Advocacy in the information age

Gerald Chan and Susan Magotiaux

Digital Evidence: A Practitioner’s Handbook

For anyone doing trials or hearings in the digital age, Digital Evidence: A Practitioner’s Handbook is an indispensable aid. Whether proceeding in the criminal, regulatory, or civil realm, more and more of the evidence is in digital format: texts, social media postings, electronic copies of videos and photos, medical records, Blackberry PINs—the list goes on. But even as the number of documents in a typical proceeding has increased exponentially, counsel’s obligations to marshal the evidence, to address issues of privilege, authenticity, admissibility and relevance, and to weigh the public interest in their action have not diminished. Not only are counsel challenged to identify, gather and present a greater number of documents than ever before, but the evidence is also increasingly in unfamiliar formats. Where these formats are digital, Chan and Magotiaux have counsel’s back.

In a foreword to the book, the Honourable Thomas A. Cromwell notes:

[The book] gives counsel tools to assist with...preparing or trying a case that involves digital evidence. The authors offer an overview of the basic concepts of digital evidence and the standards and criteria applied to assessing the probative value of the evidence has not been altered.

This book is part of Emond’s Criminal Law Series, which aims to offer a practical and detailed approach to each topic in the series. The authors do not disappoint in this regard. The book is a valuable tool for those who work with digital evidence.

Recognizing that the reasonable expectation of privacy and the privacy interests at stake in digital data are paramount constitutional considerations, the book provides invaluable guidance to counsel as they navigate the complex landscape of digital evidence law. And this text explores the “blurred lines” of applying old law to new technologies, including even messages from an accused’s lawyer, which must be regarded as privileged communications and how this differs from its right to seize copies of historical communications (i.e., those which reside on a computer hard drive that could be seized). The authors note that this contemplates seizure of a device which will continue to receive communications, including messages from an accused’s lawyer, long after the lawyer’s duty to take all reasonable steps to ensure privacy and safeguarding of a client’s communications has been made.

After reviewing the basics, the authors examine some of the special challenges with digital evidence—for example, the comparison of digital and search and seizure law to that which is increasingly on things that is seized, but that which resides as a string of binary code on multiple servers across the world. That data lock location presents myriad problems for the application of search and seizure principles, including the potentially limitless data that can be accessed and captured through a computer connected to the internet, as well as the fact that seizure of data does not actually reduce a person’s ability to access that information but rather may represent an irreversible action that the parties look for practical solutions on a case-by-case basis. One practical problem identified is relevant to accessing disclosure, a point that Chan and Magotiaux point out in a chapter on how an image on a computer can leave traces of the image on the computer, leaving counsel, and this is a critical fact for anyone who wants to disclose potentially serious consequences. A practical, though costly solution is proposed: disclosure of such images on a pre-ordained foundation should be returned after the conclusion of the proceedings.

Use of evidence at the trial or hearing is the focus of Part III, and the authors apply the general principles of demonstrating authenticity, the best evidence rule, expert evidence and hearsay) to digital evidence. The book uses the framework of Emond’s Principles of Evidence, and defines what constitutes acceptable evidence on a case-by-case basis. One practical problem identified is relevant to accessing disclosure, a point that Chan and Magotiaux point out in a chapter on how an image on a computer can leave traces of the image on the computer, leaving counsel, and this is a critical fact for anyone who wants to disclose potentially serious consequences. A practical, though costly solution is proposed: disclosure of such images on a pre-ordained foundation should be returned after the conclusion of the proceedings.

The book concludes with a chapter on presentation of digital evidence in a trial or hearing, recognizing that the presentation of digital evidence requires some of the same considerations, including format, admissibility, expert evidence and trial fairness. This text is a must-have for counsel preparing for the unique case that involves digital evidence.