

# THE NATIONAL LAW REVIEW

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## Electronic Evidence Can be Easily Falsified and Even Erased Altogether

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The nature of electronic evidence in the courts of law has undeniably and irrevocably changed over the past few decades. No longer is a photograph simply a photograph, or a video, well, a video. Tweets, Facebook posts, Instagram, Photoshop, these have all altered the landscape of the burden of digital proof. Questions range on a wide spectrum of possibility. Even something as ostensibly innocuous as being Facebook friends has complicated implications when it comes to family law such as divorce.

Angela M. Scafuri writes with clarity on these, particularly interesting and relevant issues. She says that though a lot of the newer case laws regarding electronic evidence in family law is more [concerned with the “preservation and production” of digital records and data](#), there is an equally important task at hand in the “authentication and admissibility” of that same information. The more that spouses present “evidence” against their estranged husbands and wives, the thornier the issue becomes and the more important it is to understand the laws surrounding this electronic information.

### Tracking Electronic Evidence in the Law

It has become a truism that technology progresses faster than we are able to consume it. It is akin to driving through a small town in the rural parts of America, one might say, “blink, and you’ll miss it.” A similar notion is at work in technology, especially with regard to the Internet, iPhones and Androids, and the app revolution that has changed computing and the way we interact with our devices, each other, and ourselves. To rephrase the adage: “blink, and it’s all different.”

In this way, the law is similar to us, as you are likely aware. Legislation and law have struggled to keep up the pace with the ever-shifting technological terrain. Like digital tectonic plates beneath our fingertips, the digital world is constantly changing. To put things in perspective, it was [estimated](#) at the end of 2017 that over 400 hours worth of videos was uploaded to YouTube every single minute, tallying to over a half million hours of video content each day. Here’s another staggering figure: a billion collective hours of video are being watched every day on the YouTube platform alone.

That’s just YouTube! If you take Facebook, Instagram, Twitter, Snapchat, and the other social media platforms out there, it quickly becomes too much to comprehend (if it wasn’t already). Add to this the startling idea that there are more phones (and similar devices) than human beings on Earth, and [“more data has been created in the past two years than in the entire previous history of the human race”](#). The point is that the world is recording more and more digital content, and it is incredibly likely some of that will end up in family law proceedings like divorce.

### The Times They Are Electronically Changing

The “old school” paradigm of paper evidence has existed for centuries within a single general modality of



Article By [PracticePanther](#)  
[Jaliz MaldonadoPractice Panther](#)

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expected behavior and burden of proof. But, with this changeover, the transition from paper documents to electronic data, there is the necessity that lawyers' to understand the switch as well. Whether the concern is with the saving of electronic data or its retrieval or verification, it is vital that one becomes familiar with the ways in which electronic evidence can be easily changed, falsified, or even erased altogether.

As such, many states are requiring lawyers to undergo training to be better equipped to deal with these matters. [Family Lawyer Magazine \(FLM\) writes](#), "The Florida Supreme Court, for example, mandates technology courses for lawyers. Attorneys in Florida are required to take an additional three hours in an approved technology program course." Other states are following suit as well.

That said, simply having attorneys go through mandatory training does not solve the problem of electronic evidence. The burden of authenticity remains a tricky issue. Provided the unpredictable sort of evidence that is electronic in nature, the law is currently not up to the task, which is to say that is not modern enough to deal with the surfeit of digital evidence and the issues that arise with it. FLM goes on, "In cases where digital evidence is dispositive, admitting such evidence must be fairly balanced against the nature of digital evidence. While many articles are written on digital evidence, courts continue to struggle with the requirement of authentication set out in" the Federal Rules of Evidence (FRE). In other words, the acceptability of such evidence can only be fulfilled by other support that is satisfactory in providing information that buttresses the electronic evidence's claim to be what it claims to be. Along these lines, FLM says that "two standards exist for authenticating social media evidence: the Maryland standard (Griffin v. State) and the Texas standard (Tienda v. State)."

The problem is that neither one is wholly adequate, so we are left with both law and precedent that does not account for the nature of the reality in which attorneys must practice. According to the FRE, as listed by Cornell Law School, "[To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.](#)" This tautology is exactly the problem, and as some have pointed out, the burden of proof is shifting more and more toward the defense, which is self-evidently [dangerous in the case of impecunious defendants](#) hoping to falsify electronic evidence against them.

## Summary

Attorneys are dealing more and more with electronic evidence. In this modern world, there is no way around it. Unfortunately, the law itself is currently not sufficient to deal with the changing landscape, whether with regard to data storage, the retrieval of said data, or the high likelihood that the data can be modified or deleted. As such, you will want to be as familiar as possible (technical limits notwithstanding) with electronic evidence and its discontents in order to give your clients the best chances at a fair trial.

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