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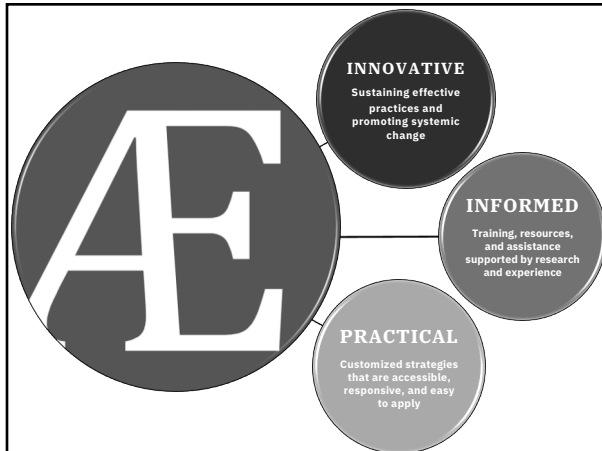
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What We Do	
 <p><b>Resources</b> Create, research, and curate publications, statutory and case law compilations, and other resources that strengthen prosecution practices</p>	 <p><b>Consultations</b> Offer on-demand 24/7 consultations with our seasoned prosecutors to answer case-specific inquiries, discuss strategy, conduct research, and recommend data-driven solutions</p>
 <p><b>Training Events</b> Develop curricula and facilitate a wide range of specialized in-person and web-based trainings designed to empower prosecutors and allied professionals</p>	 <p><b>Partnerships &amp; Initiatives</b> Provide long-term support in building frameworks for coordinated responses to gender-based violence including data collection and analysis, task force development, and training</p>

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## Support

This project was supported by Grant No. 2020-YX-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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
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## Objectives

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Identify how technology can be used to perpetrate crimes
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Understand underlying theories of digital evidence admission by analyzing evidence rules and case law
- 

Recognize the balance or privacy interests of victims/witnesses with respect to digital evidence

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## Where do you find digital evidence?

*What is digital evidence?*

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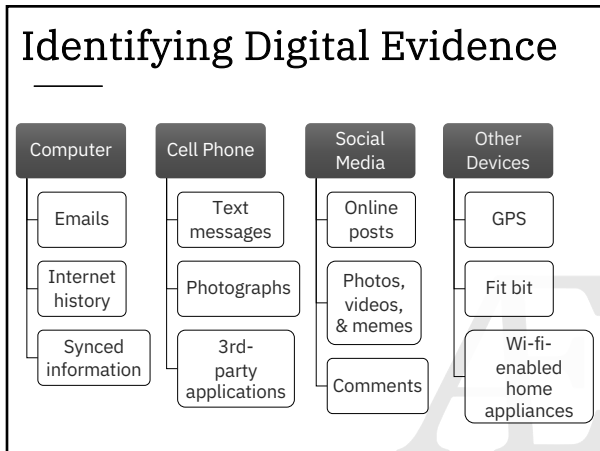
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## Tools to Seize Digital Evidence

<b>Subpoenas</b> <ul style="list-style-type: none"> <li>Subscriber Information</li> <li>Transaction History</li> <li>IP Addresses</li> </ul>	<b>Court Orders</b> <ul style="list-style-type: none"> <li>Location Data</li> <li>Tower Dumps</li> <li>Wiretap petitions</li> </ul>
<b>Search Warrants</b> <ul style="list-style-type: none"> <li>Historical Location Data</li> <li>Cell Phones</li> <li>Social Media</li> <li>Computers</li> </ul>	<b>Consent</b> <ul style="list-style-type: none"> <li>Voluntary</li> <li>Apparent Authority</li> </ul>

**\*\*This is an area of law that is constantly changing, so please check your local law\*\***

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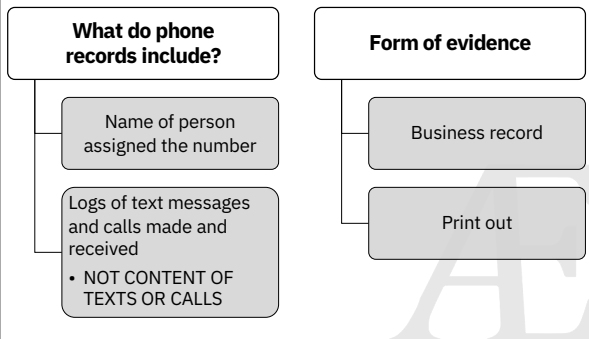
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## Phone Records



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## Other Considerations

- Preservation letters
- Non-disclosure orders
- Consent to assume online presence
- Law enforcement guides and online portals
  - Ex: Search.org
- Secondary searches & “taint” teams

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## Tools to Search Digital Evidence

Forensic Examination, Manual Examinations

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## The Basics

- Preserve evidence
- Secure through warrant or consent
- Ask for passcodes
- Speak with examiner
- Manual examination

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## Cell Phone Examinations

- |   |                   |
|---|-------------------|
| • Contact list                            | • Browser history |
| • Call logs                               | • Linked accounts |
| • Text & multimedia message (MMS) content | • Email           |
| • Photos & videos                         | • Chats           |
| • Calendars                               | • Wi-Fi           |
| • Task lists                              | • Location data   |

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## What about Locked Devices?

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## State v. Diamond

905 N.W.2d 870 (Minn. 2018)

- Appeal of Trial Court granting State's motion to compel Δ to provide fingerprint to unlock cellphone seized in burglary investigation.
- Court held that producing fingerprint to unlock cellphone is non-testimonial act and not protected by 5<sup>th</sup> Amend.
  - Not clear if State could use compelled fingerprint to show **control** of cellphone.
  - Did not decide if providing password is testimonial. 905 N.W.2d at 876, fn. 5.

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## Theories of Admission

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## Analytical Process

What is being admitted?

How is it authenticated?

How is content linked to the adverse party?

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## What are you admitting?

- Testimony
- Records
- Screenshot / photograph
- Screen recording
- Forensic report
  - HTML document
- Manual examination
  - Video, photos

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## Authenticating or Identifying

Minn. R. Evid. 901(a)

**General provisions.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

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## Authenticating or Identifying

Minn. R. Evid. 901(b)

**(b) Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

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

...

(4) *Distinctive Characteristics and the Like.*  
Appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken in conjunction with circumstances.

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## Ways to Authenticate

- Testimony from people involved with communication that were consistent with content of social media /electronic communication
- Action by purported author in conformance with content (*i.e.*, makes plans to meet and shows up)
- Admissions of authorship of content contained in social media /electronic communication
- Admission of ownership or access of device where content was recovered from
- Certified business records of content (in part)

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## Best Evidence Rule

### Minn. R. Evid. 1002

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Legislative Act

### Minn. R. Evid. 1003

A duplicate is admissible to the same extent as an original unless: (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original

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## “Original”

Minn. R. Evid. 1001(3)

- 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

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**“Duplicate”**

Minn .R. Evid. 1001(4)

A counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that **accurately reproduces the original.**

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### Linking the Content to the Adverse Party

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### How do you put the adverse party behind the...

- ☐ Electronic device
- ☐ Text message
- ☐ Social media post
- ☐ Phone records
- ☐ Financial records
- ☐ Photograph

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## Making the Link

### Circumstantial Evidence

- Where was the device found?
- Who is the account registered to?
  - What is the name on the social media account?
  - Is someone familiar with the regular use of the account?
- Who has access to the photographs?
- Are there words or phrases that are commonly used by the offender?

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## Case Examples

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## Example #1

- Offender is charged with stalking after repeatedly tweeting threatening messages to victim
- State executed a Search Warrant for offender and victim's Twitter accounts
- Twitter emailed a PDF document containing the requested records

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## Process

What are you trying to admit?

How are you going to authenticate it?

How are you going to link the evidence to the offender?

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## Business Records

- Hearsay Exception for Records of Regularly Conducted Activity
  - Minn. R. Evid. 803(6) Records of Regularly conducted Business Activity
- Minn. ST § 600.02. Business Records as evidence.

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## Example #2

- Defendant is charged with misdemeanor domestic violence (DV) battery after slapping the victim
  - Battery occurred during fight over money because rent was due
- Victim took screenshots of text conversation on her cell phone

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## Example #2

Cont'd

Before the fight, the victim and offender exchanged text messages:

V: "RU coming STR8 home?"

V: "Don't forget rent is due"

D: "Don't piss me off I had a shitty week"

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## Process

What are you trying to admit?

How are you going to authenticate it?

How are you going to link the evidence to the offender?

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## State v. Haines

No. A07-1743 (Minn. Ct. App. 2008) (unpublished opinion)

- State admitted into evidence 3 photographs of screen of victim's cell phone that displayed information about Δ and text messages he sent her.
- Police officer testified that Δ called him from same number as listed to Δ in victim's phone.
- Court found sufficient foundation for authentication.

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## Admissibility

- Same as a photograph
  - “Is that a true and accurate representation of the screen when you saw it?”
- Weight v. Admissibility
- Consider Hearsay analysis

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## Example #3

- Defendant is charged with Nonconsensual Distribution of an Intimate Image after posting three photographs to the victim’s Facebook account
- The photos were nudes of the victim, that she had taken with her cell phone and sent to the defendant while they were dating

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## Example #3

Cont’d

- The victim deleted the photos from her Facebook account immediately upon seeing them
- A search warrant was issued for the defendant’s Facebook account, but the account was deleted
- Victim had the “original” photographs on her cell phone

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## Process

What are you trying to admit?

How are you going to authenticate it?

How are you going to link the evidence to the offender?

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## Testimony Alone

*State v. Winbush*, 912 N.W.2d 678, 683-684 (Minn. 2018)

[One] example of authentication is testimony of a witness with knowledge that a matter is what it is claimed to be. Minn. R. Evid. 901(b)(1). This conventional method for authenticating [copies] is referred to as the “*pictorial witness theory*” because the [copy] is thought to be a pictorial representation of what the witness observed.

*State v. Winbush*, 912 N.W.2d 678, 683-84 (Minn. Ct. App. 2018) (quoting *In Re Welfare of S.A.M.*, 570 N.W.2d 162, 164 (Minn. Ct. App. 1997)

(Investigator authenticated printout of Δ’s Facebook page, which he observed.)

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## Safeguarding Victim Privacy in a Digital World

Webinar found at:  
<https://aequitasresource.org/resources/>

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## Cell Phones & Privacy

Riley v. California, 134 S. Ct. 2473 (2014)

Court recognized “several interrelated privacy consequences”

- Massive amounts of storage
- Interconnectivity of data
- Information dating back years

*...more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives.*

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*“Brady prohibits suppression of evidence, it does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel.”*

*United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002)

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## *In re B.H.*

946 N.W.2d 860 (Minn. 2020)

- Trial Court reversed for ordering Victim to turn over cell phone to defense forensic expert.
- Victim didn’t waive right to privacy in her phone by bringing sexual assault disclosure and allowing to copy limited portion of her phone.
- Per *Riley* and privacy concerns with electronic devices, Courts should carefully examine motions for such data, particularly for sexual assault victim

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## Motion to Compel

### Victim has the phone

- Prosecutor should argue the phone is not in their “care, custody, or control”
- Victim is not subject to criminal discovery
- Victims’ rights

### Phone is in evidence

- Entire phone is not subject to discovery
- Defense is going on a fishing expedition
- Defense expert has limited access
  - Protective Order
- In camera inspection

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## National Resources

### Without My Consent, Something Can be Done! Guide

- <http://withoutmyconsent.org/resources>

### Cyber Civil Rights Initiative

- <https://www.cybercivilrights.org>

### National Crime Victim Law Institute

- [https://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/](https://law.lclark.edu/centers/national_crime_victim_law_institute/)

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## Jonathan H. Kurland

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 Washington, DC 20005

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