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CRIMINAL PRACTICE

Sexting: Criminal Prosecution, Juvenile Adjudication and Megan's Law

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Special to the Legal

Smartphones have changed the professional and social landscape. Increasingly, everybody carries a minicomputer with a camera. In the hands of today's computer-savvy teenagers, camera phones have created many complex parenting and legal issues, "sexting" among teens and tweens being one of the most important.

Sexting is a text message to another that contains self-taken nude or lascivious images. What many teens do not realize is that, under state and federal law, a sexual image of any person under the age of 18 is child pornography. Illicit sexting among juveniles implicates both sender and recipient in an unlawful conspiracy to possess and distribute child pornography.

Current laws criminalize sexting and permit prosecution under child pornography laws regardless of age or intent. Pennsylvania's child abuse law, 18 Pa. C.S.A. § 6312(b), prohibits possession or distribution of a photograph or videotape depicted on a computer or film of a child under the age of 18 engaging in a prohibited sexual act. The statute defines "prohibited sexual act" to include "lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction."

Notably, Section 6312 does not differentiate between voluntary and involuntary actors depicted in, or possessors of, any photo or video of a juvenile engaging in a prohibited sexual act. The corollary New Jersey



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statute is found at N.J.S.A. 2C:24-4 and prohibits any "knowing" possession of child nudity intended for sexual stimulation, regardless of the actors' mens rea. Federal law is similar to New Jersey's because it requires only that the defendant acted knowingly. Importantly, however, any federal prosecution would still require a jurisdictional hook such as the involvement of interstate commerce or occurrence on federal land. As such, under current law, nude or sexually explicit smartphone photos of a juvenile taken by a juvenile and texted or e-mailed to another juvenile or adult violate federal and state law regarding the creation, distribution and possession of these images.

Criminal prosecution versus education about appropriate Internet/smartphone computing was addressed by the 3rd U.S. Circuit Court of Appeals in a 2010 opinion in *Miller v. Mitchell*. In *Miller*, the district attorney for Wyoming County, Pa., threatened prosecution of female juvenile sexters for violating

Section 6312 unless they participated in a morality education class just conceived by the District Attorney's Office, Victim's Services, and the Juvenile Probation Department. The teenagers' parents sought an injunction precluding the prosecution based upon First and 14th Amendment grounds. In affirming the district court's grant of injunctive relief, the 3rd Circuit concluded that the threat of prosecution to compel participation in the morality education program was unconstitutional.

Filing criminal charges based upon the teens' refusal to participate in the program, rather than the sexting conduct, violated the parents' substantive due process right to direct their children's education on some of the issues addressed in the program. In discussing the retaliatory nature of the prosecution, the court implied that state-imposed diversionary measures that include post-prosecution intermediate punishment, education or other discretionary first offender programs would pass constitutional muster.

Pennsylvania and New Jersey lawmakers are heeding *Miller's* suggestion and creating diversionary programs for first-time juvenile offenders that unknowingly violate child pornography statutes when they sext inappropriate and illegal images. Pennsylvania's proposed bills create a new and separate offense, 18 Pa. C.S.A. § 6321, called "Cyber-bullying and Sexting." With regard to sexting, the proposed statute would make it a misdemeanor of the third degree for any minor to knowingly transmit a visual depiction of himself or any other person in a state of nudity to another minor with the knowledge or intent that the message would coerce, intimidate, torment, harass or otherwise

cause emotional distress to the person in the picture or the recipient. (SB 850, 2011 Leg., Reg. Sess. (Pa. 2011).) It would also be a misdemeanor of the third degree if a minor “photographs, videotapes, depicts on a computer or films the other minor in a state of nudity without the person’s knowledge or consent; or transmits, distributes, publishes, or disseminates a visual depiction of the other minor in a state of nudity where the minor depicted has not given consent or has withdrawn consent for the dissemination.”

The Senate bill also amends the statute governing expungement to require expungement of the juvenile’s record six months after successful completion of a diversion program.

The Pennsylvania House Bill would make it a second degree misdemeanor if a minor “knowingly transmits an electronic communication or disseminates a depiction of himself or herself or another minor, or possess a depiction of another minor, engaging in sexually explicit conduct.” (HRB 815, 2011 Leg., Reg. Sess. (Pa. 2011).) The House bill also includes direction to consider alternatives to adjudication, such as diversionary programs, informal adjustment or entry into a consent decree.

New Jersey’s proposed legislation does not create a new criminal offense, but focuses on a diversionary program for non-predatory first-time offenders. Eligibility for the special diversion program requires the juvenile to not possess a criminal record that includes “any crime or offense which if committed by an adult would constitute aggravated assault; sexual assault; aggravated criminal sexual conduct; endangering the welfare of a child; luring or enticing a child, or luring or enticing an adult; or any attempt to commit any of the above offenses.” (S.B. 2700, 214 Leg., 2d Reg. Sess. (N.J. 2011).) Additionally, the juvenile must have been unaware that his conduct committed a crime and must not have had any criminal intent. A court would also have to find that the juvenile is amenable to change through participation in an educational program and that the benefit to society from the juvenile entering the program outweighs the detriment to society from abandoning criminal prosecution prior to placing the juvenile in the diversion program.

New Jersey Assembly Bill 1561 has a similar approach to the New Jersey Senate

bill; however, it requires the conduct have occurred without “malicious intent,” a requirement that tracks Pennsylvania’s concern regarding sexting as a cyber-bullying tool.

In addition to criminal penalties associated with sexting, juveniles who are convicted or adjudicated for sexting may face future Megan’s Law registration obligations. Currently, teens adjudicated in Pennsylvania’s Family Court are not required to register as sex offenders because 42 Pa. C.S.A. § 9795.1 mandates registration of persons convicted, not adjudicated, of violating Section 6312. Pennsylvania’s special terminology only permits juveniles to be “adjudicated delinquent” when prosecuted in Family Court, which makes the word “conviction” a term of art in Pennsylvania’s Megan’s Law statute. Even if a juvenile is successfully adjudicated for sexting under Section 6312, as long as the teen is not certified to adult court, there is no reporting requirement because there is no conviction.

In contrast, New Jersey’s Megan’s Law statute requires annual registration of anyone convicted of creating or disseminating child pornography and does not distinguish between juveniles and adults. According to N.J.S. 2C:24-4.b(5)(a), anyone “who knowingly ... gives, provides, lends, trades, mails, delivers, transfers, ... circulates ... through any means ... ” illicit images of minors will be required to register if convicted. This statutory language would apply to sexting and requires registration when any person initiates or forwards any illegal content. Although a different subsection of the same law would permit successful prosecution for possession of the same images, New Jersey law at N.J.S. 2C:7-2 does not require registration for individuals convicted of mere possession.

Federal registration requirements outlined in the Adam Walsh Child Protection Act of 2006 require juveniles to register as sex offenders if they were at least 14 years old when adjudicated delinquent or convicted and their conduct was similar to the federal aggravated sexual assault statute found at 18 U.S.C. § 2241. In addition to violent sexual assaults such as rape, this statute covers any sexual act with a child under the age of 12. The term “sexual act” does not currently include child pornography offenses. Therefore, federal law does not mandate registration for juveniles convicted of child pornography offenses.

However, because registration requirements are not considered “punishment” for purposes of the Eighth Amendment, there is significant reasonable concern that juveniles adjudicated delinquent for child pornography offenses today will have to register in the future. This concern is predicated upon previous legislative expansion of registration requirements in the form of reclassification and increased registration obligations of prior offenders. Politicians’ election platforms and promises to be tough on crime can easily target persons adjudicated for a sexting offense, thereby placing the now juvenile offender at risk for future registration as an adult.

From a policy perspective, there is a significant concern about juvenile sexting because of the potential for a single sext to become “viral.” Chain-texting magnifies the effect of typical teen behavior of spreading rumors, innuendo and tales of salacious conduct. Word of mouth now travels at the speed of light, not sound, and is accompanied by photographs. Embarrassment, ridicule and cyber-bullying are inextricably linked with viral sexts. Our children’s teachers, guidance counselors and school officials are overrun with panic-stricken and depressed victims of malicious sexts who will not return to a class, a school or a school district. Even worse, these teen victims are committing self-inflicted injury and suicide.

The goal of increased state educational involvement is to reduce the number of teens who sext. Creation of alternative statutes applicable only to juveniles and promulgation of diversionary programs for non-malicious first-time offenders will result in increased compulsory education and training in how and why to refrain from this very dangerous behavior. The first lesson in any of these programs must be: “Don’t take nude photographs and delete any inappropriate sexts you receive.”

As parents first, and lawyers second, it is important that we realize that the legislatures, the schools and the police through prosecution, cannot do it alone. The most effective tool in reducing this dangerous activity is a frank and open discussion in the home. •