Sex, Lies, and Videotape: Cyber Liability Issues in a Digital World

By Mercedes Colwin and Elizabeth F. Lorell

MySpace. Facebook. Friendster. Blogs. AboveThe Law.com. You won't find these terms in the latest edition of Black's Law Dictionary. But they are appearing with greater frequency in legal memoranda and briefs, law journal articles and court opinions.

The explosive growth of social networking sites and computer-based platforms people use to express their opinions and to communicate with each other is reshaping the legal landscape in dramatic ways. Lawyers and clients venturing onto this terrain are confronting legal issues of first impression in the federal and state courts.

Indeed, the absence of settled precedent in "cyberlaw" presents significant challenges to a wide variety of clients, whether they are school districts or Fortune 500 companies. Underscoring cyberlaw's unpredictability is the inherent difficulty in applying decades-old legal precedent to emerging technologies. Two cases from two federal district courts in the Third Circuit starkly illustrate this clash, both of which are discussed in the article. In addition, this article discusses a case involving efforts to invoke the justice system to punish an online prank that went too far and a case in which a local prosecutor sought to indict a group of teenagers for the act popularly known as "sexting." The article then goes on to address other cyberspace-based platforms similar to MySpace.com, and discuss how they can bring unwanted attention to your law firm, your clients, or your company. Finally, the article proposes a set of "best practices" to help you navigate the pitfalls that so often dot the terrain in cyberspace.

I. Cases Involving Cyber Law

A. MySpace Mayhem—Protected Speech or Punishable Offense?

It all started with a computer, an Internet connection, and an idea. Justin Layshock, a high school senior from Western Pennsylvania, was not particularly fond of his principal, Mr. Trosch. So he decided to play a prank on Mr. Trosch. On or about December 10, 2005, he logged on to his grandmother's computer, and signed onto MySpace.com ("MySpace").[1] The Court described MySpace.com as "a very popular Internet site where users can share photos, journals, personal interests and the like with other users of the Internet."[2] On MySpace, Layshock created a "parody profile" of Mr. Trosch.[3] "No school resources were used to create the profile but for a photograph of [Mr. Trosch] that [Layshock] copied from the school's website[.]"[4] The "parody profile" depicted Mr. Trosch answering a number of "non-sensical answers to silly questions[.]"[5]

For example,

> In response to the question "in the past month have you smoked?," the profile says "big blunt." In response to a question regarding alcohol use, the profile says "big keg behind my desk." In response to the question, "ever been beaten up?," the profile says "big fag." The answer to the question "in the past month have you gone on a date?" is "big hard-on." The profile also refers to [Mr.] Trosch as a "big steroid freak" and "big whore." The profile also reflected that [Mr.] Trosch was "too drunk to remember" the date of his birthday.[6]

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Word of Layshock's prank spread quickly through the school. In fact, Mr. Trosch learned of the unflattering MySpace profile from his daughter, also a student at Layshock's school.[7]

Discipline was swift. On December 21, 2005, Layshock and his mother were summoned to a meeting with the school district's superintendent and Mr. Trosch's co-principal, where Layshock admitted his involvement in the prank.[8] He was immediately suspended from school, and was ultimately prohibited from attending his high school graduation ceremony.[9]

On January 27, 2006, Layshock filed a lawsuit against the school, in which he alleged that the punishment meted out by the school violated his First Amendment right to engage in free speech.[10] He also alleged that the school's disciplinary policies and rules were unconstitutionally vague and/or overbroad.[11]

At the district court, both parties moved for summary judgment.[12] The Court framed its task as "balanc[ing] the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning."

This was not the first federal court to confront the thorny issue of student free speech. In fact, the United States Supreme Court faced a similar question more than 30 years ago in *Tinker v. Des Moines Independent Community School District*.[13] In *Tinker*, the Supreme Court held that school officials have a right to prescribe and control conduct in schools consistent with fundamental constitutional safeguards.[14] Yet the Court also rather famously observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15]

More recently, the Supreme Court revisited the *Tinker* issue in 2007 in *Morse v. Federick*.[16] In *Morse*, the Supreme Court rejected a First Amendment challenge brought by a student who was disciplined by his school for unfurling a banner which proclaimed "Bong HiTS 4 Jesus."[17]

Layshock, however, marked the first time a court was asked to consider a First Amendment challenge to a disciplinary measure as a result of a phony MySpace profile. Here, the Court reviewed both *Tinker*, *Morse*, and its progeny, and concluded that as an initial matter, the school had to "establish that it had the authority to punish the student."[18]

The Court then determined that the school *had not* established that authority. Critical to the Court's decision granting partial summary judgment in favor of Layshock was the fact that the school had "not established a sufficient nexus between [his] speech and a substantial disruption of the school environment."[19] Unlike *Morse*, where the conduct occurred just shortly after the students were dismissed from class to view the running of the Olympic torch, the conduct in *Layshock* occurred off-campus, *i.e.*, at the student's grandmother's house, where he logged onto her computer and created the phony MySpace profile.[20] This off-campus conduct created "gaps in the causation link between [Layshock's] speech and a substantial disruption of the school environment."[21] Thus, the Court held that the discipline imposed on Layshock violated his First Amendment free speech rights, and he was therefore entitled to a trial on damages.[22]

Particularly interesting in the Court's analysis is the notion that the conduct occurred off-campus. Although it is true that Layshock logged onto the website at his grandmother's house, the record before the Court also revealed that many other students knew about the impostor profile because they, too, had viewed the MySpace profile from their home computers. Indeed, the wide dissemination of the impostor profile—potentially to the millions of individuals with access to MySpace, including the other students at Layshock's school who viewed the MySpace page about Mr. Trosch—appears to cast doubt on the theory that Layshock's conduct was confined to a single personal computer with insufficient links to the school. Although the apparent takeaway from *Layshock* is that the *situs* of the conduct is dispositive, another district court within the Third Circuit took a contrary view.

The facts of *Layshock* and *Snyder v. Blue Mountain School District*[23] are essentially indistinguishable. Like the student in *Layshock*, the student in *Snyder* created an impostor MySpace profile of her high school principal, "which indicated, *inter alia*, that he is a pedophile and a sex addict."[24] Although the profile did not identify the principal by name, "it identified him as a principal and included his picture which had been taken from the school district's website."[25] As in *Layshock*, the discipline in *Snyder* was swift. The student received a ten-day suspension from school. And like the student in *Layshock*, she brought a lawsuit against the school, also alleging that the school's disciplinary action violated her First Amendment right to free speech.[26]

In its analysis of the parties' respective motions for summary judgment, the Court examined *Tinker*, *Morse*, and several other cases balancing the free speech rights of public school students with the right of school administrators to maintain an educational environment free from distraction. Here, however, the Court focused on the content of the MySpace profile, rather than where it was created. The Court noted that the profane language contained in the impostor profile greatly diminished its First Amendment protection, and that, based on *Morse*, the "school can validly restrict speech that is vulgar and lewd...and promotes unlawful behavior."[27]

The Court was not persuaded by the student's argument—met with success in *Layshock*—that she cannot be "punished for the website at school although she created it off campus."[28] The Court noted that there was a strong connection between the off-campus conduct, the creation of the impostor profile, and its "on-campus effect."[29] Indeed,

> [t]he website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website.[30]

The foregoing indicia of an on-campus connection was critical to the Court's decision dismissing the complaint, and it is perhaps what distinguishes it from *Layshock*. However, the similarities are striking enough to raise serious questions about the applicability of law developed in the pre-Internet age to issues that arise in cyberspace.

Both decisions were affirmed on appeal to the Third Circuit.[31] However, once the conflict between the rulings in *Layshock* and *Snyder* became apparent, the Third Circuit vacated the decisions and ordered *en banc* rehearings. It will certainly be interesting to see how the Third Circuit reconciles these conflicting decisions, and whether its future *en banc* ruling will provide some much-needed clarity in this complicated realm of cyberlaw.

B. MySpace Prank That Went Too Far

While the fallout from the pranks involved in *Layshock* and *Snyder* can largely be characterized as hurt feelings and bruised egos, few would dispute that a MySpace prank in Missouri had devastating consequences.

There, prosecutors charged that Lori Drew:

> with the help of her daughter and a family friend who worked for Ms. Drew, had created a phony identity and MySpace account for a teenage boy, "Josh Evans," on a computer in Ms. Drew's home in suburban St. Louis. According to evidence at the trial, Ms. Drew then used the account to conduct an online courtship with Megan Meier, an emotionally disturbed 13-year-old girl who had once been a friend of her daughter.[32]

When Drew abruptly ended the "relationship," Meier committed suicide.[33] Local authorities declined to prosecute, but federal prosecutors indicted Drew in Los Angeles, where MySpace maintains its servers, and she was convicted on charges of computer fraud.[34] That conviction was later vacated.[35]

Some have commented that the inability to convict Drew for her role in the hoax suggests a need to modify criminal statutes to prosecute crimes in the digital age, and once again shows how the advancement of technology has spawned new and complex issues of liability in cyberspace.

C. Sexting: Felony or Foolishness?

In what may be the first Court of Appeals case to ever define the term "sexting," the Third Circuit recently affirmed a ruling enjoining a district attorney in Pennsylvania from indicting a group of teenagers who used their cell phones to exchange nude or semi-nude photographs.[36] The facts of *Miller* are as follows: in October 2008, school officials in Tunkhannock, Pennsylvania, "discovered photographs of semi-nude and nude teenage girls, many of whom were enrolled in their district, on several students' cell phones."[37]

School officials seized the phones and turned them over to the local district attorney, who launched an investigation. Believing that a crime had been committed, the District Attorney ("DA") sent a letter to the parents of between 16 and 20 students "threatening to bring charges against those who did not participate in what has been referred to as an 'education program[.]'"[38] The program was designed to last six to nine months and was to focus on education and counseling.[39]

One of the photographs depicted two teenagers "wearing white, opaque bras."[40] Another showed a teenager "wrapped in a white, opaque towel, just below her breasts, appearing as if she just had emerged from the shower."[41]

Most of the parents objected to the program, and the threat of criminal charges. They filed temporary restraining order (TRO) enjoining the DA from initiating criminal charges for the photographs. The TRO was granted, and the DA appealed.[42]

In an extensive opinion, the Third Circuit held that a future prosecution would be a retaliatory act in violation of a parents' Fourteenth Amendment right to parental autonomy and a student's First Amendment right against compelled speech.[43] To that end, the Court held that the DA cannot assume the role of a parent and "impose on their children his ideas of morality and gender roles."[44] As to the students' First Amendment claim, the Court held that the "sexting" at issue was essentially a moral—and not legal—matter over which the DA lacked authority.[45]

The Third Circuit's decision is yet another example of how government officials have grappled with new and expanding modes of expression that involve issues of sex, morality and expression. It may also serve to alert parents of teenagers to monitor their children's cell phone usage.

II. Cyber Websites and Why Law Firms Need to Be Wary

A. An Online Battle Royale

Although MySpace serves as the starting point for our discussion of some of the legal issues in cyberlaw, it is certainly not the only source of "cybercontroversy." Take, for example, the AboveTheLaw.com website. That site permits readers to anonymously post comments about all things legal. In fact, some users frequently post negative comments about specific law firms, while others leak internal firm memo's that are subsequently published on the AboveTheLaw.com website. While it is true that law firms are much different than public schools, it seems reasonable to ask whether a First Amendment defense could be invoked by a government attorney who posts comments about issues of public concern on the AboveTheLaw.com website. Or whether a website like AboveTheLaw.com could be held liable for disseminating a firm's internal memo.

Of course, not all postings on websites like AboveTheLaw.com involve issues of public concern. And not all posters have altruistic motives. Take, for example, the case of Aaron Brett Charney. He sued the prominent law firm of Sullivan & Cromwell LLP in New York State court, and his sex discrimination complaint was displayed prominently on AboveTheLaw.com. The complaint, which is still available for download on AboveTheLaw.com, alleges, among other things, that a Sullivan & Cromwell partner threw a document at Charney's feet and remarked: "bend over and pick it up—I'm sure you like that[.]"[46]

What AboveTheLaw.com managed to do in this instance is take a rather acrimonious dispute between two parties and publish it to a much larger audience. Now consider the impact. Current and potential clients may become aware of the dispute and develop reservations about the firm. Sullivan and Cromwell employees may become aware of the firm's "dirty laundry" simply by logging on to AboveTheLaw.com. And plaintiffs like Charney may use the unwanted exposure as a leverage point in settlement discussions.

Sullivan and Cromwell hasn't been the only firm to find itself in the cyberspace spotlight.

One attorney became so incensed with his former employer, Levinson Axelrod, P.A., a New Jersey-based personal injury law firm, that he created a website named—what else—www.levinsonaxelrodreallysucks.com.

The site was created and is maintained by Edward Heyburn, a former Levinson Axelrod associate. His strong negative feelings about the firm, and his ongoing legal battles with Levinson Axelrod, are well-documented on the website. In fact, in May 2010, the United States District Court of the District of New Jersey granted in part and denied in part a motion by Heyburn to dismiss a lawsuit filed by Levinson Axelrod.[47] The lawsuit seeks damages for "cybersquatting, trademark infringement, false designation of origin, trademark dilution, trafficking in counterfeit marks, and fraud."[48] The opinion noted that a prior court order directed Heyburn to shut down the website he previously used to sling mud at Levinson Axelrod: www.levinsonaxelrod.net.[49]

In its May 3 decision, the Court held that all but one of Levinson Axelrod's claims against Heyburn could move forward. The only cause of action dismissed from the lawsuit was a claim predicated on the New Jersey Consumer Fraud Act, which, as a matter of law, does not apply to attorneys.[50]

While it appears that the firm's efforts to shut down the prior website—www.levinsonaxelrod.net—were largely successful, it is also evident that the firm has failed to quash the dissent still emanating from www.levinsonaxelrodreallysucks.com. In fact, the associate's quest to smear his former firm has gained traction. In November 2009, *The AmLaw Daily* posted an article on the Internet chronicling the back-and-forth between Levinson Axelrod and its web-based rival.[51] The article notes that the website's operator "calls one Levinson partner 'a used cars salesman with a law degree' and opines that another 'looks like death.'"[52] It is thus clear that efforts to contain the damage generated by these sorts of websites may often backfire. Perhaps one would conclude that in this situation, Levinson Axelrod faced a Hobson's choice.

In addition to the websites discussed here, there are a host of others dedicated to dissecting the legal profession. They include: The *Wall Street Journal* law blog (www.blogs.wsj.com/law); www.judged.com (billed as "insider source for real, unfiltered intelligence on law firms around the world"); and www.ratethecourts.com (where visitors can post comments about judges under the cloak of anonymity). It is important that readers look at these websites to see how much of the previously uncirculated private opinion has now been opened for millions to get at the click of the button.

III. Best Practices

So how can you avoid having your internal memorandum shared with the world via sites like AboveTheLaw.com, and what can be done to avoid the types of discontent that spawn websites such as www.levinsonaxelrodreallysucks.com?

First, keep in mind that anything you publish, whether in print or in e-mail, can easily be shared. If written communication—such as an internal memorandum—is necessary to effectively manage your operation, require each recipient to agree to maintain its confidentiality.

Second, follow the Golden Rule. Broadcasting abrasive e-mails late at night and early in the morning can foment unhappiness and lay the groundwork for an extensive cyberbattle.

Third, create and disseminate a comprehensive Internet usage policy that expressly prohibits anyone from posting information about your firm on any websites. You can also install software that blocks access to sites like AboveTheLaw.com.

Of course, this is not an exhaustive list of steps you can take to avoid the situations discussed in this paper, and you will have to tailor your decisions to the needs of your firm or your business. Moreover, it may be helpful to learn the lingo of cyberspace. To that end, included at the end of this article are the "Top 50 Popular Text Terms Used in Business," and the "Top 50 Acronyms Parents Need to Know, both courtesy of www.netlingo.com.

Conclusion

The advent of cyberspace presents a complex set of challenges for attorneys, their firms, their clients as well as for schools, parents and children. In the absence of legislative enactments and legal decisions, we caution that all of us, in order to protect our colleagues and families from cyber disaster, need to find creative and safe ways to navigate the unfamiliar—and constantly shifting—terrain of cyberspace.

Endnotes

1. *Layshock v. Hermitage School District*, 496 F. Supp.2d 587, 590-591 (W.D. Pa. 2007), *aff'd*, 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted, op. vacated* (April 9, 2010).
2. *Id.* at 591.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 593.
9. *Id.* at 593-94.
10. *Id.* at 594.
11. *Id.*
12. *Id.* at 590.
13. 393 U.S. 503 (1969).
14. *Id.* at 503.
15. *Id.*
16. __ U.S. __, 127 S.Ct. 2618 (2007).
17. *Id.*
18. *Layshock*, 496 F. Supp.2d at 600.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 601.
23. No. 3:-7cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), *aff'd*, 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted, op. vacated* (April 9, 2010).
24. *Id.* at *1.
25. *Id.*
26. *Id.* at *3.
27. *Id.* at *6.
28. *Id.* (Footnote omitted).
29. *Id.* at *7.
30. *Id.*
31. *See Layshock v. Hermitage School Dist.*, 593 F.3d 249 (3d Cir. 2010); *see also J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 593 F.3d 286 (3d Cir. 2010).
32. Rebecca Cathcart, *Conviction Is Tossed Out In MySpace Suicide Case*, N.Y. Times, July 3, 2009, at A4.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).
37. *Id.* at 143 (footnote omitted).
38. *Id.* at 144.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 145.
43. *Id.* at 150.
44. *Id.* at 151.
45. *Id.* at 152.
46. *Charney v. Sullivan & Cromwell LLP*, Index No. 07100625 (Sup. Ct. N.Y. Co. 2007).
47. *See Axelrod v. Heyburn*, Civ. No. 09-5627, 2010 WL 1816245 (D.N.J. May 3, 2010).
48. *Id.*
49. *Id.* at * 1.
50. *Id.* at *4.
51. http://amlawdaily.typepad.com/amlawdaily/2009/11/jerseyfirms.html.
52. *Id.*

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Top 50 Popular Text Terms Used in Business

AFAIC—	As Far As I'm Concerned
ASAP—	As Soon As Possible
BHAG—	Big Hairy Audacious Goal
BOHICA—	Bend Over Here It Comes Again
CLM—	Career Limiting Move
CYA—	Cover Your A** -or- See Ya
DD—	Due Diligence
DQYDJ—	Don't Quit Your Day Job
DRIB—	Don't Read If Busy
EOD—	End Of Day -or- End Of Discussion
EOM—	End Of Message
EOT—	End Of Thread (meaning: end of discussion)
ESO—	Equipment Smarter than Operator
FRED—	F***ing Ridiculous Electronic Device
FUBAR—	F***ed Up Beyond All Recognition (or Repair)
FYI—	For Your Information
GMTA—	Great Minds Think Alike
HIOOC—	Help, I'm Out Of Coffee
IAITS—	It's All In The Subject
IANAL—	I Am Not A Lawyer
KISS—	Keep It Simple Stupid
LOPSOD—	Long On Promises, Short On Delivery
MOTD—	Message Of The Day
MTFBWY—	May The Force Be With You
MYOB—	Mind Your Own Business
NRN—	No Reply Necessary
NSFW—	Not Safe For Work
NWR—	Not Work Related
OTP—	On The Phone
P&C—	Private & Confidential
PDOMA—	Pulled Directly Out Of My A**
PEBCAK—	Problem Exists Between Chair And Keyboard
PITA—	Pain In The A**
QQ—	Quick Question -or- Cry More
RFD—	Request For Discussion
RFP—	Request For Proposal
SBUG—	Small Bald Unaudacious Goal
SME—	Subject Matter Expert
SNAFU—	Situation Normal, All F***ed Up
SSDD—	Same Sh** Different Day
STD—	Seal The Deal -or- Sexually Transmitted Disease
SWAG—	Scientific Wild A** Guess -or- SoftWare And Giveaways
TBA—	To Be Advised
TBD—	To Be Determined
TWIMC—	To Whom It May Concern
TIA—	Thanks In Advance
WIIFM—	What's In It For Me
WOMBAT—	Waste Of Money, Brains And Time
WTG—	Way To Go
YW—	You're Welcome

* Information was obtained from Netlingo.com on May 17, 2010

Top 50 Acronyms Parents Need to Know

8—	Oral sex
1337—	Elite -or- leet -or- L337
143—	I love you
182—	I hate you
1174—	Nude club
420—	Marijuana
459—	I love you
ADR—	Address
AEAP—	As Early As Possible
ALAP—	As Late As Possible
ASL—	Age/Sex/Location
CD9—	Code 9—it means parents are around
C-P—	Sleepy
F2F—	Face-to-Face
GNOC—	Get Naked On Cam
GYPO—	Get Your Pants Off
HAK—	Hugs And Kisses
ILU—	I Love You
IWSN—	I Want Sex Now
J/O—	Jerking Off
KOTL—	Kiss On The Lips
KFY -or- K4Y—	Kiss For You
KPC—	Keeping Parents Clueless
LMIRL—	Let's Meet In Real Life
MOOS—	Member Of The Opposite Sex
MOSS—	Member(s) Of The Same Sex
MorF—	Male or Female
MOS—	Mom Over Shoulder
MPFB—	My Personal F*** Buddy
NALOPKT—	Not A Lot Of People Know That
NIFOC—	Nude In Front Of The Computer
NMU—	Not Much, You?
P911—	Parent Alert
PAL—	Parents Are Listening
PAW—	Parents Are Watching
PIR—	Parent In Room
POS—	Parent Over Shoulder -or- Piece Of Sh**
pron—	porn
Q2C—	Quick To Cum
RU/18—	Are You Over 18?
RUMORF—	Are You Male OR Female?
RUH—	Are You Horny?
S2R—	Send To Receive
SorG—	Straight or Gay
TDTM—	Talk Dirty To Me
WTF—	What The F***
WUF—	Where You From
WYCM—	Will You Call Me?
WYRN—	What's Your Real Name?
zerg—	To gang up on someone

* Information was obtained from Netlingo.com on May 17, 2010