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THE MODERN JURY

Social media go to court

Litigators find there's more to Web 2.0 than what jurors post on their Facebook profiles.

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IF A CASE IS COVERED in the news media, it will also be covered in the Internet's social media.

The term social media now encompasses a vast range of online participatory content not only on social and professional networking sites, but also through reader comments on message boards and in wikis and through video- or photo-sharing networks. The Internet has drastically changed the news media landscape. There has been a massive shift to blogs and citizen-generated journalism. Web 2.0 (first coined in 2005 to describe new ways of using the Web and "harnessing collective intelligence") is a sociological and technological evolution in the mass communications landscape.

There is no doubt that there has been an explosion of online communities and interest groups that are organizing faster and smarter than ever before. The social aspect of Web 2.0 consists of individuals contributing to online conversations on news stories, blogs, message boards and community Web sites on every issue, opinion or product. This new ethos of

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participation and sharing, authenticity and transparency, has replaced traditional news media values of objectivity. Many people have traded personal privacy for greater access to information and individually tailored news feeds.

Litigators know that both high-profile and local cases can be intensely covered in the news media either positively or negatively. It is not unusual for litigators to conduct media research on information about their case or case issues. Traditional news media analysis has long been useful to study the exposure of a particular venue to case facts. Today, there is a

much wider sphere of influence affecting the potential jury pool. Effective media analysis now must encompass not only the Internet but also the social media. In-depth social media study is the newest tool to inform formal jury research and modern trial practice.

The Obama model

By now, everyone is well aware of the advantages that President Barack Obama's election campaign gained from the successful use of a social media strategy. Obama's team posted 1,800 videos on YouTube that received 110

million views. The Obama Facebook Group gained more than 3 million fans. Obama's MySpace page had more than 844,927 friends. The Obama Twitter account had more than 130,000 followers. J.D. Lasica, "Barack's Use of Social Media," www-socialmedia.biz/2008/11/barack-obamas-u.html. Obama was able to target and inspire a much larger constituency through these social media strategies. As a result, traditional political and fundraising campaigns have been changed forever.

The Internet exerts immense influence on the jury pool

The impact of the rapid dissemination and access to information via social media is unprecedented and exciting, but it also raises a few concerns for litigators. Before getting carried away with the utopian optimism of the new social media, a few cautionary tales should be noted.

Attorneys have made errors attempting to manipulate social media to their advantage. There are both risks and rewards to be found in the use of social media as the new court of public opinion. Attorneys have learned that the sponsorship of Google links or the posting of video depositions on YouTube can backfire with judges. Prosecutors have used personal information found on Facebook and MySpace to their advantage in a few recent driving-under-the-influence (DUI) cases. And attorneys increasingly are attempting (with limited results) to vet jurors on Facebook and MySpace.

A recent example of a social media tactic to which a court objected took place in December 2008, when a plaintiff's lawyer in a local fraud case attempted to influence public opinion by posting an excerpt of a defendant's deposition testimony on YouTube. Judge Roberta Lloyd of Harris County, Texas, Civil Court in Houston ordered the law firm to remove the excerpted video deposition from YouTube primarily because it was not officially a "public record" and had not been properly filed with the court. Attorneys can now learn through social media study to keep an eye on what social media tactics or strategies opposing counsel is using before they get to trial. Brenda Sapino Jeffreys, "Judge Orders Counsel to Remove Deposition Excerpt From YouTube," *Texas Lawyer*, Dec. 9, 2008.

Elsewhere, some very basic uses of social media have affected court decisions. Prosecutors have used photos on Facebook and MySpace to seek increased sentences in DUI cases. Last year, the online social profiles of at least three young people were a factor in their DUI trials.

Joshua Lipton, 21, posted a photo of himself on Facebook jokingly wearing an orange prison jumpsuit during a Halloween party. Rhode Island Assistant Attorney General Jay Sullivan displayed the photo in court as part of a PowerPoint presentation with the title "Remorseful?" Superior Court Judge Daniel Procaccini focused in part on the photo when deciding to sentence Lipton to two years in state prison for his DUI. Andrea Panciera, "Facebook Photo Plays Role In DUI Accident Sentencing," *Providence J.*, May 27, 2008, at <http://newsblog.projo.com/2008/05/facebook-photo.html>.

Lara Buys, 22, on trial in Santa Barbara County, Calif., Superior Court, received two years in prison after posting pictures on the Internet of herself drinking and partying just months after causing the death of her best friend in a drunken driving accident. Melissa Evans, "Internet Plays Key Role in Vehicular Manslaughter Sentence," *Santa Barbara Newsroom*, April 14, 2007, at www.santabarbaranewsroom.com/news/crime-justice/internet-plays-key-role-in-vehicular-manslaughter-sentence.html.

Message boards, blogs and the rest shape public opinion

Jessica Binkerd, 22, was sentenced to five years by Santa Barbara Superior Court Judge Brian Hill for a fatal DUI accident. During the trial, Binkerd was advised by her defense attorney, Steve Balash, to remove incriminating photos of herself on her MySpace profile page. She neglected to do so. "Unrepentant on Facebook? Expect Jail Time," July 20, 2008, *CNN.com*.

There have been recent reports about vetting jurors on Facebook and MySpace. However, this use of social media may be of limited and narrow use to litigators. Searching individual jurors can be challenging—juror names are not always available to counsel and, when they are, there often is very little time before trial to search those names.

Deep veins of gold

There is much more valuable content to be found deeper in the social Web—Facebook and MySpace are just the tip of the iceberg. Just as it handicaps attorneys and the justice system to totally ignore social media, so too can overreliance on superficial levels of social media prove strategically counterproductive. To uncover currents of thought that may affect individual attitudes and beliefs, one must apply a social science analysis to findings rendered in a search of the deeper Web.

It's been known for a while that the Internet exerts immense influence on public opinion and therefore the jury pool. Litigators who want to know who is saying what to whom, why, to what extent and with what effect, are looking toward the new trends in social media and citizen-journalism. Recent statistics demonstrate why it is more critical than ever to understand the effects of the new media landscape.

For example, according to the Internet World Stats Usage and Population Statistics, 72.5% of the U.S. population is online. See www.internetworldstats.com. And according to Reuters, 70% of Americans believe that traditional journalism is out of touch. "More Americans turning to Web for News," *Reuters.com*, Feb 29, 2008. Not surprisingly, the Internet has shown the biggest increase in popularity as a news source, with 31% of Americans now saying it is a daily news source. This marks a nearly 50% increase since 2006 and a more than 100% increase since 2002. Use of the Internet as a news source has increased each time Gallup has asked about it, beginning in 1995. Lymari Morales, "Cable, Internet News Sources Growing in Popularity," *Gallup Poll News*, Dec. 15, 2008, www.gallup.com/poll/113314/Cable-Internet-News-Sources-Growing-Popularity.aspx.

A recent scientific survey found that peer-to-peer opinions are considered the most credible and have more influence on the Internet today. For example, it was found that employee spokespeople are considered more trustworthy than chief executive officer spokespeople as sources for information about a company. The survey also found that trust in "a person like me" as a source for information about a company skyrocketed to 58% agreement in 2008 from only 20% in 2003. Consumer marketing professionals know that understanding this new sociological formation of social media communities and listening to the peer-to-peer communication is fundamental to the task of publicizing a new product or trend. *Edelman Trust Barometer 2008*, at

http://www.edelman.com/trust/2008/TrustBarometer08_FINAL.pdf.

The value of this information is not only for marketers. Litigators and jury consultants would be wise to pay close attention to the social formation of new online communities to gain early insight into prevailing attitudes, values and beliefs about their case issues.

Attorneys are beginning to recognize the need to monitor potential community activist groups online. Activist media can be found in real-time message boards such as Twitter, community-run Web sites, Facebook groups and “flash cause” groups, i.e., instant campaigns that pop up online, leveraging passion and technology. All are potential sources of fast and wide-spread mobilization. Social media study can determine whether there is a strong level of anger or support in the community against a client or issue. Social media study can identify any highly mobilized groups that could show up on the date of an important hearing. Monitoring the social media is essential if one wishes to identify the presence of organized groups, the issues important to them and the amount of influence they may be having on public opinion.

According to Nobel Prize for literature winner Jean-Marie Gustave Le Clézio, the power of the Internet cannot be overstated. In his Dec. 7, 2008, speech to the Swedish Academy, Le Clézio said, “Who knows, if the Internet had existed at the time, perhaps Hitler’s criminal plot would not have succeeded—ridicule might have prevented it from ever seeing the light of day.” If there is indeed this much political power in the social media, then it is a gold mine of information for trial attorneys and jury research consultants. Karl Ritter, “Nobelist: Web could have halted Hitler; Prize Winner says Ridicule May Have Prevented Hitler’s Criminal Plot,” Associated Press, Dec. 8, 2008, www.msnbc.msn.com/id/28111671/.

Some recent examples

The following are a few examples of social media and the new court of public opinion:

In July 2008, Trisha Walsh Smith made a YouTube video regarding her bitter divorce from Broadway mogul Phillip Smith. In the video, Smith complained about the terms of her prenuptial agreement and made embarrassing remarks about her then-husband. The video received more than 3 million views and was highlighted on several cable TV news programs. Justice Harold Beeler of New York County, N.Y., Supreme Court, who was presiding over the case, was appalled at the YouTube video and, as a result, did not change the terms of the prenuptial agreement and granted the husband a divorce on the grounds of cruel and inhuman treatment.

Brad Hamilton, “Inside the YouTube Divorce,” N.Y. Post, April 20, 2008, at www.nypost.com/seven/04202008/news/nationalnews/inside_youtube_divorce_107240.htm.

Last month, Judge Lael E. Montgomery of Boulder County, Colo., District Court approved the use of Twitter and blogs inside the courtroom to cover an infant-abuse trial. Local reporter Ron Sylvester, who also writes for the blog “What the Judge Ate for Breakfast,” pushed for the court to allow the use of Twitter for his courtroom reporting. Montgomery said, “I think there are other manageable options and less restrictive options than shutting down the flow of information during trial.” Because this judge acknowledged that Twitter was a legitimate public source for courtroom reporting, attorneys should remember to monitor Twitter when they go to trial. Ernest Luning, “Judge Orders Twitter in the Court, Lets Bloggers Cover Infant-Abuse Trial,” The Colorado Independent, Jan. 5, 2009, at <http://coloradoindependent.com/18805/judge-orders-twitter-in-the-court-lets-bloggers-cover-infant-abuse-trial>. The trial was moved to Denver after “Midyette’s lawyers said pretrial media coverage had tainted the jury pool in Boulder.” “Boulder County man’s child abuse trial begins Mon.,” Associated Press, Jan. 11, 2009.

Social media analysis supplements jury analysis

In-depth social media study is best used when it is driven by an understanding of how people filter information and make decisions. Social scientists know that fact-finders filter the world through their pre-existing attitudes, values and experiences. Fact-finders hold biases that influence them to accept or reject ideas. Through social media, litigators now have unprecedented access to the public’s conversations, attitudes and opinions, giving valuable insight into the cognitive filter that influences the fact-finder’s perceptions.

Through tracking the social media on message boards, in readers’ discussions, in the news media and in blogs, litigators can study attitudes about a subject, client or case. They can learn unknown or little-known attitudes and opinions, leading to more informed jury research and, therefore, a wiser trial strategy. There is an abundance of reader reactions to

news stories on blogs and in online comments that provides a whole new access to what the potential jury pool is thinking about cases that have been publicized.

Social media research on jurors had better not stop at Facebook

Without the vast information available via a social media study, litigators could be missing valuable attitudes and opinions (both wide-spread and local) to test during jury research exercises. For example, a recent social media study found that although the mainstream news media were predominantly negative about alleged corruption by a local government official, there existed in fact widely divergent opinions. Social media analysis conducted before trial found a larger number than expected of supporters for that official. The arguments used in support of the defendant were similar to those found in a formal jury research exercise and ultimately those that prevailed with the jury. The trial was decided largely in favor of the defendant, even though early reports were unanimous that public opinion was against him. *U.S. v. Carona*, No. SA CR 06-224 (C.D. Calif.).

There is no shortcut for in-depth social science-based jury research into the public’s attitudes and beliefs about a case or subject matter. Only a formal research study can reveal statistical information about particular demographics. Given that the social media are generated through spontaneous reaction to real events, news stories or online opinions, it is an invaluable resource for litigation practice. However, additional formal research will always be needed for controlled testing of response to specific issues and attitudes.

Attorneys are slowly waking up to this new court of public opinion. Litigators now have unprecedented access to the conversations, attitudes and opinions of millions of Americans. Social media analysis will be considered an essential preliminary study as litigators enter the next wave of jury analysis and litigation practice. **NLJ**

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