

# Ethical Issues in Documentary and Oral Discovery

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# Overview

1. Producing relevant documents (even when they are harmful to your client's case).
2. Communicating with your clients during examinations for discoveries.
3. Correcting "incorrect" evidence given by your clients on discovery.
4. Drawing the line: When can you walk out of a discovery?
5. Think before you undertake: the effect of giving an undertaking.
6. Investigating another party on social media websites: The fishing expedition v. the smoking gun.

## Producing Relevant Documents (even when they are harmful to your client's case)

- This duty stems from the *Rules of Professional Conduct*, rule 4.01(4), regarding discovery obligations.
- Characterizing relevancy: An ethical dilemma arises in characterizing 'relevancy'.

## **Producing Relevant Documents (even when they are harmful to your client's case)**

- **Indirect Duty to Produce All Relevant Documents:**  
The duty to make full disclosure is imposed on the client and only indirectly on the lawyer - counsel must explain this duty to the client and assist the client in fulfilling these obligations, but ultimately the duty to make full disclosure rests with the parties.

# Communicating with Your Clients During Examinations for Discoveries

- **Communication between counsel and a witnesses giving evidence is addressed under *Rule 4.04*.**
- **Starting Point: Rules on communicating with witnesses during discoveries do not apply in exactly the same manner as they would during trials.**

# Communicating with Your Clients During Examinations for Discoveries

**Modified Rules for communicating with discovery witnesses:**

- 1. Where a discovery is to last no longer than a day, counsel for the witness should refrain from having any discussion with the witness during this time.**
- 2. In a lengthy discovery or series of discoveries, counsel may consider it necessary to discuss evidence with the witness. Generally the intention to do so should be disclosed to opposing counsel and if there is an objection it may be necessary to seek leave of the court.**

## Communicating with Your Clients During Examinations for Discoveries

- 3. If there is a break between rounds of discovery, counsel is free to meet with the client to prepare for the upcoming discovery.**
- **It may also be necessary to discuss evidence already given to obtain instructions in regard to discovery motions, to advise the client of the duty to correct answers and to answer undertakings.**
  - **It is prudent to disclose this intention to opposing counsel.**

## **Communicating with Your Clients During Examinations for Discoveries**

- 4. Counsel ought not unnecessarily to oppose reasonable discussions between counsel and client provided they are disclosed.**
- 5. Counsel for the witness should not seek an adjournment during the examination to specifically discuss the evidence that was given by the witness.**



# Correcting “Incorrect” Evidence Given by Your Clients on Discovery

- This obligation stems from rule 4.01 (5).
- **Duty of Witness:** it is the duty of the witness and not counsel to correct any evidence given during discovery.

## Practice Tips:

1. Lawyer can correct this, subtly, at the discovery.
2. Counsel may re-examine his or her own client at discovery.

## Correcting “Incorrect” Evidence Given by Your Clients on Discovery

3. Lawyer can correct incorrect evidence, in writing, after the discovery.
  4. Counsel may correct evidence after having the client review the transcript from the discovery.
- BUT “corrected” evidence may be given less weight.

## Drawing the Line: When Can You Walk Out of a Discovery?

- When the entire purpose of the discovery is being thwarted.
- Angry and frustrated opposing counsel is not sufficient.
- When discovery turns into a personal attack that cannot be remedied by an apology.
- When all else fails: leave.

## Think Before You Undertake: The Effect of Giving an Undertaking

- **4.01 (7) A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another legal practitioner in the course of litigation.**
- **6.03 (10) A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.**

# Think Before You Undertake: The Effect of Giving an Undertaking

- **What is an undertaking?**
- **Personal liability**
- **Performance of an Undertaking / qualifying an Undertaking**
- **Acknowledging the relevancy of documents**
- **Breach of Undertaking**
- **Enforcement of an Undertaking**

# Investigating Another Party on Social Media Websites: The Fishing Expedition v. The Smoking Gun

- **Formal (motion) and informal (research) discovery tactics**
- **Ethical Implications**
  - Rule 6.03 (7): lawyer cannot communicate with a represented person.
  - Rule 6.01 (1): lawyer shall maintain the integrity of the profession.
  - Rule 4.01 (1): lawyer shall represent the client resolutely and honourably within the limits of the law.

# Investigating Another Party on Social Media Websites: The Fishing Expedition v. The Smoking Gun

**American case law developed the following guidelines for lawyers dealing with social media discoveries:**

- (1) [...] [L]awyers should never use false identities and fabricated profiles to obtain access to and information contained on social media websites.
- (2) A lawyer using his or her true identity may request “friend” or “follower” status of an unrepresented person, but should include with the request a statement disclosing the purpose of the request.

## Investigating Another Party on Social Media Websites: The Fishing Expedition v. The Smoking Gun

- (3) A lawyer may enlist a third party agent to request “friend” or “follower” status of an unrepresented person, but should also include with the request a statement disclosing the purpose of the request.
- (4) Lawyers should refrain from requesting “friend” or “follower” status of a represented person’s profile.
- (5) A lawyer should not engage in interactive review – posting, messaging, tweeting - of a represented person’s social media profile.



## **Investigating Another Party on Social Media Websites: The Fishing Expedition v. The Smoking Gun**

- **The foundational principles that apply to discoveries generally will apply to social-media discovery.**
- **Any document that is relevant to any matter in issue is discoverable – therefore, if the social media profile of any party or witness is relevant than it should be discoverable.**

## Investigating Another Party on Social Media Websites: The Fishing Expedition v. The Smoking Gun

- Practitioners have a duty to ensure that their clients understand that Facebook profiles are producible “documents”, and that any relevant content that is posted on a Facebook profile will need to be disclosed, and preserved in order to avoid spoliation issues.
- **Compelling disclosure:**
  - *Murphy v. Perger* (2007), Ontario Superior Court of Justice
  - *Leduc v. Roman* (2009), Ontario Superior Court of Justice