

# **Electronic and Digital Evidence: What Every Practitioner Needs To Know**

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## The Prevalence of Digital Information

- 99.97% of Corporate Data
- Two-thirds Never Printed
- 60 *Billion* Emails in 2006
- Other Sources
  - Surveillance Cameras
  - GPS Devices
  - Building/Facility Access Control Devices
  - Parking Lot Access
  - Vehicle Computers
  - Appliances
  - RFID Merchandise Tags
  - Copier Hard Drives

## The Relevance of Digital Information to Litigation

- Business Litigation
  - Memoranda
  - Correspondence
  - Emails
  - Drafts and Discarded Versions of Memoranda, Correspondence

- Criminal Prosecutions
  - “Computer Crimes”
  - “Traditional Crimes”
    - Research/Preparation
    - Corroborating/Disproving Alibis
- Matrimony Cases
  - Internet Surfing
  - Financial Records
  - Emails
  - Text Messages
- Personal Injury
  - Commercial Truck
    - Delivery Logs
    - Customer Records
    - Weight and Load Records
    - Maintenance Records
- Products Liability
  - Design
  - Testing
  - Complaints
  - Internal/External Correspondence

The Relevance of Digital Information for Non-Litigators

- Data Management/Counsel
- Preserving Confidentiality

Assessing Whether Digital Evidence Exists in Your Case

- Within Your Opponent's Possession/Control
- Within Your Client's Possession/Control
- Within Third Party Possession/Control
- Methods of Acquisition (Outside Discovery)

E-Discovery

- Materially Different Than “Traditional” Discovery
  - Properties of Electronically Stored Information (ESI)
    - Volume
    - Duplicability
    - Fragile, Yet Persistent
    - Ease of Undetected Alteration
    - Metadata
    - Hardware Dependent
    - Searchability
  - Obligations of Counsel
  - High Stakes
    - *Zubulake v. UBS Warburg*
      - \$9.1 million compensatory, \$20.2 million punitive
    - *Coleman v. Morgan Stanley*
      - \$604.3 million compensatory, \$850 million punitive
      - Reversed on unrelated grounds
    - *Qualcomm v. Broadband*
      - 14 in-house and outside counsel
      - Rule to Show Cause
      - Referral to State Bar Disciplinary Committee

- Conducting E-Discovery
  - Scope
  - Cost
  - Format
  - Privilege
  - Federal Rules
- Steps to Compliance
  - Locate
  - Preserve
  - Review
  - Produce
- Data Management Key to Compliance
  - Client's Computing Architecture
  - Client's Computing Practices
  - Data Retention Policies
  - Computer Use Policies
  - Litigation Hold Protocol
- Attorney Obligations – *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 WL 1409413 (S.D.N.Y.)
  - Responsive data on computers which migrated to “successor” company
  - **Law Firm** “never undertook the more methodical survey of the SRC Defendants’ sources of information”
  - **Law Firm** “simply accepted the defendants’ representation that, because SRC was no longer in operation, there were no computers or electronic collections to search”
  - “Had **Law Firm** been diligent, it might have asked – as it should have – what had happened to the computers SRC used”

- “**Law Firm’s** obligation extends to an inquiry as to whether information was stored on that server and, **had the defendants been unable to answer that question, directing that a technician examine the server”**

#### Search and Seizure

- Search Warrants
  - Reasonable Expectation of Privacy
    - *U.S. v. Carey*, 172 F.3d 1268 (10<sup>th</sup> Cir. 1999)
    - *U.S. v. Runyan*, 275 F.3d 449 (5<sup>th</sup> Cir. 2001)
  - Establishing Probable Cause
    - Crime Has Occurred
    - Evidence of Crime at Site to be Searched
    - Evidence of Crime on Computer
  - Challenges to Probable Cause
    - Nexus Between Location and Crime
    - Nexus Between Computer and Crime
      - *U.S. v. Reyes*, 798 F.2d 380 (10<sup>th</sup> Cir. 1986) – probable cause that evidence exists in electronic format not required
      - *U.S. v. Hudspeth*, 459 F.3d 922 (8<sup>th</sup> Cir. (Mo.) 2006)
    - Staleness
      - 4-1/2 Months
        - *U.S. v. Fazio*, 2006 WL 1307614 (E.D. Mo. 2006)
      - 13-15 Months
        - *U.S. v. Harvey*, 2 F.3d 1381 (3<sup>rd</sup> Cir. 1993)
    - Lack of Corroboration

- General Insufficiency
  - *U.S. v. Strauser*, 247 F.Supp.2d 1147 (E.D. Mo. 2003)
  - *U.S. v. Alagic*, 2007 WL 128947 (E.D. Mo. 2007)
- Particularity
  - *In the Matter of the Search of 3817 W. West End, First Floor, Chicago, Illinois 60621*, 321 F.Supp.2d 953 (N.D. Ill. 2004)
  - *U.S. v. Kaechele*, 2006 WL 3510898 (E.D. Mich. 2006)
  - Special Masters
  - “Taint Teams”
    - *U.S. v. Triumph*, 211 F.R.D. 31 (D.C. Ct. 2002)
- Statutory Issues – 542.276 RSMo
  - 10 Days for Execution
  - Execution by Peace Officer
  - Within Territorial Jurisdiction of Court – 542.286.2 RSMo
  - *State v. Rupnick*, 280 Kan. 720 (Kan. Sup. Ct. 2005)
- Exceptions to the Warrant Requirement
  - Consent
    - Third Party Consent
      - Authority to Consent
        - *U.S. v. Smith*, 27 F.Supp.2d 1111 (C.D. Ill. 1999)
      - Apparent Authority
      - Parental Consent
        - *U.S. v. Rith*, 164 F.3d 1323 (10<sup>th</sup> Cir. 1999)

- System Administrators
- Password-protected Files
  - *Trulock v. Freeh*, 275 F.3d 391 (4<sup>th</sup> Cir. 2001)
- Implied Consent
- Practical Considerations
  - Withdrawal of Consent
  - Scope of Consent
  - Focus of Search -- *Carey*
- Search Incident to Arrest
  - *U.S. v. Reyes*, 922 F.Supp. 818 (S.D. N.Y. 1996) (pager memory)
- Exigent Circumstances
  - *U.S. v. David*, 756 F.Supp. 1385 (D.C. Nev. 1991) (data deletion)
  - *U.S. v. Romero-Garcis*, 991 F.Supp. 1223 (D.C. Ore. 1991) (pager)
  - *U.S. v. Ortiz*, 84 F.3d 977 (7<sup>th</sup> Cir. 1996) (pager)
- Plain View
  - “The plain view doctrine does not authorize agents to open and view the contents of a computer file that they are not otherwise authorized to open and review.” – *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, United States Department of Justice, 2002
- Inventory Search
- Automobile Search

- Other Issues
  - Workplace Searches
    - Co-Worker Consent
      - *U.S. v. Longo*, 70 F.Supp.2d 225 (W.D. N.Y. 1999)
    - Employer Consent
    - Government Employers
      - *O'Connor v. Ortega*, 480 U.S. 709 (U.S. Sup. Ct. 1987)
      - *U.S. v. Thorn*, 375 F.3d 679 (8<sup>th</sup> Cir. (Mo.) 2004)
  - Private Searches
    - *U.S. v. Anderson*, 2007 WL 1121319 (N.D. Ind. 2007)
  - Privilege
    - *In Camera* Review
    - Special Master
    - “Taint Team”
      - *U.S. v. Neill*, 952 F.Supp. 834 (D.C. D.C. 1997)
      - *U.S. v. Hunter*, 13 F.Supp.2d 574 (D.C. Vt. 1998)
- Statutory Issues
  - ECPA – 18 U.S.C. 2701 *et seq*
  - PPA – 42 USC 2000aa *et seq*



Computer Forensics

- The use of specialized techniques for recovery, authentication and analysis of electronic data usage – Kroll OnTrack
- Issues Relating To:
  - Reconstruction of Computer Usage
  - Examination of Residual Data
  - Authentication of Data by Technical Analysis
  - Explanation of Technical Features of Data and Computers
- Ability To:
  - Locate and Produce Deleted Content
  - Provide Detailed History of Internet Use
  - Produce Usernames and Passwords
  - Provide Date/Time Stamps and Other Metadata
- Limitations
  - “Placing User at the Keyboard”
  - Make Assumptions as to Why Something Was Done
  - Find Something That Does Not Exist

Resources

- E-Discovery
  - The Sedona Conference – [www.thesedonaconference.org](http://www.thesedonaconference.org)
  - Kroll Ontrack Data Recovery – [www.ontrackdatarecovery.com](http://www.ontrackdatarecovery.com)
  - Craig Ball, Esq. – [www.craigball.com](http://www.craigball.com)
- Search and Seizure, Statutory Issues
  - U.S. Department of Justice, Computer Crime and Intellectual Property Section (CCIPS) – [www.usdoj.gov/criminal/cybercrime/index.html](http://www.usdoj.gov/criminal/cybercrime/index.html)
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Q & A