

LITIGATION

INFORMATION MEMO

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New York's Highest Court Grapples with Video Evidence in the Age of "Deepfakes"

As every trial attorney knows, litigation hinges on evidence. Not just *any* evidence, but evidence that is relevant and authentic and which meets the standards for admission "into evidence" in the case at hand. But with advances in technology, it becomes increasingly challenging to ensure that only authentic items of evidence are able to be considered by judge or jury. In *Matter of M.S. (M.H.)*¹, the New York Court of Appeals tackled the pervasive modern problem of "Deepfakes" – and in the process, likely raised the bar for securing admission of video evidence at trial.

Matter of M.S. (M.H.) began as a family court proceeding involving allegations of sexual abuse of children in a family home. The family court determined that the appellant had failed to protect her children from sexual abuse by her live-in boyfriend, leading to removal of children from the family home and placement in a foster care setting. The key piece of evidence that the family court relied on was a set of video clips that appeared to show appellant's instances of sexual abuse in the living room of the family home.

The issue on appeal was the authenticity and reliability of the video clips. The video clips were not discovered in the family home or on any camera or computer belonging to Appellant or the former live-in boyfriend. Instead, the video clips were discovered in the course of an entirely unrelated FBI investigation against a separate individual suspected of trafficking in child pornography. In that separate investigation, the suspected pornographer told an FBI agent that he had "hacked into" security web cameras for the past few years, and that he believed he had observed an adult male sexually abusing a young woman in one of the videos he obtained. The FBI recovered three video clips from the computer of the alleged pornographer and provided the video clips to New York law enforcement.

Law enforcement personnel made contact with appellant and provided her with screenshots of the two people depicted in the video clips. Appellant confirmed that the screenshots depicted her daughter and former live-in boyfriend. This led to a consensual search of appellant's home and photographs of the alleged scenes of the events depicted on the video clips. Appellant's children were interviewed by trained professionals – appellant's daughter (the alleged victim) denied any sexual contact with the live-in boyfriend. Although law enforcement obtained the computer devices of the live-in boyfriend, no evidence from those devices was offered at the family court proceeding. Nor did appellant or either of her children testify at trial. The sole evidence of abuse offered at trial were the video clips, along with testimony of a law enforcement personnel asserting that the living room of the appellant's family home "matched" the living room in the video clips, and testimony by the FBI agent who recovered the video clips regarding "chain of custody" of that evidence.

Family court held that sufficient foundation was established to admit the video clips into evidence, and went on to reach its determination of abuse. On appeal, appellant asserted that the foundation was not sufficient to warrant admission of the video clips into evidence in the case, and that the finding of abuse against her was not supported by the required preponderance of the evidence. The intermediate appellate court (Appellate Division, Fourth Department) affirmed the lower court determination, noting that any uncertainty with respect to the video clips should go to the "weight" of the evidence instead of its admissibility. The intermediate appellate court concluded that the family court could in fact infer from the video clip evidence and testimony that "the mother knew or should have known about the abuse and did nothing to prevent it, and that the facts surrounding M.S.'s alleged abuse justified a finding of derivative abuse."

The New York Court of Appeals reversed the lower courts. In a Feb. 17, 2026 majority opinion authored by Chief Judge Rowan, the court concluded that the video clips were not properly authenticated. The majority was concerned that the individual who allegedly created the video clips (i.e. the alleged abuser) provided no evidence or testimony at trial; nor did the third-party child pornographer. Further, a significant portion of the authentication testimony provided by the FBI agent who recovered the video clips was determined to be hearsay testimony. The majority was concerned that only video *clips* were offered into evidence – no full and uncut video footage was offered at trial and there was no testimony presented that the video clips were "unaltered." The majority observed that there was a roughly a two-and-a-half-year period between the date at which the videos were "stolen and snipped by the child pornographer" (mid-2019) and when they were recovered

¹ *Matter of M.S. (M.H.)*, 2026 N.Y. Slip Op. 00825 (N.Y. Ct. App. Feb. 17, 2026)

by the FBI (circa 2022). This “long gap in the chain of custody of a key piece of evidence” raised further concerns about the authenticity of the video clips.

Although the majority asserted that “the technology to make realistic manipulated videos” was “widely available” by 2022, the majority also noted that the *likelihood* of the alteration “is beside the point”. The question at issue was whether the proponent of the evidence at trial had laid a sufficient foundation to establish the reliability and authenticity of the video clips. The majority specifically cited the confluence of factors concerning these particular video clips – including the bizarre circumstances that led to discovery of the video clips and the lengthy duration of time between creation and recovery of the video clips – as a basis for its decision. The majority concluded that the questions concerning authenticity were significant and that the burden to dispel doubts was not sufficiently met in the lower court.

The majority opinion stated that it is simply not enough in this day and age for video clips to accurately depict a particular filmed location – the majority specifically asserted that the increasing prevalence of “deepfake” videos has now reduced the method of matching circumstantial details to personal observations to a *more suspect* form of authentication: “what matters most is whether the events depicted are as real as the proponent claims them to be, not whether there are some identifying features of the video that can be corroborated in real life”. The majority made a point to note that it was not stating that the proffered video clips evidence was “false”, or even that “adequate authentication testimony” for the video clips evidence could not have otherwise been offered at trial – rather, it was holding that “the evidence of authentication proffered here was legally insufficient” to allow admission of these video clips into evidence at trial.

Two Justices dissented in highly critical separate opinions. Justice Troutman asserted that the “deepfake” concern was not raised during the Family Court proceedings, and that there was no actual evidence presented at Family Court to suggest that the video clips were “fabricated.” Justice Troutman asserts that the majority opinion “creates new and perhaps insurmountable hurdles for future authentication of video evidence,” and that as a result of the majority decision “children will be harmed and abusers will escape accountability”.

Justice Singas agreed with Judge Troutman’s dissent but wrote separately to criticize the majority opinion for its “superficial and simplistic analysis of deepfake technology”. She expressed concern that the Court had just created a presumption of deepfake forgery moving forward. Justice Singas asserted that “the level of fakery required” to support the majority’s determination was simply “not possible let alone readily available” when these alleged events were captured on video (circa 2019) or recovered by law enforcement (circa 2022). Justice Singas accused the majority of being “deeply out of touch” and basing its analysis on a “parade of legal and factual errors” that included contorting the record from the Family Court proceeding.

In the wake of *Matter of M.S. (M.H.)*, litigation attorneys will now need to exercise more care than ever to demonstrate the reliability and authenticity of video evidence at trial.

If you have any questions regarding this information memo, please contact [Richard L. Weber](#), any attorney in Bond’s [litigation](#) or [artificial Intelligence](#) practice, or the attorney at the firm with whom you regularly communicate.

