Facebook. The order for substitutional service of a Statement of Claim in *Knott v. Sutherland, et al.* (Alberta Q.B., Edmonton Centre, Action No. 0803 02267, February 5, 2009) required the plaintiff to serve the amended Claim on the defendant by, inter alia, posting it on the defendant's Facebook profile (presumably, on the "Wall" although the order does not specify.)

What these decisions highlight is the necessity for litigators to be both aware of the social networking tools available around them and sufficiently savvy in the use of those tools so as to effectively relay to clients the necessity of disclosing and preserving the contents of those sites where relevant to an ongoing or pending litigation matter. Equally, these cases point to the need for litigators to develop a level of proficiency in use of these tools in order to make appropriate and sufficiently detailed requests for preservation of sites or pages created by opposing parties, and to use that technology creatively to advance their own case and to further the litigation process.

A related issue not addressed in these decisions is a lawyer's professional obligation to be competent in the technological aspects of his or her practice. The Canadian Bar Association's *Guidelines for Practising Ethically with New Information Technologies* sets out the nature of this obligation in some detail, referring to obligations under Chapter 2 (competence and quality of service) of the Model Code of Professional Conduct and states that:

... To meet the ethical obligation for competence in Rule II, lawyers must be able to recognize when the use of a technology may be necessary to perform a legal service on the client's behalf, and must use the technology responsibly and ethically.

Lawyers may satisfy this duty by personally having a reasonable understanding of the technology and using it, or by seeking assistance from others who have the necessary proficiency. Lawyers also need to have a reasonable understanding of the technologies that their clients are using, when such knowledge is relevant to providing legal advice.

In considering whether or not to adopt and learn about new social networking technologies, lawyers should keep in mind that failing to meet the level of technological competency and facility reasonably expected of a lawyer could potentially result in a law society complaint and might also form the basis for a claim of professional malpractice.