

## **Social Media as Evidence**

Review Of: The Social Media “Smoking Gun”: An Analysis of SOCIAL MEDIA AS EVIDENCE by

By Joshua Briones & Ana Tagvoryan

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*“The proverbial ‘smoking gun’ document of the pre-Internet era, which had given way to the smoking gun e-mail, has now given way to the smoking gun social media post.”<sup>1</sup>*

Joshua Briones and Ana Tagvoryan’s *Social Media as Evidence* is a practicing attorney’s guide to the relationship between social media and litigation. The prevailing use of technology in the courtroom and during trial preparation requires today’s attorneys to be fully educated and informed in the laws, regulations, and practical usage of social media when presenting evidence. This review examines the entirety of the guide, ranging from the core basics of what social media constitutes through actually presenting social media as evidence during trial. With social media being the new “smoking gun” of evidence during trials, this guide serves as an outstanding compilation of practical knowledge that every practicing attorney should have on their bookshelves.

Joshua Briones and Ana Tagvoryan are both highly reputable authors. Joshua Briones is a member of the bar in California, where he is a partner in his firm’s Litigation group, a co-chair of their Social Media practice group, and an editorial advisory board member of Bloomberg BNA’s Social Media Law & Policy Report. With extensive knowledge on counseling clients on social media legal issues and the preservation and use of social media, Briones’ knowledge and

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<sup>1</sup> JOSHUA BRIONES & ANA TAGVORYAN, SOCIAL MEDIA AS EVIDENCE 3 (2013).

experience have warranted his annual award of being named a Southern California Rising Star. Ana Tagvoryan is also a member of the California bar. Tagvoryan is similarly accredited, being a member of her firm's Litigation Group and Social Media practice group. Tagvoryan regularly presents on social media, and has been published on the subject. Additionally, Tagvoryan is also an editorial advisory board member of Bloomberg BNA's Social Media Law & Policy Report. Briones and Tagvoryan have also co-authored an article in *Corporate Counsel*, entitled *What Court Rulings Say About Online Consumer Privacy*.<sup>2</sup>

This guide focuses solely on the use of social media as evidence as it pertains to civil litigation. It is a mere five chapters long and is structured sequentially by chapter, beginning with a basic introduction to social media and then moving into how to retrieve and retail social media data, how the discovery of social media data is used in a civil suit, how to lay the foundation and authentication of the data, and finally the use of social media during trial. The guide then provides an appendix of sample cases, statutes, rules, and regulations as they pertain to social media.

While this guide is written primarily for civil litigators, it makes no assumptions about the prior knowledge of the reader in regards to experience with or usage of social media. Therefore, the first chapter focuses on the reasons why lawyers need to understand social media, emphasizing the expanding usage of social media in the legal field. Briones and Tagvoryan then give descriptions on the most popular social media sites, including Facebook, Twitter, Myspace, LinkedIn and YouTube. The purpose of this section is to acquaint all readers with the social media sites that are to be discussed in the following chapters, and provide a foundation for the exploration of using social media data as evidence. This chapter, and throughout the rest of the

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<sup>2</sup> See JOSHUA BRIONES & ANA TAGVORYAN, WHAT COURT RULINGS SAY ABOUT ONLINE CONSUMER PRIVACY, <http://www.blankrome.com/index.cfm?contentID=37&itemID=3393> (last visited 09/13/2014).

guide, the authors include “Practice Pointer” tips on how to implement or use what is being discussed. For example, after discussing YouTube, the authors point out that anyone can post on YouTube, and that attorneys should search YouTube for potential evidence in regards to their cases.<sup>3</sup> Chapter one also explains the basics of privacy settings, where data is stored, and how users can download their data.

Chapter two focuses on the retrieval and retention of social media. Because social media – like other forms of electronic data – must be preserved, it is crucial for lawyers to know how to do so. The authors highlight challenges with preserving social media data, focusing in on the fact that many users of social media add and delete their posts regularly, so a proper chain of custody must be established. The authors note the leading case on preserving social media data, *Zubulake v. UBS Warbug LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003), which held that “a party’s duty to preserve evidence extends to all electronically stored information that a party knows, or reasonably should know, is relevant to the subject matter of the litigation.”<sup>4</sup> Additionally, the authors examine the Federal Rules of Civil Procedure, which has added E-discovery Amendments into Rule 34(a)(1), allowing parties to request the production, inspection, copying, testing, or sampling of electronically stored information that is within the responding party’s possession, custody, or control.<sup>5</sup> The authors point out challenges that courts have not yet resolved after Rule 34(a)(1) was established, noting that the terms “possession, custody, or control” can be vague. This chapter additionally explores the spoliation of social media data, and emphasizes the sanctions given for the failure to preserve potentially relevant evidence.

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<sup>3</sup> See *supra* note 1, at 11.

<sup>4</sup> See *supra* note 1, at 16.

<sup>5</sup> See *supra* note 1, at 17.

The third chapter of this guide turns to the discovery facet of using social media as evidence. More specifically, the chapter focuses on the discovery of social media through the parties in the litigation. While the authors do not discuss the discovery of social media data in a criminal action, they do provide a link should lawyers want to explore the differences. Because people share information and feelings much more freely on social media, parties in a lawsuit should take extra steps to ensure that they are using social media data in their case. But, obtaining data directly from social media sites can be problematic, because of user consent, federal laws about disclosure without consent and user confidentiality. One “Practice Pointer” even points out that many times discovery requests and trial subpoenas served directly to social media sites will be met with objections, or even non-response.<sup>6</sup> In response, attorneys can get court ordered consent, and argue that the very nature and purpose of social media is to share personal information. This section highlights that social media data can be discoverable when it is material and necessary for the party’s defense, when the party’s emotional or mental state is at issue, when the party waives their right to privacy and where the data can be used to impeach a witness. The chapter wraps up with a discussion of ethical considerations when obtaining social media through informal discovery. The considerations include that an attorney should not “Friend” a represented adverse party or a witness, judge, or unrepresented party; but that the attorney should do their due diligence in searching lawyers and judges online. Along with ethical considerations, the authors speak about expert witnesses, and how they should refrain from posting on blogs or social media sites until the conclusion of the trial.

Chapter four examines how to lay foundation and authentication of social media data. Because tracking the source of media data can present challenges, such as user pseudonyms and

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<sup>6</sup> See *supra* note 1, at 39.

a confusing path between a person and a social media post, attorneys should be wary of viruses, spam, and posts that appear to be posted by someone other than their adverse party. Additionally, *ad hoc* and self-collection procedures taken to preserve social media data are often inadmissible because they do not meet the authentication requirements. As far as foundation, attorneys should use the Federal Rule Evidence 901(a), which lays a relatively low standard, and Rule 901(b)(4) with circumstantial evidence that reflects the “contents, substance, internal patterns, or other distinctive characteristics” of the evidence.<sup>7</sup> This chapter also highlights leading cases that involve authentication and foundation for social media data. One “Practice Pointer” in this chapter even helps to phrase questions to deponents on the risks of providing false testimony in regards to social media data.

The final chapter of this guide deals with the use of social media during trial, honing in on the fact that using social media is becoming more crucial to providing a fair trial. The authors suggest that juror questionnaires should include language regarding the usage, or lack thereof, of social media during a trial. Additionally, the authors provide sample language used or to recommend to be used in an attorney’s own case. The authors provide that attorneys may use social media to research jurors during the voir dire process, and that although there is little case law, lawyers have been allowed to use the WiFi provided in the courthouse to search potential jurors online. The authors also suggest that attorneys should continue their research on jurors during the trial, to ensure that there is no jury misconduct. Similarly, student observers in court should not be allowed to post real-time feeds or live blogging, because the use of social media during a trial could lead to a mistrial.

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<sup>7</sup> See *supra* note 1, at 61.

Lastly, the guide provides an appendix of useful sample documents. Included in this section are sample interrogatories, document requests, deposition questions, proposed jury instructions, a third-party social media provider preservation notice and a litigation hold memorandum to a client.

Ultimately, this guide is short and sweet. It serves as a concise reference tool for civil litigators to use in their practice, and examines every aspect of social media data that can be used in a lawsuit. The “Practice Pointer” sections found within each chapter are especially beneficial, as they point out real world scenarios where an issue might arise, and how to confront and combat those issues. The author’s language is not pretentious; they do not assume a specific level of expertise on the subject for their readers and begin with an introductory chapter that lays the foundation for readers with either a variety of knowledge on the subject, or none at all. Whether the audience is young litigators with knowledge of social media but little experience with lawsuits or more experienced litigators with experience with lawsuits and little with social media, this guide serves as an excellent resource.

Additionally, the guide provides excellent explanations of case law and statutes that apply to social media data and how to avoid common mistakes and challenges. It even points out different rules about requesting a judge to be your “Friend” on social media across different states. Similarly, it not only points out how to be sure that there is no jury misconduct or misconduct of a client, but also considerations that attorney’s should consider so as to not violate ethical regulations. The reader has basically everything they need to know about social media data in a civil litigation in one concise book that is small enough to keep on hand in the office or in court.

While being an excellent resource, there are aspects of the guide that could be improved upon. For example, while the authors do give a link to social media as evidence in criminal cases, it would be helpful for the guide to include a small section, or even a “Practice Pointer” section in each chapter on some of the similarities and differences between the rules and regulations between criminal and civil suits in regards to social media data. Additionally, while the authors state upfront that they will not cover the logistics of finding and searching through social media profiles, it may be beneficial to include information on how an attorney can do so. Being able to find and search through social media profiles is a crucial aspect of using social media data as evidence, and it would be beneficial to educate the readers on that aspect.

Overall, this guide proves to be an all around helpful resource for civil litigators. While this is the primary audience, it would definitely be a helpful resource for students, professors, and academics looking to further their knowledge on the subject. The guide is developed in an orderly, clear, logical, and concise way that allows readers to pick it up and put it down without becoming confused, and allows readers to jump around to areas that they are looking for specifically.

I would wholeheartedly recommend this book to civil litigators. It was enjoyable and informative, and gives litigators the practical information they need in a way that is easy to comprehend and apply. I recommend that every civil litigator pick up a copy and read it before taking on their next case!