



Privacy Law in New Mexico

- **Presenter: Jeffrey D. Myers**
- **Peacock Myers, P.C., Intellectual Property Law Services**
- **jmyers@peacocklaw.com**
- **<http://www.peacocklaw.com>**
- **(505) 998-1500**



Invasion of Privacy -- Topics

- **Overview**
- **Intrusion Upon Seclusion**
- **False Light**
- **Public Disclosure of Private Facts**
- **Appropriation of Name or Likeness**
- **Related Rights of Publicity and Copyright**



Overview (1)

- **Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), proposes “right to be let alone” as separate tort**
- **Many states now recognize tort**
- **Also read into “penumbras” of Bill of Rights and “concept of liberty” guaranteed by the Fourteenth Amendment by the Court in *Roe v. Wade*, 410 U.S. 113 (1973)**

Overview (2)

- **Person's right of privacy violated by:**
 - **(1) Intrusion upon seclusion;**
 - **(2) Placing person in a false light;**
 - **(3) Public disclosure of private facts; or**
 - **(4) Appropriating name or likeness for benefit.**
 - **Restatement (Second) of Torts § 652A (1977)**
- **Right is personal; does not survive death**
- **Person may license a privacy right**



Overview (3)

- **Damages Available**
- **Compensatory - Emotional Distress**
 - **Anxiety, embarrassment, humiliation, depression, and anguish due to violation**
 - **Presumably, any bodily injury due to distress**
- **Punitive - Usually Available**
- **Attorney's Fees - Usually Not Available**



Intrusion Upon Seclusion (1)

- **Restatement (Second) of Torts § 652B**
- **Occurs when a person intentionally intrudes into a place or into the affairs of another person in which that person has an expectation of privacy and when such intrusion is highly offensive to a person of ordinary sensibilities**



Intrusion Upon Seclusion (2)

- **Physically intruding into secluded place**
- **Overseeing or eavesdropping on private affairs of another**
- **Investigating into a person's private concerns**
- **NOT by taking photograph in public place**
- **Information need not be published**



False Light (1)

- **Restatement (Second) of Torts § 652(E)**
- **Occurs when false or misleading representation or imputation published which places the person in a false light which would be highly offensive to a reasonable person**



False Light (2)

- **Person's picture placed in conjunction with offensive story having no relation to person**
- **Generally NOT when publisher edits a factually accurate video tape and only displays selected portions**
- **Constitutional limitations on defamation claims generally apply**



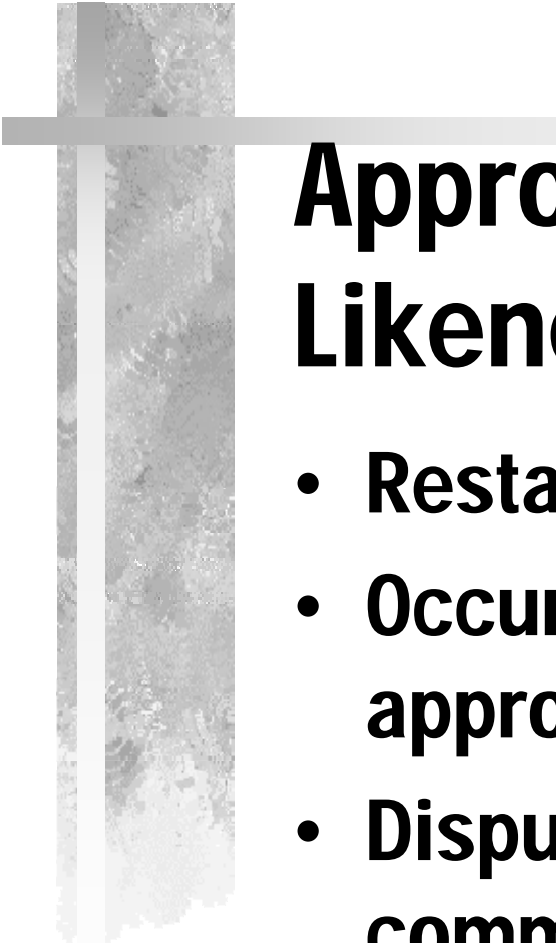
Public Disclosure of Private Facts (1)

- **Restatement (Second) of Torts § 652D**
- **Violated when private facts about a person are publicly disclosed, being highly offensive to ordinary person**



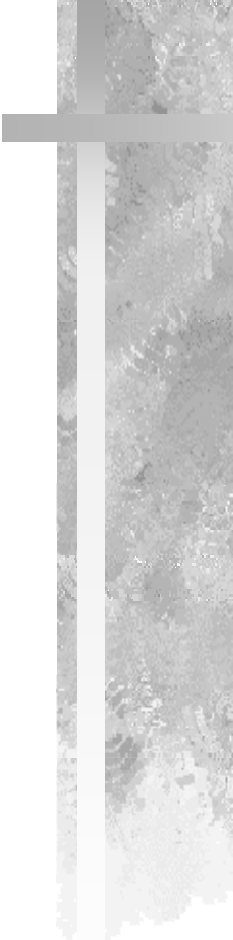
Public Disclosure of Private Facts (2)

- **Nude pictures**
- **Certain medical procedures (mastectomy)**
- **Certain afflictions (e.g., AIDS)**
- **NOT photo taken in public place**
- **NOT if business interest/limited disclosure**
- **Regarding public figures or matters of public concern, greater leeway**



Appropriation of Name or Likeness (1)

- **Restatement (Second) of Torts § 652C**
- **Occurs when one's name or likeness is appropriated for another's benefit**
- **Dispute as to whether benefit must be commercial**
 - **Blends into Right of Publicity if so**
 - **Restatement (Second) of Torts § 652C comment d supports commercial requirement**



Appropriation of Name or Likeness (2)

- **Sub-tort sometimes called simply “Appropriation” or “Misappropriation”**
- **Relationship to right of publicity**
 - **Some courts treat identically**
 - **Some distinguish on damages available (commercial value of persona v. mental injury)**
 - **Others point to non-commercial benefits may be covered by appropriation tort**



Related Right of Publicity (1)

- **Involves control over legal right to exploit name, image, or character traits of a living (and in some states, dead) person**
- **Prevents unauthorized commercial use of:**
 - name;
 - likeness (including lookalikes (Vanna White));
 - voice (soundalikes (Bette Midler)); or
 - other identifying feature (“Here’s Johnny!”).



Related Right of Publicity (2)

- **Varies widely between jurisdictions**
- **Usually a matter of state common law (NM)**
- **Some states have statutes of varying scopes (e.g., CA, FL, IL, IN, KY, MA, NB, NV, NY, OH, OK, PA, RI, TN, TX, UT, VA, WA, WI)**
- **OK to have incidental use in content (e.g., panning crowd in public places)**
- **But best to get waiver, if possible**



Related Right of Publicity (3)

- **Usually joined with right of privacy claim**
- **Advertising v. Protected Uses**
 - **Advertising is per se commercial use**
 - **Reporting of news considered not and is protected by First Amendment**
 - **Multitude of gray areas**



Related Right of Publicity (4)

- **Gray Area Questionnaire**
 - **Magazine cover showing parade OK**
 - **News account placed in movie OK**
 - **Likeness of Ali in Playgirl cartoon BAD**
 - **Statistical information on athlete used in board game BAD**



Related Right of Publicity (5)

- **Survival**

- Some states, expires like privacy rights at death (e.g., New York and Ohio) (NM??)

- Others, continues after death

- Common law, NJ (Elvis Presley)

- Statute, CA (50 years), FL (40 years), TN (10 years)

- **Transferability**

- Usually freely assignable and licenseable



Related Right to Copyrights

- **Title 17 of the United States Code**
- **For certain “works of authorship”, grants exclusive rights to the author to make and distribute copies of the work**
- **Limited “Fair Use” exception provided for extracts -- issue often boils down to effects of copying on market for original work**
- **NOT extracts of unpublished Ford letters**



New Mexico

- **Essentially all common law**
- **No Uniform Jury Instructions (UJIs)**
- **Only single cause of action for tort founded on single publication or exhibition or utterance -- NMSA § 41-7-1**
- **Eleven cases on privacy and publicity rights next discussed in chronological order**

New Mexico Cases (1)

- ***Gruschus v. Curtis Pub. Co.*, 342 F.2d 775 (10th Cir. 1965)**
 - Article giving false impression that plaintiff's deceased father bribed public officials
 - Invasion of privacy claim did not survive death of father

New Mexico Cases (2)

- ***Hubbard v. Journal Pub. Co.*, 69 N.M. 473, 368 P.2d 147 (1962)**
 - **Verbatim publication of brief juvenile court record involving minor sexual assault of another minor**
 - **Law at time made such records public; therefore publication privileged**
 - **First reported case in U.S. of privacy invasion by victim of sexual assault against media?**

New Mexico Cases (3)

- ***Blount v. TD Pub. Corp.*, 77 N.M. 384, 423 P.2d 421 (1966)**
 - **Article reconstructing in detail events around murder of plaintiff's husband**
 - **What is newsworthy within article is question of fact, so summary judgment was improper**

New Mexico Cases (4) - Part 1

- ***Bitsie v. Walston*, 85 N.M. 655, 515 P.2d 659 (Ct. App.), cert. denied 85 N.M. 639, 515 P.2d 643 (1973)**
 - Follows Restatement of Torts § 867
 - Sketch based on photograph of healthy Navajo child associated with article on cerebral palsy

New Mexico Cases (4) - Part 2

- ***Bitsie v. Walston*, 85 N.M. 655, 515 P.2d 659 (Ct. App.), cert. denied 85 N.M. 639, 515 P.2d 643 (1973)**
 - **“We cannot equate an offense to persons holding a traditional belief with an offense to persons of ordinary sensibilities” in that tort relates to customs of New Mexico**
 - **Defendant must realize offensiveness**

New Mexico Cases (5)

- ***McNutt v. N.M. State Tribune Co.*, 88 N.M. 162, 538 P.2d 804 (Ct. App.), *cert. denied* 88 N.M. 318, 540 P.2d 248 (1975)**
 - Publication of officers' addresses newsworthy as necessary to properly identify individuals part of newsworthy event
 - Favorably cites four-part definition of right of privacy of *Prosser on Torts* § 117 (4th ed. 1971)



New Mexico Cases (6)

- ***Poteet v. Roswell Daily Record, Inc.*, 92 N.M. 170, 584 P.2d 1310 (Ct. App. 1978)**
 - **Publication of minor's name as victim of attempted criminal sexual act held privileged as appearing in public record**
 - **Followed *Hubbard* despite subsequent passage of Children's Code, as noted by Judge Sutin in special concurrence**



New Mexico Cases (7) - Part 1

- ***Benally v. Hundred Arrows Press, Inc.*, 614 F. Supp. 969 (D.N.M. 1985), *rev'd on other grounds* 858 F.2d 618 (10th Cir. 1988)**
 - Navajo photo taken with permission published without permission
 - Invasion of Privacy is “not one tort, but a complex of four”, per Prosser § 117 (4th ed. 1971)

New Mexico Cases (7) - Part 2

- ***Benally v. Hundred Arrows Press, Inc.*, 614 F. Supp. 969 (D.N.M. 1985), *rev'd on other grounds* 858 F.2d 618 (10th Cir. 1988)**
 - **Misappropriation of likeness is an action for injury to property for statute of limitations purposes**
 - **Further, Only applies to a commercial use, citing Restatement (Second) of Torts § 652C comment d**

New Mexico Cases (7) - Part 3

- ***Benally v. Hundred Arrows Press, Inc.*, 614 F. Supp. 969 (D.N.M. 1985), *rev'd other...***
 - **No public disclosure of private fact because photograph exposed no more to public eye than exposed to one encountering plaintiffs in public; also followed *Blount***
 - **Further, subjective knowledge of offensiveness irrelevant, distinguishing *Bitsie* as based on Restatement of Torts § 867**

New Mexico Cases (8)

- ***Moore v. Sun Publishing Corp.*, 118 N.M. 375, 881 P.2d 735 (Ct. App.), *cert. denied* 1994 N.M. LEXIS 350 (1994)**
 - **Follows Restatement (Second) of Torts**
 - **Factually correct notice regarding employee actions corrected after termination**
 - **Summary judgment reversed for false light despite absence of express false statements**

New Mexico Cases (9)

- ***Andrews v. Stallings*, 119 N.M. 478, 892 P.2d 611 (Ct. App. 1995)**
 - **False light close cousin of defamation**
 - **Public figures involved in matters of public concern protected by same constitutional limitations as with defamation**
 - **Report to IRS not “publicity” as required for false light sub-tort**

New Mexico Cases (10)

- ***Schuler v. McGraw Hill Co.*, 989 F. Supp. 1377 (D.N.M. 1997), *aff'd* 145 F.3d 1346 (10th Cir. 1998)**
 - “[L]ike defamation, false light invasion of privacy requires proof of a false statement of fact”, contradicting *Moore*
 - 1970’s interviews regarding gender change operation withdrew same from being a private fact



New Mexico Cases (11)

- ***Fernandez-Wells v. Beauvais*, 127 N.M. 487, 983 P.2d 1006 (Ct. App. 1999)**
 - **Mailing of letter to Secretary of State regarding informal admonition of attorney was not a public disclosure**
 - **Plaintiff had no “special relationship” with Secretary of State’s office despite having a friend who worked there**



Internet Privacy Law -- Topics

- **Privacy Related Computer Crimes**
- **Threats to Privacy**
- **Defamation On-Line**
- **Trade Secrets**
- **Jurisdiction**

Privacy Related Computer Crimes (1)

- **State**
 - **Computer Abuse -- NMSA § 30-45-4**
 - **Willfully and without authorization altering, changing, damaging, disrupting, or destroying any computer, network, software, database, ...**
 - **Dissemination of material harmful to minor by computer -- NMSA § 30-37-3.2**
 - **Knowingly and intentionally engaging in communication with a minor depicting nudity, sexual intercourse or "any other sexual conduct"**

Privacy Related Computer Crimes (2)

- **Federal - Miscellaneous**
 - **Wire Fraud, 18 U.S.C. § 1343**
 - Scheme or artifice to defraud
 - **Obscenity, 18 U.S.C. § 1465**
 - What is the applicable community standard?
 - **Copyright Infringement, 17 U.S.C. § 506**
 - Willful infringement, retail value above \$1,000
 - Must be for purpose of “commercial advantage” or “private financial gain”

Privacy Related Computer Crimes (3)

- **Federal - 18 U.S.C. § 2701 et seq.**
 - **Electronic Communications Privacy Act (ECPA)**
 - **Intentional access without authorization a facility through which an electronic communication service is provided; or**
 - **Exceeds authorization and obtains, alters, or prevents authorized access to e-mail**
 - **Civil Action, may receive attorney's fees and punitive damages, 18 U.S.C. § 2707**



Threats to Privacy (1)

- **Unsolicited Email (Spam)**
 - No different than junk mail? No, because source of viruses, spyware, phishing attacks. Use filters ...
- **Computer Hacking**
- **Ease of Copying Materials**
- **Access of Web Sites recorded**
 - Assume you are identifiable
 - Use <http://www.anonymizer.com>



Threats to Privacy (2)

- **Countermeasures**
 - **Encryption: Digital Certificates; Pretty Good Privacy (<http://www.pgp.com>)**
 - **Baseline Computer Security: Hardware firewall + security software suite + ?**
 - **Windows Secrets Newsletter (<http://www.windowssecrets.com>)**
 - **Electronic Privacy Information Center (<http://www.epic.org>), re privacy rights issues**



Defamation On-Line

- **In short, rules not really any different (same with copyright law)**
- **E-mail like private snail mail**
- **Newsgroups and blogs are public forums**
 - **<http://groups.google.com>**
 - **<http://www.blogger.com>**
- **Web sites like poster on wall, may be mix of advertising, news, and combo items**



Trade Secrets

- **Trade secrets protected by state and federal statute and common law**
- **In short, anything held secret which grants a competitive advantage over competitors**
- **Technological processes, formulas, customer and supplier lists, etc.**
- **Watch for accidental exposure over Internet via Web Site or security glitch**



Jurisdiction

- **Early cases suggested that having a web site available everywhere makes one subject to personal jurisdiction everywhere**
- **Newer cases seem to be focusing on whether commercial activity invited interactively**



Printed Sources

- **Sack & Barron, *Libel, Slander, and Related Problems*, ch. 10 (2d ed. 1994)**
- **Scott, *Multimedia Law*, ch. 9 (2d ed. 1997)**
- **Cavazos & Morin, *Cyberspace and the Law* (1994)**
- **McCarthy, *The Rights of Privacy and Publicity* (2d ed. 2006)**



Internet Sources

- **Information Technology Association of America (<http://www.ita.org>)**
- **Electronic Privacy Information Center (<http://www.epic.org>) (good bibliography)**
- **Gigalaw (<http://www.gigalaw.com>)**
- **Windows Secrets (<http://www.windowssecrets.com>)**