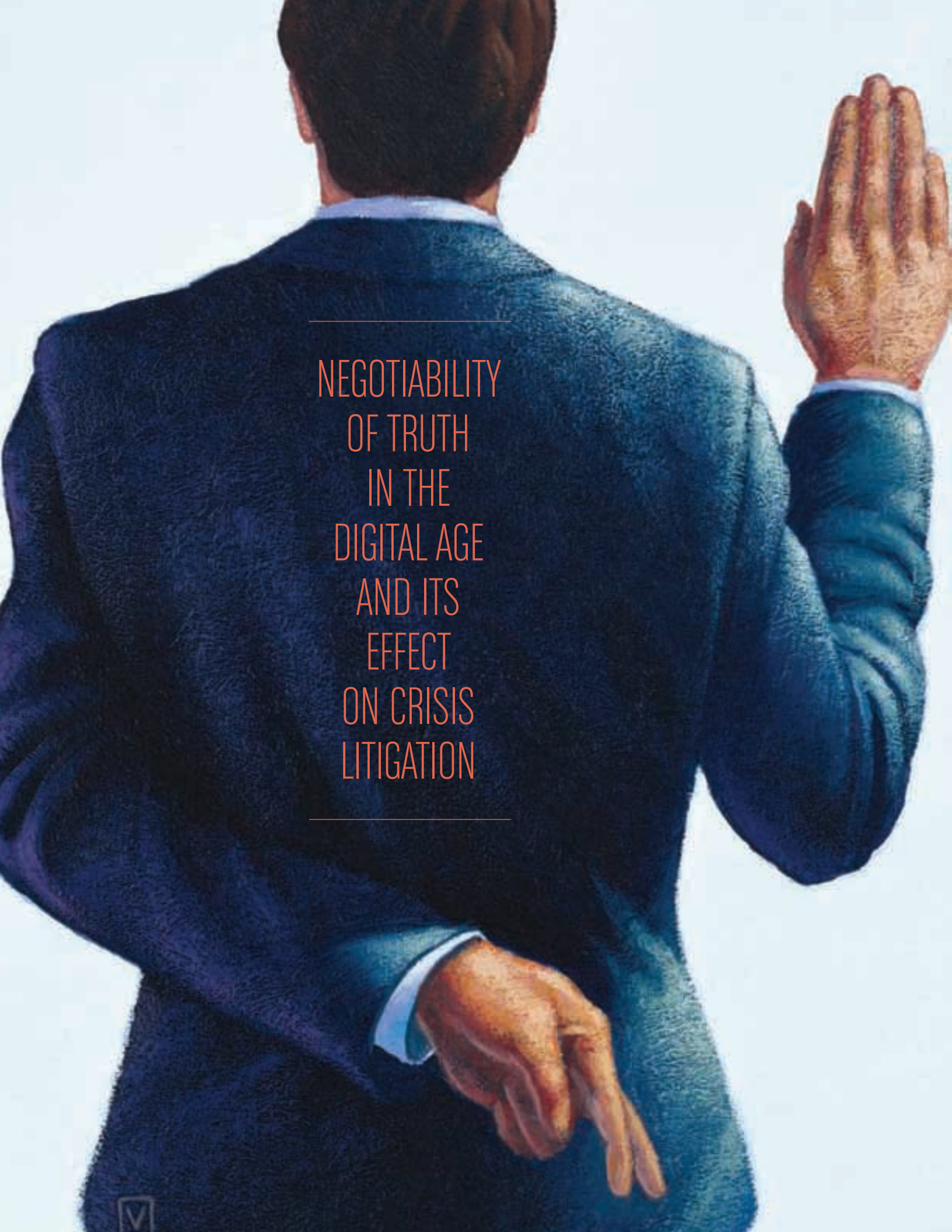

NEGOTIABILITY OF TRUTH IN THE DIGITAL AGE AND ITS EFFECT ON CRISIS LITIGATION

by Carol A. Hogan and Harlan A. Loeb

THE TEMPERAMENTAL RELATIONSHIP BETWEEN LEGAL ADVOCACY AND TRUTH DATES TO THE BIBLICAL DEBATE BETWEEN MAN AND GOD IN THE GARDEN OF EDEN. SPECIFICALLY, THE LORD CONFRONTS ADAM FOR VIOLATING THE FIRST-EVER LEGAL INJUNCTION, WHICH IS AGAINST EATING THE "FORBIDDEN FRUIT" FROM THE TREE OF LIFE OR, AS SOME COMMENTATORS TERM IT, THE TREE OF TRUTH. CAUGHT RED-HANDED AND KNOWING THAT THE DESTINY OF THE WORLD IS BEING WEIGHED IN THE BALANCE, ADAM BEGINS TO NEGOTIATE WITH GOD, INSISTING, "I DID NOTHING WRONG. YOU CREATED WOMAN, NOT ME, AND IT WAS SHE WHO PROCLAIMED THE INNOCENCE OF EATING FROM THE TREE." AND SO TRANSPIRES THE WORLD'S FIRST LEGAL CRISIS–AND ITS SUSCEPTIBILITY TO NEGOTIATION OF "THE ORIGINAL RECORD" (DOUBLE-ENTENDRE NOTED).

Today, the truth is perhaps nowhere more negotiable than in the crisis-litigation context. An entire body of trial advocacy relates to the belief that lawyers should choose a trial "theme" that emphasizes the "story" they want jurors to "buy." This same school of thought advises lawyers to downplay facts that do not support the trial theme. Jury research establishes that picking the right trial theme, one that appeals to the basic beliefs and core values of the vast majority of potential jurors, can prove critical in one's chances of winning or losing a lawsuit.

What jury consultants and experts do not concede readily is how crucial a strong trial theme really is, since truth in the litigation context always has been negotiable. Post-verdict interviews of jurors and studies by jury consultants and other research groups reveal that jurors—depending on gender, political views, income level, race, and other factors—will disregard facts and evidence, even if undisputed, that do not comport with their views of how the case should turn out. This concept is nothing new.

What has changed relates to the explosion of digital socialization and the plethora of digital and electronic outlets to express anyone's version of "the truth." This zeitgeist of digital socialization has dramatically influenced the negotiability of truth in all arenas, including litigation. Its true impact has not been fully appreciated because the number of digital outlets for the expression of opinions expands further every year. They range from social networks, such as YouTube, Facebook, Twitter, and MySpace, to blogs, message boards, and online forums.

Sobering statistics hold that newspaper readership is down 30 percent and broadcast-news viewership is down 67 percent.[1] Seventy-nine percent of all adults are online for an average of 33 hours per week.[2] Ninety-two percent of journalists say they conduct research online before writing their stories.[3]

Often, stories that appear in digital outlets create "truths" that bear little resemblance to the original content. These sites compare

functionally to the children's game known as "Telephone," in which participants sequentially whisper a phrase and then compare the first utterance to the last. Then they laugh at the vast distortion between what the first child heard and the last child said. However, in crisis litigation, unlike in the game, a risk develops if no attempt is made to reconcile any irregularities or inconsistencies between original source material and the "truths" that evolve during the (digital) dialogue.

This distortion grows more alarming as digital-content aggregators and blogs spawn unprecedented volumes of "conversational content" around a variety of legal issues. The Dow Chemical Company's litigation with Rohm and Haas last year provides a vivid example. Rohm and Haas sued Dow to enforce a definitive merger agreement with a material-adverse-change clause in place. The deal did not close in the wake of the credit crisis and economic recession. In pleadings, Dow stated that it had every intention of closing the merger but needed more time to structure viable credit terms, considering that the nation was mired in the worst recession in 80 years.

The Huffington Post, Seeking Alpha, the *New York Times* DealBook, and *The Wall Street Journal*'s blog substantially influenced public opinion in the *Dow* litigation. Selective use of online content created inferences and "versions of the truth" that proved highly potent in shaping the court of public opinion. The clips below from Seeking Alpha and from the web site The Truth About Dow demonstrate the manner in which online content creates "truth" in crisis litigation:

Seeking Alpha:[4]

> Less than a month ago Dow Chemical . . . was begging Rohm & Haas . . . to come to the bargaining table. Now, after a new agreement with their lenders and some chiding from the judge, they are essentially telling Rohm, "give us the deal we want or we'll see you in court."

The Truth About Dow:

> Terrible credit markets are Dow Chemical's story and the company is sticking to it.
>
> The Midland, Mich. chemical giant is locked in bitter litigation with the once-object of its affections, Rohm & Haas, over their $15.3 billion merger. Dow Chemical maintains that it is having trouble refinancing a $13 billion bridge loan for the merger and it will take until June 30 to determine whether the company can go ahead.
>
> If Dow Chemical is hoping to use the credit markets as a defense, however, it will have to bind and tie Wall Street banks that are now underwriting debt for companies with credit ratings high and low.

Both references above take stories written by Heidi Moore, a former *Wall Street Journal* reporter now with *The Washington Post*, and position them as the last word on the litigation, when she actually wrote numerous stories on the litigation. For the millions who rely on digital media for news and information about the *Dow* litigation, the "facts of the case" presented by these sources would differ greatly from the full coverage of the story by *The Wall Street Journal*, *The New York Times*, or even CNBC.

Because the Digital Age democratizes global communications and access to information, "citizen journalists" now participate actively in content formation in ways that shape the public narrative, on issues ranging from health-care reform to SEC lawsuits. In both, the underlying facts are negotiated and debated by empowered social media unbound by the rules governing lawyers and traditional journalists. Lawyers must be "tuned in" to this rapidly growing reality because litigation outcomes weigh in the balance. They must assume that a large percentage of potential jury pools gains some exposure to this tidal wave of opinion, unencumbered, in many cases, by any ties to facts or data.

And since almost 99 percent of commercial litigation settles with no imprimatur of "right or wrong" conferred by a judicial body, lawyers and clients also need to be aware that Twitter, Facebook, and "The Daily Show" are making and negotiating these pronouncements. Thus, this form of communication affects not only jury-verdict outcomes but the reputational risk posed to clients. As a result, stating "no comment" or "we do not comment on pending litigation" can prove to be a perilous course for clients in the throes of crisis litigation.

Fortune 500 corporations and their advisors, particularly their lawyers, need to know their way around this new mega-mall of digital media. The volume of information and the speed at which it is disseminated can seem overwhelming. Consider that the crash of the US Airways jet into the Hudson River in January 2009 was first reported by a rescue worker on one of the ferries who was Twittering from his iPhone. Below is a minute-by-minute recounting of the digital communications about the crash:

15:26 The incident occurs.
15:36 Ten minutes later a worker on the rescue ferry Twitters from his iPhone the first known photo of the incident. Thirty-four minutes later, MSNBC interviews him as a witness.
15:36 Airliners.net posts its first thread on the incident.
15:41 FlyerTalk.com posts its first thread on the incident.
15:46 Airline Pilot Central Forums posts its first thread on the incident.
15:49 The WSJ blog posts its first story: "US Airways Plane Crashes in New York's Hudson River."
15:52 A WSJ email alert is issued to subscribers.
16:00 The story appears on Google News.
16:03 The AP story begins to appear on blogs and web sites.
16:04 The first person to Tweet the story is interviewed on MSNBC as a witness.
16:12 US Airways issues its first statement.
16:15 Nine of the 10 most discussed topics on Twitter pertain to the incident.
16:30 @SouthwestAir (Southwest's Twitter profile) posts the following message: "Our friends @USAir and their Customers are in our thoughts this afternoon."
16:34 Someone Tweets that Wikipedia has an entry on the crash before any info is available on USAirways.com.
16:40 Twitterers are anticipating the US Airways press conference.
16:49 US Airways issues its second statement.
16:56 Someone creates a Twitter profile titled "@Hudsoncrash" to share news.
16:59 @SkyTalk (the Star-Telegram Twitter profile) Tweets the link to the flight log.
17:00 US Airways creates its first Twitter account (@USAirways).
17:20 People begin following the newly created US Airways Twitter account.[1]

[1] *Christi Day, Southwest Airlines, August 2009.*

Remarkably, the volume of calls into US Airways' call center was not particularly high because citizen journalists were providing the information families and customers were seeking. This phenomenon creates enormous challenges for companies in crisis because critical information, intelligence, and brand value are driven by direct touch points between the corporation and the customer. This example also illustrates how opinions can form and discourse can occur about an event—its causes and who is to blame—even before a corporation has learned that the incident took place and has decided what to say about it.

While harnessing this new tidal wave of communication can seem overwhelming, corporations and their advisors must recognize that these same digital forms of communication can serve as effective defensive weapons when crisis litigation erupts. Viacom's lawsuit against Google over copyright protections related to YouTube postings vividly illustrates this new social dynamic. Viacom claimed, among other things, that YouTube (owned by Google) knew about the infringing content and should have removed it. Google claimed it was clearly protected by the Digital Millennium Copyright Act safe-harbor provisions.

Both companies launched decidedly different digital campaigns to influence the public's perception of their respective positions in this high-profile lawsuit. Google benefited from citizen journalists championing the First Amendment values of free expression and access to information and content and in the end carried the court of public opinion and won on summary judgment.

The digital dialogue on the *Google* case boiled down a very complex case of first impression into a public debate that pits the value of free expression and content accessibility against the legal interests surrounding copyright protections. Consistent with campaign-based advocacy, both sides deliberately and diligently orchestrated the underlying dispute to facilitate a context for "choosing sides" or casting a vote. The result will weigh heavily on the intangible asset value of both corporations' brands.

As has become evident, counsel and client must advocate aggressively in the digital domain. This requires a level of "readiness" and active engagement that differs dramatically

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from the status quo of litigation communications. Rather than engaging reactively, counsel and client must identify ways to participate affirmatively in shaping the public narrative in a case or controversy. Unlike print media, new media create a permanent and easily retrievable impression, and companies must be prepared to shape their reputations accordingly.

As this constitutes an unprecedented challenge for many lawyers and their clients, some basic tools can help guide them through the traps of "litigation by digital advocacy." This digital due-diligence checklist for clients includes the following basic requirements:

- Establish digital protocols for engagement immediately after a complaint is filed or reported.
- Determine accountability for ensuring rapid participation and identifying escalation scenarios.
- Secure all search terms relevant to the litigation and issues on popular search engines such as Google.
- Include digital or social media components in the litigation communications plan.
- Encourage clients to create online engagement protocols that help set the framework or guidelines for when to engage or respond online.
- Recognize that clients must have pre-established relationships with key online influencers (*e.g.*, bloggers and community moderators responsible for fostering these relationships who serve as points of contact).

Lawyers today must recognize and adapt to the digital reality that now defines crisis litigation and the truths that shape settlements and jury verdicts. Counsel must equip themselves with the resources necessary to contend with these powerful media. ■

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[1] *Available at* http://en-us.nielsen.com/content/nielsen/en__us.html (web sites herein last visited Oct. 20, 2010).
[2] *Id.*
[3] *Id.*
[4] Seeking Alpha describes itself on its web site as "[t]he premier website for actionable stock market opinion and analysis, and vibrant, intelligent finance discussion." It publishes approximately 250 articles daily and boasts, "Seeking Alpha differs from other finance sites because it focuses on *opinion and analysis rather than news*, and is primarily written by *investors* who describe their personal approach to stock picking and portfolio management, *rather than by journalists*" (emphasis in original). *Available at* http://seekingalpha.com/page/about__us.