

Electronically Stored Information and Your Breakup

Tips, Tricks, and Pitfalls

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On her lawyer's advice, a woman going through a divorce used a password in her possession to access her husband's company emails (both before and after he opened them) to obtain proof that her husband was lying and hiding assets.

Following the divorce, her then ex-husband's company sued her for violations of the Stored Communications Act, 18 U.S.C. § 2701 *et seq.* A jury concluded that her actions were violations of the Stored Communications Act, though the jury declined to award damages to the ex-husband and his company. *Vista Marketing, LLC v. Burkett*, 812 F.3d 954 (11th Cir. 2016).

Prior to divorce proceedings commencing, a man installed a key-logger program on the computer primarily used by his wife and obtained password-protected information that he used in the divorce proceedings and in post-judgment custody proceedings. Even though the parties settled their divorce case and entered into an agreement stating that their divorce agreement settled "all claims" between them, the wife was permitted to proceed with a civil lawsuit against her husband for violations of federal and state laws. The wife successfully obtained summary judgment against the husband in the civil lawsuit with respect to his violations of the Stored Communications Act. *Miller v. Meyers*, 766 F. Supp. 2d 919 (W.D. Ark. 2011).

A man going through a divorce purchased spyware programs to "jailbreak" his wife's iPhone. He installed the spyware program on her iPhone, purportedly obtaining access to her privileged communications with her divorce counsel, as well as other information. The trial court ordered the husband's electronic devices be turned over for inspection by a forensic computer expert to determine the communications to which he had access. *Crocker C. v. Anne R.*, 2015 WL 5664299 (N.Y. Sup. Ct. Sept. 18, 2015).

What do these cases have in common? They all involve the thorny issues surrounding the acquisition and use of electronically stored information (ESI) in divorce cases. They illustrate how easy it is to run afoul of federal and state law in the quest to obtain ESI for use in family law cases and why litigants and their lawyers must proceed with caution navigating divorce in the digital age.

What Is ESI, and How Do I Know Whether It Impacts My Family Law Case?

It is a rare case these days that does not involve ESI in some form. Our reliance on technology and electronics has opened up many new avenues for obtaining information that can help litigants build their case, if the information is obtained legally. However, our daily intersection with ESI has made every family law litigant subject to a higher level of scrutiny than ever before.

By definition, ESI includes all information that is created, maintained, and/or stored using electronic means. ESI can include everything from the obvious, such as emails; text messages; social media postings; direct messages exchanged using social media applications; information found on computers, servers, cloud storage, removable hard drives, and thumb drives; and audio, video, and photographs stored electronically, to the less obvious, such as metadata, geotags, and GPS. The more obvious types of ESI are used in almost all litigated family law cases. Emails, text messages, and direct messages sent using other applications (such as Facebook, Instagram, and WhatsApp) find their way onto nearly every family law attorney's exhibit list at trial. A social media posting disparaging a party's co-parent or Ring camera footage with time stamps contradicting a witness's testimony regarding comings and goings from a home can be used to significant effect on cross-examination.

Many family law litigants do not realize that some of the less obvious types of ESI can prove useful as well. For example, metadata, which, in laymen's terms, is data about data, can reveal who created a document, when it was created, and when it was last accessed or modified. A savvy financial expert, when provided with a spreadsheet created by an opposing party, may look to the metadata available to attempt to determine if the opposing party is being truthful about who created the document and when, and who may have modified it. In more complicated cases, a computer forensic expert can be utilized to examine metadata. A trained expert can obtain metadata without altering it, which is necessary if the metadata is to be used as evidence at trial.

ESI can be useful in cases involving infidelity, domestic violence, harassment, stalking, drug or alcohol abuse, and financial misconduct because it often reveals information that can be used to impeach the testimony of the person who is the abuser or who engaged in misconduct. Additionally, it can be used to bolster the testimony of the person who is telling the truth so that the person is not solely reliant on testimony that can be viewed as he said/she said. ESI can help paint a more vivid picture for a judge. For example, in a domestic violence case or case involving an arrest for driving under the influence, sometimes police officer body camera footage can be subpoenaed, revealing an opposing party's actual demeanor and admissions for review by a judge. Those videos can sometimes be more compelling than a recitation in a police report or even the testimony of a witness.

How Can ESI Be Obtained?

The most effective and safest way to obtain any ESI that you think may be useful in your family law case is to request it through the formal discovery process. Doing so has several advantages: (1) you avoid unintentionally running afoul of federal and state laws by trying to access the information yourself, (2) you may avoid some evidentiary issues if the opposing party provides the ESI as part of discovery, and (3) you will potentially obtain helpful information at less expense than other methods. It is typical to request copies of email, text, and other direct message communications between the parties in a formal document request, mainly because you may not have kept all of those communications, but your spouse or co-parent may have. Receiving copies of any of your communications in which you did not come across well is just as important as receiving the ones where you do present well. It is far better to have negative communications you sent in advance so that you can prepare an appropriate response with your attorney, rather than to be surprised with it during a trial. If infidelity is suspected, requesting copies of all electronic communications with any paramour can be illuminating, but keep in mind that most text messages are not saved indefinitely on a device and cannot be obtained from the cell phone provider. Another way to capture information that may be useful is to include a document request that a party use the "Download Your Information" feature (or similar) found in certain social media applications to download social media profiles, postings, pictures, friends and followers, direct messages, status updates, and the like. While any response provided will only capture a snapshot in time of a person's social media usage, that snapshot can be updated by the party throughout the case.

If you anticipate that the other side's ESI may be needed in your case, discuss with your lawyer whether it is appropriate to send a preservation letter. A preservation letter is a letter sent to the opposing party in which your attorney puts the opposing party on notice that ESI may be requested in the case and requests that the individual preserve and retain

any ESI. The letter makes it clear that the opposing party may not delete, destroy, or otherwise alter ESI. The letter should also state that the ESI must be preserved in its original form because hard copies of ESI will not always reveal the level of data that you need. The purpose of the preservation letter is to prevent "spoliation" (i.e., destruction) of valuable evidence in your case. If the opposing party receives such a letter and deletes or destroys ESI anyway, that party could be subject to sanctions from a court.

If you believe that helpful ESI was deleted, or if you have reason to believe that there may be ESI that should be accessed directly from a party's device (such as internet browser search histories, photographs, or videos), you and your attorney may decide that filing a motion in court to request access to the other party's devices for inspection by a computer forensic expert is a sound strategy. This does not occur in every family law case but may be appropriate in certain situations.

It is common for parties to be "friends" or followers of one another on social media. If an opposing party's social media profile is public, or if you are friends with the person on social media, you can screenshot any information that you think may be helpful. It is important to do so at the time that you see a posting, picture, reel, story, or other video because many of these postings or images can be deleted or will disappear after a period of time. It can be a violation of ethical rules for your lawyer's office to "friend" the opposing party for purposes of obtaining information gleaned from social media, so that will not be a viable option.

What to Avoid When Accessing ESI and Social Media

Retrieval of information directly from a device should only be done with court approval and with the assistance of a computer forensic expert. As the examples at the beginning of this article demonstrate, there are numerous cases where a party has attempted to access ESI without court order or consent and, in doing so, has exposed that individual to civil and criminal penalties. The laws governing access to devices and accounts containing ESI are complicated and easily violated. Spyware and other key logging software can be problematic for these reasons. Always consult with your attorney prior to taking any action to obtain ESI from your spouse or co-parent. Copying a hard drive left in the house or intercepting your spouse's emails on that individual's cell phone may seem like a good idea, but the consequences to you legally and within the context of your case can be harmful.

Furthermore, novices who attempt to access ESI may do more harm than good. A computer forensic expert can ensure that data, including data believed to be deleted, are recovered and preserved properly. Deleted data are not always deleted permanently, as many times the data exist until they are overwritten by other data. Backup copies may also be recoverable from storage and cloud devices. Computer

forensic experts can obtain that information properly and preserve it for use in court.

How to Protect Your ESI

Experienced family attorneys will tell you to assume that everything you put in writing (in whatever form) will be read by a judge someday. When writing emails, text messages, and the like to your spouse or co-parent, keep your communications brief and limited to essential matters. Messages written in a flash of anger can live on in your case for years and may be cited by a judge in a decision about your family someday. The same principles apply to your social media postings. Even if your profiles are set to private, there may be friends or extended family who will provide information that you post to the opposing party. Do not post about your divorce or custody case, and keep in mind that anything you post, even if it seems innocent at the time, can be potential evidence later on in your case. For this reason, you should monitor posts in which you are tagged as well.

As discussed above, deleting data such as messages, postings, pictures, and videos will not help you and could expose you to sanctions by a court. You should assume that your spouse or co-parent has already seen the message or posting and has a copy of it. If you delete the message or posting and are caught, a judge could view you as less credible on other issues in the case. If there are messages or posts that concern you, discuss with your lawyer the best way to defuse their impact.

Many of the ways you protect your information in your daily life will help you in your family law case. Do not leave your devices unattended, particularly if you and your spouse are living together during a divorce. Likewise, do not use the family computer or iPad to communicate with your lawyer or to prepare notes for your case, as those communications are protected by attorney-client privilege and confidentiality. You do not want your spouse (or your children) intentionally or unintentionally viewing them. Once a family law case starts, you should change your passwords on all of your accounts and devices and set up two-factor authentication so that you will be notified if an account or device is accessed without your consent. Only use passwords you will remember (and that are not known to the opposing party), and change them periodically.

Also use caution when using any device owned by your employer or email account provided by your employer for personal communications, as confidentiality may be compromised. In some cases, litigants subpoena information from the opposing party's employer, leaving your personal and confidential information vulnerable to exposure.

Cloud storage, such as the iCloud, can be problematic. It is common for litigants to think that they have safeguarded their ESI, only to find out that the family cloud storage was saving backup information that could be viewed by the other party. Pictures with a paramour, emails and text messages, and other

private information can be saved and accessed by the opposing party, and sometimes your children, using the cloud.

Conclusion

When it comes to ESI and your family law case, rely on your attorney to counsel you on the appropriate strategy. While there are numerous ways that ESI can be accessed and used for your case, that does not mean that it is always necessary to do so. You and your attorney should decide what ESI will be beneficial to your case and the best way to obtain it. Hiring experts and subpoenaing information can become expensive, as can reviewing the ESI obtained. Helpful questions to ask your attorney about ESI and your case include: Will the cost be justified by the benefit you expect to receive? If you pursue certain ESI, will the other side then request similar information from you that you would rather not provide? Are there simpler ways to prove my case?

While there is no question that ESI obtained from your spouse can be helpful in your family case, it must be obtained using legal means and formal discovery to be strategically useful in your case. Consult with your lawyer prior to attempting to obtain ESI on your own to prevent violations of federal and state law. Experienced family lawyers often have teams of professionals with whom they work, including computer forensic experts and criminal attorneys, to obtain ESI properly. **FA**



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