ARTICLES AND TREATISES

- Social Networking and Technological Abuse – Constitutional, Ethical and General Issues

  Joshua Azriel, “Social Networking as a Communications Weapon to Harm Victims: Facebook, MySpace and Twitter Demonstrate a Need to Amend Section 230 of the Communications Decency Act,” 28 John Marshall J. of Computer and Information Law 415 (Spring 2009)

  Laurie L. Baughman, “Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites by Domestic Violence Perpetrators,” 19 WIDENER L.J. 933, 954 (2010)


  A. Delaney and D. Heitner, “Made for Each Other: Social Media and Litigation,” N.Y.S. Bar J. (Feb., 2013)

  Mary Anne Franks, “Unwilling Avatars: Idealism and Discrimination in Cyberspace”, 20 Colum. J. Gender & L. 224 (2011)


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Ken Strutin, Social Media and the Vanishing Points of Ethical and Constitutional Boundaries, 31 Pace Law Rev. 228 (Winter 2011)

Social Cyber-bullying, Witness Intimidation, Sexting, Texting and Teen Dating Violence


Susan W. Brenner & Megan Rehberg, “Kiddie Crime”? The Utility of Criminal Law in Controlling Cyberbullying, 8 First Amend. L. Rev. 1 (Fall 2009)

J. Browning, “#Snitches Get Stitches: Witness Intimidation in the Age of Facebook and Twitter,” 35 Pace L.Rev. 192 (Fall, 2014)
Joan M. Gilbride & Brian M. Sher, E-Mail, Text, Facebook . . . Lawsuit? Legal Minefield of Cyberbullying, N.Y.L.J.,

Oct. 24, 2011
Caitlin May, “Internet-savvy Students” and Bewildered Educators: Student Internet Speech Is Creating New Legal Issues for the Educational Community, 58 Cath. U. L. Rev. 1105 (Summer 2009)

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Emily Shaaya, States Address the Disconnect: Teens in a Sex-crazed Culture, 27 Criminal Justice #2:18
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Michael J. Telfer, Taking the Fight Against Cyber-bullies Outside the School House Gates, 4 Alb. Gov't L. Rev. 843 (2011)

Jamie Wolf, Note: the Playground Bully Has Gone Digital: the Dangers of Cyberbullying, the First Amendment Implications, and the Necessary Responses, 10 Cardozo Pub. L. Pol'y & Ethics J. 575 (Summer 2012)

J. Zweig, M. Dank, J. Yahner and P. Lachman, The Rate of Cyber Dating Abuse Among Teens and How it Relates to Other Forms of Teen dating Violence (Urban Institute, Wash., D.C., Feb., 2013)

Evidence, Discovery, Service of Process and Proof


Stephen Gassman, Matrimonial Law in the Digital Age; What You Need to Know about Electronic Evidence and Why, New York City Bar Association Center for CLE (Nov. 8, 2010)

William Hamilton & Wendy K. Akbar, E-discovery in the Age of Facebook, Twitter, & the Digital Family: The Ethical Demands for Attorney Competence, 33 Family Advocate 16 (Fall, 2010)


Gregory P. Joseph, Internet, Email and Social Media Evidence, ST051 American Law Institute-American Bar Association Continuing Professional Education 51 (June, 2012)


Marjorie A. Shields, Discovery of Deleted E-mail and Other Deleted Electronic Records, 27 A.L.R.6th 565 (2007, updated 2012)

Zitter, Annotation, Authentication of Electronically Stored Evidence, Including Text Messages and E-mail, 34 ALR 6th 253 [2008]

**FEDERAL STATUTES**

Electronic Communications Privacy Act, 18 U.S.C. §2501 et seq.

Stored Communications Act, 18 U.S.C. §2701 et seq.

**ETHICS OPINIONS AND BAR ASSOCIATION GUIDELINES**

NYS Advisory Committee on Judicial Ethics, Opinion 13-39 (2013)


NY County Lawyers Assoc. Comm. On Professional Ethics Formal Opinion
#743: Lawyer Investigation of Juror Internet and Social Networking Postings
During Conduct of Trial (May 18, 2011)

NYS Bar Association Comm. on Professional Ethics Opinion 843: Lawyer’s
Access to Public Pages of Another Party’s Social Networking Site for the
Purpose of Gathering Information for Client in Pending Litigation (9/10/2010)

NYS Bar Assoc. Commercial and Federal Litigation Sections, Social Media

SELECTED CASES

- Electronic Communication, Social Networking and No-contact
  Orders of Protection

A. New York State and Federal Courts: Selected Cases

statutes of limitations apply to civil enforcement action under Computer Fraud
2701, et seq.; ex-girlfriend’s action against former boyfriend for hacking her
AOL e-mail and Facebook accounts, preventing her from logging in, time-
barred as to e-mail but timely as to Facebook)

Zaratzian v. Abadir, No. 10 CV 9049 VB, 2014 WL 4467919 (S.D.N.Y., 2014),
Appeal Docketed, No. 15-1243 (2d Cir., Apr. 17, 2015) (Summary judgment
denied to divorced husband alleged to have violated Wiretap Act, where he set
up then-wife’s e-mail account and did not reveal that he auto-forwarded her e-
mails to his account)

People v. Rizvi, 126 A.D.3d 1172 (3d Dept., 2015) (affirmed convictions for
terroristic threat and identity theft 1 where defendant’s waiver of Miranda rights
was knowing and voluntary, “prior bad act” evidence properly admitted
regarding prior threatening e-mails to government officials and testimony from
former spouse regarding defendant’s prior filing of false reports against her;
terroristic threat consisted of e-mail sent by defendant from public library
computer containing threats to murder governor, his spouse, and other citizens
of state unless imprisoned terrorist was released; also, defendant sent e-mail
to induce government officials to initiate criminal prosecution and possible
deportation of former wife; defendant abandoned appeal from identity theft
conviction)
People v. Kwas, -Misc.3d-, 2016 NY Slip Op. 26186 (App. Term, 2nd Dept., Apr. 6, 2016)(affirmed stalking 4° conviction after plea; criminal information facially sufficient where complainant’s deposition stated she asked defendant to stop contacting her but he came repeatedly to her job and home and texted her; sufficient facts supported intent element and the “sheer volume” of unwanted contact established the “no legitimate purpose” element)

People v. Marian, 49 Misc.3d 52, 2015 N.Y.Slip Op. 25231(Crim.ct., NY Co., July 14, 2015)(dismissed stalking 3° count as facially insufficient where defendant allegedly sent 10-15 e-mails to complainant’s work e-mail, since that statute requires stalking to be “at” the ’place of employment or business;’ stalking 4° count not dismissed, consisting of over 100 Instagram messages, numerous e-mails and texts to home accounts, over 80 phone calls and appearances at apartment, at a bar and at Bowery Electric, including incident at latter where defendant grabbed complainant by the neck; falsely reporting an incident 3° count not dismissed where defendant made false assault report that caused complainant to be arrested)

People v. Selinger, 48 Misc.3d 1218, 2015 NY Slip Op. 511161 (Unrep., Crim.Ct., N.Y.Co., Aug. 11, 2015)(Court granted dismissal of stalking 4° count and denied Clayton motion; defendant’s conduct was “infantile” and “annoying,” but posed no threat of danger to complainant; defendant allegedly placed photo of complainant on Instagram seeking sex partners, defendant RSVP’d for self, dog and deceased father on www.theknot.com to attend wedding, although not invited, and, using alias, had wildlife conservation web-site notify complainant that he had named a cockroach after her)

People v. Dinorcia, 46 Misc. 3d 1223(A), 2015 N.Y. Slip Op 50274 (U) (Crim.Ct. Qns. Co., 2015) (Duplicitous counts of stalking were based on allegation that defendant sent texts threatening to harm complainant and another person but the facts showed that defendant’s course of conduct targeted only the complainant)


People v. Kitsikopoulos, 47 Misc. 3d 1220(A), 2015 N.Y. Slip Op 50714(Unrep.) (Crim.Ct. N.Y. Co., 2015) (denied most of motion for facial insufficiency of complaint charging menacing 2°, stalking 3°, harassment 1° and two counts of stalking 4°; defendant’s similar threats to ex-girlfriend and their children, via
phone and e-mail, over a 4 year period, though infrequent, constituted a course of conduct to make the information facially sufficient for menacing, stalking and harassment; stalking 4° count facially sufficient as to the “no legitimate purpose element” where only purpose of defendant was to cause particular harm identified in NY Penal Law § 120.45(1) and (2), but the information was facially insufficient as to “initiation” element and did not make out a prima facie case of violation of 120.45(2); count alleging endangering the welfare of a child was time-barred where accusatory instrument was filed over two years after date of alleged offense and circumstances extending or tolling this period were absent

People v. Dinorcia, 46 Misc. 3d 1223(A), 2015 N.Y. Slip Op 50274 (U) (Crim.Ct. Qns. Co., 2015) (Duplicitous counts of stalking were based on allegation that defendant sent texts threatening to harm complainant and another person but the facts showed that defendant’s course of conduct targeted only the complainant)

Schoenl v. Schoenl, 136 A.D.3d 1361 (4th Dept., 2016)(Court affirmed violation of Family Court order of protection for text message but reversed NYS law restrictions on possession of firearms and eligibility to obtain firearms, since didn’t meet the criteria in the Family Court Act §§842-a, 846-a regarding crime, use or threat of use of weapon and injury)

People v. Stone, 43 Misc. 3d 705 (Crim. Ct., NY Co., 2014)(Criminal Court granted motion to dismiss misdemeanor information alleging menacing 2 since although defendant put girlfriend in reasonable fear of injury, his text message “Take that” with photograph of himself with mask and knife is not a display of a dangerous instrument, i.e., it is simply a photo of the display of a knife)

People v. Kelley, 42 Misc.3d 1221(A), 986 N.Y.S.2nd 867, 2014 WL 422279(U) (Crim. Ct., N.Y. Co. 2014)(Unrep.) (information alleging three phone calls received around 2:45PM were insufficient to support three counts of aggravated harassment 2o and criminal contempt 2o; the order of protection did not prohibit all communication, only communication which amounted to aggravated harassment 2 ; no allegation that any communication ensued or communication that amounted to aggravated harassment 2 occurred since no indication of whether messages were left or conversations occurred)

People v. Tyrell, -Misc. 3d-, 2014 NY Slip Op. 51095 (Pough. City Ct., July 7, 2014)(denied motion to dismiss criminal contempt 1 and 2 for violating Family Court order of protection and stalking 4 as complaint not facially deficient; under the “injured forum jurisdiction” doctrine, it was immaterial that GPS device was installed in another jurisdiction by private investigator hired by defendant; CPL §530.12 doesn’t limit prosecution of violations of orders of protection to the county in which the violations occurred; defendant was personally served in
court with the order; Family Court order of protection and deposition containing non-hearsay statements were attached to complaint; GPS as form of stalking instilled fear of material harm to complainant and her four children) [See Laws of 2014, ch. 184, which, effective Oct. 21, 2014, includes GPS tracking as a form of stalking where it causes material harm and offender had been told to cease]

Melody M. v. Robert M., 103 A.D.3d 932 (3rd Dept., 2013)(affirmed Family Court order granting father’s motion for sole custody of 3 children in response to mother’s application to change joint custody schedule; parties’ relationship deteriorated so as to constitute change in circumstances rendering joint custody no longer viable; children’s best interests served by custody with father; court approved Family Court issuance sua sponte of order of protection against mother prohibiting her from posting any communications to or about children on Facebook, since she had used it to demean and insult 10-year old who had mental health problems, including, inter alia, posting that he was an “asshole”)

People v Montague, 39 Misc.3d 151(A), 2013 WL 3111447 (Table), 2013 NY Slip Op 50982 (App. Term., 2nd Dept., 2013) (Unreported) (reversed harassment conviction; defendant allegedly followed complainant in his car after “friending” her on Facebook, which she deleted after he told her he recognized her; insufficient evidence that defendant’s conduct placed complainant in fear of physical injury)

Marcela H.A. v. Azouhouni A., 132 A.D.3d 516 (1st Dept., 2015)(Court affirmed harassment 2°, menacing 2° and stalking 3° where Appellant sent annoying and alarming e-mails and texts and stood outside Appellee’s apartment)

Matter of Melody M. v. Robert M., 103 AD 3d 932 (3rd Dept., 2013), lve. app. denied, 21 N.Y.3d 859, 2013 NY Slip Op. 77645 (2013)(affirmed modification of joint custody, custody to father and order of protection prohibiting mother from posting on any social networking site regarding children; relationship between parties deteriorated so as to render joint custody not viable, mother used physical force and posted demeaning statements regarding 10-year old child with mental health issues on Facebook; although father didn’t specifically request the order of protection, it was proper in light of mother’s use of force, disparaging postings and lack of insight as to their effects)

Matter of Giresi-Palazzolo v. Palazzolo, 127 A.D.3d 752 (2d Dept., 2015) (foundation sufficient to admit Respondent’s recording of conversation, where Family Court credited his testimony that “he had personally recorded the conversation, that the recording was a complete and accurate reproduction of their interaction, and that the recording had not been altered.”)
Matter of Jennifer G. v Benjamin H., 84 A.D.3d 1433, 923 N.Y.S.2d 249 (3rd Dept., 2011)(affirmed modification of custody order to give mother exclusive legal custody, although father’s parenting time should not have been reduced; father, inter alia, committed the family offense of aggravated harassment by sending an e-mail to mother’s sister disparaging the mother that was intended to reach mother)

Matter of Julie G. v. Yu–Jen G., 81 A.D.3d 1079, 917 N.Y.S.2d 355 (3rd Dept., 2011)(Family Court family offense of aggravated harassment 2 affirmed where father sent 294 e-mails to mother that made her ill, despite her repeated requests to limit his e-mails to issues regarding the visitation; affirmed five-year order of protection since father’s contact with State Police constituted willful violation of order of protection supporting finding of aggravated circumstances)

Matter of Ashley D., 55 A.D.3d 605, 866 N.Y.S.2d 222 (2d Dept.,2008)(affirmed juvenile delinquency adjudication for assault and order placing juvenile on probation with prohibition against using computer except for educational purposes; juvenile had bragged about her crime on MySpace with a link to a YouTube video of the crime in violation of earlier Family Court order)

Matter of Shannon M. v. Michael C., -Misc.3d-, 2012 WL 2877566 (Fam.Ct., Kings Co., July 10, 2012), N.Y.L.J., July 19, 2012 (court dismissed family offense proceeding where, after connecting through the social networking service “J-Date,” the parties exchanged numerous chat messages; the messages reflected “ordinary fraternization,” first on a social and then on a business level, but did not establish an intimate relationship so as to provide Family Court jurisdiction under Family Court Act §812(1))

People v. Fernino, 19 Misc.3d 290, 851 N.Y.S.2d 339 (Crim. Ct., Rich. Co., 2008)(denied motion to dismiss criminal contempt 2° information since sending a “Friend Request” from MySpace may violate no-contact temporary order of protection issued by Family Court in a juvenile delinquency case)

People v. Welte, 920 N.Y.S.2d 627 (Webster Town Ct. Monroe Co. 2011) (dismiss criminal contempt 2 and stalking 4 charges as insufficient; defendant’s accessing complainant’s list of “friends” on her Facebook account and sending them letters accusing complainant of using their children against him did not violate order of protection that prohibited contact with her either directly or through a third party; dismissed criminal contempt since order of protection did not prohibit contact with her Facebook “friends;” dismissed stalking since pleading insufficient to establish the four elements – lack of legitimate purpose, course of conduct, material harm and prior demand to cease.)
B. Cases in Other Jurisdictions

U.S. v. Jeffries, 2010 WL 4923335, report and recommendation adopted, 2010 WL 4923324 (E.D.Tenn. Oct 22, 2010) (NO. 3:10-CR-100)[not reported in F.Supp.](adopted magistrate’s recommendation to deny defendant’s motion to dismiss indictment for knowingly transmitting a threat of physical harm in interstate commerce where a video was posted on YouTube and Facebook threatening to kill and injure a local judge, as well as his ex-wife for alienating his child from him; threats were not protected speech)

Byron v. Byron, (Ct. Common Pleas, Hamilton Co., Ohio, Jan. 25, 2012) [available on-line at http://westlawinsider.com/wp-content/uploads/2012/03/Facebook-Harassment-Order.pdf] (husband’s abusive, disparaging Facebook posts regarding wife violated order prohibiting direct or indirect contact, husband directed to purge the contempt by posting an apology on Facebook every day for 30 days)

C.L.C. v. Bowman, 249 Or.App. 590, 277 P.3d 634, 2012 WL 1526260 (Or. Ct. App. May 2, 2012)(reversed termination of respondent’s Stalking Protective Order on the ground that court improperly ruled that it could not consider respondent’s blog postings on social networking web-site, where both parties were members, including a comment on petitioner’s boyfriend’s profile; although not direct threats, the postings could be considered in the context of other contacts between the parties)

Barber v. Keas, 2011 WL 5009850 (Tex. App. Oct. 20, 2011)(affirmed granting of order of protection on ground of likelihood of further violence against former dating partner, in part because defendant posted a “veiled threat” on Facebook, i.e., “[t]hat he would never-never intentionally put a person in a position to fail, but being put in that position, that he'll still be standing when the dust clears” in addition to other comments on his Facebook page that made his former dating partner feel unsafe)

Ohio v. Yambrisak, 2011 WL 4974850 (Ohio Ct. App. Oct. 17, 2011)(reversed contempt of court for violation of mediation “no contact” agreement where trial court permitted prosecution to call defendant as a witness against himself in violation of his Fifth Amendment rights; defendant had been charged with posting blogs referencing the complainant)

Andrews v. Ivie, 956 N.E.2d 720 (Ct. App. Ind., 2011)(civil protective order affirmed, since stalking course of conduct during 1 1/2 -year period was demonstrated by 64 pages of e-mails, as well as texts, Facebook messages and gifts that were alarming to former girlfriend)
Johnson v. Arlotta, 2011 WL 6141651 (Minn. Ct. App. Dec. 12, 2011) (affirmed extension of Harassment Restraining Order, although reduced duration from 51 to statutory maximum of 50 years; although not communicating directly with complainant, defendant had violated the “no-contact” order by creating a blog entitled “Help Ann Johnson,” the complainant, which discussed his relationship and personal information about the complainant in the third person, not identifying himself as author; defendant publicized and promoted the blog by sending electronic messages to the complainant’s relatives and friends, posting links to the blog on other websites and using fake Facebook identities to post the blog to other Facebook users, including the complainant’s family)

Dockery v. Dockery, 2009 WL 3486662 (Tenn. Ct. App. Oct. 29, 2009) (husband’s contact with friend of wife through MySpace, asking her to contact wife to ask her to call him, violated “no contact” order of protection; printouts of MySpace communication from the friend’s computer properly were authenticated)

People v. Corleone, 2009 WL 1077189 (Cal. Ct. App., 4th Dist., Apr. 22, 2009) (Unpub.) (affirmed conviction for violating temporary restraining order where defendant posted a Craigslist ad pretending to be complainant, posted multiple threats against complainant on his Myspace page, sent her threatening e-mails and one directing her to his Myspace page and posted a threatening blog entry)

Beaston v. Ebersole, 2009 Pa. Super 243, 986 A.2d 876 (Pa. Super. Ct. 2009) (reversed order returning computers to defendant because there was a sufficient nexus between his computers and his criminal contempt conviction for violation of a “protection from abuse” order; he sent a disturbing e-mail to ex-dating partner [complainant]’s sister, using an e-mail address which included complainant’s initials, job occupation and the word “killer;” he created a MySpace page, which identified him as the “Skankn8er”[“Skank” refers to complainant and the “n8er” is a form of “terminator”, making him the “Skankinator”]; his MySpace page played a song “I Used to Love Her But I Had to Kill Her,” contained the headline “Justice is Coming” and included a posting in which he threatened her; after he “friended” some of complainant’s friends, they alerted her to the postings)

Bedinghaus v. Adams, 2009 WL 279388 (Tex. App., Ft. Worth, Feb. 5, 2009) (affirmed granting of protective order against former dating partner, ruling that the complainant has a reasonable basis for fear as a result of the following pattern of conduct: defendant sent 600 to 800 text messages and e-mails to complainant, some of which were threatening; he sent an invoice to complainant indicating that he hired a private investigator to follow her, printed derogatory statements about her and sent them to her friends, family,
neighbors, and employer; he created blogs on which he posted statements referring to her; he came onto her property and he told her that he saw her while she was vacationing out of state)

Rios v. Ferguson, 51 Conn. Supp. 212, 978 A.2d 592 (Superior Ct., CT., 2008) (posting of threatening video by respondent in North Carolina on YouTube was properly prosecuted as tortious act in Connecticut under its long-arm jurisdiction. citing “New York’s similar long arm statute,” and justified issuance of civil restraining order; assertion of personal jurisdiction over respondent did not offend due process as satisfied criteria of minimum contacts and reasonableness; posting video was not simply passive act on public site but was targeted specifically against petitioner by threatening physical harm)

Odden v. Rath, 730 N.W.2d 590 (N.D. 2007)(affirmed extension of “no-contact” order of protection against father where he had sent mother an e-mail and posted messages on the message-board on his web-site discussing the mother and the custody dispute in violation of the order)

■ Harassment and Bullying

A. New York State and Federal Cases

Elonis v. United States, 135 S.Ct. 2001 (2015) (reversed conviction for posting threatening communications on Facebook; although 18 U.S.C. §875(c) did not specify mens rea, the prosecution failed to prove that defendant intended to issue threats or knew communications would be viewed as threats; court rejected reasonable person standard in favor of proof of actual intent)

T.K. v. NYC Dept. Of Education, 779 F.Supp.2d 289 (E.D.N.Y. 2011)(denied dismissal of parents’ claim child was deprived of Free Appropriate Public Education under federal Individuals With Disabilities Education Act since school personnel were “deliberately indifferent” to, or failed to take reasonable steps to prevent, bullying, but granted dept.’s motion regarding the child’s Individualized Education Plan; student’s right to privacy and to be let alone includes right to security + there is no “constitutional right to be a bully”)

Finkel v. Dauber, 29 Misc.3d 325, 906 N.Y.S.2d 697 (Sup.Ct., Nassau Co., Jul 22, 2010)(disparaging messages about plaintiff regarding sex and HIV, as well as doctored photos, on Facebook group did not constitute defamation, nor could parents of teen-age group members be liable for tort of negligent entrustment of computer to the teens as a dangerous instrument causing harm)
People v. Rodriguez, 19 Misc.3d 830, 860 N.Y.S.2d 859 (Crim. Ct., Kings Co., 2008) (granted motion to dismiss complaint charging aggravated harassment 2, harassment and endangering welfare of a child where defendant allegedly sent messages, including “we need to be together,” “I will never stop talking to you,” and “I love you,” to 14-year old on MySpace social networking site; complainant recognized photo and MySpace name but messages were protected speech, not threats, and suggestion to her that she disobey her father in order to join him were insufficient to constitute endangerment)

People v. Kochanowski, 186 Misc.2d 441, 719 N.Y.S.2d 461 (App. Term, 2d Dept., 2000), lve. app. denied, 95 N.Y.2d 965 (2000) (affirmed aggravated harassment 2 conviction where defendant set up anonymous web-site with suggestive photos of ex-girlfriend, along with her name, telephone number and address, after break-up, and solicited third parties to contact her, although he did not do so directly himself; criminal contempt conviction reversed because order of protection contained no directives to take down the web-site, since ex-girlfriend was not yet aware of it, and order of protection was not served until after the web-site had been created)

People v. Munn, 179 Misc.2d 903, 688 N.Y.S.2d 384 (Crim.Ct., Queens Co., 1999) (denied motion to dismiss aggravated harassment 2 charge for posting threat to police officer on an Internet “newsgroup;” posting was an electronic communication and inclusion of police officer’s name “transformed the communication to one not only intended for the general public, but specially generated to be communicated to” the officer)

B. Cases in Other Jurisdictions

D.C. v. R.R., 182 Cal.App.4th 1190, 106 Cal.Rptr.3d 399, 254 Ed. Law Rep. 305 (Ct. App., 2nd Dist., Calif., 2010) (affirmed denial of defendants’ motion to strike plaintiffs’ suit under “strategic lawsuit against public participation” (SLAPP) statute; plaintiff, a 15-year old high school student, and his parents sued other students and parents for hate crime, defamation and intentional infliction of emotional distress as a result of a student posting a desire on plaintiff’s web-site to “rip [his] heart out” and pound [his] head with an ice pick;” defendants failed to demonstrate that the posting was protected speech)

A.B. v. State of Indiana, 885 N.E.2d 1223, 231 Ed. Law Rep. 921 (Sup. Ct., Ind., 2008) (reversed juvenile delinquency adjudication as evidence of “vulgar tirade” against school principal on student’s private MySpace profile page did not constitute harassment, i.e., communication intended to harass, annoy or alarm; student’s privacy settings made it unlikely principal would see the posting)
Evidence, Discovery and Proof

A. New York State and Federal Cases

United States v. Vayner, 769 F.3d 125 (2d Cir., 2014) (Conviction vacated and case remanded for new trial because District Court abused its discretion in admitting unauthenticated printout of defendant’s purported Facebook profile into evidence and because the erroneous admission was not harmless error)


People v. Badalamenti, 27 N.Y.3d 423 (2016)(evidence of recording of five-year old child’s phone, including defendant threatening to hit child, admissible as not violative of Penal Law §250.00 prohibition against wiretapping without consent of one party to conversation; other parent’s vicarious consent on behalf of child permitted where objectively reasonable basis for belief that recording necessary to serve child’s best interests, including consideration of child’s age; applies federal standard of Thompson v. Delaney, 838 F.Supp. 1535 (D.Utah, 1993))

People v. Johnson, 51 Misc.3d 450, 2015 NY Slip Op. 25431 (Co. Ct., Sull. Co., Dec. 31, 2015)(granted prosecutor’s motion to preclude Facebook evidence that defendant brought to police, as not authenticated, replete with hearsay and not proven relevant or probative; child “liking” a “mildly pornographic” or sexually suggestive 3rd party site on Facebook didn’t mean she consented to sexual molestation by step-father, nor would it impeach child’s credibility; material also violates rape shield law)

People v. Agudelo, 96 A.D.3d 611 (1st Dept., 2012)(affirmed grand larceny 3 conviction where complainant adequately authenticated a print-out of the cell-phone instant messages on complainant’s cell-phone that had been exchanged with defendant; complainant testified defendant’s name appeared on her phone when she received them and a detective testified he had seen the messages on the complainant’s phone and the print-out of the messages; court distinguished People v. Clevenstine, infra, where MySpace provided testimony, since in Clevenstine, that testimony was essential to establish sender’s identity)

Patterson v. Turner, 88 A.D.3d 617, 618 (2d Dept. 2011) (plaintiff’s online Facebook postings were not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access).
People v. Clevenstine, 68 A.D.3d 1448, 891 N.Y.S.2d 511 (3rd Dept., 2009) (affirmed rape 3 conviction, inter alia, because the computer disk containing instant MySpace messages between defendant and two victims was sufficiently authenticated; “both victims testified that they had engaged in instant messaging about sexual activities with defendant,” a State Police investigator testified that he retrieved the messages from the computer used by the victims, a legal compliance officer for MySpace testified that the messages on the disk had been exchanged by users of accounts created by defendant and the victims, and defendant’s wife testified that she had seen the sexually explicit conversations on defendant’s MySpace account)

People v. Givans, 45 A.D.3d 1460, 845 N.Y.S.2d 665 (4th Dept., 2007) (convictions for criminal possession of controlled substance, conspiracy and unlicensed operation of a vehicle affirmed as modified; court held, inter alia, that it was error to admit cell-phone text message sent to defendant without evidence he ever retrieved or read it and without authentication of its accuracy or reliability and, further, that it was error to permit jury to access entire contents of the cell-phone, including items not admitted into evidence)

People v. Pierre, 41 A.D.3d 289, 838 N.Y.S.2d 546 (1st Dept., 2007) (affirmed murder 2 conviction, inter alia, because Internet instant message sent by defendant to victim’s cousin and threatening voice-mail from defendant on victim’s phone were properly authenticated; although victim’s cousin didn’t print or save the instant message and no technical evidence was offered by the Internet service provider or others as to its authenticity, an accomplice witness, a close friend of defendant, testified to defendant’s screen name and the cousin testified that she sent an instant message to that screen name and received a reply; also, the content of the instant message made no sense unless it was sent by defendant and there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name; the voice-mail was authenticated by a witness who recognized defendant’s voice)

Smith v. Smith, 24 A.D.3d 822, 804 N.Y.S.2d 854 (3rd Dept., 2005) (reversed grant of order of protection to wife in family offense proceeding alleging aggravated harassment 2 where she failed to prove that her husband had been the sender of three threatening e-mails to three e-mail addresses that she established after they separated; the first message appeared to come from wife’s former Yahoo ! account, the second from a previously unidentified address and the third appeared to be a message from a person with the wife’s name that had been forwarded to her sister; the Court held that “Even assuming that respondent could access her former Yahoo account to send the first message, this record contains no evidence that links respondent to the
other two messages or which establishes that he knew the addresses to which these e-mail messages were sent.” 804 N.Y.S.2d at 855-856.)

People v. Foley, 257 A.D.2d 243, 692 N.Y.S.2d 248 (4th Dept., 1999)(affirmed conviction for promoting sexual performance by a child and attempted dissemination of indecent material to minors, since computer disk containing conversations between undercover trooper and defendant, as well as graphic images sent by defendant to trooper, were properly admitted; contents were unique and were authenticated by trooper; court also ruled indecent dissemination law not vague or overbroad and not protected speech)

People v. Harris, -Misc.3d-, 2012 WL 2533640, 2012 N.Y. Slip Op. 22175 (N.Y. Crim. Ct. N.Y. Co., June 30, 2012), N.Y.L.J., July 5, 2012 (denied Twitter’s motion to quash prosecutor’s subpoena, rejected 4th Amendment, federal Stored Communications Act and NYS legal arguments, after earlier denial of defendant’s motion; Twitter directed to produce arrested Wall St. Occupier’s user account information and “tweets” between Sept. 15th and Dec. 30, 2011 in disorderly conduct charge stemming from Brooklyn Bridge demonstration; access to “tweets” after Dec. 30th require a warrant; as the recipient of the prosecutor’s subpoena, Twitter, but not defendant, had standing to challenge it; Twitter users have no proprietary interest or reasonable expectation of privacy in publicly posted “tweets,” especially since Twitter signed agreement with Library of Congress to archive all “tweets” and states in its Terms of Service that it is “primarily designed to help you [the user] share information with the world”; court noted that the change to Twitter’s Terms of Service, effective May 17, 2012, made only after the denial of defendant’s motion to quash, now provide that “You Retain Your Right to Any Content You Submit, Post or Display on or Through the Service;” court also rejected Twitter’s argument that compliance with the subpoena would be a burden) [note: Twitter has indicated it will appeal. See T. El-Ghobashy, “Twitter to Appeal Occupy Decision,” Wall St. Journal, July 20, 2012]

Matter of B.M. v. D.M., 31 Misc.3d 1211(A), 927 N.Y.S.2d 814 (Table), 2011 WL 1420917 (N.Y.Sup.), 2011 N.Y. Slip Op. 50570(Unreported disposition) (in divorce action, wife’s testimony acknowledging authorship and accuracy of blog- posts regarding belly-dancing on websites tribe.net, facebook.com, and myspace.com was used to refute her allegations that an injury caused permanent disability preventing physical activity )

People v. Lenihan, 30 Misc.3d 289, 911 N.Y.S.2d 588 (Sup.Ct., Queens Co., 2010)(court declined to permit defendant to cross-examine two prosecution witnesses regarding photos his mother printed from MySpace that allegedly depicted the witnesses and victim making hand gestures and wearing clothing
that suggested an affiliation with the “Crips” gang; court held “[i]n light of the ability to ‘photo shop,’ edit photographs on the computer,” the photos could not be authenticated)

Schreiber v. Schreiber, 29 Misc.3d 171, 904 N.Y.S.2d 886 (Sup. Ct., Kings Co., 2010)(in matrimonial action, court denied wife’s application for entire hard drive of husband’s office computer containing financial data to be deposited with clerk of court for forensic examination or for wife’s expert to copy it)

Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (Sup. Ct., Suffolk Co. 2010) (court granted the defendant’s motion to access plaintiff’s current and historical Facebook and Myspace pages and accounts, including deleted pages; court directed plaintiff to sign an authorization and consent and reasoned that plaintiff did not have a reasonable expectation of privacy in light of the policies of both social network companies)

Gurevich v. Gurevich, 24 Misc.3d 808, 886 N.Y.S.2d 558 (Sup.Ct., Kings Co., 2009)(in matrimonial action, wife was permitted to introduce e-mails she obtained from husband’s e-mail account after they separated using the password he had given to her while they were together, notwithstanding Penal Law §250.05, the eavesdropping statute, since the e-mails were already stored in his account, not intercepted while in transit)

Matter of D.M. v. J.E.M., 23 Misc.3d 584, 873 N.Y.S.2d 447 (Fam. Ct., Orange Co., 2009)(in family offense proceeding alleging that father sent vulgar messages to mother containing false allegations of sexual abuse of child, court approved subpoena directing Yahoo!, the Internet Service Provider, to disclose only information identifying father as holder of the e-mail account and the contents of e-mail messages sent from that account to the mother's e-mail account during a designated time-frame)

Matter of Bill S. v. Marilyn S., 8 Misc.3d 1013(A), 801 N.Y.S.2d 776 (Table), 2005 WL 1645339, 2005 N.Y. Slip Op. 51093(Sup.Ct., Nassau Co., 2005) (Unreported Disposition)(subpoena of e-mails, telephone logs and three years of AOL instant messages chat logs to establish divorce grounds rejected as overbroad; court noted that more latitude is afforded to discovery regarding financials, as compared to grounds)

Byrne v. Byrne, 168 Misc.2d 321, 650 N.Y.S.2d 499 (Sup. Ct., Kings Co., 1996) (in matrimonial action, court granted wife’s motion for discovery of information stored on a laptop computer used by husband, as well as by the children, in the marital residence although owned by his employer, subject to exclusions on the ground of attorney-client privilege; wife’s taking possession of “family” laptop not improper)
B. Cases in Other Jurisdictions

Crispin v. Christian Audigier Inc., 717 F. Supp. 2d 965, 974 (C.D. Cal. 2010) (party has standing to challenge a subpoena to a third party defendant where the party had personal interest in the postings and messages on Facebook and Myspace and had standing to challenge the subpoena, citing federal Stored Communications Act, 18 U.S.C. § 2703; case remanded to determine whether the party's privacy settings on Facebook and Myspace granted limited access to the party’s page and, based on this finding, whether the motion to quash should be granted, e.g., if the party's privacy settings restricted access to a limited few instead of the general public, the party’s motion quash the subpoena could be granted)

People v. Rodriguez, 128 Nev. Adv.Op 14, 273 P.3d 845 (Sup.Ct., Nev., 2012) (failure to authenticate 1o out of 12 text messages was error but harmless; citing Commonwealth v. Koch, infra, court held that evidence is needed to show not simply that messages came from a particular phone, but that the alleged author of the messages was the one who actually sent them since others might have used the phone)

State v. Eleck, 130 Conn.App. 632, 23 A.3d 818 (Conn.App.,2011)(affirmed conviction of assault with dangerous instrument where defendant failed to authenticate print-out purporting to be electronic messages sent from prosecution witness’ Facebook account; witness indicated her account had been “hacked;” networking site not high- security and content of messages not so distinctive as to necessarily point to witness as author)

Commonwealth v. Koch, 39 A.3d 996 (Pa.Super.Ct., 2011)(substance conviction reversed because police detective’s transcriptions of text messages on defendant’s cell-phone were not properly authenticated and error was not harmless; while phone was found on a table near defendant, the prosecution conceded that defendant did not author all of the text messages on her phone; prosecution offered no direct proof in the form of testimony from recipients or other possible authors of the text messages and the contents of the messages did not provide any circumstantial evidence as to authorship; while text messages are unique to the cell-phone from which they were sent, the owner of the cell-phone does not necessarily have exclusive access to it) [Note: pending appeal: appeal granted, 44 A.3d 1147 (Pa. May 15, 2012)]

State v. Ruggiero, 163 N.H. 129, 35 A.3d 616 (Sup.Ct., N.H., 2011)(affirmed conviction for falsifying physical evidence and filing a false report, inter alia, on the ground that e-mails sent by defendant to her divorce attorney, the assistant attorney general and prosecutor were properly authenticated in testimony by both the assistant attorney general and divorce attorney)
Tienda v. Texas, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012) (affirmed murder conviction, as admission of MySpace profile print-outs was adequately authenticated by circumstantial evidence indicating that it was created and maintained by defendant; the web-page print-outs contained photos of defendant and referred to the victim’s death, to music played at his funeral, to defendant’s gang and to the electronic monitor that was a condition of his house arrest pending trial; also, the web-page print-outs indicated that defendant was the author and referenced his nick-name and e-mail address)

Vermont v. Simmons, 27 A.3d 1065, 1071 (Vt. 2011)(affirmed denial of defendant’s motion to suppress evidence obtained by subpoenaing Myspace, since defendant had no reasonable expectation of privacy; Myspace Terms of Service privacy policy authorized disclosure of account information if necessary to respond to a subpoena)

Griffin v. Maryland, 419 Md. 343, 19 A.3d 415, 427-28 (Md. 2011)(reversed conviction for insufficient authentication of printout of image from defendant’s girlfriend’s MySpace page ostensibly containing her picture, date of birth and location and identifying the defendant; prosecution failed to inquire whether MySpace account was hers or whether she produced its contents and offered no extrinsic evidence about how the police obtained the printout or how it was linked to the girlfriend; no evidence was presented as to search of owner of computer used for the posting or as to efforts, if any, to obtain the information from MySpace to link the profile and posting to the girlfriend)

Commonwealth v. Purdy, 459 Mass. 442, 945 N.E.2d 372 (Sup. Jud. Ct.,Mass., 2011)(affirmed conviction for maintaining house of prostitution; e-mails allegedly sent by defendant were properly authenticated; they were sent from defendant’s e-mail address, were on the hard drive of a computer defendant that he said he owned and were accessible through the passwords he provided from memory to the police; one e-mail contained a photo of him and another described his unique combination of businesses as a hair stylist, masseur and art/antiques dealer; defendant’s argument that others had access to the computer and sent the e-mails and that there was no direct evidence of observation of defendant preparing and sending the e-mails related to weight, not admissibility)

Commonwealth v. Williams, 456 Mass. 857, 869, 926 N.E.2d 1162 (2010) (although it “did not create a substantial likelihood of a miscarriage of justice,” testimony regarding a MySpace message should not have been admitted in absence of evidence authenticating authorship, indicating whether alleged author had exclusive access to the account, not simply that it appeared to come from a particular account; evidence was insufficient regarding MySpace security and whether site was password-protected)
Dockery v. Dockery, 2009 WL 3486662 (Tenn. Ct. App. Oct. 29, 2009) (copies of print-outs of MySpace contacts from computer of friend of wife sufficiently authenticated so as to be admissible; husband’s contact with friend of wife through MySpace, asking her to contact wife to ask her to call him, violated “no contact” order of protection)

Yath v. Fairview Clinics, N.P., 767 N.W.2d 34, 39 (Minn. Ct. App. 2009). The plaintiff subpoenaed the defendant’s computer files, which the defendant received two days after the browser history and temporary internet files had been erased from her computer. Id. at 41. The evidence was not able to be obtained, and the court did not impose sanctions on the defendant because the deletion of evidence could have been from standard computer maintenance. Id. at 42.

Service of Process by Social Media


Baidoo v. Blood -Dzraku, 48 Misc.3d 309, 5 N.Y.S.3d 709 (Sup. Ct. N.Y. Co., 2015) (Wife permitted serve divorce papers on husband via Facebook where inability to locate husband made personal service impossible, substitute service on person of suitable age and discretion and “nail & mail” service were also impossible, wife had no e-mail address, newspaper publication was almost guaranteed to not provide husband with notice, and where wife verified that Facebook account belonged to husband and was regularly checked, and wife could call or text husband to check his account) [note: not a domestic violence case]