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Ask the Experts: Strategies for Gathering and Interpreting Electronically Stored Information (ESI)

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Evaluations conducted within the context of child custody litigation can be among the most complex evaluations undertaken by mental health professionals. Data collection for these evaluations typically falls into one of several foundational categories: direct and collateral interviews, psychological testing, review of records, and observed interactions. Within the category of 'records,' data from emails, text messages, social networking site (SNS) posts, various cell, tablet, or computer applications, and other online sources of interpersonal communication can provide evaluators with information useful for their evaluation's purpose. We propose using the term Electronically Stored Information (ESI) to refer to this type of information. ESI is information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software.[1] Data from these sources can:

- Provide insight into how evaluees communicate, both in general and with their once-and-future co-parent.
- Inform hypotheses regarding each evaluee's current and past functioning, the relationships between evaluees, and the insight evaluees have into their own contributions to conflict.
- Inform professional opinions on child functioning, including to what extent a child might be exposed to the conflict between parents.
- Help inform hypotheses regarding how and to what extent a parent monitors a child's internet usage.

Collecting, considering, and archiving this data comes with its own challenges, above and beyond those presented by more traditional sources of records.

As mentioned, hypotheses regarding several areas of an individual's functioning (as a parent or otherwise) can be informed through consideration of ESI. For example:

We can learn about how evaluees communicate with others and how they interpret communication from others.

[1] Withers, K. J. (2005). Electronically stored information: The December 2006 amendments to the federal rules of civil procedure. *Nw. J. Tech. & Intell. Prop.*, *4*, 171.

Consider:

- Are messages from the opposite parent reported as antagonistic or patronizing but do not appear to be so?
- Is an evaluee able to maintain a rational and calm style of communication in the face of clearly antagonistic behavior? Are the content and tone of the evaluee's messages with others consistent with how they represent their communication style during the interview?
- Are the content and tone of the evaluee's messages with others consistent with collaterals' reports of the evaluee's content and tone?

We can learn whether evaluees demonstrate insight into how their behavior potentially benefits or harms the relationship between the minor children and themselves, the minor children and the opposite parent, or even the minor children and their social circles.

Consider:

- Do they make public posts denigrating their ex?
- Are they public members of online communities that could directly or indirectly harm the opposite parent's relationships?
- Have concerns been raised about their online presence, and how, if at all, have they modified their online presence in response to these concerns?

We can learn how well an evaluee understands social networking and technology. We can also learn whether they effectively monitor and control a minor child's access to information in an appropriate manner.

Does the evaluee, for example:

- Understand the forever nature of online posts?
- Understand and make use of parental controls?
- Understand and make use of privacy controls?
- Monitor their child's internet usage?
- Understand that some apps required for school or other legitimate activities may provide access to unrestricted communication?

With these items in mind, here are some things to think about when gathering and interpreting ESI:

1. Understand the difference between authentication and forensic methodology.

As we have demonstrated during our AFCC presentations, ESI can be fabricated with computers and artificial intelligence. It has become quite easy to generate inauthentic emails, text messages, written documents such as court documents, SNS data, and audio recordings. Although much more difficult to do, it is even possible to generate fake video recordings.

ESI can be 'authenticated' by a forensic digital expert. To authenticate is to demonstrate or verify the authenticity. This type of authentication allows the expert to establish ESI as true, accurate, or unaltered to a mathematically-defined degree of certainty. The digital expert will likely need the device or devices the ESI was purportedly created on in order to do this.

However, the services of a forensic digital expert are not necessary to use ESI in a reliable manner as part of forensically appropriate psychological evaluations. Evaluators can apply forensic methodology to reliably request, receive, and review ESI as part of their evaluation. Then, an evaluator can use this data and data collected from other sources (e.g., other record requests or interviews of parents, collaterals, and children) to determine how much weight to place on that ESI. As we describe below, evaluators can 'bounce' the data back and forth between the parents to assess for completeness and reliability.

2. Learn about an evaluee's use of Social Networking Sites (SNS), various cell phone or tablet applications, and other electronic communication.

When trying to elicit information about what SNS apps people use or how they communicate with others, it is important to keep in mind that there might not be consistency between how we all define various terms (e.g., 'app,' 'chat,' 'posts,' 'forum'). This makes it important to learn which terms evaluees use. This can be done by crafting an interview around a series of (admittedly somewhat repetitive) queries.

For example, ask an evaluee:

- With whom do you talk online?
- Do you use a tablet or a phone to talk to people? Do you use a computer?
- Do you communicate with people electronically other than through placing calls or through video chat?
- Do you have a particular app that you use?
- Do you solely use the phone?
- Do you message? (expand on this- text, messenger, etc.)
- Are there websites you go to in order to communicate with people you know?
- Are there websites you go to in order to communicate with strangers?
- Are you a part of any online communities?
- Do you read or post on any particular website, message board, or app?

While we do not believe it is appropriate for an evaluee to show you the contents of their posts on their devices, don't be afraid to ask the evaluee to show you what the icon looks like for the applications they use.

3. Listen to how parents describe their communication with others.

There's also a passive part of gathering this data. We can learn a lot by listening to how a parent describes communicating with the other parent, friends, family, and even teachers.

- When an evaluee says, “I said to the teacher…” or “My neighbor told me…”, they might be referring to communication that has taken place via electronic communication such as text messaging or email. This is particularly true with teachers; it is less common for parents to talk to teachers directly as they are more likely to email. This leaves a record of communication that can be examined.
- If an evaluee says, “My friend and I were talking about that the other night”, ask: “How were you talking about it?” Clarify if the communication was by telephone or text, a chat program, an app, etc. Ask them, "How did they tell you?" or, "How did you guys talk about it? Was the conversation in person? Was it by phone? Were you talking by text? Were you using an app like WhatsApp or another chat app, like Snapchat?"

By following up thusly, not only are you getting the information that you need but also training the interviewee to relate this type of information at the outset.

4. Ask an evaluee for what they might know about privacy settings and parental controls.

Privacy settings and parental controls are two separate things: privacy settings help an individual control who has access to their information; parental controls allow a parent to monitor and limit portions of a child’s electronic interactions. Ask a parent to describe to you how privacy settings or parental controls work on the various programs their child uses. While we recommend against having a parent demonstrate these things using their own devices, you can explore their knowledge of the general concepts and some aspects of how to implement them on common applications such as Instagram and Facebook together.

Additionally, parents should be asked how they audit their children’s internet usage, if at all, and how often. Ask them what they require their children to do to facilitate such audits and how they explain the necessity of conducting audits to their children. In some situations, it might also be worth asking a parent to imagine their child started using a hypothetical new app or website and then explain how they would educate themselves about it.

5. Learn about children’s access to SNS and other online communication.

It is important to know if minor children have uncontrolled access to smartphones, tablets, and computers. Do they have their own device(s)? Do they share devices with their parents? If so, are the parents logging out of their email and other accounts before

allowing a child to use the device?

When there are concerns about a child or teenager's usage or behavior around screen time, evaluators should ask how parents are monitoring screen time. A common challenge for parents is that technology continues to advance. With new applications, there are new skills parents must adopt to appropriately monitor their children's usage.

While we have presented on many of the well-known applications, the applications are ever-evolving. An area of continued concern are innocuous apps that a child may need for school or other activities that appear safe yet allow children untethered access to the web.

During our interviews with children, particularly teenagers, they frequently acknowledged that they had access to their parents' cell phones, email, and social media accounts, almost always inadvertently and unbeknownst to the parents. This poses the question, "Are parents aware that when they hand their smartphones to their children, the children might look through their pictures, emails, or text messages?" What a child can find when they peruse a parent's cell phone can be a problem, let alone what notifications might pop up while the child is using the device for something innocuous. Don't forget to ask children what SNS their parents use, what kinds of things their parents might post on SNS, and, most importantly, how they know this information.

6. Should you search for evaluees on SNS?

We are almost always asked this question, and we understand the thought process behind this query. However, we recommend against it. Searching for evaluees on SNS expands the data you collect, but it is extremely time-consuming and the quantity of data that such a search obligates an evaluator to archive can be problematic. Further, and most importantly, it's reasonable to assume that if there's SNS data that's meaningful, you'll learn about it through your regular data collection techniques, as meaningful SNS data will be presented by both sides. Some licensing boards may have regulations on this type of professional activity as well.

Also, consider the following: because of how the algorithms that govern search results work, results from future search queries are based, in part, on past search queries and even more so on past links that have been clicked on. Facebook knows whose profiles you see. Google knows whose names you're searching. If, for example, you do 150 searches for major league baseball players, Google is more than likely going to serve you up information related to major league baseball players after your next search. If you're looking at your evaluees on Facebook, LinkedIn, Instagram, or anywhere, then Google, Facebook, LinkedIn, and Instagram notices that. The algorithms make note, adjust to those clicks, and make a connection, and this connection is not just linking the evaluee to you, but you to the evaluee. We could conduct a whole seminar to inform evaluators how to manage their own online presence to minimize risk. It is our recommendation that, rather than seek out SNS data independently, evaluators ask evaluees and collaterals to

provide what they might think is meaningful.

7. SNS and other data present a good opportunity to collect balanced data.

As forensic evaluators, we have interviewed evaluees about conversations, only to learn later that, intentionally or inadvertently, the evaluee did not disclose some key parts of their discussions or interactions. Whether we're talking about in-person discussions or email chains or any other ESI, it can be helpful to ensure you get both sides of the conversation. A convenient property of electronic communication is that all parties connected to the conversation have access to records, and you can request these records from more than one party. If you have concerns about authenticity or completeness, collecting this additional data allows you to check if records are complete and if conversations have been edited or presented out of context. And, as an aside, when we write "both parties to the conversation," we're not just talking about conversations between evaluees but also conversations between evaluees and a collateral source or even between collateral sources.

Related, did you know that all electronic communication can be fabricated? Emails, texts, Facebook or Twitter posts can all be mocked up in very convincing manners. In the **on-demand workshop** we recorded for the AFCC 58th Annual Conference, we demonstrated how an evaluee could fabricate a text message exchange. In later presentations, we've demonstrated how an evaluee could fabricate or alter audio recordings. The lesson here is to remember that it's always an option to ask the other party to the conversation about the information you've reviewed.

We also recommend asking people, evaluees in particular, if there are any deleted messages or if there's any data that they have deleted that could have informed areas of discussion. The legal ramifications of spoliation aside, an evaluee's decision to delete or withhold information can be informative. One can never know if an interviewee is telling the truth about this, yet their response may prove meaningful to the court.

8. "Bouncing it back"

Take advantage of the fact that evaluations conducted within the context of child custody litigation feature two (or more) parties, each with pretty extensive knowledge of the other. Just like you might ask Parent A, "What are your parenting strengths?" and "What are Parent B's parenting strengths?", we think there can be good information in then asking, "When I ask Parent B what your parenting strengths are, what are they going to say?" Similarly, if you're interviewing Parent A, you ask Parent A about their ESI and SNS usage. A savvy evaluator also knows to ask Parent A about Parent B's SNS usage. Although this can get somewhat difficult to phrase or follow, we recommend taking this a step further and asking Parent A what Parent B would say about Parent A's ESI and SNS usage. We refer to this third line of inquiry as "bouncing it back" to the initial interviewee. ESI data should be gathered early in the evaluation process so that if it is relevant, evaluators can

incorporate it into interviews with parents, children, and collaterals.

We conclude with the following:

- ESI can be authenticated by a digital expert, or an evaluator can use forensic methodology.
- ESI can provide evaluators with a source of communication they can use to inform their evaluation.
- When you are provided with ESI data, it is likely something the parent or their attorney believes is important or illustrates a point.
- Like data from any other source, data from ESI can help an evaluator generate hypotheses for investigation and can provide an evaluator with data that lends support or argues against hypotheses.
- Data from ESI, like data from any other source, is rarely in and of itself dispositive.
- Data from ESI, like data from any other source, needs to be interpreted taking into account all other relevant collected data.

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