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Locate the right people before you start litigation

Google shouldn't be your only fact-finding resource

By Philip Segal

Litigation is above all about facts, so why are there so few law school courses on fact investigation? Whatever the answer, lawyers often need help gathering facts before, during and after trial.

Take beforehand: Many of the facts a litigator needs in order to win are not yet written down when the case begins. If these facts are in writing, they are not available on Google.

With billions of web pages available, you still can't just Google "Acme Investing" to find a list of people who used to work there. Google won't tell you who reported to the CFO and what the organization chart in the C-level suites looked like. Nor will it tell you whether executives ever went on retreats where they discussed important business. Where were those retreats and when?

These are the kinds of key questions litigators need answered as they write up a complaint or head into discovery. The Internet is just one tool among many that can help provide answers. But alone it's not enough.

We've all tried putting our own names into Google. Unless you're a famous public figure, less than 1 percent of what you know about yourself is up there on the Internet. Here is why:

1. **Most things in the world aren't on Google.** The fact that Google wasn't around before 1998 is one reason for this, but there are others.
2. **Google likes to give you information** about the things that are profitable for Google, not useful for you. We know how a library index is put together, but Google's algorithms, ever-changing, are a business secret. Google has to make its money from ads. The information you want about what is, for now, an obscure conversation at a company in Cleveland is not something that will drive a lot of ad-related searching.
3. **Using Google properly requires "meta searching,"** or searching for the thing that will lead you to the answer you want. Say you want to find an accountant in a certain state. He probably won't be on Google because the state board of accountancy that licenses accountants is either not online or uses PDF documents that Google's robots don't index. But, if you Google "state accounting regulators," you could then download and read the PDF file to find the person you're looking for.

We tell our clients all the time that while computers linked to the Internet are a good start, the real secret in fact investigation is an often-overlooked device known as the telephone. To use one well, you need people who are good at interviewing those who know the things you need to know.

Interviewing is an art, especially early in the process before you are armed with a subpoena. The trick is to get people to talk to you when they may have no good reason to do so. You also have to do it without lying to them, since the ethics rules that bind attorneys and their agents forbid this.

One essential tool before you or your investigator picks up a phone is a template that acts as a roadmap for how the principal (the lawyer) instructs his agent (the investigator) on some key questions.

How is the investigator representing himself? If the attorney approves a script that says the investigator will identify himself as the agent of a fictitious company, that's a problem for the attorney. It's better for the attorney to approve a template that gives the investigator's real name and affiliation and says something like, "I'm doing an investigation but I can't tell you who my client is." If the investigator then went off-script and got into ethical hot water, the attorney would have some protection.

When creating a template, you also should make sure your investigator takes adequate precautions against inadvertently talking to a represented party or soliciting privileged or confidential information.

For the hour or two it takes to draft and approve a template, both attorney and agent can move forward knowing that they are both comfortable with the questions being asked in their name.