

# Legal Pitfalls in Getting the Story: Newsgathering Torts

## PROJOURN



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**KEY TIP**

**Journalists pursuing in-depth, thoughtful, and important pieces must be leery of the pitfalls that may result in criminal and civil liability.**

A good rule of thumb to remember is that journalists are subject to the same laws as everyone else. **For instance, speed limits apply to the general public.**

If a journalist is pulled over for speeding while on the way to a news story, there is no exception for the journalist trying to get to a scene. This article provides a high-level summary of some common newsgathering activities that could carry civil liability – trespass, recording without consent, invasion of privacy, and publishing illegally obtained information – and their potential impact on the newsgathering process.

## TRESPASS

**Trespass occurs when someone is on private property without consent.** While this may sound straightforward, a journalist may trespass without realizing it.

As a general rule, don't enter private property without consent, either from a property owner or from the person or entity that rents the private space.

Seems simple, right? *But it can get complicated.*

Trespass can occur on public or private property when a person has consent to be there but remains on the premises after consent is withdrawn. There can be a trespass for exceeding the scope of the consent. Entering private property and making an audio or video recording can be a trespass if the journalist does not disclose an intent to record or gather information for reporting. Then, if the recording is discovered and the person is asked to leave, failing to leave quickly could result in liability for trespass.

A trespass can also occur if a person has consent to be on property, but only in particular areas. A good example of this is in a space where the public is allowed to be, but the space is privately owned, such as a store.



### TRESPASS cont'd

Customers and the public can be on the sales floor and other customer-facing areas, however, the moment a person enters a space not meant for the general public, such as an employee break room, that could be a trespass. Surveillance by audio or visual enhancement also may be a trespass, such as using long-distance microphones or telephoto lenses to gain access that a person would not otherwise have.

#### **Entering private property under false pretenses can be a trespass.**

In a well-known media case, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), the U.S. Court of Appeals for the Fourth Circuit held that a grocery store chain could sue for trespass after two journalists working for ABC lied on employment applications to gain access to Food Lion's private facilities. The journalists were working on an ABC investigation alleging that Food Lion's meat department required employees to engage in unsafe, unhealthy, or illegal practices, including selling old meat that was washed with bleach to kill odor, selling cheese that had been gnawed by rats, and working off the time clock.

To avoid a trespass claim, a journalist should get consent to be on private property. Be honest about the purpose for being on the property. If the reason for being on the property changes, a journalist should get consent for the new reason. And finally, if asked to leave the property by the owner or occupant, the journalist should do so quickly.



#### **And don't overlook the possibility of trespass to private property in our virtual world. Other possible trespass scenarios are:**

- Listening to a voicemail message through a private company's voicemail system (such as when a source gives a journalist the password to the voicemail system);
- Accessing a website that is closed, but the journalist has a code to access the site;
- Getting around (hacking) any anti-circumvention measures to access electronic information.

## RECORDING CALLS AND IN-PERSON COMMUNICATIONS

### **Audio recording another person without his or her knowledge and consent is illegal in most states.**

Under what circumstances the recording is illegal varies from state to state: Some states require consent from all persons being recorded, some states require only two people to consent, and other states require consent from only one person in the conversation.

The analysis becomes more complicated when the conversation is conducted between people in two or more states because two different laws may apply simultaneously.



### RECORDING CALLS cont'd

A good policy is to follow the rule of the most restrictive state or, if you don't know what the rule is, ensure that everyone involved consents to the recording.

Before you record, know the requirements of the state law in the state(s) where you are doing the interviews. Even if you believe you can record without consent, getting consent to record is never a bad idea.

## INVASION OF PRIVACY AND DISCLOSURE OF PRIVATE FACTS

**Reporting on a matter of public interest may not insulate a journalist when the subject of or participant in a story feels his or her privacy has been invaded: that person could bring a claim for breach of privacy (by intrusion) or disclosure of private facts.**

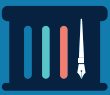
A journalist who intentionally intrudes, physically or otherwise, on the privacy of another or his or her private affairs may be subject to liability if the intrusion would be highly offensive to a reasonable person.

The courts often balance the public's right to know against the individual's privacy interests by drawing a line where the information disclosed is no longer relevant to the newsworthy report. These claims may also focus not just on what was reported but how the newsgathering was done: The method of investigation itself may be deemed offensive.

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These claims can arise even when the events appear to be taking place in a setting that looks to be public. For example, in *Shulman v. Group W Productions, Inc.*, a 1998 California case, a court ruled against a reporter who was covering a car accident. In that case, the journalist took photos of a woman and her son as they were rescued from a car that had been involved in a serious accident and while they were being transported in a medical helicopter.

While the journalist's observations of events on the side of the road were deemed permissible, what he observed (and recorded) inside the helicopter was seen as a potentially improper intrusion. (This is a different issue than disclosing private facts where the information could be viewed from the side of the road in a public setting.) A related issue in *Shulman* was the published photos of the victims receiving medical attention, which the court deemed to be very offensive.



### INVASION OF PRIVACY cont'd

**Use of technology can trigger these claims.** Equipment such as hidden cameras, miniature cordless and directional microphones, and drones are powerful investigative tools for newsgathering, but may also be used in ways that raise personal privacy concerns.

Currently, 13 states prohibit the unauthorized installation or use of cameras in private places. Using cameras in private locations such as bathrooms, hospital rooms, and locker rooms could raise a privacy claim because these are areas where people have an expectation of privacy.

Similarly, some states have anti-harassment and similar laws, such as California's anti-paparazzi law, that may limit a journalist's ability to record or take photos if the subject perceives the journalist's actions to be harassment.

Repeatedly contacting a subject to seek comment may be perceived as a violation of an anti-harassment law. Those laws, however, can run afoul of the First Amendment. For instance, in *ACLU v. Alvarez*, the U.S. Court of Appeals for the Seventh Circuit invalidated an eavesdropping statute after concluding that the statute, which banned all audio recording of any oral communication absent consent of the parties regardless of whether the communication is or was intended to be private, violated the First Amendment.

### ILLEGALLY OBTAINED INFORMATION

**Here is another twist: the journalist obtains information based on someone else's illegal actions.** Does that mean a journalist who publishes the illegally obtained information can be subject to liability?

Generally, a journalist may publish information that a third party obtains illegally if the journalist did not participate in the original illegal act and the issue is a matter of public interest. The most prominent case on this point is *Bartnicki v. Vopper*.

There, the U.S. Supreme Court held that the First Amendment protected the disclosure of part of an illegally obtained cell phone conversation as part of a discussion about contentious union negotiations. The Supreme Court held that while there is an interest in deterring the illegal interception of communications, the law could not be extended to punish otherwise innocent third parties from publishing the information.

**A major consideration is the public interest in publishing the information.** A journalist should consider how much of the information is necessary and whether some of the information is relevant to that matter of public interest.



### ● ILLEGALLY OBTAINED INFORMATION cont'd

For example, in *Pierre-Paul v. ESPN Inc.*, ESPN disclosed private medical records to the public about football player Jason Pierre-Paul's medical condition after his hand was injured in a fireworks accident. The medical records were not publicly available, nor did Pierre-Paul consent to their use. Although ESPN tried to argue that Pierre-Paul's medical condition was one of legitimate public concern, the court found that the limits on disclosing private facts are anchored in "common decency" that must take into account the feelings of the individual and the harm that will be done to him by the exposure.

Journalists may even become liable if they take actions to encourage the illegal activity, such as encouraging or paying someone to steal private information, breach a contract, or breach a fiduciary duty. A journalist will likely face close scrutiny if the information is of the type that is not typically available to the public, such as accessing sealed court records, medical records, classified government documents, and business trade secrets.



**A journalist should take these torts into consideration when gathering the news. Before a journalist takes actions that could bring on a civil claim, the journalist will want to carefully weigh the risk of a lawsuit against the important interest that is at the heart of their newsgathering.**