

Application of Existing Laws on Emerging Technology

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Examples of “Emerging Technology”



01

Drones
Package delivery
Sales
Agriculture
Film
Law enforcement



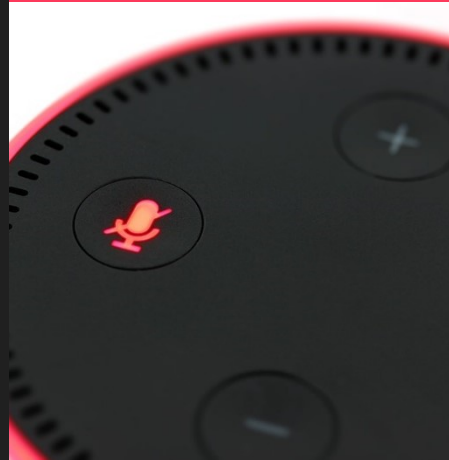
02

Blockchain
Internet purchases
Smart contracts
Rewards programs
Alternative Currency



03

Security / Smart Devices
Retail sales / loss
Business
Education



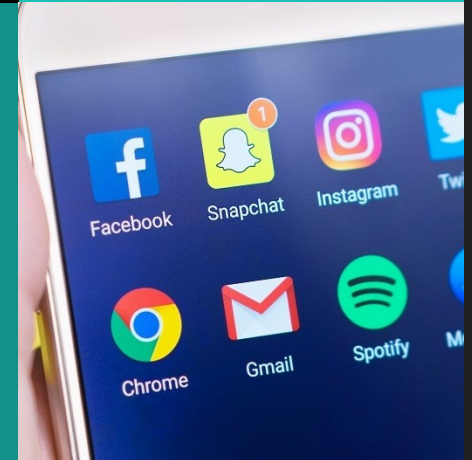
04

Virtual Reality
Retail sales
Real estate
Education
Entertainment



05

Social Media
Marketing
Advertising
Entertainment



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]



HOA versus boy-and-his-drone



HOA versus boy-and-his-drone

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[REDACTED]

[REDACTED] Homeowners Association
[REDACTED]
Deerfield Beach, FL 33441

RE: In Re: Potential Drone Regulation -- CEASE AND DESIST

Dear Board of [REDACTED] Homeowners Association:

Please allow this letter to introduce myself as counsel for Mr. and Mrs. [REDACTED] (" [REDACTED]" or "Client"), who are Members of the [REDACTED] Homeowners Association (" [REDACTED]"). On behalf of my Client, we demand that the [REDACTED] Board desist from passing any new rule or regulation which would prohibit the otherwise lawful, recreational use of recreational Unmanned Aircraft ("UA" or "drones") operated from private property within or adjacent to the [REDACTED] community. **As directed below, a response from you is due by Friday,**

HOA versus boy-and-his-drone

First, to be clear, the [REDACTED] Board does not rule the skies. Whether it be for recreation or profit, the Federal Aviation Administration ("FAA") has preempted the field and, in practical terms, has exclusive domain over any Aircraft or flying device. Any action or restriction by your Association is an unlawful violation of federal law. I refer you to the Federal Aviation Act of 1958; the Federal Aviation Act of 2012; and the FAA Advisory Circular 91-57A. In short, the FAA has exclusive control over the National Airspace System and Congress has ordered the FAA to regulate and integrate drones into our airspace ("airspace" meaning anything off the ground). Stated more simply, this is FAA territory and their Administration, not your HOA, is tasked with safety regulations for UA/drones.

HOA versus boy-and-his-drone

Second, within your own Association documents, there is no lawful basis to limit my Client's (or any other Owner's) lawful access to the skies which are, again, wholly controlled by the federal government. This is not an issue of maintenance or regulation of Common Elements.

HOA versus boy-and-his-drone

Third, a prohibition on drones by the [REDACTED] Board would be impractical. Anyone could launch a drone (or any other device, such as a kite with a GoPro) from the adjacent [REDACTED] Road and fly above your community. No HOA rule could prevent it. Likewise, a person could launch a drone from a neighboring association ([REDACTED] HOA) and, there too, you would have no recourse under your regulations. Finally, your HOA should not expend precious resources performing a witch-hunt for “UFOs” to locate the alleged offending pilot. Spending Board resources and legal fees on developing, enforcing, and defending such a regulation would be wasteful, short-sighted, and costly.

HOA versus boy-and-his-drone

or operate on insufficient power. The concern that some person will use a drone for prolonged surveillance or that recreational flights are going to cause an extended risk of harm to ■■■ is dubious at best. It is unlikely that your HOA can point to a single injury or damage caused by drones. Moreover, there is already a Florida state law which prevents aerial spying (F.S. 934.50) and there are host of existing laws regarding nuisance. There is no need for the HOA to traipse into aeronautics or law enforcement for the isolated and brief operation of drones which may occur in the vicinity of your community.

HOA versus boy-and-his-drone

sales are booming. I am certain that your community receives Amazon and eBay boxes by the truckload on a daily basis. It is not science fiction to anticipate drones being used in the near future to inspect construction, market homes for sale, spray herbicide, create school projects, and, yes, deliver packages. Creating an enclave which bans the progress of technology would undermine the value of living in your community.

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]



First Amendment & Social Media

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

What is NOT Protected?

- **Obscenity**
- **Fighting words**
- **Defamation (including libel and slander)**
- **Child pornography**
- **Perjury**
- **Blackmail**
- **Incitement to imminent lawless action**
- **True threats**
- **Solicitations to commit crimes / integral to criminal conduct**
- **Likely also: treason and plagiarism of copyrighted material**

(not here: harassment, bullying, and hate/racist statements)

How Does the 1st Amendment Apply?

Ex-boyfriend: If you don't apologize for what you've done to me, I'm going to continue to email your family, friends, and employer (and post on Facebook) to tell them that you are an exotic dancer.

How Does the 1st Amendment Apply?

Ex-girlfriend: Go away, stalker, or I'm calling the authorities!

How Does the 1st Amendment Apply?

Ex-boyfriend: What I'm saying is true and I have a First Amendment right!

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B.L. v. Mahanoy School District, - March 2019

Cheerleading Policy: “There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.” (signed)

“B.L.” is on JV team but is *passed over* for varsity.

“...to add insult to injury, an incoming freshman made the varsity squad.”

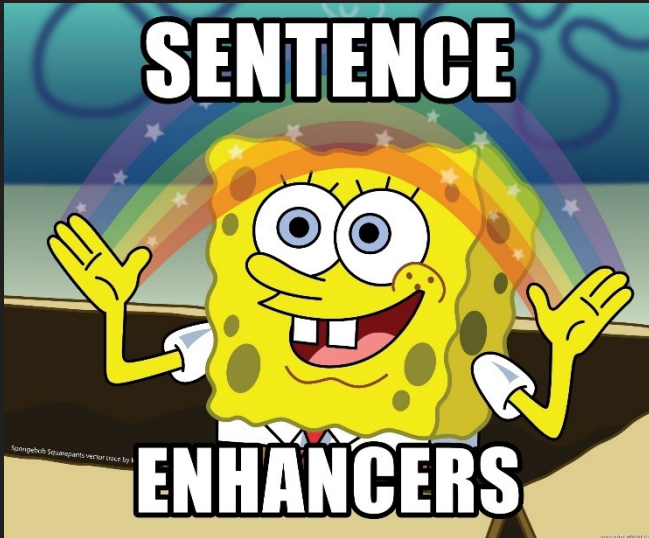
What should B.L. do??



B.L. v. Mahanoy School District, - March 2019



***“Fuck School, fuck softball, fuck cheer,
fuck everything”***



Can she say that?

B.L. v. Mahanoy School District

Some facts:

- On a Saturday
- From the Cocoa Hut, a student hangout
- Street clothes
- Selfie with a friend, giving the finger
- 250 friends, private Snapchat
- “electronic squabbling amongst cheerleaders is ‘a fairly typical occurrence’”
- would not suspend her if she didn’t mention cheer

B.L. v. Mahanoy School District

LEGAL STANDARDS REGARDING STUDENT SPEECH

- Protected student speech: “anything that does not, or in the view of reasonable school officials, will not cause material and substantial disruption at school.”
- School may punish for offensively lewd, obscene, indecent, or vulgar speech without “substantial disruption”
- Schools can reasonably exercise editorial control in school-sponsored expressive activities
- Schools can prohibit speech reasonably regarded as encouraging illegal drug use

How did the Court rule?

B.L. v. Mahanoy School District, - March 2019

RULING:



- No evidence of material and substantial disruption
- Not school sponsored; no drug reference
- First amendment rights are not weighted against Government interest
- Schools cannot punish Students for off-campus speech that is merely profane

What if private school? What if on campus?

Invasion of Privacy

Disclosure of Private Fact

Cape Publications, Inc. v. Hitchner (Fla. 1989)

Publication of a Private Fact

- (1) Publication
- (2) Of private facts
- (3) That are offensive; and
- (4) Are not of a public nature.

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(like concept
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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.

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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.”

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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Fifth Amendment & Smartphones

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

No person... shall be compelled
in any criminal case to be a
witness against himself.

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....”

Police were allowed to compel Touch ID under these circumstances.

G.A.Q.L. v. Florida, 4th District, Oct 24, 2018

Minor is speeding, crashes, kills someone in his car. .086 ETOH. Search warrant for the car, police find two iPhones. One belongs to a surviving passenger who had been texting with the driver. Second iPhone belongs to driver.

Passenger said she was texting and Snapchatting with driver all day and they had been drinking. Police want iPhone 7 passcode.

Can police do that?

G.A.Q.L. v. Florida, 4th District, Oct 24, 2018

“[A defendant] may in some cases be forced to surrender a key to a strongbox containing incriminating documents but I do not believe he can be compelled to reveal the combination to his wall safe.”

“Thus, when the compelled act is one of testimony rather than simple surrender, the Fifth Amendment applies.”

G.A.Q.L. v. Florida, 4th District, Oct 24, 2018

- Act of revealing password asserts a fact: the defendant knows the password
- If the minor were to reveal the code, he would be engaging in a testimonial act utilizing the “contents of his mind” and demonstrating... that he knows how to access the phone.

G.A.Q.L. v. Florida, 4th District, Oct 24, 2018

UNANSWERED: why did they need the phone in the first place?

How else could they have proven that the minor was drinking?

Florida v Stahl, 2nd District, Dec 7, 2016

Man accused of “video voyeurism” (holding cellphone under a woman’s skirt in the mall). Store surveillance caught both the act and the man leaving. It also showed his license plate. Police ID’ed the man based upon the video and his driver’s license. Police obtained his iPhone 5. But it had a passcode.

Same result as GAQL?



Florida v Stahl, 2nd District, Dec 7, 2016

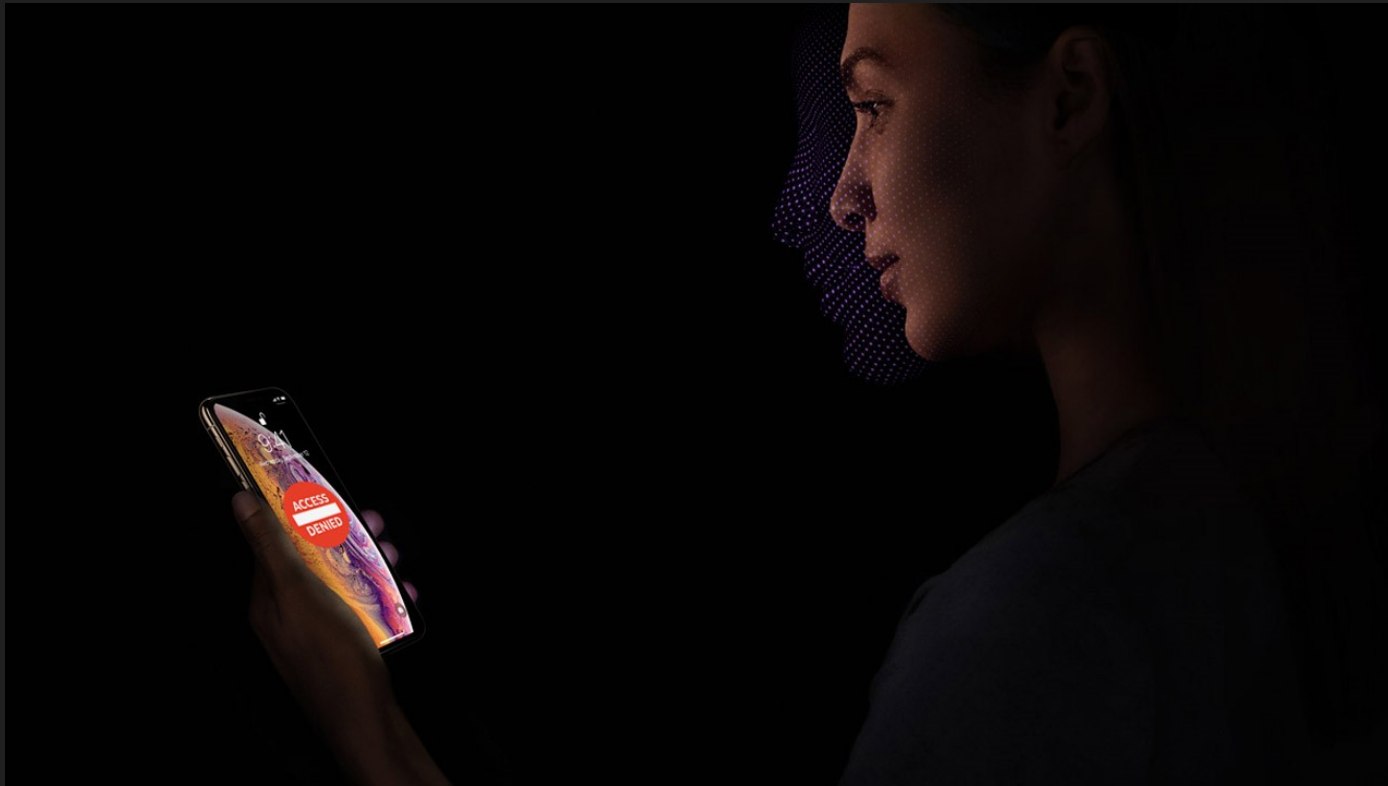


- In this case, [the passcode] was sought only for its content and that content had no other value or significance. By providing the passcode, Stahl would not be acknowledging that the phone contains evidence of video voyeurism.
- We question whether identifying the key which will open the strongbox – such that the key is surrendered – is, in fact, distinct from telling an officer the combination. More importantly, we question the continuing viability of any distinction as technology advances.”

Florida v Stahl, 2nd District, Dec 7, 2016
G.A.Q.L. v. Florida, 4th District, Oct 24, 2018



*What about Touch and Face ID?
Is that “testimony”?*

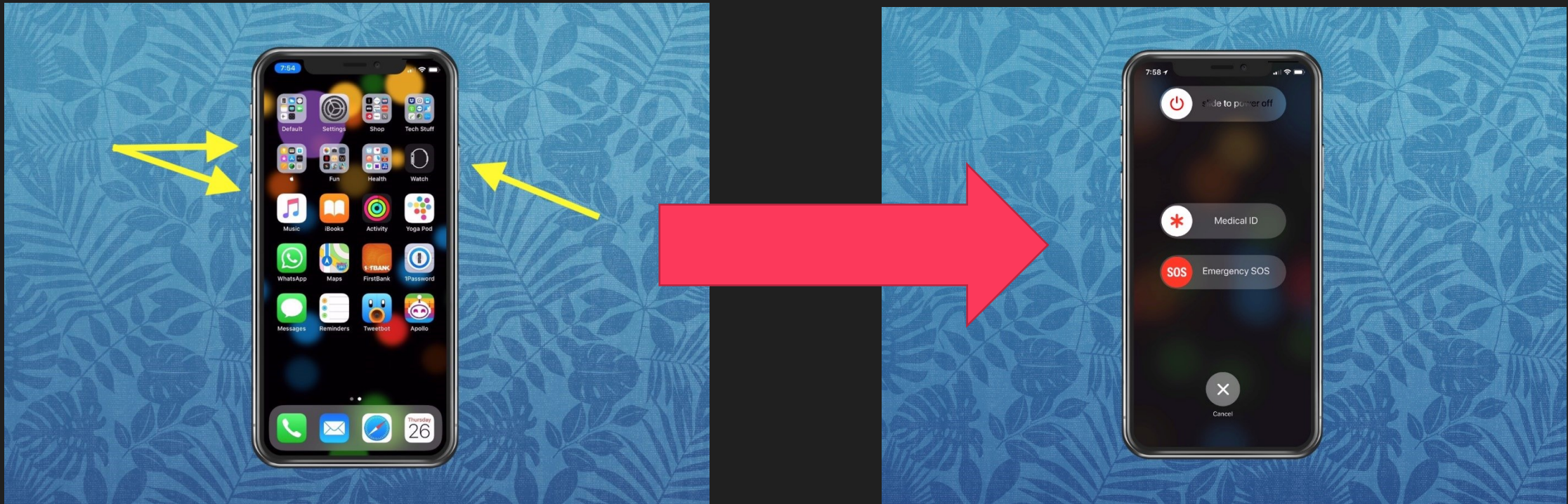


Emerging Technology



McDonald Hopkins

Turn off Face ID – Press and hold volume and side button for two seconds



Turn off Touch ID – Side button 5 times



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



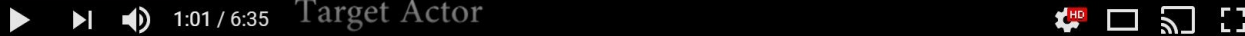
Real-time Reenactment



Reenactment Result



Target Actor



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)

Christopher Hopkins

McDonald Hopkins LLC – West Palm Beach

*Trial and appellate counsel with emphasis on emerging technologies:
blockchain, data breach, defamation, drones, e-discovery, EULAs, internet
crimes, privacy, & social media.*

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