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Why Defense Lawyers Should Care About Social Media, Part 2

By Andrew B. Downs

This is the last post in a two part series from the Federation of Defense & Corporate Counsel's (FDCC) Blog on social media and what defense lawyers need to be aware of.

In Part 1, we discussed the mob rule aspects of social media. Not long afterwards, an interesting article in appeared in the New York Times on that very subject. (<http://nyti.ms/19clfwk>) It discussed how those with the ability to quiet an on-line mob often fail to do so. In Part 2 we focus on what the defense or corporate attorney can do to mitigate the harm resulting from social media criticism of the client or its defense strategy.

Usually, social media criticism can't be stopped. Efforts to stop that criticism are likely to inflame it instead. What the defense or corporate attorney can do is be prepared for it. In many ways the fundamental strategy is not appreciably different for social media than it is for traditional media. The difference is social media is immediate and impatient. There are no "news cycles" in social media.

Preparation begins with risk assessment before the social media storm. Is the case or situation one in which the client will be perceived as having disproportionate power, influence or wealth? Can the client's position be characterized as unfair, unjust or oppressive? Is the *justice* of the client's position difficult to explain in a sound bite? If the answer to any of these questions is "yes," there may be a significant risk.

The second part of risk assessment is to study the opponent. Is the opponent articulate? Appealing? Does he, she or it have powerful or influential friends or supporters? Is there a history of social media commentary on the part of the opponent or its friends or supporters? Does opposing counsel have a history of using the press or social media to advance his or her goals?

Once the risk has been assessed, identify the available tools and assess their efficacy. Many institutional clients centralize their public communications in corporate public relations or communication departments and forbid defense counsel, much less corporate counsel, from making public statements. If the case presents a significant risk of adverse social media exposure, outside defense counsel should discuss this risk with the client at an early stage so appropriate internal alerts can be provided and the client's communication department can be included in the planning process.

In litigation, parties speak through their court filings. When drafting pleadings and motions, defense counsel needs to consider the risk that the content of the defendant's pleadings will be quoted out of context by individuals lacking in legal training. One feature of social media is out of context statements develop lives of their own. Once disseminated in social media, they are difficult to explain, clarify or correct. When feasible, it's beneficial to draft pleadings that won't provide the "twitterverse" and bloggers with material.

The third step in preparation is planning the response in the event there is social media criticism. Not all social media criticism deserves a response, but a response strategy should be considered before the criticism surfaces. Usually the lawyer won't be the conduit for the response, but the lawyer who has a coherent and considered response strategy will be more valuable to the client at a time when action may need to be swift and well thought out.

After preparation comes monitoring. Social Media criticism builds quickly and the defendant



needs as much notice of that criticism as is feasible. Institutional clients with corporate communications and social media presences often already monitor social media for references to the client. Other clients do not have an institutional tool available. In those circumstances, defense counsel needs to take action. The available tools are evolving continuously and what works today may be passé tomorrow. Available options include Google Alert e-mails (setting an alert in Google for new mentions of the client, the opponent or the incident that gave rise to the lawsuit), or manually monitoring the opponent's Twitter account without officially following that account. There are apps and webpages designed to automate this process, but the author has not used them and cannot comment on their utility.

The bottom line is defense lawyers cannot ignore social media. It can be as dangerous, if not more dangerous to the client as traditional press coverage, only without the professional and ethics standards to which the mainstream press aspires.