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## March 2004

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#### “Is Anyone Watching?”

#### Invasion of Privacy Issues for the Investigator

By Peter A. Lynch

Thermal scanning devices, directional listening devices, TV hat cams, and hidden cordless microphones all permit access to information previously not available to insurance investigators. Does each advance in investigative hardware, however, mean a corresponding increase in potential invasion of privacy claims?

Invasion of privacy claims are not a new concern. Since the 1890s, commentators have decried the increasing ability of investigators to gather information previously thought to be private. At that time, critics derided the development of mechanical devices that allowed the dispersion of personal information. Modern surveillance equipment permits easier collection of personal information, such as that described in George Orwell's 1984. An easy way to allege an invasion of privacy claim is when an investigator uses new technology to gather information. This includes using listening devices, directional microphones, thermal scanners, and video cameras to get information from private semi-private places.

The most easily understood example of invasion of privacy is the tort of intrusion into private places, conversations, or personal matters. This tort covers physical intrusion into someone's home, hospital, or other place of privacy without consent. It includes unwarranted sensory intrusion by visual spying, photographic spying, wire tapping, and eavesdropping.

These intrusions are seen as personal attacks on an individual's dignity.

Intruding into another's personal affairs is the “primary weapon of the tyrant,” wrote Edward J. Bloustein in his 1964 study, *Privacy as an Aspect of Human Dignity*. As the intrusion tort has been defined, “One who intentionally intrudes, physically or otherwise, on the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” For example, an investigation is unreasonably intrusive when a private investigator gains admittance to a person's hospital room and, by deception, secures relevant information regarding a legal action (*Noble v. Sears, Roebuck & Co.* [1973] 33 Cal.App.3d 654, 657, 660).



## Privacy Invasion Case Law

California has been on the forefront of invasion of privacy information claims. In *Mar Sanders v. ABC* (1999) 20 Cal.4th 907, the California Supreme Court held that, in an office or other workplace to which the general public does not have unfettered access, employees still can enjoy a limited expectation that their conversations and other interactions will not be videotaped secretly by undercover television reporters.

An ABC reporter, Stacey Lescht, obtained a job at a tele-psychic agency in Los Angeles to conduct an investigation of the industry. The psychics' work area consisted of a large room with rows of cubicles. The public generally was prohibited access to the office without specific permission. Once Lescht was hired, she sat at a cubicle desk while she gave telephone readings to customers. While not on the phone, she talked to others in the room. She secretly videotaped these conversations with a hat cam, a small camera hidden in her hat with a microphone attached to her. These conversations were videotaped, including two with Sanders, portions of which were broadcast by ABC. Sanders sued for violation of Penal Code section 632 and for the common law tort of invasion of privacy by intrusion.

The court held that a person who lacks a reasonable expectation of complete privacy in a conversation, because it can be seen and overheard by co-workers but not the general public, still can allege a claim for invasion of privacy by intrusion, based on the covert videotaping of the conversation. This case involved the question of an expectation of limited privacy. The court held that there are degrees and nuances in the recognition of expectations of privacy; the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.

Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion. Even employees without personal offices may have reasonable, but limited, expectations of privacy against intrusions by strangers to the workplace. It is highly unlikely that the plaintiff would have expected conversations to be electronically intercepted and monitored in an office. The possibility of being overheard by a co-worker does not, as a matter of law, render unreasonable an employee's expectation that his interactions in a non-public workplace will not be videotaped in secret by a journalist.

In *Wilson v. Layne* (1999) 526 U.S. 603, the U.S. Supreme Court held that a media presence along with a home violation of the Fourth Amendment. The majority held that, because state law was not clearly established at the time of entry, the police officers were entitled to qualified immunity. The Supreme Court noted that the officers had a warrant and were entitled to enter the home to execute the warrant. However, that did not permit them to bring a newspaper reporter and photographer with them. The presence of members of the media was not necessary for execution of the warrant, and violated the Fourth Amendment.

In *Ruth Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, two people were injured in a car that went off the highway and trapped them inside, leaving one a paraplegic. A medical transport and rescue helicopter attended the victims, while a camera operator hired by a television show filmed the event. The nurse wore a microphone that recorded the conversation. The film and audio was broadcast later without the permission of the injured parties and suit was filed alleging invasion of privacy. The California Supreme Court agreed, finding that the plaintiffs could allege a claim for intrusion of privacy. That cause of action requires two elements: intrusion into a private place, conversation, or matter, and that it be done in a manner highly offensive to a reasonable person.

The court noted that examining public records, taking photographs in a public area, observing without aids does not constitute a tort. The plaintiff must show that the "defendant penetrated some zone of physical or sensory privacy surroundings, or obtained unwanted access to data about the plaintiff." A plaintiff can recover if he

establishes an objectively reasonable expectation of seclusion or solicitude in the pl conversation, or data source.

Videotaping of an accident scene is not an invasion by itself because the plaintiffs h no ownership or possession of the property at which the accident occurred. Howeve triable issues remained because of the filming done inside the helicopter and the recording of conversations with the nurse. Such conversations generally are viewed meant to be private. The court held that eavesdropping or recording that confidentia communication without a warrant constituted an invasion of privacy. To determine th offensiveness element, one must look at the circumstances of the intrusion: its degr and setting, and the intruder's motives and objectives. Motive was important becaus the First Amendment issues.

### **California Statute**

The California legislature amended Civil Code section 1708.8 to subject individuals invade the privacy of others to civil tort liability. The cases discussed above did not address this newly enacted statute. Section 1708.8 states that a person is liable for invasion of privacy when he knowingly enters the land of another without permission otherwise commits trespass, in order to physically invade the privacy of the plaintiff the intent to capture any type of visual image or sound recording, or a plaintiff enga in personal or familial activity in a manner offensive to a reasonable person. Person and familial activity includes, but is not limited to, the plaintiff's personal life and interactions with the plaintiff's family or significant others.

Any person is liable for "constructive" invasion of privacy when he attempts to captu any type of visual image, sound recording, or impression, through the use of visual , auditory enhancing devices, of the plaintiff engaging in personal or familial activity ir which the plaintiff had a reasonable expectation of privacy, regardless of whether th is a physical trespass, if the image, sound, or impression could not have been achie without a trespass and unless the visual or auditory devices were used. The person directs an individual to violate this section can be held civilly liable also.

Law enforcement officers, governmental employees, and other entities, either public private, who, "in the course and scope of their employment," supported by reasonat suspicion, attempt to capture visual images, sound recordings, or physical impressio of a person during an investigation, surveillance, or monitoring of any conduct to ob evidence of suspected illegal activities, suspected fraudulent insurance claims, or a other suspected fraudulent conduct or activity involving a violation of law should not subject to invasion of privacy claims. A court can grant injunctive relief to halt such activities. A jury can award general, special, and punitive damages for invasion of privacy. The statute does not allow invasion of privacy claims for illegal or otherwise criminal activity. There are no reported appellate court cases in California interpretir this new section.

If you are a private investigator, your actions are not covered by any governmental discretionary immunity. Do not use high-tech equipment to obtain video or auditory material in areas in which individuals have reasonable expectations of seclusion or privacy. This is especially true in California, unless you have a legitimate suspicion of fraudulent insurance claim pursuant to the requirements under Civil Code § 1708.8(

You can videotape activities in areas in which an individual does not own or posses property rights, such as the accident scene noted in Shulman; however, you still mu concerned whether the individual has a legitimate expectation of limited privacy, suc a place of employment, as discussed in Sanders.

As an insurance investigator, you must stay current on the techniques that can be u without warrants. One simple question to ask yourself is "Would I be embarrassed t explain to a jury how I conducted this investigation?" If the answer is yes, avoid the activity or get a legal opinion permitting the activity.

As technology advances, so does the potential for invasion of privacy claims. For example, computer analyzers are new forensic tools that analyze a computer's disk drive and storage area, which generally are unknown to, or beyond the reach of, most general computer users. If you use that tool on a computer when the user has an expectation of privacy, you may be subject to an invasion of privacy claim. Be prepared to explain why your actions are valid, or risk a plaintiff's suing for invasion of privacy.

As Sergeant Esterhaus in Hill Street Blues said, "Let's be careful out there." You need to be careful when employing the newest technological surveillance devices in an insurance investigation.

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