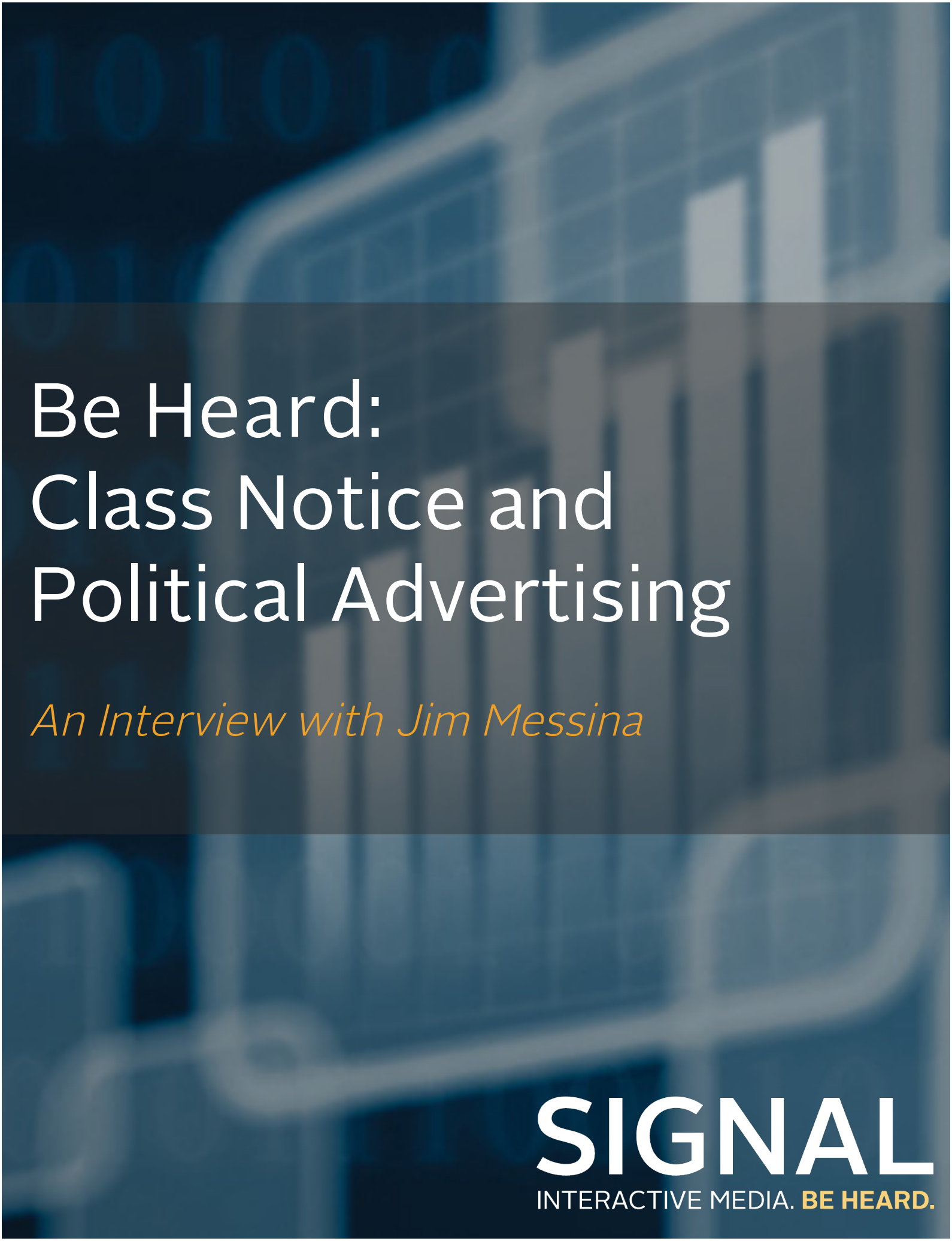

Be Heard: Class Notice and Political Advertising

An Interview with Jim Messina

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In 1984, the re-election campaign of President Ronald Reagan created a one-minute network television ad commonly known as "Morning in America." As optimistic images and soft music played, the narrator stated: "It's morning again in America, and under the leadership of President Reagan, our country is prouder and stronger and better…"

The ad was iconic and widely credited with helping President Reagan win 49 of 50 states in the 1984 election. It's a piece to which the best mass-media political ads are still compared.

But what do we really know about how effective the ad actually was? The outcome speaks for itself, but certainly there were many more factors at work. What analytics were available then to measure how effectively the ad informed and engaged individual voters? What tools are available today?

It is no secret that ads and campaigns have changed since President Reagan won in 1984. In recent years, no one has driven this change more strongly than Jim Messina, founder of *The Messina Group*. As President Obama's 2012 campaign manager, Messina abandoned every step of a traditional presidential campaign and merged media, analytics, and politics in an unprecedented way. Messina's approach to media established the modern presidential campaign—Google's Executive Chairman Eric Schmidt called it "the best-run campaign ever."[1]

Messina and his team have supervised over $1.1 billion in paid advertising. His group currently designs media plans for political campaigns, non-profits, and leading corporations from top Hollywood studios to international publishers. During the Obama Campaign, he saved $40 million by applying testing and data analytics to paid advertising.

Messina's "winning formula" is rooted in data analytics. In developing media plans, his group is guided by the belief that data, analytics, and testing can deliver dramatic improvements in efficacy per dollar. For example, to *identify* voters, his team compiled a score between 1 and 100 and predicted the vote for every single registered voter in Ohio—nearly 8 million people. His ability to *test* and *analyze* data enabled him to predict the early voting results within 1 percentage point nationwide, and the total results within .2 percentage points in Florida, a state in which 8.4 million people voted. As *Time Magazine* reported, "[A]ssumptions were rarely left in place without numbers to back them up."[2] Messina defined the modern approach to identify, reach, and effectively engage individuals through political advertising.

So what could any of this possibly have to do with mass torts?

As a practical matter, mass media and analytics are vital to the practice of law and essential to mass tort lawyers—from legal advertising to class notice. In the class-certified mass tort context,[3] class notice is the vehicle for *due process*, the core tenet that no one shall "be deprived of life, liberty, or property"[4] without a "meaningful opportunity to be heard."[5]

The need for due process safeguards are heightened in the opt-out class action context, because class actions are a form of representative litigation. Elizabeth Cabraser explains, "[A] formal class action is an expression of *representative democracy*. By definition, a class action is a litigation mechanism in which a few plaintiffs represent the rights and interests of many others, who are not named parties to the action, but will, by virtue of their class membership, be bound by the outcome."[6]

As such, class notice is not a "mere gesture."[7] It should strive to leverage all of the art and science of today's commercial and political advertising to safeguard due process—to effectively reach, inform, and provide a meaningful opportunity to be heard.

To this end, *The Messina Group* and *The Garretson Group* recently collaborated in the context of several class-certified mass tort cases. The groups evaluated how the bench and bar might leverage the art and science of political advertising to improve class notice.

Garretson's group focused on providing structure to the opportunity to be heard. Any large-scale notice campaign invites diverse individual responses. Absent structure—clear and consistent options, simple mechanisms to participate, and the infrastructure to accommodate thousands of incoming and outgoing responses—a mass tort program can go underwater quickly.

In a recent article, Judge Weinstein speaks to the benefit of structure in mass actions: "The fully democratic model of litigation is that of the pro se plaintiff. It does not work well...[T]hey often have difficulty understanding legal standards and marshaling the evidence necessary to meet those standards."[8] Today, familiar tools such as call centers, web-based intake, and simplified claim forms offer structure, controlled two-way communication, and at the same time, a greater degree of *democratization*[9] in representative actions.

With this infrastructure in place, Jim Messina provides guidance on the use of modern data analytics to actually empirically measure the efficacy of class notice, as well as to reduce scattershot negative messaging, cost, and waste.

Adopting Messina's approach—the same approach that determined the election of the President of the United States—and applying it to class notice may seem bizarre. It shouldn't, considering what is at stake. After all, class actions are an expression of *representative democracy*,[10] and class notice is rooted in *due process*, an essential right.

Due Process: Primary and Secondary Authority

Rule 23 establishes that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members."[11] Rule 23(c)(2)(B) provides that the Court must ensure that class members receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be *identified* through reasonable effort."[12] Further, seminal case law holds that notice should be "reasonably *calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[13]

In the realm of political advertising, Messina faces a similar challenge to *identify* individual voters and their characteristics, and to *calculate* the true efficacy of a media plan. His methods are empirical, targeted, and dynamic. On the front-end of the media program, his group undertakes *pre-program modeling*. *Pre-program modeling* is essentially a statistical methodology to score individuals' likelihood of having a specified attribute. Next, throughout the media program, his group engages in ongoing *in-program testing* and *adjustment*. Data is continuously collected and analyzed, and the program is continually tailored to more effectively reach the target audience (and only the target audience). This dynamic, empirical approach assures maximum reach, control, and efficacy of the message per dollar.

With respect to secondary authority, the Federal Judiciary Center (FJC) and leading experts provide extensive guidance for class notice programs. For example, the web site of the FJC offers notice examples, templates, and judicial checklists.[14]

Curiously, FJC guidance reveals that, in some cases of the past, there has been a disconnect between fundamental principles of class notice and those of everyday mass media advertising. One commentator laments that because "most of the ads 'look like legal notices,' and are 'typically announced in dull legalistic splendor in newspapers and . . . magazines,' the notices have 'hardly (been) a clarion call to the masses.'"[15] Commentators cite an example of a notice plan with "wall to wall legalese" that "conveys no more than a hint of its eye-glazing opaqueness."[16]

In *Mullane*, the Supreme Court felt compelled to enunciate a rudimentary goal of class notice—to actually inform the class member. The Court wrote, "[P]rocess which is a *mere gesture* is not due process. The means employed must be such as one *desirous of actually informing* the absentee might reasonably adopt to accomplish it."[17]

One expert draws a comparison to commercial advertising, explaining "If a business wanted its customers to know about a new product, it would not publish an ad in small, fine print with no headline. It would not have a meeting to explore "the least we could get away with," or ask "can we just run it in the back of *USA Today*?"...The business would want its existing customers and would-be customers to actually know about its product, so it would adopt reasonable communication means to accomplish the objective of informing them."[18]

Measuring Efficacy of Class Notice and Due Process

Measuring the efficacy of class notice is perhaps less complicated than measuring that of political or

commercial advertising for several reasons. Unlike political or commercial advertising, the message in class notice is neutral. It seeks to inform, but not to influence a choice. Further, valid options for participation often include *doing nothing at all*. The Supreme Court writes, "[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[19] Messina's group explains that it is actually much easier to measure whether a message reached and informed someone than whether it influenced them (which requires additional surveys.)

Because an absent class-action plaintiff is not required to do anything at all, participation rates (claims rates)—a commonly used benchmark in class actions—might provide a shaky measure of the efficacy of class notice alone. If the notice effectively informs potential class members, class members may simply choose to do nothing. The class notice itself may be measurably effective without additional participation.

Similarly, opt-out and objection rates provide a tenuous measure of efficacy of notice. One empirical study found that "opt-outs from class participation and objections to class action resolutions are rare: on average, less than 1 percent of class members opt-out and about 1 percent of class members object to class-wide settlements."[20] As such, neither opt-out or objection rates might be truly statistically significant to measure the efficacy of class notice and due process.

Even more tenuously, the type of media itself is sometimes cited to establish the efficacy of class notice. For example, the Supreme Court once held, "[N]otice by publication will suffice under Rule 23(c)(2) and under the due process clause when class members cannot be reached by mail."[21] However, consider that studies show that "75% of all direct mail ends up in the trash unopened; and that four billion tons of junk mail is received every year of which 44% is unopened."[22]

This direct mail is often supplemented with publication notice to reach unknown class members. For national notice programs, publication notice often still equates to print-ads in newspapers and magazines.

With respect to newspapers, it is well-known that circulation continues to decline. 41% of adults now claim to read a newspaper daily, down from 78% in 1970.[23] On average, only about two-thirds of a newspaper's pages are opened.[24] The bright spot for newspapers are the digital editions of the paper—online readership has slowed the decline of total readership. "[A]mong the top-five papers, they generate about one-quarter of their total circulation from the digital paper."[25]

Further, readership figures for magazines may be overstated and misleading in the context of class notice. Reported readership numbers for magazines accumulate over a relatively long period of time. Often, publications take many weeks to reach their projected readership numbers, which means the reader may not see the publication within a shorter notice period. For example, *People Magazine* may take 26 weeks to reach the projected number of readers. If the particular notice period is 90 days, there is a high chance that a reader will read the issue with the ad notice well after the notice period has ended, and thus may not be able to file a claim or objection under the terms of the class settlement.

To compound this issue, a recent Nielsen report concluded that between 2009 and 2011, confidence and trust in magazines has decreased by about 20%. This indicates that consumers are becoming increasingly wary of what they see and read in magazines, including the advertisements they contain.[26] In the class notice context, trust is a critical factor in a class member's decision to participate in the class action.

Moreover, even if publication notice offers broad circulation and reach, it may not effectively target individuals in the class. Examples of wasteful (and negative) scattershot notice abound. With respect to publication notice in newspapers, the demographic profile of the typical newspaper reader may not be aligned with that of the target class member (e.g., a soft-drink consumer class member). The profile of the newsreader is a professional, college graduate, over 45 years old, who is married and owns his home. The single-can soft-drink buyer is young, male, works part-time, reads sports magazines, and watches *The Simpsons*.[27] Does the one-eighth-page ad buried somewhere in the *USA Today* effectively reach and inform that potential class member? According to one commentator, "such notice targets the American cognoscenti, and ignores most everyone else."[28] In fact, in many cases, negative and scattershot publication notice may be more likely to reach the shareholders than the potential class member!

Comparative Framework: Class Notice and Political Advertising

By and large, the landscape of commercial and political advertising provides an excellent comparative framework to rethink class notice. In simply adopting this framework, the bench and bar accepts all of the well-established art and science of mass media, beginning with an up-to-date dictionary and organization of mass media concepts.

One expert shares, "The media business can be thought of as an ocean."[29] Without some standard system of organization, mass media planning may be perceived by the bench and bar as "mystical or esoteric."[30] To compound this challenge, where the numerous types of media are becoming more and more fragmented,[31] it is critical to adopt some standard dictionary, organization of media, and benchmark metrics to measure efficacy across media and across class action cases.

For example, the traditional categorization of class notice media often encompasses only "individual notice" (a.k.a., direct mail) and "publication notice." This is a crude framework used in legal jurisprudence, but not often in modern commercial and political media planning. Similarly, in the legal realm, media is still often categorized as either "print" or "electronic." Today, these distinctions are obsolete–is a newspaper read as print or online?

Experts such as Jim Messina organize media within three broad categories: paid, owned, and earned media. This organizational framework provides valuable guidance when designing a media plan (and evaluating a notice plan)—the mix of these categories has a substantial effect on cost, efficacy, and waste.

In general, *paid media* encompasses direct mail, newspapers, magazines, outdoor display, internet display, and paid internet search. *Owned media* encompasses, for example, web sites ordered by the court, television channels or product packaging owned by the defendant, and events (such as the "town hall" meetings held by Special Master Ken Feinberg in the *September 11th* settlements[32]). *Earned media* encompasses, for example, social networking, organic internet search, press coverage, and press releases.

Based on this standard organization of mass media, the bench and bar can evaluate the numerous media options available in a more consistent manner, and define common metrics and benchmarks across class actions. For example, standard empirical metrics include ratings, reach, frequency, coverage, circulation, shares, gross impressions, gross rating points, and exposure distribution, among many others. Standard algorithms for analysis may include, for example, the *random duplication formula*, a formula used to estimate the combined reach of media. In sum, by adopting the art and science of political and commercial advertising, the bench and bar also gain the up-to-date dictionary, organization, and analytics of contemporary mass media.

Encouraging Creativity and Innovation

Beyond analytics, adopting the art and science of commercial and political advertising also encourages the bench and bar to embrace creativity, innovation, and technology in the context of class notice. Today, legal precedent sets the boundaries of notice plans, but the bench and bar more readily accept innovation. One class action luminary explains, "The advent of the Internet has fostered a revolution in class action notice. Notification through the Internet is virtually free, websites may be updated hourly, claim forms and questionnaires can be completed and returned online, and class members can visit the class action website as frequently they desire to stay current on events in the case."[33]

But the rise of the internet (and notorious decline of the print newspaper) is only the tip of the iceberg. Owned media—television channels, web sites, product packaging, among others—provides innovative, low-cost, highly-targeted vehicles to deliver class notice. The cost and control of this media may appeal in particular to defendants—rather than broadcasting a negative message to the public at large (many of whom have no relationship to the brand), the defendant can target only relevant consumers, control the message, and own the communication platform.

Consider the approach of one expert: "One illustration of a creative notice occurred in *In re Arizona Dairy Products Litigation*, where the court ordered that an abbreviated notice be printed on defendant's milk cartons. Courts applaud innovative notice programs by publication in large consumer class actions if evidence shows that the class will be satisfactorily reached by notice: 'The Court is convinced that the innovative notice program designed by plaintiffs not only comports with due process and is sensitive to defendants' res judicata rights, but it is the only notice program suitable for this unique and massive consumer class action.'"[34]

Leveraging Earned and Owned Media to Reduce Cost

The use of the defendant's packaging to deliver notice is an example of leveraging *owned media*. Framing the options for class notice in terms of paid, owned, and earned media supports a more

practical assessment of *cost*. Naturally, cost is a critical factor of a notice program (and political and commercial advertising, as well as any other real-world transaction).

Yet cost holds an idiosyncratic role in class-notice precedent. On one hand, the requirements of due process may be said to wholly trump considerations of costs. In the seminal case of *Eisen v. Carlisle & Jacqueline*, the Supreme Court generalized that plaintiffs should cover the cost of class notice, and that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs."[35] Years later, however, the Court clarified that it has discretion to order a defendant to perform certain work, such as the identification of class members, if the defendant can do it more efficiently or with less expense.[36]

Perhaps Cabraser best enunciated the role of cost in the context of due process: "Due process is not an absolute, whose application should be allowed to thwart real fairness by insistence on unlimited process in the name of an ideal. Rather, due process is achieved by balancing time, money, and attention, to preserve a system in which the cost of litigation does not outweigh its utility. Due process thus implies—indeed, it depends on—the conservation of both public and private resources. Neither the litigants, nor the court system itself, should be bankrupted in the cause of due process."[37]

As its name implies, *paid media* carries direct cost. Paid media includes the old pillars of class notice precedent, such as direct mail, as well as publication in newspapers (with notoriously declining circulation and ill-fitting demographics) and magazine ads (carrying the highest cost of reaching 1000 members of the audience). More sophisticated paid-media programs have included internet banner ads, pre-roll ads (e.g., ads prior to YouTube videos), radio, and television (the highest total expense).

The bench and bar has been slower to embrace notice strategies involving *earned media* (e.g., social networking) and *owned media* (such as the defendant's product packaging, web site, or television channels). However, in the political arena, Messina proves that earned media, such as social media, offers increased demographic targeting and empirical measurements in real-time. Using digital media, parties can now better analyze data during the program, adjust the media, and dial in on efficacy, both in absolute terms and per-dollar spent.

The Notice Program as an Ongoing Asset

By drawing a comparison between notice and commercial advertising, notice may also be properly viewed as an ongoing asset, rather than a sunk cost. Unfortunately, most notice programs today are not viewed as, and do not aspire to be, any sort of ongoing asset. Rather, they are analogous to one-time publication by newspaper—–they are often a large investment in a short issue life; it's read "today or never," as they say. At the end of the day, the newspaper and notice program are simply discarded. They are one-and-done, a sunk cost, and unconnected with an investment in an ongoing asset, communication platform, or brand awareness.

In creating media models and producing market research, Messina contends that an effective notice program may be properly be viewed as an ongoing asset, not a sunk cost. The reusable asset might be the market study, the social networking platform, or the brand of outreach and customer care. With

respect to Messina, Google's Eric Schmidt explains, "[C]orporate America, Silicon Valley were knocking down the door trying to hire these guys…there's a lot of carry-over from political tactics to business tactics."[38] The same is true of business tactics and notice tactics. They share a common fundamental goal to reach and inform the target audience.

Next Steps

Experts in political advertising offer a fresh outlook on class notice. After all, class actions are an "expression of representative democracy,"[39] an analog to our overarching form of government. In this context, class notice is the vehicle for *due process*, the core tenet that no one shall "be deprived of life, liberty, or property"[40] without a "meaningful opportunity to be heard."[41]

It may seem academic to compare class notice and political advertising. However, the advantages of viewing two through the same lens are significant. For example, political advertising offers an up-to-date dictionary and organizational structure for the bench and bar to consistently navigate the ocean[42] of media. A comparative framework also presumes creativity and innovation apply to class notice, and the commercial and political landscape offers modern tools such as data analytics to actually measure the efficacy of class notice. Further, by considering the complete landscape of *paid, earned,* and *owned media*, the parties may more precisely target the audience of potential class members, lower costs, and avoid wasteful (and negative) scattershot messaging. Finally, if done properly, the class notice program may be viewed as an investment in an ongoing asset, as opposed to a sunk cost. Reusable assets include, for example, market research, social networking platforms, and the branding of outreach and customer care.

Perhaps one actionable next step to better incorporate the art and science of political advertising in class notice is to expand the FJC templates and checklists to reflect contemporary commercial and political advertising practices. For example, updated FJC materials may include a common media selection guide to help the bench and bar consistently navigate and evaluate the numerous fragments of media. Further, updated FJC materials may include common benchmark metrics, analytics, and standards per medium. By leveraging all of the art and science of contemporary mass media employed by experts such as Jim Messina, the bench and bar can better safeguard due process, measure and improve the efficacy of class notice, and provide a more meaningful opportunity to *be heard* in representative actions.

[1] Joshua Green, *Corporations Want Obama's Winning Formula*, Bloomberg Business (Nov. 21, 2012), http://www.bloomberg.com/bw/articles/2012-11-21/corporations-want-obamas-winning-formula.
[2] Michael Scherer, *Inside the Secret World of the Data Crunchers Who Helped Obama Win*, Time Magazine (Nov. 07, 2012), http://swampland.time.com/2012/11/07/inside-the-secret-world-of-quants-and-data-crunchers-who-helped-obama-win.
[3] See, e.g., *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., MDL No. 2047, 626 F. Supp. 2d 1346 (J.P.M.L. 2009) (providing one of many examples of a recent class-certified mass tort).
[4] U.S. CONST. amend. V; see also U.S. CONST. amend. XIV.
[5] Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884).
[6] Elizabeth J. Cabraser, *The Essentials of Democratic Mass Litigation*, 5 Colum. J.L. & Soc. Probs. 499, 510 (2012) (emphasis added) [hereinafter Cabraser, Democratic Mass Litigation].
[7] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950) [hereinafter Mullane].
[8] Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 Colum.. J.L. & Soc. Probs. 451 (2012).
[9] See generally Cabraser, Democratic Mass Litigation; Alvin K. Hellerstein, *The Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473 (2012); Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 Colum. J.L. & Soc. Probs. 451 (2012).
[10] Cabraser, Democratic Mass Litigation, at 510.
[11] FED. R. CIV. P. 23.
[12] FED. R. CIV. P. 23(c)(2)(B) (emphasis added).
[13] Mullane, at 314.
[14] Federal Judicial Center, http://www.fjc.gov/ (last visited January 27, 2015).
[15] Jordan S. Ginsberg, *Class Action Notice: The Internet's Time Has Come*, 2003 U. Chi. Legal F. 739, 771 (2003) (internal citations omitted). C. Lexis 218 (Ont. Super. Ct. J. Jan. 13, 2004), *aff'd*, Currie v. McDonald's Rests. of Can. Ltd., 74 O.R.3d 321, 321-41 (O. Ct. App. 2005).
[17] Mullane, at 315 (emphasis added).
[18] Todd B. Hilsee et al., *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More than Just Plain Language: A Desire To Actually Inform*, 18 Geo. J. Legal Ethics 1359, 1361-1362 (2005).
[19] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).
[20] Theodore Eisenberg and Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1532 (2004).
[21] Carlough v. Amchem Prods., Inc., 158 F.R.D. 314, 325 (E.D. Pa. 1993) (citing Mullane, at 317-18).
[22] Todd B. Hilsee et al., *Hurricanes, Mobility, and Due Process: The "Desire-To-Inform" Requirement for Effective Class Action Notice is Highlighted by Katrina*, 80 Tul. L. Rev. 1771 (2006).
[23] Helen Katz, THE MEDIA HANDBOOK, 80 (5th ed. 2014).
[24] Id at 84.
[25] Id at 81.
[26] *Global Trust In Advertising And Brand Messages*, Nielson (April 10, 2012), http://www.nielsen.com/us/en/insights/reports/2012/global-trust-in-advertising-and-brand-messages.html.
[27] Helen Katz, THE MEDIA HANDBOOK, 18 (5th ed. 2014).
[28] Jordan S. Ginsberg, *Class Action Notice: The Internet's Time Has Come*, 2003 U. Chi. Legal F. 739, 752-53 (2003).
[29] Helen Katz, THE MEDIA HANDBOOK, 4 (5th ed. 2014).
[30] Id at X.
[31] Television today, for example, is fragmented into network TV, cable TV, satellite TV, IP TV, television on demand (DVR and Video on Demand), among other media.
[32] See, e.g., Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 Colum. J.L. & Soc. Probs. 459 (2012) ("Kenneth Feinberg made himself available to each of the 9/11 claimants. He has also been accessible to the many more numerous Gulf oil spill claimants. Judge Alvin Hellerstein has consulted closely with groups of those affected by the post-9/11 cleanup litigation.) (internal citations omitted).
[33] Cabraser, Democratic Mass Litigation, at 507.
[34] Todd B. Hilsee, et al., *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice is More than Just Plain Language: A Desire To Actually Inform*, 18 Geo. J. Legal Ethics 1359, 1364 (2005).
[35] Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 176 (1974).
[36] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).
[37] Cabraser, Democratic Mass Litigation, at 514.
[38] Joshua Green, *Corporations Want Obama's Winning Formula*, Bloomberg Business (Nov. 21, 2012), http://www.bloomberg.com/bw/articles/2012-11-21/corporations-want-obamas-winning-formula.
[39] Id at 510.
[40] U.S. CONST. amend. V; see also U.S. CONST. amend. XIV.
[41] Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884).
[42] Jordan S. Ginsberg, *Class Action Notice: The Internet's Time Has Come*, 2003 U. Chi. Legal F. 739, 752-53 (2003).