

Social media: *The new battleground in civil litigation*



As internet users expose their activities, personal preferences, and sentiments online, social media has increasingly become a potential gold mine for evidence in civil litigation, significantly raising the bar for litigators. One can hardly imagine the wealth of robust, often deeply personal information that is stored in cyberspace forever — and proving to be not only relevant, but also critical in many court cases.

Amid this inundation of social media data, leading firms are seeking out new and innovative ways to mine this data and reveal relevant information about their clients and clients' potential adversaries; findings can prove fruitful as possible evidence. As such, having a social media strategy in place is becoming critical to enabling firms to provide high-quality services to clients and remain competitive in today's marketplace.

What is a social media monitoring plan?

Systematic, ongoing monitoring of social media has traditionally been used in the context of brand management, competitive intelligence, customer impact, and public relations. For years, marketing departments have used social media to analyze, track, and benchmark public perceptions about their brand and their competitors.

Today, however, the same methods are increasingly being adapted for use in threat detection generally and litigation in particular. While litigators have used numerous sources and methods in collecting and analyzing evidence (e.g., traditional discovery, e-discovery, and public records research), social media is growing in importance as a component of that strategy. A good litigation-focused social media strategy generally begins with background monitoring and then moves into more targeted research.

The first step in a litigation-focused social media strategy: Background monitoring

Leading law and professional services firms are increasingly tracking social media activity on behalf of their clients on an ongoing basis. This sort of "passive" monitoring runs continually in an effort to detect any spikes or upticks in chatter, or changes in the nature or tone of such chatter. It also aims to identify commentary that may initially be viewed as minor ripples, but may be part of a larger misinformation campaign. Especially in instances where litigation is anticipated, a social monitoring platform should be fully operative to detect any changes in the sentiment surrounding social media conversations. Having an "always-on" monitoring program in place is the sine qua non of a litigation-focused social media strategy.

Taking it to the next level: Gaining a deeper understanding of clients, adversaries, and third parties

If an uptick or substantial change in social media chatter is flagged, more targeted techniques can be brought to bear to shed understanding and track specific actors who may be the source of shifts in social media regarding your client.

Authority analysis is frequently used in the context of targeted social media research, especially after negative content has been detected. Authority analysis aims to measure the contextual influence and authority of specific social media voices by evaluating indicators such as inbound linking, rankings, traffic, followers, visitor engagement, and traditional media crossover. This capability can help to determine the reach, resonance, and relevance of potential detractors, thereby assessing their capacity to shift opinions and mobilize opposition. It also aims to lend understanding of changes in authority over time.

Imagine if a company detects a major uptick in social media mentions of the entity, including such negative terms as “fraud,” “scam,” and “rip-off.”

Might it be that someone will soon view this chatter as an opportunity for a lawsuit against the business? Might a class action lawsuit be on the horizon?

If the presence of social media content might be a factor in an actual or potential case and no background monitoring has been done, it's important to quickly assess the “when and where” of the data. This requires targeted research of historical social media data — research that can enable the identification of “first mentions” of adverse information, as well as in-depth analysis to identify who is pushing negative content about your client into cyberspace and perhaps even why. Such a capacity is already used in tort and insurance claims, and is increasingly important in the context of hostile takeovers and proxy contests where social media can be used as a platform for smear campaigns.

In January 2013, the Consumer Financial Protection Bureau proposed that social media data may soon be scrutinized as part of its assessments of consumer financial products and services.¹

In April 2013, the Securities and Exchange Commission issued a Report of Investigation, which included guidance permitting publicly-traded companies to disclose material information via social media channels, as long as they inform investors of those channels in advance. The new guidance would allow companies to disclose material information through social media without running afoul of Regulation FD.²

Social media challenges and opportunities for litigators

Although social media and capabilities for making sense of it are evolving by the day, applying good social media analytics remains a challenge for several reasons:

- Social media speaks many languages and our ability to analyze the world of non-English social media remains nascent. There is no out-of-the-box tool on the market that can replace a strategy of preparedness and a team of seasoned, multi-lingual investigators.
- Useful background monitoring methods are often not geared toward deeper, more targeted research. For instance, they may not be up to the task of capturing deleted content, which, if netted, may yield insight into attempts at spoliation of evidence. They also may not house a body of historical social media data that goes back for a number of years, and such capabilities are necessary for gleaning information from social media regarding the historical track record and public profile of adversarial parties.

Does an adversarial party have any social media information from three months, six months, or two years ago that might be used to challenge credibility? Has an opposing expert ever made statements that damage credibility? Does embedded social media metadata support or contradict claims made by an opposing party (i.e., timestamp/location metadata)?

- Social media is not monolithic. It's constantly changing and doesn't exist in isolation from other information sources. As such, a litigation-focused social media strategy should rely upon multiple sources; it should also cross-reference leads against disparate information sources (e.g., accounting records, email, sales presentations, and property records). Because of the sheer speed at which social media moves, leading firms are also devising sets of predetermined but customizable response plans — which often cover responses and countermeasures to critical (and likely) social media events.

Despite these challenges, social media is increasingly being used as a source of potentially useful evidence.

By effectively monitoring and strategically using social media in the litigation context, counsel can likely be better prepared — and better prepare their clients — to respond to social media data challenges. This can help firms to provide creative, forward-looking, and timely legal services.

¹ Source: <https://www.federalregister.gov/articles/2013/01/23/2013-01255/social-media-consumer-compliance-risk-management-guidance>

² Source: <https://www.sec.gov/litigation/investreport/34-69279.pdf>

Contacts

For a deeper discussion, please contact:

Sanjay Subramanian

PwC

(703) 918-1509

sanjay.subramanian@us.pwc.com

Marissa Michel

PwC

(703) 918-3948

marissa.o.michel@us.pwc.com

Shanti Salas

PwC

(703) 918-6058

shanti.salas@us.pwc.com

© 2013 PricewaterhouseCoopers LLP, a Delaware limited liability partnership. All rights reserved.

PwC refers to the United States member firm, and may sometimes refer to the PwC network. Each member firm is a separate legal entity. Please see www.pwc.com/structure for further details.

This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.

PwC United States helps organizations and individuals create the value they're looking for. We're a member of the PwC network of firms in 158 countries with more than 180,000 people. We're committed to delivering quality in assurance, tax and advisory services. Tell us what matters to you and find out more by visiting us at www.pwc.com/US.