

PROFESSIONAL LIABILITY



SOCIAL MEDIA RESEARCH: THE NEW REALITY FOR TRIAL ATTORNEYS

By Christine Martin – November 4, 2010

Jump Right In but Wear a Tube

Social media has been lauded for its power to enrich our social and professional networks with good reason. At the same time, there are serious risks and liabilities associated with the Internet and social media, particularly for legal professionals and their clients. To begin with, there are risks and liabilities covered by the rules of professional ethics, confidentiality, defamation, copyright, and trademark, not to mention legitimate concerns over privacy and safety. In addition, there exists genuine apprehension about social media's effect on time management. Social media research is time consuming and it requires new skills to be learned and timely awareness of new technologies. Finally, there is a real danger of damage to reputation from negative reviews or online campaigns launched against an individual or company. These concerns are daily issues for many Internet users to manage.

Legal professionals need to become more knowledgeable about the best use of social media research—not just for their own sake but also to better serve their clients. Reputation monitoring and opinion mining is becoming progressively more important for legal professionals. It has become common for Internet users to google themselves. Fifty-seven percent of adult Internet users now use search engines to find information about themselves online. (Pew Internet & American Life Project, Reputation Management and Social Media, Washington, D.C., May 2010.) However, if you are a legal professional or a corporate litigant, it may not be enough to simply type your name into Google. For a litigator who is going to trial, even more attention and analysis is required to keep up with the demands of social media and its impact on the jury pool. Information available online is readily accessible to

jurors. You need to do in-depth research to find out what the jury pool has access to regarding you and your client.

Public Opinion Gone Wild

Social media provides many new ways for people to publicize their opinions, and the prepared litigator needs to be aware of those opinions. A few examples readily highlight the relevance of social media research and analysis in the litigation context.

Social media research can be used to measure public opinion on hot button issues that may arise in your case as it progresses to trial. Consider all of the recent litigation related to the financial sector and the economic downturn. A 2009 Harris Poll provides data on the public's opinions of the 60 most visible companies in the United States. It is no surprise that the financial sector received the lowest reputation scores. In the last few years, Americans have experienced job loss, increased foreclosure rates, and bankruptcies. They have used social media to express their anger and frustration, not only towards the financial sector, but also towards professionals and corporations in general. All nature of opinion has been increasingly expressed on numerous blogs, in an explosion of online groups and forums, and through an abundance of news readers' comments in the daily online news outlets. Mining this vast resource of opinion data provides valuable insight into the public's attitudes and beliefs about case-related issues.

Research also should be done into any negative social media related to you or your client. Consumer reviews, viral videos, online flame wars, flash mobs, and spontaneous Twitter or Facebook protests have empowered stakeholders and activists to operate on a wider scale and have broader influence than ever before.

Activists and angry stakeholders lurk in every corner of the Internet, threatening to send out viral videos and initiate online campaigns and protests. Negative messages like these can affect professional reputation and company status and have a powerful impact on the jury pool. Although consumer review and rating sites such as Amazon.com, Consumerist, Yelp, Ripoff Report, Complaints Board, Avvo, and Merchants Circle have been popular for over a decade, ratings and review are not limited to just consumer issues any more. Many sites include reviews and opinions of companies and businesses, including doctors, lawyers, and other professionals. Monitoring these sites along with the multitude of other online opinion forums is a necessary part of trial research. Professionals need to be aware of the potential for harm in negative online reviews.

BP's oil spill and the reaction to it provide a timely case study on the use of social media. BP's response to the environmental disaster in the Gulf caused a barrage of negative feedback online. Critics and activists used social media to express their concerns and protests in unique ways. During the first month of the crisis, the official BP Twitter account, @BP_America, had only about 18,000 followers. A much more popular Twitter parody account, @BPGlobalPR, had over 187,000 followers and sent out more frequent satirical tweets about BP's failed efforts to stop the flow of oil, including skeptical comments about the PR efforts and messages mocking Tony Hayward, BP CEO. Other activists sent out spoof TV ads, which quickly went viral; "BP Spills Coffee" has received over 10 million views on YouTube.

The Boycott BP group on Facebook is followed by over 800,000 people who have provided more than 90,000 links to

detrimental information and photos about the company and the event.

BP worked to manage the intensity of social media activism. It responded with a variety of its own social media strategies, including reportedly spending \$1 million on GoogleAdwords to ensure favorable search engine placement of their ads and PR efforts. They also created an informative website (Gulf of Mexico Response Information, www.BP.com), invested at least \$5 million in TV ads, and created an official BP YouTube channel, a BP Facebook page, and a BP Flickr account.

Social Media Analysis Informs Formal Jury Research and Trial Strategy

We've covered the risks of social media thus far, but it also has a significant potential upside for you and your clients. The biggest potential social media holds for legal professionals as a tool is for trial research through in-depth social media analysis, which involves rigorous study of news media and Internet communications that may influence your potential jury pool's attitudes, beliefs, and understanding of case-specific issues. The valuable data gathered online can inform many aspects of trial practice, including opposition research, witness research, jury selection, venue analysis, change of venue studies, online panel review, and much more. Social media analysis is most effective for

supporting trial practice when it includes a study of opinions and attitudes in a potential jury pool. It is no longer enough to rely on a clipping service to keep track of what is being said about you or your client. These days the task of monitoring public opinion is much more robust, including tracking influence and authority in blog conversations, harvesting numerous readers' comments, sifting through rapid real-time comments, and taking into account the array of reviews and ratings from all corners of the Internet. Especially with large amounts of information, this requires advanced search techniques and qualitative and quantitative tools to measure sentiment and mine opinions. Social science methods, such as content analysis techniques, can provide reliable quantitative results of the data found online.

Last year there was a tsunami of appeals and mistrials due to juror misconduct on Facebook, Twitter, and Google. There will be more. Preparing for googling jurors means knowing everything a potential juror could be exposed to online—prior to and during trial. Attorneys must assume that jurors could look up key definitions on Wikipedia, use Google to research trial participants, including the lawyers, and search for geographical locations and the history of the case. Part of the trial team's new due diligence is being informed about what is available online. For example, motions in

limine are potentially much less effective if excluded evidence is online. Recent trials have demonstrated that there is a danger of juror exposure to potentially inadmissible evidence, undisclosed information, and excluded facts that are easily obtained and shared. Not to mention that opposing parties could plant information and misinformation. By properly monitoring social media, there is less potential for foul play and jury contamination.

Litigators can benefit from in-depth social media analysis and expert tracking of opinions and sentiment about their case issues. Social media due diligence before and during trial requires sophisticated search techniques and analytical methods. Ultimately, formal jury research is the best study of jurors' preexisting attitudes, opinions, and beliefs. However, your jury research will be much more targeted after performing effective social media analysis. There is no substitute for a rigorous social science-based survey or strategy development through a mock trial, but now we also need to be aware of what case-related information is available to the jury pool, what could they have been exposed to, and what could they potentially seek out online. Social media analysis combined with jury research is your best preparation for today's jury 2.0.

Glossary of Terms

Viral video: a video that becomes popular through internet sharing

Online flame war: a heated discussion on message boards or through online comments sometimes inciting or attacking other commentators

Flash mob: large group of people who assemble suddenly in a public place, usually organized through social media, or viral emails

Social media marketing: use of social media to promote a business or service

Social media research: basic internet research, including Google

Social media analysis: a rigorous study of news media and internet communications, which influences the potential jury pool's attitudes and beliefs as well as how they understand specific case issues; utilizes sophisticated qualitative and quantitative tools to inform jury research and trial strategy

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