

The Missing Evidence Problem

This guide addresses the problem of missing evidence in UK litigation, detailing how to prove what should exist, find where it went, and litigate the resulting gap. It covers preservation duties, recovery maps, and the legal consequences of absence.

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MISSINGEVIDENCE · A GUIDE FOR UK LAWYERS The Missing Evidence Problem Proving What Should Exist, Finding Where It Went, and Litigating the Gap COMPUTER FORENSICS LAB

§ ABOUT THE AUTHOR PREPARED BY COMPUTER FORENSICS LAB E-DISCOVERY TEAM

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EXPLAINITSABSENCE, ANDPURSUEITWHEREITSTILLSURVIVES: WITHTHE
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BOOKKEEPING COUNTERPARTS RESIDUE BACKUPS / POLICY / STORES FILE

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have discovered our own client's gap. What now?

§ 14 · REFERENCE Glossary Sources and authoritative references DISCLAIMER

§ HOW A SPECIALIST LABORATORY CAN ASSIST Working with Computer Forensics Lab
Speak to a forensic examiner, not a salesperson. INSTRUCT THE LAB
NEW ENQUIRIES EMAIL - DISCOVERY

Questions and answers

The other side says the documents were deleted under a retention policy. Is that the end of it?

Only if the policy story survives testing: the policy's terms and dates, its execution logs, the duty clock (§6) and the selectivity check (§4) either corroborate the account or contradict it:

Example 3 shows the version that holds, Example 1 the version that does not. Ask for the records with §11's request; policies that ran as claimed can always produce them.

Can deleted material really be recovered, or is that television?

Both, honestly: recycle stores, versions, backups, duplicates and counterparts recover a great deal inside their windows (Examples 1-2), while properly wiped media and expired cloud stores are genuinely gone: §5's map with

How do we prove something existed if it no longer does?

From the estate's redundancy: quoting replies and thread structures, file-system and sync bookkeeping, counterpart copies, platform counters, and volume analysis (§3): traces that outline the item precisely enough to litigate. Counterpart copies are the gold standard: the deleted email's recipient rarely deleted it too.

When does the duty to preserve actually start?

On contemplation of proceedings, not service: PD 57AD's duty (with its hold-notice and suspension obligations) is engaged when litigation is reasonably in prospect, and the certificate later signs for compliance: which is why the contemplation date is investigated, not conceded, in every gap dispute. Material expiring before that date is retention; after it, the questions begin.

Will a court really draw an adverse inference?

On a proven record, yes: destruction evidenced, timed against the duty, with recovery exhausted: the inference calibrated to what the file shows: and on suspicion alone, no: §7's whole architecture exists because courts punish demonstrated conduct, not gaps as such. Build Example 1's schedule; skip Example 1's indignation.

We have discovered our own client's gap. What now?

Investigate it exactly as you would an opponent's: existence, cause, recovery: then preserve everything about the investigation, take conduct advice where §4's findings warrant it, and ensure the certificate and any witness evidence state the position accurately: the honest, evidenced account (Example 3's defence) is both the ethical course and, in practice, the winning one. What converts a gap into a catastrophe is almost never the loss; it is the account of it that unravels. cflab. u k · e-disc o v e r y. u k ©2026 Computer Forensics Lab Ltd ·cflab.uk ·e-discovery.uk ·info@cflab.uk ·+44 (0)20 7164 6915 Page 15 of 17

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