

## Illinois Court Rejects Overly Broad Request For Forensic Imaging Of Plaintiff's Personal Computers

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An Illinois appellate court has vacated a trial court's order compelling the forensic imaging of several personal computers used by plaintiff, applying a balancing test that takes into account both the proportionality rule and the privacy concerns implicated in the request. In ***Carlson v. Jerousek***, 2016 IL App (2d) 151248, P4 (Ill. App. Ct. 2d Dist. 2016), defendants in a personal-injury case moved to compel discovery of "electronically retrievable information," ultimately asking the trial court for unrestricted access to inspect plaintiff's personal computers, including a computer leased to plaintiff by his employer.

Carlson alleged that a brain injury affected his ability to complete tasks at work. The defendants argued that metadata from Carlson's work computer would show them how long it took Carlson to complete tasks, and metadata from Carlson's personal computer would indicate whether he stayed up at night playing computer games, demonstrating his ability to concentrate. The defendants conceded that they did not know how to use the metadata but a "computer expert" would. Although the trial court expressed skepticism about the broad nature of the requests, it entered an order requiring forensic imaging of the plaintiff's computers.

The plaintiff sought reconsideration based on an affidavit from his employer's in-house counsel, stating that the employer's computer contained restricted information that could not be shared. The trial court refused to consider the affidavit.

On appeal, the court noted that there is dearth of case law on forensic imaging and sought to fill in the gaps by examining the constitutional right to privacy, and applying the proportionality rule to electronic data.

In addressing privacy concerns, the appeals court found that the trial court should have considered the employer's affidavit because it directly addressed the issue of private information. The court noted that electronic discovery implicates privacy rights in a way that may sometimes seem "incomprehensible" to litigators, because of the sheer volume of information that can be stored on a computer. For example, even if a computer might contain some discoverable information, it might also contain large quantities of personal information or confidential business data. On this basis, the

appeals court found that the defendants were not entitled to such a “broad and intrusive” search.

As to proportionality, the appeals court explained that the proportionality requirement specifically targets the challenges posed by electronic discovery. Certain categories of data, such as data that is deleted, fragmented, ephemeral (such as random access memory), duplicative, or difficult to obtain without additional programming, is presumptively undiscoverable unless the requesting party can justify it. To evaluate such a request, the court established a framework requiring the requesting party to show that: (1) there is a compelling need for the information; (2) the information is not available from other sources; and (3) the requesting party is using the least intrusive means to obtain the information.

Noting that the defendants’ showing did not adequately address this framework, the court held the trial court erred by not applying the correct analysis. The defendants’ requests, the court said, were “vague and ambiguous,” and at a minimum, they should have involved an expert from the beginning to formulate search terms and narrow the scope. The court also pointed out that the potential utility of the information was outweighed by the burden imposed by forensic imaging. And finally, the court noted the lack of evidence that the computers were likely to contain the evidence that defendants contended could be relevant. In other words, the searches might turn up nothing.

The takeaway from this case – which surveys a number of cases from other jurisdictions – is that blanket requests for forensic imaging probably will not be approved without very specific parameters that describe the relevance of the information, the precise method for obtaining it, and the reason that the information cannot be obtained elsewhere. Litigants who wish to undertake such discovery should be prepared to articulate a significant need for the data sought, and to show that imaging is truly warranted under the circumstances of the case. Litigants opposing intrusive e-discovery should consider whether they can oppose aggressive e-discovery based on the various factors discussed in the majority opinion.

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