A Guide for Lawyers on Authenticating Social Media Evidence: Part 1 of 2

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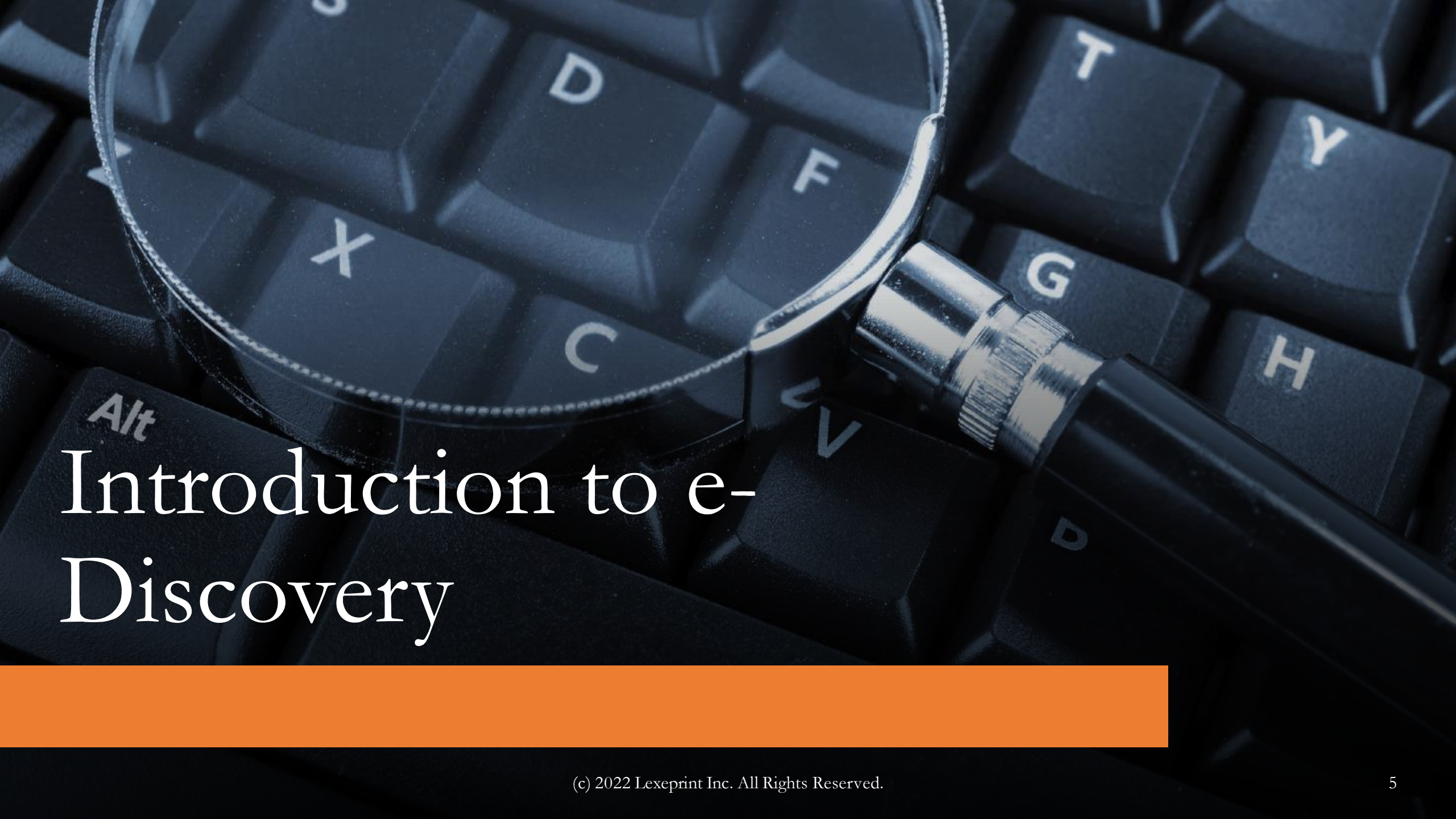
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Agenda

- Introduction to e-Discovery
- Attorney's Duty to Make e-Discovery Cost Effective for Your Clients
- Preparing Social Media Evidence for Trial

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Introduction to e-Discovery

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What is e-Discovery?

- Electronic Discovery or "e-Discovery" is the general term used to describe the preservation and production of electronically stored information ("ESI"), typically done during the discovery phase of litigation. *CDS
- ESI can include:
  - E-mails
  - Texts
  - Chats
  - Instant messages
  - Files
  - Website Activity and History

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Attorney's Duty to Make e-Discovery Cost Effective for Your Clients

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e-Discovery is costly at all stages

- Attorneys have an affirmative duty to oversee discovery, even e-discovery.
- e-Discovery is costliest during its review stage, directed at determining responsive and relevant documents to produce as well as privileged and sensitive documents to withhold.
- Without a sophisticated e-Discovery vendor, review becomes a time burden.

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Reducing Costs of e-Discovery

- Minimizing human review of ESI is a key component in reducing e-Discovery costs *AND* avoiding possible sanctions.
- Working with a vendor:
  - Utilize for meet-and-confer, will make meetings more efficient.
  - Will be able to facilitate efficient coordination with other parties due to technical knowledge of E-Discovery including electronic document storage, organization, and format issues, as well as retrieval technology like search methodology.

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Key Steps to Comply with e-Discovery

- Through cooperation and searchability, the e-Discovery process may be easier to review and process information.
  - Cooperation:
    - Exchange information with other side at earliest possible stage of discovery.
    - Make reasonable discovery requests and make timely responses.
  - Searchability:
    - Producing party *should* do what it can to give receiving party text-searchable documents.
    - Identify e-mail custodians, search terms, and production time frames; requesting party should limit its search terms requested to ten and should be narrowly tailored.

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Common Locations to Find ESI

- Personal computers at work and/or home
- Laptop computers and tablets
- Networked devices (*i.e.,* "the Internet of Things")
- Photocopiers
- Removable media (disks, flash drives)
- Disaster recovery backup media
- Third-party providers (incl. social media)
- "Wearable" technology
- Random Access Memory ("RAM")
- Slack space
- Residual data
- System data

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Federal Rules of Evidence (FRE)

- FRE 902(13): The December 2017 amendment to the Federal Rules of Evidence added a rule for the self-authentication of records "generated by an electronic process or system that produces an accurate result."
  - For example, a system registry report showing how a smartphone software obtained GPS coordinates.
- FRE 902(14): The FRE amendments also added a rule for the self-authentication of records "copied from an electronic device, storage medium, or file" by use of has values.

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Federal Rules of Civil Procedure (FRCP)

- Proportionality: The burden of electronic discovery does not outweigh the amount at stake in the case, despite how relevant discoverable evidence may be.
- Early discovery: Discovery may now be taken earlier in the case, so that ESI disputes may arise prior to the 26 (f) conference.
  - This amendment aims to encourage coordination between counsel and discussion of discovery disputes with the judge.
- Spoliation: Rule 3(e) creates a uniform standard for spoliation sanctions, and the parties must take "reasonable steps" to preserve electronic evidence.

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Preparing Social Media Evidence for Trial

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Examples of Discoverable Content

- Image-based content
  - Snapchat (activity logs preserved despite temporary content)
  - Instagram
- Location information
  - Facebook (event RSVP's, location tagging in images and posts)
  - Instagram (location tags)
- Professional activity
  - LinkedIn
  - Facebook

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Stored Content

- Facebook, Twitter, and other social media sites indefinitely store a user's archives.
  - If a user opts to delete his or her account, Facebook will store the user's archive for at least 90 days.
- According to a report by Krebs on Security, Facebook acknowledged a bug in its password management systems that caused hundreds of millions of user passwords for Facebook and Instagram to be stored as plaintext in an internal platform.
  - This means that thousands of Facebook employees could have searched for and found them. Krebs reports that the passwords stretched back to those created in 2012.

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Stored Content

- Snapchat maintains information logs regarding the content sent—who each image was sent to and when–for 30 days, but the actual content is not even available to the users.
- Snapchat automatically deletes the content of your "Snaps" (the photo and video messages that you send) from servers after they detect that it has been opened by all recipients or has expired.

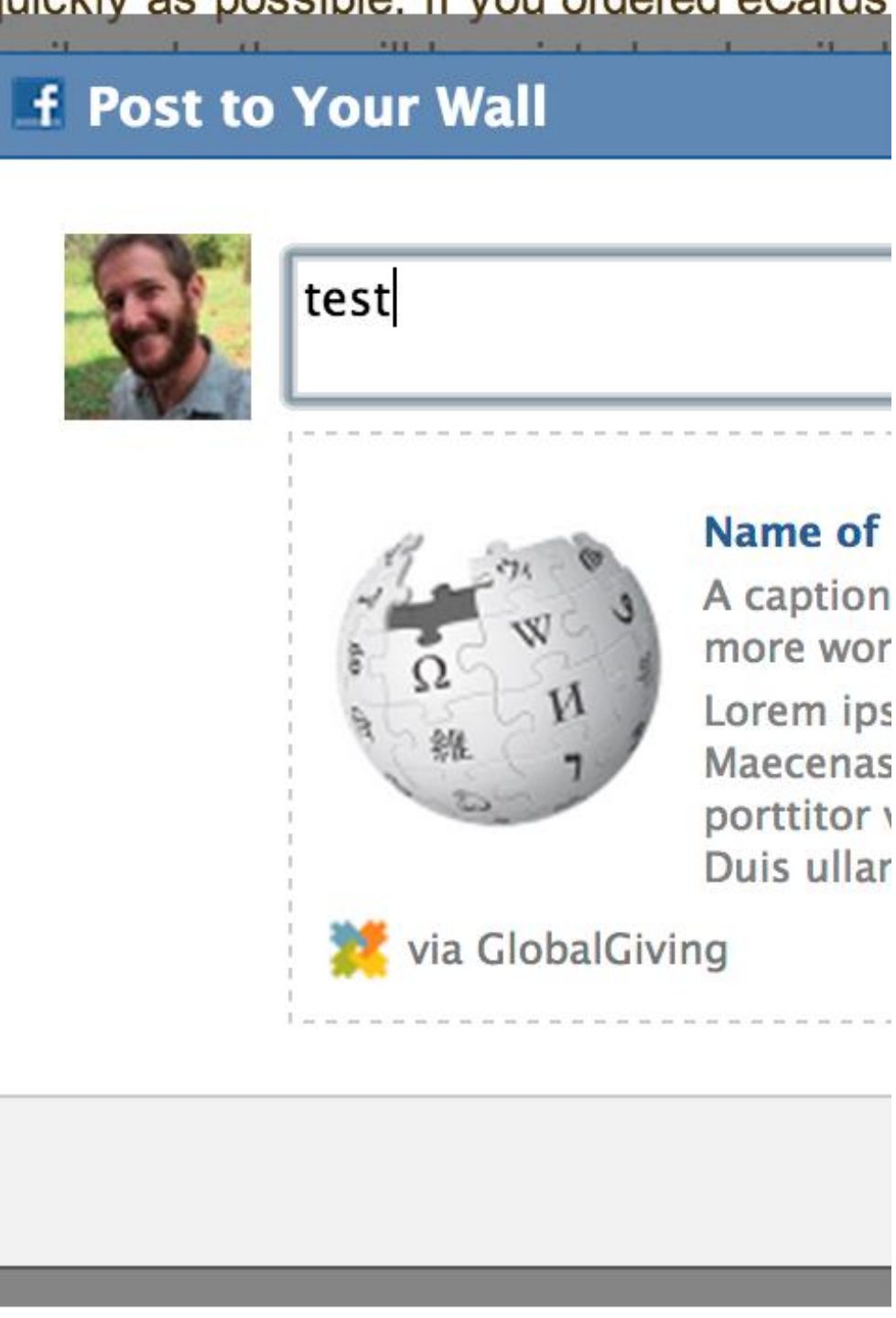
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Duty to Preserve

- The duty to preserve evidence does not change when the evidence in question comes from social media sites.
- If the litigation is ongoing or reasonably anticipated, deleting social media content could be understood by the courts as spoliation, especially if social media content has the potential to become relevant evidence in the trial.

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Preserving Opposing Parties' Posts

- If you have access to an opposing part's content without needing to go through discovery (if your client is "friends" with him or her on Facebook, for example, or if they have liberal privacy settings), then taking screenshots or page printouts of the content is a useful way of keeping track of content that may be relevant while discovery is pending.
- For trial, however, you will want to gain access to the archived files that the opposing party should provide you though discovery.

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Finding Deleted Content

- When a Facebook user deletes content, that content may still be accessible in the following locations:
  - The user's archives
  - The user's email account (when someone comments on your post, Facebook will often email you the comment)
  - Facebook notification history

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Laying a Foundation for Authenticity

- Is the author of the content willing and able to testify to its authenticity?
- Has other social media evidence been admitted with which to compare the content to determine its authenticity?
- Can you trace the user account to the content's purported author?(Profile information such as their picture, birthdate, time of access, and IP address listed in archives).
- Does a post or message contain specific content that connects it with an individual?

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Blocking Admissibility

- "Internet postings are out-of-court declarations and present a hearsay issue." *People v. Johnson*, 51 Misc. 3d 450, 465, 28, N.Y.S.3d 783, 795 (N.Y. Co. Ct. 2015)
- Social media content cannot be admitted under the F.R.E. Rule 803(6) business records exception alone, even if the content is posted on a business' official Facebook page. *United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000); People v. Glover 2015 COA 16, 22, 363 P.3d 736, 741
- If the user provided his or her username and password credentials to other people, the diminished security of the account will help to discredit the content's reliability.

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Questions?

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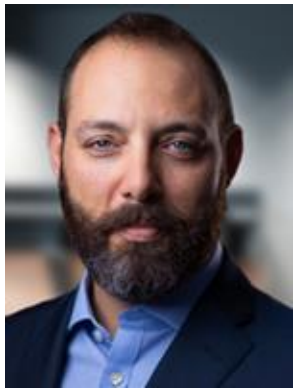
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Daniel Garrie is the Co-Founder of Law & Forensics LLC, Head of Computer Forensics and Cyber Security Practice Groups and has been a dominant voice in the computer forensic and cybersecurity space for over 20 years. Prior to Daniel's legal career, he successfully built and sold several technology start-up companies. Since co-founding Law & Forensics LLC in 2008, Daniel has built it into one of the leading boutique cybersecurity forensic engineering firms in the industry. Daniel has both a Bachelor's and a Master's Degree in computer science from Brandeis University, as well as a J.D. degree from Rutgers Law School. Daniel has led forensic teams in some of the most visible and sensitive cyber incidents in the United States. In particular, Daniel recently located and recovered deleted files in both private and public cloud computing environments using his patented software, Forensic Scan. This investigation took less than forty-eight hours to clean and recover the data from the servers of a cloud-hosting provider that was compromised by a malicious cyber-attack. Thanks to the Forensic Scan technology, that Daniel co-invented and patented (US9990498B2 and US9990497B2), and his own expertise, Daniel and his team was able to identify the source of the breach and remediate the problem in record time.

Daniel regularly testifies as an e-discovery, cybersecurity and computer forensic expert witness, authoring forensic expert reports on multi-million-dollar disputes. His ability to perform complex investigations and effectively communicate the results to a jury has made him one of the most sought-after experts in the country. His testimony has been pivotal in a number of cases, including one involving the embezzlement of millions of dollars from a large non-profit. Daniel was able to perform a thorough analysis of the alleged embezzlers' phone and computer, despite the embezzlers' attempts to wipe them, and identify concrete evidence of the embezzlement to a jury. Since 2008, Daniel has served as a Neutral and Special Master and in 2016, he joined JAMS as one of the organization's youngest Neutrals. At JAMS, Daniel serves as an Arbitrator, Forensic Neutral, and technical Special Master with a focus on cybersecurity, cryptocurrency, and complex software and technology related disputes. Some of the major cases for which he has served as an e-discovery special master, or forensic neutral include: *Hougan vs. City of Newport Beach, No. 30-2012-00582855* (Super. Ct. Cal. 2014)*; Small v. University Medical Center of Southern Nevada, 2014 WL 4079507*(D. Nev. 2014)*; C.D.S. Inc. v. Zelter and Amazon Web Services, Inc.*, (S.D.N.Y. 2016); *Jawbone, Inc. v. Fitbit Inc.* et al (Super. Cal., S.F. County 2018). In addition to his vast litigious experience, Daniel is well-published in the cybersecurity space, Editor-in-Chief of the Journal of Law & Cyberwarfare, author of more than 200 articles and books including, "Understanding Software, the Internet, Mobile Computing, and the Cloud. A guide for Judges", published by the Federal Judicial Center. He has been recognized by several United States Supreme Court Justices for his legal scholarship and is a trusted source and a thought leader for cybersecurity articles and opinions, being cited over 500 times to date.

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Distressed Real Estate

Mr. Nagi represents lenders and borrowers in every aspect of distressed real estate, from the pre-default stage through bankruptcy exit. Mr. Nagi is well versed in the issues presented by securitized loans, special servicers, banks, and private lenders in distressed commercial loans, sales via the Uniform Commercial Code, fraudulent transfer actions, and through every stage of insolvency proceedings. In addition to his experience in Single Asset Real Estate bankruptcy cases, Mr. Nagi has represented agent banks and majority lenders for syndicated loans, in out-of-court workouts, and both contested and consensual court-supervised restructurings. Mr. Nagi has represented large international corporations, insurance companies, financial institutions, and individual businesses in federal and state courts in New York and New Jersey.

FinTech

Mr. Nagi uses his creditor-focused, finance experience to counsel early-stage and mature FinTech companies as well as traditional and non-traditional lenders in both business ventures and litigation. He regularly counsels' companies in applying blockchain technology to their respective industries, fundraising efforts, and regulatory issues. Mr. Nagi advises clients on SEC, CFTC, FinCEN, and state-level MSB matters, including the issuance of securitized digital assets. He has authored numerous articles on FinTech issues and is a frequent speaker at conferences.

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Stacy is an experienced trial lawyer, who practices complex business litigation for clients in the entertainment industries, with an emphasis on intellectual property, licensing, unfair competition, business torts, and breach of contract claims. She also represents financial institutions and property owners in real estate disputes. Stacy counsels high-profile artists, producers and talent in accounting and profit-participation, licensing, and other disputes involving the television and motion picture industries. She also has represented numerous other producers and artists, including a film production company, defeating a copyright and trademark infringement lawsuit filed by an individual claiming to have co-written screenplay; well-known artists prosecuting a copyright infringement and right to publicity action for defendants' improper use of performance sound recordings; and a film financier regarding investments in several independent films.

Her work for clients in the commercial real estate, banking, and financial services industries focuses on partnership disputes and representing secured creditors in judicial and non-judicial foreclosure actions and bankruptcy proceedings. She has represented numerous real estate developers and property owners, including Ronald A. Simms and the Simms/Mann Institute for Education and Community Development in connection with various disputes. She also has represented financial institutions in bankruptcy proceedings, including adversary proceedings, regarding priority lien disputes and other business issues.

While she is always prepared to try any case, Stacy firmly believes that resolution of certain matters outside of court sometimes are in the best interests of her client. As such, she is highly skilled in representing clients in alternative dispute resolution through mediations and arbitrations and was elected an Alternative Dispute Resolution Neutral for the Los Angeles County Superior Court in 2006.

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Doug Smith is counsel in Mayer Brown's Los Angeles office and a member of the Litigation & Dispute Resolution, Cybersecurity & Data Privacy and Supreme Court & Appellate practices. Doug handles complex trial and appellate court litigation, focusing on antitrust, intellectual property, tax-related class actions, and data privacy and cybersecurity.

Before recently joining Mayer Brown, Doug was a litigator with the New York and Los Angeles offices of Skadden, Arps, Slate, Meagher & Flom LLP. He also clerked for The Honorable Beverley B. Martin of the United States Court of Appeals for the Eleventh Circuit, Colorado Supreme Court Justice Richard L. Gabriel while he was on the Colorado Court of Appeals, and Colorado Supreme Court Justice Monica M. Márquez. He also has extensive federal government service, including with the White House's Council of Economic Advisers, the Department of Justice, FDIC, Freddie Mac, the US House of Representatives, and the US Senate.

Doug has a strong commitment to pro bono and has received numerous awards for his pro bono service, including the California Young Lawyers Association's Jack Berman Award of Achievement. Most recently, he argued before the Ninth Circuit and secured his second favorable published opinion on behalf of pro bono clients. He also is a lecturer in law at USC Gould School of Law, teaching a three credit class on Fundamentals of Intellectual Property Law. Doug holds CIPP/US and CIPM certifications from the International Association of Privacy Professionals, He also serves as the Managing Editor of the Journal of Law & Cyber Warfare, and on the board of Neighborhood Legal Services of Los Angeles.

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