

Introduction

“The New Cyberbully: Adults Bullying Children Online”

—Parentology, Parenting in the Digital Age, by EYAL ALONY, January 10, 2020

“A Third of Young People Polled by UN, Report Being a Victim of Online Bullying”

—news.un.org, Human Rights, September 4, 2019

“Girls Report More Harassment Amid Rise in US Cyberbullying”

—ASSOCIATED PRESS, Sally Ho, July 26, 2019

“Cyberbullying on the Rise in U.S. Schools, Federal Report Finds”

—Institute for Education Sciences, edweek.org, ALYSON KLEIN, July 25, 2019

Headlines such as these are no longer the exception. They have become regular fare in news stories in the United States and worldwide. Much attention is being paid to this global epidemic by schools, courts, and professionals working with both perpetrators and victims.

Congress has yet to define cyberbullying or enact federal legislation criminalizing it. States have taken up the cause by either prohibiting “cyberbullying” by name or deferring to existing stalking, intimidation, threatening, and harassment laws in the criminal codes of each state. Some cyberbullying laws have been found to be ambiguous or overbroad, thereby unconstitutional, whereas prohibiting “electronic harassment” has fared better under judicial scrutiny.

Cyberbullying affects all ages in all walks of life. It surfaces in a variety of legal actions, thereby necessitating a familiarity with this developing area of the law. Lawyers and judges specializing in family law, juvenile law, civil injury, employment law, and wrongful death actions (bullycide), and those representing school districts will encounter cyberbullying in their work.

Attorneys practicing education law face issues involving due process in the disciplinary process (suspension and expulsion of students), and regarding privacy and the federal Family Educational Rights and Privacy Act (FERPA). In addition, there are issues concerning students' rights (First and Fourth Amendment protections), technology, and school safety.

Juvenile law practitioners deal with clients charged with cyberbullying or related probation restrictions on the use of the Internet and digital devices. Fourth Amendment issues of search and seizure are often challenged in the trial and appellate courts, particularly when a probation term requires warrantless disclosure of a juvenile's username and password for all Internet accounts.

Family law attorneys deal with the impact of cyberbullying and sexting when attempting to negotiate parenting time and custody issues as well as control of a child's digital devices. Orders of protection often place restrictions on social media when cyberbullying is a factor in the case. Revenge pornography and digital stalking are also considerations of attorneys and judges when confronted with this aspect of a domestic dispute.

Civil suits alleging a personal injury or wrongful death claim, either under state law or a Section 1983 federal claim, may be filed against a school district or against bullies and their parents. First Amendment and civil rights attorneys, as well as practitioners of Internet law, may also find *Cyberbullying Law* useful.

All-in-all, attorneys should be knowledgeable and current on the role cyberbullying plays in the lives of their clients, adult or juvenile. This phenomenon has become a part of everyday practice in our trial and appellate courts. It is the intention of *Cyberbullying Law* to inform the bench and bar in this developing area of law. Sound representation and judicial wisdom require current and thorough material to study and ponder. Only then may justice be done.

Before jumping into cyberbullying statutes and cases, it would be useful to understand the development of juvenile justice in the United States and the interplay with family courts across the country. It has been a slow march since 1899, when juveniles were first recognized as persons with some individual rights. Prior to the Illinois Juvenile Court Act of 1899,¹ minors were considered the property of their parents and were treated the same as adults if charged with a crime. The best interest of the community came first, not the concept of rehabilitating the juvenile.

Chapters 1 to 3 of *Cyberbullying Law* present a brief history of the rights of minors, due process, and application of the First Amendment's freedom of speech, in and out of school. Case summaries with relevant quotes from the courts' decisions are included. Chapters 4 to 10 include some replicated cyberbullying cases, with full citations. Sidebars are included throughout the book that stem from relevant cyberbullying lawsuits, some of which did not result in appellate opinions.

¹ 1899 Ill. Laws 131.

Docket numbers or citations to court documents in those cases are provided where available. Chapters 11 to 13 cover state laws on cyberbullying, revenge pornography, and sexting, as well as the federal response to cyberbullying and resources for further study.

Chapter 1 presents significant state and federal cases that constitute the foundation of juvenile rights today. Family and civil courts deal with juvenile justice issues regularly. An understanding of the basic principles is essential to an appreciation of cyberbullying laws and its impact on judicial decision making.

Chapter 2 discusses the principle of due process as applied to students, school districts, and family court litigation. Discipline is a regular function of our educational system and the Supreme Court has weighed in on the Fourteenth Amendment and its role in public schools. In *Goss v. Lopez*,² the Supreme Court recognized education as an entitlement calling for minimum due process. The right to notice and to be heard in a family court matter is essential to issues regarding custody, visitation, and orders of protection.

Student speech, on and off campus, whether oral, written, or symbolic, has been litigated in state and federal courts. Chapter 3 reviews one hundred years of jurisprudence regarding the rights of minors and adults under the First Amendment guaranty of freedom of expression. Exceptions to First Amendment protection are addressed, as well as the landmark *Tinker* decision that has become the basis for ongoing debate about student digital speech.

Chapter 4 covers cyberbullying cases where students have successfully challenged the actions of school officials or state prosecutors in court through either civil or criminal litigation.

Chapter 5 presents cyberbullying cases where school discipline has been imposed and/or prosecution undertaken and, when challenged through litigation, upheld by trial and appellate courts.

In Chapter 6, the Fourth Amendment is studied since cyberbullying occurs on digital devices that are carried and used by the majority of youth. Cell phones, tablets, and other devices may contain evidence of a school rule violation or criminal act. With or without a search warrant, these devices are vital to any investigation of cyberbullying.

A rare but logical extension of search and seizure law is the subject of strip searches. Case law about this intrusion of privacy usually relates to contraband (drugs and weapons) but has also involved missing money at school. The Supreme Court has referred to this practice as an “invasion of constitutional rights” and “more than that: it is a violation of any known principle of human decency.”³

² *Goss v. Lopez*, 95 S.Ct. 729, 419 U.S. 565, 42 L.Ed.2d 725 (1975).

³ *Safford Unified Sch. Dist., No. 1 v. Redding*, 129 S.Ct. 2633, 557 U.S. 364, 174 L.Ed.2d 354 (2009) quoting *Doe v. Renfrow*, 631 F.2d 91 (1980).

Chapter 7 addresses the issues presented to family courts when the Internet is used to harass or intimidate another. Due to the ubiquity of cell phones and other devices, family court judges frequently handle petitions/motions to ban or restrict a party's use of such. Protective orders, injunctions against harassment, and other remedies to control interaction among litigants are a daily responsibility of our courts.

In Chapter 8, sexting, revenge pornography, e-stalking, and defamation are discussed. Litigation based on cyberbullying has been brought by victims against the bully and/or parents, as well as school districts. Civil actions and criminal prosecution have resulted from incidents of revenge pornography and defamation via the Internet.

Chapter 9 provides an overview of lawsuits filed as Title IX actions under the federal Education Amendments. Cyberbullying among students raises the issue of deliberate indifference by a school, or negligent handling of a bullying complaint from parents by school officials and liability therefrom. Cases of wrongful death litigation with cyberbullying as a factor are presented, as well as cases against Internet service providers, and comments about cyberbullying insurance.

Cyberbullying in the workplace is the subject of Chapter 10. Cases cover all methods of online communication, from email to texting, chat rooms, and sexting. Lawsuits between employees as well as against employers have become subjects of judicial oversight.

Cases in Chapter 11 exemplify the difficulty in crafting an anticyberbullying statute that will survive judicial inspection. Whether vague or overbroad, some state laws have been determined unconstitutional on their face. Legislatures are then faced with rewriting the law to meet stringent judicial review.

Chapter 12 provides an overview of federal laws and acts concerning privacy, protection of children, and the protections provided Internet service providers. A federal prosecution under the Computer Fraud and Abuse Act is also covered.

Chapter 13 lists the websites referred to in the research and writing of *Cyberbullying Law*. A summary of services offered by each is presented, including helplines for victims of cyberbullying, current information on reported cases, appellate briefs and arguments, and additional research materials.

It is the purpose of *Cyberbullying Law* to educate the reader about cyberbullying and its effect on society. Litigants, attorneys, and judges need to be up to speed in this ever-changing digital world. Youth are ahead of most adults, including their parents, when it comes to new platforms and social media. To effectively represent a client, argue a case before a trial or appellate court, or simply play a video game with a family member, knowledge of cyberbullying and its consequences is essential.