

SATISFYING DUE PROCESS IN THE DIGITAL AGE

Melissa Wolchansky & Daniel Bryson

I. Federal Judicial Standard: Reach and Frequency Standard

Satisfaction of due process in the context of media notice is first and foremost founded on meeting the Federal Judicial Standard with respect to reach and frequency. The Federal Judicial Center Judges' Class Action Notice and Claims Process Checklist states that "it is reasonable to reach between 70-95% of the class."

It is important that in crafting a media notice program that the reach calculation methodology is aligned with regular practices in media planning. Accordingly, the notice administrator should either be well-versed in purchasing and implementing a media campaign or they should outsource to a digital media company that specializes in mainstream media.

Ensure your reach/frequency is measured properly. Reach and frequency in the media context is measured in terms of "impressions." The FJC cautions that "total, or gross, impressions of the entire website do not reveal how many people will view the notice 'ad' appearing periodically on a particular page.

II. Trends in Media Consumption

It is logical that notice should be provided in concert with the trends in media consumption.

Key Facts:

- **Print decline:** Today US consumers spend 21 minutes a day with print (down from 44 minutes in 2011);
- **Digital is #1 source of media consumption:** In May 2015, Digital passed TV and spend 16x more time online than with Print. In total 338 minutes per day.

In the past decade, and specifically within the past few years, consumers have significantly shifted their consumption of media from print-based consumption to online-based consumption. In response to this consumer shift in consumption, advertisers have shifted their spending from print-based to online-based advertising.

The major driver behind these shifts is technology and its impact on consumers' time with media each day. As reported by eMarketer,¹ U.S. adults in 2008 spent a combined 63 minutes every day reading magazines and newspapers.² In 2011, that number had declined to 44 minutes per day, a decline in usage of 30%. In 2015, that number has declined to 21 minutes, a

¹ eMarketer aggregates more than 4,000 sources of digital marketing and media research and publishes objective analysis of internet market trends. For more than a decade, leading brands and agencies have relied on eMarketer as a recognized resource for data, analysis, and insights on digital marketing, media, and commerce. eMarketer clients include Google, General Motors, and Kimberly Clark. FRWD is also a client.

² Source: eMarketer, Dec., 2011.

decline of 109% in the last 4 years alone ³. During that same time period from 2011 to 2015, daily time spent via digital (online & mobile) has increased from 232 minutes per day to 338 minutes per day, a 50% increase. Thus, the average US adult in 2015 now spends 16x more time each day consuming media & information online than reading newspapers and magazines.

Average Time Spent per Day with Major Media by US Adults, 2011-2015
hrs:mins and CAGR

| | 2011 | 2012 | 2013 | 2014 | 2015 | CAGR (2011-2015) |
|--------------------------|--------------|--------------|--------------|--------------|--------------|---------------------|
| Digital | 3:40 | 4:20 | 4:51 | 5:15 | 5:38 | 11.4% |
| —Desktop/laptop* | 2:33 | 2:27 | 2:19 | 2:22 | 2:22 | -1.8% |
| —Mobile (nonvoice) | 0:48 | 1:35 | 2:16 | 2:34 | 2:51 | 37.2% |
| —Other connected devices | 0:18 | 0:18 | 0:17 | 0:19 | 0:25 | 7.8% |
| TV** | 4:34 | 4:38 | 4:31 | 4:22 | 4:15 | -1.8% |
| Radio** | 1:34 | 1:32 | 1:30 | 1:28 | 1:27 | -2.0% |
| Print** | 0:44 | 0:38 | 0:32 | 0:26 | 0:21 | -17.0% |
| —Magazines | 0:18 | 0:16 | 0:14 | 0:12 | 0:10 | -13.5% |
| —Newspapers | 0:26 | 0:22 | 0:18 | 0:14 | 0:11 | -19.8% |
| Other** | 0:39 | 0:38 | 0:31 | 0:26 | 0:24 | -11.7% |
| Total | 11:11 | 11:46 | 11:55 | 11:57 | 12:04 | 1.9% |

Note: ages 18+; time spent with each medium includes all time spent with that medium, regardless of multitasking; for example, 1 hour of multitasking on desktop/laptop while watching TV is counted as 1 hour for TV and 1 hour for desktop/laptop; *includes all internet activities on desktop and laptop computers; **excludes digital
Source: eMarketer, April 2015

188127 www.eMarketer.com

The data on the total percentage of the average U.S. adult’s interaction with media are similar. Time online (mobile + traditional Internet) in 2010 made up 33.3% of the average person’s total media consumption each day. In 2015 time, online is now 44.6%. In 2010, time with newspapers and magazines combined for 8.2% of the average person’s consumption, down from 10.8% in 2008⁴. In 2015, time spent with newspapers and magazines is at 1.7%.

This shift in consumer consumption of media has led to widespread adoption of online advertising and a concurrent decline in reliance on print media. Industry-wide, this impact is evident from another eMarketer study. In the year 2000, advertisers spent a collective \$72.68 billion on magazine and newspaper advertising.⁵ In 2005, this number increased to \$74.14 billion. It has since been on a significant and steady decline, totaling \$51.54 billion in 2009 and projecting to \$31.6 billion in 2015.⁶

Unsurprisingly, advertisers have shifted their expenditures to meet consumers where they are: online. In 2000, advertisers spent \$6.0 billion online. In 2005, that number increased to \$10.0 billion. In 2009, the amount dedicated to online advertising reached \$20.3 billion.⁷ In 2012, the amount dedicated to online advertising reached \$36.8 billion and is projected to reach \$52.5 billion in 2015.⁸

III. How Digital Media Satisfies the Reach and Frequency Standards

³ Source :eMarketer, April, 2015

⁴ Id.

⁵ ZenithOptimedia, Apr. 7, 2010; provided to eMarketer by StarcomMediaVest Group, June 1, 2010.

⁶ eMarketer April, 2015

⁷ Internet Advertising Bureau Revenue Report, <http://www.iab.net/AdRevenueReport>.

⁸ eMarketer April, 2015

Given trends in media consumption, the use of digital media goes a long way to satisfying the recommended reach and frequency requirements as promulgated by the FJC. Specifically, digital media aids in satisfying the requirements in the following manners:

- **Targeting Accuracy:** In providing notice through traditional published media (USA Today or People Magazine), you simply buy a “complete” populations—all readers. However, through the use of media notice, notice providers are able to target specific audiences based on their online activity, purchase behavior, and interests. Via digital, you can directly connect to dozens, or hundreds of websites (desktop and mobile), apps, search keywords, social networks. Direct connection means you can “hand-select” these inventory sources and connect the ad delivery technology to only purchase via these sources. This ensures the advertisements are only displayed in the locations, and at the time, you select. In addition, this advantage enables targeting to “exclude” certain inventory which may be brand sensitive to the defense teams. Digital enables the ability to serve notice while also “missing” the locations which may further hurt the defendant’s brand.
- **Viewability:** In print media, there is no way to prove that a class member actually saw the advertisement. Digital media allows for accurate measurement of the percentage of notice advertisements actually viewed by the class member. The notice provider can then model against advertisements class members have seen versus projected impression numbers.
- **Frequency Control:** Through digital media, you can accurately measure the total number of times an individual viewed the advertisement. In addition, as a cost protective measure, you can cap the number of times an advertisement is seen to extend each dollar and ensure efficiency.

Online advertising affords multiple options to reach and verify that the Settlement Class Members were exposed to the Notice. Specifically, demographic and psychographic controls can be implemented to ensure precision. This can be done as follows:

- Focusing notification advertising on specific websites (domains), which index high against the core target.
- Leveraging industry leading digital tools such as comScore and Google to select particular websites on which the particular audience visits at a rate of 50% greater than the typical Internet population. Creating a custom list is a best practice in consumer advertising.
- Modeling notice specifically to the target consumer. Media notice allows targeting into specific interest targets (i.e. interest in a brand or category), as well as the content of the page a consumer is reading. Additionally, you can focus online targeting based on past-purchase behavior.

There is an efficiency advantage to using media notice in addition to the benefits detailed herein. The combination of targeting, frequency control, and lower overall cost of media enables

notice programs to more effectively reach a class, and more definitively prove that a class was reached at optimal reach/frequency, all the while spending less to do so.

Finally, reach and frequency can be measured in terms of the connection to the settlement website. All digital communication in the form of web-based banners, keyword search and content syndication can be—and should be—connected to the notice website. In addition, you should connect a large majority of social media (Twitter & Facebook) communication to the notice website with a small percentage driving traffic to a dedicated notification facebook page to increase word of mouth.

Specifically, banner advertisements should list the Settlement website so that users who click on the banner advertisements will be routed directly to the Settlement website, where they will find information in greater detail. This combination of *reaching* the audience and connecting to greater detail via the settlement website and Facebook page provides a far more comprehensive approach to reaching settlement class members than traditional print notice.

Finally, media notice providers can leverage Google Analytics⁹ (“GA”) on the settlement website. This allows class counsel to showcase reporting on the engagement of the settlement class members on the settlement website. Specifically, GA will measure the most highly trafficked content and the total number of settlement class members performing specific actions, such as the number of visitors, the number of pages viewed, the time spent, and the number of documents downloaded by type.

IV. Creating a Balanced Media Plan

Not all media plans are created the same. The most effective media plans achieve multiple goals and mirror the consumption patterns of today’s consumer. Balance, therefore, is achieved through ensuring quality impressions across multiple channels such as desktop banners, mobile banners, and paid social media to drivers of earned media such as press release distribution and online sharable content in forums and online communities and demand based media such as keyword search.

In consumer advertising, this is known as marketing surround. In notice administration, the approach provides the class member multiple engagement points throughout the media plan, therefore not simply meeting due process, but truly meeting the class member where and how they consume media.

Finally, balance should extend beyond the media channel to the ad sizes and formats.

V. Court Opinions Approving the Use of Media Notice

⁹ Google Analytics is a service offered by Google that generates detailed statistics about the visitors to a website. GA can track visitors from all referring websites, including search engines, display advertising, pay-per-click networks, email marketing, and other traffic sources.

Courts have recognized in recent years that media notice (especially electronic notice) can be an effective tool, when used appropriately. Court approval of electronic notice programs has caught the eye of the Advisory Committee on Civil Rules, which recently made a recommendation to consider altering the notice requirements set forth in Rule 23 of the Federal Rules of Civil Procedure. Specifically, the Advisory Committee is considering whether to focus on some relaxation of the current rule requiring first class notice be mailed for (b)(3) class actions (possibly by including a provision that provides notice may be given by “U.S. mail or electronic or other appropriate means”), as well as possibly including a provision for “reasonable notice” in (b)(1) and (b)(2) class actions. In light of the recent court orders approving the use of media notice, it should come as no surprise that the Advisory Committee noted that “requiring mailed notice of class certification seems an anachronism.

1. Facebook Is Not Enough to Provide Notice

Courts have approved the use of electronic media in achieving notice alongside more traditional methods. In *Flynn v. Sony Elecs., Inc.*, Case No. 09-cv-2109-BAS(MDD), 2015 U.S. Dist. LEXIS 2077 (S.D. Cal. Jan. 7, 2015), the court certified two classes of individuals who had purchased a defective Sony VIAO laptop, one in California and one in New Jersey. These two classes had an estimated 436,892 class members, and plaintiffs’ counsel only proposed to send direct email notice to 143,792 known class members. In addition to placing ads in People Magazine and a California newspaper, plaintiffs’ counsel proposed to provide electronic notice via Facebook text ads, a case-specific Facebook website, a case-specific litigation website, and internet banner ads on thousands of websites.

The defendant objected to the case-specific Facebook page on the grounds that it does not provide notice and was overbroad. Plaintiffs’ counsel argued that the creation of a Facebook page will allow class members to “friend” the page, allowing them to receive updates about the case. The court rejected this justification as out of line with the purposes of class action notice, which is to let class members know of the suit and provide them an opportunity to opt out of it. The Facebook page was not embedded in the direct emails, banner ads, or Facebook text ads, meaning that class members would have to actively search out the Facebook page in order to “friend” it. Thus, the Facebook page did not provide class-action notice and was not approved by the court. The court approved all other proposed methods of notice.

2. Court Approves Social Media Plan That Mirrors Approved Notice

In *Mark v Gawker Media LLC*, Case No. 13-cv-4347, 2014 U.S. Dist. LEXIS 155424 (S.D.N.Y. Nov. 3, 2014) the court held that “to the extent Plaintiffs propose to use social media to provide potential plaintiffs with notice that mirrors the notice otherwise approved by the Court, that request is granted.” The court required the plaintiffs to confer with the defendant over the form and substance of the posting. However, the court did not require the defendant to provide links to the settlement website on the defendant’s website, and distinguished several cases that had held to the contrary.

3. Court May Closely Scrutinizes Banner Ads

In *In re Motor Fuel Temperature Sales Practices Litig.*, MDL No. 1840; Case No. 07-MD-1840-KHV, 2013 U.S. Dist. LEXIS 76227 (D. Kan. May 29, 2013), the court considered the proposed electronic notice for class members who purchased motor fuel at retail locations across America. Plaintiffs' plan was two fold. First, for those states in which at least 75 percent of residents have internet access, Plaintiffs proposed to provide notice via banner ads on the websites that class members most frequently visit. Second, for those states in which less than 75 percent of residents have internet access, Plaintiffs would supplement their digital notice with newspaper and radio notice.

The court had numerous questions concerning the banner ads' reach. In order to arrive at the 75 percent threshold, the plaintiffs relied on results from the 2010 U.S. Census showing internet *access*, but the court questioned how those results correlated with the plaintiffs' identification of internet *users*. See *In re Motor Fuel Temperature Sales Practices Litig.*, 2013 U.S. Dist. LEXIS 76227, at *62 ("It is unclear whether the number of people with internet "access" as defined in the U.S. Census, see Dahl Affidavit ¶¶ 19, 21, 23 and Dahl Supplemental Affidavit ¶¶ 14-15, is the same number of people who constitute internet "users" as discussed in Grudnowski's affidavit. In other words, it is unclear whether all people identified in the 2010 census as having internet "access" would constitute on-line "users" under the comScore study which Grudnowski cites."). The court further questioned the extent to which the internet users identified by plaintiffs would visit the domain names they identified. The court required plaintiffs' counsel to submit supplemental documentation on these questions.

The court also questioned the content of the banner ad proposed by plaintiffs. The proposed banner ad was split vertically into two statements, one that said "If you purchased gasoline or diesel fuel at gas stations in certain states on or after January 1, 2001, class actions settlements may affect your rights" with the other portion of the ad specifically identifying California gas station purchasers. The court found these notices inadequate. First, the proposed banner ad did not identify every state involved in the class action. Second, the proposed banner ad did not state that both sections applied to California consumers. The court ordered plaintiffs' counsel to revise the banner ad accordingly.

After plaintiffs' counsel submitted supplemental affidavits from notice experts explaining that measures of internet "access" is the best available evidence of the number of internet "users" that could be reached by digital notice tactics, and submitted revised banner ads, the court stated that it "has carefully reviewed the revised notice forms and finds that they meet the requirements of Rule 23." The court approved the revised notice plan and granted preliminary approval of the settlement.

4. Notice Provided by Banner Ad Trumps Accuracy

In *Helmer v. Goodyear Tire & Rubber Co.*, 12-cv-00685-RBJ, 2014 U.S. Dist. LEXIS 126368 (D. Col. Sep. 9, 2014), a class was certified of homeowners who installed Entran 3, a hose used in Goodyear's radiant heating systems, in their homes. Plaintiffs' proposed notice included online banner ads that would be visible to an estimated 41 million people. Goodyear

objected, claiming that the notice would errantly communicate that Entran 3 was causing widespread damage and that by identifying Goodyear the notices caused harm to its image.

The court split its ruling, finding that the banner ads provided sufficient notice but that the ads should not identify Goodyear by name. The court disagreed with Goodyear's assessment that the ads falsely communicated widespread damage. Assuming that the ads did communicate widespread damage, though, the court did not see how the content would affect the ads' accuracy: either people would have had damage and thus been inside the class, or they would not be a part of the class and their opinions as non-class members would be irrelevant. Thus, Goodyear's objection did not touch on the due process interests of alerting possible class members.

The court was sensitive to the potential for undue harm to Goodyear's image. As Goodyear's name did not appear on the Entran 3 tubing, the court found that the association between the two was not necessary to determine class membership. Further, the court was cognizant that the ad would reach 41 million consumers. Based on these two factors, the court ordered that Goodyear's connection to Entran 3 in the banner ads be removed.

5. Court Orders Digital Notice

Plaintiffs' attorneys are not the only parties who look to the internet as a crucial resource in providing notice. In *In re NCAA Student-Athlete Concussion Injury Litig.*, MDL No. 2492, 2016 U.S. Dist. LEXIS 8595 (N.D. Ill. Jan. 26, 2016), the parties settled claims by current and former college athletes over how the NCAA handled concussion-related risks and injuries. The settlement included a medical monitoring program intended to last 50 years. The parties proposed a notice program that would supplement direct notice (estimated to reach between 59% to 62% of class members) with notice in national print publications, a settlement website, and a press release. Despite the notice program's reach, the court ordered the parties to provide notice via the NCAA's social media pages, including Facebook and Twitter. The court specifically mentioned that "the Court does not anticipate that the costs of such additional efforts would be substantial, and they would provide additional publicity of the settlement to the class." The court required additional publicity through print and internet publications, as well as through social media, on the ten, twenty, thirty, and forty-year anniversaries of the medical monitoring program's commencement.

VI. Claim Enhancement Opportunities

A tool that can be utilized in administering a media plan is the reservation of funds for claim enhancement. Reserving a small amount (5-10%) of the total notification effort can be used to leverage in advanced modeling following the initial weeks of notice. For example, once there is data from the existing notice plan, the administrator can optimize the targeting toward audiences, websites, and interests that are more likely to result in filed claims. This inherently provides more information on the class and enables the campaigns essentially to get smarter as the notification is executed. To achieve this, the administrator should track all in-bound class member engagement from source through to conversion as well as "feed back" that data into media delivery.

VII. Getting Your Notice Program Up and Running

You should know the right questions to ask of your notice administrator to be sure the correct information is sought in order to ensure your notice program meets due process. You do not necessarily need to seek this information, but be sure your notice administrator is obtaining the proper information from the defendant. This can be done through engagement with the marketing department or through brand research.

- **Brand marketing information:** Obtaining brand information allows the notice provider effectively align the notice strategy. This therefore provides a greater level of accuracy as well as avoid conflicts with brand advertising.
- **Audience purchase trends:** It can be helpful to gather information on the typical demographic and psychographic profile of the class. In addition, if specific geographic considerations should be given such as heavier purchasing/use in specific settlement regions.

VIII. Understand Pressure Points with Defendant

Finally, you will be in a much better place to negotiate the terms of the notice if you understand that there is brand sensitivity in a media notice campaign. Specifically, keep in mind:

- **Timing:** Holidays/high season for advertising can easily be avoided through negotiation while still satisfying due process.
- **Art:** Defendant has a significant interest in how the notice will confront consumers.
- **Placement:** You can satisfy due process and obtain the appropriate reach and frequency while also maintaining a level of sensitivity to the defendant's advertising.