

# Invasion of privacy in the modern era: The increasing trend toward protecting individual rights

By Kelly Armstrong

There is a growing movement in the United States to protect individual privacy interests as evidenced by recent national events. California has already enacted legislation to protect the privacy rights of individuals. The body of law related to privacy rights is also evolving to address previously unanticipated violations involving the Internet, email communications and cellular telephones. Existing California case law regarding privacy claims in employment and private settings is discussed in this article.

On June 9, 2013, The Guardian and Washington Post identified former Central Intelligence Agency employee and National Security Agency (NSA) contractor Edward Snowden as the source of information regarding the United States' mass surveillance of its citizens' private information. Mr. Snowden revealed that telephone and Internet providers had been leaking private information to the NSA as part of a secret surveillance program without our knowledge or consent. The

debate regarding how much of a reasonable expectation of privacy we are entitled to against intrusions by the government amidst claims of national security interests is ongoing. Snowden stated that his sole motive for leaking the documents was "to inform the public as to that which is done in their name and that which is done against them."<sup>1</sup> Civil liberties groups have filed transparency lawsuits to compel United States agencies to release information regarding the controversial program.<sup>2</sup> Apple, Google, Microsoft, Twitter and 59 other technology companies and trade organizations have also formed an alliance asking the NSA for greater transparency as to its surveillance programs.<sup>3</sup> The Edward Snowden scandal has ignited a national debate regarding the current state of our privacy rights.

## Anti-Revenge Porn Cases and Bills

Recently there have been a number of cases in the news dealing with violation of the privacy rights of private citizens. Several cases involving disgruntled ex-lovers posting naked photos of their former partners online prompted California Governor Jerry Brown to sign a bill outlawing so-called "revenge porn." Senate Bill 255 went into effect in October 2013, making it a misdemeanor to post identifiable nude pictures of a person online without permission with the intent to cause emotional distress or humiliation. The bill calls for a maximum penalty of up to six months in jail and a \$1,000 fine. However, California's bill has been criticized by victim-advocates

for being both under-inclusive and under-protective.<sup>4</sup> In December 2013, Attorney General Kamala Harris charged the owner of revenge porn website UGotPosted with 31 counts including extortion and criminal conspiracy.<sup>5</sup> Invasion of privacy in the civil context may also overlap with criminal claims creating additional tactical considerations when prosecuting claims against defendants. Many victims do not wish to bring further attention to their most intimate moments in a criminal prosecution, although they would like to seek monetary damages and send a message to defendants in the civil context. A primary consideration in determining whether or not to represent an invasion of privacy plaintiff in a civil case is whether an individual defendant is in a position to pay monetary damages. Many defendants also quickly erase all evidence when they learn of claims against them so preservation of evidence letters should be transmitted quickly along with requests to examine all computers and cell phones used by defendants during the relationships in question.

Prompted by California's bill, New York politicians introduced legislation in October 2013 that would make "the non-consensual disclosure of sexually explicit images a class A misdemeanor," which could potentially equal up to a year of prison time and up to \$30,000 in potential fines.<sup>6</sup> The proposed bill would protect all victims whose photos were self-taken. This would be a step farther than California's bill, which currently only protects victims whose photos were taken by the person who published them without the victim's consent as opposed



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to “selfies.” Historically, New Jersey is a leader in protecting the rights of individuals. It was the first state to take action on the revenge porn issue in 2004 when it adopted an invasion-of-privacy law, which prohibited the dissemination of sexual recordings or pictures without consent.<sup>7</sup> California lawmakers are monitoring actions in other states in order to determine whether privacy rights should be further expanded here. The activity surrounding invasion of privacy in the criminal context is opening the doors for civil litigation practitioners who seek to make the victims whole.

### Tort Claims: Privacy Rights

The Second Restatement of Torts details the common law cause of action for invasion of privacy, which is comprised of four distinct torts. (Rest.2d Torts, § 652D.) Tort liability for invasion of privacy arises from four distinct kinds of activities: “(1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person’s name or likeness.” (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 24; see also CACI No. 1800.) Among other things, the privacy tort “seeks to vindicate ... freedom to act without observation in a home, hospital, or other private place....” (*Hill v. NCAA, supra*, at 24.) Liability for invasion of privacy for private individuals as discussed above most commonly arises from both: (1) intrusion into private matters, and (2) public disclosure of private facts.

### Intrusion into Private Places, Conversations or Other Matters

The tort of intrusion is one of the primary types of invasion of privacy in the 21st century. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230.) Intrusion includes “unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying.” (*Id.* at 230-31.) It is in these cases that “invasion of privacy is most clearly seen as an affront to individual dignity.” (*Id.* at 231.) The elements of intrusion are: “(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person.” (*Id.*) Areas reserved “exclusively for performing bodily functions or other inherently personal acts” maintain the utmost privacy expectations. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 290.) For example, in *Trujillo v. City of Ontario* (C.D. Cal. 2006) 428 F.Supp.2d 1094, 1099-1100, the court held that employees of a police station had a privacy interest against the use of a hidden camera in the basement locker room of a police station. A plaintiff who was secretly recorded or videotaped when they were either in a restroom taking a shower and using the facilities or during intimate relations may also have a claim under this tort. Someone whose intimate and/or nude photos were stolen from their cellular telephone and shared with others may allege a claim here also.

Intrusions into the most private areas of an individual’s life are highly offensive to a reasonable person. The manner of the intrusion is considered in light of “all the

circumstances of the intrusion, including its degree and setting and the intruder’s ‘motives and objectives.’” (*Shulman, supra* at 236, citing *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1483-1484.) Secretly videotaping a woman while she is using the bathroom, or in the bedroom during intimate relations, is highly offensive. It is disturbing how many people videotape others without their knowledge or consent during intimate relations as some sort of trophy collection for repeated viewing unbeknownst to the victim. However, defense counsel may seek to discredit the victim by claiming they were too intoxicated or a willing participant and cannot prevail on an invasion of privacy claim because they did not conduct themselves in a manner consistent with an actual expectation of privacy. (See *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129.)

### Publication of Private Facts

The elements of a public disclosure tort are: “(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.” (*Shulman, supra* at 214; see also Rest.2d Torts, § 652D [“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that [¶] (a) would be highly offensive to a reasonable person, and [¶] (b) is not

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of legitimate concern to the public.”].) An invasion of privacy claim lies if “the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source.” (*Shulman, supra* at 232.) For this type of invasion of privacy claim, the plaintiff must show that the private information was disseminated to one or more third parties. It is a difficult claim to prove when it is unclear exactly where the victim’s photos



and/or videos were disseminated. Google has a function where you can upload a photograph into its browser search bar to find where the photo(s) or video(s) or like images may be located on the Internet, but it could also make it easier for others to locate embarrassing and compromising visual images by engaging in this type of search by creating a search history, which Google tracks.<sup>8</sup>

## Constitutional Privacy Rights

Plaintiffs may bring invasion of privacy claims based on Article I, Section 1 of the California Constitution because its inalienable rights provision provides the ability to bring claims against private parties. (*Hill v. NCAA*, *supra*, at 20.) Interestingly, the California Supreme Court has construed the California Constitution to provide broader protection in employment litigation than the United States Constitution. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 327-329.) The elements for a California constitutional right of privacy claim are: (1) Defendant engaged in conduct that invaded the plaintiff's privacy interests; (2) Plaintiff had a reasonable expectation of privacy as to the interests invaded; and (3) the invasion was serious. (*Hill v. NCAA*, *supra* at 32-37.)

Courts have established a high bar for employees to claim privacy rights with respect to romantic relationships in the workplace when they involve felons or subordinate employees due to the employer's

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overriding interest in workplace safety and avoiding conflicts of interest. (*See Ortiz v. Los Angeles Police Relief Ass'n* (2002) 98 Cal.App.4th 1288, 1314; see also *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, 532-533.)

## Monitoring Employees' Computer and Internet Usage

The law regarding Internet usage is still developing, but there are multiple cases which currently provide guidance. One of the first cases addressing employee privacy rights regarding computer and Internet use held that the employer was entitled to review the employee's computer and Internet use even when they worked on a computer at home. The court in *TBG* found for the employer because the employee agreed in writing in advance to the employer's right of access. (*TBG Ins. Services Corp. v. Sup. Cr. (Ziemenski)* (2002) 96 Cal. App.4th 443, 452). For employees who have not consented in writing with their employers, there is a stronger argument for privacy rights. However, it has been reported that over 70 percent of employers regularly review their employee computer and Internet usage, which suggests caution when using the Internet either at work or on employer-owned equipment.

The employer may also have less right to monitor its employees' use of computers with Internet access when the employer permits its employees to use the Internet for personal use so long as the usage is deemed reasonable and there is no written consent as in *TBG Ins. Services*. (*See Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1359-1360.) Federal and state laws may also limit employers' monitoring of its employees' email and Internet use and accessing their personal files on company computers. (*See Hernandez v. Hillsides, Inc.*, *supra*, at 298.) Labor Code Section 980 provides significant protections for employees' social media accounts and usage such that an employer shall not require or request an employee to: (1) disclose a username or password for the purpose of accessing personal social media; (2) access social media in the presence of the employer; or (3) divulge any personal social media unless it is reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.<sup>9</sup> Finally, employers may not subpoena employees' stored wire and electronic communications and transactional records held by

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third-party email Internet service providers or they will be in violation of the federal Stored Communications Act. (18 U.S.C. §§ 2701-2712.)

## Vicarious Liability for Employers

An employer is vicariously liable for the negligent or intentional torts of its employees committed within the scope of the employment. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208.) The nature of an employee's conduct and the intent in so acting are important considerations in determining whether the employee acted in the course and scope of the employment. (*Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 Cal.4th 291, 297.) When citing to *Lisa M.* for a statement of the general law, it should be noted that the California Supreme Court ruled against the plaintiff in a particularly dismaying holding regarding vicarious liability authored by Justice Werdegar. You will need to distinguish the facts in *Lisa M.* from your case to avoid defense counsel using the case to undermine your client's ability to establish liability against an employer. Determining whether a tort is engendered by the employment is not satisfied by the "but-for" test, but rather a foreseeability test. (*Id.* At 299) The proper inquiry for that foreseeability test is not whether it is foreseeable that one or more employees might at some time act in such a way as to give rise to civil liability, but rather, whether the employee's act is foreseeable in light of the duties the employee is hired to perform. (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 142.)

## Conclusion

The laws regarding privacy rights appear to be leaning toward the protection of individual and employee rights, especially when the Internet is involved, but it will be interesting to see how the area of law continues to evolve. ■

first time." *The Guardian* (London), Nov. 19, 2013.

<sup>3</sup> Bryan Chaffin. "Apple, Google, Microsoft, Twitter to Ask NSA for Greater Transparency on U.S. Surveillance." *The Mac Observer*, July 17, 2013.

<sup>4</sup> Heather Kelly. "New California 'Revenge Porn' Law May Miss Some Victims." *CNN*, Oct. 3, 2013.

<sup>5</sup> Office of the Attorney General. "Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Website Operator." Dec. 10, 2013.

<sup>6</sup> Jessica Roy. "Anti-Revenge Porn Legislation Proposed in New York." *Time.com*, Oct. 4, 2013.

<sup>7</sup> New York Times Editorial Board. "Fighting Back Against Revenge Porn." *New York Times*, Oct. 12, 2013.

<sup>8</sup> <http://www.wikihow.com/Search-by-Image-on-Google>

<sup>9</sup> Our office recently cited this statute as an objection in discovery responses to a defense request for a plaintiff's social media account information. We will see if the objection is deemed viable.



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<sup>1</sup> Greenwald, Glenn; MacAskill, Ewen; Poitras, Laura. "Edward Snowden: the whistleblower behind the NSA surveillance revelations." *The Guardian* (London). June 9, 2013.

<sup>2</sup> Spencer Ackerman. "Fisa court order that allowed NSA surveillance is revealed for

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