

# HOW “BEING FRIENDS” HAS IMPACTED THE INVESTIGATIVE & LEGAL LANDSCAPE

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# PRESENTERS



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## Select Experience

- Provides practical guidance to employers on avoiding litigation risks on issues including employee discipline, workplace harassment, improper use of electronic systems, FMLA/disability leaves, and breaches of non-compete/non-solicitation obligations
- Represents employers in all phases of litigation through to jury trials and appellate court practice
- Represents employers in all aspects of traditional labor-management relations, including collective bargaining and grievance arbitration

## Education

- J.D., Villanova University School of Law, 1995
- B.S., *cum laude*, University of Pennsylvania, Wharton School of Business, 1992

# PRESENTERS



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## Select Experience

- Certified Computer Forensic Examiner (EnCE, ACE), Certified Public Accountant (CPA), and Certified Fraud Examiner (CFE)
- Specializes in forensically preserving, analyzing, and producing electronically stored information (ESI)
- Employs various computer forensic and e-Discovery tools, including EnCase, FTK, Concordance, Relativity, Stratify, and others
- Strategizes with counsel during all phases of litigation and investigations
- Leads high-profile domestic and international computer forensic and e-discovery engagements involving TeraBytes of data for hundreds of Custodians

## Education

- B.S., Summa Cum Laude, Bloomsburg University of Pennsylvania
- Guidance Software
- AccessData



# AGENDA

- I. Social Media - What Is It?
- II. Social Media - Why It Is Important / Legal Implications
- III. What Social Media Information Is Available & How to Preserve It
- IV. Analyzing Social Media Information
- V. The Impact of the Use of Social Media on Phones or Handhelds
- VI. What to Expect Going Forward – Technology & Legal
- VII. Q&A

# SOCIAL MEDIA - WHAT IS IT?

Social Media includes websites and applications that allow for the exchange of user-generated content as well as provide a forum to:

- Share Pictures
- Share Video
- Email / Chat
- Make Public Postings / Blogs
- Share Music / Play Games / Other
- Connect with Other Individuals

# SOCIAL MEDIA - WHAT IS IT?

## Examples

- Facebook - 500 million+ active users (becoming common method of personal communication)<sup>[1]</sup>
- Twitter - 200 million+ active users<sup>[2]</sup>
- MySpace - 130 million+ active users<sup>[1]</sup>
- LinkedIn - 80 million+ active users<sup>[3]</sup>
- Others

[1] <http://www.alexa.com/siteinfo>

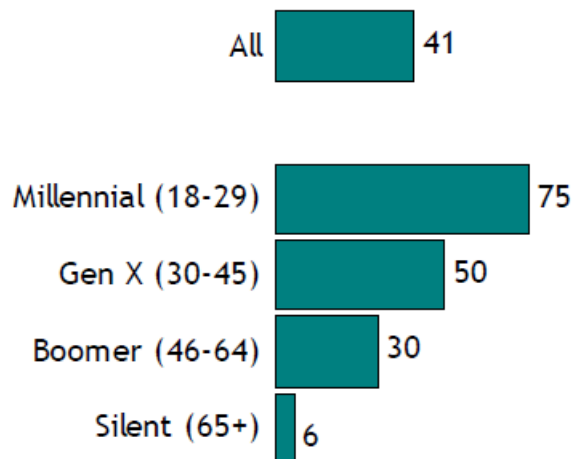
[2] <http://themetricsystem.rjmetrics.com/2010/01/26/new-data-on-twitthers-users-and-engagement>

[3] <http://press.linkedin.com/about>

# SOCIAL MEDIA - WHAT IS IT?

## Do You Have a Profile on a Social Networking Site?

% saying "yes"



PewResearchCenter

## Social Networking Users

% of adults who use social networking sites

	Feb/Mar 2005*	Aug 2006*	Nov/Dec 2008*	Jan 2010**	05-10 Change
All	5	11	27	41	+36
Millennial	7	51	71	75	+68
Gen X	7	10	38	50	+43
Boomer	5	4	13	30	+25
Silent	2	*	2	6	+4

\*Data from surveys conducted by the Pew Research Center's Internet & American Life Project. Question wording varied from 2005 to 2008.



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# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

## Social Media Policy

- Do you have one? If so, what does it say?
- What is / is not prohibited?
  - Speech about company, executives and employees
  - References/recommendations
  - Who is your “friend”?
- How do you handle blogging at work vs. on non-working time?
- How do you handle blogging on company vs. non-company systems?
- Do you require disclaimers as taglines to posts?
- Do you monitor employees’ social media activities? If so, do you advise employees as to potential monitoring?
- Do you identify penalties for violations?
- Do you enforce the policy in an evenhanded, non-discriminatory manner?

# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

## How Employers Are Using Social Media

- Reviewing Facebook/MySpace profiles before making hiring decisions
- Monitoring weblogs of employees
- Making employment decisions based on information learned on social media sites. Examples:
  - Applicant to Cisco not hired after Facebook post weighing merits of “fatty paycheck” against long commute to work
  - Brixx waitress fired after complaining about low-tipping customers on Facebook
  - Private school teacher fired after employer learned about the anonymous sex blog she operated on non-working time
  - Purportedly sick employee fired when employer discovered posted photo showing employee was at a party instead of work

# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

Careful what you wish for ... there is a downside of learning too much information through social media!

- Electronic Communications Privacy Act (ECPA)
- Fair Credit Reporting Act (FCRA)
- Americans with Disabilities Act (ADA)
- Title VII of the Civil Rights Act (Title VII)
- Age Discrimination in Employment Act (ADEA)
- Genetic Information Nondiscrimination Act (GINA)
- Family and Medical Leave Act (FMLA)
- Health Insurance Portability and Accountability Act (HIPPA)
- State off-duty conduct laws
- State criminal background check laws

# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

*Crispin v. Christian Audigier, Inc., et al.*,  
CV 09-09509-MMM-JEMx (C.D. Cal. May 26, 2010)

- Copyright infringement/breach of contract claims
- Defendant sought plaintiff's communications from Facebook and MySpace via subpoena to service providers
- Plaintiff sought to quash subpoena based on the Stored Communications Act (SCA), 18 U.S.C. § 2701
- SCA limits the government's ability to compel Internet service providers to "disclose information in their possession about their customers and subscribers, and does not prohibit disclosure on information that is already public."

# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

*Crispin v. Christian Audigier, Inc., et al. (continued)*

## KEY HOLDINGS:

- Plaintiff has standing to move to quash based on “personal” nature of records
- No immunity for disclosure of information in civil litigation by third-party service provider
- Facebook and MySpace = “electronic communication service” (ECS) providers based on wall/comment posting services
- Facebook and MySpace = “remote computing service” (RCS) providers based on storage of opened messages following transmission or use of privacy settings for wall/comment posting services
- Subpoena quashed to the extent sought non-public information

# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

*EEOC v. Simply Storage Management LLC, et al.*,  
No. 1:09-cv-1223-WTL-DML (S.D. Ind. May 11, 2010)

- Sexual harassment claim brought by EEOC on behalf of two employees
- Employer requested production of employees' Facebook/MySpace profiles, including photos, messages, videos, wall comments, status updates, groups/causes joined, blog entries, activity streams, blurbs and applications (including "How well do you know me" and the "Naughty Application")
- EEOC opposed request, claiming overbroad, not relevant and unduly burdensome, because invades claimants' privacy and will harass and embarrass them
- Court found request to be overbroad but not necessarily an invasion of privacy
- Application of basic discovery principles in novel context

# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

*EEOC v. Simply Storage Management LLC, et al., (continued)*

## KEY HOLDINGS:

- SNS content not shielded because “locked” or “private”
- SNS content must be produced when relevant to claim or defense
- Allegations of depression and stress disorders broaden the appropriate scope
- Reasonable to expect severe emotional or mental injury to manifest in SNS
  - May show onset and degree of distress
  - May reveal other stressors
  - This is NOT “garden variety emotional distress” claim
- Must produce any profiles, postings or messages and SNS applications that *“reveal, refer or relate to any emotion, feeling or mental state, as well as communications that reveal, refer or relate to events that could reasonably be expected to produce a significant emotion, feeling or mental state,”* including third-party communications and relevant photos/videos

# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

*TEKsystems, Inc. v. Brelyn Hammernick, f/k/a Brelyn Kritz, et al.,*  
Civil Action No. 10-CV-00819 (D. Minn.)

- Alleged breaches of non-compete/non-solicitation covenants based on continued post-employment contacts through LinkedIn

Tom—

Hey! Let me know if you are still looking for opportunities! I would love to have [you] come visit my new office and hear about some of the stuff we are working on!

Let me know your thoughts!

Brelyn

# SOCIAL MEDIA - WHY IT IS IMPORTANT / LEGAL IMPLICATIONS

Federal Trade Commission regulations, 16 CFR Part 255

*Guides Concerning the Use of Endorsements and Testimonials in Advertising*

- Posts by bloggers who receive cash or in-kind payment to review a product are considered to be endorsements
- Bloggers who make endorsements must disclose material connections they share with the seller of the product or service
- “Objective” test as to whether speaker’s statement can be considered “sponsored” by the advertiser
- \$11,000 penalty per infraction
- “If you can’t make the disclosure, you can’t make the ad.”<sup>[1]</sup>

<sup>[1]</sup> Richard Cleland, Associate Director of FTC’s Advertising Division

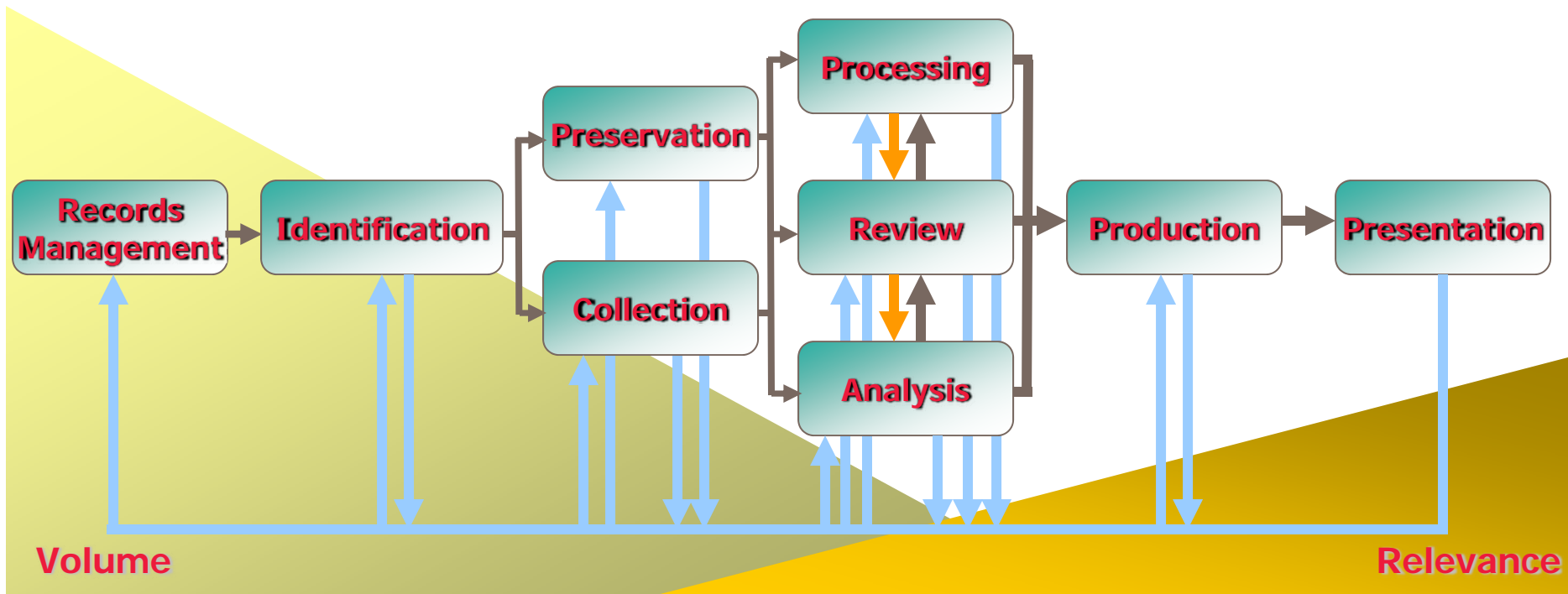


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# WHAT SOCIAL MEDIA INFORMATION IS AVAILABLE & HOW TO PRESERVE IT

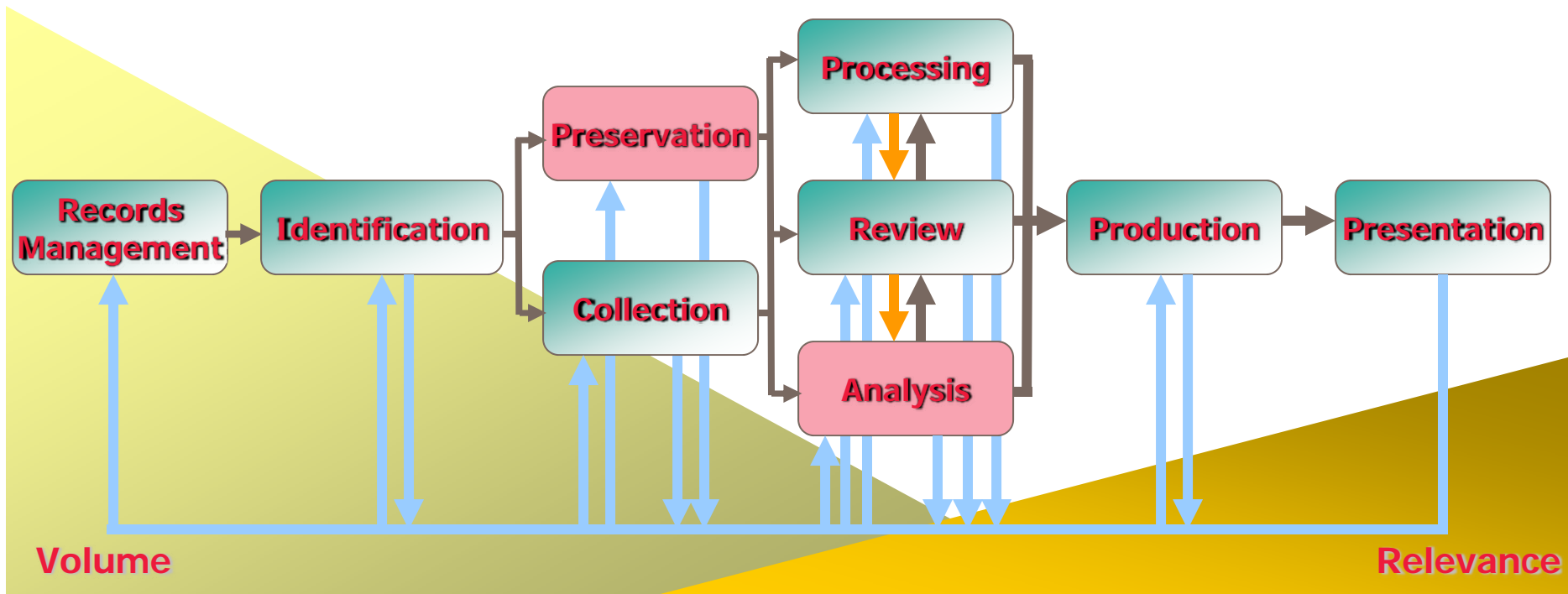
## ELECTRONIC DISCOVERY LIFECYCLE



Source: Socha Consulting and Gelbmann & Associates.

# WHAT SOCIAL MEDIA INFORMATION IS AVAILABLE & HOW TO PRESERVE IT

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# WHAT SOCIAL MEDIA INFORMATION IS AVAILABLE & HOW TO PRESERVE IT

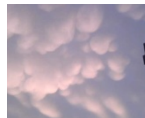
- “Traditional” ESI

- Location on Company Servers / Systems
- Under Control of Company and Is Accessible
- Little to No Assumption of Privacy



- Social Media ESI

- Location on Cloud
- Third-Party Control
- Potential Assumption of Privacy
- Password Preventing Access for Companies



# WHAT SOCIAL MEDIA INFORMATION IS AVAILABLE & HOW TO PRESERVE IT

## Proactive Preservation Tools

- Monitoring Tools / Website Archiving Tools
- Future Data Only
- Potential High Volume of Preserved Data to Store
- Can't Preserve Mobile Phones
- Do You Need Ongoing Preservation?

# WHAT SOCIAL MEDIA INFORMATION IS AVAILABLE & HOW TO PRESERVE IT

## Active ESI Preservation

- Active Data Residing on Web
  - Recording Tools
  - Screen Shots
  - Saving Web Pages
  - Saving Source Code
  - Application Program Interface (e.g., Twitter)
  - Challenge - Data May Be Inaccessible Due to Passwords
- Active / Historic ESI Residing on Web
  - Subpoenas

# WHAT SOCIAL MEDIA INFORMATION IS AVAILABLE & HOW TO PRESERVE IT

## Historic ESI Preservation

- Historic ESI Can Be Forensically Preserved from Hard Drives
  - Artifacts/Remnants
    - Stored in Cache
    - Stored in Unallocated Space
    - Saved Chat Logs
    - Challenge - Data Can Be Overwritten
  - Need Expertise - IT Administrators Are Not Forensic Experts



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# ANALYZING SOCIAL MEDIA INFORMATION

## Forensic Analysis of Historic Data

- Finding the Data
  - Review Cache
  - Data May Need to Be Recovered
  - Identify/Search for User IDs
- Understanding/Reviewing the Data
  - Need to Parse Through HTML Code
  - May Need to Reconstruct Historic Web Pages
  - May Need to Convert Date/Time Information
  - May Need to Corroborate Dates/Times with Pictures/Other Evidence
- Expertise Required



# ANALYZING SOCIAL MEDIA INFORMATION

## Recent Experiences

- Case Involving Allegations of Inappropriate Behavior
- Case Involving Threats / Impersonation



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# THE IMPACT OF THE USE OF SOCIAL MEDIA ON PHONES OR HANDHELDS

## Preservation / Analysis of Mobile Phones

- Need to Have Possession of Phone
- Mobile Phone Forensic Technology Not as Sophisticated as Computer Forensics
- New Devices / Updates Coming Out Faster than Forensic Solutions
- May Need to Use Proprietary Software for Analysis / Review
- More Than One Option - Also Use Phone Backup Software
- Deleted Data Often Not Available
- Text Messaging / Contacts /Other Information Stored in Phone Apps
- Voicemails Typically Are Not Stored On Phones
- Geographic Location Can Provide Evidence



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# WHAT TO EXPECT GOING FORWARD - TECHNOLOGY & LEGAL

- Technology Tool Advancement
  - Continued Advancement in Computer Forensics Technologies
  - Enhanced Backup Capabilities of O/S Making More Data Available (Volume Shadow Copy)
  - More Information May Become Available (e.g., WayBack Machine)
  - More Business Being Done on Mobile Phones Will Mean:
    - Continued Advancement in Software to Preserve/Analyze
    - More Storage Means More Data

# WHAT TO EXPECT GOING FORWARD - TECHNOLOGY & LEGAL

## Legal Developments

- SCA woefully out of date - Congress has left it to the courts to interpret applicability to social media applications that did not exist
- Further development of case law regarding admissibility of SNS content - current limited case law only deals with production requirements
- Potential guidance by newly constituted NLRB on permissible restrictions for social media policies
  - Expect *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia and Vivian A. Foreman*, 343 NLRB 646 (Nov. 2004) to be overruled and overly broad restrictions on speech to be outlawed due to chilling effect on employees' Section 7 rights under NLRA
  - Ruling would apply to unionized and non-unionized workplaces

# Q & A

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Jennifer Platzkere Snyder is a Partner in the Litigation Department and the Labor and Employment Group at Dilworth Paxson LLP, where she represents public and private sector employers across a wide array of industries in all aspects of labor and employment law. Ms. Snyder's practice includes traditional labor-management relations, employment discrimination and sexual harassment, restrictive covenants and trade secret disputes, whistleblowing, executive employment agreements, wage and hour audits, personnel policies, reductions-in-force, and employee discipline and discharge matters. She provides practical guidance to employers on avoiding litigation risks where possible, and aggressively litigates disputes before federal and state courts, administrative agencies and arbitrators.

Named one of "50 on the Fast Track" by the Legal Intelligencer and Pennsylvania Law Weekly, Ms. Snyder is an award-winning lecturer on topics such as the legal implications of the electronic workplace, prevention of workplace harassment, new frontiers in labor law, the magic of advocacy, and the protection of assets using restrictive covenants. She is admitted to practice in the State and Federal courts of Pennsylvania, New Jersey and New York.

## **Education**

J.D., Villanova University School of Law, 1995

B.S., *cum laude*, University of Pennsylvania, Wharton School of Business, 1992

National Theatre Institute, 1990

## **Professional Affiliations**

American Bar Foundation, Fellow (2009 - present)

The Baldwin School, Distinguished Young Alumnae Award, 2003

*The Legal Intelligencer/Pennsylvania Law Weekly*, 50 on the Fast Track, 2002

American Bar Association, Section of Labor & Employment Law, Practice & Procedure Under the NLRA Subcommittee member (2005 - present), ABA Fellow (2003 - 2005)

Temple American Inn of Court, Barrister (2003 - present), Executive Committee (2005 - present)

The Baldwin School, Alumnae Association Executive Board (1996 - present), Trustee/President of Alumnae Association (2002 - 2005)

*Philadelphia Lawyer Magazine*, Editorial Board (2004 - present)

Philadelphia Bar Association, Commission on Judicial Selection and Retention, Investigator (2009 - present)

BNA Books, *How to Take a Case Before the NLRB*, Chapter Editor (2007 - present)

# BIOGRAPHIES



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Jeffrey S. Leap is a Senior Manager in BDO Consulting, a division of BDO USA, LLP, in New York. Mr. Leap specializes in preserving, analyzing, and producing electronically stored information (“ESI”) and is experienced with computer forensic and e-Discovery tools including EnCase, FTK, Concordance, Stratify, and many others.

Mr. Leap has led numerous high profile computer forensic and E-Discovery engagements including matters related to fraud, embezzlement, money laundering, employee misconduct, and political investigations. He has assisted attorneys and management with the recovery, analysis, and discovery of electronically stored information in these cases, involving hundreds of pieces of media.

Mr. Leap has led numerous high profile computer forensic engagements including matters related to fraud, embezzlement, money laundering, employee misconduct, and political investigations. He has assisted attorneys and management with the recovery, analysis, and discovery of ESI in these cases, involving hundreds of pieces of media. Mr. Leap has teamed with BDO’s International members by assisting with investigations abroad. Mr. Leap has assisted with preservation and analysis of evidence within the U.S., Europe, and Asia and has seconded in London, U.K. Mr. Leap also leads BDO’s International Computer Forensics Conference.

Mr. Leap is certified by Guidance Software and AccessData, the creators of EnCase and FTK respectively, on ESI preservation and analysis, including preservation, various analyses, password and deletion recovery, and more. Mr. Leap is trained by both Guidance Software and AccessData and is trained in Guidance Software’s Expert Series in Advanced Internet Investigations course. Mr. Leap has provided accounting and consulting services to a variety of businesses and individuals for over eight years.

## **Education**

BS, Accounting, Bloomsburg University

## **Professional Affiliations**

High Technology Crime Investigation Association

Association of Certified Fraud Examiners

American Institute of Certified Public Accountants

New York State Society of Certified Public Accountants

New Jersey State Society of Certified Public Accountant

# SERVICE RULES<sup>SM</sup>

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