

# Practical and Ethical Considerations When Admitting Social Media and Other Electronic Evidence

Heidi J.K. Fessler

Judge *Tanya M. Bransford*

*Manny K. Atwal*

*Vicki J. Vial Taylor*

# Electronic Evidence Defined

**Digital evidence** or **electronic evidence** is any probative information stored or transmitted in **digital** form that a party to a court case may use at **trial**. Electronic evidence is data created, maintained or transmitted in an electronic/digital form.

Examples: email, photographs, text messages, video, audio recordings, GPS data, Internet of Things (IoT).

# Ethics of E-Discovery

**A Defendant is entitled to the effective assistance of counsel.**

# Ethics of E-Discovery

Minnesota adopted the ABA comment to Rule 1.1 of the Model Rules of Professional Conduct:

***“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”***

# Ethics of E-Discovery

## Rule 1.1 of the Minnesota Rules of Professional Conduct:

- Our world is digital – and virtually every document is an e-document, or generated through an electronic system. The knowledge required by Rule 1.1 includes knowledge about how to handle ESI.
- Attorneys must have a basic understanding of electronic discovery and engage eDiscovery experts when appropriate.
- The competency requirement is held by counsel and cannot be abdicated to support staff.

# Designated Discovery Counsel

**“There is simply too much technology, growing too fast and changing too quickly, for most lawyers to keep up with all of it, on top of staying abreast of the substantive areas of law in which they practice.”**

*Strategic Use of E-Discovery Counsel to Manage Risk and Cost*”, Jeffrey C. Sharer and Colleen M. Kenney , May 22, 2013, ABA Law Journal

# New Types of Electronic Data

## State v. Bates

- Data Recorded via an Amazon Echo
- Stored in Amazon Cloud
- Immediately streamed to the cloud
- Smart home devices

# Criminal E-Discovery

## 2014 Advisory Committee's Note to LR 12.1

- Rule to promote early and comprehensive disclosures in criminal cases and an ongoing exchange of information between the parties, particularly as to discovery.
- Identification of the evidence that may be introduced at trial and the nature of any challenges to that evidence will facilitate efficient resolution of suppression and other motions.
- The requirement that the parties confer is not intended to alter the discovery obligations imposed by the Federal Rules of Criminal Procedure and by case law. The conferral requirement is also not intended to require disclosure of information protected by the attorney-client privilege, work-product doctrine, or any other privilege.

# Criminal Practice and Social Media

“As a prosecutor, the first thing I do when I get a case is to Google the victim, the suspect, and all the material witnesses. I run them all through Facebook, MySpace, Twitter, YouTube and see what I might get. I also do a ‘Google image search’ and see what pops up.

Sometimes there’s nothing, but other times I get the goods – pictures, status updates, and better yet, blogs and articles they’ve written.” A former Deputy District Attorney for Los Angeles County

# Social Media Defined

The "**social**" part: refers to interacting with other people by sharing information with them and receiving information from them.

The "**media**" part: refers to an instrument of communication, like the internet.

Social media are web-based communication tools that enable people to interact with each other by both sharing and consuming information.

*<https://www.lifewire.com/what-is-social-media-explaining-the-big-trend-3486616>*

# Social Media - How do I get it?

## Demonstrate Relevance and Need

- Requests for Social Media data should be narrowly tailored to target the specific information you need. See *Waters v. Union Pacific Railroad Co.* 2016 WL 3405173 (D. Kan. June 21, 2016).

## Specialized Collection Methods

- There are companies/tools specifically designed to collect social media in a forensically sound manner including the metadata needed to authenticate.. (X1 Social Discovery, Hanzo) including extracting metadata.

# Stored Communications Act

The Stored Communications Act (“SCA”) governs the ability of governmental entities to compel service providers, such as Twitter and Facebook, to produce content (e.g., posts and Tweets) and non-content customer records (e.g., name and address) in certain circumstances.

**Issue:** Federal law provides that, in some circumstances, the government may compel social media companies to produce social media evidence without a warrant.

**Issue:** Awaiting ruling on Facebook’s challenge of the government gag order prohibiting it from telling its users that the government has issued a search warrant to obtain their social media content. (Washington D.C. Appeals Court)

**Issue:** Defendants do not have the same ability as the government to look at peoples social media sites.

# Ethical Practice

## Permitted Social Media Content Access:

- Counsel can view the publically available content on a social media site such as Facebook.

## Prohibited Social Media Content Access:

- You may not “friend” someone in order to further access the privacy-restricted portions of an individual’s profile. (Ethics opinions - Philadelphia Bar Association (March 2009), New York City Bar (September 2010), New York State Bar (September 2010), Oregon Bar (February 2013), New Hampshire Bar (June 2013)).
- You cannot have someone else “friend” the social media holder to gain access and you can not use deception to get the user to accept your “friend request”.
- Such conduct violates the rules of professional conduct against engaging in deceptive conduct or misrepresentations to third parties. Deception is even easier in the virtual world than in person.

# Ethical Practice

## Rule 3.4 of the Model Rules of Professional Conduct (Fairness to Opposing Party and Counsel):

- lawyers may not “unlawfully . . . destroy or conceal a document or other material having potential evidentiary value,” and they may not counsel any other person to destroy or conceal evidence having value.
- Rule Commentary: Clarifies that the prohibition “applies to evidentiary material generally, including computerized information,” and to information that has potential evidentiary value to “a pending proceeding or one whose commencement can be foreseen.”
- Moreover, destroying evidence relevant to pending litigation—or causing someone else to do so—is a criminal offense in addition to being an ethical violation.

# Ethical Practice

## Facts:

- Civil case for wrongful death of young wife resulted in \$10.6 million verdict to widower.
- After verdict it was discovered that counsel told plaintiff to “clean up” his Facebook page and then to deactivate his Facebook account.

## Result:

- final order cutting verdict in half,
- sanctions against plaintiff and counsel totaling \$722,000.00. Plaintiff to pay \$180,000.00 and counsel to pay \$542,000.00.
- Counsel left the practice of law.

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

