

Quick E-Evidence Tips for Family Law Practitioners

- 1. What you're looking for:** Typically, family law attorneys are looking for e-mails and cell phone text messages. That's where the evidence of adultery is usually to be found. In many cases, chat and instant messages are not recoverable because they are not written to the hard drive. You'll need to explain exactly what applications were used to your computer forensic expert before you can know what is likely to be recoverable and what is not. E-mail, including web-based mail, is generally recoverable. Ditto for cell phone text messages, though the forensic acquisition of some cell phones is not yet supported. You may also be looking for Internet history, perhaps to show an Internet sex addiction, a fascination with something particularly disturbing for someone who has partial or full custody, or to show the purchase of gifts for a third party. You may also be interested in financial records to prove that there are hidden assets or that there has been a dissipation of assets.
- 2. How you get what you're looking for:** If the computer itself is password-protected, or if it is not a marital asset, you need to get a court order to forensically image and analyze. If it is a marital asset, and e-mails, text messages etc. are password protected, you will to get a court order. Courts abhor fishing expeditions so the requests should be specific. File a Motion to Image and Analyze a Computer (or other device).
- 3. How do you protect privacy rights?** Besides being specific, make sure the court understands that your forensic expert will turn over the results of any searches to the opposing counsel for review and production. Alternatively, the other side may perform its own forensics and searches – however, it is key that the parties agree on what the search parameters are. Sex-related terms are common, as are date restrictions, or searches for particular e-mail addresses. Quite often, we have seen parties agree that the search can be for evidence of adultery, sexual conduct on the Internet, or asset dissipation or concealment without further parameters. Again, this is a matter for agreement between counsel – or the judge will be happy to decide for you.
- 4. What about the ISPs?** Internet Service Providers do not like to retain deleted data – they hose it as quickly as possibly (almost always in 30 days or less) to avoid the subpoenas. With respect to e-mail, unless you are only interested in current activity, you are going to have to get the computer of the sender or the recipient. You can get activity logs from ISPs, but they will not contain the content of communications. This is also true for cell phone providers. The data is on the phone itself.
- 5. What happens if child pornography is found?** Any competent examiner is going to turn the evidence over to the police, as required by law. Sometimes, when child pornography is suspected, it is wise for counsel to consider how the wife will support herself and the children before getting access to a computer

containing contraband. Once the rabbit is out of the hat, it is a near certainty that criminal charges will be brought and defendant will be financially ruined – and incarcerated if guilty.

6. **How much does the usual divorce case cost in terms of computer forensics?** It isn't cheap, so there is always a calculation to be made when deciding to proceed down this road. If the assets are modest, it may not be worthwhile, unless there is a serious child custody issue involved. A small case, one involving both forensic imaging and forensic analysis, is one that comes in under \$10,000. More than 80% come in under this amount. The remainder generally do not exceed \$15,000. Only cases with considerable financial or other complexities (such as e-mails in a foreign language) tend to exceed that amount. Remember that there are additional charges for producing a forensic report (very time-consuming) or appearing in court.
7. **How long will it take to do the imaging?** This depends on the size of the hard drive and how intensively the computer has been used. A common amount of time is 4-6 hours.
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9. **Can the person then have the computer back?** Absolutely, your computer forensic expert will work on the image of the evidence.
10. **How long will the analysis take?** This varies by company, but you need to anticipate a minimum of 2-4 weeks after the forensic image has been made. Sometimes, they can expedite the analysis and sometimes these cases are stacked up like patients on gurneys in a hospital corridor.
11. **How do I maintain chain of custody?** FedEx, or any other tracking number system, will work just fine. If people are used, a chain of custody form should be used each time the evidence is transferred.
12. **How much deleted data can you find?** Attorneys hate this answer, but it just plain depends – once again, on the size of the hard drive and how intensively the machine was used. A small hard drive, written to intensively, will overwrite data faster – and then it is really gone unless you go to a wildly expensive white lab – we have yet to see that ever done in a divorce matter.

The electronic era has certainly complicated the life of the family law practitioner. We've come a long way from the days of Perry Mason, who had trusty PI Paul Drake to help him solve his cases. Now the detectives are digital and the cases often blossom into a *CSI* script.

The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology and computer forensics firm based in Fairfax, VA. 703-359-0700 (phone) www.senseient.com

