

# Effectively Managing the Social Media Invasion of the Legal System



Corporate Counsel Roundtable



The sanctity of the courtroom has been invaded by the Internet and the use of social media. Courtroom justice is played out across the globe in the nanoseconds it takes to put information online for use and abuse by interested and committed parties.

The rise of online communications and social media have changed how the world communicates and profoundly affected how individuals and organizations engage with one another; with their customers, supporters, adversaries, and competitors; and, in the context of litigation, as advocates, legal opponents, judges, and jurors. How does counsel and their clients deal with the explosion of information in bits and bytes? How can a company balance

the legal risks with the financial and reputational risks that accompany almost any legal action in a world driven by social-media empowered stakeholders?

This article examines the rapidly emerging new challenges facing attorneys and their clients trying to manage litigation in an online and social media-driven world. We then outline the six key components of an effective response to the challenges for defense lawyers created by the rise of social media:

- Monitoring and surveillance;
- Connect the dots;
- Risk/opportunity stakeholder analysis;
- Scenario planning;
- Stakeholder engagement plan;
- Close cross-functional coordination using clear processes and procedures.

Collectively, these actions are the foundation of a tested approach to successfully communicating about difficult legal situations in a way that minimizes the collective risk to an organization.

## New World, New Challenges

### A Shifting Media Landscape

Back in the early 1990s, the million dollar verdicts in the silicone breast implants cases were largely covered by reporters writing for newspapers. A story in *the New York Times* would set the agenda and tone of a legal controversy. By the turn of the millennium, cable news networks began to drive the narrative, as seen when CNBC set up an outdoor studio in Angleton, Texas, for the first VIOXX verdict in 2005 and interviewed jury members live; print reporters from major publications

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including *the Wall Street Journal* and *the New York Times* filed their stories from the courthouse. In both of those litigations, news of verdicts spread in traditional channels with original reporting done by reporters sitting in the courtroom.

Less than 10 years later, a bellwether trial on vaginal mesh products, one of the largest mass tort litigations in history, ended without a single reporter in the courtroom. Only a handful of stories appeared the next day, primarily in legal trade publications. However, news about the verdict immediately spread online and reverberated around the world. What changed? The rise of the Internet and social media opened the way for those without printing presses, broadcasting facilities, editors, or even press credentials to become loud voices powered by an Internet-based megaphone.

#### **New Media Infiltrates the Legal World**

Despite the legal system's effort to protect the sanctity of the legal system, social media and the Internet have invaded every step of the legal process—from the identification and recruitment of clients to division of payment after judgment. The speed with which these changes have happened has been difficult in many industries, but the legal system's foundation in judicial precedent and the often slower legislative process have resulted in a particularly jarring set of challenges for the defense bar and their clients.

For instance:

- Millions of dollars are spent every year putting information online designed to identify and enlist plaintiffs, sway jurors, and attract followers as part of coordinated campaigns against individuals, institutions, and corporations facing litigations. As one example, as recently documented by *Forbes Magazine*, hedge funds and specialized litigation finance firms have “bankrolled a wave of television advertising and online marketing that has helped stimulate tens of thousands of lawsuits against Boston Scientific, Johnson & Johnson and others.”
- Plaintiffs can leverage the power of online networks to “crowdsource” to raise money for lawsuits. One large example is JusticeInvestor, the online

resource that describes its mission as helping plaintiffs “even the odds because they can raise funds to pursue their cases” against wealthy defendants.

Social media has also made it much easier to leverage litigation as part of a quickly growing and viral campaign designed to pit public opinion against an organization

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and damage reputations and brands. While these campaigns may have initially started as organic grassroots, they have quickly evolved. Traditional business adversaries have put together large, full-time online platforms like the Corporate Action Network, which exist to “address the imbalance of power between corporations and people” by providing resources and expertise to mount large scale online and social media campaigns that are frequently connected to litigation. The Corporate Action Network's campaigns against DuPont and Walmart and other corporations are often connected to lawsuits and designed to “tap into larger networks than labor and provide cutting edge online support to increase the impact” of coordinated efforts.

#### **Trial Bar Inc. and the Online World**

For corporate defendants, the challenges are particularly enhanced by the way that

social media and online tools have been employed by the plaintiffs' bar to identify and recruit plaintiffs, as well as poison jury pools and draw political and regulatory attention that help drive settlement numbers higher.

The plaintiffs' bar has become extremely sophisticated in the use of the Internet, especially concerning efforts to recruit clients. One of the trial lawyer organizations, the Illinois Trial Lawyers Association, writes on its website that the “Internet dramatically alters the economics of attorney advertising” because the relatively small cost of having a significant visibility and effect “is leveling the playing field for client acquisition.”

Google any product liability litigation and up will pop websites run by plaintiff firms. There's a reason for that: plaintiffs' lawyers were spending \$53 million dollars a year to just secure keywords that lead unsuspecting Google searchers to these websites, according to a 2012 report by Institute for Legal Reform, which is an arm of the U.S. Chamber of Commerce.

Those online efforts are closely coordinated with television advertising, where plaintiff firms are spending an estimated \$10 million dollars a month, according to Rustin Silverstein of the Silverstein Group, which closely monitors advertising.

This barrage of partisan information is a critical underpinning of what can be called Trial Bar Inc., which is in the business of getting as many cases as quickly as possible and making damaging statements about products and companies, all designed to ultimately corner defendants into settlements.

#### **Challenges Continuing to Increase**

These challenges are only going to grow in the years ahead as the already-huge audience on social media continues to grow by leaps and bounds. The number of social media users increased by 176 million people in the last year and the Pew Research Center reports 30 percent of the world's population is now on social media, 71 percent of Internet users are on Facebook and 23 percent are on Twitter. And as the social media population soars, over various demographics, 63 percent of Twitter and Facebook users report they get their

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news from those sources, again according to Pew.

## Effectively Addressing the Challenges of Social Media

### A Comprehensive, Legal-Driven Strategy

To effectively manage the expanding risks of the social media invasion of the legal system, corporate defendants must have a strong communications effort based in the online world and designed to directly reach critical stakeholders, not only just to protect brand and reputation, but also to understand and address the litigation risks that Trial Bar Inc. is creating on these platforms. The ability of counsel to work with counterparts across the client organization to address the risks created by this new environment is going to become increasingly important. “No comment” is not a feasible approach in a social media world—the damage and legal dangers associated with a widespread viral campaign can be far more severe than a judgment in the courtroom.

Both general counsel and outside law firms must be prepared to take a leadership role in crafting a comprehensive, legal-driven plan that effectively addresses these challenges without taking unnecessary additional legal risks, and in the next several sections, we outline the key elements of a response strategy to achieve these goals.

#### Element 1: Monitoring and Surveillance

An effective strategy—legal, business, or communications—requires good information about the situation being addressed. One of the benefits of the rise of social media is that what is happening in this space is (almost by definition) easily available online, making it possible for nearly anyone to quickly gather a great deal of data about who is engaging around a particular issue, what they feel about it, and how they are connected with one another.

With so much information available across the expanse of the Internet, the real challenge is learning to make sense of the outpouring of activity by separating the significant from the blather. There are a number of vendors, like Sysomos, Gorkana, and Polecat that track online conversations in real-time using keyword searches and monitoring. These tools can pull in

large volumes of information and provide a general sense of the scope and tenor of the social media conversation, all of which is critical baseline data. While these tools are becoming increasingly sophisticated, correctly setting search parameters that weed out the irrelevant data but capture everything important is frequently

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a difficult process that requires ongoing engagement from someone with an understanding of the issue. Getting these search terms refined and up and running quickly is essential.

Even when the right search terms are employed, automated results require interpretation and analysis by a human with close knowledge of the issue and players involved. Seemingly similar activities on social media can have very different implications, as demonstrated with two tweets from Kim Kardashian, the famous for being famous celebrity who has 34 million Twitter followers and 42 million Instagram followers. When she goes online to mention advertising for plaintiffs’ lawyers, monitoring services flash red, which happened a few years ago when she referenced advertisements for a medical device

in a few tweets. But a closer look with an understanding of the situation recognized that in this case, although she prompted thousands of tweets and retweets with relevant words, her lighthearted tone and indirect reference rendered the tweet largely irrelevant.

But when Kardashian launched social media posts endorsing a prescription drug for morning sickness, there was a significant difference in reach and impact. Treato, an Internet-based intelligence company, reported Kardashian created a 500 percent increase in digital buzz about the drug and drowned out online conversations about a competitor. It was then disclosed that Kardashian was compensated by the manufacturer “for sharing her experience” with the product. The Food and Drug Administration also ordered the manufacturer of the prescription drug to take the posts down because they were “false or misleading.”

The process of collecting comprehensive online information, even when publicly available, is unfortunately still time consuming. However, the data gathered through the monitoring and surveillance process provides the essential foundation for making smart decisions about how to understand the nature and scope of the legal, business, and reputational risks that an organization faces.

#### Element 2: Connecting the Dots

A complete understanding of the nature of the situation requires a close analysis of data obtained from the monitoring and surveillance in order to determine which actors are influencers, which are followers, and how everyone is connected to one another (if at all). This process, which we call connecting the dots, enables you to answer questions that are essential to the development of an effective engagement strategy, such as, “Are the activists just talking to themselves or are they breaking into other stakeholders?” and, “How likely is political or regulatory interest in this topic?”

Because of the volume of data that is needed to obtain answers to these types of questions with any degree of certainty, it can easily become overwhelming or difficult to distill key findings. The output of

this exercise is thus a visual representation of the conversations and connections that enable all internal decision-makers to quickly and easily understand the individuals or organizations driving an issue and the potential areas of concern going forward.

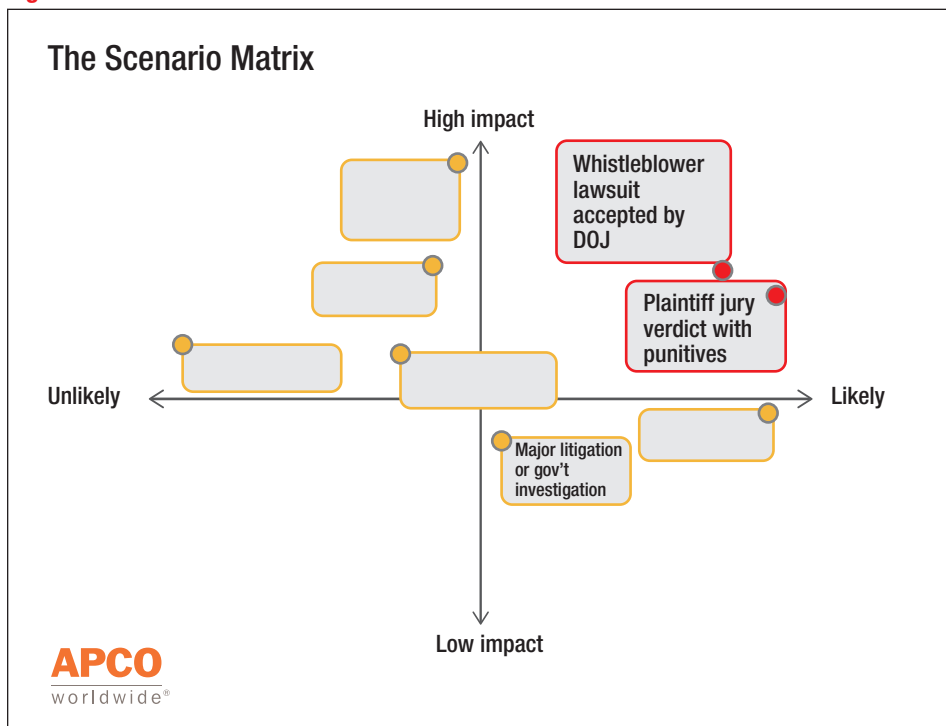
In a major litigation, this exercise enables you to both clearly see extent of the conversations and uncover links between activists and plaintiffs' lawyers as they conduct campaigns to recruit size-

able numbers of clients (which in turn helps them increase fees for administrative work when a resolution occurs in a mass tort or in a multidistrict litigation). Understanding how plaintiffs are being recruited not only enables the organization to be better able to take steps to protect their reputation with key stakeholders (customers, employees, suppliers, etc.) but also craft a legal strategy that better takes into account the tactics and processes of the other side.

**Table 1**

Stakeholder	Priority	Communications Strategy & Tactics
Employees	LOW	<ul style="list-style-type: none"> <li>• Arm managers with responsive talking points</li> </ul>
Board of Directors	MEDIUM	<ul style="list-style-type: none"> <li>• Engage immediately upon rollout or unexpected break</li> <li>• Provide briefing, talking points and FAQ</li> </ul>
Customers	HIGH	<ul style="list-style-type: none"> <li>• Prepare targeted messaging for customers</li> <li>• Employ webpage and/or e-mail address to provide factual information and address customer questions and concerns</li> </ul>
National Media Reporters	HIGH	<ul style="list-style-type: none"> <li>• Identify and proactively engage with a select group of outlets/reporters most likely to write accurate stories</li> <li>• Monitor coverage closely and prepare to engage reactively</li> </ul>

**Figure 1**



### Element 3: Risk and Opportunity Stakeholder Analysis

Building on the first two elements is a methodical review of how your stakeholders are being affected or affecting the situation. Because stakeholders in today's communication environment are constantly interacting, influencing one another, and gathering information from multiple sources, including online and on social media, an effective response plan must be designed to minimize the risks and maximize the opportunities with each through targeted engagement.

A relatively simple risk matrix can be created that captures the appropriate, cross-functional approach that should be taken with each individual stakeholders group in order to most effectively counter the opposing side's narrative and tactics. See Table 1.

This chart of stakeholder risk provides an actionable road map to mitigate reputational harm through strategic communication and stakeholder engagement. Additionally, by engaging all relevant internal decision-makers—such as legal, communications, government relations, and business leadership—in the development of the chart, and ranking the priority of each stakeholder, the internal team is generally able to quickly coalesce around an organized, strategic approach.

### Element 4: Scenario Planning

Stakeholder risk and opportunity analysis invariably leads to the identification of scenarios that may unfold. While it is impossible to predict every possible event that may arise, especially over the course of prolonged litigation, it is critically important to understand the most dangerous situations that are most likely to occur and, at the same time, have the highest impact on the company. We recommend creating a simple matrix that captures the team's best thinking on the likelihood and impact of the identified scenarios. See Figure 1.

This type of chart can help the team focus on those scenarios deemed to be most dangerous to the organization and take steps from a legal, business, and communications perspective that will both prepare for and help prevent the worst possible outcomes.

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### Element 5: Stakeholder Engagement Plan

When completed appropriately, the first four elements drive directly to the rapid creation of a stakeholder engagement or communications plan that will help protect corporate and personal reputations, brands, and products that are fully coordinated with legal and business goals.

The specifics of the plan for any given situation will vary widely depending on the nature of the risks and opportunities, stakeholders involved, and history and structure of the organization. However, such plans are likely to address or include some of the following:

- Clear processes to align communication with the legal strategy through close coordination with in-house and outside legal counsel ensure cross functional coordination around strategy, decision-making, and message development and approval;
- Core messages that are updated as the situation develops;
- Derivative, stakeholder-specific messages (both written and oral);
- Activation of a website specifically focused on the issue of litigation;
- Social media messages and scenario plans;
- Infographics or other explanatory materials;
- Identification and training of media spokespeople, potentially including members of the legal team, C-Suite, communications staff, or outside agency;
- Third parties who may speak publicly;
- Triggers that are likely to prompt proactive engagement with media or other key stakeholders;
- Staffing for critical litigation or regulatory events.

### Procedures to Protect Confidentiality and Legal Privilege

Communications materials created for planning purposes during litigation can create legal and reputational risks and must be properly protected. Drafts, scenarios, assessment of stakeholders, and templates of responsive language can be attractive to opposing counsel. They can seek them through discovery and then not only use them in depositions or trial, but also spew them online for rapid dissemination to

generate public attention and influence the course of the litigation. Once in the cloud, these internal materials can then be cut into out of context snippets and put on websites like The Smoking Gun, or sites funded by activist groups or plaintiffs' lawyers.

Critically, once online, this laundered material can be impossible to pull back.

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Federal District Judge Jack B. Weinstein ordered that leaked documents in the Zyprexa litigation that began appearing on several sites critical of the drug be returned. Some sites complied, others didn't. Copies of the documents survived on servers in Sweden and under a domain registered in Christmas Island, an Australian outpost off the coast of Java, well outside the jurisdiction of U.S. courts.

Reducing these risks requires that all appropriate steps are taken to ensure that documents created by or disclosed to the communications staff working with the legal team are protected by either attorney-client privilege or the work-product doctrine. Frequently, this effort can be enhanced by engaging outside specialists, not only because they are more familiar with the risks associated with sensitive

documents during contentious litigation, but also because corporate communications staff often do not have a working knowledge of the litigation environment and may need to concentrate on their usual and continuing responsibilities.

Unfortunately, case law on the protection of documents shared with or produced by an outside public relations crisis consultant is murky, with various courts reaching seemingly conflicting decisions even among federal district courts in a single circuit, to say nothing of the varying privilege and work product protections at the state level. For these reasons, counsel should always carefully review recent case law in the relevant court, work with the client to understand the potential risks and implement processes that best mitigate those risks.

However, while there is no certainty that a court will ultimately uphold a decision not to disclose these documents, as Amar Esteban summarized in an article for the Sedona Conference a few years ago, case law over the last 15 years does offer some basic guidance on the types of arrangements and materials that are more likely to be protected. Ultimately, precedent appears to suggest that the court must be convinced that the use of crisis consults is not simply an effort to cloak otherwise discoverable documents. Some of the key factors that have been identified in prior opinions include:

- Explicitly engaging the consultants for the purpose of assisting counsel in providing legal advice and using consultants that specialize in crisis or litigation PR are particularly transparent factors that can sway the court one way or another. (*In Re SCBA Liquidation, Inc., Case No. 04-12515*, Western District Michigan, Southern Division (Nov. 28, 2007 hearing transcript)).
  - Consultant work that extends beyond the litigation into "ordinary PR" is an easy excuse for a judge to order disclosure of documents (*NXIVM Corp. v. O'Hara*, 241 F.R.D. 109 (N.D.N.Y. 2007)).
  - Simply "assist[ing] counsel in assessing the probable public reaction to various strategic alternatives" may not be sufficient (*Calvin Klein Trademark Trust v. Wachner*, 198, F.R.D. 53 (S.D.N.Y. 2000)),
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though other courts have been less stringent here, especially if other factors were met (Grand Canyon Skywalk Development v. Cieslak, D. Nevada 2015).

- Retention of the consultant by outside counsel can be helpful in establishing the nature and purpose of the consultant's work. (*In Re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001)).
- Communications around potential criminal charges are more likely to be considered protected because of Supreme Court dicta acknowledging the validity of defense attorney efforts "to demonstrate in the court of public opinion that the client does not deserve to be tried." (*Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)).
- The work product doctrine will sometimes successfully protect certain documents, even when the court has reached a decision that the consultant was not covered by the attorney-client privilege (*In Re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001)).
- Documents produced by communications consultants appropriately captured in a privilege log are more likely to be considered protected (*Schaeffer v. Gregory Village Partners, L.P.*, 2015 WL 349039 (N.D.Cal. 2015)).

In sum, there are a number of actions and procedures that can significantly limit the potential discovery risks of engaging communications consultants to help navigate the many challenges outlined in this article.

## Conclusion

A fully functional communications infrastructure aligned with the litigation goals and directed by counsel can be of immense help to corporate decision makers as they struggle to decide what to say, or not to say, in the midst of an intense legal war, with changing battle lines. Should they follow the ancient Arab proverb, "The dogs bark but the caravan moves on", which is the tactic of saying nothing and hoping that the dogs are only barking at each other and will have no lasting effect.

Or has the situation reached a tipping point that author Malcom Gladwell

describes as "that magic moment when an idea, trend or social behavior crosses a threshold, tips, and spreads like wildfire" where "products and messages and behaviors spread like viruses do"? Knowing exactly where you are on the barking dogs tipping point spectrum by understanding social media and the communications environment in real-time is the best way to make the best decision in this risk-filled world. Following the approach outlined above can offer legal practitioners and their clients the roadmap to effectively manage this new and rapidly evolving invasion of online and social media in our legal system without taking unnecessary legal or reputational risks. 