

Leveraging Social Media for Litigation

BY AMY SINGER

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Social media: To some people, it means Facebook and its nearly one billion members. To others, it means Twitter and its nearly 300 million tweets per day. And to others, it means YouTube streaming 28 billion videos every week. To civil litigators, most of whom don't know it yet, it should mean a prime opportunity to achieve the best possible trial or ADR outcome.

By quantitatively and qualitatively testing your courtroom presentation, trial theme, opening statement, direct examination, cross-examination, witness testimony, and closing argument with hundreds, thousands, even tens of thousands of people online, all of whom function, in effect, as virtual, surrogate jurors, you can analyze and dissect what your actual jurors will think and feel about the important aspects of the case. This finely tuned, interactive intelligence ultimately will lead you to optimal strategic planning that the other side cannot match. And guess what? You can conduct such invaluable online testing inexpensively and easily and at the very last minute! How does this work? Read on.

Social media (Web 2.0) is a development that is just as revolutionary as the Internet (Web 1.0). It enables engagement and conversations of all types among all of the peoples of the world that have access to Internet connections. Social media concerns communities of people who gather online in one form or another to socialize, communicate with one another, and share information and opinions.

It takes multitudinous forms: microblogs such as Twitter, social networks such as Facebook, video-sharing services such as YouTube, photo-sharing services such as Flickr, plus, online gaming, live-casting, aggregators, podcasts, virtual worlds and much more. Confusing? Not at all – just think of social media as the world's water cooler, where everyone gathers online to converse.

As such, social media is the ideal online milieu for trial consultants. These professionals use focus groups and other litigation research testing methods to hypothetically replicate, usually in advance, how jurors will deliberate – that is, converse – about court cases. Ultimately, trial consulting and litigation research are all about tapping into the probable conversations in which jurors will engage when they deliberate to reach their verdict decisions, and then recommending trial or ADR strategy based on this invaluable information.

Before social media, trial consultants were restricted, on a practical basis, to a finite number of focus groups (termed “jury simulations”) comprised of a finite number of participants (termed “surrogate jurors”). Such jury simulations, repeated over and over, could provide excellent qualitative information about the predilections of jurors concerning how they would think about and decide the case.

But now, thanks to the availability of online social communities made up sometimes of hundreds of millions of people, along with online social media research that can tap into these vast communities, the number of people trial consultants can test to gauge their attitudes and opinions concerning litigation disputes is virtually limitless. Therefore, trial consultants can now provide legitimate quantitative (as well as qualitative) information about jurors’ potential attitudes and opinions. This is a remarkable breakthrough for trial consultants – and for the lawyers they counsel and assist. It provides extraordinary advantages to the attorneys wise enough to take advantage of this remarkable litigation intelligence.

Casey Anthony

The 2011 Casey Anthony trial concerned the Orlando woman who was found not guilty of first-degree murder of her two-year-old child, Caylee Anthony. It was dubbed the social media trial of the century. This was because all the social media networks were abuzz with comments and opinions about the case and its various aspects. The trial was fully covered by the media, and interactive websites about the trial were posted before, during, and after the proceeding. Our firm has mined the social media data from this trial and our analysis has provided the following insights.

The Four Steps for Social Media Courtroom Strategizing

Harnessing the amazing power of social media to win in the courtroom or ADR involves four key steps: 1) audience gathering, 2) engaging, 3) listening and analyzing, and 4) responding. Each of these individual steps is crucial. You must handle them all not only correctly but also adroitly, indeed, expertly. If you don’t, your attempts to secure and employ insights gained by monitoring the tweets, blog postings, and other comments by people online will almost surely blow up in your face. To borrow a term from computer scientists, it is the old GIGO problem: garbage in-garbage out.

Securing appropriate and meaningful data from the proper online sources, systematically analyzing this information and then, on the basis of the insights you have developed, crafting the optimum courtroom or ADR strategy and tactics, requires a sophisticated understanding of exactly what it is that you are doing at every step along the way. To paraphrase popular humorist and writer Finley Peter Dunne, online persuasion research for litigation applications “ain’t beanbag.” Message to attorneys and other legal professionals who are not expert at persuasion research and unfamiliar with online social media sampling, testing and analysis: Don’t try this yourself.

Audience Gathering

The premise here is simple. Gather an audience of online participants who are not just willing but eager to comment about your case and its key particulars. I have achieved excellent results by congregating online audiences for my litigation research. How? After much trial and error, I will share with you some key points to focus on.

Much research has been done on how to use the science of influence in regards to social media. This discipline has been evolving and now new ideas are emerging in 2012. Today it is not just about how many people follow you on Twitter or how many friends you have on Facebook. It is about how many people you are engaging with. With any interaction of people, some will influence a group more than others. There is a measurement for this phenomenon, it is called their “Klout” score.

“Klout” is a formal measure of a person’s influence across the social networks they are engaged with. This score looks at the size of a person’s network, the online content created from it and also how other people interact with that content. People who have a high “Klout” rating are able to gather a larger, more diversified audience. The question arises, “Do you want influencers on your jury?” What do the influencers think about the issues key to your case?” The answers to these questions affect the entire process of voir dire. I have found the key for gathering an effective audience is to identify the right influencers, then activate an association with them by reaching out and nurturing a relationship, such as offering incentives.

One promising social media service for congregating audiences is Twitter. I particularly like this popular social media service because you can learn valuable personal information about your audience of followers through their Twitter profiles, for example, “MaggsBear - Retired executive. Father, grandfather and Maggie’s husband. I rant against hypocrisy and stupidity in a world with too much of both. I have a new bike...”

Take a look at these actual profiles. Whose opinion would you like to analyze?

“I’m a writer that enjoys blogging, politics, hard news, technology, and writing for other folks. I like to blog and consider myself a liberal Democrat.”

OR “*Conservatarian and Constitutionalist. God/Guns/Country.*”

OR “*Pro-Israel Proud Jew. Anti-Islam. Anti-antisemitism. Against Christian missionaries with an agenda to convert Jews. Proud friend and supporter of XYZ.*”

OR “*I’m a slave of Allah & Trying to Follow our beloved Prophet Muhammad (PBUH) If you want One way To Jannah Follow Prophet Muhammad (PBUH) FreePalestine*”

OR lastly, “*Citizen, Conservative, Daughter, Mother, Grandmother, Mad as Hell, Limited Government, Fiscal Restraint, Country Pride, No apologies.*”

Decades of jury research findings clearly demonstrate that nothing correlates more closely with jury verdict decisions than jurors’ values and beliefs.

Audience gathering involves three key aspects: “mining,” which is finding out who is out there online, and what they think and feel about the litigation issues you wish to evaluate; “seeding,” which is planting specific ideas about your case with your audience (“Although the evidence proves that the trucking company forced their delivery drivers to travel at breakneck speeds all day long to make all of their stops on time, the company claims that the drivers are never pressured in any way”); and “farming,” which is collecting the comments and opinions of your audience members and using this information for your research.

Note the word “audience” for this initial step, not “panelists,” or “respondents,” or “participants.” This is not a casual definition. Indeed, when it comes to social media research, the word “audience” is perfectly apt. Why? The people you will gather for your online research will share one salient characteristic: They all want to be entertained. Or as they might tweet about this concept in the Twitterverse: They all want to *follow* you. Thus, the second step in the leveraging social media process: *engagement*.

Engaging

According to Mark Smiciklas’s Social Media Advocacy Model, “audience engagement objectives, strategies and tactics should evolve past acquisition towards advocacy.” Advocates are people who have opinions and ideas about the issues in your case.

If you can’t engage people online, you will never gather an adequate following to do meaningful online persuasion research. However, when it comes to the four separate steps for social media leveraging for litigation applications, engagement is, by far, the most challenging aspect. It also is the one step out of the four that requires the most artistry. Instructing people on how to engage others in a successful manner (particularly online) is a little like trying to teach people how to be funny. You either are funny, or you are not. Similarly, you are engaging, or not, depending on who you are.

The best way to engage people online is to provide information on topics that engage them. Thus, if you are interested, for example, in environmental and sustainability issues, and tweet and/or blog about these issues on a regular basis, you can readily engage others who share this sustainability concern. Because these individuals follow you when you communicate on environmental issues, you have entrée to approach them when you have a case and want them to comment online about various aspects of the legal dispute.

Of course, it is far easier to interest people online if they live and promote green lifestyles, or love James Dean movies, or are inveterate sports fans, than it will be to hook them with litigation proceedings concerning, for example, a nursing home malpractice suit. But as I wrote above, this is where the artistry comes into play. One way to engage people is via online forums. Discussion groups, for example, Google Groups, are also excellent for this purpose. Many of the online groups involve causes, for example, “Save the Whales” and “Stop Animal Cruelty.” By offering to make small donations on behalf of group members, you can often engage these individuals to participate in your online research.

To spot the ideal individuals that you want for your online social media research, look for people who comment online about the specific issue that you target. Thus, if you plan to donate to an environmental group in order to engage people for your research who worry about sustainability, look for tweets and/or online comments like this actual tweet from one individual on Twitter: “Building roads is usually hot work, but there’s a cooler approach that helps cut fumes.”

Facebook permits interested parties, including trial attorneys and jury consultants, to form so-called “secret focus groups” where they can conduct online litigation research. Some examples of organizations with “secret focus groups” now online at Facebook: International Association of Certified Home Inspectors, Snowmobile.com, and Skullcandy. Even Victoria’s Secret has its own secret focus group! What is interesting about secret focus groups on Facebook is that the trial consultant and attorney can cherry pick certain individuals from the groups to engage in more comprehensive conversations via private IM chats, and thus secure additional insights concerning how jurors will view the case.

Listening and Analyzing

In this step, listening and analyzing largely represent the same thing. The concepts for step three are eminently direct: You pay close attention to what your online commenters, that is, your audience, have to say about key legal issues in dispute. You then carefully analyze these comments to draw reliable – and actionable – meaning from them. Those attorneys who get social will be very successful, while those who fight or ignore the feedback available within social media will find themselves overpowered. The key is to join them, as you will not be able to beat them.

This process takes two forms: content analysis (what online users have to state about the legal issues) and sentiment analysis (how online users feel about the legal issues). Both content and sentiment are important. However, how people feel about the legal issues often is closely predictive on how jurors will actually decide the case.

I would like to share with you some notes to reinforce some of the key things you will want to pay attention to in this tremendously important listening and analysis step. They are defined as follows: 1. emotions, 2. questions, 3. relating, 4. observations, 5. game-changers, and 6. judgments.

1. Of course, emotions concern how people feel about things. For example, are online users angry concerning particular legal issues? If so, you may be able to use this information to craft direct examination questions that strongly resonate with jurors. By the way, our experience with anger statements from online audience members is that if they project to the jurors, you never will be able to change the jurors’ minds (that is, if they are angry – emotionally invested – against your client) regardless of the evidence and testimony.
2. Questions are the actual queries that online audience members raise concerning legal issues. The attorney must be sure to answer all of these questions during the trial, that is, during his or her opening statement and closing argument, or through direct examination and/or cross-examination. Otherwise, these questions will almost surely linger in the minds of the jurors. If they do, the jurors will focus on these unsettling questions and will tune out what the attorney and witnesses have to say during the trial.
3. “Relating” comments have to do with statements such as this by online audience members: “I can relate to _____.” The more positive relating comments you are able to secure online, the better. Among other benefits, savvy attorneys can leverage relating comments to craft the most effective voir dire questions.

4. Observations concern what online users notice – and remember – about the witnesses, the evidence, and the attorneys. If these observations are negative, for example, people online hate how your primary witness styles her hair, it will be helpful to advise the witness to change her hair style. Otherwise, jurors may end up negatively thinking about the witness's appearance, and not pay attention to what she has to say on the stand.
5. Game-changers are just that: Information that changes the minds of online users who initially were skeptical about your client and his or her case, but now fully back that individual. Thus, game-changers are the most important variable of your analysis. Obviously, game-changers are potentially invaluable for your side. Therefore, it is incumbent that you and your trial colleagues isolate these specific game-changers and then find ways to exploit them during the case presentation.
6. Judgments consist of how people perceive the issues and problems of your case. This category is broken down into the following variables: compelling, believable, impressive, agreement, etc.

Responding

In the responding stage, the trial consultant/social media researcher comments (responds) to initial comments from online users. These new comments spark an entire repeat cycle of commentary from the online audience. At the same time, the trial consultant empowers online users to spread their message, which allows for additional audience gathering. This is necessary because people online routinely drop out of virtual conversations (which is what your online social media research truly is). You then follow this by additional engaging, then more listening and analyzing, and then even more responding.

You keep going through this loop, over and over, getting an increasingly precise and reliable fix on how people think and feel about the case. If you have handled things correctly, this is most likely how jurors will also think and feel about the case as well (and how they will decide it). As you refine things, learning more and more through your virtual conversations – which will directly parallel the jurors' deliberations – and adapting your case presentation or trial planning accordingly, you eventually will reach the final goal of this elaborate social media research exercise: *to discover the argument for which there is no counter-argument*.

Once you do, you have accomplished your online research mission: to provide the attorney with the most reliable and validated information he or she can use to win the case. Armed with such data, the jury has only one option to exercise: to surrender (that is, accept your side's version of events). Ultimately, this is what online persuasion research is all about.

Sifting Through 40,000 Separate Online Comments

When our firm mined the social media networks concerning the Casey Anthony trial, I utilized colleagues, interns, and volunteers to amass, sift through, classify, and segregate some 40,000 separate tweets, blog postings and other online comments about the case. They did so primarily through sophisticated keyword search algorithms that my firm developed.

Once my assistants performed this tedious mining operation, and after an elaborate data analysis, we were able to derive reliable meaning (and accompanying insights) from this immense amount of data. We created a dashboard for effective content and sentiment analysis of this data. Our dashboard reported on the analysis of this voluminous data by the following key criteria: questions, observations, judgments, emotions, relating, and change.

After conducting social media research for numerous trials, including some low-profile cases now in various planning stages, it is clear to me, that the findings from such research provide an ideal blueprint for voir dire and case presentation strategizing and tactics, as well as ADR planning and strategizing.

SNOW

In addition to the online social media research activities outlined above, another attractive research option is SNOW, an acronym that stands for “social network opinion website.” Utilizing the advanced SNOW methodology, the trial consultant creates multiple websites solely for social media online research purposes. Using sophisticated audience-gathering techniques, the trial consultant secures numerous (often, tens of thousands) visitors to the various websites, where they have the opportunity to learn about a particular litigation dispute, and then to render opinions on its individual aspects.

From these opinions, the trial consultant can develop valuable insights on the tactics and the strategies the attorney can use to persuade jurors. To illustrate to CNN (and the rest of the media) how social media research works, my firm set up a SNOW website in conjunction with the trial of Dr. Conrad Murray, Michael Jackson’s personal physician, who was accused and found guilty of involuntary manslaughter of the pop singer and cultural icon. There, visitors offered their instructive opinions on the guilt or innocence of Dr. Murray.

Multiple SNOW websites are utilized for this online social media research. The reasons for this are twofold: 1) you can conduct different forms of social media research at multiple websites; and 2) some SNOW websites are set up solely to (quite cleverly) provide misinformation to the other side’s counsel should he or she attempt to access the websites (extremely difficult without the correct passwords).

The SNOW acronym is an apt one for this type of research (and misdirection). For example, you can characterize each SNOW website as a research “snowflake.” Using them together, the trial consultant can fashion a research “snowball.” Only the client (along with the trial consultant) has full access to all of the SNOW websites. Thus, it is only he or she who can build a full-fledged research “snowman.” All of the carefully controlled misinformation and misdirection means that if opposing counsel actually gains partial access to any of the “snowflakes,” his or her “snowman” will end up as nothing but a big puddle!

Recent Developments

As a result of our firm's experience with the benchmark Casey Anthony trial, we can see the value of automating all of the tedious work we previously assigned to our assistants, interns, etc. We believe that the human-intensive data mining, seeding and farming that needs to be part of a quality online social media research program should give way to automated software systems.

We also recognize the value of incorporating secret channels for online focus groups to secure maximum confidentiality for attorney work product. An advanced program that includes these elements as well as predictive modeling is something we believe will break new ground in 2012.

Our research is looking at a SNOW capability that has complete anonymity for all online commenters, thus enhancing unbiased data input for our research. We want to look at software applications to expand many research functions, including the introduction of online shadow juries using conventional jury simulations. In short, trial consultants will be seeing expanded applications of software and Information Technology to make their work exponentially more effective in 2012.

Litigators on either side of the aisle will like what online social media research has to offer them this year and beyond. More reliable quantitative and qualitative information enhances jury selection and trial outcomes. It will be fast, cost effective and offer a menu of resources for the law firm. Right now trial counsel can access tens of thousands of surrogate jurors to use as an electronic shadow jury in real time during trial proceedings. Online social media research is recognized as providing a resource advantage over opposing counsel in both trial and ADR applications. My experience is that the litigator who utilizes online social media research puts him or herself at an advantage that makes the other side seem like it is playing slow motion checkers. Bottom line of course, online social media research works. My experience confirms that.