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CLASS ACTION NOTICE

Effectively reaching the target audience and satisfying judicial standards for reach and frequency require a clear understanding of the viability of specific media channels to actually deliver a class action notice to a projected audience, say Judge Dickran M. Tevrizian and legal notice expert Jeanne C. Finegan in this BNA Insight. The authors say employing a qualified legal notice expert will help ensure practitioners select the most appropriate media to reach potentially affected class members and that the reach, frequency, and effectiveness of a notice program is accurately reported to the court.

Expert Opinion: It's More Than Just a Report . . . Why Qualified Legal Experts Are Needed to Navigate the Changing Media Landscape

BY HON. DICKRAN M. TEVRIZIAN AND JEANNE C. FINEGAN

Ten years ago, it would have been unthinkable to send or receive notice of a class action by email, mobile website, phone or through any channels other than traditional mail, print publication, or radio/television broadcast. But thanks to an on-demand media explosion, consumers are customizing their media usage to fit their lifestyles. As a result, notice campaigns have had to adapt and integrate these preferences. It's now all about just-in-time media—how you want it, where you want it—from streaming radio, to news feeds you select on RSS, to shopping online or on mobile, and texting on your Smartphone.

As a result, practitioners increasingly will see modern notice programs incorporate social media, banner advertising, opt-in text messaging, mobile web sites and email as standard components. Recently approved notice programs that have combined traditional elements with online and/or social media elements include *Gemelas v. Dannon*, *Stern v. AT&T*, *Hartless v. Clorox*, and *Stefanyshyn v. Consolidated Industries*.[1] Other cases employing cost-efficient and effective email notice to reach class members include *Fairchild v. AOL*, and *In re: Expedia Hotel Taxes and Fees Litigation*.[2]

Media and communication channels seem almost limitless and as a result, courts expect a much greater level of sophistication in the design, dissemination, and reporting accuracy of legal notice programs. Thus, spe-

cial expertise is required to avoid notice pitfalls and to plan and implement a best practicable notice program to ensure that your settlement is approved.

ADR, Mediation and Why You Need a Legal Notice Expert

The path to judicial approval of a notice plan can be fraught with potential peril. But the pitfalls can be avoided with proper planning and discussion (as early as at the pre-settlement arbitration or mediation session). Arbitrators and mediators can and should use their experience to craft early agreement between the parties regarding publication of notice, which in the end will help avoid delays, potentially costly negotiations between counsel, and proceedings before the bench.

Not only have new media options greatly expanded, the risk and consequence of objection or rejection in class action settlements is much greater now. Again, arbitrators and mediators can help provide insight on partnering with qualified legal notice experts, which will ensure that proper notice is given to class members, that due process standards are met, and that results are accurately calculated and reported to the court.

Central to this discussion is the understanding that not all advertising agencies are alike, especially when it comes to legal notice. Many advertising agencies do not understand how to appropriately use media research tools to rigorously test and prove target audience delivery in the legal context. Without these tools and analysis, the reach calculation can be significantly overstated[3] which can open up a settlement to judicial review and/or objection.

This article explains more fully why it is important to use a qualified legal notice expert, and how to determine whether your legal notice provider is qualified to offer an expert opinion and potentially testify on issues of notice in a class action proceeding.

The Changing Media Landscape

The media landscape has changed more in the past five years than it has in the last 50. Significantly, there are now four generations[4] of workers who are active consumers, all with distinctly different media habits and preferences. Consequently, a wide range of media must be employed to reach many target audiences now. The resulting notice costs can be considerable. This is partly due to divergent, generational media considerations, and predominantly to the fact that Americans, across all demographics, have become media grazers. Americans now tend to use multiple media channels and tend not to stay with one medium for long. Reaching certain populations requires more media outreach now than it did 10 years ago because there are more outlets and each is delivering a smaller audience. Therefore, media planners building cost efficient programs must spend budgets across a wider range of outlets in order to meet judicially articulated legal notice requirements.

Despite considerable media costs, there is ever-present pressure to provide low-cost notice solutions. Balancing expense and reasonability are, of course, fundamental to the process. However, administrators or agencies unfamiliar with the syndicated media research, calculations and accepted models applied to Rule 23, might unknowingly build a plan which seems inexpensive, but overstates the percentage of a class reached by such a program. Legal notice programs using non-expert tools and methods that fail to adhere to recognized legal standards—both for performance and methodology—simply to save money, can be disastrous.

Background: The Legal Notice Framework

Due Process

The Due Process Clause of the Fourteenth Amendment entitles members of a class action to receive notice reasonably calculated to inform them of their rights and proceedings.[5] For any class certified under Fed. R. Civ. Pro. 23(b)(3), the court must direct to class members the ''best notice practicable'' under the circumstances, including individual notice to all members who can be identified through reasonable effort. See Fed. R. Civ. Pro. 23(c)(2).

Legal Notice Expert Opinion

Though Rule 23(c)(2) seems to allow for considerable flexibility, judicial approval of notice campaigns is anything but automatic, especially within the last few years. As the legitimacy of the class action mechanism rests on the ability to ensure that class members are notified of their rights, the vast majority of courts have been careful to analyze the quality, methodology, and effectiveness of notice campaigns—requiring a high level of detail in testimony provided by notice experts.

Fed. R. Civ. P. 26(a)(2) requires parties to disclose the identity of any expert witness they may use at trial through a written report.

The written report must contain:

- A complete statement of all opinions the witness will express and the bases and reasons for them;
- The data or other information considered by the witness forming the opinion;
- Any exhibits that will be used to summarize or support the opinion;
- The witness's qualifications, including a list of all publications authored in the previous 10 years;
- A list of all other cases in which the witness testified as an expert at trial or by deposition, during the previous four years; and
- A statement of the compensation to be paid for the study and testimony in the case.

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[1] *Gemelas v. The Dannon Company*, No. 1:08-cv-00236 (N.D. Ohio, E. Div.); *Stern v. AT&T Mobility Wireless*, No. 09-cv-1112 CAS-AGR (C.D.Cal.), *Hartless v. Clorox Company*, No. 3:06cv02705 (S.D. Cal.); *Stefanyshyn v. Consolidated Industries*, No. 79 D 01-9712-CT-59 (Tippecanoe County Sup. Ct., Ind.).

[2] *Fairchild v. AOL, No. CV 09-03568 (C.D. Cal.)*; *In re Expedia Hotel Taxes and Fees Litigation*, No. 05-2-02060-1 (SEA) (Sup. Ct. of Wash. in and for King County).

[3] See: Federal Judicial Center, Notice Checklist and Plain Language Guide (2010) (*Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*) http://www.fjc.gov/.

[4] The Great Generation, Baby Boomers, Gen X and Gen Y.

[5] See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

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Further, Fed. R. Evid. 702,[6] which governs the admissibility of expert testimony, now requires that such testimony be ''***based upon sufficient facts or data***,'' that it be ''***the product of reliable principles and methods***,'' and that the expert ''appl[y] the principles and methods reliably to the facts of the case.''[7]

In Practice: Recent Court Cases

Recently, a New York district court was asked to exclude the testimony of a legal notice provider based on the provider's lack of direct media expertise and failure to comply with FRCP 26(a)(2) and FRE 702. See *Weiner v. Snapple Beverage Corporation*, No. 1:07-cv-08742 (S.D.N.Y.), Defendant Snapple Beverage Corporation's Memorandum of Law in Support of Motion to Exclude the Expert Testimony (April 9, 2010). The Motion to Exclude the Expert Testimony also alleged that the expert used a company resume instead of the expert's personal resume, and had failed to include a list of cases wherein the provider had previously testified as the legal notice expert.

While the motion was ultimately rendered moot because the Court did not certify the class in *Snapple*, the court noted that it had ''***serious questions [about the providers'] qualifications and about plaintiffs' compliance with Rule 26.***'' *Weiner v. Snapple Beverage Corporation*, 2010 U.S. Dist. LEXIS 79647 (S.D.N.Y. 2010).

In 2009, a New Jersey district court required the parties in an early-termination-fee class action to significantly amend portions of a disseminated notice program after objectors challenged the individual notice component and reach calculations. See *Larson v. Sprint Nextel Corp.*, 2010 U.S. Dist. Lexis 3270 (D.N.J. January 15, 2010). The court also held that the important statistic for the purpose of analysis was the calculation of net reach.

Further, in a recent state court case, a Louisiana appellate court found a notice program deficient both in methodology and application that—among other problems—lacked plain language and failed to include publication. The court concluded that the ''method of notice . . . create[d] a lack of meaningful representation for the class members.'' See *Orrill v. AIG Inc.*, No. 2009-CA-0888 (Ct. of App. La. 2009).

Accepted Methodology and the Differences In Models Measuring Total Audience

For the purpose of legal notice, courts have employed an exacting and complex model called Reach and Frequency. Net reach is the average percentage of net individuals exposed to a notice program. Net reach attempts to eliminate duplication and to count each person only once, no matter how many media channels that person may use. Frequency is the average number of times a person has the opportunity to see a message. The importance of a correct calculation of reach and frequency provided by a trained media expert is underscored in the recently published Federal Judicial Center's *Judges Class Action Notice and Claims Process Checklist* where it cautions, ''Claims administrators are often accountants by training and may lack personal knowledge or the training to conduct reach analyses.''[8]

The calculation of reach and frequency requires the use of sophisticated and proprietary nationally syndicated data and software. Practitioners should be cautious because not all advertising and media agencies are skilled or experienced in calculating a net reach and frequency model that courts have now come to expect. In fact, agencies use a host of different media models to measure performance based on their core business, i.e., direct marketing, online, social media, etc.

Direct Marketing Model

Depending on the core business model of a given media agency, its target audience reporting could be colored by its day-to-day business practice. For example, direct marketing agencies frequently use a Direct Response Return on Investment model[9] (''DR'' or ''ROI'') to count total purchases. In this model, a purchaser will be counted in any medium where a potential sale could be made. If this model were utilized in the notice context, the resulting ''reach'' calculation would be overstated if the agency did not calculate net audience, but rather added together the reach of all media outlets—magazine, television and internet. The golden rule of net reach is that you cannot count a person more than once; pure addition is not acceptable in net reach calculation. Adding the results fails to filter ''audience duplication'' and therefore substantially over-reports the total audience reached. Thus, using a Direct Marketing model for reach calculation yields overstated results—reporting impossibly large reach calculations on a very small budget, a result literally too good to be true.

Behavioral Targeting Model

Another model used by some online marketing and advertising agencies is called Behavioral Targeting (''BT''). This model predicts where web visitors will likely view pages and therefore be most inclined to make a purchase or take action on a sales offering. The BT model considers only those who are most inclined to make a buying decision or use a product. BT does not consider brand switching or product satiation. Thus, a legal notice program planned under the BT model will likely: (1) understate the potential universe of affected individuals (because it only considers those actively in

[6] Amended in 2000 to reflect the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael* 526 U.S. 137 (1999).

[7] In the context of a settlement fairness hearing, Rule 702 may be applied ''in a manner somewhat less formal'' than that used in a jury trial, though the principles of *Daubert* always apply. See e.g., *UAW v. GM*, 235 F.R.D. 383, 387 (E.D. Mich. 2006).

[8] *See FJC Notice Check List, Judges' Class Action Notice and Claims Process Checklist*, and *Plain Language Guide*, p.3, http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf . (''Are the reach calculations based on accepted methodology? An affiant's qualifications are important here. . . . Claims administrators are often accountants by training and may lack personal knowledge or the training to conduct reach analyses. '').

[9] ''General advertising measures cost per thousand (CPM), reach and frequency (R/F). Direct response measures profits. Every airing is tracked and profits or losses are measured. What ends up being accountable is *not* the quantity or quality of the people watching or listening to a commercial but the quantity of people that actually pick up the phone and order a product or service they see in the commercial.'' See, http://www.directresponseacademy.com/artcl.MsrngPrftblty.html.

the market *and* who are online); and (2) greatly overstate reach, due to the smaller universe.

An agency not well versed in legal notice and the rigorous requirements of due process may offer this method of targeting as the most effective tool because it has very little (extra visitor) waste. Under a pure BT model, (using a hypothetical example) a planner could use a small budget to buy specific sites with a very small number of impressions, (e.g., 15 to 20 million), and then report to a court that they believe they have reached an estimated 70 percent of target audience. The employment of a proper reach calculation, contemplating both present and past users of the product (not just current users as contemplated in the targeting model) reveals that the BT program actually only reaches a single-digit percentage (not the stated 70 percent) of a target audience—which would not be sufficient under Rule 23. In cases where the class period begins years before the date of submission of the notice program, a pure BT calculation can be particularly perilous.

Using a BT model to supplement a notice program is acceptable, but not to the exclusion of finding those who have switched brands or services, or may be no longer engaged with a defendant company. Providing notice to both current and former customers of a company is fundamental to legal notice. Therefore, the BT model alone simply does not work as a stand-in for a reach-based legal notice program.

What Makes a Best Practicable Legal Notice Plan

In order to create a ''best practicable'' notice program, notice experts must consider those who are currently in the market to buy or research a product or service, those whose needs have been sated (those who are out of the market), as well as those who have changed or switched brands. Consequently, a well-planned legal notice program should use general media along with highly targeted outlets. By using broad reaching and highly targeted outlets for a notice program, a legal notice expert can report on *all* individuals that may have been affected by a class action, not just those currently using a product.

In defining a class, notice experts must also analyze demographic characteristics: values and lifestyle habits, (product and brand preferences) as well as media consumption habits.

The basis for this analysis is typically proprietary nationally syndicated media research bureaus such as GfK Mediamark Research and Intelligence, LLC (''MRI''), Scarborough, Arbitron, Neilsen, comScore and Ando Media, among others. These media research bureaus scientifically sample and characterize populations into clusters by demographic factors including age, ethnicity, income, geographical distribution, gender and profession. Once the demographic profile has been established, the analysis continues to include a target audience's qualitative characteristics, such as their choice of media. These complex reports can identify and cluster target populations by a host of variables including the target populations' tendency to use certain products and brands. Based on this information, the reports further identify which media channels are favored by a target audience, e.g., magazines, television, radio, social media, websites, mobile.

How Do You Know If You Have Partnered With a Qualified Expert?

Here are some simple things to look for and questions to ask your expert:

- Has your expert actually worked in the field of media, public relations or communications?
- How long have they practiced in that field?
- Does your expert actually have *direct experience* and *expertise*, or are they reporting what others have given them?
- Have they provided expert testimony through an affidavit or in court?
- Has a court previously discounted their experience or opinion?
- Have they published articles, or have they spoken on media and related legal notice?
- What case experience do they **personally** have—*not a company case resume.*
- Are they writing a report in a way that can be replicated by a peer?
- Are they citing the research used and are they clearly describing how they have arrived at their conclusions?

If the expert answers ''no'' to any of these questions, the explanation and reasons for the negative response should be carefully examined (and practitioners should expect potential objectors to scrutinize this after submission as well, which could be disastrous). Scrutinize statements that seem too good to be true. Also, keep in mind that a reputable media expert will not speculate on, report on, or measure the results of certain elements such as a press release *before* it is issued. No credible public relations person would do this, as it is not possible to predict in advance how many articles will result from a press release. The news of the day could trump any given publicity effort.

After the notice program has been implemented, the legal notice expert must be able to fully explain to the court the methodology used to determine the target audience. The expert affiant should be the person who actually devised and implemented the media program, not the administrator. The media expert must provide the reasons for choosing certain means of communication, and the basis for the overall effectiveness of the program using reach and frequency percentages.

Conclusion

Now more than ever, a greater level of sophistication and effort is required in the design, implementation, and reporting of legal notice programs. New media channels and changing consumer behaviors alter the way class members may expect to receive notice, and judges are taking note. A legal notice expert can help you successfully navigate this complex process, saving you time, money, resources and potential frustration.

The media landscape is changing at a rapid-fire pace, and this will continue to have an impact on legal notice programs. Reaching certain target audiences of a class action will always require careful analysis of changes in media preferences. Effectively reaching the target audience and satisfying judicial standards for reach and frequency also requires a clear understanding of the viability of specific media channels to actually deliver notice to a projected audience. Employing a qualified legal

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notice expert will help ensure you have selected the most appropriate media to reach potentially affected class members and that the reach, frequency and effectiveness of your notice programs are accurately reported to the court.

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