New Private Privacy Intrusions During Prelitigation Civil Claim Investigations

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New Private Privacy Intrusions in Illinois During Prelitigation Civil Claim Investigations

JEFFREY A. PARNESST

I. INTRODUCTION

Privacy intrusions have usually involved either property trespasses or bodily invasions. New technologies, including facial or license plate recognition, audio and/or visual recording, and location tracking can now prompt privacy intrusions without trespasses or invasions. Privacy intrusions can occur during civil claim investigations, either before or after litigation is commenced. Civil claim investigators include lawyers and their agents.

Limits on privacy intrusions differ for governmental (public) and non-governmental (private) investigators. Only in the former are there significant federal and state constitutional constraints, including, but not limited to, search and seizure and both procedural and substantive due process. With both public and private investigations, however, there are a variety of

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nonconstitutional constraints, including statutory, court rule, and common law guidelines. Nonconstitutional constraints include tort claims. Nonconstitutional constraints can operate for all investigations, or only in prelawsuit or postlawsuit settings, or only in public or private settings.

This Article explores how new technologies challenge Illinois tort lawmakers regarding private privacy intrusions during prelitigation civil claim investigations not involving property trespasses or bodily invasions. It utilizes the recent Illinois Supreme Court decision in Lawlor v. North American Corporation of Illinois. In Lawlor, a private privacy intrusion prompted the first high court recognition of “the tort of intrusion upon seclusion.” This Article examines prelitigation private seclusion intrusions after Lawlor, focusing on possible lawyer liability to nonadversaries of a lawyer’s clients. In particular, this Article reviews the issues of agency, deceit, and waivers.

3. Consider, for example, the anti-eavesdropping statute. 720 ILL. COMP. STAT. ANN. 5/14-2(3) (LexisNexis 2008) (making it a crime to record telephone conversation without two party consent or to use, divulge, or disseminate any unauthorized recording that the user or divulger “knows or reasonably should know was obtained through the use of an eavesdropping device”). Statutory constraints on lawyer (or lawyer-directed) investigations are limited, however, by separation of powers principles. See, e.g., Kosydor v. Am. Express Centurion Servs. Corp., 2012 IL App (5th) 120110, 38 (recognizing that under Cripe v. Leiter, 703 N.E.2d 100 (Ill. 1998), law is “a business historically regulated by the Illinois Supreme Court, not the Illinois legislature”; high court rules and precedents can reach “beyond the attorney-client relationship itself to regulate the conduct of an attorney with a nonclient and a potential or actual adversary”).

4. Consider, for example, the professional conduct rule on ex parte communications with those represented by counsel. ILL. RULES OF PROF’L CONDUCT R. 4.2 (2010).

5. Consider, for example, the so-called “Petrillo doctrine” on certain ex parte contacts with the treating physicians of personal injury claimants. Petrillo v. Syntex Labs, Inc., 499 N.E.2d 952 (Ill. App. Ct. 1986); 210 ILL COMP STAT ANN. 85/6.17(e-5) (LexisNexis 2012) (allowing certain ex parte contacts by hospitals with hospital medical staff who are their “actual or alleged agents, employees, or apparent agents”).


7. Id. ¶ 35. The tort of intrusion upon seclusion was deemed “one of the four branches of the tort of invasion of privacy” found in the Restatement (Second) of Torts § 652B (1977) (stating the others are “appropriation of the plaintiff’s name or likeness”; “disclosure of the details of the plaintiff’s private life”; and “publicity tending to put the plaintiff in a false light”). Id. ¶ 33 n.4. The Lawlor court did not limit further the breadth of the seclusion intrusion tort recognized in the Restatement. Compare, for example, with Keller v. Patterson, 819 N.W.2d 841, 845-46 n.3 (Wis. Ct. App. 2012) (unlike the Restatement, the Wisconsin privacy intrusion upon seclusion tort requires intrusion “in a place” Wis. STAT. ANN. § 995.50(2)(a) (West 2007)). Before Lawlor, the high court refused to rule on the validity of such a tort at least once. Lovgren v. Citizens First Nat’l Bank of Princeton, 534 N.E.2d 987 (Ill. 1989). All five appellate districts had recognized the tort. Burns v. Masterbrand Cabinets, Inc., 874 N.E.2d 72, 75 (Ill. App. Ct. 2007).
II. LAWLOR ON SECLUSION INTRUSIONS

Kathleen Lawlor (hereinafter Kathleen) sued her former employer, North American Corporation of Illinois (NAC), in part, for money damages for intrusion upon seclusion involving unauthorized procurement and use of her cell and home phone records. A counterclaim alleged Kathleen, then working for a NAC competitor, breached the fiduciary duty of loyalty while still employed at NAC.

Soon after Kathleen left NAC, it began an investigation to determine if she had breached her duty of loyalty. NAC asked "its longtime corporate attorney, Lewis Greenblatt, to conduct the investigation, and assigned its vice president of operations, Patrick Dolan, to serve as the company contact person." Greenblatt hired Probe, an experienced private investigative firm, for NAC's benefit. Greenblatt took no significant role in the investigation and "did not limit what Probe could do." Dolan gave Greenblatt and Albert DiLuigi, Probe's principal, Kathleen's birth date, address, home and cell phone numbers, and social security number, which Probe passed on to


9. Lawlor, 2012 IL 112530 ¶ 1. The lawsuit began when Kathleen sued "North American seeking outstanding commissions that she alleged were owed and a declaration concerning the enforceability of the noncompetition agreement." Id. ¶ 6. The phone records intrusion upon seclusion claim was set forth in an amended complaint. Id. Kathleen also sued NAC for seclusion intrusion because it, via a private investigator, Probe, "conducted physical surveillance ... while she was in public and plain view" and because it "stole her mail during its surveillance." North American Corporation's Opening Brief at 10 n.1, Lawlor v. N. Am. Corp. of Ill., 409 Ill. App. 3d 149 (2011) (No. 09-3603) [hereinafter NAC's Opening Brief]. The former claim was dismissed at trial because "such public surveillance, as a matter of law, cannot be an intrusion upon seclusion." Id. The latter claim was "rejected" by the jury. Id.

10. In its counterclaim, NAC alleged "Lawlor breached her fiduciary duty of loyalty by attempting to direct business to a competitor while in North American’s employ and by communicating confidential corporate sales information to a competitor"; it also alleged Lawlor had drawn excess commission payments. Lawlor, 2012 IL 112530, ¶ 6.

11. Id. ¶ 5 ("investigation to determine if she had violated a noncompetition agreement"), ¶ 9 (investigation sought by John Miller, NAC’s chief executive officer and president).

12. Id. ¶ 9.

13. Id. ¶ 10. NAC urged that Greenblatt also “recommended” Probe. NAC’s Opening Brief, supra note 9, at 8.

14. Lawlor, 2012 IL 112530, ¶ 10 (stating Greenblatt did not know whether Probe obtained Lawlor's phone records, did not discuss with Probe "investigative techniques," and "did not receive any updates or documents to review" from Probe).

15. Id. ¶ 12 (recounting Dolan said he relied on Greenblatt and DiLuigi for the investigation and "did not instruct them on how it should be conducted"). NAC urged that Greenblatt “asked Dolan to provide to Probe certain information,” including Kathleen's
Discover, "another investigative entity," upon asking Discover to "obtain Lawlor's personal phone records."\(^{16}\) Evidently, upon receiving from Discover handwritten phone call logs relating to Kathleen,\(^{17}\) which were obtained through deceit,\(^{18}\) Probe faxed the information to NAC,\(^{19}\) which used it to investigate further.\(^{20}\) Greenblatt's law firm paid Probe for its work and was then reimbursed by NAC.\(^{21}\)

NAC conceded that the investigators' acts "constituted an intrusion or prying into" Kathleen's seclusion; Kathleen had "a reasonable expectation of privacy in her phone records"; and the "intrusion would be highly offensive to a reasonable person."\(^{22}\) NAC urged "it had no control over the manner in which Probe or Discover did its investigative work," making them independent contractors and not agents of NAC who could prompt its vicarious liability.\(^{23}\) The high court, however, found agency with Probe, as the jury could believe DiLuigi, from Probe, who testified that Dolan, from NAC, wanted Probe "to obtain Lawlor's phone records"; could believe NAC knew that "Lawlor's phone records were not publicly available"; and could believe NAC set into motion "a process by which investigators would pose as Lawlor to obtain the material."\(^{24}\) The court distinguished a precedent, *Horwitz v. Holabird and Root*, wherein there was no agency in a lawyer as an alleged agent of a client because the lawyer did not direct, control, or authorize the "intentionally tortious conduct" of the client against the

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social security number and two telephone numbers. NAC's Opening Brief, *supra* note 9, at 8.


18. *Lawlor*, 2012 IL 112530, ¶ 23 (stating the jury's answer to the special interrogatory indicated Discover obtained Kathleen's phone records through "pretexting" and that both Probe and NAC knew about the pretexting).

19. *Id.* ¶ 5.

20. See *id.* ¶ 5 ("Northern American employees attempted to verify if any of the numbers belonged to one of their customers."). See also *id.* ¶ 13 (stating that Todd Paris, NAC's vice president and general manager, researched some of the records on the internet).


23. *Id.*. The court noted an independent contractor could, at times, also be an agent. See *id.* ¶ 43.

24. *Id.* ¶¶ 11, 46.
third-party and did not later ratify the client's conduct undertaken within the client's "independent judgment." 25

As the issue was not raised by Kathleen, the court did not comment on the possible application to NAC of another branch of the tort of invasion of privacy—namely, the "disclosure of the details of the plaintiff's private life." 26 It also did not comment on the possible application of any privacy tort to the two phone companies, to Greenblatt, or his law firm, though there was some indication that "pretexting" had been successfully employed in the past by Discover to secure from phone companies customer records without customer authorization. 27

III. PRIVATE SECLUSION INTRUSIONS BEYOND LAWLOR

A. AGENTS AND PRINCIPALS

1. Intentional Acts

Under Lawlor, a principal like NAC may only be liable for the intentional tort of intrusion upon seclusion by its agent where the principal directed, controlled, authorized, or ratified the conduct. 28 Seemingly, NAC both authorized (in advance by asking for nonpublic records) and ratified (by using the records) the torts committed by Probe (if not Discover). 29 Yet Greenblatt, NAC's lawyer, in an affidavit stated that Probe was his agent. More importantly, Greenblatt testified that "he did not limit what Probe could do"; did not discuss with Probe "investigative techniques"; and did

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25. *Id.* ¶ 51 (distinguishing Horwitz v. Holabird & Root, 212 Ill.2d 1, 23 (2004), which found that a lawyer could, at times, be an "agent" of a client while, at other times, the same lawyer could be an independent contractor).


27. Brief of Plaintiff-Appellee, *supra* note 17, at 11 ("With NAC’s authority, Probe ordered Lawlor's phone records from 'Discover,' a purportedly defunct Florida company that Probe previously used to get phone records.").

28. While the necessary intent to commit the tort of intrusion upon seclusion in *Lawlor* involved deceit to gain access to private matters, other elements of the *Lawlor* tort do not require intent, as with the effect of the intrusion needing to be only "offensive or objectionable to a reasonable" person and thus not requiring the tortfeasor's actual intent to be offensive or objectionable. When a tortfeasor intends to intrude, but without deceit, the claim is sometimes characterized as "an unreasonable intrusion upon the seclusion of another." Melvin v. Burling, 490 N.E.2d 1011, 1012-14 (Ill. App. Ct. 1986). However, punitive damages may not be available here.

29. While Discover (no longer in business at the time of trial, with no former Discover official or agent testifying at trial, *Lawlor*, 2012 IL 112530, ¶ 11) obtained the records from Lawlor's two phone carriers, Probe "had conducted other noncompetition investigations and had obtained phone records," supplied Discover with Kathleen's private information, and forwarded Kathleen's records to NAC upon receipt from Discover. *Lawlor*, 2012 IL 112530, at ¶ 11.
not receive any updates or documents to review from Probe, presumably other than the bill which Greenblatt paid and for which he was reimbursed by NAC. Should Probe (if not Discover) also be viewed as Greenblatt’s agent because of his lack of control? Can a failure to control, which allows another to commit an intentional tort, prompt vicarious liability under Lawlor, as can the exercise of control, which prompts another to commit an intentional tort?\(^{31}\)

The questions are challenging, as Greenblatt did, in fact, have professionalism oversight responsibilities, at least regarding Probe.\(^{32}\) Professional

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30. Id. ¶¶ 10 n.1, n.10.
31. In Burns v. Masterbrand Cabinets, Inc., 874 N.E.2d 72, 77 (Ill. App. Ct. 2007), the court found issues of vicarious liability of an employer, the employer’s worker’s compensation adjuster, and a private investigation agency, for the deceitful acts of a private investigation agency’s investigator’s deceit were “not ripe for review” where the adjuster retained the investigation agency; there was no indication in the case of any entity’s direction, control or the like of the individual investigator.
32. In New York, but not Illinois, a law firm also has professionalism oversight responsibilities for nonlawyers “who work for the firm.” N.Y. PROF’L CONDUCT R. Rule 5.1 (2004) (stating that a firm is to ensure those “participating in the organization’s work undertake measures giving reasonable assurance” lawyers conform to the Professional Conduct Rules), and N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-104(c) (duty to supervise “adequately”). For an argument favoring possible disciplinary sanctions against law firms (including, one imagines, for inadequate supervision or control of all lawyers at the firm), see Ted Schneyer, Professional Discipline for Law Firms?, 77 CORNELL L. REV. 1 (1991) (arguing for an extension by analogy to the regulation of corporate crime); Elizabeth Chambliess & David B. Wilkins, A New Framework for Law Firm Discipline, 16 GEO. J. LEGAL ETHICS 335, 350-51 (2003) (suggesting “alternative framework for law firm discipline based on the emerging role of in-house compliance specialists,” rather than on an entity duty of supervision); and Irwin D. Miller, Preventing Misconduct By Promoting the Ethics of Attorneys’ Supervisory Duties, 70 NOTRE DAME L. REV. 259, 309-17 (1994). But see Julie Rose O’Sullivan, Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal, 16 GEO. J. LEGAL ETHICS 1, 90 (2002) (“I ultimately (and reluctantly) believe that this threat [of law firm discipline] will not have any deterrent effect and that an ineffective threat of firm disciplinary sanctions is not worth its potential cost.”).

The American Bar Association Commission on Evaluation of the Rules of Professional Conduct (the “Ethics 2000 Commission”) initially proposed to extend the Rule 5.3 supervisory duties to law firms as well as individual lawyers but ultimately decided any possible benefit was small “when compared to the potential cost of de-emphasizing the personal accountability of partners and supervisors.” Margaret Colgate Love, The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000, 15 GEO. J. LEGAL ETHICS 441, 470-71 (2002). Given New Jersey Rule of Professional Conduct 5.1(a), New Jersey disciplinary sanctions (reprimands) were assessed against a law firm (for improper client solicitation) in In Matter of Ravich, Koster, Tobin, Olenckna, Reitman & Greenstein, 715 A.2d 216 (N.J. 1998) and (for failure to supervise attorneys) in In Matter of Sills Cummis Zuckerman Radin Tischman Epstein & Gross, 927 A.2d 1249 (N.J. 2007). The best contemporary review of the law firm discipline debate and experience was done by one of its early proponents, Ted Schneyer, On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance With Broad Ethical Duties of Law Firm Management, 53 ARIZ. L. REV. 577, 584-85 (2011) (assessing New York and New Jersey experienc-
conduct standards for lawyers, while not “designed to be a basis for civil liability,” are frequently employed in formulating tort law duties. Under Illinois Rule of Professional Conduct (IRPC) 5.3(a), a partner, or one with managerial authority, should “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance” that a nonlawyer “retained by or associated” with the firm conducts herself in ways “compatible” with the partner’s own “professional obligations.” Moreover, under IRPC 5.3(b), Greenblatt, if he assumed “direct supervisory authority” over DiLuigi, Probe’s principal, must “make reasonable efforts to ensure” that DiLuigi’s “conduct is compatible” with Greenblatt’s own “professional obligations.” Finally, even if not a partner, manager, or supervisor, under the IRPC, Greenblatt should not “knowingly assist or induce another” to violate the Rules of Professional Conduct or violate those rules “through the acts of another.”

As noted, Greenblatt “testified that he did not have any discussion with Probe concerning investigative techniques,” that “he did not receive any updates or documents to review,” and that “he did not know whether Probe obtained Lawlor’s phone records.” Yet, DiLuigi, who was “retained” by Greenblatt, testified that Probe had previously conducted other

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34. See id. (concluding most cases find that professional conduct rules can be used in establishing standards for lawyer malpractice actions and for breaches of lawyers’ fiduciary duties).
35. ILL. RULES OF PROF’L CONDUCT R. 5.3(a) (2010).
36. Id. at R. 5.3(b).
37. Id. These IRPC 5.3 duties are also reflected in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 11(4) cmt. b (2000) (indicating nonlawyer conformity with rules governing lawyers is grounded on agency law). Case law and ethics opinions on ABA Model Rule 5.3 duties followed in Illinois are examined in Use of Nonlawyer Assistance Puts Onus on Law Firm Managers and Supervisors, 28 ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT 689 (11-7-12).
38. ILL. RULES OF PROF’L CONDUCT R. 8.4(a) (2010). But see OR. CODE OF PROF’L RESPONSIBILITY DR 1-102(D) (2003) (explicitly recognizing lawyers can advise clients or others about, or can supervise, lawful covert activity, wherein information is sought “through the use of misrepresentations or other subterfuge”). This rule is applauded, and other state limits on lawyer deceit are reviewed in Douglas R. Richmond, Deceptive Lawyering, 74 U. CIN. L. REV. 577, 605 (2005) [hereinafter Richmond, Deceptive Lawyering] (finding American state laws vary and “clear ethics guidelines are not easily formulated”).
40. Id.
41. Id.
42. Id. ¶ 5. Under the IRPC, if DiLuigi was selected only by NAC to investigate, Greenblatt and his firm would need to agree with NAC regarding “the allocation of respon-
noncompetition investigations during which he had obtained phone records. Dolan testified that he provided Greenblatt, as well as DiLuigi, "with Lawlor's date of birth, her address, her home and cellular telephone numbers, and her social security number." What were Greenblatt and his firm to do with Kathleen's social security number? And did they know it was conveyed to DiLuigi?

Further, the jury in Lawlor found that both Probe and NAC knew Kathleen's records were obtained by Discover through pretexting. In this setting, did Greenblatt have "direct supervisory authority," and if so, did he reasonably seek to ensure Probe (if not Discover) acted properly? Greenblatt's vicarious liability for his own oversight failures, possibly including IRPC violations involving the intentional acts of others, would be more fair even if he did not explicitly direct DiLuigi to pretext but if he knew of

43. See Lawlor, 2012 IL 112530, ¶ 11.
44. Id. ¶¶ 5, 12.
45. There are circumstances wherein divulgence of a social security number is justified. See, e.g., Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1008-09 (N.H. 2003).
46. Lawlor, 2012 IL 112530, ¶ 23. Where information obtained via pretexting is not "something secret, secluded or private," there may be no intrusion upon seclusion. Remsburg, 816 A.2d at 1009.
47. Under Comment 3 to ABA Model Professional Conduct Rule 5.3, a lawyer who uses a nonlawyer outside the law firm to investigate "must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations," with reason guided, inter alia, by "the education, experience and reputation of the nonlawyer"; "the nature of the services provided"; and "the legal and ethical environments of the jurisdictions in which the services will be performed." Seemingly important in a Lawlor setting is the significant, and unusual, Illinois protection against eavesdropping (i.e., two party consent needed to record).
48. See, e.g., O'Sullivan, supra note 32, at n.330 (stating that sanctions against individuals for oversight failures involving the conduct of others "will spur individual action" that law firm liability will not). Compare id., with Bookhamer v. Sunbeam Prods. Inc., No. C 09-6027 EMC (DMR), 2012 WL 4943730, at *2 (N.D. Cal. Oct. 17, 2012) (stating that while court may hold a counsel liable for its investigator's intentional misconduct in undertaking ex parte contacts with adverse litigants and witnesses represented by other counsel, here counsel's explicit instructions to the investigator were not followed, and counsel ended the investigation and reported the ex parte contact violation to the adversary upon learning of it). Consider, as well, Fed. R. Civ. P. 11, which authorizes law firm financial responsibility for its lawyer's misconduct when the firm failed to act upon learning of the misconduct in time to remedy or mitigate, or itself set policies prompting the lawyer to act badly in the first place. Fed. R. Civ. P. 11 advisory committee's note to 1993 Amendment; see O'Sullivan, supra note 32, at 4-5, 76-78 (arguing that if there is to be any law firm discipline for the acts of its lawyers, it should only come under a "reasonableness" standard and not via respondent superior; such a standard should be implemented via "concrete benchmarks" or "a list of criteria" that allows "more objective, uniform and reliable sanctioning decisions").
NEw PRIVATE PRIVACY INTRUSIONS

Probe’s (or Discover’s) history of pretexting or if he failed to try to end DiLuigi’s ongoing pretexting when evidence of it came to light.

2. **Negligent Acts**

After Lawlor, can Greenblatt’s (or his firm’s) tort liability to Kathleen be grounded solely on the negligent acts, and not just the deceitful acts, of agents like NAC or Probe (if not Discover)? Further, could strict vicarious liability (i.e., no negligence or other affirmative conduct of the principal beyond agency) suffice? Finally, could vicarious tort liability arise for the acts of those associated with, but not agents of, a lawyer (or his firm)?

The American Law Institute’s Restatement of the Law Governing Lawyers provides some support for, and guidance on, the vicarious liability of lawyers and their law firms for the negligent acts of both agents and nonagents (like independent contractors). With certain exceptions unrelated to civil claim investigations, the Restatement declares “a lawyer is subject to liability to a . . . nonclient when a nonlawyer would be in similar circumstances.”

Vicarious liability of (law firms and) certain law firm principals
is also recognized for the acts of law firm employees "acting in the course of the firm's business or with actual or apparent authority." 54

Of course, the negligent acts of agents which could bind principals differ from any negligent acts by the principals themselves. Thus, a lawyer's (or law firm's) negligence in choosing which licensed detective agency to employ to investigate a client's (potential or actual) adversary could be grounds for tort damages to the adversary whose seclusion was intruded upon by the agency. 55

B. DECEIT

1. Privacy Intrusions with No Deceit?

In Lawlor, NAC—the defendant in a tort claim involving Discover's intrusion upon Kathleen's seclusion—knew about, aided, and ratified Discover's pretexting, as did Probe. 56 But is deceit always needed for a seclusion claim against a principal? Drawing on the Restatement (Second) of Torts, the Lawlor court said tort liability attaches if one "intentionally intrudes... upon the... seclusion of another or his private affairs or concerns" as long as "the intrusion would be highly offensive to a reasonable person." 57 The deceit was important in Lawlor as Kathleen sought, and won, punitive damages. 58 Incidentally, the use of the information secured by deceit, as opposed to its procurement, was not deemed necessary in Lawlor for a viable tort claim since compensatory damages were available even if the "private" or "personal" materials obtained were not published or otherwise used. 59


54. RESTATEMENT § 58. Note e extends possible law firm liability to a nonclient for the acts or omissions of an outside lawyer (or investigator?) "when principals or employees of the firm direct or help perform those acts or omissions."

55. See, e.g., Noble v. Sears, Roebuck and Co., 109 Cal. Rptr. 269 (Cal. Ct. App. 2d 1973); RESTATEMENT (THIRD) OF AGENCY § 7.05(1) (2006) ("A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.").

56. While Discover had been "based in Florida" but was "no longer in business" at the time of trial, Probe seemingly was still operating as DiLuigi testified as "the president of Probe." Lawlor v. N. Am. Corp. of Ill., 2012 IL 112530, ¶ 11 (2012). The details on whether and why Kathleen chose to sue or not to sue DiLuigi and/or Probe (or Dolan of NAC, for that matter) are not contained in the Illinois Supreme Court's decision.

57. Id. ¶ 33. See also RESTATEMENT (SECOND) OF TORTS § 652B (1965).

58. Lawlor, 2012 IL 112530, ¶¶ 54-66 (reducing the $1.75 million punitive damages award by jury, reinstated by Appellate Court, to $65,000).

59. Id. ¶ 33; see also RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1965). See also, e.g., I.C.U. Investigations, Inc. v. Jones, 780 So.2d 685, 689 (Ala. 2000) (stating in tort
Would NAC’s examination of Kathleen’s phone records, received from investigators, be actionable by Kathleen even without any deceit in obtaining them, as long as it would be “highly offensive” to Kathleen for her records to be examined and as long as NAC had no evidence of any privacy waiver by Kathleen?60 Or, does high offense vary dependent upon the nondeceitful means used in obtaining the records? For example, would liability attach if Kathleen’s phone records were obtained, upon request by Discover, from Kathleen’s spouse? Would it matter if her spouse (or significant other, or child, or mother) paid Kathleen’s phone bills? If NAC paid Kathleen’s phone bills? When would a NAC phone bill examination, in the absence of deceit, no longer be “highly offensive” to Kathleen?

Even if deceitful and nondeceitful privacy intrusions are actionable in tort, explorations into whether certain conduct is or is not deceitful are often necessary. The distinction is at least important when punitive damages are sought.61 And, there are other settings where deceit is important and may...
differ in meaning outside the tort setting. For example, lawyers like Greenblatt usually cannot engage, per the IRPC, in "conduct involving . . . deceit."62 Does deceit here embody the purposeful concealment of, or failure to mention, a highly material fact as well as an outright lie? One local lawyer guidance committee deemed that deceit, for professional responsibility purposes, encompassed a lawyer employing a third person to attempt to "friend" a witness without using untruthful information.63 Should deceit vary in tort and ethics settings so that a lawyer like Greenblatt may not be liable in tort, but may be disciplined for a third party's privacy intrusion?

2. No Privacy Intrusions with Deceit?

While the Lawlor case involved deceitful privacy intrusion in one type of civil claim investigation—an inquiry into a possible breach of the fiduciary duty of loyalty—might deceitful privacy intrusions in other types of civil claim investigations be nonactionable in tort and perhaps nonsanctionable under professional conduct guidelines? And might governmental and private lawyers be differentiated?

Governmental lawyers who use trickery or deceit to obtain consents to searches have at times been recognized as acting reasonably for Fourth Amendment purposes. Such acts in criminal case investigations are often viewed under a totality of circumstances analysis in determining whether consents were voluntary or the product of duress or coercion.64 This totality analysis also includes such factors as "physical mistreatment, use of violence, threats, promises, inducements . . . or an aggressive tone, the physical and mental condition and capacity of the defendant [challenging the search], the number of officers on the scene and the display of police weapons," as well as whether Miranda rights were read and an acknowledgment that there was a right to refuse consent.65 Likewise, trickery or deceit in civil case investigations by government lawyers might not render as coercive all consents to searches guided by the Fourth Amendment. Is crime detection so much more important than the detection of regulatory violations that deceit is only sanctioned for investigations of the former?

62. ILL. RULES OF PROF'L CONDUCT R. 8.4(c) (2010).
63. Phila. Eth. Op. 2009-02, 2009 WL 934623 (Mar. 2009) (utilizing the state's equivalent to IRPC 8.4(c)) [hereinafter Ethics Opinion 2009-02]. The Committee also deemed such employment would constitute the making of "a false statement of material fact to the witness." Id. (utilizing Pennsylvania's equivalents to IRPC 4.1(a) and 8.4(a)).
64. See, e.g., United States v. Sawyer, 441 F.3d 890, 895 (10th Cir. 2006), followed in United States v. Harrison, 639 F.3d 1273, 1278 (10th Cir. 2011); United States v. Jones, 701 F.3d 1300, 1309 n.9 (10th Cir. 2012).
65. Sawyer, 441 F.3d at 895.
Private lawyers who investigate civil claims are not constrained by the Fourth Amendment, so that the reasonable and ethical nature of their acts might be judged differently, and perhaps more harshly (for example, the needs of crime and regulatory enforcement should override privacy interests more often than the needs of private civil claim enforcement). As well, private lawyers typically do not intrude on matters that are public, often immunized from intrusion upon seclusion torts.

Private lawyers in certain civil claim investigations have, in fact, been distinguished. One New York Ethics Committee opinion sanctioned deceit in private investigations into civil rights and intellectual property rights. Earlier cases had allowed evidence procured by private lawyers via deceitful investigators to prove these very same claims. What other civil claims are comparable?

C. PRIVACY WAIVERS

In Lawlor, the privacy intrusions involved Kathleen’s personal cell phone and home phone records. Would a seclusion claim have been viable if only her cell (and not her home) phone records were obtained and if Kathleen was reimbursed by NAC for her cell phone expenses as part of her employment, especially if NAC expected Kathleen to utilize that cell phone for much—if not all—of her work-related calls, which were expected to be numerous? Assuming Kathleen was allowed by (or known to) NAC to use...
such a cell phone for personal calls, her records might be deemed to contain only some information whose invasion "would be highly offensive to a reasonable person." To escape tort liability if it ever reviewed Kathleen's records, could NAC simply secure in advance a total privacy waiver from Kathleen, even if a bit coercive, by making it an absolute condition of employment? Would it matter if NAC paid the whole cell phone bill or only that part related to work calls? Should employer-supported cell phones be treated like employer-supported vehicles or computers, or are reasonable privacy expectations different? What limits should be recognized for contractual privacy waivers?

Illinois precedent clearly establishes that privacy interests involving governmental investigations are not lost simply because one shares personal information with a third party, at least when sharing cannot be avoided. For example, in People v. Jackson, the appellate court recognized a bank depos-

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71. Id. ¶ 40.
73. See, e.g., Ariz. v. Estrella, 286 P.3d 150 (Ariz. App. 2d 2012) (explaining government attached GPS device to employer's van in order to gather evidence on employee's illegal drug trade; evidence is admissible against employee though no warrant was obtained as tracking was not excessive or unreasonable and as employee failed to show he had a reasonable expectation of privacy). Compare K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632, 637 (Tex. App. 1984) (privacy expectation in company locker secured by employee's lock).
74. See, e.g., United States v. Hamilton, 701 F.3d 404 (4th Cir. 2012) (explaining employee waived marital communication privilege attached to communications with spouse via employer-supported computer though communications occurred before there was any employer policy on employer access to all employee emails; employee failed to take action to preserve confidential communications after the policy was adopted), and Mitchell Co., Inc. v. Campus, 672 F. Supp. 2d 1217 (S.D. Ala. 2009) (intermingled business and personal records can be examined by company where employee subject to an explicit non-expectation-of-privacy policy).
itor retains privacy protections regarding bank dealings though bank deposits "reveal many aspects of her [i.e., depositor's] personal affairs, opinion, habit and associations which provide a current biography of her activities."75 Resort to "the banking system" by a depositor did not automatically waive "any legitimate expectation in her financial records" as "it is virtually impossible to participate in the economic life of contemporary society without maintaining an account with a bank."76 Under Jackson, "opening a bank account is not entirely volitional."77 Privacy interests comparably survive many other third party interactions wherein private matters are revealed,78 as with evidentiary privileges involving doctor-patient79 and attorney-client80 relationships. Phone records, like bank, medical, and legal records, are necessary today "to participate" in life.81 So beside contractual waivers, when should privacy waivers due to third party interactions be recognized? What about the sharing of personal information on a Facebook account where access is limited only to those designated as friends?82 Can private investigators legitimately ask Kathleen's Facebook friends what Kathleen posted about her work at NAC?

IV. CONCLUSION

In Lawlor, the Illinois Supreme Court first recognized the intentional tort of intrusion upon seclusion and then applied it on behalf of a former employee against a former employer whose agents deceitfully investigated

76. Id. at 88-89.
77. Id.
78. Here, of course, privacy protections are nonconstitutional (i.e., statutory, common law, or court rule) as there is no state action seemingly required for state constitutional privacy interests. See, e.g., People v. Nesbitt, 938 N.E.2d 600 (Ill. App. Ct. 2010) (under Jackson (and the Illinois Banking Act), Art. I, §6 of the Illinois Constitution protects an individual's bank records), and People v. Caballes, 851 N.E.2d 26, 42-43 (Ill. 2006) (limited lockstep approach to interpreting Art. I, §6, so that its explicit "right to be secure . . . against unreasonable . . . invasions of privacy" can extend beyond federal constitutional search and seizure and substantive due process protections when "a specific criterion -- for example, unique state history or state experience -- justifies departure from federal precedent").
79. See, e.g., 735 ILL. COMP. STAT. 5/8-802 (West 2006).
80. See, e.g., ILL. SUP. CT. R. 501 (stating the witness privilege is governed by common law where there is no explicit constitutional, statutory, or rule provision); People v. Adam, 280 N.E.2d 205, 207 (Ill. 1972) (outlining elements of attorney-client communication privilege).
81. Jackson, 452 N.E.2d at 88-89.
82. On the effects of sharing information on Facebook for Fourth Amendment purposes, see Monu Bedi, Facebook and Interpersonal Privacy: Why the Third Party Doctrine Should Not Apply, 54 B. C. L. REV. 1 (2013) (urging the concept of interpersonal privacy rights should be employed to protect certain communications over social networking sites like Facebook).
the employee in contemplation of future civil litigation. In Lawlor, the employer’s lawyer was also involved in the investigation. Under certain circumstances, given the Lawlor rationale, that lawyer could also be liable in tort to the former employee. Lawyer liability after Lawlor could be founded on either the intentional or unintentional acts of either the lawyer or the lawyer’s agent and may not need deceit. Liability might fail if there was a privacy waiver. The circumstances permitting lawyer liability for intrusion upon seclusion during prelitigation civil claim investigations would often include violations of the lawyer ethics rules elsewhere employed for lawyer discipline. Because those harmed by lawyer intrusions seem far more likely to complain in their own civil suits than in lawyer disciplinary proceedings, in the future, lawyer presuit civil claim investigations will increasingly be scrutinized under the IRPC in tort rather than disciplinary settings.

Lawlor prompts many questions about lawyer liability for private privacy intrusions during civil claim investigations, including questions about agency, deceit, and waiver. For now, Illinois lawyers should investigate cautiously.