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ILLEGAL EVIDENCE: WIRETAPPING, HACKING, AND DATA INTERCEPTION LAWS

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Bio

Articles

Firm

Groups

Contact

Wiretapping and Data Interception Cases

The following cases relate to the state and federal wiretapping and data interception laws. For further information, please refer to Emily's paper, "[Illegal Evidence: Wiretapping, Hacking, and Data Interception Laws.](#)"

Texas Cases

- [Alameda v. State](#)
- [Allen v. Mancini](#)
- [Collins v. Collins](#)
- [Elliot v. State](#)
- [Mitchell v. State](#)
- [Tienda v. State](#)

Federal Cases

- [Bailey v. Bailey](#)
- [Bess v. Bess](#)
- [Dorris v. Absher](#)
- [Fields v. ATSF Railway Co.](#)
- [Klumb v. Goan](#)
- [Leach v. Byram](#)
- [Miller v. Meyers](#)
- [Nix v. O'Malley](#)
- [Reynolds v. Spears](#)
- [Thompson v. Dulaney](#)
- [U.S. v. Wuliger](#)

• **Or, download [all cases](#) in pdf form**

scholar.google.com



- Articles (include patents) Case law
 Federal courts Texas courts [Select courts...](#)

SOCIAL MEDIA FACTS

In 2012, 56% of Americans had a profile on a social media site.

Up from 52% in 2011 and 48% in 2010.

Significantly more Americans have a social media profile than do not.

Consumers continue to spend more time on social networks than on any other category of sites.

Social media has overtaken pornography as the No. 1 activity on the web.

One out of eight couples married in the U.S. last year met via social media.

Facebook has 1.1 billion monthly active users.

(The U.S. population is 313.9 million.)

25% of Facebook users don't bother with privacy settings.

Facebook has 751 million mobile users each month.

Facebook users “Like” 4.5 billion items daily.

23% of Facebook users check their account five or more times every day.

On a typical day, more than 500 million Tweets are sent on Twitter, averaging 5,700 per second.

The fastest-growing group on Twitter is the 55-64 age bracket.

YouTube reaches more US adults aged 18-34 than any cable network.

After Google, YouTube is the second largest search engine.

What kinds of evidence?

- Facebook
- Social Media
- Texts
- Voicemail
- Digital Photos
- Videos
- Recorded Calls
- Websites
- Emails
- Chats / IMs

Why?

Amit [redacted]'s Photos - Profile Pictures

Photo 48 of 66 | [Back to Album](#) | [Amit's Photos](#) | [Amit's Profile](#)



Added 09 July 2007



Narlapp [redacted] haw, y u teachin her bad habbits amit lol
10 July 2007 at 20:57



Kiran [redacted] shud i laff or not?
17 September 2007 at 16:31



Sammatha

08.22.12

Share - Monday via PicsArt Photo Studio



Melissa lose the cig

Monday at 8:49pm · 7



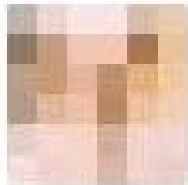
Sarah oh my gosh is that a baby bumb i see...

Monday at 8:51pm



Sammatha I've cut down ALOT. I'm slowly quitting. that's a promise to my baby. ♥

Monday at 8:52pm · 3



Shannel [redacted]

you are my babies daddy.....

Like - Comment - Yesterday at 1:36am - 👤



Logan [redacted] are you fucking kidding me ? out of all places to tell me this, you say it on facebook. k sweet.

Yesterday at 1:24pm - Like - 👍 1



Shannel [redacted] sorry I couldn't get ahold of you :(

Yesterday at 1:54pm - Like



Logan [redacted] could have messaged me instead of making it so public when we don't even know if it's mine yet.

Yesterday at 2:02pm - Like



Shannel [redacted] it's definitely yours. you asshole man up and take some responsibility.

Yesterday at 2:26pm - Like




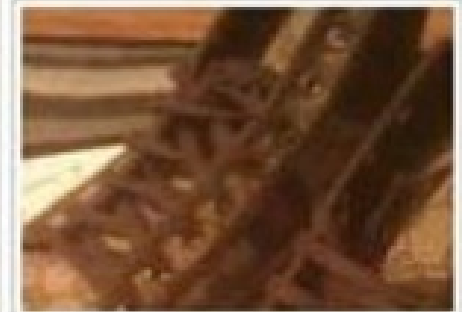
Nebula's Photos





 Like -  Comment - 6 hours ago - 



Dinah just like mommy
6 hours ago · Like

 **Daniel** added 5 new photos to the album haters.



 Like ·  Comment ·  Share · 16 hours ago via mobile · 

 **Stevie** Where's my child support?
August 2, 2011 at 4:10pm · Like

 **Michael** Wow lol.
August 7, 2011 at 12:40am · Like



In this photo: Ellie [redacted] (photos)

FUCKKKK DADDYYYY



In this photo: Meggy [redacted] (photos)

Added February 24



Kenny [redacted] Yes. We really did have Meggy's birthday party at Hooters. The wings are still the best and it's a fun environment.

February 24 at 6:55am · [Report](#)



Lulu

Hmmm what to eat?

[Like](#) · [Comment](#) · [Unfollow Post](#) · [Share](#) · [Edit](#) · Wednesday via mobile



Laurel Probably nothing... There aint shit in there!
Maybe if I received child support, I could afford to put food in
my fridge!!!

14 minutes ago · [Like](#)



Ariciro I ain't payin shit bitch succ my
dicc!!!

8 minutes ago · [Like](#)

[How to Report Things](#)

[Don't Have an Account?](#)

[Report a Violation](#)

[Report a Bug](#)

[Bullying](#)

[Tools for Addressing Abuse](#)

[Tools for Parents & Educators](#)

Law Enforcement & Third-Party Matters

[Intellectual Property Issues](#)

[Image Privacy Rights](#)

[Give Us Feedback](#)

[Back](#)

Law Enforcement & Third-Party Matters

[How does Facebook work with law enforcement?](#)

[How do I tell law enforcement to get in touch with Facebook?](#)

[How can I report a convicted sex offender?](#)

[Does Facebook notify users prior to responding to subpoenas?](#)

[Where can I learn more about Facebook's Privacy Policy?](#)

[What's the difference between the Facebook Safety Center and the Help Center Security section?](#)

Information on Civil Subpoenas

May I obtain contents of a user's account from Facebook using a civil subpoena?

Federal law prohibits Facebook from disclosing user content (such as messages, timeline posts, photos, etc.) in response to a civil subpoena. Specifically, the Stored Communications Act, 18 U.S.C. § 2701 et seq., prohibits Facebook from disclosing the contents of an account to any non-governmental entity pursuant to a subpoena or court order.

Parties to civil litigation may satisfy discovery requirements relating to their Facebook accounts by producing and authenticating contents of their accounts and by using Facebook's "Download Your Information" tool, which is accessible through the "Account Settings" drop down menu.

If a user cannot access content because he or she disables or deleted his or her account, Facebook will, to the extent possible, restore access to allow the user to collect and produce the account's content. Facebook preserves user content only in response to a valid law enforcement request.

Was this answer helpful? Yes · No

[Permalink](#) · [Share](#)

May I obtain any information about a user's account using a civil subpoena?

Facebook may provide **basic subscriber information (not content)** to a party in a civil matter only where: 1) the requested information is indispensable to the case and not within the party's possession; and 2) you personally serve a **valid California or federal subpoena** on Facebook.

Out-of-state civil subpoenas must be domesticated in California and personally served on Facebook's registered agent.

Parties seeking basic subscriber information as set forth above must specifically identify the account by providing the email address, Facebook user ID (UID) and vanity URL (if any) Names, birthdays, locations, and other information are insufficient to identify a Facebook account. UIDs and/or vanity URLs may be found in the uniform resource locator available in a browser displaying the account in question. For example, in the URL <http://www.facebook.com/profile.php?id=12345678910>, 12345678910 is the UID.

Was this answer helpful? Yes · No

[Permalink](#) · [Share](#)

When will I receive a response to my civil subpoena?

Facebook requires a minimum of 30 days to process a civil subpoena for basic identifying information. Additional time may be required depending on various factors. Delivery may be delayed if you fail to include Facebook's processing fee in your request.

Was this answer helpful? Yes · No

[Permalink](#) · [Share](#)

Do I need a Facebook representative to testify at a civil trial?

No. The account owner, or any person with knowledge of the contents of the account, can authenticate account content. Further, under federal and California law, business records produced by Facebook are self-authenticating.

Was this answer helpful? Yes · No

[Permalink](#) · [Share](#)

ILLEGAL EVIDENCE

SCOPE

Laws relevant to civil and criminal attorneys in private practice

Will not include:

- ⦿ Law enforcement
- ⦿ Warrants for wiretapping
- ⦿ “Bugs” – mechanical devices

1. Wiretapping

- ⦿ Federal – 18 U.S.C. 2510-2522
- ⦿ Texas – Tex. Penal Code 16.02
Tex. CPRC Ch. 123

2. Electronic Data

- Federal – 18 U.S.C. 2701-2712
- Texas – Tex. Penal Code 16.04

3. Other Computer Crimes

- Breach of Computer Security –
Tex. Penal Code 33.02
- Online Impersonation –
Tex. Penal Code 33.07
- Civil Cause of Action –
Tex. CPRC Ch. 143

Why Talk About Federal Law?

- Federalism
- Concurrent jurisdiction
- State courts are courts of general jurisdiction

- “Nothing in the concept of the federal system prevents state courts from enforcing rights created by federal law” --U.S. Supreme Court

Federal Wiretap Act

- Initially passed 1968
- Updated 1986 and 1994

Federal Wiretap Act

Offense:

“intentionally intercepts...any wire, oral, or electronic communication”

“wire communication” = “aural transfer”

“oral communication” = “oral communication”

“electronic communication” = “signs, signals, writing, images, sounds, data”

Federal Wiretap Act

Offense:

- ⦿ “intentionally discloses, or endeavors to disclose, ... knowing or having reason to know that the information was obtained through interception”
- ⦿ “intentionally uses, or endeavors to use, ... knowing or having reason to know”

Federal Wiretap Act

Criminal Penalty:

- Fined and/or imprisoned up to 5 years

Civil Cause of Action:

- Actual damages, or statutory damages of \$100/day or \$10,000 -- whichever is **greater**
- Punitive damages, equitable relief
- Attorney's fees

Federal Wiretap Act

Civil Cause of Action:

Collins v. Collins, 904 S.W.2d 792 (Tex.App.-**Houston** [1st Dist.] 1995, writ denied):

Case between husband and wife in which 18 U.S.C. 2510 provided the civil cause of action. Held that there is no spousal exemption in state and federal wiretapping laws.

Klumb v. Goan, 884 F.Supp.2d 644 (E.D. Tenn. 2012):

Ex-wife placed spyware on ex-husband's computer that forwarded all of his emails to her own private account. Court held that this was a violation of the Federal Wiretap Act and that ex-husband was entitled to \$10,000 in liquidated damages.

Federal Wiretap Act

Exclusionary Rule:

“Whenever any wire or oral communication has been intercepted, no part of the contents...and no evidence derived therefrom may be received in evidence”

Texas Wiretap Law

Tex. Penal Code 16.02

Offense:

“intentionally intercepts...a wire, oral, or electronic communication”

“wire communication” = “aural transfer”

“oral communication” = “oral communication”

“electronic communication” = “signs, signals, writing, images, sounds, data”

Texas Wiretap Law

Offense:

- ⦿ Intentional disclosure, knowing or having reason to know the information was obtained through interception
- ⦿ Intentional use, if the person knows or is reckless about whether the information was obtained through interception

Texas Wiretap Law

Criminal Penalty:

- 2nd degree felony

Texas Wiretap Law

Tex. Penal Code 16.02

Elliott v. State, 293 S.W.3d 781 (Tex.App.-Waco 2009)

Ex-wife taped conversations between her ex-husband and his adult son in which they planned to take her car keys and prevent her from using her car. She then took the recordings to the police station. No action was taken against ex-husband and son, but she was sentenced to 6 years in jail for recording a telephone conversation without consent of any of the parties to the conversation.

On appeal, she unsuccessfully made defenses of necessity and self-defense.

Texas Wiretap Law

Tex. Penal Code 16.02

Vicarious Consent – exception for recording a child

Alameda v. State, 235 S.W.3d 218 (Tex.Crim.App. 2007)

Parent believed her minor child was being abused, so she recorded a telephone conversation between her minor child and the defendant/alleged abuser. Court found that the vicarious consent was proper, and it complied with case law that required that the vicariously-consenting parent have an **objective, reasonable belief that consenting to the recording of the conversation on behalf of the child is in the best interest of the child.**

TX Wiretap Civil Cause of Action

TX CPRC Chapter 123

Cause of Action:

- ⦿ Intercepts or attempts to intercept a communication
- ⦿ Uses or divulges information – knows or reasonably should know was obtained by interception

TX Wiretap Civil Cause of Action

“Communication”:

- ⦿ Speech uttered by a person
- ⦿ Information (including speech) that is transmitted with the aid of a wire or cable

TX Wiretap Civil Cause of Action

- Injunction,
- Statutory damages of \$10,000 per occurrence,
- Actual damages in excess of \$10,000,
- Punitive damages, AND
- Attorney's fees

TX Wiretap Civil Cause of Action

TX CPRC Chapter 123

Allen v. Mancini, 170 S.W.3d 167 (Tex. App—Eastland 2005, pet. denied)

Ex-husband recorded conversations between him and his ex-wife, as well as between her and their minor son. Ex-wife sued under Ch. 123. Court ruled that ex-husband was permitted to record conversations with ex-wife because TX law only requires one-party consent. Court also held that ex-husband was allowed to record conversations between his son and ex-wife because parents may consent to such recordings on behalf of a minor child.

Federal Stored Comm. Act

Offense:

- Intentionally accesses
- Without authorization, or exceeds authorization
- And obtains access to a wire or electronic communication
- While it is in electronic storage

Federal Stored Comm. Act

“Electronic storage”:

Temporary, intermediate storage of a wire or electronic communication incidental to its electronic transmission

Federal Stored Comm. Act

Criminal Penalty:

- 1st offense – fined, imprisoned up to 5 years
- Subsequent – fine, imprisoned up to 10 years

Civil Cause of Action:

- Actual damages not less than \$1,000
- Punitive damages, equitable relief
- Attorney's fees

Federal Stored Comm. Act

Bailey v. Bailey, 2008 WL 324156 at *4 (E.D. Mich., Feb. 6, 2008).

H used key-logging software to acquire W's email password, accessed her email, and discovered sexual communications with various individuals. H shared emails with his attorney (co-Defendant) who sent them to W's attorney for W to admit or deny their authenticity. W then sued H and his attorney for violating the Wiretap Act and the Stored Communications Act.

Holding: H's MSJ granted as to Wiretap Act because the emails were not viewed by H contemporaneously with their transmission (he read them after she had already opened them). H's MSJ denied as to Stored Communications Act claim; Court disagreed with his interpretation of whether accessed emails were in "electronic storage."

Federal Stored Comm. Act

Civil Cause of Action:

Miller v. Meyers, 766 F.Supp.2d 919, 923 (W.D.Ar.2011)

Ex-husband placed key-logging software on ex-wife's computer during divorce. The software allowed him to discover various passwords which he then used to access her email account. He used information he found in her email account against her, and admitted all this to the court. Summary judgment as to his liability for violating the Stored Communications Act was awarded by the court, with damages to be determined at trial.

Texas Stored Comm. Law

Tex. Penal Code 16.04

Criminal Penalty:

- State jail felony

Texas Computer Security Law

Tex. Penal Code 33.02

Offense:

knowingly accesses a computer, network,
or system without the effective consent
of the owner

Texas Computer Security Law

Criminal Penalty:

- Amt. involved < \$20,000 – state jail felony
- < \$100,000 – 3rd degree felony
- < \$200,000 – 2nd degree felony
- > \$200,000 – 1st degree felony

- If not to “harm another” - misdemeanor

Texas Computer Security Law

Tex. Penal Code 33.02

Mitchell v. State, 12 S.W.3d 158, 159 (Tex.App.-Dallas 2000, no pet.):

On her last day of work at the Dallas Fire Department, Defendant (a disgruntled employee) corrupted department documents on her work computer as retaliation. As a result of her actions, the department was forced to have the documents recreated at a cost of \$1,400. The court found that because she was not authorized to access these documents for the purpose of corrupting them, her conduct was in violation of Tex. Penal Code 33.02.

Texas Online Impersonation Law

Tex. Penal Code 33.07

Offense:

Without consent

With intent to **harm**, defraud, intimidate, or threaten

Creates a webpage or sends a message using the name or persona of another

Texas Online Impersonation Law

Tex. Penal Code 33.07

Criminal Penalty:

- 3rd degree felony
- Certain circumstances – Class A misdemeanor

- Compare: harassment is a misdemeanor

Texas Online Impersonation Law

Tex. Penal Code 33.07

Taylor v. State, No. 02-11-00092-CR
(Tex.App.-Fort Worth Mar. 22, 2012)
(memo. op.):

Defendant disputed that when he sent the impersonating message, he had the intent to harm the victim, claiming he sent the message only to test the victim's professed psychic abilities

TX Civil Cause of Action

TX CPRC Chapter 143

Cause of Action:

- ⦿ A person who is injured or whose property has been injured as a result of a violation under Chapter 33, Penal Code, has a civil cause of action if the conduct constituting the violation was committed knowingly or intentionally.

TX Civil Cause of Action

TX CPRC Chapter 143

Damages:

- ⦿ actual damages; and
- ⦿ reasonable attorney's fees and costs.