



Publication of Private Facts

In most states, you can be sued for publishing private facts about another person, **even if those facts are true**. The term "private facts" refers to information about someone's personal life that has not previously been revealed to the public, that is not of legitimate public concern, and the publication of which would be offensive to a reasonable person. For example, writing about a person's HIV status, sexual orientation, or financial troubles could lead to liability for publication of private facts. However, the law protects you when you publish information that is **newsworthy**, regardless of whether someone else would like you to keep that information private. In addition, the law protects you if you publish information already exposed to the public eye and especially material obtained from publicly available court records. Despite the law's substantial protections for legitimate reporting on matters of public interest, it is a good practice to obtain consent before publishing sensitive private information about someone.

Who Can Sue for Publication of Private Facts

Only human beings, and not corporations or other organizations, can sue for publication of private facts. Publication of private facts is a type of invasion of privacy, and you cannot invade the privacy of a dead person. Therefore, an estate cannot sue you for publishing private facts about a dead person, unless your publication took place before the person in question died. Note, however, that members of a dead person's family may be able to sue in their own right if you disclose private facts that relate to them too.

Elements of a Private Facts Claim

A plaintiff must establish four elements to hold someone liable for publication of private facts:

- 1. Public Disclosure:** The disclosure of facts must be public. Another way of saying this is that the defendant must "give publicity" to the fact or facts in question.
- 2. Private Fact:** The fact or facts disclosed must be private, and not generally known.
- 3. Offensive to a Reasonable Person:** Publication of the private facts in question must be offensive to a reasonable person of ordinary sensibilities.
- 4. Not Newsworthy:** The facts disclosed must not be newsworthy. Stated differently, the facts disclosed must not be a matter of legitimate public concern.

Below, we address these elements in greater detail. Keep in mind that publication of private facts is a state-law legal claim, so there is some variation of the law in different states. For state-specific information, see [State Law: Publication of Private Facts](#).

Public Disclosure

A plaintiff bringing a publication of private facts claim must show that the defendant made a **public disclosure** of the fact or facts in question. This means communication to the public at large, or to so many people that the matter must be regarded as likely to become public knowledge. As a general matter, publication of information on a website or blog (or any other publicly available platform on the Internet) will satisfy this element. On the other hand, it might not be a public disclosure if you simply convey private information about someone in an email to one or two other people, so long as it is understood that the information is not meant for further dissemination to the public.

Private Fact

A plaintiff bringing a publication of private facts claim must show that the defendant disclosed a **private fact**. This means pretty much what it sounds like. A private fact is an intimate detail of one's private life that is not generally known. Common examples of private facts include information about medical conditions, sexual orientation and history, and financial status. It may also include things like someone's social security or phone number, if that information is not ordinarily publicly available. A plaintiff has no privacy interest with respect to a matter that is already public. Thus, you cannot be held liable for discussing or republishing information about someone that is already publicly available (e.g.,

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und on the Internet or in the newspaper). For instance, a few years ago, Robert Steinbuch, a former congressional aide sued Jessica Cutler, another former Congressional aide, for publishing information out their private sexual relations on her blog, [Washingtonienne](#). Steinbuch also sued Anna Marie Cox [Wonkette](#) for calling attention to Cutler's blog and making the story spread around the Internet like wildfire. Steinbuch's claim against Cutler may have some merit because she disclosed on her blog embarrassing information about him that was not publicly available, but the case has yet to be decided. See our database entry, [Steinbuch v. Cutler](#) for details. On the other hand, the court dismissed Steinbuch's publication of private facts claim against Cox because she did nothing but blog about a matter that was already public. (Cox's lawyers do an excellent job of arguing the point in [this brief](#).)

In addition, you cannot be held liable for giving publicity to a matter that the plaintiff leaves open to the public eye. For example, when the man who helped stop an assassination attempt on President Ford sued two newspapers for revealing that he was a homosexual, the court denied him relief, finding that his sexual orientation and participation in gay community activities was already widely known by hundreds of people in a variety of cities. The record showed that, prior to the publication in question, the plaintiff had frequented gay bars, participated in gay pride parades, and that his friendship with Harvey Milk (a prominent gay figure) was well-known and publicized in gay newspapers. This, in the court's view, was sufficient to establish that the plaintiff had left his sexual orientation open to the public eye. See *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040 (Cal. Ct. App. 1984). In another case, a stripper sued ABC for publishing private facts about her when the television show 20/20 aired a program about the allegedly illegal activities of several persons associated with the strip bar where she worked. The plaintiff appeared in a few shots of the TV program dancing nude in the background. The court held that the plaintiff did not have a valid claim for publication of private facts because her stripping activity was open to the public eye; anyone who paid the \$5.00 cover charge could see her performing her work. See *Puckett v. American Broad. Co.*, 1990 WL 170425 (6th Cir. Nov. 6, 1990). In a more recent case, several Navy SEALs sued the *Associated Press* for publishing photographs of them tentatively abusing Iraqi captives. The court held that the images were not private because the plaintiffs are members of the military on active duty conducting wartime operations in full uniform and chose to allow their activities to be photographed and placed on the Internet. See *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005).

In the latter two cases suggest, a person's photograph or image can be a "private fact," but generally not when it is captured in a public or semi-public place. Therefore, you can generally publish photographs of an individual or individuals taken in public places without liability for publication of private facts. For example, in *Gilbert v. Hearst Pub. Co.*, 253 P.2d 441 (Cal. 1953), the court held that a newspaper was not liable for invasion of privacy through publication of private facts when it published a photograph of a couple kissing at the farmer's market in San Francisco. Note, however, that publishing photographs of other people, even if taken in public, may result in liability for unauthorized use of name or likeness. See [Using the Name or Likeness of Another](#) for details. And, if you intrude into a private place in order to photograph or record someone, you could be held liable for [intrusion](#). See [Gathering Private Information](#) for details.

Offensiveness

A plaintiff bringing a publication of private facts claim must show that, under the circumstances, publishing the facts in question would have been **highly offensive to a reasonable person of ordinary sensibilities**. The question is not whether the plaintiff himself/herself found the public disclosure highly offensive, but whether an ordinary person reflecting community mores would find it so. Thus, the law does not give special solicitude to a plaintiff with a "thin skin." As the Restatement of Torts explains:

Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. Thus he must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken his ankle, is not

sufficient to give him a cause of action under the rule stated in this Section. It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.

Restatement (Second) of Torts § 263D cmt. c. Some examples of activities found to be highly offensive include publishing a photograph of a woman nursing a child or posing nude in a bathtub, displaying a movie of a woman's caesarian operation, and disseminating a video showing two celebrities having sex. Some activities found not to be highly offensive include publishing an accurate account of a private wedding, publishing a photograph of a couple kissing in public, and publishing photographs of military personnel showing potential prisoner abuse.

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newsworthiness -- Matters of Legitimate Public Concern

newsworthiness is ordinarily the most important issue in a publication of private facts case. In many cases, a plaintiff bringing a publication of private facts claim must show affirmatively that the facts disclosed were not newsworthy -- i.e., they were not a matter of legitimate public concern. In other cases, the defendant must raise newsworthiness as a defense. Many courts hold that publishers have a constitutional privilege to publish truthful information on a matter of legitimate public concern. In any event, you ordinarily cannot be held liable for disclosing private facts about someone so long as those facts are of legitimate public concern.

Defining what is a matter of legitimate public interest can be tricky. But, courts generally are reluctant to second-guess the media, and they therefore take a very broad view of newsworthiness. Courts have held that there is a legitimate public interest in **nearly all recent events, as well as in the private lives of prominent figures such as movie stars, politicians, and professional athletes.** Thus, newsworthy publications include those "concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and any other similar matters of genuine, even if more or less deplorable, popular appeal." Restatement (Second) of Torts § 263D cmt. Moreover, the protection for newsworthy publications extends beyond the dissemination of "news" in the sense of current events or commentary upon public affairs. It tends also to "information concerning interesting phases of human activity and embraces all issues out of which information is needed or appropriate so that individuals may cope with the exigencies of their period." [Campbell v. Seabury Press](#), 614 F.2d 395, 397 (5th Cir. 1980). Thus, courts have found to be newsworthy articles dealing with unique love relationships, an Indian rope trick, the whereabouts and living conditions of a former child prodigy, and the peculiar personal characteristics of Bush campaign volunteers.

Despite the broad scope of potentially newsworthy topics, you risk losing your protection from liability if you exceed the bounds of common decency: "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes **a morbid and sensational prying into private lives for its own sake**, with which a reasonable member of the public, with decent standards, would say that he had no concern." [Virgil v. Time, Inc.](#), 527 F.2d 1122, 1129 (9th Cir. 1975). The courts agree that most facts about public officials and celebrities are of legitimate public concern, but they also recognize that even famous public figures retain a zone of privacy relating to things like sexual activity and medical information. Ordinary people may become "involuntary public figures" when they take part in an event or occurrence of public significance, such as a crime, an accident, or a spontaneous act of heroism. When this happens, many facts about their lives become legitimately newsworthy, like their home addresses and information about their education, upbringing, and family. The media is allowed to use colorful facts about newsworthy individuals to create a thorough and compelling portrayal, so long as there is some logical connection between the facts disclosed and the matter of legitimate public interest. Accordingly, a court has held that information about a physician's psychiatric history and marital life was substantially relevant to the newsworthy topic of policing failures in the medical profession, when the physician in question had committed two acts of alleged malpractice. See [Gilbert v. Medical Economics Co.](#), 665 F.2d 305 (10th Cir. 1981). Similarly, a court held that a newspaper could legitimately publish the name and address of the father of a person who was being questioned as a suspect in the rape of a young girl. See *Strutner v. Dispatch Printing Co.*, 442 N.E.2d 129 (Ohio Ct. App. 1982). In yet another example, a court held that a woman could not successfully sue over a photograph of her walking on the grounds of a private psychiatric hospital when she was walking next to a famous fellow patient whose "mental and physical habilitation was clearly newsworthy." *Howell v. New York Post Co.*, 181 A.D.2d 597 (N.Y. App. Div. 1992).

On the other hand, sometimes the connection between disclosed private facts and a topic of admitted

public interest is too attenuated. In one case, a court held that the disclosed fact that a student political leader was a transsexual was not of legitimate public concern, even though the disclosure happened in connection with a series of newsworthy articles about the student leader (she was the first female student body president at the college in question). See *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 8 (Cal. Ct. App. 1983). The court reasoned that there was no connection between the plaintiff's gender status and her fitness for office or any other relevant issue, and that her position did not warrant opening up her entire private life to public inspection. Moreover, the court perceived that the reporter's question was making a joke at the plaintiff's expense, which did not help his case. In another case, a court held that a surfer could take his publication of private facts claim to trial where he established that a magazine published information about embarrassing incidents from his personal history. While the overall topic of the offending article (body surfing at a famous California beach) was newsworthy, the court ruled that a jury would be entitled to conclude that information about the plaintiff's non-surfing life was not newsworthy. See [Virgil v. Time, Inc.](#), 527 F.2d 1122 (9th Cir. 1975).

The passage of time might also affect whether a private fact is newsworthy. Facts that might be

nsidered newsworthy at the time of the event will not necessarily remain so months or years later. is sometimes comes up with information about past crimes. Some courts have held that information out an individual's commission of a crime in the remote past is not a matter of legitimate public ncern when that individual has completely rehabilitated himself/herself. However, other courts have jected this view, so long as there is some connection to a topic of continuing interest. Nevertheless, u may want to think twice about publishing private information about someone who used to be an ortant public figure, but who now has faded into obscurity.

Relying on Public Records

[Cox Broadcasting v. Cohen](#), 420 U.S. 469 (1975), the Supreme Court of the United States held that e First Amendment to the Constitution prohibits states from imposing a penalty on the press for blishing accurate information obtained from a public court record. As a result of this case, most ates recognize an absolute privilege for publication of information found in a publicly available (i.e., t sealed) court record. While the case involved traditional media, there is no reason to believe that its asoning and holding would not extend to non-traditional journalists and other online publishers. This eans that you cannot be held liable for publishing accurate facts about someone that you find in a blic court record, regardless of how embarrassing they are. Note that this privilege will protect you in blishing information about past crimes (discussed above), so long as you gather your information m publicly available court records, such as an indictment or trial transcript. For information on ccessing court records, see [Access to Courts and Court Records](#).

any states have extended this protection from liability to the publication of information found in ublic records" in addition to court records. The exact meaning of "public records" varies, but in some ates it includes information obtained from government agencies through state freedom of information uests. See [State Law: Publication of Private Facts](#) for details on the scope of the First Amendment ivilege and [Access to Government Records](#) for information on freedom of information requests.

Consent

nsent is a complete defense to a legal claim for publication of private facts. When you interview meone to gather information for later publication, it is a good practice to ask for consent to use the aterial on your website, blog, or other online platform. Make sure to get consent in writing whenever ssible. You can use an **interview release form**. This release can help protect you against [isappropriation and right of publicity](#) claims in addition to publication of private facts claims. Some amples of interview releases can be found in [Stanford's Copyright and Fair Use Guide](#), and at [nilioCorsetti.com](#) and [the University of Michigan Press](#). You can find additional samples by doing a sic Internet search for "interview release," and the book *The Copyright Permission and Libel ndbook* by Lloyd J. Jassin and Steven C. Schecter has two excellent examples. An interview release n take various forms; you will need to choose and customize one to suit your own purposes. Make re to mention explicitly your intent to use information conveyed during the interview for publication i the Internet.

you take photographs of someone for later publication, you should also consider getting a **model lease**. A model release primarily protects you against [claims of unlawful use of name or likeness](#), but also may be helpful if you photograph an individual in a private setting or if a photograph otherwise eals private information. You can find examples at [Ourmedia](#), the [American Society of Media otographers](#) ([model release for adult](#), [model release for minor child](#), [simplified model release](#), and [cket release](#)), and the [New York Institute of Photography](#). As above, you will need to customize the lease to fit your purposes and circumstances.

ildren cannot consent on their own behalf. When using the name or likeness of a minor (generally meone under the age of eighteen), you should seek consent from the minor's parent. Some of the ample release forms linked to above are geared toward getting the consent of minors. State laws may ognize other situations where individuals are not able to consent on their own behalf. For instance, agine you come across the scene of an accident and find a half-conscious accident victim. You might ek the consent of that individual to take pictures and ride along with him or her in the ambulance on e way to the hospital. Depending on state law, a court might not recognize consent provided by such a lf-conscious and obviously traumatized individual.

ep in mind that people giving you consent can revoke (i.e., take back) that consent anytime before the e of their name or photograph takes place. Therefore, you should honor the decisions of consenting rsons who suddenly change their minds, so long as publication hasn't already taken place.

Statute of Limitations

ie ["statute of limitations"](#) is a term used by courts to describe the maximum amount of time plaintiffs n wait before bringing a lawsuit after the events they are suing over took place. This time limit is set tate law and is intended to promote fairness and keep old cases from clogging the courts. In blication of private facts cases, the statute of limitations ordinarily runs from the date of first blication of the offending facts. The limitations period varies based on state law; usually it is between

ie and three years. See the [state pages](#) for the applicable term in your state.

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Related Resources:

[The First Amendment Handbook](#) - helpful resource from the Reporters Committee for Freedom of the Press (RCFP) with a section on invasion of privacy.

[A primer on invasion of privacy](#) - another helpful resource from the RCFP.

[9 Keys to Avoiding Invasion of Privacy Suits](#) - practical tips from the RCFP.

[Bloggers' FAQ: Privacy](#) - good resource from the Electronic Frontier Foundation.

[Model Releases](#) - a fantastic page on model release forms from photographer Dan Heller.

[Model Release Primer](#) - another great resource on model releases from Dan Heller.

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