AELE Monthly Law Journal

ISSN 1935-0007
Cite as: **2008 (4) AELE Mo. L. J. 101**
Civil Liability Law Section – April, 2008

Civil Liability from Media Activities During Law Enforcement Operations

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1. Introduction.

Law enforcement activities often, understandably, result in media interest and attention to searches, seizures, arrests, and investigations. Many law enforcement agencies have engaged, at one time or another, in allowing media "ride-alongs" in which members of the media accompany law enforcement officers performing their duties.

Controversy has surrounded such activities from time to time, and resulted in lawsuits for damages. Such lawsuits have also resulted from "perp walks" in which arrestees are allegedly intentionally "paraded" before the media, from "reality TV" shows in which videotapes of law enforcement operations are broadcast on television, and from the release of information to the media concerning crimes, investigations, and arrests.

The following article briefly reviews some of the important court decisions on this topic, including two U.S. Supreme Court rulings. The topic of violation of privacy and/or defamation from the release of information to the media is also touched on. At the conclusion of the article, a number of useful resources are listed, along with links to available on-line materials.

2. U.S. Supreme Court rulings

The U.S. Supreme Court has unanimously held that allowing members of the news media to enter private residences along with law enforcement officers during the execution of arrest or search warrants violates the Fourth Amendment rights of the residents. At the same time, as of the date of the decision, the Court ruled that individual defendant officers were entitled to qualified immunity in two cases before the Court, since the principles pronounced by the Court had not previously been "clearly established" law, so that the officers did not have clear notice that their actions in allowing the media presence could violate the occupants' constitutional rights. The two cases are Wilson v. Layne, #98-83, 526 U.S. 603 (1999), and Hanlon v. Berger, No. 97-1927, 526 U.S. 808 (1999). Wilson is the main opinion, with Hanlon being a very short decision applying the principles in Wilson to the facts of the Hanlon case.

In Wilson, a team of officers from the U.S. Marshals Service and from a county in Maryland were involved in a "media ride-along," during which a newspaper reporter and a photographer went along with them during the attempt to execute, at a private home in Rockville, Maryland, three arrest warrants for a suspect they believed was armed and likely to resist arrest.

The law enforcement officers were unsuccessful since the home they went to turned out to belong to the suspect's parents, rather than the man named in the warrants. The officers mistakenly believed that the suspect's father, who confronted them, was the suspect, and they subdued him. The confrontation was witnessed by the suspect's mother, but also by the print reporter and by the photographer, who took numerous pictures. Those pictures, however, were not later published in the newspaper.

After the officers learned of their error and that the suspect was not in the home, they left. The two parents filed a lawsuit in federal court against the federal officers under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, #301, 403 U.S. 388 (1971), and against the county officers under 42 U.S.C. Sec. 1983.

The plaintiffs claimed that the defendants' actions in bringing members of the media into their home to record and observe the attempted execution of the arrest warrants violated their Fourth Amendment rights.

The U.S. Supreme Court unanimously agreed, finding that the media ride-along at issue was a violation of the Fourth Amendment, since bringing media members or other third parties into a private home during the execution of a warrant violates

privacy rights when the third parties are not there to aid in the execution of the warrant.

The Court rejected the argument that the promotion of "good public relations" for law enforcement, standing alone, would justify such a "ride-along" intrusion into a home. Additionally, a desire to promote accurate reporting of law enforcement activities had no direct relationship to any constitutional justification for the intrusion.

Still, the Court concluded, both the federal and the county officers were entitled to qualified immunity from liability for damages for their actions, because it was not clearly established, on the date of the incident in April of 1992, that the practice of a media-ride-along was unlawful when it involved members of the media entering a home. (One Justice, Justice Stevens, agreed that the actions violated the Fourth Amendment, but disagreed on the qualified immunity defense, believing that the principles involved had already been clearly established).

In Hanlon v. Berger, No. 97-1927, 526 U.S. 808 (1999), two residents of a Montana ranch filed a federal civil rights lawsuit against some federal employees—special agents of the U.S. Fish and Wildlife Service and an assistant U.S. attorney, for damages. Their lawsuit included claims that the defendants had violated their Fourth Amendment rights.

In that case, a magistrate judge had issued a search warrant providing for the search of the 75,000-acre ranch near Jordan, Montana, and several structures there—but not the residence—for evidence of violation of federal laws concerning the taking of wildlife.

Approximately a week after that, government agents and a group of reporters and photographers from a cable news company (CNN) went to a place close to the ranch, traveling in a caravan of vehicles.

The officers, during the day that followed, searched the ranch and its outbuildings, as authorized by the warrant, and the media members came along with them, observing their activities and recording their conduct in executing the warrant.

Relying on the principles announced in Wilson on the same day, the Court ruled that these actions in allowing members of the media to accompany them in this manner violated the owners' Fourth Amendment rights, but also found that the individual defendants were entitled to qualified immunity because the law on the subject was not clearly established at the date of the search.

One thing that law enforcement agencies and personnel must be clear on—the qualified immunity defense allowed for the individual defendants in these two cases was based on the lack of prior case law giving officers notice that such conduct was unconstitutional. Following the U.S. Supreme Court's two decisions on the matter, similar conduct will result in civil liability, and the defense of qualified immunity will not apply.

3. "Perp Walks"

Law enforcement officers have sometimes been accused of purposefully subjecting arrestees to "perp walks" in which they are paraded before the media so that they can be photographed, videotaped, or otherwise subjected to public scrutiny. Courts have arrived at a variety of conclusions about whether such actions can subject law enforcement to civil liability, with the result depending on the particular facts of the case. The key principle seems to be whether the exposure of the suspect to the media is incidental to some other legitimate law enforcement purpose, such as the necessary transportation or transfer of an arrestee from one place to another, or rather was unrelated to such purposes, and instead was "staged" solely to have them photographed.

In Gibbons v. Lambert, No. 2:02 CV 01244, 358 F. Supp. 2d 1048 (D. Utah 2005), a federal court ruled that subjecting a homeowner, following a search of his home and his arrest for providing harmful materials to a minor and a drug offense, to a "perp walk" resulting in him being photographed as he was led from his home to a police vehicle did not violate his Fourth Amendment rights. The media representatives, in that instance, did not enter the homeowner's property, and the officers' actions were found to be reasonable, since the residence may have been used to victimize young women and expose them to sex and drugs. Publication of the photos of the arrestee's face could help alert other possible victims and encourage them to provide information to aid the investigation. In other words, there was not an intrusion into the privacy of the home, and there was an argument that a legitimate law enforcement purpose was being served by the media's photographing of the suspect.

Similarly, in Caldarola v. County of Westchester, No. 01-7457, No. 01-7457, 343 F.3d 570 (2nd Cir. 2003), a federal appeals court found that a county's action in videotaping a county correctional officer when he was escorted to a car to be transported to a police station for booking in a "perp walk" manner was a "seizure" under the Fourth Amendment, but also that his privacy interest in not having the videotape broadcast to the public was outweighed by a legitimate governmental purpose in informing the public about efforts to stop the abuse of disability benefits by its employees and to deter others from attempting similar crimes.

In Lyde v. New York City, 145 F. Supp. 2d 350 (S.D.N.Y. 2001), a federal trial court ruled that an officer was entitled to qualified immunity for subjecting an arrestee to a "perp walk," displaying him to the media in 1997, as the right not to be displayed in this manner was not then clearly established.

Following the date of that search, however, a federal appeals court in Lauro v. Charles, #99-7239, 219 F.3d 202 (2nd Cir. 2000), ruled that "perp walks," parading arrestees before the media for the "sole purpose" of having them photographed, violates the Fourth Amendment. Following that ruling, the defense of qualified immunity would no longer be viable in New York or other states governed by the decisions of the U.S. Court of Appeals for the Second Circuit.

In Lauro, the court raised the question of whether police may "constitutionally force an arrested person to undergo a staged 'perp walk' for the benefit of the press, when the walk serves no other law enforcement purpose?" The court concluded that such activity "exacerbates the seizure of the arrestee unreasonably and therefore violates the Fourth Amendment." While the defendant in that particular case was granted qualified immunity, the decision's implication clearly barred future such immunity, given the same facts.

The court commented that the "perp walk" was a "widespread police practice" at the time in New York City, and involved the suspected perpetrator of a crime, after being arrested, being "walked" in front of the press so that he can be photographed or filmed. The "perp walk," the court noted "both publicizes the police's crime-fighting efforts and provides the press with a dramatic illustration to accompany stories about the arrest."

The effect of such walks on the suspect, however, the court found, "can be less benign," particularly as it commonly occurs before any judicial determination that a suspect has actually committed the crime for which he was arrested, "or even that there is enough evidence to justify a trial." The presentation of a suspect in handcuffs being led into a police station, under these circumstances, can be a "powerful image of guilt" and has been described, according to the court, as a "ritual degradation that publicly signals" the arrestee's change in status from an "ordinary citizen."

In some instances, the court noted, the police, in the normal course of transferring an arrestee from one location to another, may place the suspect in a position where they might be photographed by the press. Whether or not police in those instances notify the press or not concerning the move, the court argued, "these walks are very different from staged perp walks" in which police take a

suspect outside of a police station, at the request of the press, for “no reason other than to allow him to be photographed.”

In the particular circumstances of the Lauro case, the plaintiff was a doorman and was arrested on charges involving burglary, petit larceny, and possession of stolen property. Charges against him were later dismissed after he was ordered to perform one day of community service.

Two hours after his arrest, a detective at the station allegedly received a phone call from the Police Department’s Office of the Deputy Commissioner of Public Information informing him that members of the media were interested in the case, and that the arrestee should be taken on a “perp walk.” The arrestee was allegedly handcuffed and walked out the front door and outside the police station, with this walked filmed by a TV crew from Fox News. Footage of the walk, along with other material, was later broadcast on television.

Relying in part on the U.S. Supreme Court’s decision in Wilson v. Layne, the appeals court found that this kind of “perp walk” was not reasonable in light of legitimate law enforcement purposes. It rejected any argument that privacy protections were “inapplicable” to persons lawfully in police custody, and found that the staged “perp walk” had adverse effects on the arrestee’s dignity and privacy, and that it was not closely related to any legitimate governmental objective.

4. **“Reality TV” Shows**

What about the popular television shows which broadcast video footage of officers in action stopping motorists, detaining suspected drug dealers or prostitutes, or engaging in confrontations with offenders?

One New York state court expressed concern about the possible implications of such activities. It declined to dismiss a lawsuit against a production company and two broadcasting companies which alleged that, in the course of filming a "reality-based" television program showing police on patrol, they encouraged police to use excessive force, adopting a “common plan” to use excessive force which resulted in injuries suffered when a police detective fired his gun, injuring a woman during the execution of a search warrant. Rodriguez v. City of New York, #2004-11173, (Index No. 20154/04), 827 N.Y.S.2d 220, 2006 N.Y. App. Div. Lexis 15242 (2nd Dept.).

The plaintiff claimed that the media members and the police department had an “understanding,” whether express or tacit, that excessive force would be used in the execution of a warrant against the plaintiff, and actively took part in planning

the incident, and in furthering it by "cooperation or request" and by "aid and encouragement" by the media to police to use such excessive force.

While the focus in the case itself is on the possible liability of the media members for the actions of officers, clearly any proof of such a prior agreement to use allegedly excessive force in order to make the media's presentations more "exciting" would call into question the reasonableness of the force actually employed for purposes of Fourth Amendment liability on the part of the officer and the police department.

5. Privacy and Defamation

In the course of investigations of crime, law enforcement agencies necessarily release various information to the public and the media. The dissemination of such information helps to encourage witnesses and others with evidence helpful to the investigations to come forward. It also promotes good relations between the agency and the public, and complies with the public's "right to know" about matters of interest in their community. Both the constitutional right to freedom of the press under the First Amendment to the U.S. Constitution (and equivalent guarantees under the Constitutions of the various states), and a variety of "freedom of information" laws on the state and federal level mandate that much of this information be provided, with exceptions available when the release of information would interfere with an investigation or with important rights.

There have been a number of lawsuits over the years that have claimed that the release of information by police agencies concerning either the suspects in criminal investigations or the victims of crime violates their right to privacy or constitutes defamation.

As for defamation, there may be instances under state law in which the release of information that is false may result in liability for damage to an individual's reputation. At a minimum, a showing of negligence in providing false information will be required. Gertz v. Welch, #72-617, 418 U.S. 323 (1974). For statements concerning public officials or public figures who have thrust themselves into public controversies, the standard of proof is constitutionally required to be greater—it is "actual malice," defined as knowing falsity or "reckless disregard" as to whether the information released or stated is true or false. N.Y. Times v. Sullivan, #39, 376 U.S. 254 (1964).

Such defamation, however, does not constitute a violation of federal civil rights, such a violation of due process. In Paul v. Davis, #74-891, 424 U.S. 693 (1976), a man's photograph, bearing his name, was included in a flyer publicizing "active shoplifters' after his arrest for a shoplifting charge in Louisville, Kentucky.

That charge was later dropped, and the arrestee filed a lawsuit against police chiefs who had been involved in having the flyer distributed to merchants in the area.

The U.S. Supreme Court ruled that the distribution of the flyer, even if it were arguably false and defamatory under state law, did not deprive the plaintiff of any protected "liberty" or "property" rights protected by the Fourteenth Amendment's due process clause, and there is no claim for recovery for damage merely to reputation alone (unconnected from such harm as damage to employment, etc.) in a federal civil rights lawsuit. The Court also rejected the argument that the flyer deprived the plaintiff of the right to privacy based simply on public disclosure of the fact of his arrest on the shoplifting charge.

Following Paul v. Davis, a number of courts have ruled that the mere release of the facts about an arrest to the media will not ordinarily result in liability for a violation of privacy rights. In one recent case, this was true even though the information released arguably subjected the plaintiff to very particular harm in the form of "identity theft." In Lambert v. Hartman, No. 07-3154, 2008 U.S. App. Lexis 4019 (6th Cir.), a motorist who was given a speeding ticket complained that she was subjected to "identity theft" after the local county clerk published the ticket, containing personal information, including her Social Security number, on the clerk's website. A federal appeals court found that any alleged privacy interest did not involve a fundamental right and was not sufficient to establish a violation of her 14th Amendment due process rights from the publication.

Similarly, in Bailey v. City of Port Huron, No. 06-2375, 507 F.3d 364 (6th Cir. 2007), a woman arrested following an alleged drunk-driving accident did not show that police officials and the city violated her constitutional right to privacy when they disclosed her name, hometown, photograph, phone number, and her husband's occupation (undercover officer) after the charges were brought against her. Her husband was charged with operating the vehicle while impaired, and she was charged with obstructing by lying about who was driving the car, as well as resisting. Both she and her husband pled no contest to the criminal charges. The appeals court found that criminal suspects do not have a constitutional right of privacy concerning the nondisclosure of the information the police released, including information in the police report, especially information released in response to legitimate inquiries from the press submitted under a Michigan state Freedom of Information Act.

In some instances, however, courts have ruled differently concerning the release of highly sensitive or private information concerning the victims of crime, as opposed to criminal suspects. In one such prior decision, Anderson v. Blake, No. 05-6329, 469 F.3d 910 (10th Cir. 2006), for instance, a federal appeals court ruled that a police officer was not entitled to qualified immunity in lawsuit by rape

victim claiming that he improperly released a videotape of her rape to a television station, which aired portions of it. The court rejected the officer's arguments that the victim did not have a constitutionally protected privacy interest in the contents of the tape, or that her privacy right was not clearly established. The federal appeals court later found that the plaintiff's allegations about the officer's involvement in the publication of a portion of the videotape were not sufficient to show that the officer, the reporter, and the television station owner acted jointly or that the private parties acted under color of law. Anderson v. Suiters, No. 06-6134, 499 F.3d 1228 (10th Cir. 2007).

See also Loeks v. Reynolds, #01-1183, 34 Fed. Appx. 644 (10th Cir. 2002), holding that a sheriff's office did not violate the privacy rights of a 13-year-old girl when it issued a press release stating that she had engaged in consensual sex with an 18-year-old man whom she had met on the internet. There was no reasonable expectation of privacy in the statements she made to law enforcement officers and the press release was "substantially true," defeating any defamation claim.

The family of a person who died in fatal car crash failed to show that the actions of police in dealing with them and the media following the accident violated their due process rights. No prior case recognized a due process right concerning the manner in which a family is notified of the death of a family member, and if there was any such right, it would only apply to conduct that was shocking to the conscience. In this case, the police did not act with deliberate indifference and their conduct was not conscience shocking. They did use "deception" to first obtain a photograph of the victim to aid in his identification, and did not tell the family he had died until they had made the identification. A statement the police made to the media concerning the accident was justified by the legitimate purpose of informing the public about a fatal collision. Estate of Gadway v. City of Norwich, No. 3:05-CV-935, 512 F. Supp. 2d 134 (D. Conn. 2007).

Other cases of interest include:

* Livsey v. Salt Lake County, No. 00-4005, 275 F.3d 952 (10th Cir. 2001), holding that a decedent's family had no constitutionally protected privacy interest in preventing officer from making public statements containing information about his highly personal sexual behavior of an allegedly autoerotic nature, and were not entitled to a "name-clearing hearing."

* Nilson v. Layton City, #94-4077, 45 F.3d 369 (10th Cir. 1995), holding that an officer's discussion of expunged sexual abuse arrest and conviction during a television broadcast did not violate school teacher's federal constitutional privacy

rights; issue of whether or not it violated Utah state expungement statute was not determinative of federal civil rights claim

* McCambridge v. City of Little Rock, #87-352, 766 S.W.2d 909 (Ark 1989), ruling that the government interest in disclosure of the facts of crime outweighed the privacy interest of the estate and mother of stockbroker who apparently killed family and committed suicide

* Mensah v. Darby Borough Police Department, No. 05-2193, 145 Fed. Appx. 742 (3rd Cir. 2005), holding that a police department's alleged retention of "fictitious" criminal information about a woman could not be the basis for a federal civil rights lawsuit. Even if this claim were true, the filing of false information at most states a claim for libel or defamation, a state law claim, not a violation of constitutional rights.

*Sylvester v. City of New York, No. 03 Civ. 8760, 385 F. Supp. 2d 431 (S.D.N.Y. 2005), in which the court found that police release of details about man's criminal record to the press after he was fatally shot by a police officer could not be the basis for a federal civil rights claim for harm to his reputation, nor did false statements allegedly made about the circumstances of the shooting support a claim for intentional infliction of emotional distress brought by the decedent's family, although a claim for negligent infliction of emotional distress brought by members of the decedent's family who witnessed the shooting was viable. The decedent did not suffer specific harm to his employment, education, professional licensing or insurance opportunities based on the statements made about him, and under New York law had no protected liberty interest in his reputation which survived his death.

6. Resources

Best Practices in Public Information. (2006). A book published by the IACP drawing from the experience of police chiefs, their public information officers, and media personnel, and illustrating the importance of having an effective police-media relationship. It provides the modern police executive with a comprehensive guide for developing, maintaining, and improving this critical relationship.

“Media Ride-Alongs,” by Kimberly A. Crawford, 69 FBI Law Enforcement Bulletin, No. 7, pgs. 26-31 (July 2000). “Officers must legally justify inviting third parties into private premises and determine whether their presence exceeds the authority of the warrant.”

"Working with the Media in Times of Crisis," by James D. Sewell, 76 FBI Law Enforcement Bulletin No. 3, pgs. 1-6 (March 2007). "Agencies can follow several

key principles to ensure that they are ready to handle media attention." [.html version]

AELE Monthly Law Journal
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