

An Ocean of Media: Digital Media and Class Action Notice

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Today, counsel seeks class action treatment for a number of mass tort matters, including, for example, a segment of cases involving pharmaceuticals, medical devices, and toxic exposure. As such, class notice plays a critical role in informing potential class members of their rights and options to participate in these matters.

That said, the ocean of media in current class action notice planning can be dizzying. Today, digital media is introduced, adopted, and consumed at a non-stop pace. As a result, the array of media options are increasingly fragmented. As digital media evolves, traditional media such as direct mail, newsprint, and magazine ads (once staples of class notice) struggle to compete for attention. In response, the Advisory Committee to the Federal Rules of Civil Procedure,ⁱ class action practitioners,ⁱⁱ and working groups continue to study the role of digital media in order to improve the reach and efficacy of class notice (and to ultimately to safeguard Due Process).ⁱⁱⁱ

Class Notice: Key Rules and Standards

Rule 23(c)(2)(B) requires “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”^{iv} Seminal case law holds that notice should be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”^v Further, in *Mullane*, the Supreme Court felt compelled to clarify that class notice “which is a *mere gesture* is not due process. The means employed must be such as one *desirous of actually informing* the absentee might reasonably adopt...”^{vi}

The Ocean of Fragmented Media

Today, even traditional media is increasingly fragmented and complex. For example, “newspapers” now encompass print and online editions. More fragmented, “television” now refers to a broad array of media vehicles, such as network TV, cable TV, satellite TV, streaming digital TV (from YouTube to Hulu), and on-demand and DVR-based TV.

In the context of class notice, the distinction is critical to assess true reach and efficacy. Consider, for example, that DVR is available in 44% of U.S. households, and DVR users skip 60% of commercials during prime time programming.^{vii} Further, only 41% of adults now claim to read a newspaper daily, down from 78% in 1970.^{viii} Moreover, on average, only about two-thirds of a newspaper’s pages are opened.^{ix} The bright spot for newspapers are their digital editions— “[A]mong the top-five papers, they generate about one-quarter of their total circulation from the digital paper.”^x

Beyond newspapers and television, the ocean of digital media available to class notice planners includes, for example, email (e.g., Amazon SES), paid search (e.g., Google currently holds 85% of share over competitors Bing and Yahoo), social networking media (e.g., over 1 billion active daily users on Facebook; Twitter, LinkedIn, etc.), digital display (e.g., banner ads), YouTube pre-roll advertising, mobile app advertising (e.g., PlaceIQ and Conversant), and content integration (e.g., Taboola and Outbrain), among many, many other digital media vehicles and tools.

Advantages of Digital Class Notice

The benefits of digital media include the availability of “big data” and data analytics—advanced, data-driven consumer modeling of the class audience. This capability for advanced targeting avoids the “scattershot” and wasteful approach of some traditional media options (e.g., relatively expensive newspaper advertising that is ill-aligned with class member demographics and less effective than alternatives).

Moreover, digital media in class notice offers one notable advantage over traditional media: the ability to more precisely and empirically measure reach and participation rates. To provide simple, data-driven proof of results to the parties and Court, the notice media planner can track and report on empirical metrics such as reach (a measure of the number of people exposed to the notice ad), impressions (the number of times an ad is posted), frequency (the average number of times the advertisement was served to each person), the number of clicks on the ad, and the cost per click.

The real-time availability of empirical data makes digital ads (such as social media advertising) a tremendously customizable and attractive form of notice advertising. Most digital ads are billed per impression or per click, ensuring that there are no “wasted” ads purchased. Moreover, real-time data provides the opportunity to measure, adjust, and optimize effective reach throughout the notice program.

Getting Started: Evaluating Digital Notice Plans

While the ocean of digital media may be overwhelming, a few steps can help guide counsel to select the most effective notice program (including a mix of digital media) on behalf of class members. The first recommendation is familiar—retain a notice media planner with demonstrable experience and expertise in digital advertising. Just as not all attorneys are class action attorneys, not all media planners have substantial expertise in digital advertising. To select the notice agent that will best reach and inform the class, the request-for-proposal process may be designed to allow counsel to compare metrics and experience (e.g., exemplars of past digital media notice campaigns, total past digital media purchase, *inter alia*), across prospective notice agents, apples to apples.

Second, proposals made by the media planner can often be tested empirically. Pre-program media testing is a common best practice in commercial advertising, for example. Pre-program testing allows the media planner to run several ads (varying the graphic design and messaging) among several test cohorts (e.g., 30,000 putative class members). Through pre-program testing, media planners can empirically evaluate, adjust, and propose the notice advertisements that will effectively reach and inform the largest number of putative class members, and best safeguard Due Process.

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ⁱ Advisory Committee on Civil Rules, Nov. 5-6, 2015, http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf, last accessed Dec. 14, 2016.

ⁱⁱ Jason Ross, Electronic Class Notice May Be The Best Notice Practicable, Class Action Law360, available at <http://www.arnoldporter.com/~media/files/perspectives/publications/2016/04/electronic-class-notice-may-be-the-best-notice-practicable.pdf>, last accessed December 14, 2016.

ⁱⁱⁱ U.S. CONST. amend. V; see also U.S. CONST. amend. XIV.

^{iv} FED. R. CIV. P. 23(c)(2)(B).

^v *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

^{vi} *Id.*

^{vii} Helen Katz, *THE MEDIA HANDBOOK*, 66 (5th ed. 2014).

^{viii} *Id.*, 80-84.

^{ix} *Id.*, 80-84.

^x *Id.*, 80-84.