

# New and Novel Sources of Evidence

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# The New Standards

- ABA Model Rule 1.1
  - “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* . . .”
- To date, 37 states have adopted this heightened standard of competence, including Florida, New York, Illinois, Massachusetts, Pennsylvania, Ohio, and Virginia, Louisiana, and Texas
- Amendment of Texas Rule 1.01
  - Competent and Diligent Representation to include a revised Note 8 that adds “including the benefits and risks associated with relevant technology” to remaining “proficient and competent in the practice of law.”



# Statistics

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- Over two billion people use Facebook regularly
- Over one billion active Instagram users
- Over 350 million active Twitter users
- Over 27 million use a Fitbit regularly
- 39 million Americans use “smart speakers” (Amazon Echo/Alexa, Google Home)





## Dating Apps

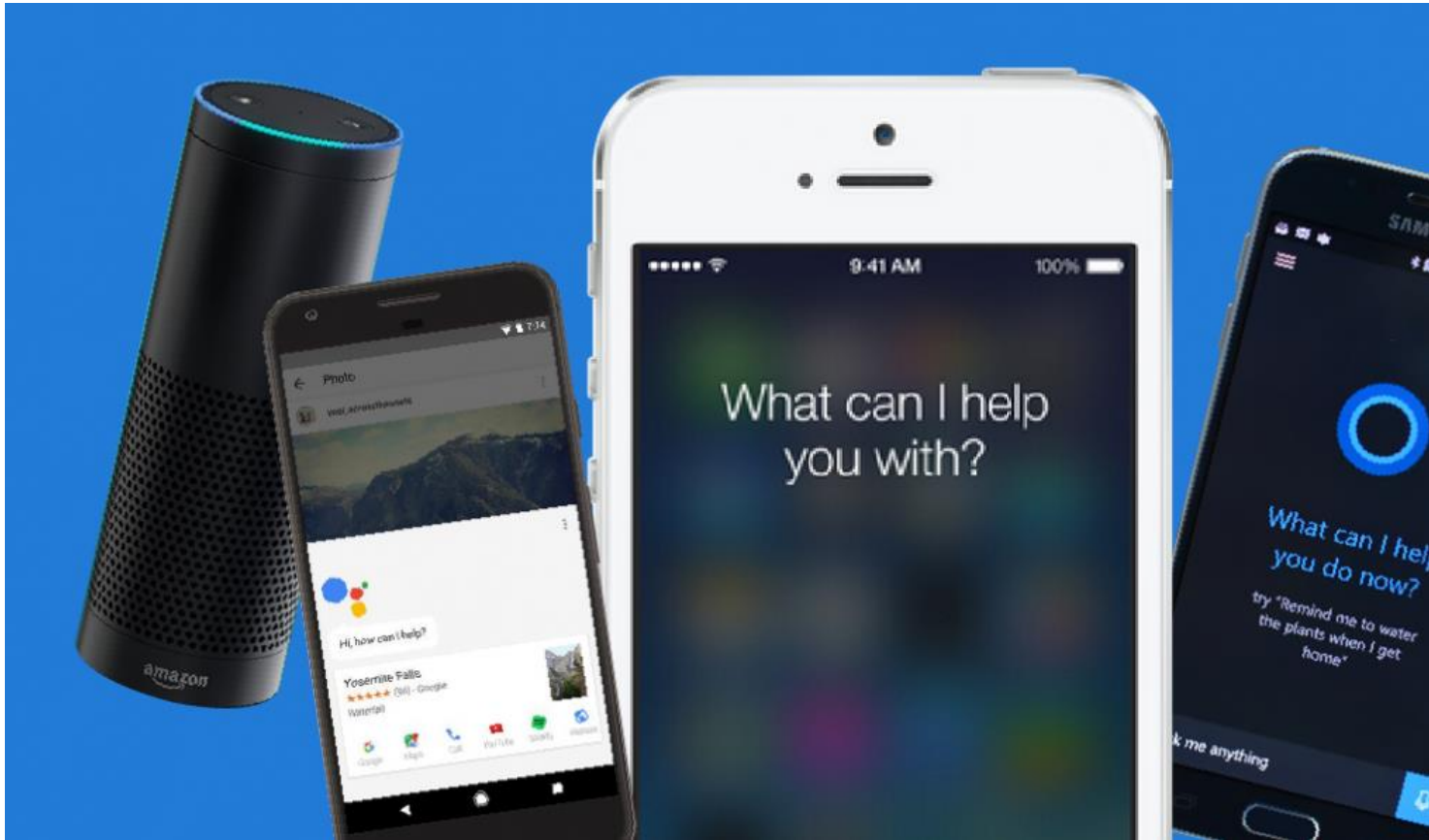


- 25 million people use dating apps at least monthly
- Dating Apps + Family Law
  - Profiles can be discoverable
    - Can be shown to prove party was depleting assets in the marriage on an active dating life
    - May impact custody – various partners around children, safety of children
  - Legal Ethics
    - DON'T CREATE A FAKE DATING PROFILE FOR OPPOSING COUNSEL
    - Illinois lawyer, Drew Randolph Quitschau created fake Match profile for OC, Michelle Mosby-Scott
      - Fired from firm, license revoked for 6 months, recommended six months of driving Uber



# Live Streaming Apps

- Marina Lonina live-streamed the rape of her 17 year old friend on the live-streaming app, Periscope
- 2019 -- People v Y.L. (NY)
  - Two adolescents were captured on FB Live beating a mentally ill homeless man
  - Charged with Attempt to Commit the Crime of Gang Assault in the First Degree
  - Appealed, claiming People did not lay the proper foundation for the video
  - Arguments failed – each D had confessed to being in the video
- 2017 -- Kanongataa v. ABC (NY)
  - Father streams son's live birth on FB Live (120,000 people watched)
  - ABC, Yahoo, others use clips in news stories; Father files copyright infringement claim
  - Case dismissed, based on fair use



## AI Assistants/ Smart Speakers

- About 16% of U.S. homes have some sort of smart speaker listening in on our lives
- Amazon says it gets fewer than 500 search warrants annually for Echo



## “Alexa” is listening...

- 2016- State of Arkansas v. James Andrew Bates
  - Did Alexa record signs of a struggle?
  - Prosecutors ultimately dismiss murder charges in December 2017
- 2017- Murders of Christine Sullivan and Jenna Pellagrini (New Hampshire)
  - Court finds probable cause to believe Amazon Echo recorded evidence of crime; orders Amazon to turn over data
- 2019 – Suspicious Death of Sylvia Galva (Florida)
  - Police obtained a search warrant for anything recorded by two Amazon Echo devices between July 11 at 12 a.m. and July 12 at 11:59 p.m.





# Wearables and Trackables

- 2015 – Commonwealth v. Risley (Pa.)
  - Fitbit data used to contradict sexual assault allegation
- 2015 – Richard Dabate murder prosecution (Connecticut)
  - Fitbit data contradicts defendant's alibi
- 2018 – Nicole VanderHeyden murder (Green Bay, Wisconsin)
  - Fitbit data rules out suspect Doug Detrie.

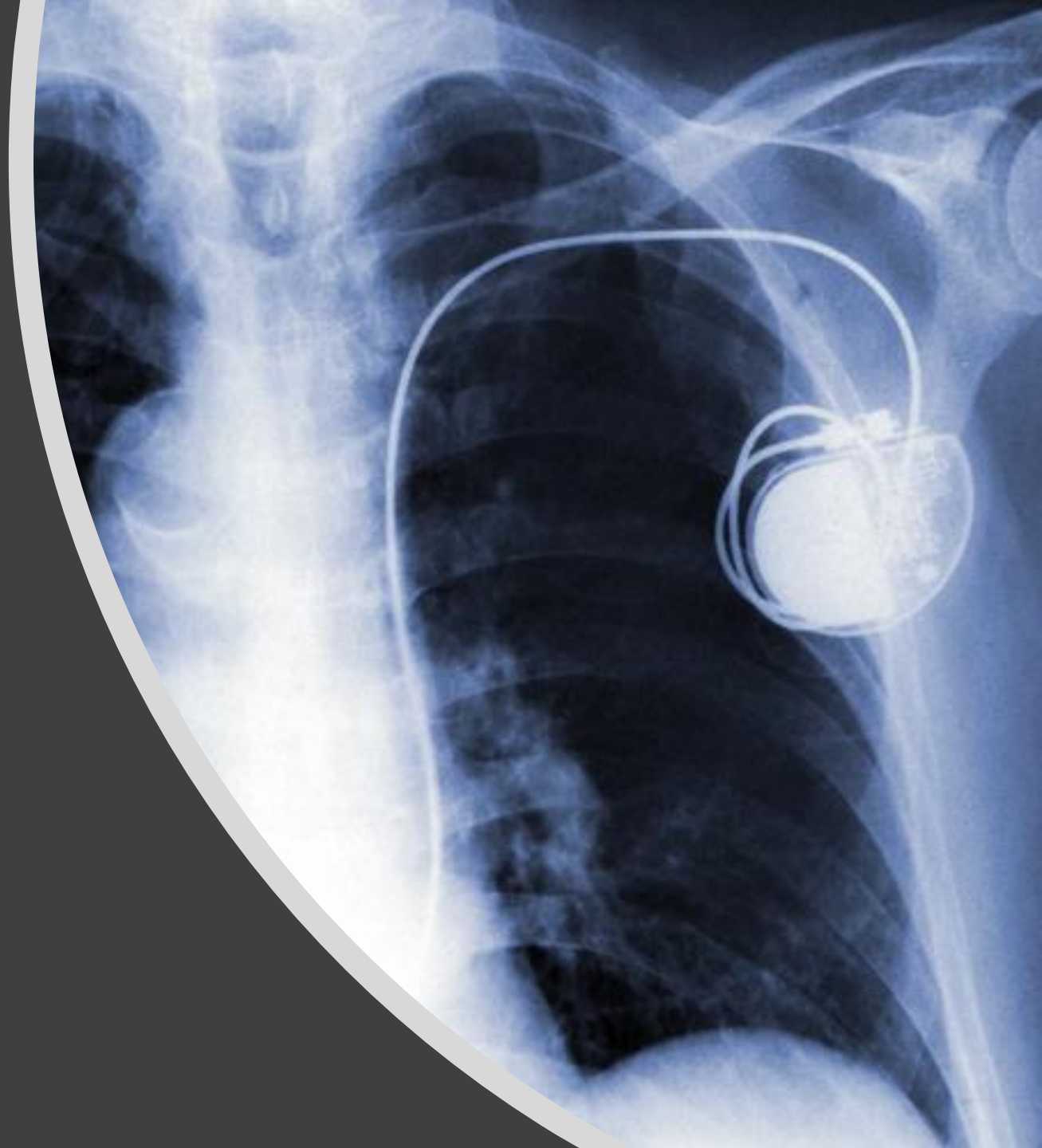


# Wearables and Trackables

- Apple Watch data used to solve 2017 murder of Myrna Nilsson (Australia)
- Murdered Saudi journalist Jamal Kashogg. recorded and uploaded audio of his own 2018 torture and murder at the Saudi consulate in Turkey – using his Apple watch
- Garmin GPS watch owned by British hitman Mark “Iceman” Fellows used to convict him of 2 murders

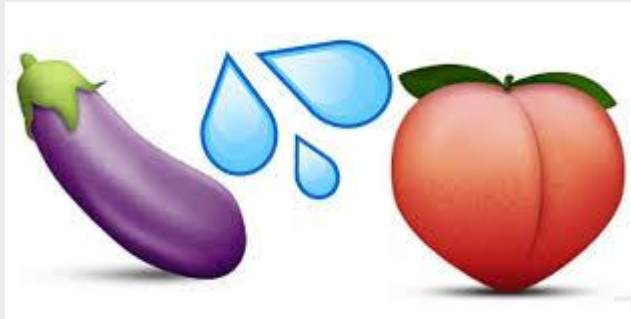
# The Tell-Tale Pacemaker

- "[I]t is highly improbable Mr. Compton would have been able to collect, pack and remove the number of items from the house, exit his bedroom window and carry numerous large and heavy items to the front of his residence during the short period of time he has indicated due to his medical conditions."





## Emojis



- Emojis provide context and meaning to electronic communications
- Over 92% of the online population uses emojis
- So far, been used as evidence in primarily criminal cases
- 2019 - People v. Jamerson (CA)
  - D is alleged to be a pimp
  - Instagram DM: “Teamwork make the dream work 👠💰”
  - Pimping vs. Romantic Relationship?
  - Sex trafficking expert: “wear your high heels to come make some money.”
- Sexual harassment case in CA – does 💋 as a response to sexually explicit text messages mean that a person welcomes the advance?
- Be aware of the meanings of 🍆 , 🍑 , 🍋



# Questions?

Thank you!