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# The Legal Evolution of Electronic Communications

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**T**he use of electronic communications has impacted the way we speak, communicate, think, and live. Our personal and professional lives have become overwhelmed with information and the use of electronic communications that deliver information to us each day via text messages, email, and social media. State and federal laws have begun, albeit slowly, to address the use and misuse of electronic communications, with Maryland lawmakers taking recent action to clarify and toughen laws.

## Recent Cases

With increased national awareness on the issue of bullying, states have been forced to amend existing laws or enact new laws on electronic communications to address the new "electronic schoolyard" in cyberspace. Recent high profile cases underscore the importance of establishing clear laws to better define electronic communications, as well as the underlying conduct delivered through such communications, in order to protect the intended victims. They include a Missouri mother's use of the social media site, MySpace, to harass a young girl who ultimately took her own life, a West Virginia cheerleader's use of MySpace to harass a peer using school computers, and a New Jersey college student's use of a webcam to film and broadcast his roommate's activities with a same-sex partner which allegedly contributed to the filmed roommate's suicide. While such high profile cases clearly invade one's moral conscience, only recently has the conduct at the forefront of these electronic abuses been defined or even recognized as a crime.

In the August 2010 Cyberbullying Report commissioned by Maryland Governor Martin O'Malley, statistics revealed that, by 2008, 93 percent of adolescents ages 12 to 17 had access to the Internet. *Cyber Bullying: Keeping Maryland at the Forefront of Bullying Prevention*, Governor's Summer Internship Program (August 13, 2010), <http://desertrose.shriver.umbc.edu/gsip/gsip.policy.papers.2010/gsip10.cyberbully.pdf>. Over the past several years, our country has witnessed both adults and adolescents alike committing acts of abuse via electronic communications. In 2006, a Missouri mother, Lori Drew, created a fictitious MySpace account in the name

of a sixteen year old boy to harass her daughter's friend. Through the use of both MySpace and America Online Instant Messenger, Drew and her assistant communicated with the teenage girl while posing as a teenage boy, in an alleged scheme to humiliate her, which ultimately led to the girl's suicide. In November, 2008, Drew was convicted of three misdemeanor counts under the Federal Computer Fraud and Abuse Act which included unauthorized access to computers.

On appeal, Drew's convictions were vacated. In vacating Drew's convictions, the United States District Court judge reasoned that, "[t]reating a violation of a website's terms of service, without more, to be sufficient to constitute 'intentionally access[ing] a computer without authorization or exceed[ing] authorized access' would result in transforming [the statute] into an overwhelmingly overbroad enactment that would convert a multitude of otherwise innocent Internet users into misdemeanor criminals." *United States v. Drew*, 259 F.R.D. 449, 466 (C. D. Cal. 2009).

In 2005, a West Virginia high school senior and cheerleader, Kara Kowalski, created a MySpace page titled "S.A.S.H.," which stood for "Students Against Sluts Herpes" or "Students Against Shay's Herpes," directed at a fellow student, Shay N. Ms. Kowalski created the webpage from her home and invited 100 of her MySpace "friends" to join the page, of which twenty-four students joined, one of whom subscribed using a school computer. Shay N.'s parents contacted Kowalski and filed a harassment complaint with the school, which resulted in a ten day suspension of Kowalski, a ninety day social suspension prohibiting Kowalski from

attending school social events, and suspension from the cheerleading squad. Kowalski then filed a civil suit in the United States District Court for West Virginia against the school district challenging her suspension, arguing that her speech originated *outside* of the school, and therefore was beyond the reaches of the school's anti-bullying policy. *Kowalski v. Berkeley County Schools, et al.*, 652 F.3d 565, 575 (4<sup>th</sup> Cir. 2011), *cert. denied* 132 S. Ct. 1095 (2012).

The United States District Court for West Virginia granted summary judgment in favor of the school district Defendant, upholding Kowalski's suspension. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the District Court, and applied the standard set forth in *Tinker v. Des Moines*, holding that it was "satisfied that the nexus of Kowalski's speech to [the school's] pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being." *Id.* at 573.

In a 2010 case that received international attention, a Rutgers University student, Dharun Ravi, used a webcam to film his roommate engaged in a consensual sexual encounter with a same-sex partner in the dormitory room that the two shared. Ravi broadcasted the video on the Internet and it was seen by friends of Ravi. Following the distribution of the video, the victim, Tyler Clementi, took his own life. Ravi was criminally charged with invasion of privacy, bias intimidation, tampering with evidence, witness tampering, and hindering apprehension or prosecution in a New Jersey state court. On March 16, 2012, following a jury trial, Ravi was found guilty

of, among other things, invasion of privacy for the filming and distribution of the video of Clementi and another man. There was widespread media coverage of this case. On May 21, 2012, Ravi was sentenced to serve thirty days in jail, placed on three years' probation, and ordered to perform 300 hours of community service and pay a \$10,000 fine, as well as mandatory attendance in counseling on the topics of cyberbullying and alternate lifestyles. Ravi completed his sentence after serving only twenty days of incarceration. Christina Ng, *Ex-Rutgers Student Dharun Ravi Released from Jail*, ABC News (June 19, 2012), <http://abcnews.go.com/US/rutgers-student-dharun-ravi-released-jail/story?id=16602245#.UD9iSsGPXSg>.

## Electronic Communications

Understanding laws and definitions regarding electronic communications will assist practitioners to identify relevant issues in their cases which will likely impact virtually all legal practice areas. In March, 2012, the National Conference of State Legislators ("NCSL") defined cyberstalking as the use of the Internet, email or other electronic communications to stalk, and generally referring to a pattern of threatening or malicious behaviors. *State Cyberstalking and Cyberharassment Laws*, National Conference of State Legislatures (2012), <http://www.ncsl.org/issues-research/telecom/cyberstalking-and-cyberharassment-laws.aspx>. Cyberstalking may be considered the most dangerous form of Internet harassment, based on posing a credible threat of harm. For states with cyberstalking laws, punishment can range from misdemeanors to felonies.

To date, Maryland does not have a cyberstalking law.

The NCSL distinguishes cyberharassment from cyberstalking in that cyberharassment is generally defined as not involving a credible threat. Cyberharassment usually pertains to threatening or harassing email messages, instant messages, or to blog entries or websites dedicated solely to tormenting an individual. Some states approach cyberharassment by including language addressing electronic communications in general harassment statutes, while others have created stand-alone cyberharassment statutes. Cyberbullying is the "willful and repeated use of cell phones, computers, and other electronic communication devices to harass and threaten others." *State Cyberstalking and Cyberharassment Laws*, National Conference of State Legislatures (2012), <http://www.ncsl.org/issues-research/telecom/>

cyberstalking-and-cyberharassment-laws.aspx.

In Maryland, electronic communication is defined under Maryland's Education Code as, "a communication transmitted by means of an electronic device, including a telephone, cellular phone, computer, or pager." Md. Code Ann., Educ. §7-424(a)(3) (2012). Electronic communication is also separately defined for its application under Maryland's wiretap laws. Md. Code Ann., Cts. & Jud. Proc. §10-401(11)(2012).

Electronic mail, not communication, is currently defined under Section 3-805(a) of Maryland's Criminal Code as "the transmission of information or a communication by the use of a computer or other electronic means that is sent to a person identified by a unique address and that is received by the person." This statute was recently amended after the 2012 Maryland General Assembly

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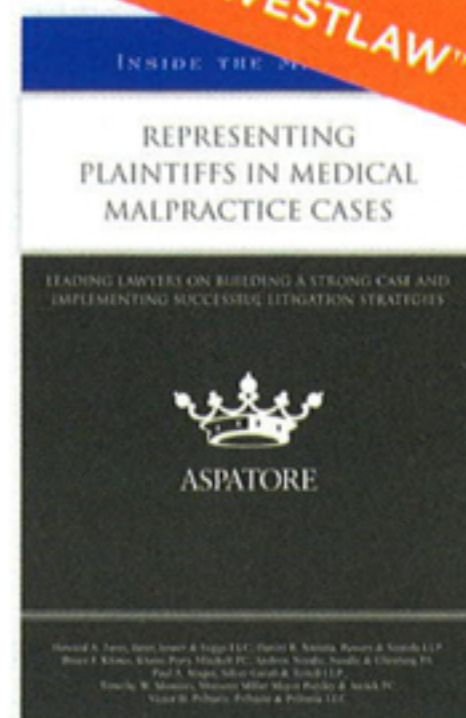
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unanimously passed House Bill 8 and Senate Bill 175 to expand the definitions and prohibitions for electronic harassment effective October 1, 2012. Md. Code Ann., Crim. Law §3-805 (2012). Prior to these amendments, Section 3-805(b) only identified the use of electronic mail with intent to harass one or more persons or by sending lewd, lascivious, or obscene material as prohibited conduct.

Recognizing that electronic attacks can take many forms, the amended criminal statute now prohibits the malicious course of conduct through electronic communications that alarms or seriously annoys another, with the intent to harass, alarm or annoy, after receiving a reasonable warning or request to stop, and is without a legal purpose. Md. Code Ann., Crim. Law §3-805(b)(2012). The amended criminal statute broadens the definition of "electronic mail" to "electronic communication," which is now defined as "the transmission of information, data, or a communica-

tion by the use of a computer or any other electronic means that is sent to a person and that is received by that person." According to the Bill's fiscal notes, the Office of the Attorney General interpreted amended Section 3-805 to apply to the harassed person's Facebook page and instant messages, but not to communications on blogs, webpages, Twitter, bulletin boards, and postings on the poster's or a third party's Facebook or My Space page because of the requirement that the communication be sent "to a person" and "received by the person." *House Bill 8 Fiscal and Policy Note*, Department of Legislative Services, Maryland General Assembly (2012). The elements of this amended statute are consistent with language already contained in the harassment criminal statute found in Section 3-803 of Maryland's Criminal Code. Md. Code Ann., Crim. Law §3-803(a)(2012).

Section 7-302 of Maryland's Criminal Code is also relevant to electronic communications and it identifies other prohibited conduct regarding computers and technology. Maryland Criminal Code §7-302 (c) (1) provides:

A person may not *intentionally, willfully, and without authorization* (i) access, attempt to access, cause to be accessed, or exceed the person's authorized access to all or part of a computer network, computer control language, computer, computer software, computer system, computer service, or computer database; or (ii) copy, attempt to copy, possess, or attempt to possess the contents of all or part of a computer database accessed in violation of item (i) of this paragraph.

Under Section 7-302(c)(3) of the Maryland Criminal Code, "[a] per-

son may not intentionally, willfully, and without authorization (i) possess, identify, or attempt to identify a valid access code; or (ii) publicize or distribute a valid access code to an unauthorized person." The statute provides for either a felony or misdemeanor to be charged depending upon the applicable section of the statute given the particular facts. Md. Code Ann., Crim. Law §7-302(d)(2012).

In an effort to address the widespread trend on bullying, including cyberbullying, the 2005 Safe Schools Reporting Act required the Maryland State Department of Education ("MSDE") and all Maryland County and Baltimore City public school systems to report all instances of harassment and intimidation reported by students. Md. Code Ann., Educ. §7-424 (2012). In 2008, the General Assembly required MSDE to develop a model anti-bullying policy. Md. Ann. Code Educ. §7-424.1 (2012). Maryland's Education Code defines "bullying, harassment, or intimidation" as:

(2) intentional conduct, including verbal, physical, or written conduct, or an intentional electronic communication, that:

(i) Creates a hostile educational environment by substantially interfering with a student's educational benefits, opportunities, or performance, or with a student's physical or psychological well-being and is:

1. Motivated by an actual or a perceived personal characteristic including race, national origin, marital status, sex, sexual orientation, gender identity, religion, ancestry, physical attribute, socioeconomic status, familial status, or physical or mental ability or disability; or

2. Threatening or seriously intimidating; and
- (ii) 1. Occurs on school property, at a school activity or event, or on a school bus; or
2. Substantially disrupts the orderly operation of a school.

Md. Code Ann., Educ. §7-424(a)(2) and §7-424.1(a)(2)(2012).

Maryland law requires that each school district in the State of Maryland have available on its website the local policy regarding anti-bullying. Nonpublic schools that receive State funds are likewise required to develop a bullying, harassment, and intimidation policy or forego the funding. Md. Code Ann., Educ. §7-424.3 (2012). The MSDE also makes available its model policy on its website. *Maryland's Model Policy To Address Bullying, Harassment, or Intimidation*, Maryland State Department of Education (February 24, 2009), <http://www.marylandpublicschools.org/NR/rdonlyres/0700B064-C2B3-41FC-A6CF-D3DAE4969707/19401/ModelBullyingPolicyDRAFT102108.pdf>.

In its March 31, 2012 report to the Maryland General Assembly ("MSDE Report"), the MSDE reported 4,678 state-wide incidents in the 2010-2011 school year, an increase of 860 from the 2009-2010 school year and an increase of 2,992 from the 2008-2009 school year (page 4). *Bullying, Harassment, or Intimidation in Maryland Public Schools*, Maryland State Department of Education (2011), <http://www.marylandpublicschools.org>. The majority of victims and offenders were age 12. MSDE Report, pp. 10,11. Interestingly, only 7.7 percent of reported incidents consisted of electronic communications,

an increase of 4.5 percent from the previous year. Incidences of bullying, however, are significantly underreported. MSDE Report, pp. 10, 21.

### A New Kind of Playground for Children, Adolescents and Parents

Child and teen access to computers and the Internet has steadily increased over the past decade. As of 2011, 95 percent of adolescents ages 12 to 17 had access to the Internet and 80 percent of those are users of social media sites, the highest percentage of any age group using the Internet in America. Joanna Brenner, *Pew Internet: Teens*, Pew Research Center's Internet and American Life Project (2011), <http://pewinternet.org/Commentary/2012/April/Pew-Internet-Teens.aspx>.

There is currently no Maryland appellate opinion on cyberbullying. Older cases from other jurisdictions, including *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), *Bethel Sch. Dist. No 403 v. Fraser*, 393 U.S. 503 (1969), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), have provided the standard for courts to analyze speech of students in light of First Amendment protections. More recent cases involving electronic communications by students on and off school property are highly fact specific and must be analyzed under applicable standards on a case by case basis. In January, 2012, the United States Supreme Court denied *certiorari* on three student First Amendment challenges, including *Kowalski*, leaving unanswered the question of whether school districts can discipline students for their off-campus speech made on the Internet about adminis-

trators or peers.

Parents of children and adolescents who engage in the misuse of electronic communications may find themselves liable for the acts of their children in certain circumstances. Arizona and California have enacted laws that allow for parental liability for the acts of their children who engage in cyberbullying or other forms of cyber abuse where such acts are malicious, willful, or intentional. Cal. Civ. Code §1714.1; A.R.S. §12-661. Maryland statutes do not specifically provide for such parental liability.

### Conclusion

Some form of electronic communications exists in virtually all law practice areas today. Criminal and civil discovery requests now routinely include the production of electronic communications. Accordingly, the use of email communications, Facebook postings, twitter, blogs, text messages, and other web materials have become commonplace in litigation matters. Our reliance upon the Internet as practitioners brings with it additional professional responsibilities to understand and ensure compliance with current state and federal laws governing technology. Practitioners must be aware of the appropriate use of electronic communications and educate themselves to both better assist clients and to maintain the highest ethical standards in the practice of law.

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