

"You Can't Build A Great Building on a Weak Foundation: The Art of Laying Proper Foundation"

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You Can't Build a Great Building on a Weak Foundation: The Art of Laying Proper Foundation"

Constance Endelicato

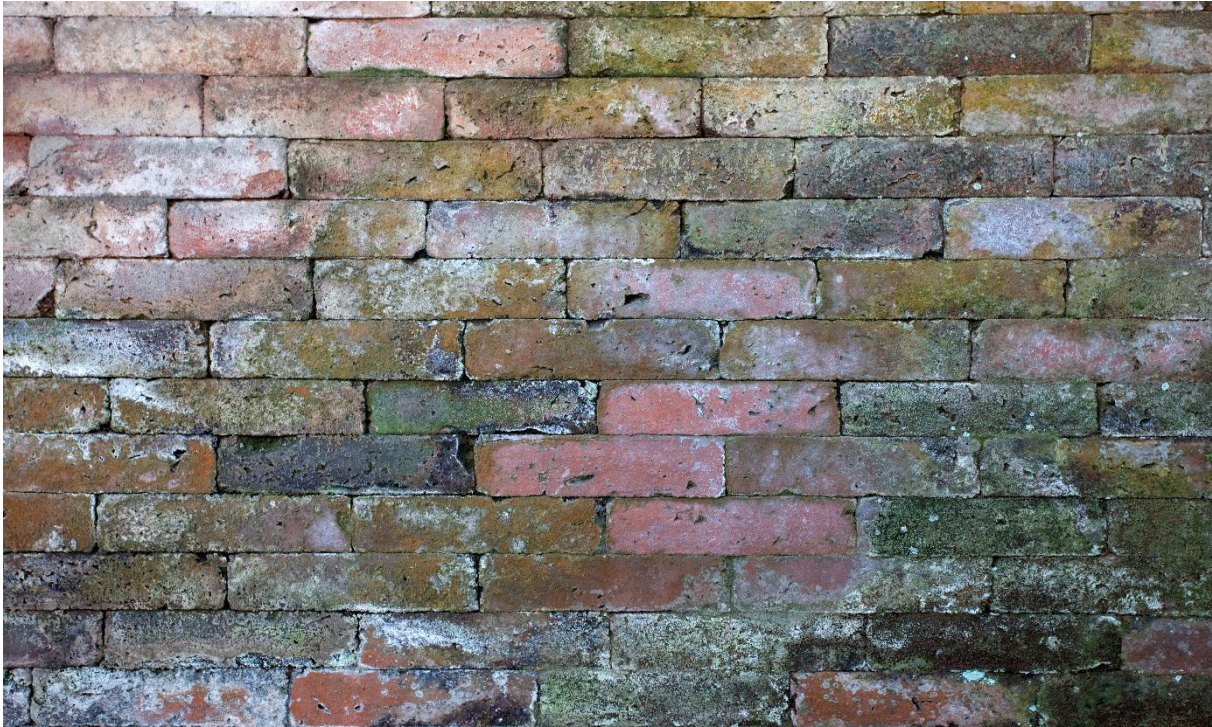
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Building a Foundation



1. Protect the fortress
2. Identify what you are trying to prove
3. Ensure you have the evidence
4. Proper authentication
5. Witness testimony/affidavit
6. Know your statutes & case law
7. Hearsay objections/exceptions
8. Identify damaging evidence

Evidentiary Foundation

The word “Foundation” does not appear in the Federal Rules of Evidence.

The basis for admitting testimony or evidence into evidence. Laying a foundation establishes the qualifications of a witness or the authenticity of the evidence.

Texas Rule of Evidence 613

“Foundation” appears in Texas Rule of Evidence 613. When examining a witness about their prior inconsistent statement or about their bias or interest—whether oral or written—a party must first tell the witness:

- (A) the contents of the statement;
- (B) the time and place of the statement; and
- (C) the person to whom the witness made the statement.

FRE Rule 602

- Need for Personal Knowledge

“A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony.”

(This Rule does not apply to a witness’s expert testimony under Rule 703.)

FRE ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions That Apply to This Article

In this article:

- (a) A “writing” consists of letters, words, numbers, or their equivalent **set down in any form.**
- (b) A “recording” consists of letters, words, numbers, or their equivalent **recorded in any manner.**
- (c) A “photograph” means a photographic image or its equivalent **stored in any form.**

(d) An “**original**” of a writing or recording **means** the writing or recording itself or **any counterpart intended to have the same effect by the person who executed or issued it.** For **electronically stored information**, “**original**” **means any printout — or other output** readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.

(e) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1004. Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) all the originals are lost or destroyed...;
- (b) **an original cannot be obtained by any available judicial process;**
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, or photograph is not closely related to a controlling issue.

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent **may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered.** The proponent need not account for the original.

Rule 1008. Functions of the Court and Jury

...in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

FRE 901. Authenticating or Identifying Evidence

(b)(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

Foundation for audio message or phone call

FRE 901(b)(5) Opinion About a Voice. An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

- (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
- (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

Foundation for handwriting

FRE 901(b)

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

Mean Business!

Be familiar with the applicable rules of evidence and use them to your advantage.

BANK OF AMERICA 

Reference number
[REDACTED]
Court case number
[REDACTED]
Court or issuer
Mayer LLP
Court case name:
[REDACTED]

Declaration of Bank of America Officer and/or Custodian of Records

Before me, the undersigned authority, personally appeared, [REDACTED] who, being duly sworn by me, deposes and says as follows:

1. Authority

I, [REDACTED] am a duly authorized bank officer and/or custodian of the records of Bank of America, N.A. with authority to execute this affidavit and certify to the authenticity and accuracy of the records produced with this affidavit.

2. Records

The records produced herewith by Bank of America, N.A. are original documents or are true copies of records of a regularly conducted banking activity that:

- Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;
- Were made and kept in the course of regularly conducted banking activity by Bank of America, N.A. personnel or by persons acting under their control; and
- Were made and kept by the regularly conducted activity of Bank of America, N.A. as a regular practice, on or about the time of the act, condition or event recorded.

Emails or text messages may be admissible as business records pursuant to the requirements of Rule 803(6)...but not all emails or texts sent or received by a business are business records.

Social Media Evidence

Consider social media as part of your discovery plan.

Foundation for evidence is based on someone knowing about a thing and explaining the what, why, and how of it.

Not enough to simply testify that you located the materials on a particular social media site.

Foundation for Social Media Evidence

Must be authenticated, must establish that the evidence is what it purports to be and must offer testimony about the circumstances surrounding the purported evidence.

No universal approach but must show sufficiently linked to the alleged author to justify submission to the jury:

- Testimony by a witness familiar with the person who posted the information

- Records about the email associated with an account

- Location of the account holder

- Photographs of the account holder

- References to events at issue

Foundation for ESI

Introduce evidence that the system or process that generated the ESI is reliable (does not require expert testimony) and the identity of the person who created the ESI.

Can be shown through distinctive characteristics including appearance, contents, substance, patterns, similarity to other known examples.

In Texas, the trial court only needs to make a “preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic.”

Frelix v. State, 2019 WL 4399478, at *3 (Tex. App. – Amarillo 2019, pet. ref’d).

The Game of Chess: Identify the Weakness in the Foundation



Cal Evidence Code 801

- Expert opinion limited to that which is:
- A) Related to a subject that is sufficiently beyond common experience....
- B) Based upon matter (including his or her special knowledge, skill, experience, training, education,...) perceived by, personally known to the witness, or made known to him...**whether or not admissible**, that is a type that may be reasonably relied upon by an expert in forming an opinion....

When Case Law Creates Hurdles



People v Sanchez (2016) 63 Cal 4th 665

“When any expert relates to the jury case-specific out-of-court statements and treats the content of those statements as true...the statements are hearsay.”

Impact of Sanchez

- Opinion statements of treating physicians
- Critical statements of fact by treating physicians and witnesses
- Live testimony may be required
- Depositions must be taken of percipient witnesses
- Motions for Summary Judgment must be supported by properly authenticated evidence
- Plaintiff lawyers have advantage under HIPAA to “off the record” conversations with physicians
- Necessary witnesses may avoid deposition or live testimony

When Case Law Creates Hurdles

Randy's Trucking v Super. Ct (2023) 91 Cal App 5th 818

- Requires defense to provide raw data, tape recordings, confidential and proprietary test and examination materials in neuropsychological exams directly to plaintiff's counsel



Impact of Randy's Trucking

- Plaintiffs can introduce their expert neuropsych's opinion without this restriction
- Neuropsych experts refuse to perform a Defense Mental Exam.
- Renders it nearly impossible to disprove alleged brain deficit
- Requires Law and Motion for Protective Order, the outcome of which will be dependent upon your trial judge.
- Without court order against this Court of Appeal decision, your only hope is a written stipulation with plaintiff's counsel

Plaintiffs' Tactics

And How to Beat Them at Their Own Tricks



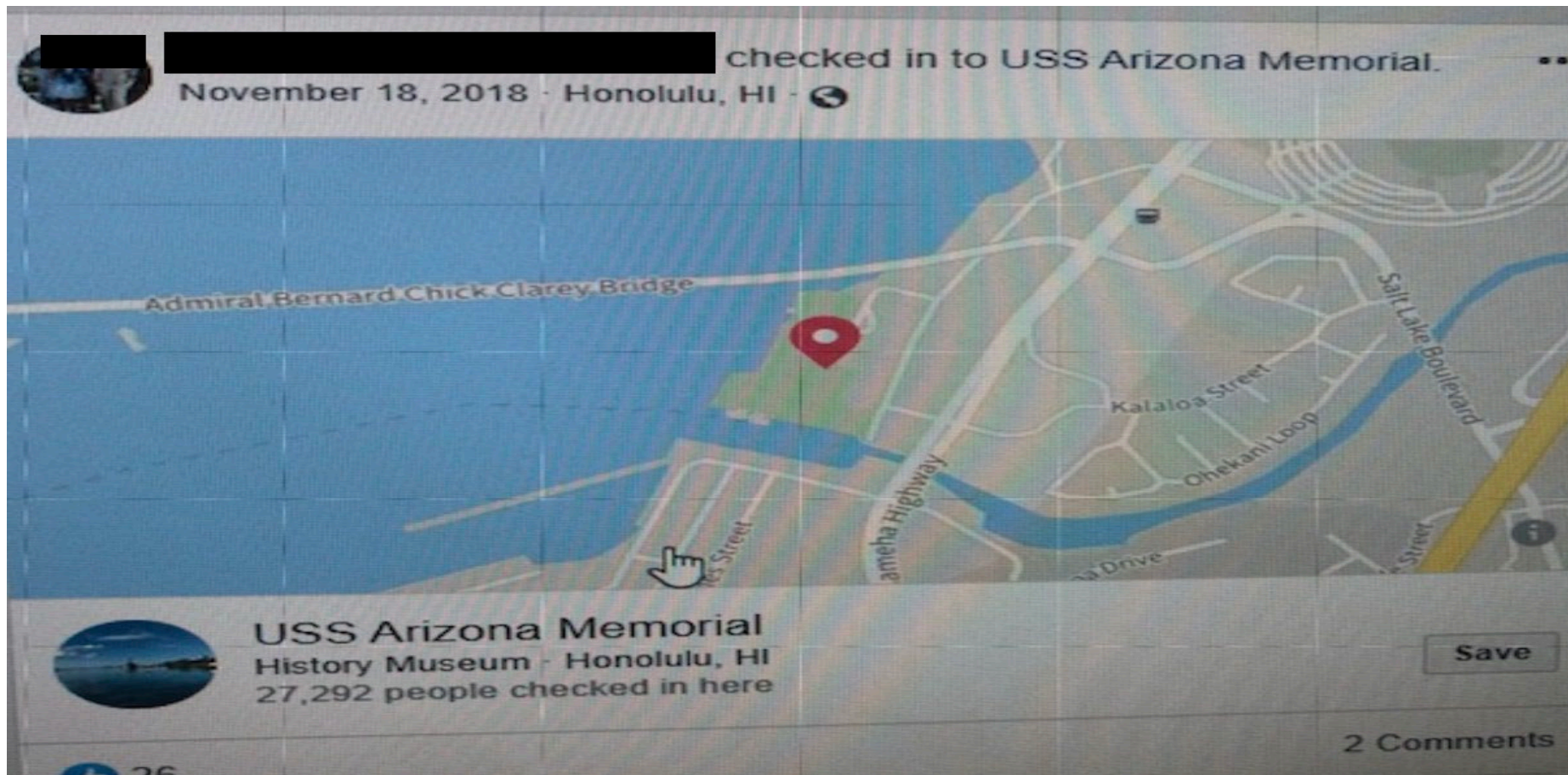
Bank Records



Life Care Plans



When the evidence is against you: Social media faux pas



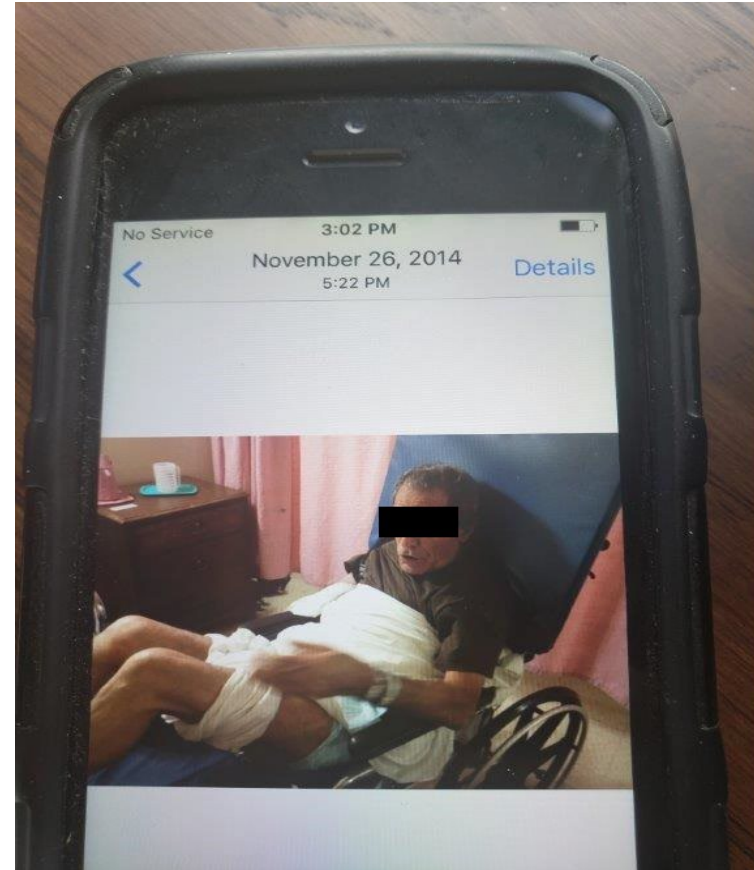
Cellphone Records

Nov 21	10:17 AM	714.754.████	Honolulu, HI	Incoming, CL	6
Nov 21	10:53 AM	857.325.████	Huntington, CA	Newton, MA	1
Nov 21	11:35 AM	714.402.████	Honolulu, HI	VM Deposit, CL	1
Nov 21	11:36 AM	714.402.████	Honolulu, HI	Anaheim, CA	1
Nov 21	11:58 AM	857.325.████	Huntington, CA	Newton, MA	1
Nov 21	12:35 PM	714.361.████	Honolulu, HI	Santa Ana, CA	3
Nov 21	2:13 PM	714.402.████	Honolulu, HI	VM Deposit, CL	1
Nov 21	2:14 PM	714.916.████	Honolulu, HI	VM Deposit, CL	1
Nov 21	2:14 PM	714.625.████	Honolulu, HI	VM Deposit, CL	1
Nov 21	2:15 PM	714.402.████	Honolulu, HI	Anaheim, CA	1
Nov 21	3:43 PM	714.402.████	Honolulu, HI	Incoming, CL	1
Nov 21	3:52 PM	714.625.████	Honolulu, HI	Incoming, CL	1
Nov 21	3:54 PM	714.402.████	Honolulu, HI	Incoming, CL	1
Nov 21	6:48 PM	857.325.████	Huntington, CA	Newton, MA	1
Nov 21	11:19 PM	857.325.████	Huntington, CA	Newton, MA	1
Nov 21	11:20 PM	714.966.████	Whittier, CA	Incoming, CL	1
Nov 21	11:31 PM	714.754.5454	Los Angeles, CA	Incoming, CL	3
Nov 22	12:01 AM	857.325.████	Huntington, CA	Newton, MA	1
Nov 22	1:22 AM	714.402.████	Westminste, CA	Incoming, CL	1
Nov 22	3:09 AM	857.325.████	Huntington, CA	Newton, MA	1
Nov 22	3:23 AM	857.325.████	Huntington, CA	Newton, MA	1
Nov 22	3:34 AM	857.325.████	Huntington, CA	Newton, MA	1
Nov 22	3:37 AM	857.325.████	Huntington, CA	Newton, MA	1
Nov 22	3:45 AM	714.754.5522	Anaheim, CA	Santa Ana, CA	10
Nov 22	4:00 AM	714.966.████	Huntington, CA	Santa Ana, CA	5

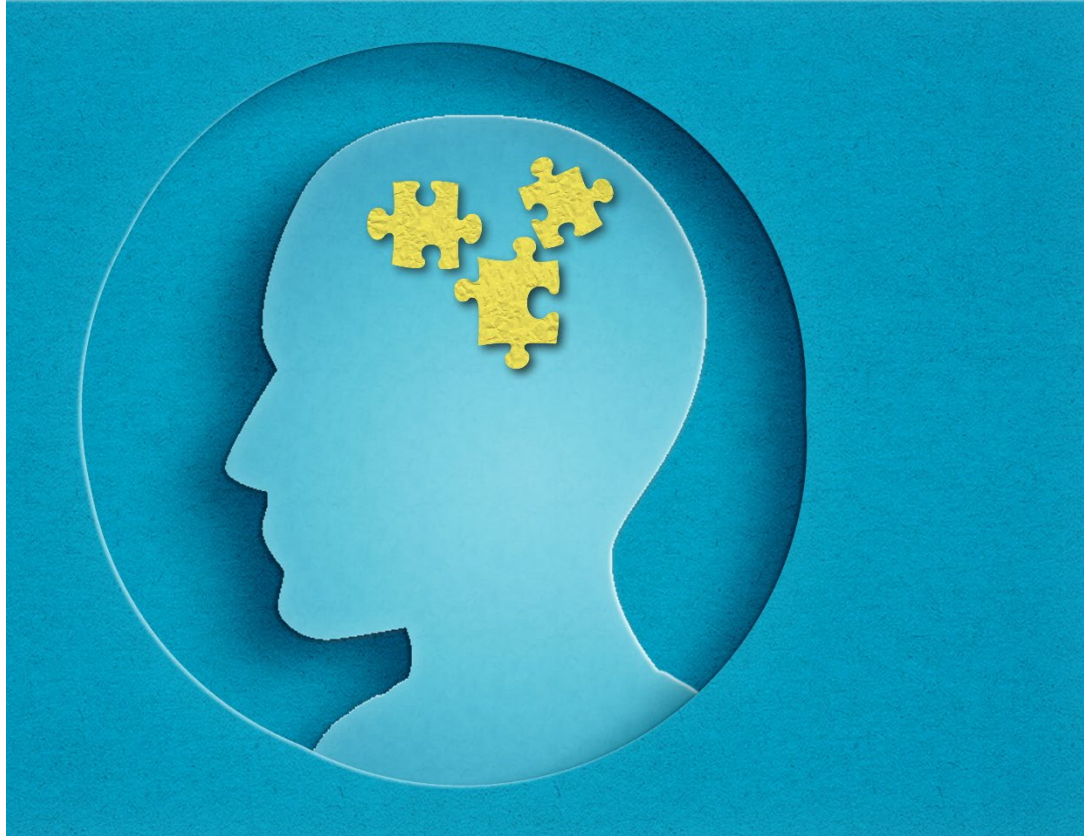
When the evidence is against you: Photos/Text Messages



Text Messages



Ethical Considerations



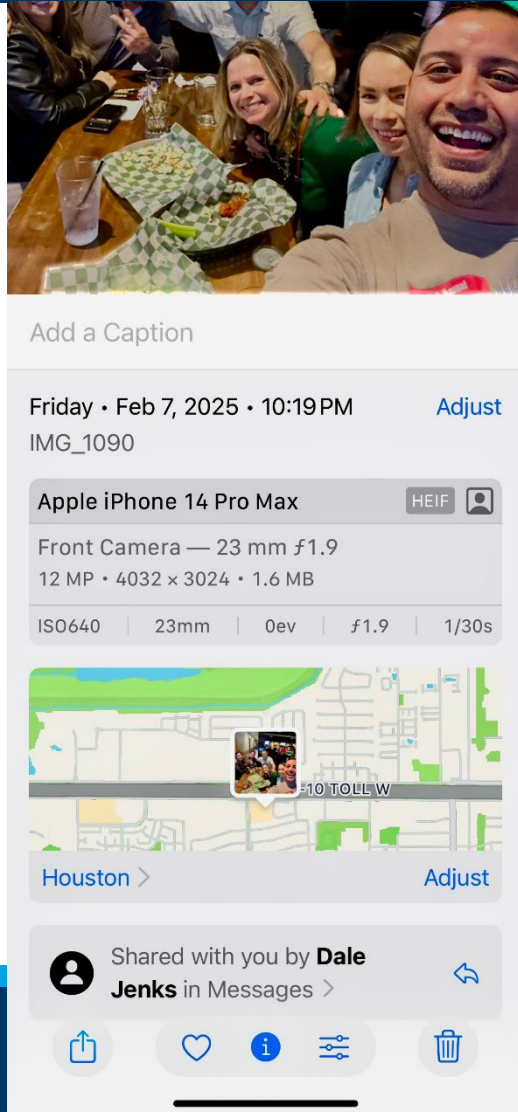
- Misuse of Case Law Interpretation
- Hiding Evidence
- Willful Blocking of Evidence
- Witness Tampering
- Destruction of Evidence

ABA Model Rules of Professional Conduct

Rule 1.1: Competence

Comment 8. 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**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Ethical Considerations



Ethical duty to be competent in the use of technology requires familiarity with evidentiary issues implicated by new technology.

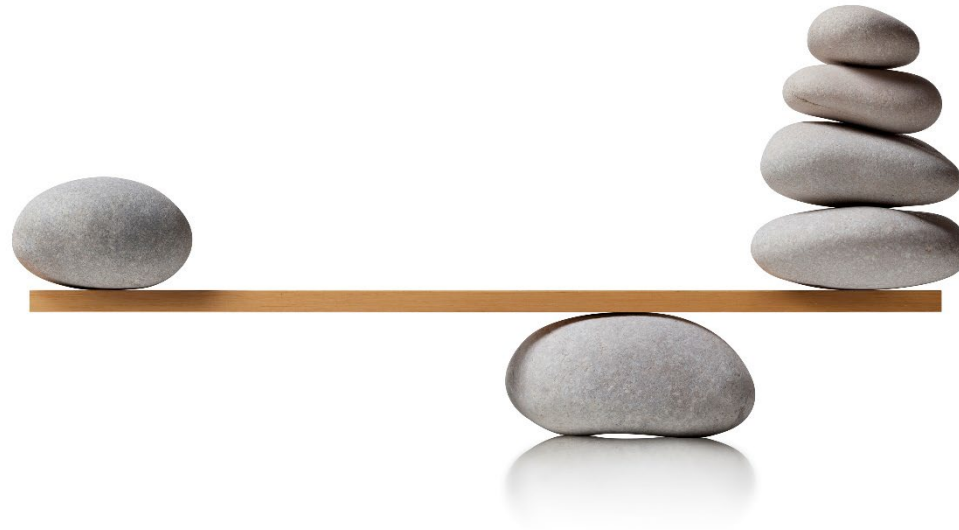
Protect yourself and clients!

The Building Blocks



1. Know your laws
2. Prepare pre-trial checklist of your crucial evidence
3. Create a toolkit to ensure admissibility of your evidence
4. Recognize plaintiff's tactical trends
5. Develop strategies to block plaintiff's evidence

Leave No Stone Unturned



Questions/Comments?



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