

ADVOCATING IN THE AGE OF SOCIAL MEDIA

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THE PROBLEM: SOCIAL MEDIA DEBACLE DURING TRIAL

You are Vice President and General Counsel of GOAT-Tees, LLC, which operates retail stores in 19 states and 8 other countries. Most of your stores are in shopping centers or strip malls where crime is not a significant problem. Even so, you have established comprehensive training programs for retail associates that include a full hour on how they should deal with threatening and inappropriate behavior by customers, suppliers, and other third parties. You assure them their own safety is paramount and always takes priority over protecting the store or its merchandise. In the event they perceive danger, you instruct them to protect themselves by using the store phone to call the police or their manager, or by leaving the store and seeking help at a neighboring business. You also show them a video depicting appropriate responses to situations, have them role-play those situations and model the appropriate responses, and require them to pass a written quiz that reinforces the lessons.

Your lessons apparently didn't stick with Dora Bell, a female college student who was working alone one evening in a store in a strip mall north of Phoenix. Dora was standing at the cash register near the front door when a man entered the store, walked into the aisle where women's swimsuits were displayed, unzipped and dropped his trousers, and started masturbating. Rather than leaving the store or calling the police from the phone at the cash register, Dora ran into a room at the back of the store and used a company phone to call another store where a friend of hers was working. The pervert followed her and pushed against the door, which knocked the phone from Dora's hand and her onto the floor. The pervert then wrestled her blouse and bra up to expose her breasts and stood over her and masturbated before running out the back door.

Dora sued GOAT-Tees alleging negligent failure to protect her and other employees. You moved for summary judgment based on workers' compensation exclusivity, but the motion was denied because Dora suffered no physical injuries and received no medical treatment. You are now present for the trial, where GOAT-Tees is denying negligence and arguing the measures it took to protect employees, including the training Dora ignored, were reasonable under the circumstances.

The first day of trial is over. You and GOAT-Tees' trial lawyer are in the war room rehashing jury selection and opening statements when you get an urgent call from the Associate General Counsel who advises GOAT-Tees' social media operation. She tells you a video clip showing a 14-second excerpt from GOAT-Tees' opening statement at trial has been posted on social media with the hashtag #GOATTeesIsOverParty. The clip is already trending. She wants to know whether GOAT-Tees' attorney really said, "GOAT-Tees gave its employees all the tools they need to prevent outcomes like this. Unfortunately, Dora Ball didn't use those tools." Neither of you remember the precise language, but you have to admit the wording is consistent with the theme of GOAT-Tees' defense. The Associate GC's response is unprintable. You ask how she is going to handle the social media blowup. She responds with a question to you: How are you going to keep the social media blowup from reaching the jury and affecting the trial?

CAN THIS REALLY HAPPEN?

We haven't found any reported case in which a video clip from a trial was posted on social media during the same trial, but it isn't hard to imagine. Even before smartphones became ubiquitous, judges recognized that jurors are curious and likely to go on the Internet to assuage their curiosity, so they have been telling jurors they must

refrain from doing their own on-line research.¹ It seems doubtful anyone ever believed those instructions actually inoculated venires from Google, but the idea is ludicrous now that “[s]ocial media sites have surpassed print newspapers as a news source for Americans.”²

There is little question that social media is infecting litigation. For example, last summer, a video clip of an oral argument before the U.S. Court of Appeals for the Ninth Circuit was posted on social media and went viral.³ The argument was about the Court’s jurisdiction to hear an appeal from an order that enforced a twenty-year-old settlement agreement that required the Border Patrol to provide “safe and sanitary facilities” for unaccompanied children it detained. During the argument, a judge asked Sarah Fabian, an attorney from the Office of Immigration Litigation in the Department of Justice, whether she agreed that “safe and sanitary” requires the Border Patrol to provide toothbrushes, soap, and blankets, and when Fabian said those items might not be required for shorter stays, another judge interrupted to say the stays were not short. Although the full argument went over an hour and focused on technical legal issues, someone clipped a one-minute video of that exchange from the Court’s website and posted it on Twitter.⁴ The post said Fabian was arguing against providing basic hygiene items, which was not true. And the post prompted Bob Carlson, the President of the American Bar Association, to issue a statement calling on the U.S. government to provide humane care for immigrant children.⁵ Carlson apparently was assuming that Fabian was defending the Trump administration’s confinement of unaccompanied minors in deplorable conditions, an issue that was dominating news reports at the time. In fact, Fabian’s argument had nothing to do with the Trump administration. The order she wanted the Ninth Circuit to reverse had been issued over a year earlier, and it granted motions that were filed in 2015, during the Obama administration.⁶

It would be naïve to think events that make headline news will not spin webs that trap businesses. When a galvanizing event occurs shortly before or during a trial that seems fairly routine, we have to assume that someone—perhaps a spectator, but maybe an adverse party or lawyer—will post something to social media that is going to trend.

WHAT IS THE WORST THAT CAN HAPPEN?

Once a post goes viral, anything the business does will offend someone, as the Hallmark Channel discovered last December.⁷ The network had run an ad that featured a same-sex couple kissing at their wedding, but it generated a flood of complaints from conservatives, so Hallmark pulled it. Then, that prompted a social media backlash from the LGBTQ+ community that included threats by other advertisers to boycott the network. Hallmark executives spent several anxious days hoping the issue would fade, but it didn’t. They apologized, reversed the decision and put the ads back on the air, which of course offended the conservatives who had initially complained.

¹ See, e.g., Ninth Cir. Pattern Jury Instruction 1.12 (2007).

² Elisa Shearer, *Social media outpaces print newspapers in the U.S. as a new source*, PEW RESEARCH CENTER (Dec. 10 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>

³ Debra Cassens Weiss, *Lawyer faces Twitter condemnation after arguing immigrant kids don’t need soap or toothbrushes*, A.B.A. J. (June 25, 2019), <http://www.abajournal.com/news/article/lawyer-faces-twitter-condemnation-after-arguing-immigrant-kids-dont-need-soap-or-toothbrushes>.

⁴ Compare the video available at Weiss, *supra* note 1, with the video of the entire argument at *Jenny Flores v. William Barr*, No. 17-56297, U.S. COURTS FOR THE NINTH CIR. (June 18, 2019), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015907.

⁵ Weiss, *supra* note 1.

⁶ See Bf. for Appellants, *Flores v Sessions*, ECF No. 6, Court of Appeals Docket number 17-56297, pp. 7-9 (Jan. 5, 2018).

⁷ Suzanne Vranica, *In Three Days, the Hallmark Channel Managed to Upset Pretty Much Everyone*, WALL ST. J., (Dec. 17, 2019), <https://www.wsj.com/articles/in-three-days-the-hallmark-channel-managed-to-upset-pretty-much-everyone-11576607566?mod=searchresults&page=1&pos=2>.

Large corporations always operate in a fraught environment. According to the Gallup Poll organization, only one quarter of Americans have much confidence in big business.⁸ Since 1973, that proportion has been as low as 16% and as high as 34%, but it has consistently fallen far short of the confidence two-thirds of Americans have in the military and in small business, and is also lower than the confidence Americans place in organized labor, churches, the Supreme Court, and the Presidency. On the other hand, confidence in newspapers and television news has fallen and is now on par with the confidence Americans have in big business, and our confidence in news on the internet is even lower. Big business also is now trusted more than Congress, since only one-ninth of Americans express a lot of confidence in that institution.

Of course, enjoying trust greater than Congress is not something big business should celebrate. And since three-fourths of Americans voice little confidence in big business, it is hardly surprising that juries are not particularly friendly to corporate defendants. A Wall Street Journal analysis suggests “the frequency of very big jury awards might be rising.”⁹ The WSJ analysis found the incidence of verdicts exceeding \$20 million in 2019 is three times higher than the annual average of verdicts from 2001 to 2010. That means social media snafus could cost a lot more than they might have just a decade ago.

WHAT DO YOU DO WHEN A SOCIAL MEDIA CRISIS HAPPENS?

None of your choices are good. It might be tempting to imitate the plan Starbucks used to quell the outcry after two black men were arrested in one of its stores in Philadelphia last April.¹⁰ Starbucks closed more than 8,000 stores for a day so its 175,000 staff members could attend racial bias training. Starbucks’ response was incredibly expensive, and it isn’t clear how much it actually improved Starbucks’ reputation, or that it spared the company from litigation since a discrimination suit now has been filed by a former regional manager who is white and claims Starbucks scapegoated her.

Moreover, it is hard to see how the Starbucks response can be applied to a viral video that is recorded during a pending trial. Starbucks apologized to the customers, issued a statement saying, “We take these matters seriously and clearly have more work to do when it comes to how we can handle incidents in our stores,” and fired some managers. A company can’t fire its lawyer in the middle of trial, and issuing a public statement that disavows the lawyer’s opening statement would seem hypocritical or worse. It could even trigger the wrath of the trial judge and lead to any number of unpleasanties, such as sanctions, a mistrial, ethical complaints, or a threat of criminal charges for jury tampering.

On the other hand, those unpleasanties might be turned against Dora if GOAT-Tees can establish that the video was posted on social media by Dora, her attorney, or someone associated with her. A Jewish realtor from Whitefish, Montana, who was the victim of an anti-Semitic “troll storm” pursued claims for invasion of privacy, intentional infliction of emotional distress, and violations of Montana’s Anti-Intimidation Act.¹¹ Her claims survived a motion to dismiss based on the First Amendment and eventually resulted in a judgment of \$4 million in compensatory damages and \$10 million in punitive damages.¹²

⁸ *Confidence in Institutions*, Gallup.com, <https://news.gallup.com/poll/1597/confidence-institutions.aspx>.

⁹ Telis Demos, *The Specter of Social Inflation Hunts Insurers*, WALL ST. J. (Dec. 28, 2019), <https://www.wsj.com/articles/the-specter-of-social-inflation-haunts-insurers-1577442780?mod=searchresults&page=1&pos=1>.

¹⁰ Ewan Palmer, *White Starbucks Manager Fired After Two Black Men Were Arrested in Store for No Reason Files Racial Discrimination Lawsuit*, NEWSWEEK (Nov. 1, 2019), <https://www.newsweek.com/starbucks-shannon-phillips-lawsuit-racial-discrimination-1469170>.

¹¹ *Gersh v. Anglin*, 353 F.Supp.3d 958 (D. Mont. 2018).

¹² Judgment, *Gersh v. Anglin*, U.S. Dist. Ct. Mont., Case No. CV-17-050-M-DLC (Aug. 8, 2019).

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If the wrongdoer is an attorney, a victim of social media attacks can seek disciplinary action from the bar, as Mike Huckabee, former governor of Alabama and presidential candidate, did against a Florida lawyer who ridiculed him on Twitter.¹³ A Louisiana attorney was disbarred for conducting a social media campaign that disseminated false and misleading information, disclosed confidential information regarding a child custody case, and threatened and attempted to intimidate the presiding judges.¹⁴

Sanctions may also be an option. In *Leigh v. Avossa*, two federal judges invoked Federal Rule of Civil Procedure 37(a)(5)(A) and the courts' "inherent authority" to impose severe sanctions against another Florida lawyer because his "social media posts, and his conduct in ... two federal lawsuits, [we]re wholly inconsistent with his oath of admission" to the bar.¹⁵

If Dora or her lawyer did something that motivated the judge to declare a mistrial or dismiss her case as a sanction, that could eliminate—for the time being at least—GOAT-Tees' concerns about what jurors in the pending case might see on social media, so GOAT-Tees could focus on the larger public relations problem.

And then GOAT-Tees will want to figure out how to keep the problem from happening again.

HOW CAN YOU PREVENT A SOCIAL MEDIA CRISIS AT TRIAL?

Phones with video cameras are ubiquitous, so it is never safe to assume that what we do or say is not being recorded and won't end up on Instagram or Twitter. A business defending a suit that seems headed for trial should anticipate that possibility. It should assign someone to look through newspaper, television, and social media archives over the past year for stories that might have focused the attention of prospective jurors on events that could be seen as comparable to the events at issue in the trial. And that effort should continue up to and during the trial. If there are comparable events, it may be wise to hire a trial consultant or a public relations specialist (or both) to conduct focus groups or other research and to frame arguments that anticipate the jury's mindset or highlight important differences between events that seem similar.

The research may reveal, or you may conclude based on your own instincts, that even though the company has a viable legal defense, that defense cannot be presented to a jury at trial in a way that minimizes the risk of a social media brouhaha sufficiently. Then, the company may have no choice but to eliminate the risk by settling.

Of course, a company's eagerness to avoid risk can play into the hands of an aggressive plaintiff attorney. But plaintiffs' attorneys also can overplay their hands. For example, the lawyers who tried to capitalize on a viral Facebook post about a Subway Footlong sandwich that was only 11 inches long by filing a class action came up with nothing, even after Subway agreed to "ensure, to the degree practicable, that its sandwich rolls measure at least 12 inches long," because the Court of Appeals for the Seventh Circuit found the settlement "didn't benefit the class in any meaningful way," said the case should have been dismissed out of hand, and reversed the half million dollar in fees the trial court had approved.¹⁶

¹³ **Error! Main Document Only.** Debra Cassens Weiss, *Mike Huckabee files bar complaint against lawyer for Twitter ridicule, including 'beach thief' nickname*, A.B.A. J. (Dec. 10, 2019), <http://www.abajournal.com/news/article/mike-huckabee-files-bar-complaint-against-lawyer-for-twitter-ridicule-including-beach-thief-nickname>.

¹⁴ *In re McCool*, 172 So. 3d 1058 (La. 2015).

¹⁵ *Leigh v. Avossa*, No. 16-81612-CIV, 2017 WL 2799617, at *10 (S.D. Fla. June 28, 2017).

¹⁶ *In re Subway Footlong Sandwich Marketing and Sales Practices Litigation*, 869 F.3d 551, 557 (7th Cir. 2017).

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Using social media as a litigation tactic also can backfire in a big way. Lawyers who have threatened to unleash social media firestorms against companies unless they settle patently outrageous claims or pay exorbitant “consulting fees” have been charged with criminal extortion.¹⁷

CONCLUSION

It isn’t possible for any business to ignore social media or to avoid all litigation, so the risk of an unpleasant interaction between the two cannot be ignored. Attorneys who defend and protect businesses need to avoid those interactions when possible and, when avoidance isn’t possible, be prepared to respond promptly and appropriately.

¹⁷ See, e.g., *Stenehjem v. Sareen*, 226 Cal.App.4th 1405 (2014); *Celebrity Attorney Mark Geragos Named Co-Conspirator In Avenatti Extortion Case; CNN Cuts Ties*, CBS LOS ANGELES (March 25, 2019), <https://losangeles.cbslocal.com/2019/03/25/attorney-mark-geragos-co-conspirator-in-michael-avenatti-nike-extortion-case-sources-say/>; *Virginia Attorney Arrested for Engaging in Scheme to Extort a Public Company*, U.S. DEPT. OF JUSTICE (Dec. 17, 2019), <https://www.justice.gov/opa/pr/virginia-attorney-arrested-engaging-scheme-extort-public-company>; *Could AMI’s Deputy General Counsel Face Extortion Charges? Probably Not but NY Ethics Violations Look Likely*, YAHOO! FINANCE (Feb. 11, 2019), <https://finance.yahoo.com/news/could-amis-deputy-general-counsel-100441112.html?guccounter=1>.