

Murder 101: Using Technology to Prove Your Case

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What is digital evidence?

- Digital evidence is any probative information stored or transmitted in digital form that a party to a court case may use in trial. Namely, anything electronic.
- Examples:
 - Cellphone logs
 - Text messages
 - Emails
 - Photos/videos
 - Social media
 - Browser history

How do you obtain and collect digital evidence?

- Firstly, ask, are you working with a third party? Such as, Meta. If yes:
- **Q: How can you preserve digital evidence?**
 - Notify the third party (i.e. Meta). Send the company a “Preservation Letter”.
 - Today, many companies have law enforcement portals where you request to preserve a user’s information.
 - Typically, a preservation lasts for 90 days. After that, a follow-up with a search warrant is required.
 - You must be specific with your request (i.e.: just photos, messages with a specific user, friends lists, etc.) And, the amount of time you have probable cause.

When do you need a search warrant?

- If you are an investigator and you seize the evidence, put the phone in airplane mode. This way, it cannot be accessed by an outside party and wiped.
- If you are contacting a company for a subpoena you must send a “Non-Disclosure Order” so that the subscriber is not notified when law enforcement accesses their account.

What two ways are there for obtaining digital evidence?

- Firstly, you may receive access to a person’s phone by receiving their consent.
- Secondly, you may get a warrant to seize the phone.
- Third, you shall receive a warrant to seize the phone from the victim. Then, you shall receive a search warrant to specifically search the contents on the digital device.
- Note, a search warrant to get a phone works to enter inside their home. But, for homicide, it is not probable cause if the suspect talks about the crime on the phone.

How can you get a passcode to search a device?

If I have a warrant to search someone’s device, how can I get their passcode to get into the device? Can you compel someone to give you their passcode?

- Not necessarily. There are 5th Amendment concerns regarding forcing someone to give up their passcode. In some states, it is a violation of the 5th amendment, self-incrimination, to compel a passcode from someone. If someone provided their passcode and the evidence in the device is incriminating, they incriminated themselves.
- However, if you can prove the device belongs to the person, for instance because you found the device in their pocket, then the forgone conclusion test applies, this is not deemed self-incrimination. For probable cause, the time that is relevant is strengthened by prior relations, conspiracies, and any other relevant information.

What can you search for?

- Cell phones contain a person’s entire life.
- IE: Apps with locators (such as Google Maps) show where someone is when using the app at a specific time. Access to deleted messages or photos can be recovered. Browsing history may be useful as well.
- The process is time consuming. But sometimes going through the device very carefully will reveal evidence to assist your case.
- If you cannot get the phone at the time of arrest, consider a “Cloud Warrant” to search and seize anything saved into a person’s iCloud.

How do you authenticate digital evidence?

- A: F.R.E. 901: To authenticate evidence, the proponent must provide sufficient proof that the item is real. Testimony from any knowledgeable witness can support this.
- Sample questions to ask on direct examination to enter a phone in evidence:
- Firstly, call the officer who found the phone to testify.
- 1. Where did you find this phone?
- a. “On the defendant”
- 2. Where did the phone go after that?
- a. “In an evidence bag”
- 3. Is this your writing on the evidence bag?
- a. “Yes, that is the date, my initials, and my writing”
- 4. Where did the phone go next?
- a. “I took the phone to law enforcement officer B. They examined the phone.”
- i. Move phone into evidence.
- Call Officer B to testify about the forensic examination. Focus on how the report was made and the phone's contents.

How do you authenticate audio recordings?

- Anyone with knowledge of a person's voice can authenticate it. Lack of a prior witness to the defendant's voice does not prevent the authentication of audio evidence.
- Q: When should I use demonstrative exhibits?
- A: F.R.E 107 Illustrative aids are helpful for jurors if and only if you make them easy to understand. When an expert is testifying sometimes it is helpful to make simple map outlines in PowerPoint format to help the jurors understand.
- Note: the prosecutor will need to file a motion asking for the PowerPoint to be used and explain why it is relevant. However, this motion does not move the aid into evidence! If the jury wants to hear testimony again, or has a question regarding the aid, the jurors only receive a normal playback.
- Secondly, text messages can be easily understood through demonstrative exhibits.

What makes evidence inadmissible?

- A: F.R.E 801(d) Hearsay. Concession do not count! But, statements of a party opponent and statements of the defendant, especially through digital evidence, are very helpful.
- Statements of a co-conspirator are admissible through the federal rules of evidence.
- F.R.E 803 where the court may exclude relevant evidence if its probative value is substantially outweighed by an unfair prejudice. One or more of the following are considered unfairly prejudicial:
 - (1) Unfair prejudice
 - (2) Confusing the issues
 - (3) Misleading the jury
 - (4) Undue delay
 - (5) Wasting time
 - (6) Needlessly presenting cumulative evidence
- Side Note: Always remember, the duty of a prosecutor to turn over exculpatory evidence that could prove innocence, reduce a sentence, or otherwise cast doubt on the guilt of a criminal suspect.

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