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The Use of Personally-Owned Mobile Phone Cameras and Pocket Video Cameras by Public Safety Personnel

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❖ **Mobile phone cameras**

Police officers, sheriff's deputies, coroner's investigators, corrections officers, firefighters, paramedics and ambulance personnel are exposed to persons who have suffered horrible injuries and violent deaths. Some seasoned rescue workers and evidence technicians avoid stress by intentionally distancing themselves from tragedies. ^[1]

Management has the right to designate mandatory and permitted equipment worn by its on-duty personnel, although a recognized bargaining unit is permitted to negotiate over "safety equipment." ^[2]

– *Catsouras incident*

One of the more prominent instances of the misuse of photographs followed the decapitation of an 18-year-old driver who had crashed into a toll booth on Halloween,

2006. According to *Newsweek*, the “accident was so gruesome the coroner wouldn’t allow her parents to identify their daughter’s body.” Photographs of the scene were taken by California Highway Patrol officers as part of their routine fatal collision procedures.

Her parents sued the CHP, alleging that two officers had e-mailed nine grotesque images to their friends and family members on Halloween — for pure shock value. The photographs were forwarded to others, and then were spread across the Internet “like a malignant firestorm, popping up in thousands of Web sites.” The parents also claimed that Internet users taunted them with the photographs, in deplorable ways.

California law clearly provides that surviving family members have no right of privacy in the context of written media discussing, or pictorial media portraying, *the life* of a decedent. Any cause of action for invasion of privacy in that context belonged to the decedent and expired along with him or her. [Flynn v. Higham](#), #168301, 149 Cal.App.3d 677 (1983). That case was bought by the daughter of the late cinema actor, [Errol Flynn](#).

However, that did not end the dispute. A three-judge appellate panel wrote:

“The publication of death images is another matter, however. How can a decedent be injured in his or her privacy by the publication of death images, which only come into being once the decedent has passed on? The dissemination of death images can only affect the living. As cases from other jurisdictions make plain, family members have a common law privacy right in the death images of a decedent, subject to certain limitations.”

The panel concluded that the complaint stated a cause of action against the two officers for the tort of invasion of privacy based on the public disclosure of private facts. The elements of such a claim 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 concern.

They noted that the gruesome death images were disseminated “out of sheer morbidity or gossip, as opposed to any official law enforcement purpose or genuine public interest” and supported a cause of action for invasion of privacy.

The panel also held that the plaintiffs stated a cause of action for the intentional infliction of emotional distress. The elements of that tort are:

“(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing emotional distress;
“(2) the plaintiff’s suffering severe or extreme emotional distress; and
“(3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.”

[*Catsouras v. Calif. Highway Patrol*](#), #G039916, 181 Cal.App.4th 856, 104 Cal.Rptr.3d 352, 2010 Cal. App. Lexis 113; review denied, #S180881, 2010 Cal. Lexis 3456.

Additionally, management imposed a 25-day disciplinary suspension against the dispatch supervisor who sent the photos to other CHP personnel.

Liability can attach even if photographs or videos are viewed only by curious coworkers. In a Western Colorado murder investigation, photographs of the deceased should have been put in an evidence locker, but instead, were kept in an unlocked desk drawer. Among other holdings, the Tenth Circuit held that a reasonable officer would recognize when a privacy interest is breached, writing:

“... we conclude that the privacy right violated here was clearly established. Under [[*Slayton v. Willingham*](#), #82-2109, 726 F.2d 631, 635 (10th Cir. 1984)], a reasonable officer would have known that passing around naked photographs of crime victims for no legitimate purpose would violate constitutional privacy rights. Thus, neither Lieutenant C__ nor Chief H__ is protected by qualified immunity.”

[*Donohue v. Hoey*](#), #02-1405, 109 Fed. Appx. 340, 2004 U.S. App. Lexis 19594 (Unpub. 10th Cir.); cert. denied, 2005 U.S. Lexis 2465.

❖ **Wearable video cameras**

Wearable mini cameras are advertised on electronic store websites and in magazines found in airplane seatbacks. Lightweight and rechargeable (or disposable battery powered), the sound and video data can be uploaded to a computer via a [USB](#) port. The cost differs widely; some models retail for a little over a hundred dollars and record a good picture and optional sound for up to three hours.

More direct than dash cams, these electronic devices record what an officer or paramedic/ EMT responder actually hears and sees. ^[3] A short video file, sent by a civil process

server to an attorney, will display a person receiving a summons or subpoena – or a motorist angrily refusing to accept a traffic citation. The camera angle is called [POV video](#) (point of view).



Close up of a pocket mini cam



Attached AV recorder (Seattle)

Several agencies have equipped patrol officers with wearable mini cams. Others allow officers to use them as a personally-owned accessory. But some agencies prohibit officers from carrying unapproved electronic devices.

Three reasons for providing or allowing a personally-owned mini cam are:

1. A recording is evidence, and is admissible in court, because it documents a suspect's behavior or incriminating statements.
2. A recording can powerfully contravene a false complaint of excessive force or lesser misconduct.
3. Officers tend to be more courteous, restrained and patient during verbal confrontations, because they know their words and actions are being recorded. ¹⁴¹

Four reasons for not allowing the use of personally-owned mini cams are:

1. Management has legitimate concerns about selective use, breach of confidentiality (improper file sharing) and potential privacy litigation.
2. If some officers have a personal video camera and others do not, the news media, judges and juries may find an officer's testimony less credible if it is not accompanied by a confirming video.
3. The agency will have to respond to discovery demands in criminal cases and

freedom of information requests from news media and citizens.

4. Management has a statutory duty to archive and lawfully dispose of evidence and “public records.” If a personally-owned device is activated while an officer is on duty, or while performing an official act when off-duty, public records laws apply, even if no crime occurred.

– ***Audio issues***

Section 2511(2)(d) of the [Crime Act of 1968](#) permits one-party consent to surreptitious audio monitoring and recording. Twelve states require the consent of all persons present – absent listed exceptions.^[5] However, several courts have held that consent is not required for conversations with a police officer in a public place.^[6]

Some agencies will not issue and do not permit officers to use electronic devices that can audio record an encounter, because of state penal code provisions.

❖ **Policy considerations**

– ***Mobile phones***

The IACP’s Cellular Telephones Model Policy (Dec. 2003) was drafted almost decade ago and preceded the proliferation of inexpensive mobile phones with built-in cameras and wireless transmission capability.

Today, some officers carry multiple cellular devices or multi-line mobile phones. They receive calls from family and friends, they arrange secondary employment engagements, they retrieve personal and business-related e-mail and text messages and access Internet news sources.

The use and misuse of mobile phones should be addressed in a stand-alone policy, whereas the acquisition and disposition of crime scene and accident photos (including suspects and victims) should be covered in policies dealing with those topics.

A separate policy should address the issue of citizen use of mobile phone cameras, including the capture and recovery of evidence of a crime or critical event.

See, for example, Miami Beach Police [General Order 11-03](#), which provides:

“When there is probable cause to believe that the portable video and/or photo recording device depicts visual and/or audio items pertaining to a criminal act, the device may be seized without consent if exigent circumstances exist.”

The Denver Police policy states:

“The use of personal cameras/video by any officer acting in an official capacity at crime scenes, accidents, or natural disasters is expressly forbidden. Officers on or off-duty, who gain access to any scene on the basis of their status as an officer, will be deemed to be acting in an official capacity.

“In the event personal equipment is used in an emergency to document perishable evidence, those images produced will be considered case evidence and governed by the provisions in section 106.08 (2) b. All such images will be surrendered to the detective in charge of the case at the earliest possible convenience.”

– ***Wearable mini cams***

Agencies that issue mini cams are likely to distribute a policy concerning their use, such as:

1. When to activate
2. Supervisory review
3. Flagging selected videos
4. Tagging as evidence
5. Retention periods

Example: “Officers will activate the unit to record during each citizen encounter related to a call for service, enforcement action, traffic stop, and/or police service. Additionally, tactical activities such as, building searches, searches for suspects, and building checks at alarms will be recorded.” Source: [Wearable Video Recorders](#), Standard Operating Procedure, Chesapeake, VA, Police Dept.

A written directive is necessary even if officers utilize personally-owned mini cam devices. In the twelve states that require all-party consent, the policy should address when the video-only mode must be used.

Finally, management needs to decide whether officers will be allowed to view their own

recordings prior to the completion of a use of force report, or an interview conducted by their superiors or internal investigators. AELE has a [Special Report](#) on that issue on its website.

❖ Notes and references

Endnotes

1. [Law Enforcement Traumatic Stress: Clinical Syndromes and Intervention Strategies](#), by Laurence Miller, Ph.D., Web article, American Academy of Experts in Traumatic Stress.
2. E.g., a union “safety” proposal specifying equipment to be maintained in police patrol vehicles was mandatorily negotiable, respecting: (1) armored vest; (2) helmet with detachable face shield; (3) head restraints; (4) lap and shoulder belts; (5) flares; (6) cable cutters; (7) fire extinguishers; and (8) clip board. Management did not have to bargain over the types of guns, other weapons, and quantities of ammunition to be provided. *Twp. of So. Brunswick and P.B.A. L-166*, NJ-PERC #86-115 (1986), 12 NJPER (LRP) ¶ 17,138.
3. Actually, the mini cam records in the direction where the officer is facing. In fact, he or she may be looking at a 90° angle to the right or left.
4. See however, [Videotaping and Police Behavior](#), 2011 (6) AELE Mo. L. J. 501. The article, written by a prominent police psychologist and a trial lawyer, ponders the question why an officer would misbehave when he or she knows the incident is being video recorded.
5. Twelve states require all parties to a conversation to consent before it can be recorded: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania and Washington.
6. [Oregon v. Neff](#), #A141960, 246 Ore. App. 186, 2011 Ore. App. Lexis 1464; [Glik v. Cunniffe](#), #10-1764, 655 F.3d 78 (1st Cir. 2011); [Maryland v. Graber](#), #12-K-10-647 2010 Md. Cir. Ct. Lexis 7 (Harford Co.); [Illinois v. Allison](#), #2009-CF-50 (Cir. Ct. Crawford Co. 2011).

References (Chronological)

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2. [Comment: Confirmation of a Catch-22: *Glik v. Cunniffe* and the Paradox of Citizen Recording](#), C. Hampton, Univ. of Florida, 63 Fla. L. Rev. 1549-1559 (2011).
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 5. [Dying for Privacy: Pitting Public Access Against Familial Interests in the Era of the Internet](#), Northwestern Univ., 105 Nw. U. L. Rev. Colloquy 18 (2010).
 6. Salvaging Privacy & Tranquility From the Wreckage: Images of Death, Emotions of Distress & Remedies of Tort in the Age of the Internet, Michigan State Univ., 2010 Mich. St. L. Rev. 311-340 (2010).
 7. Social Media: Model Policy and Concepts & Issues Paper, IACP National Law Enforcement Policy Center (2010).
 8. [Officer Privacy and a Citizen's Right to Video-Record Police Activity](#), 2009 (5) AELE Mo. L.J. 201.
 9. [Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations](#), U.S. Dept. of Justice (3rd edit. 2009).
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 11. [IACP Model Policies](#): Crime Scene Processing Policy (Jan. 2003) and IACP Cellular Telephones Policy (Dec. 2003).
 12. Freedom of Expression, Democratic Norms, and Internet Governance, Dawn C. Nunziato, 52 Emory L.J. 187 (2003).
 13. Ambulance Personnel and Critical Incidents: Impact of Accident and Emergency Work on Mental Health and Emotional Well-Being, 178 Brit. J. of Psychiatry 76-81 (2001).
 14. Stress Among Police Body Handlers, 163 Brit. J. of Psychiatry 806-808 (1993).
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Wayne W. Schmidt, Executive Editor
AELE Law Enforcement Legal Center
P.O. Box 75401
Chicago, IL 60675-5401 U.S.A
E-mail: info@aele.org
Tel. 1-800-763-2802

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