

CYBER

Before E-Discovery Begins: Interrogatories or Depositions?

By Victor John Yannacone Jr.

After you serve the litigation hold notice, but before there is any electronic production of what might be thousands of emails, should you propound interrogatories, take depositions, or perhaps, do both. Before deciding, you should consider just what you need to know at the very beginning of E-discovery.

Your first action is to identify all of the ESI (electronically stored information) custodians. Remember, however, in this digital age, you can no longer just ask for the “name” of a witness. You need to know all their names — the names they use online to send and receive emails, the names and the aliases they use on social media, their avatars and all the other identifiers they use in the cyberspace of the digital world.

First the basic inquiry

The basic questions — who, what,

when, where, why, and how — are just as important to attorneys in E-discovery as they are to journalists on a story and detectives on a case.

In addition to the usual questions, you need to inquire about the identifiers the custodian uses to access any and all the electronic accounts they maintain or have maintained, which might contain information relevant to the litigation. You must ask the custodian to:

- Identify all the online and internet personas or identities they have assumed, and the names of the websites with which those identities and personas are associated.
- Provide all of the email addresses, which they are now using or have used during the period of interest in the litigation, together with all of the identifying information for the accounts the custodian maintains or



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has access to at ISPs (Internet Service Providers), particularly anonymous or proxy servers.

- Identify any chat rooms or social networking web-sites they have, or had an account with or used during the entire time that you claim is relevant to the case, and provide the information necessary to access their accounts.
- Identify all cellular phones, satellite phones, tablets, smartphones, and any other mobile communication devices capable of sending or receiving messages or exchanging information or data which the custodian used or had access to including all the identifying numbers associated with each mobile device — not merely the phone number or Skype address — together with the telephone number contact list the custodian utilizes for text messaging.
- Identify any blog sites, wiki

providers, or similar accounts, which the custodian maintains or contributes to including the specific screen names for all such accounts.

- Identify the electronic calendar systems the custodian uses or has access to and the identifiers necessary to access the calendars.
- Identify all the social media they access and the identifiers they use to obtain access to those services.

Be sure to insist that the custodian fully explains the retention and deletion policies, procedures, and timetables for all the ESI, not just the e-mail, voicemail, and text messages.

Inquire about information storage in the Cloud, and the systems involved such as Dropbox, Google Drive, or Microsoft SharePoint, among others.

The usual concluding question has not changed since discovery began, “If you know others who would possess information, documents or records relevant to this matter, please identify them.”

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Require the custodian to submit the interrogatory responses online using a commercial system which permits you to integrate the interrogatory responses with your case management system.

Social media

Social media are web-based and mobile technologies that enable interactive online dialogue. They include the nearly infinite variety of internet forums, blogs and websites permitting users to post and access content including text, music, photographs, and recorded or live-streamed videos. Facebook, launched in 2004, is the most ubiquitous of the social networking platforms, which include MySpace, LinkedIn, and many similar services in the United States and overseas.

The basic features common to all social media are a visible profile for each user, a list of “friends,” sections containing “postings,” and some kind

of privacy controls that allow users to choose who may view their profiles or contact them.

Twitter, started in 2006, is a real-time social networking and microblogging service that lets users broadcast to selected persons, or to the world, what they are doing and thinking at any moment — within a 140-character limit for each “tweet.”¹

Social media in litigation

Since the purpose of social media is to share personal information about activities, lifestyle, and state of mind, courts are regularly allowing parties access to social media accounts in cases which those factors are relevant such as matrimonial actions, personal injury claims, and employment litigation.²

While there can be no reasonable expectation of privacy in information voluntarily posted online and available to anyone with a computer, where a

Facebook public profile showed nothing inconsistent with the claims of a party, at least one federal court has held that there is no general right to information restricted from public view by the party.³

You will have to evaluate on a case-by-case basis whether gaining access to online content justifies the cost and effort. Just remember that it may be considered prima facie evidence of professional incompetence not to serve a Litigation Hold Notice⁴ together with the summons and complaint in any civil action.

More on the specifics of social media discovery next issue.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters.

Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. Mr. Yannacone can be reached at (631) 475-0231, or vyannacone@yannalaw.com, and through his website <https://yannalaw.com>.

¹ See In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d). — F.Supp.2d — 2011 WL 5508991 (E.D.Va. Nov. 10, 2011).

² Romano v. Steelcase Inc., 30 Misc.3d 426, 428, 907 N.Y.S.2d 650, 652 (S.Ct.Suff.Cty. 2010).

³ Tominspk v. Detroit Metropolitan Airport, Slip Copy. 2012 WL 179320 (E.D.Mich. Jan. 18, 2012).

⁴ See, “E-Discovery: The litigation hold notice”, *The Suffolk Lawyer*, www.scba.org, Vol 32 No. 3, November 2016, pp. 20, 27