

Application of Existing Laws on Emerging Technology

2018 Florida Atlantic University



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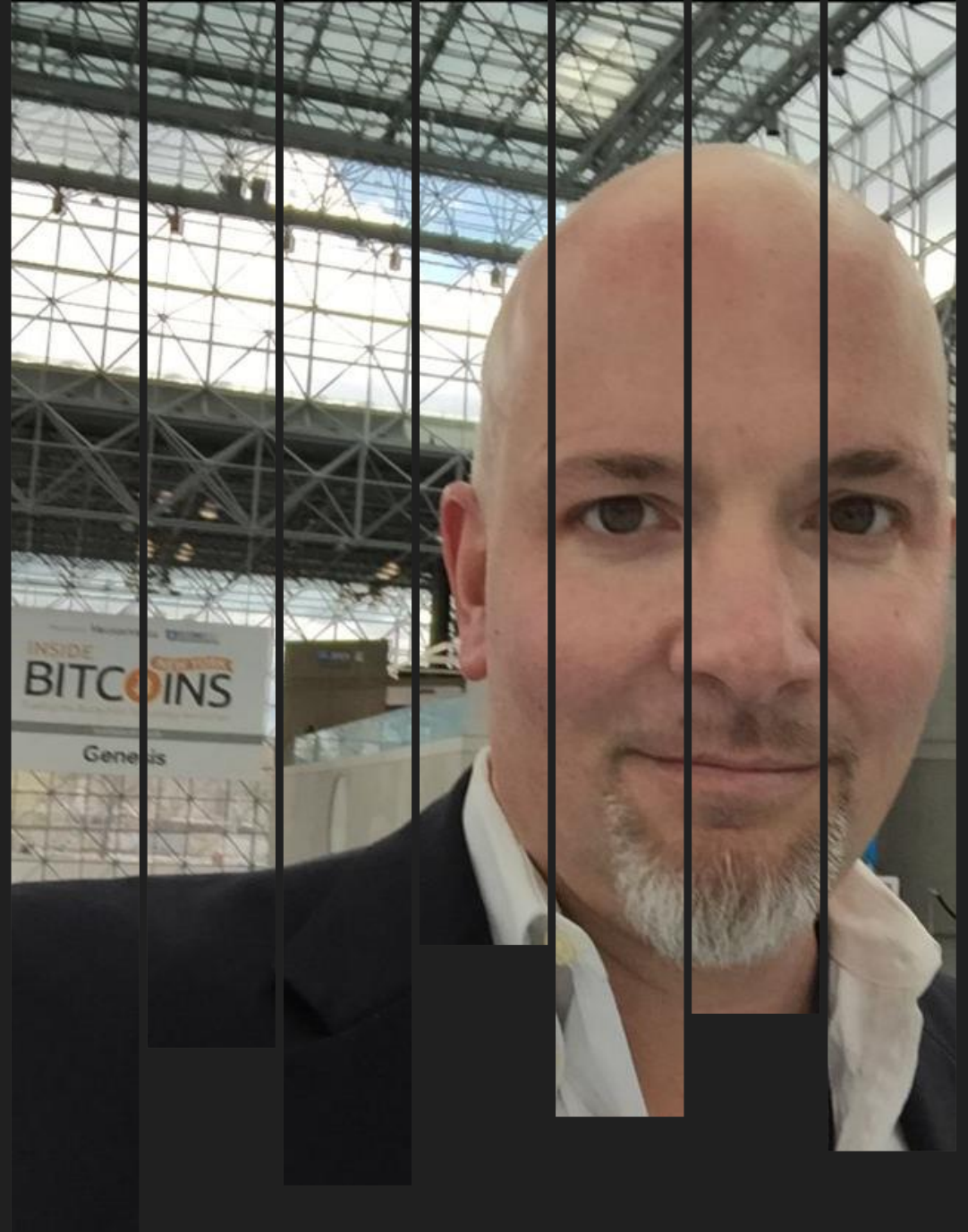


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Examples of “Emerging Technology”



01

Drones

Package delivery

Sales

Agriculture

Film

Law enforcement



02

Blockchain

Internet purchases

Smart contracts

Rewards programs

Alternative Currency



03

Security / Smart Devices

Retail sales / loss

Business

Education



04

Virtual Reality

Retail sales

Real estate

Education

Entertainment



05

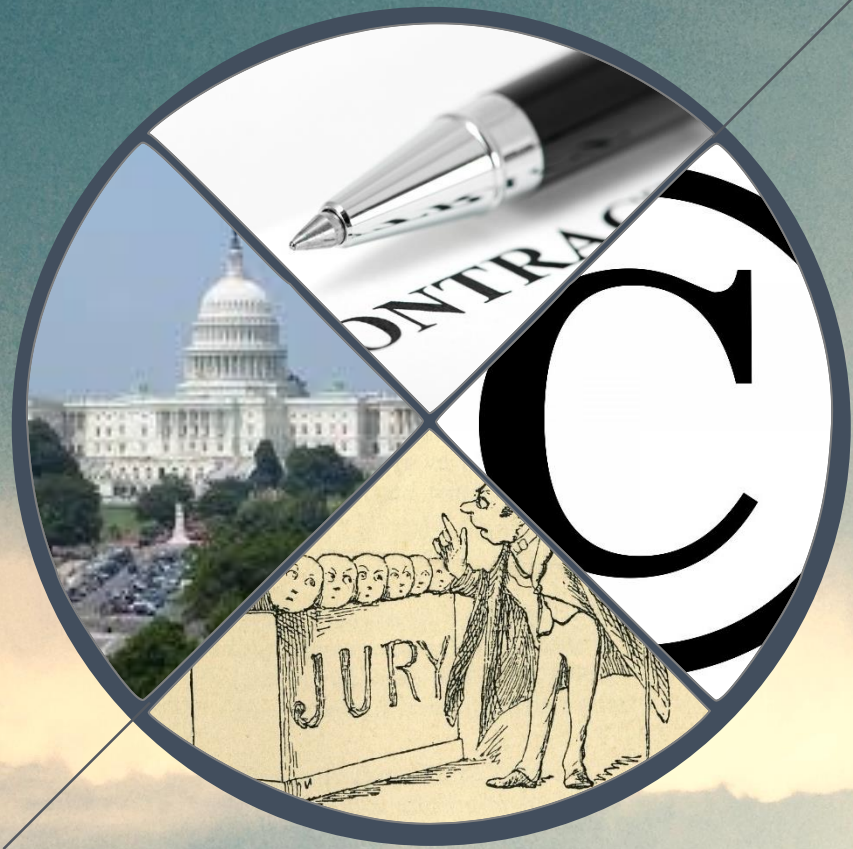
Social Media

Marketing

Advertising

Entertainment





What do all of those emerging technologies have in
Common?

Contracts

Regulation

Litigation

Intellectual Property

You.

The application of Law to new ideas often turns on....

Creativity



Attorney
Knowledge of
Technology



Social Trends
(like concept
of Privacy)



[sometimes
the law
adapts well]



True Threats

I'm going to kill you.

I'm going to kill you. 

I'm going to kill you.



I'm going to kill you.

I'm going to kill you.



I'm going to kill you.



Emojis can change the message... but emojis use “Unicode” which appear differently on different platforms, which can distort the message

92% people use emojis in online communications

BUT

25% can't agree on connotation.



Emoticon Stalking Case

“I’m not going to do anything to serious. Just want to make her feel crappy -D”

(when police got the warrant, they dropped the “-D”
from this statement)

Emoticon Defamation Case

“City is getting more trucks because [plaintiff] wants to sell more tires to get money :P”

(Court: “on its face, [this statement] could not be taken seriously. The use of the :P makes it *patently clear* that the commenter was making a joke.”) Really?

Outcome of these cases are going to turn on...

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Legal Ethics & Social Media



Rules Reg. Florida Bar 4-4.2 and 4-3.5

- “a lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.”
- “a lawyer shall not... communicate or cause another to communicate with anyone the lawyer knows to be a member of the [panel] from which the jury will be selected.”

Question #1 (you are a paralegal or law clerk)

Your lawyer is suing a large corporation.

He asks you to FB-friend an executive at the company who you do not know in order to access that person's Facebook information.

Should you?

No, you cannot make *ex parte* contact with an opposing party.

See Rule 4-4.2; 4.3; see *also* San Diego Bar 2011-2

Question #2 (you are a paralegal or law clerk)

During trial, you are asked to check if jurors have public Facebook accounts.

Your lawyer now asks you to research jurors' LinkedIn profiles; you have a LinkedIn account which you rarely use.

You log in to see the jurors' LinkedIn profiles.

Any ethical concern?

Yes, likely there is a concern.

If LinkedIn (or any social media site) would notify the person that you looked at his/her page, this “might run afoul” of the ethic rules against direct communication with jurors.

Facebook and Twitter do not notify people that you have searched for them (at least currently).

Unless you change your LinkedIn settings, people can see that you’ve looked at their LinkedIn profile.

NY City Bar Opinion 2012-2; see also FI Rule 4-3.5(d)(1)-(2).

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Is Accessing Someone's Facebook Acct a Crime?

Florida Computer Crime Act, F.S. 815.06(2)(a)

“a person commits an offense against users [of a device or network] if he or she willfully, knowingly, and without authorization... accesses or causes to be accessed any computer, computer system, network, or electronic device with knowledge that such access is unauthorized.”

Mario Crapps v. Florida (Fla. 1st DCA 2015)

Court held that he “access[ed] a program or information” (Instagram) but that is not necessarily the same as accessing a device or computer network. Huh?

The appellate court reversed Crapps’ conviction because the prosecutor failed to present evidence.

“Nothing in the record establishes or explains how accessing an Instagram account works from a technological perspective, leaving unanswered whether or how Appellant’s actions amounted to accessing a specific computer, computer system, or computer network.”

(This is the only case in Florida referencing Instagram)

Joel Umhoefer v. Florida (Fla. 2d DCA 2017)

State of Florida put on expert testimony explaining that the defendant used Pass Finder to bypass password protection on the victim's account (evidence of unauthorized access) and that the content accessed was "not stored locally but on Facebook's server farm, which is a network of computers that provide service and content access."

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Secretly Recording Someone

Interception and Disclosure of Wire, Oral, or Electronic Communications, F.S. 934.03

It's a crime to:

- 1. Intentionally intercept any wire, oral, or electronic communication*
- 2. Disclose content of any communication if you know it was intercepted*
- 3. Use content of any communication if you know it was intercepted.*

Includes: attempting; using a device; or getting someone else to do it

BUT: *the person has to have a reasonable expectation of privacy*

Prohibition of use as evidence of intercepted... oral communications, F.S. 934.06

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.

McDade v. State (Fla. 2014)

A minor, the alleged victim of child abuse, tries to stop her abuser by secretly recording a conversation with the defendant while he is abusing her in his bedroom. The recording is damning.

Convicted?

McDade v. State (Fla. 2014)

No. The minor “intentionally intercepted” the conversation and the defendant, in the bedroom of his own home, had a reasonable expectation of privacy for that conversation.

[bad lawyering and incomplete police work?]

Belle v. State (Fla. 2d DCA 2015)

One night, Defendant arrives intoxicated in his girlfriend's house. They get into an argument. She tells him that she is recording what he is saying since he's not making sense during a fight and she wants to play it for him when he sobers up. He takes the phone from her. Angry, she leaves.

Her iPhone, still on, records him saying, "I'm going to play with your f***[ing] daughter" followed by recorded sounds consistent with child molestation.

Convicted?

Belle v. State (Fla. 2d DCA 2015)

Yes.

- Girlfriend was not intentionally recording that subsequent conversation.
- It was not hidden – he was told that the iPhone was recording and he took possession.
- Unlike McDade, not in his own home.

State v. Caraballo (Fla. 2d DCA 2016)

Retail store theft case where a security camera captured “recorded statements apparently containing admissions by [Defendant].”

The Defendant worked at a cellular phone store and was confronted at a reception area, during business hours, near one of several cameras which blink while recording.

The Defendant was aware of the video cameras and there was a notice posted that “this business is under 24-hour video and audio surveillance.”

State v. Caraballo (Fla. 2d DCA 2016)

- Not hidden recording
- No reasonable expectation of privacy (what if the conversation occurred outside of business hours?)
- Worse, this was a cell phone store which may suggest the defendant had greater sophistication

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How do you prove a
text message came
from the defendant?

Alvin Gayle v Florida (Fla. 4th DCA 2017)

39 year old man has a sexual relationship with 14 year old girl.

Police obtained image of victim's cell phone which was assembled by a program into an Extraction Report.

Her phone had texts messages between her and the defendant "in which [defendant] directly stated he was having sex with the victim."

In closing, the State attorney said, "what's more clearer [sic] than that?"

Defendant, meanwhile, denied he sent the text and claimed that it was hearsay.

Alvin Gayle v Florida (Fla. 4th DCA 2017)

Admission: with the proper predicate, this could be proven through the victim. Defendant could still dispute, but it would go to weight, not admissibility.

State of Mind: on appeal, State argued it was not trying to admit for the truth of the statement but to show victim's state of mind (that he was in a relationship). But the closing argument?

Business Record: for hearsay, a statement is an oral or written assertion by a declarant. Machines are not declarants. The Extraction Report is more akin to a photograph than a written assertion. Neither photo of the world at the time, nor the content of the phone, requires any interpretation or assertion.

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Can the police require
that suspects try to
open an iPhone with
Touch ID?

In the Matter of the Search Warrant Application of _____ (U.S. E.D. IL 2017)

Child pornography case. Police seek search warrant for home. Facts support there is an iPhone and iPad with illegal content. Only four residents. Police want to have each resident put their fingers, chosen by police, on the Touch ID to open.

Time urgency. Devices will auto-lock in 48 hours. Touch ID will not open after 5 failed attempts.

Can police do that?

In the Matter of the Search Warrant Application of _____ (U.S. E.D. IL 2017)

Fifth Amendment. Person cannot be a “witness” against himself.

Witnesses give “testimony.” Government cannot force someone to provide a communication that is “testimonial” in character.

Is a finger on Touch ID “testimonial”?

In the Matter of the Search Warrant Application of _____ (U.S. E.D. IL 2017)

More of a “physical feature” than testimony:

- Put on a shirt to see if it fits
- Provide a blood sample
- Submit to fingerprints or photo
- Voice sample
- Handwriting example

In the Matter of the Search Warrant Application of _____ (U.S. E.D. IL 2017)

“The government agents will pick the fingers to be pressed on the Touch ID sensor... so there is no need to engage the thought process of any of the residents....”

[Court did not discuss whether this was an unreasonable search under 4th Amendment... but likely not]

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Conclusion

Photoshop for audio “Project VoCo”

Adobe is working on an audio app that lets you add words someone never said

Watch what you don't say

By [Nick Statt](#) | [@nickstatt](#) | Nov 3, 2016, 6:30pm EDT

[f](#) [t](#) [SHARE](#)



Facial Reenactment & “Deep Fakes” Software

Source Actor



Real-time Reenactment



Reenactment Result



Target Actor



1:01 / 6:35



Understanding emerging
Technology is a business
advantage that you have
over other lawyers.



Clients need efficiency & to use new technology. There are risks and benefits.



Clients need lawyers who can creatively marry knowledge of tech with the application of law



Clients need someone who understands social norms (and the arguments to expand them)



Clients appreciate a lawyer who can make existing law work for them (cheaper than forcing a change)

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