Disclosure of Personal Information

Basically, there are two lines of cases in California pertaining to the disclosure of personal information as a potential violation of privacy rights. The first category of cases falls under the common law tort of invasion of privacy. The second involves disclosure as a possible violation of the state or federal constitutional right of privacy.

Disclosure as a Tort

The first California case discussing privacy as being protected by tort law was decided in 1931. In Melvin v. Reid, the Court of Appeal established the right of privacy in California, basing it on the state Constitution's recognition of the pursuit of happiness as an inalienable right. In this case a woman sued a motion picture studio because the studio released a movie that depicted the details of her former life as a prostitute and used identifying information that let the public know that the movie was based upon true facts about her former life. This caused her to be subjected to ridicule and shame.[317]

After acknowledging the existence of privacy as a protected right in California, the Court of Appeal set out the first parameters of this common law right:[318]

- The right of privacy is an incident of the person and not of property — a tort for which the right of recovery is acknowledged in some jurisdictions, including California.

- A cause of action based upon the right of privacy is purely personal and does not survive, but dies with the person.

- A cause of action based upon disclosure of personal information does not exist where the complainant has caused the material to be published, or consented thereto.

- There is no violation of the right of privacy for publication of information that is already in the public domain. The mere publication of material gleaned from public records does not constitute an actionable invasion of privacy. Privacy may also be waived to various degrees by virtue of a person's becoming established as a public official or a public figure.

- The right of privacy does not prevent the publication of newsworthy events that pertains to matters of legitimate public interest.

In this case, since the information about the plaintiff was a matter of public court record, there could be no violation of privacy rights for merely publishing true facts. However, since the plaintiff was not a public official or a public figure, there was no legitimate newsworthy interest in publishing her true identity and name in the motion picture. The court held that public policy favors rehabilitation, and the disclosure of ancient facts concerning misdemeanor convictions of a private citizen, which served no important newsworthy purposes, was violative of this policy and of the privacy rights of the plaintiff. The violation of privacy was accentuated by the fact that the primary motive for the publication was to make a profit.

The first Supreme Court case involving a tortious privacy action was decided in 1952. In Gill v. Curtis Publishing Co., the Supreme Court made its first privacy pronouncements and accepted the right of privacy as an interest worthy of protection under California law.[319] In this case, the Ladies' Home Journal was sued for publishing a photograph of the plaintiffs in connection with a nonfictional pseudo-psychological story about different types of love. A photographer took a photo of plaintiffs showing them embracing. The photo was taken without their knowledge or consent. It was then published along with this article on "love," and under the photo was a slogan which suggested that the sole interest plaintiffs had in each other was sexual. The story connected plaintiffs with involvement in "the wrong kind of love." Plaintiffs were not celebrities but were private individuals who were basically exploited by the photographer and by the publication. The photograph was not taken in connection with some current newsworthy event, but seemed to be taken at random for the purpose of illustrating a particular point in the story. Plaintiffs were outraged and sued the publication for invasion of privacy. The Supreme Court used this case to discuss the rationale for balancing competing interests in privacy lawsuits involving injurious disclosures by the media. In this regard the Court said:[320]

> The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individual's interest in peace of mind and freedom from emotional disturbances.

> When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy. . . .
>
> Assuming [the story] to be within the range of public interest in dissemination of news, information or education, and in a medium which would not be considered as commercial — for profit or advertising — there appears no necessity for the use in connection with the article without their consent, of a photograph of plaintiffs. The article, to fulfill its purpose and satisfy the public interest, if any, in the subject matter discussed, would, possibly, stand alone without any picture. In any event, the public interest did not require the use of any particular person's likeness nor that of plaintiffs without their consent. . . . The impact on the plaintiffs has been as alleged . . . that they are depicted as persons whose only interest in each other is sex, a characterization that may be said to impinge seriously upon their sensibilities.

Ten years later, in the case of Carlisle v. Fawcett Publications, the California courts again expounded on tortious privacy invasions in an action involving a motion picture magazine.[321] In this case the Court addressed some of the pitfalls that go hand-in-hand with being a public figure, such as a movie celebrity (or someone who is closely associated with a celebrity). The magazine contained an article about Janet Leigh when she was 14 years old and also implicated her former husband. He sued the publication on the grounds that the story violated two aspects of the tort of invasion of privacy, " (a) Public disclosure of embarrassing private facts about the plaintiff; and (b) Publicity which places plaintiff in a false light in the public eye." As to the balancing of competing interests, the Court held:[322]

> A consideration of the limits of the right of privacy requires the exercise of a nice discrimination between the private right "to be let alone" and the public right to news and information; there must be a weighing of the private

interest against the public interest. [Citation.] It is clear that as current news occurs those involved in the happening may be named and discussed in newspapers or over the air even though the process actually invades the privacy of the individual. If a householder is burglarized, or a pedestrian is held up and robbed in the street, or two automobiles collide at an intersection, news media may properly give an account of what happened even though the individual objects. The freedom of the press is constitutionally guaranteed, and the publication of daily news is an acceptable and necessary function in the life of the community.

The privilege of printing an account of happenings and of enlightening the public as to matters of interest is not restricted to current events; magazines and books, radio and television may legitimately inform and entertain the public with the reproduction of past events, travelogues and biographies.

If the necessary elements which would permit the publication of factual matter are present, mere lapse of time does not prohibit publication. [Citations.] . . . [M]ere passage of time does not preclude the publication of . . . incidents from the life of one formerly in the public eye which are already public property.

Furthermore . . . public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons. . . .

A necessary corollary is that people closely related to such public figures in their activities must also to some extent lose their right to the privacy that one unconnected with the famous or notorious would have. If it be objected that the mere relationship with some public figure should not subject a person to a qualified loss of his privacy, the identical observation could be made logically to the man held up on the street, the householder who is burglarized, or the victim of the accident; all may be equally unwilling to be publicized.

As to plaintiff's claim that there were some inaccuracies in the story (not amounting to defamatory material) the Court held that the mere fact that there are errors in a story does not constitute an invasion of privacy. The Court then concluded its opinion by stating:[323]

> The protection afforded by the law to the right of privacy must be restricted to "ordinary sensibilities" and not to supersensitiveness or agoraphobia. There are some shocks, inconveniences, and annoyances which members of society in the nature of things must absorb without the right of redress.

In 1959, the Court of Appeal resolved a personal privacy conflict in a lawsuit brought by Mrs. Jesse James against Screen Gems for producing a movie about her late husband.[324] In upholding the dismissal of the lawsuit, the Court of Appeal held that there is no "relational" right of privacy:[325]

> The authorities appear to be uniform that the right of privacy cannot be asserted by anyone other than him whose privacy is invaded. . . . "Neither reason nor authority indicates that there should be an extension of liability to cover [incidental invasions]. Such a rule would open the courts to persons whose only relation to the asserted wrong is that they are related to the victim of the wrongdoer and were therefore brought unwillingly into the limelight. Every defamation, false imprisonment, and malicious prosecution would then be an actionable invasion of the privacy of the relatives of the victim."

On a related note, however, in a case previously discussed in this Report, the Court of Appeal, while emphasizing that there is no "relational" right of privacy, stressed that recovery by a relative may be possible if that relative's own privacy is sufficiently or directly invaded.[326]

Just three years ago, the California Supreme Court again addressed invasion of privacy as a tort. In this case, the heirs of Bela Lugosi sued Universal Pictures, seeking to recover profits made by the studio in its licensing to commercial firms of the use of Lugosi's likeness and character as portrayed by the actor in a film made for Universal. The trial court held that the actor had a proprietary interest in his facial characteristics and it was inheritable by his heirs. A closely divided Supreme Court reversed,

holding that although a proprietary interest in one's likeness exists during one's lifetime, it does not automatically transfer to one's heirs.[327]

The Court noted that the heirs sued Universal under the fourth aspect of privacy as a tort, namely, appropriation, for the defendant's advantage, of the plaintiff's name or likeness. As to the personal nature of the tort, and the rules of standing that are required to assert it, the Court quoted from Prosser:[328]

> There has . . . been a good deal of consistency in the rules that have been applied to the four disparate torts under the common name. As to any of the four, it is agreed that the plaintiff's right is a personal one, which does not extend to members of his family, unless, as is obviously possible, their own privacy is invaded along with his. The right is not assignable, and while the cause of action may or may not survive after his death, according to the survival rules of the particular state, there is no common law right of action for a publication concerning one who is already dead.

The Court then held that under the development of privacy as a common law tort in this state, a cause of action for invasion of privacy does not survive the death of the victim.[329] The majority then explained:[330]

> There is good reason for the rule. The very decision to exploit name and likeness is a personal one. It is not at all unlikely that Lugosi and others in his position did not during their lifetimes exercise their undoubted right to capitalize upon their personalities, and transfer the value into some commercial venture, for reasons of taste or judgment or because the enterprise to be organized might be too demanding or simply because they did not want to be bothered.

A lengthy dissenting opinion was filed by Chief Justice Bird, joined by Associate Justices Tobriner and Manuel. Recognizing that the right of privacy protects the feelings of individuals, the dissent noted that the interest invaded in this case was a proprietary interest, not an emotional one. The dissent felt that evolving common law principles should be expansive enough to protect a "right of publicity" as well as the right of privacy. The opinion of the Chief Justice urged the legal profession not to confuse two separate and distinct rights, each protecting separate interests: the right of

publicity, on the one hand, which protects individuals against commercial exploitation by placing a value on individual personalities; and the right of privacy, on the other hand, which protects the sensibilities and feelings of individuals against exploitation by others. While the right of privacy and its protection of feelings is not transferable, said the dissent, the right of publicity should be assignable and should survive the death of an individual.

The parameters of a right of publicity and its transferability involve important matters of policy. The fact that the Supreme Court narrowly declined to expand common law principles to protect this right is some indication that the problem may benefit from further scrutiny. The arguments advanced by the dissent in this case may not have been sufficient to influence a majority of the court to judicially create protection for this right of publicity, but the arguments may be well received in legislative quarters.

The Lugosi case noted that the Legislature has stepped in to fill a gap in the common law right of privacy, by providing for minimum penalties in cases of exploitation of one's name or likeness. The common law had required proof of actual damages. As Assemblyman John Vasconcellos, the author of the statute creating minimum penalties, stated:[331]

> This bill fills a gap which exists in the common law tort of invasion of privacy in the state of California: to provide a minimum amount of damages for the invasion of the "little man['s]" privacy occasioned by an unauthorized commercial use. This bill provides a simple, civil remedy for the injured individual.

Just as the Legislature has filled one gap in this aspect of privacy law, it might consider filling another, namely, the nontransferability of the "right of publicity." While the Commission is not prepared to take a position as to which result is more prudent, it suggests that the Legislature review both sides of the arguments presented in the Lugosi case, with a view toward clarifying the law in this area.

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Disclosure as a Constitutional Violation

Sometimes the common law tort that prohibits certain disclosures of personal information falls short of providing protection to individuals, and, therefore, other bases of protection must be used. For example, since there is no "common law" imposition of tort liabilities on governmental entities in California, a privacy action against state or local government must be premised on statutory or constitutional protections.[332] This section of the Report discusses case law imposing constitutional limitations on the disclosure of personal information by governmental entities and private parties.

In the case of Porten v. University of San Francisco, the Court of Appeal noted that the plaintiff student could not recover against the university under tort law for the disclosure involved, because the common law tort requires disclosure to a large audience as distinguished from one individual or a few.[333] But although tort law missed the mark, the 1972 Voters' Amendment was held to expand the common law right of privacy to cover the situation at hand. Of the four principal "mischiefs" that the amendment was directed to correct, one pertains to disclosures of personal information, namely, "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party." Thus, disclosures to even one individual could violate the state constitutional right of privacy.

The case of Loder v. Municipal Court addressed the application of the right of privacy in article 1, §1 of the state Constitution as a potential limitation on the retention and dissemination of arrest records by government agencies.[334] Writing for a unanimous Court, Justice Mosk made several remarks pertinent to the compelling need of the government to retain and sometimes use arrest records, including those from arrests that did not result in convictions. Although the right of privacy applies to such records, the Court found a compelling state purpose supporting limited retention and use of arrest records, namely, protecting the public from recidivist offenders. The opinion demonstrates how this purpose is often accomplished.[335]

> First, at the time of arrest the suspect's right of privacy is obviously outweighed by the necessity of identifying him correctly, and does not give him the right to refuse to disclose his name and address to the arresting officer. Not only may such information be taken down, it may immediately

be put to use: the officer may transmit the data to his headquarters in order to determine whether the arrestee is wanted on any other charge or is a fugitive, or whether he presents a threat to the officer's safety. If the arrestee is thereafter transported to the police station and booked, the identification process may lawfully extend to taking his fingerprints and photograph, and recording his vital statistics. [Citation.]

In addition, the suspect's right of privacy is not violated by prompt and accurate reporting of the facts and circumstances of his arrest: "It is also generally in the social interest to identify adults currently charged with the commission of a crime. While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime. Naming the suspect may also persuade eyewitnesses and character witnesses to testify. For these reasons, while the suspect or offender obviously does not consent to public exposure, his right of privacy must give way to the overriding social interest." [Citations.]

Next, the information derived from the arrest may be used by the police in several ways for the important purpose of investigating and solving similar crimes in the future. We have held, for example, that a photograph taken pursuant to even an illegal arrest may be included among those shown to a witness who is asked to identify the perpetrator of a subsequent crime. [Citation.] This is a fortiori permissible in the case of a lawful arrest; and the same identification function is served, of course, by the arrestee's fingerprints and other recorded physical description. . . .

Often the prior arrest is not an isolated event but one of a series of arrests of the same individual on the same or related charges. This is especially true when the crime in question is typically subject to recidivism. . . . In these cases a pattern may emerge -- for example, a distinctive modus operandi -- which has independent significance as a basis for suspecting the arrestee if the crime is committed again. . . .

> While a record of arrests not resulting in conviction is generally inadmissible at trial, it may serve significant functions in both pre-trial and post-trial proceedings. First, among the circumstances often taken into account in the exercise of prosecutorial discretion is the arrest record of the defendant. For example, prosecutors have considered that record . . . in deciding whether to file a formal charge against the defendant, or whether to prosecute as a felony or as a misdemeanor a crime which can be either class of offense, or whether to agree to a bargain for a specified penalty or a plea to a lesser offense. . . .
>
> After the defendant has been appropriately charged, the court is usually called upon to determine the question of pretrial release. Again, arrest records may be relevant. . . .
>
> Upon conviction, the case of each eligible felony defendant is referred to the probation officer. That officer must investigate the circumstances of the crime and "the prior history and record of the person," and report his findings to the court. . . . For [purposes of deciding whether to grant probation or not] it has been held that the court may properly consider not only current arrests of the defendant giving rise to charges still pending [citation] but also prior arrests which did not result in conviction [citations]; and it has also been held that if the defendant is sentenced to prison, the Adult Authority may take his arrest record into account in determining when to release him on parole. [Citation.]

The Court declared these multiple purposes for using arrest records to be a "substantial governmental purpose."[336] Against these purposes, the Court weighed the arrestee's legitimate concern to protect himself from improper uses of his record. A survey of extensive literature on that subject elicited the primary dangers as: inaccurate or incomplete arrest records; dissemination of records outside of the criminal justice system; and reliance on such records as a basis for denying the former arrestee business or professional licensing, employment, or similar opportunities for personal advancement. With respect to these problems, the Court stated:[337]

We do not underestimate the adverse effects on an individual's later life if these dangers materialize. But we are convinced that in California the risks have been greatly diminished in recent years by significant legislative and executive action.

The Court then recited statutes that provide a degree of protection to those who had been arrested, including:

- Penal Code §849.5, which requires a substantial number of arrests not resulting in convictions to be recorded as "detentions" rather than "arrests."

- Penal Code §851.6, which requires a certificate of release to be issued in cases where the prosecutor fails to file a formal charge after an arrest, describing the action as a "detention" and requiring removal of the incident from arrest records of the arresting agency and the Department of Justice.

- According to Penal Code §11115, each agency reporting an arrest to the Department of Justice or the F.B.I. must report a disposition to these agencies when a person is released without formal charges being filed. If the arrest is deemed to be a detention, the disposition report must state the specific reason for the release.

- In cases in which formal charges are filed, Penal Code §11116 requires the court clerks to furnish a disposition report to the law enforcement agency primarily responsible for investigating the offense. If the case is dismissed, the particular reason for the dismissal must be stated.

- Courts must also furnish these disposition reports to the Department of Justice and the F.B.I., who in turn must submit the report to all bureaus to which the arrest data has been furnished. Penal Code §11117.

- A person who is the subject of a disposition report is guaranteed access thereto. Penal Code §§11116.7-11116.9.

• A person may inspect all criminal records pertaining to him that are maintained by the state Department of Justice, and may demand correction of any inaccuracies therein. Penal Code §§11120-11125.

• In a number of cases, the Legislature has provided for sealing of arrest and court records, namely, where the disposition has been in favor of the accused and where there is a determination of "factual innocence." Penal Code §851.8. Minors can have records sealed under the provisions of Penal Code §851.7 and Penal Code §1203.45.

• Criminal penalties attach to unauthorized disclosures of arrest records. Penal Code §§11141-11143. Civil penalties are also available. Lab. Code §432.7, subd. (b).

• Penal Code §11077 makes the Attorney General responsible for the security of criminal record information and mandates that he establish regulations to assure that such information shall not be disclosed to unauthorized persons or without a demonstration of necessity; that he coordinate the California system with interstate systems; and that he undertake a continuing educational program for all authorized personnel in the proper use and control of such information.

• The Legislature has moved vigorously to prevent criminal record information from being improperly used as a basis for denying the former arrestee opportunities for personal advancement. This is so particularly in the area of minor drug arrests. Also, professional licenses cannot be denied or revoked based solely on arrest records or because of a lack of "good moral character." Even convictions cannot form the sole basis of such a denial, absent a showing that there is substantial connection with the effective performance of duty. Bus. & Prof. Code §475.

• No public agency may ask or require on an initial application form that the applicant reveal any record of arrest not resulting in a conviction. Bus. & Prof. Code §461.

• Public and private employers may not ask an applicant for employment to disclose information concerning an arrest or detention not resulting in a conviction, nor may

such employer seek such information from any source whatsoever or utilize it in employment decisions. Criminal and civil penalties are provided for violators of this prohibition. Labor Code §432.7.

Because of the tremendous number of legislative protections that have been provided in recent years, the Court in Loder held that legitimate privacy interests of arrestees were adequately protected under this legislative scheme. Hence, the provisions of article 1, §1 of the state Constitution would not impose any additional duties or liabilities on agencies involved in the processing of such arrest information.

A challenge to the practices of the Attorney General was decided by the Court of Appeal in 1979, particularly concerning the routine dissemination of arrest information to prospective governmental employers. This time the provisions of article 1, §1 were found to prohibit the dissemination practices.

In Central Valley Chapter of 7th Step Foundation v. Younger, two individuals, a taxpayer, and an ex-offender organization filed suit challenging the Attorney General's practice of sending arrest records to public employers without first deleting any references to arrests that did not result in convictions. The gist of the privacy claim against the Attorney General was that if a public employer, authorized by law to receive criminal offender information, but prohibited by law from considering a record of an arrest that did not result in a conviction, is sent a record containing any entries of arrests that did not result in convictions, this procedure violates state and federal statutes and Constitutions. The Court determined that the allegations were sufficient to constitute a prima facie violation of the state constitutional right of privacy.[338]

As to the Attorney's General's contention that requiring the deletion of non-conviction information from such routine disclosures would be very costly and burdensome, the Court not only discussed how such a procedure would not be burdensome, but added:[339]

> Respondent's alleged compelling state interest must be recognized for what it is: an interest in the avoidance of administrative burden. It is now well settled that administrative burden does not constitute a compelling state interest which would justify the infringement of a fundamental right. [Citations.]

With respect to the issue of juror privacy, the Court of Appeal has held that routine disclosures by jury commissioners, pursuant to the state Public Records Act, of the names and addresses of prospective jurors, does not violate state or federal privacy protections.[340] This is the rule, regardless of the use to which the information is put by a member of the public or an investigating agency. The Court did not decide what liability, if any, would attach to investigators who intruded into the privacy of prospective jurors under settled principles of tort law or under the newer constitutional provisions.

Finally, the state constitutional right of privacy does not prohibit disclosures of personal information obtained from confidential government files, if those disclosures are made internally within a department in an investigation for possible fraud against the department.[341]

In sum, there are several types of protection against unreasonable disclosures of personal information. The common law tort of privacy protects individuals against disclosures to a large audience when committed by private individuals, but does not afford protection for such disclosures by government entities. Article 1, §1, with its privacy provision, prohibits governmental intrusions, as well as invasions caused by private parties. This protection is more expansive than the common law right and will afford protection against unreasonable disclosures to small groups or even to one individual. Furthermore, there are any number of statutory protections, some of which have been mentioned here, as well as others that will be discussed in more detail in the section of this Report dealing with legislative protection of personal privacy.

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Collection of Personal Information

The right of personal privacy imposes limitations on information gathering and collection practices. Federal constitutional privacy provisions, particularly the Fourth Amendment, place restrictions on surveillance and other information gathering by law enforcement agencies. Article 1, §13, which is similar to but broader than the Fourth Amendment, checks unreasonable searches and seizures which are conducted during criminal investigations. Article 1, §1 of the state Constitution has expanded privacy law to prevent other unreasonable information gathering practices by organizations and individuals in the private sector as well as government entities.

A review of constitutional privacy cases that discuss limitations on such information gathering practices is included in this section of the Commission's Report because of the importance of those cases to the overall scheme of privacy regulation in California.

The cases neatly fall into the following categories, and so they will be treated accordingly: information gathering practices of law enforcement agencies; collection of personal information by other government entities; and surveillance practices of private organizations.

Police Practices

Some of the California cases discuss an extremely important area of privacy law, namely, audio or visual surveillance of private areas, such as residences, by law enforcement agencies. In Cohen v. Superior Court, after receiving an anonymous tip that prostitution was being conducted in an apartment, the officers went to the building and, observing no activity in the hallway, went onto the fire escape and looked into defendant's apartment window, where they observed some marijuana.[342] Both the trial court and counsel focused on whether a major or a minor trespass had occurred as a test for determining the legality of the officer's search.

On appeal, the appellate court noted that the wrong test had been used:[343]

> The trial court and counsel concerned themselves with evaluating whether a major or minor trespass was involved. The trial court resolved the problem by finding that there

was no "outrageous" trespass. We have concluded that the trial court erred in applying the wrong test. The test to be applied in determining whether observation into a residence violates the Fourth Amendment is whether there has been an unreasonable invasion of the privacy of the occupants, not the extent of the trespass which was necessary to reach the observation point. Whether a particular search involves an unconstitutional intrusion into the privacy of an individual is dependent upon the total facts and circumstances of the case.

The Fourth Amendment prohibits unreasonable searches and seizures, not trespasses. [Citation.] Looking through a window which is adjacent to a common area available to the other tenants of an apartment building as well as to other persons admitted by such tenants, or the management, and having legitimate business upon the premises is not an unreasonable search or a violation of a person's privacy. [Citation.] "When, . . . a person by his own action or neglect allows visual access to his residence by providing an aperture adjacent to a common area, he may not complain that police officers who were lawfully present in that area have utilized that aperture to detect the commission of crime within. [Citation.] . . .

In the instant matter the police made their observations from an outside fire escape which was available to tenants, guests, and other persons lawfully on the fourth floor in the case of fire. It is a tenable argument that tenants whose apartments had windows on the outside wall four stories above the street could reasonably expect privacy from any observations from the fire escape except during an emergency situation. In such a crisis, it is unlikely that anyone would pause to look into windows.

Whenever an individual may harbor a reasonable expectation of privacy he is entitled to be free from unreasonable governmental intrusion. [Citation.]

Therefore, the Court of Appeal reversed the lower court's order denying the motion to suppress the officer's observations, and remanded the case for another hearing on the matter with the proper test to be used by the court,

that test being based on the reasonableness of the individual's expectation of privacy and the governmental intrusion, in light of all of the factual circumstances.

The Fourth Amendment is not the only constitutional protection against unreasonable information gathering practices by law enforcement agencies. The prohibition against unreasonable searches and seizures contained in article 1, §13 of the California Constitution often imposes stricter and more protective standards than the minimum federal standards adopted by the United States Supreme Court under its interpretation of the Fourth Amendment.

With respect to constitutional limitations on police practices, the California Supreme Court has stated:[344]

> The most familiar limitations on police investigatory and surveillance activities, of course, find embodiment in the Fourth Amendment of the federal Constitution and article 1, section 13 (formerly art. I, §19) of the California Constitution. On numerous occasions in the past, these provisions have been applied to preclude specific ongoing police investigatory practices. Thus, for example, the court . . . prohibited the police practice of conducting warrantless surveillance of private residences by means of concealed microphones. And, in a series of cases . . . our court has invalidated covert police investigation involving routine and continual surveillance of public restrooms.

Article 1, §1 imposes additional restrictions on police information gathering practices, over and above those imposed by the search-and-seizure provisions of the state and federal Constitutions. On more than one occasion, the California appellate courts have noted how the 1972 Voters' Amendment has expanded existing privacy law. Furthermore, the California Supreme Court's exposition of the four principal mischiefs at which that amendment was directed, includes two "mischiefs" that are relevant to police surveillance practices:

> (1) "Government snooping" and the secret gathering of personal information; and
>
> (2) The overbroad collection and retention of unnecessary personal information by government and business interests.

Judging the police surveillance operation of university classrooms by these standards, the Supreme Court stated in White v. Davis:[345]

> In several respects, the police surveillance operation challenged in the instant complaint epitomizes the kind of governmental conduct which the new constitutional amendment condemns. In the first place, the routine stationing of covert, undercover police agents in university classrooms and association meetings, both public and private, constitutes "government snooping" in the extreme. Second, as noted above, the instant complaint alleges that the information gathered by the undercover agents from class discussion and organization meetings "pertains to no illegal activity or acts"; if this allegation is true, as we must assume it is at this stage of the proceedings, a strong suspicion is raised that the gathered material, preserved in "police dossiers," may be largely unnecessary for any legitimate, let alone "compelling" governmental interest.

In this case, the Court held that police intelligence operations may also run afoul of the First Amendment to the United States Constitution by interfering with "associational privacy."[346]

In 1979, the Court of Appeal addressed the limitations that article 1, §1 of the state Constitution imposes on optically aided visual surveillance of private areas. In People v. Arno, a police officer, using high-powered binoculars, placed offices within the Playboy Building under observation. Because the activity within the office building would not have been observable to anyone at such a distance without an optical aid such as high-powered binoculars, the officer's visual-search was held to be unreasonable and thus subject to the exclusionary rule.[347] (See quote following note 228 on pages 110-112, above.)

A recent decision handed down by the Appellate Department of the Los Angeles Superior Court poses a difficult problem for those who must balance legitimate law enforcement needs with the right of the individual to be free from surveillance while in a private residence. In People v. Goodson, the officers observed a vehicle pull up to a bus bench and pick up someone who the officers believed to be a man in woman's clothing. The officers followed the pair to a particular apartment in a private apartment complex. The

officers stood outside the locked door to the apartment, in a common hallway, and with their ears two to three inches from the door, heard conversation that involved a solicitation for prostitution. The municipal court denied the motion to suppress what the officers heard at the door, and the Appellate Department affirmed that decision.[348]

The Appellate Department felt compelled to reach that result because of two rulings from higher courts in California. The first ruling was in the case of Lorenzana v. Superior Court decided in 1973 by the California Supreme Court.[349] The second decision was handed down by the California Court of Appeal in 1977 in the case of People v. Kaaienapua.[350]

In Lorenzana, the Supreme Court held that "observations of things in plain sight made from a place where a police officer has a right to be do not amount to a search in the constitutional sense. On the other hand, when observations are made from a position to which the officer has not been expressly or implicitly invited, the intrusion is unlawful unless executed pursuant to a warrant or one of the established exceptions to the warrant requirement."[351]

In Kaaienapua, the manager of a boarding house gave police permission to enter a room adjacent to the defendant's room. By placing their ears against the dividing wall, the officers were able to discern conversation within the defendant's room and they concluded that narcotics activity was going on inside. The court held that the observations were not subject to suppression, after reviewing cases under the Fourth Amendment as well as article 1, §13 and article 1, §1 of the state Constitution.

In a concurring opinion in Goodson, Judge Saeta set forth considerations that are of great concern to the Commission on Personal Privacy, and so his opinion is set forth in full:[352]

> Under the compulsion of People v. Kaaienapua (1977) 70 Cal.App. 3d 283 [138 Cal.Rptr. 651] I concur in affirming defendant's conviction. Were I not bound by stare decisis, I would hold that the officers here violated defendant's reasonable expectation of privacy by listening at his residence door. The record shows that the door to defendant's apartment was locked (the officers kicked it in); the officers had to place their ears within two to three inches of the door to hear the conversations inside; and that defendant was talking in a normal tone. Under the Kaaienapua court's reasoning these

facts do not assist defendant in the defense of his privacy.

However, I discern a philosophical anomaly in contrasting the following passages from Kaaienapua and the leading case of Lorenzana v. Superior Court (1973) 9 C.3d 626 [108 Cal.Rptr. 585, 511 P.2d 33]: "In the instant case, the manager of a boarding house had requested the assistance of the police in dealing with illegal activities he felt appellant, one of his tenants, was conducting within the premises. With the manager's express permission they entered into a vacant room wholly controlled by the manager and, consequently, were in a place where they had a right to be." (United States v. Fish 474 F.2d 1071, 1074.) As the court in Fish determined, "Listening at the door to conversations in the next room is not a neighborly or nice thing to do. It is not genteel. But so conceding we do not forget that we are dealing here with the 'competitive enterprise of ferreting out crime' . . . the officers were in a room open to anyone who might care to rent. They were under no duty to warn . . . appellants . . . to speak softly, to put them on notice that the officers were . . . listening." (Id., at p. 1077.)

"Equally apposite are our own observations in People v. Guerra, 21 Cal.App.3d 534, 538 [98 Cal.Rptr. 627]: 'If an individual desires that his speech remain private, he can easily assure himself of privacy by whispering, so that even a person in . . . [the officer's] position cannot hear him. Since it does not establish by respectable authority that speech which is loud enough to be understood by anyone outside is not protected, it would be rather arbitrary to draw a constitutional line somewhere between a whisper and a shout.' (People v. Kaaienapua, 70 Cal.App.3d, at p. 288.)"

"The fact that apertures existed in the window, so that an unlawfully intruding individual so motivated could spy into the residence, does not dispel the reasonableness of the occupants' expectation of privacy. (See, e.g., People v. Cagle (1971) supra, 21 Cal.App.3d 57; Pate v. Municipal Court (1970) 11 Cal.App.3d 721; People v. Myles (1970) 6 Cal.App.3d 788.) To the contrary, the facts of this case demonstrate

exhibited a reasonable expectation to be free from surveillance conducted from a vantage point in the surrounding property not open to public or common use. Surely our state and federal Constitutions and the cases interpreting them foreclose a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box. The shadow of 1984 has fortunately not yet fallen upon us." (Lorenzana v. Superior Court, 9 Cal.3d at pp. 636-637.)

By sanctioning eavesdropping at locked doors of residences, we appear to be advancing rapidly into the shadow of 1984.

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The Commission on Personal Privacy is disturbed by a rule of law that permits the government to eavesdrop at locked doors of private residences without the authority of a search warrant. Following consenting adults home in the situation cited above, and listening at their door to hear what type of conversation may be going on inside, are not urgent measures that need to be taken by the police to protect the safety of members of an urban society.

A substantial number of people in our urban society lives in apartment complexes. Many of these people would prefer to own a single-family home but for financial reasons may never be able to realize the "American dream." But an American dream they should be able to experience daily, even in an apartment complex, is freedom from audio surveillance at the threshold of their household.

The Commission notes that occupants of single-family dwellings have good reason subjectively to expect that strangers are not standing at the entrances to their homes, eavesdropping in hope of overhearing private conversations that are going on inside. Society should therefore afford protection against such eavesdropping, especially if it is by an agent of the government. "Government snooping" was, it should be noted, one of the primary "mischiefs" at which the 1972 Voters' Amendment was aimed.

Because there is no definitive court decision limiting intentional police eavesdropping at the walls or doors of private residences, the Commission points to the need for legislative clarification in this area of the law.

THE COMMISSION RECOMMENDS that legislation be enacted to require a search warrant prior to intentional police surveillance or eavesdropping at doors, entrances, or walls of private residences or dwellings including residences which are considered public accommodations. This restrictive legislation should include an exclusion for cases involving exigent circumstances. Further, this legislation should contain a "plain hearing" exception similar in rationale to the "plain view" doctrine which has been established by the courts.

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Another application of article 1, §1 and its privacy provision to the area of police surveillance, is found in the case of Armenta v. Superior Court.[353] In this 1976 decision, the Court of Appeal discussed the use of police informants in criminal investigations. The police used an informant who was enrolled in a methadone program to assist them in arresting other members of the program for selling heroin. Equipping the informant with a transmitter and a tape recorder, the police sent him to "make a buy." When he succeeded in making a purchase of heroin, the police moved in and made the arrest. The defendant challenged the use of such informants in a methadone program, arguing that the tactics violated state and federal constitutional rights as well as a federal statute. The Court of Appeal discussed his arguments and upheld the conviction:[354]

> We first consider appellant's claim that the sheriff's use of Lancaster as an undercover agent for the purchase of heroin violated the right of privacy guaranteed him by article 1, section 1 of the California Constitution. The basic test of whether there has been a violation of this right is if a person's personal and objectively reasonable expectation of privacy has been infringed by unreasonable governmental intrusion. [Citation.] It is well settled that the use of an informant does not violate the right of privacy, where, as in the instant case, it relates to specific criminal activity. [Citations.]
>
> A closer inspection of petitioner's constitutional claim, however, reveals that his expectation of privacy is grounded in the several statutes and regulations — state and federal — which he claims outlaws the use of an informant in a methadone clinic. Assuming that legislation may create a constitutional expectation of privacy where it would not otherwise exist, the extent of such right will depend on the reasonable application of the legislation.

An examination of the state statute upon which the appellant relied showed that its purpose was to protect the confidentiality of records and did not prohibit the use of informants. Thus, no reasonable expectation of privacy was generated by this statute vis-a-vis the use of informants. The court discussed a federal statute that authorized the Secretary of Health, Education and Welfare to adopt regulations for the operation of federally

funded methadone programs. One such regulation promulgated by the Secretary prohibited the government's enrollment of an informer into a methadone program. The Court found that the sheriff's department had violated this prohibition by its use of an informer in this case. However, this did not end the inquiry. The final question was whether the exclusionary rule could be invoked by the defendant for a violation of a regulation issued by a federal agency. On this issue, the Court of Appeal set forth the rule regarding suppression of evidence in a criminal proceeding:[355]

> In a criminal proceeding, suppression of evidence is required only when such evidence has been obtained as a result of deprivation of constitutional rights, transgression of statutes embodying constitutional standards or where specifically required by statute. [Citations.]

As to the application of this standard to this case, the Court concluded:[356]

> As we have stated earlier, any constitutional expectation of privacy must be both personally held and objectively reasonable. [Citation.] Nothing in the record before us indicates any awareness on petitioner's part of the existence of the federal statute and regulation. [Citation.] Therefore, we are left only with the question of whether a pattern of federal law in this area, by itself, mandates suppression of evidence obtained as a result of its violation.

A review of the legislative history of the federal statute and the Secretary's regulation indicated that it was not intended that suppression of evidence be a remedy for all violations. Since the methods used in the instant case did not fall within the class of violations calling for suppression of evidence, the Court denied the defendant's application for such a remedy.

Although it is an area of law that is definitely not settled, there is another line of cases on police surveillance that pertains to the privacy of pretrial and postconviction prisoners. Several cases are presently pending in the California Supreme Court involving the privacy rights of jail inmates.[357] A detailed analysis of this aspect of government surveillance would be premature until those cases have been decided. However, a brief discussion of prisoners' privacy rights, under current case law, follows.

As a general rule, the California Courts have been reluctant to recognize

that prisoners may have a reasonable expectation of privacy.[358] Three members of the California Supreme Court have noted:[359]

> Penal Code section 2600, enacted in 1975, provides that a prisoner may " . . . be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." . . .
>
> As we recently observed, restrictions upon an inmate's associational rights are an inevitable product of his confinement: "Manifestly, one of the basic rights enjoyed by all free citizens, and necessarily denied to prisoners, is the right of association. By the very nature of imprisonment prisoners are separated from their families, their friends, and their business and social associates . . . . No legislative intent indicates, and no case law holds, that such restrictions on the right of association are invalid." [Citation.]
>
> In this regard, the right-of-privacy cases relied on by petitioner [citations] are inapposite, for they concern the personal or privacy rights of nonprisoners. Rights of privacy, like associational rights, are necessarily and substantially abridged in a prison setting.

In the latest pronouncement by the California Supreme Court (DeLancie v. Superior Court,[359a] decided in July, 1982), Penal Code sections 2100 and 2601 were further interpreted as establishing "a [legislative] policy that prisoners retain the rights of free persons, including the right of privacy, except to the extent that restrictions are necessary to insure the security of the prison and the protection of the public." [Emphasis added.] Because of equal protection principles, this policy, according to the Court, would also apply to pretrial detainees in other secured facilities.

The Court reviewed the code sections and noted that:

> [T]he broad span of constitutional rights protected by section 2600 is augmented by the terms of 2601, which specifies that state prisoners "shall have" certain civil rights, among them, the right to own or sell property; to buy and read newspapers and periodicals; to marry; to bring civil suits; and, . . . "to have personal visits; provided that the department may provide such restrictions as are necessary

for the reasonable security of the institution."

According to the Court, these code sections represent a "dramatic reversal of legislative policy," since the predecessor statute suspended all civil rights of an imprisoned person and declared that person "civilly dead":

> Under that [predecessor] provision, all state prisoners were relegated to the status of social outcasts, victims of the archaic "civil death" doctrine which conceived of prisoners as something less than human being.

The Court then overturned a lower court decision that had sustained a demurrer against a complaint alleging the covert monitoring and recording of private conversations between inmates and their visitors as well as among inmates themselves. The complaint had alleged that the purpose of the recordings was to obtain evidence for investigators and prosecutors rather than for jail security. In holding that the main factual issue properly to be addressed by the lawsuit is whether or not institutional security is the purpose of the surveillance, the Court also noted that California Administrative Code, title 15, section 3.70, "expressly directs prison officials to preserve the privacy of inmates and their visitors . . ." except for specified security-related purposes.

Finally, the Court evaluated the suggestion that posting signs warning of the monitoring of conversations in the jail would obviate a prisoner's reasonable expectation of privacy:

> That argument rests on the mistaken assumption that the subjective expectation of the person monitored is all that matters in deciding whether a right of privacy has been violated — an argument that drives a gaping hole through the constitutional and statutory right of privacy. . . . Privacy is not safe if a search or intrusion can be justified merely by proof that the state announced its intention in advance.

The sole justification for privacy invasions in penal institutions, therefore, are (1) institutional security, and (2) safety.

A few of the decisions handed down in past years by the California appellate courts regarding the privacy rights of prisoners includes the following holdings. The extent to which they may be modified or amplified by the cases now pending in the California Supreme Court is unknown at this time.

(1) Except where the communication is a confidential one addressed to an attorney, court, or public official, a prisoner has no expectation of privacy with respect to letters posted by him. Thus, routine monitoring and inspection of the contents of prison mail, other than the exceptions just mentioned, do not violate the prisoner's right of privacy.[360]

(2) The tape recording of conversations of detainees who are in the back seat of a patrol car does not violate either the state or federal rights of privacy.[361]

(3) Monitoring and recording conversations between a prisoner and a visitor (other than an attorney) in the booking area of a police station or in a visiting room of a jail does not violate the right of privacy.[362]

The Commission feels that, in order to ensure fundamental privacy rights, even in situations where intrusions may be legal (such as for institutional security), all persons, including prisoners, should be put on notice of routine practices that infringe on subjectively held privacy expectations. Unless they are given notice, many incoming prisoners will expect that their mail is not being censored and that their visitations with family and loved ones are not subject to surveillance. Once one is given notice of the necessity of such procedures, assuming that the basis of the need is security considerations, then it would be unreasonable for one to form an expectation of privacy. Of course, privacy invasions beyond what is necessary for institutional security and public safety remain unlawful.

THE COMMISSION RECOMMENDS that legislation be enacted requiring youth and adult correctional facility officials to notify inmates and wards, in writing, upon entry into the prison setting or when there is a significant change in prison policy or practice in this regard, of the extent to which (1) their mail is censored; (2) audio or visual recording devices are routinely employed in visiting or other settings; and (3) other privacy intrusions can be expected by the prisoners. Visitors should also be given written notice if their visits will be monitored.

In addition, the following recommendations were adopted by the Commission based upon research and material located in the Supplements published herewith. (See the Report of the Corrections Committee.)

THE COMMISSION RECOMMENDS that the Department of Corrections and the Youth Authority comply with the letter and the spirit of §4695 and §§3132-3165 of Title 15 of the California Administrative Code. These regulations govern the opening of inmate/ward mail and limit the opening of such mail by authorities to situations where there is an immediate and present danger to the safety of persons or a serious threat to institution security.

THE COMMISSION RECOMMENDS that all youth and adult correctional facilities institute procedural safeguards for the handling and distribution of confidential correspondence in compliance with §§3134-3143 of Title 15 of the California Administrative Code. These regulations govern the opening of confidential correspondence between inmates/wards and attorneys, judges, and other persons. It is also recommended that if and when these regulations are violated by staff members, disciplinary procedures should be instituted by management.

THE COMMISSION RECOMMENDS that the Department of Corrections and the Youth Authority distribute directives to all institutions under their jurisdiction requiring management at correctional facilities to ensure that notices are posted at all telephones used by inmates or wards warning them that telephone calls are regularly monitored. Notwithstanding interdepartmental directives and administrative codes which require such notices to be posted, the Corrections Committee of this Commission, during its institutional visits, observed numerous telephones without such warnings posted nearby. The Commission recommends that these notices be posted in both English and Spanish.

THE COMMISSION RECOMMENDS that the definition of "family" that is currently used by the Department of Corrections for eligibility to participate in family visiting programs, be expanded. Just as a person who becomes married during incarceration may be eligible to have private contact visits with the new spouse, a person who adopts or becomes adopted while incarcerated should be eligible for such visits with the newly adopted family member. A person who chooses not to marry or adopt, but who nonetheless has a family relationship with a consenting adult partner, should be considered eligible, prima facie, to participate in the family visiting program upon the filing of a Declaration of Family Status. The declaration would state, under oath, that the inmate and the prospective visitor were domiciled in the same household prior to incarceration, and they consider themselves to be a family unit.

THE COMMISSION RECOMMENDS that the Office of Information Practices investigate the practices of the California Youth Authority relating to collection, maintenance, and disclosure of information about wards. The Office of Information Practices should make recommendations for corrective legislation to protect the privacy rights of CYA wards.

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The Commission also received testimony at its hearings concerning continuing practices of police surveillance of lawful political and associational activities.[363] In the case of White v. Davis, the first case decided by the California Supreme Court under the 1972 Voters' Amendment to the state Constitution and involving such police surveillance, the Court commented on the dangers inherent in such "government snooping" by stating:[364]

> As far as we are aware, the extensive, routine, covert police surveillance of university classes and organization meetings alleged by the instant complaint are unprecedented in our nation's history. The dangers implicit in such police operations, however, have long been understood.
>
> The English historian, Sir Thomas Erskine May, writing in the middle of the 19th century, observed: "Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraint upon their liberty; they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, — who shall say that they are free? Nothing is more revolting . . . than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency."

On May 18, 1982, the Los Angeles Police Commission held hearings on new guidelines it had recently adopted for operation and oversight of the police department's Public Disorder Intelligence Division. Critics of these new guidelines cite as shortcomings or inconsistencies the absence of

standards for initiating investigations, the explicit mandate for the infiltration of political groups if such infiltration helps to establish the "cover" of a police officer, and the concentration of review procedures in the hands of the Chief of Police.[365]

The Commission on Personal Privacy was informed at its own Public Hearing last November that the Los Angeles Police Commission had established guidelines in 1976, which "set a standard for record-keeping and keeping or gathering of information on members of the Los Angeles community that put it on a very strict criminal standard; in other words, the only justification for police surveillance of individuals or organizations was to be if they were engaged or about to be engaged in planning criminal activity."[366] The witness at the Public Hearing told this Commission:[367]

> Now, it was the hope of civil libertarians, after the issuing of the 1976 guidelines, that this would put a stop to this type of police activity and police surveillance of purely lawful activity. However, it became clear around the year 1978, to our groups and to the A.C.L.U., with whom we work very closely, that in fact the spying on lawful political activity had <u>not</u> stopped. As a result of that, we entered into litigation against the City, against the Police Department, and the Police Commission, on behalf of what is now almost one hundred individuals and probably about two dozen organizations, all of whom, individuals and organizations, had been involved in purely lawful activity, but who had been infiltrated by undercover Los Angeles police officers. As a result of these lawsuits, we have currently received about 2,000 pages through legal discovery of raw police intelligence reports that were prepared on these individuals and organizations.

The witness complained that the Los Angeles Police Commission, after adopting guidelines back in 1976, has failed to follow them. The guidelines called for nine audits of the activities of the Public Disorder Intelligence Division, but, according to the witness, as of Novembesr 1981, only three had been performed. With respect to the quality of those audits that were performed, the witness stated, "We have been able to show time and time again, that these audits totally overlooked things then that we later found out about which should have been caught in these audits -- organizations that

were infiltrated for years without any hint of criminal activity, beyond the period of time when both the guidelines were promulgated and the audits were completed."[368] The Commission on Personal Privacy was then asked to make several recommendations on this topic:

> FIRST: State legislation codifying the standards that must be met prior to infiltration or surveillance of the lawful activities of individuals and organizations.
>
> SECOND: Amending the state Public Records Act, which now provides a blanket exemption from mandatory disclosure for all law enforcement investigation records, so that it will be similar to the federal Freedom of Information Act, which requires disclosure if it does not endanger an on-going investigation or someone's right to a fair trial, or adding other exemptions that balance confidentiality of police investigations with the public's right to know what kinds of personal files are being maintained on members of the public by the government.
>
> THIRD: Adopting state legislation that would impose criminal penalties for gathering intelligence on purely lawful activities.

The Commission on Personal Privacy agrees with the first suggestion. All segments of society will benefit from statewide standards, codified in legislation, which detail guidelines that must be met prior to police surveillance of the lawful activities of individuals or infiltration of organizations not involved in conducting or planning illegal activities. Local police departments or police commissions may wish to adopt even stricter voluntary regulations than any minimum standards that are adopted at the state level.

THE COMMISSION RECOMMENDS that the Legislature adopt and enact into law, standards or detailed guidelines which must be met prior to police surveillance of the lawful activities of individuals or police infiltration of organizations not involved in conducting or planning illegal activities.

As to the second suggestion regarding modification of the state Public Records Act (Gov. Code §6250 et seq.), which now provides for a blanket exemption from mandatory disclosure for all law enforcement investigation records, this Commission finds that such a broad exemption runs counter to the spirit of the right of privacy in article 1, §1 of the state Constitution.

Three of the principal mischiefs at which the privacy amendment were directed pertain to law enforcement investigation practices and records, as well as to practices and records by other government agencies and private businesses. Those mischiefs included: (1) "government snooping" and secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information; and (3) the lack of reasonable checks on the accuracy of existing records.

Rather than responding to the suggestion regarding an amendment of the Public Records Act at this point, consideration is deferred to the section of this Report that examines state legislation protecting personal privacy. Both the state Public Records Act and the state Information Practices Act (Civ. Code §1798 et seq.), as will be discussed in more detail later in this Report, are insufficient to address, in a practical manner, the above-mentioned mischiefs, for which voters sought redress by adopting adopting the 1972 Amendment to article 1, §1 of the state Constitution.

As to the third suggestion regarding criminal penalties for violations of privacy involving police surveillance of lawful activities, the Commission on Personal Privacy takes no position. The legislative committee that studies the general problem of such surveillance with a view toward adopting minimum statewide standards, should consider all possible penalties for violations of any standards that are adopted, including the possibility of criminal sanctions.

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In addition to constitutional limitations on information practices of law enforcement agencies, privacy provisions of the state and federal constitutions impose restrictions on the collection of personal information by other government entities.

The cases herein reviewed cover a wide range of information collection practices by government agencies: business and professional licensing investigations; eligibility interviews for benefits programs; motor vehicle licensing procedures; health care provider licensing requirements; and medical tests and evaluations during screening for government employment. In each of these cases either individuals or businesses who were subjected to investigation or interrogation objected to the methods of collection, basing their objections on the right of privacy.

In Cowing v. City of Torrance, the owner of an apartment complex complained after a city inspector gained entry to the premises by following the mail carrier into the building.[369] The main entry to the building was locked at all times. Only the tenants and the mail carrier had keys to the door. The inspector did not seek permission to enter, but merely waited for an opportunity to gain entry until someone with a key opened the door. He limited his inspection to common areas of the complex, finding vending machines on the premises. The owner was cited for failure to obtain permits to operate the vending machines. The owner subsequently sued the city for invasion of privacy.

The Court of Appeal held that since the apartment complex was a business venture, the city had a right to tax the business under general authority granted to municipalities under state law. Here the tax was on the use of vending machines and not on the business of renting apartments. The Court acknowledged that the inspector's entry was without the express permission of the owner. As to the owner's claim of invasion of privacy, the Court held:[370]

> As a matter of law appellant's right to privacy was not invaded and no unlawful search and seizure was conducted. There is no unlawful search and seizure unless the appellant had a reasonable expectation of privacy and that expectation was violated by an unreasonable governmental intrusion. [Citation.] Appellant claims that when the city inspector

followed the mailman through the main lobby entrance such entry constituted an unreasonable governmental intrusion in that appellant had a reasonable expectation of privacy by having the main lobby door equipped with a self-locking device such that the use of a key would be necessary to enter into the common areas of the apartment complex.

The coin-operated machines were located within a recreation building within the apartment complex and were in the plain view of any of the tenants who desired to use the recreation room; each of the tenants had his own key to get through the main lobby door. The mailman also had a key to get through the main lobby door. There is no claim that the city inspector entered any individual private dwelling or house or apartment, merely that the city inspector had entered the common entrance to the apartment complex through a normally locked front lobby door.

Appellant does not demonstrate a reasonable personal expectation of privacy inasmuch as tenants as well as the mailman had keys to the main lobby. Appellant is apparently attempting to assert the invasion of some collective but indefinite right of privacy of his tenants as the basis of the tort to him. However, the right of privacy is personal and there is no derivative right on which a civil cause of action may be based. [Citations.]

The unlicensed vending machines were in the plain view in a common area of the apartment complex. · The issue in this case is whether the license inspector could enter said common area without violating the prohibition against unreasonable searches and seizures. If the officer had a right to be in the common area, his observations of things in plain sight made from a place where he has a right to be does not amount to a search. [Citation.]

The prohibition in the Fourth Amendment of the United States Constitution (see also Cal. Const., art. 1, §13) is against unreasonable searches and seizures, not trespasses. [Citations.] Therefore, police officers in the performance of their duties may, without violating the Constitution peace-

fully enter upon the common hallway of an apartment building. [Citations.]

However, our decision does not depend on the assumption that the entry here was merely a trespass unaccompanied by a criminal prosecution using the fruits of any search. At bench the inspector had the authority to enter. A licensed inspector has authority to enter business premises to carry out the policing of reasonable revenue regulations. [Citations.] . . . Thus, under the exercise of police power, the state too and local government may enact reasonable rules and regulations authorizing entry to make reasonable inspection and search for compliance by business operators or product marketers with the licensing and other requirements designed to prevent frauds or to promote public health and safety and to assure compliance with revenue measures. . . .

According to the Court of Appeal, the presence of vending machines, even though limited to use by consumers who were renters and guests, subjected the owner to inspection under the city vending machine ordinance. Under that ordinance the inspector had authority to enter for inspection purposes. The Court held that the inspector's entry was done in a reasonable way and thus did not run afoul of constitutional protections.

With respect to privacy limitations on the authority of professional licensing agencies, such as the Board of Medical Quality Assurance, to investigate licensees, another decision of the Court of Appeal has stated:[371]

We start with these premises: an individual's right to privacy is not an absolute right; it may be outweighed by supervening public concerns; the State of California has a most legitimate interest in the quality of health and medical care received by its citizens; and an individual's medical records may be relevant and material in the furtherance of this legitimate state purpose; therefore, under some circumstances disclosure may be permissibly compelled.

But a governmental administrative agency is not in a special privileged category, exempt from the right of privacy requirements which must be met and honored generally by law enforcement officials. To so hold is to ignore the federal and state constitutional commands as well as the numerous

and persuasive judicial decisions in analogous areas. Moreover, such a premise focuses our attention only on the right of the Medical Board to investigate the doctor; it ignores the patient's constitutional and statutory rights to be left alone. . . . The argument that a privileged area — an area of reasonably expected privacy — can be subjected to government scrutiny just because the government wants assurance the law is not violated or a doctor is not negligent in treatment of his patient must give way before the articulated purposes of article 1, section 1. Although the amendment is new and its scope as yet neither carefully defined nor analyzed by the courts, "we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life." [Citation.]

To require the Medical Board, before invading the patient's medical records, to show (1) waiver, or (2) "good cause" would be merely to require administrative agencies to conform to the standards to which law enforcement officials, respondents in administrative investigations and civil litigants are held. [Citation.]

Thus, the Court of Appeal adopted standards that must be met before an administrative agency conducting an investigation involving a licensee can compel disclosure of patients' medical records. Absent waiver or consent by the patients, the following burden is placed on the administrative agency:[372]

. . . Beyond the showing of relevance, materiality to the investigation, it is incumbent on the [administrative agency] to show that the patient's constitutional rights are not infringed. If disclosure is to be compelled after the requisite balancing of the juxtaposed rights, and the finding of a compelling state interest, then it should be accomplished only by an order drawn with narrow specificity.

By interposition of such minimal due process requirements the mandate of Katz v. United States [citation]; Griswold v. Connecticut [citation], and article 1, section 1 of the California Constitution will be fulfilled and Evidence Code section 1007 held constitutional. Only by such procedure may the requisite balancing of the private and the public interest be effected.

Another major licensing case in which an agency's collection of personal information was challenged on privacy grounds is Wilson v. California Health Facilities Commission.[373] The Health Facilities Commmission was established by the California Health Facilities Disclosure Act to enforce its provisions. The Act requires all licensed health facilities that operate within the state to file with the Commission for public disclosure uniform reports of health facility cost experience, along with detailed financial statements.

The Wilsons, owners of a licensed health facility, opposed the mandatory public disclosure requirements, particularly the filing of detailed financial statements. With respect to their privacy arguments, the Court of Appeal stated:[374]

> Wilson here focused primarily on the aspect of the right of privacy involving individual interest in avoiding disclosure of personal matters. [Citation.]
>
> The federal right to privacy is a personal one that protects individuals and not the financial records of business entities [citation], which are not within the protected zone. [Citations.] . . .
>
> Even assuming, as Wilson argues, that the statute restricts a fundamental right, when the state asserts important interests in safeguarding health, review is under the rational basis standard. [Citation.] . . . The lesson of Roe for the instant case is that the disclosure of certain financial information by health care facilities is a reasonable means to assure access and availability of high quality health facility services for all persons.
>
> Where, as here, the statute primarily concerns health and safety, no fundamental right of privacy is at stake. . . .
>
> Similarly, where economic regulation is involved, the rational basis test is proper. . . .
>
> As here the state's legitimate interests in health and safety are involved, it may properly exercise its police powers and no doctrine prohibits public dissemination. . . .
>
> The inalienable right of privacy guaranteed by article 1, section 1 of the state Constitution protects a larger zone in the area of financial and personal affairs than the federal right. [Citations.] However, our Supreme Court recently held in People v. Privitera [citation] that there is a presumption of

> constitutional validity and no trespass into the forbidden zone of privacy where health and health-care legislation are involved. Thus, the state standard initially also requires a legitimate and reasonable state interest and means that bear a real and rational relation to the object sought to be obtained. [Citations.] We have already indicated above that this standard has been met.

A rather strange privacy challenge was raised against the Department of Motor Vehicles by a man who argued that it was a violation of his right of privacy for the D.M.V. to require his photo to be displayed on his driver's license.[375] He did not complain that the D.M.V. did not accurately capture his photographic likeness or that it would present him in an unusual or embarrassing or false light. He simply did not want his photo on his license. The Court of Appeal responded to this unusual argument:[376]

> In the present circumstances, there simply can be no reasonable expectation of privacy in that which is already public. [Citation.] The gravamen of the tort of invasion of privacy is unwarranted publication of details of plaintiff's private life. [Citation.] Where plaintiff retains control over his own photograph, it cannot be the mechanism by which his privacy is invaded. Moreover, the mere retention, without more, by DMV of a copy of the licensee's photograph does not constitute unwarranted publication and thus is not an invasion of privacy.

Another recent challenge to administrative collection of personal information involved an interview conducted by an eligibility worker who disqualified an applicant for unemployment benefits.[377] Because of her physical appearance, the interviewer suspected that the applicant was pregnant and therefore might not be "available" for work. He asked the applicant about her condition and she refused to answer on privacy grounds. As a result of her refusal to answer the inquiry, she was denied benefits. On the day of her appeal hearing, she presented the hearing officer with a statement signed by her doctor stating that her health condition was such that she was available for work. Rejecting the statement as "conclusionary," the hearing officer denied her benefits.

The Court of Appeal noted that article I, section 1 of the state Con-

stitution protects the individual against intrusion by the state into matters that are personal in nature, absent a compelling state interest. The Court found a compelling interest here, namely, the need to determine if an applicant is "available" for work. Therefore, inquiry into one's pregnancy or health condition is not, per se, a violation of the right of privacy. But, the Court held, the method of inquiry must be in the least intrusive manner possible.

The Court noted that the applicant wished to keep verbally to herself the details of her pregnancy and her condition. This interest could be protected while at the same time confirming her "availability" for work, by allowing her to confirm her readiness to work by submitting the letter from her doctor certifying her good health. The Court, therefore, held that she was entitled to receive benefits from the date she submitted the doctor's letter.

In another eligibility case, an applicant for aid to families with dependent children objected to the requirement that she obtain social security numbers for each of the dependent children for whom she sought aid and disclose those numbers to the welfare department.[378] The Court of Appeal held that this requirement did not violate the mother's right to privacy guaranteed under article 1, §1 of the state Constitution, where none of the mischiefs to which the right of privacy applies was involved in the case.

A rather novel claim was made by a former substitute school teacher who applied for a permanent position with the Los Angeles Unified School District. Her employment was refused because she conscientiously objected to taking a chest x-ray that was required for her employment.[379] The Court of Appeal addressed her privacy argument as follows:[380]

> Appellant's second argument on the right of privacy issue is difficult to follow. She refers us to article 1 of the state Charter of the California Declaration of Rights and the general concept of privacy as stated in White v. Davis [citation]. She does not, however, relate these broad principles to the case at bench except to say "The State here does not seek to survey or collect data about appellant's personal beliefs. It seeks, however, to circumscribe an even more profound compelling interest, specifically, the right to seek a livelihood without being required to undergo a 'fishing

> expedition' of her body." . . . [T]here is well established decisional law that chest x-rays for teachers and even students is constitutional as a health measure for the protection of society. [Citations.]

This line of cases dealing with collection of personal information by government agencies seems to indicate that the courts are reluctant to create constitutional barriers to the gathering of personal information for legitimate governmental functions. At most, there seems to be a willingness to impose some restrictions so that the least intrusive method is used in the process of gathering such data.

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With the enactment of the 1972 Voters' Amendment adding privacy to article 1, §1 of the state Constitution, there can be no doubt that unreasonable collection of personal information by private enterprises may constitute an actionable invasion of privacy. One of the four principal mischiefs at which the amendment was directed is the "overbroad collection and retention of personal information by government and businesses."

The primary controversy regarding restrictions on private searches has involved whether or not the exclusionary rule will be invoked as a remedy. Because the exclusionary rule was created to combat "governmental" action that invades constitutional rights, it has been difficult for persons who have been subjected to searches by non-peace officers to bring themselves within the protection of the exclusionary rule.

According to the California Supreme Court:[381]

> Whether the exclusionary rule should be invoked depends . . . on whether to do so would deter the particular government employee, and others similarly situated, from engaging in illegal searches of private citizens. And that question, in turn, depends on such considerations as the training or experience, responsibilities or duties of the employees in question.

Thus, in Dyas v. Superior Court, the Court applied the exclusionary rule where the search was conducted by a public housing authority patrolman whose duties and actions were "the acts of a law enforcement officer."

In 1979, the California Supreme Court held that illegal searches by private security guards, because such guards regularly perform quasi-law-enforcement activities and are increasingly relied on by the police to perform such public functions, pose a significant threat to privacy and one comparable to that posed by the unlawful conduct of police officers.[382] Therefore, when searches conducted by private security guards are in a context of an arrest or detention authorized by statute and would violate search-and-seizure standards had they been performed by police officers, such searches will be subject to the exclusionary rule.[383]

But when a private search does not fall within this limited exception to the "state action" requirement of the exclusionary rule, this powerful remedy has been held inapplicable. There is no exclusionary rule for violations of

article 1, §1 that are committed by purely private action.[384]

Likewise, it has been held that the provisions of the Fourth Amendment and the state constitutional equivalent, including the exclusionary rule, do not apply to baggage searches conducted by private airline employees, if they are not done at the direction of law enforcement officials or under compulsion of law.[385]

One practice of private department store security personnel which has come to the attention of the Commission deserves further discussion. Many department stores place their restrooms and dressing rooms under observation by undercover security personnel. The motivation for surveillance of dressing rooms is to detect shoplifting; for restrooms the purpose is often to detect possible sexual activity. Routine surveillance of these private areas subjects the innocent as well as the guilty to having the intimacies involved in changing clothes or using a toilet placed under the gaze of store personnel. The Commission notes that users of these facilities have a reasonable expectation of privacy and assume that they are not being watched by store personnel performing routine surveillance of these areas.

The 1972 amendment reflects "the public policy favoring the protection of privacy rights."[386] The Legislature has expressly declared its intent "to protect the right of privacy of the people of the state of California."[387] One such protection is a provision of the Penal Code that prohibits the use of two-way mirrors in such settings as restrooms and dressing rooms.[388]

Surveillance of restrooms and dressing rooms within business establishments, such as department stores, constitutes a serious threat to the privacy of individual patrons who must use such facilities. Just as the use of two-way mirrors has been outlawed by the Legislature to protect citizens against a serious loss of privacy, other legislation should be adopted to restore a proper balance between the privacy of users of such facilities, on the one hand, and the property interests of the proprietors, on the other hand. Obviously, monitoring these areas with video equipment should be illegal, as should any clandestine surveillance from hidden vantage points.

Some department stores have taken reasonable security measures to protect themselves against theft, while at the same time respecting reasonable expectations of privacy of patrons who use dressing rooms. Before customers are allowed access to dressing rooms in these stores, the sales clerk counts the number of items the customer wishes to try on. The customer is given a token bearing that number on it. The customer must

return the token to the clerk after using the dressing room. This procedure accomplishes what article 1, §1 commands — the protection of any compelling interests by using a procedure that is the least intrusive to privacy. This method for preventing theft is available to all merchants and is desirable because it causes no loss of patron privacy.

THE COMMISSION RECOMMENDS that §630 et seq. of the California Penal Code be amended to prohibit video monitoring and clandestine surveillance of restrooms and dressing rooms in business establishments. Non-clandestine surveillance of cubicles in dressing rooms also should be prohibited by law. Furthermore, legislation should be enacted to require business establishments to post notices warning users of restrooms if such areas are subject to surveillance of a non-clandestine nature.

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SUMMARY OF JUDICIAL CONSIDERATIONS IN PRIVACY DISPUTES

Basis for Protection

Under what legal basis is the right of privacy claimed in this case? Has the claimant raised it under one or more federal constitutional provisions? Has it been raised under article 1, §13 or under article 1, §1 of the state Constitution? If a constitutional privacy right is not at stake, has a common law privacy right been invaded or has a statutory protection been infringed?

Standing to Raise the Issue

Generally only the person whose rights have been directly invaded can assert the right of privacy. Does the claimant have standing to raise the issue? If one's right of privacy has not been personally invaded, is there a special rule that gives one standing, e.g., is one in a special relationship to the holder of the right, such as a doctor or attorney; does one have a duty to object as a custodian of personal records; does the vicarious exclusionary rule apply?

Type of Conflict

What type of conflict is involved in the case? Is it a physical or sensory intrusion into a private area? Does it involve unreasonable information practices? Has there been an unreasonable regulation of personal decisions or associations? The applicable legal principles will vary depending on the type of privacy conflict involved.

Identification of Intruder

Is the intruder a governmental entity or is there sufficient entanglement with the government such that "state action" is involved in the infringement? If state action is not at the root of the invasion of privacy, then neither federal constitutional protections nor state search-and-seizure law applies. If the infringement is caused by purely private action, in order to secure relief, the claimant must resort to article 1, §1 of the state Constitution, statutory provisions, or common law privacy principles.

Application of Appropriate Tests

Assuming that the claimant has standing to assert the right of privacy, has a prima facie violation of the right of privacy been stated? If so, has the claimant's opponent raised any legitimate competing interests? Which test should be used for evaluating the privacy interests against any competing social or government interests: the "rational basis" standard or the "compelling interest" standard? Using the appropriate test, do the privacy interests prevail or do the competing interests override? If the "compelling interest" test has been applied as the appropriate test, and if the competing interests do override privacy, has the method of intrusion been conducted in the least intrusive manner possible?

Finding the Remedy

Assuming that the privacy interests prevail, what is the appropriate way to remedy the situation: an injunction or other protective order; monetary damages; or suppressing evidence pursuant to the exclusionary rule? If the privacy claimant prevails, will attorney fees be awarded under the private attorney general doctrine?

LEGISLATIVE PROTECTION OF PERSONAL PRIVACY

Thus far, this Report has concentrated on judicial development of privacy law by analyzing a wide variety of court decisions on the subject. The privacy protection discussed in these cases has foundation based both in constitutional law and common law.

Ever since the voters of this state gave a loud and clear signal of their deeply-held interest in protecting privacy, by the adoption of the 1972 amendment to article 1, §1 of the state Constitution, the Legislature has become more sensitive to privacy issues. Although the privacy provision added to the state Constitution in 1972 is "self-executing" and does not need enabling legislation for implementation, the Legislature has nonetheless enacted numerous privacy protections to supplement constitutional safeguards of this "inalienable right."

The Commission's staff has researched California statutes that directly bear on the three major types of privacy invasion that have been mentioned throughout this Report: (1) physical or sensory intrusions into privacy areas; (2) unfair practices involving the collection or dissemination of personal information; and (3) interference with personal decisions or associations by way of regulation or discrimination.

This section of the Commission's Report presents the results of this statutory survey, as well as the Commission's recommendations regarding existing and proposed legislation.

Before examining in more detail the legislative scheme in each of these major areas of privacy, legislative findings on various aspects of privacy are set forth.

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Private Areas

In the legislation that outlawed the use of two-way mirrors by businesses in private areas such as restrooms, the Legislature expressed its intent "to protect the right of privacy of the people of the state of California."[389]

Technology and Communications

The Legislature has declared that "advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society." [390] Thus, by enacting a chapter of the Penal Code entitled "Invasion of Privacy" [§630 et seq.], the Legislature expressed its intent "to protect the right of privacy of the people of this state."[391]

Student Privacy

In a 1975 statute designed to protect the privacy of students, the Legislature found and declared that "students in schools as well as out of schools are 'persons' under the Constitution and that they are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state."[392] The Legislature further found and declared "that the right to privacy and other related rights are fundamental."[393]

Information Practices

When it adopted the Information Practices Act of 1977, the California Legislature declared that "the right of privacy is a personal and fundamental right protected by section 1 of article 1 of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them."[394] The Legislature made the following findings:[395]

> (a) The right of privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.

(b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.

(c) In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits.

Access to Public Records

The California Public Records Act, a comprehensive statutory scheme governing public access to government records, contains a legislative declaration that "[i]n enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[396] One of the classes of records that is exempt from mandatory disclosure refers to "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[397]

Financial Privacy

The California Right to Financial Privacy Act, adopted in 1976, states:[398]

The Legislature finds and declares as follows:

(a) Procedures and policies governing the relationship between financial institutions and government agencies have in some cases developed without due regard to citizens' constitutional rights.

(b) The confidential relationships between financial institutions and their customers are built on trust and must be preserved and protected.

(c) The purpose of this chapter is to clarify and protect the confidential relationship between financial institutions and their customers and to balance a citizen's right of privacy with the governmental interest in obtaining information for specific purposes and by specified procedures as set forth in this chapter.

Credit

The Legislature has made the following findings with respect to consumer credit reporting services:[399]

> (a) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, and general reputation of consumers.
>
> (b) Consumer credit reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.
>
> (c) There is a need to insure that consumer credit reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.
>
> (d) It is the purposes of this title to require that consumer credit reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title."

Virtually identical findings were made regarding consumer investigative reporting agencies as were made regarding credit reporting agencies.[400]

Insurance

The following statement of purpose was offered by the Legislature when two years ago it enacted the Insurance Information and Privacy Protection Act:[401]

> The purpose of this article is to establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents, or insurance-support organizations; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance practices, including the need to minimize intrusiveness; to establish a regulatory mechanism to enable

natural persons to ascertain what information is being or has been collected about them in connection with insurance transactions and to have access to such information for the purpose of verifying or disputing its accuracy; to limit the disclosure of information collected in connection with insurance transactions; and to enable insurance applicants and policyholders to obtain the reasons for any adverse underwriting decisions.

Teenage Pregnancy

The Legislature has found and declared that "pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in the State of California. In order to have effective freedom of choice between an abortion and carrying pregnancy to term, the assistance of the state in addition to medical services is required. The problem can be alleviated effectively by a program of structured services, including counseling and residential treatment services, provided by licensed maternity homes."[402]

Health Care

With respect to health care decisions, the Legislature has found that "adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care. . . ."[403]

As to the patient's right to have access to his or her own medical records, only last year the Legislature found and declared that "every person having ultimate responsibility for decisions respecting his or her own health care also possesses a concomitant right of access to complete information respecting his or her condition and care provided. Similarly, persons having responsibility for decisions respecting the health care of others should, in general, have access to information on the patient's condition and care."[404] It was therefore the intent of the Legislature "to establish procedures for providing access to health care records or summaries of such records by patients and by those having responsibility for decisions respecting the health care of others."[405]

On the subject of confidentiality of health care information, the Legislature found and declared that "persons receiving health care services have a right to expect that the confidentiality of individual identifiable medical information derived by health service providers be reasonably pre-

served."[406] Hence, the Confidentiality of Medical Information Act was adopted in 1981.

When it enacted statutes to protect the right of privacy and other constitutional rights of mental patients, the Legislature expressed the following concerns:[407]

> Recognizing the danger of a violation of a mental patient's constitutional right to privacy, the Legislature intends by this enactment to assure that the integrity and free choice of every such patient is fully recognized and protected. Because those who are emotionally disturbed are vulnerable to being unduly influenced, the Legislature believes the protection of their rights requires a careful process of informing and consenting in order to assure the protection and vindication of their rights.

Natural Death

With respect to the use of artificial life-sustaining techniques, the Legislature has found that one of the decisions that must rest with the individual includes "the decision to have life-sustaining procedures withheld in instances of a terminal condition."[408] In this regard, the Legislature made additional findings:[409]

> (1) that modern medical technology has made possible the artificial prolongation of human life beyond natural limits. . . .
>
> (2) that, in the interest of protecting individual autonomy, such prolongation of life for persons with a terminal condition may cause loss of patient dignity and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient. . . .
>
> (3) in recognition of the dignity and privacy which patients have a right to expect, the Legislature hereby declares that the laws of the State of California shall recognize the right of an adult person to make a written directive instructing his physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition.

Legislation Against Physical or Sensory Intrusions into Private Areas

The California Invasion of Privacy Act was adopted by the California Legislature in 1967 -- five years before the voters clarified privacy as a "super-protected" right by adding it to the list of inalienable rights in article 1, §1 of the state Constitution. The Invasion of Privacy Act contains a series of sections dealing with a variety of physical and sensory intrusions into private areas. It has been amended several times to add new provisions as a need has been demonstrated.

The Invasion of Privacy Act includes Penal Code protection in the following areas:

§631 P.C.	Wiretapping
§632. P.C.	Eavesdropping on or recording confidential communications
§634 P.C.	Trespass for purpose of committing prohibited acts
§635 P.C.	Manufacture, sale, and possession of eavesdropping devices
§636 P.C.	Eavesdropping or recording conversations between prisoner and attorney, member of clergy, or physician
§636.5 P.C.	Police radio interception and divulgence
§637 P.C.	Disclosure of telegraphic or telephonic message
§637.1 P.C.	Telegraphic or telephonic message; opening or procuring improper delivery
§637.3 P.C.	Voice prints or other voice stress patterns; use of systems to record or examine without consent
§637.4 P.C.	Polygraph of complaining witness to sex offense

One aspect of this Act that apparently needs clarification is §632 P.C., which regulates recording of confidential communications. A Los Angeles Times article published earlier this year brought to light a serious defect in this particular statute.[410]

Some poignant quotes from the article spotlight ambiguities in this section, as pertaining to participant recording:[411]

> Many newspaper and newsmagazine reporters throughout the United States routinely tape-record interviews they conduct over the telephone -- without telling their interview subjects that they are being taped. . . .
>
> [S]ome reporters say that if a reporter identifies himself, he is not behaving unethically if he then tape records a telephone interview without notifying his interviewee. . . .
>
> But many reporters -- and virtually all editors -- interviewed by The Times for this story said they consider the practice of secret taping unethical, whether over the telephone or in person. Either way, they said, it clearly is deception.
>
> Is it illegal?
>
> There is no federal law prohibiting it -- just a telephone company tariff (regulation), the violation of which is punishable by removal of the subscriber's telephone.
>
> But 13 states do have laws designed to prohibit the recording of conversation, in person or over the telephone, without the prior consent of all parties involved. In four of these states, however -- and especially in California -- the wording of these laws is so ambiguous that they may not, in fact, make all such secret recordings illegal.
>
> The California law, for example -- the Privacy Act of 1967 -- makes it illegal to record a "confidential communication" without the consent of all parties. A "confidential communication" is defined in the law as "any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties. . . ."
>
> But some newspaper attorneys argue that if a reporter

identifies himself at the beginning of an interview, what follows is clearly not "confidential," clearly not expected to be confined to interviewer and interviewee; it is an interview intended for -- specifically solicited for -- publication.

A spokesman for the California attorney general's office told The Times that this is "a reasonable interpretation of the law." But he warned that some judges -- and some juries -- might not agree.

Indeed, the author of the law says the newspaper attorneys' interpretation is "extremely bad."

California Treasurer Jesse M. Unruh, who was speaker of the Assembly when he authored the law, says he specifically intended to require people -- including reporters -- to ask permission before taping a conversation. . . .

The only court ruling on this issue that involved reporters came in Florida in 1977. The state Supreme Court there upheld the Florida state law prohibiting secretly taped conversations, and ruled that to allow reporters to secretly tape interviews "would pose a threat to citizens' justifiable expectations of privacy." . . .

Should reporters -- or anyone else -- secretly tape-record telephone calls?

Top editors at the Los Angeles Times do not think so. When Times Editor William F. Thomas learned recently that the practice was widespread at the Times, he discussed it with several other editors and reporters and then issued a memo on March 16 [1982] to the entire staff:

"To clear up any misunderstanding, it is the Times' policy that telephone or other conversations be taped only after notification and with approval of the other party or parties."

Times reporters interviewed for this story said, however, that because the practice of taping telephone interviews without prior notification was so common at the Times, they had just assumed it was regarded as an acceptable practice.

. . . The advent of video display terminals (VDT's) -- desk top computer consoles that have replaced typewriters in most big-city newsrooms -- has reduced the need for secretly

recording telephone interviews, though. With a VDT, many reporters can quietly and quickly take down a word-for-word account of most conversations. . . .

Nevertheless, more than 40 reporters from more than a dozen publications told the Times that they tape-recorded some of their telephone interviews secretly now, and it seems reasonable to assume that some who denied doing so were being less than truthful. . . .

Many reporters who admitted taping without telling said they had never even thought about the ethical considerations of the practice.

"Sometimes I tell sources (I'm taping them), sometimes I don't," a San Francisco Examiner reporter said.

What determines whether he tells or not?

"Whim," he said.

Some arguments against the practice of secretly recording telephone conversations, especially in the context of an interview by a news reporter, were advanced by the writers of this article in the Times:[412]

No reporter can be absolutely certain that, through carelessness or inadvertence, his tapes will not fall into the wrong hands and embarrass (or damage) an unwitting interviewee. Tapes can be subpoenaed. They can be seized with a search warrant. They can be mislaid or lost or borrowed or stolen.

Many editors and reporters say an interviewee is entitled to know he is taking that risk -- even if some reporters insist that it is minimal.

But the briefest, simplest, most compelling argument advanced against secretly recording telephone interviews was that offered by Gayle Montgomery of the Oakland Tribune:

"I would not like it done to me, so I don't do it to other people."

Another example of privacy infringement through participant recording of confidential conversations was discussed in a 1979 Court of Appeal decision.[413] In this case, an attorney sued his former client for invasion of

privacy, alleging a violation of §632 P.C. because the client secretly recorded in-person conversations with the lawyer that occurred in the attorney's office. The trial court dismissed the complaint and the attorney appealed. On appeal, the former client argued that the conversation in the lawyer's office should not be considered "confidential" because the client is the holder of the attorney-client privilege; only the client should be able to claim that such a conversation is confidential. Reversing the trial court, the Court of Appeal held that the attorney could proceed to trial on his theory that the conversation was "confidential" within the meaning of the Invasion of Privacy Act. The Court's opinion addressed the history and intent of §632 as well as the section's importance in protecting reasonable expectations of parties to private communications:[414]

> The Invasion of Privacy Act upon which [the attorney's] complaint was based was adopted in 1967 and replaced what one commentator has characterized as a "hodgepodge of statutes." [Citation.] The dominant objective of the act, as reflected in its preamble, is "to protect the right of privacy of the people of this state." [Citations.] While Congress adopted a partially congruent statute, title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. §§2510-2520), the federal enactment does not preclude the application of state standards which, as in the case of California's statute, apply more restrictive rules. [Citations.]
>
> The Invasion of Privacy Act provides criminal penalties for the offenses which it describes, but in addition, in section 637.2, it establishes a private cause of action on the part of "[a]ny person who has been injured by a violation of this chapter . . . against any person who committed the violation." Insofar as section 631 is concerned, appellant's claim is without merit. That section, which is quite ambiguous, has been held to apply only to eavesdropping by a third party and not to recording by a participant to a conversation. [Citation.]
>
> Section 632 is a different matter. . . . The language of that section applies to any person who "intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential

communication." This language has uniformly been construed to prohibit one party to a confidential communication from recording that communication without knowledge or consent of the other party. . . .

[C]overage of participant recording is consistent with the legislative policy declared in section 630 "to protect the right of privacy of the people of this state." While it is true that a person participating in what he reasonably believes to be a confidential communication bears the risk that the other party will betray his confidence, there is as one commentator has noted a "qualitative as well as a quantitative difference between secondhand repetition by the listener and simultaneous dissemination to a second auditor, whether that auditor be a tape recorder or a third party." [Citation.] "In the former situation the speaker retains control over the extent of his immediate audience. Even though that audience may republish his words, it will be done secondhand, after the fact, probably not in entirety, and the impact will depend on the credibility of the teller. Where electronic monitoring is involved, however, the speaker is deprived of the right to control the extent of his own firsthand dissemination. . . . In this regard participant monitoring closely resembles third-party surveillance; both practices deny the speaker a most important aspect of privacy of communication - - the right to control the extent of first instance dissemination of his statements." In terms of common experience, we are all likely to react differently to a telephone conversation we know is being recorded, and to feel our privacy in a confidential communication to be invaded far more deeply by the potential for unauthorized dissemination of an actual transcription of our voice. . . .

The definition of "confidential communication" in §632 transcends the ownership of an evidentiary privilege. It calls for a determination as to whether the "circumstances . . . reasonably indicate that any party to such communication desires it to be confined to such parties," or whether the circumstances are such that "the parties to the communication may reasonably expect that the communication

may be . . . recorded."

The Commission on Personal Privacy finds that participants to a private telephone conversation reasonably assume that their conversations are not being recorded by other participants, just as they reasonably expect that such conversations are not subject to warrantless wire-taps or other means of eavesdropping by third parties. The present definition of "confidential communication" in §632 of the Penal Code is insufficient to put potential violators on notice as to which conversations are confidential and which ones are not. Furthermore, the privacy of telephone users is not adquately protected by this definition.

THE COMMISSION RECOMMENDS that the definition of "confidential communication" contained in §632 of the California Penal Code be amended. This amendment should create a presumption that any telephone conversation is confidential and that participants to such a conversation reasonably may expect that the conversation is not being recorded by anyone, unless permission to do so has been expressly requested and granted prior to recording. An exception to this presumption should exist for obscene or harassing phone calls.

The Legislature has also enacted prohibitions agains physical or sensory intrusions into private rooms in student dormitories. In 1975, Penal Code §626.11 was enacted to protect student privacy in college dormitories. That provision provides that any evidence seized by an employee of the governing board of a college or university, or by anyone acting under the direction of such an employee or board member, is inadmissible in administrative disciplinary proceedings if the evidence is seized in violation of privacy rights under the state or federal Constitution. The statute also provides that any agreement between the college or university and a student that calls for the student to waive his or her privacy rights in a dormitory is void and against public policy.

The knock-and-demand requirements of §844 of the Penal Code are designed, in part, to protect the privacy of the householders and homeowners. That statute requires, with limited exception for emergency situations, that prior to entry into a private residence for the purpose of making an arrest of an occupant, police officers must knock and demand entry. Commenting on the relationship between this statutory requirement and the protection of privacy rights, the Court of Appeal has stated:[415]

> Section 844 has, as one of its purposes, the protection of the right of privacy established in this state by article 1, section 1, of our state Constitution. If the police may violate section 844, and thereby effect an arrest and a consent, the same temptation exists to ignore the privacy that section 844 is, in part, designed to protect. Just as searches made possible by a violation of section 844 are held unlawful, so must a consent [to search] similarly obtained.

The passage of the so-called "Consenting Adults Act" in 1975 was partially in recognition of the privacy of the home. One argument that was advanced by proponents of that bill was that "what consenting adults do in the privacy of their own bedroom is not the business of the criminal law." Effective January 1, 1976, criminal penalties were removed for private sexual conduct between consenting adults.[416]

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The following recommendation has been adopted by the Commission based upon its research and the materials located in the Supplements published herewith.

THE COMMISSION RECOMMENDS that the California Legislature consider lowering the age of sexual consent to an appropriate age and that the Legislature immediately initiate a study to determine what the appropriate age is. This recommendation stems from a recognition by the Commission that a serious problem exists with the present age of consent for sexual conduct being set at 18 years. Several sections of the California Penal Code (viz., §266.5, §286, §288, §647a) presently criminalize all private consensual sexual conduct of teenagers. Many state legislatures across the country that recently studied this issue have lowered the age of sexual consent below 18 years. The Commission believes that California would benefit from such a legislative study of this issue.

Privacy in Medical and Mental Health Care

This section of the Commission's Report will examine the present legislative scheme for protecting personal privacy in health-care settings. The three major areas under review include: (1) medical decision-making; (2) informational privacy (access to records); and (3) personal associations (visitation privileges). Since the rules are somewhat different for medical care and mental health care, they will be separately examined.

Medical Care

There is a significant amount of law on the subject of medical decision-making. The law recognizes the right of competent adults to make decisions regarding their medical care. The Legislature has declared that "adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care".[417] Furthermore, the California Supreme Court has held that a provider of medical care is liable for unauthorized medical treatment if "informed consent" has not been obtained in advance of rendering medical services.[418] In this regard, the Court stated:[419]

> . . . [P]atients are generally persons unlearned in the medical sciences and therefore, except in rare cases, courts may safely assume the knowledge of patient and physician are not in parity. . . . [A] person of adult years and in sound mind has the right, in the exercise and control over his own body, to determine whether or not to submit to lawful medical treatment. . . . [T]he patient's consent to treatment, to be effective, must be an informed consent. . . . [T]he patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions.
>
> From the foregoing axiomatic ingredients emerges a necessity, and a resultant requirement, for divulgence by the physician to his patient of all information relevant to a meaningful decisional process. In many instances, to the physician, whose training and experience enable a self-

> satisfying evaluation, the particular treatment which should be undertaken may seem evident, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie. To enable the patient to chart his course knowledgeably, reasonable familiarity with the therapeutic alternatives and their hazards becomes essential.
>
> Therefore, we hold, as an integral part of the physician's overall obligation to the patient there is a duty of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each.

Therefore, the law protects the patient's right of decisional privacy in medical care both by recognizing his or her constitutional right to determine the type of lawful medical treatment to be provided and by requiring the provider to obtain the patient's informed consent to such treatment after a reasonable disclosure regarding the treatment to be used, the risks, and other available alternatives.

This rule regarding medical decision-making does not apply where (1) there is an emergency; (2) the patient is a child; or (3) the patient is incompetent.[420] In an emergency, the law implies consent on the part of the patient for reasonable medical treatment.[421] If the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or "closest available relative."[422] According to the Supreme Court, in all cases other than the foregoing, the decision whether or not to undertake treatment is vested in the party most directly affected, namely, the patient.[423]

With respect to the right of a parent to give informed consent for the medical treatment of an adult child, the California Supreme Court held:[424]

> [A parent] is required under the law to care for and maintain an incompetent adult child. (Civ. Code, §206; see, also, Anderson v. Anderson (1899), 124 Cal. 48, 54-55) . . . . We are of the view that where an adult child is incompetent and has no legally appointed guardian the right to consent to such treatment resides in the parent who has the legal responsibility to maintain such child.

Since January 1, 1981, a new law provides for an alternative for medical decision-making other than a costly and time-consuming guardianship or conservatorship proceeding. Sections 3200 et seq. of the Probate Code are entitled "Authorization of Medical Treatment for Adult without Conservator." As used in this statutory scheme, "patient" means "an adult who does not have a conservator of the person and who is in need of medical treatment."[425]

If a patient requires medical treatment for an existing or continuing medical condition and the patient is unable to give an informed consent to such medical treatment, a petition may be filed under this statute for an order authorizing such medical treatment and authorizing the petitioner to give consent to such treatment on behalf of the patient.[426]

The petition may be filed in the superior court in the county in which the patient resides, in the county in which the patient is temporarily living, or in such other county as may be in the best interests of the patient.[427]

The petition may be filed by the patient, the spouse of the patient, a relative or friend of the patient or other interested person, the patient's physician, a person acting on behalf of the medical facility in which the patient is located, or the public guardian of the county in which the patient is located or resides or is temporarily living.[428]

The purpose of this new legislation is stated in the Law Revision Commission Comment that accompanies the legislation:[429]

> In the ordinary, non-emergency case, medical treatment may be given to a person only with the person's informed consent. [Citation.] If the person is incompetent or is otherwise unable to give informed consent and has no conservator, the physician may be willing to proceed with the consent of the person's nearest relative. [Citation.] However, if treatment is not available because of a question of the validity of the consent, court intervention may be needed to authorize the treatment and to protect medical personnel and facilities from later legal action based upon asserted lack of consent.
>
> The provisions of this part afford an alternative to establishing a conservatorship of the person where there is no ongoing need for a conservatorship. The procedural rules of this part are designed to provide an expeditious means of obtaining authorization for medical treatment while safe-

guarding the basic rights of the patient: The patient has a right to counsel (Section 3205) and the hearing is held after notice to the patient and the patient's attorney and such other persons as the court orders (Section 3206). The court may determine the issue on medical affidavits alone if the attorney for the petitioner and the attorney for the patient so stipulate. Section 3207. The court may not order medical treatment under this part if the patient has the capacity to give informed consent to the treatment but refuses to do so. See Section 3208(b).

The provisions of this legislative scheme are intended to be supplemental to other procedures for obtaining medical consent,[430] and may not be the basis for: (1) placing the patient in a mental health facility; (2) using an experimental drug on the patient; (3) using convulsive treatment on the patient; (4) sterilizing the patient; or (5) overriding any valid directive prepared by the patient under the Natural Death Act.[431]

A synthesis and summary of the statutes and cases that govern the area of medical decision-making for adult patients establish these guidelines:

- Absent an emergency situation, medical treatment may be rendered only with the patient's informed consent.
- In an emergency, a doctor may perform medical services without obtaining informed consent from anyone. The law implies patient consent under such circumstances.
- The parent of an incompetent adult patient has the right to give informed consent for medical treatment.
- The conservator of the person of an incompetent adult patient has the right to give such informed consent.
- If a patient is incompetent or otherwise unable to give informed consent, a doctor may proceed with the consent of the "closest available relative."
- If a parent or relative or conservator is not available, or if the doctor refuses to proceed with their consent, a relative or friend or other interested party may be authorized by a superior court to give informed consent on behalf of the incompetent adult patient, under the provisions of Probate Code §3200 et seq.

California's Uniform Durable Power of Attorney Act (Civil Code §§2400-2423, Stats. 1981, ch. 511) became effective January 1, 1982. Through the durable power of attorney, an agent can perform virtually every act, during the principal's incapacity, that the principal could perform were he not incompetent. An article that recently appeared in the California Lawyer, the monthly journal of the State Bar of California, discussed the parameters of this new legislation.[432] Some comments made by the author are relevant to a discussion of options for medical decision-making:[433]

> The law of agency controls all powers of attorney, whether durable or nondurable. Most of California's agency law is codified in CC §§2295-2356. The only general limitations on the types of acts that cannot be authorized appear in the following two sections:
>
> "An agent may be authorized to do any acts which the principal might do, except those to which the latter is bound to give personal attention." CC §2304.
>
> "Every act which, according to this Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears." CC §2305.
>
> Apart from several highly personal, private acts — which the reader can easily imagine — almost all actions can be validly authorized to be done under a power of attorney. . .
>
> To create a durable power [of attorney] you should include either of the following sentences from CC §2400(a):
>
> "This power of attorney shall not be affected by the subsequent incapacity of the principal."
>
> or
>
> "This power of attorney shall become effective upon the incapacity of the principal."
>
> . . . The first sentence grants all authority from the date of execution, while the second creates a springing power that does not become effective until the principal becomes incapacitated.
>
> If you choose the springing-power form, you pose another drafting problem: defining how the principal's incapacity is to be determined. One answer is to provide that incapacity will be determined by a physician's certificate. To avoid a

later dispute, you may want to attach a prescribed form for this medical opinion.

The statute does not require acknowledgment. However, good practice dictates that the power be acknowledged, so that if necessary, the agent may record the power in connection with documents affecting real property.

Witnesses are not required under California law. In borderline cases, in which the signing person's capacity may be questioned later, it is advisable to have witnesses to the execution of any legal document — including a power of attorney.

The most important rule in drafting a durable power of attorney is to be explicit in expressing the authority of the agent. . . .

Though the question is subject to debate, in this writer's opinion the durable power of attorney is a proper vehicle for conveying the principal's instructions with respect to critical decisions relating to his medical care. The principal, for example, should be able to lay down guidelines for determining when life-support measures need no longer be taken if he becomes hopelessly comatose, and he also can grant authority to the agent to have these guidelines followed.

In effect, the durable power of attorney can serve as a convenient substitute for an expensive court-supervised conservatorship. Many families have been stretching ordinary powers of attorneys for years and using them even after the principals have become incapacitated. The durable power accomplishes this objective validly. If carefully drafted and selectively employed, the durable power can become a highly useful and economical mechanism to aid your incapacitated clients.

The Commission on Personal Privacy has noted that present law governing the delegation of medical decision-making is ambiguous. A thorough survey of case law and legislative enactments has not eliminated the ambiguity. The Commission further feels that clarity in this area is a worthwhile goal. Patients, would-be patients, and their family and loved ones need to know where they stand should a medical crisis occur.

A representative of the California Hospital Association told the staff of the Commission that, absent a clear legislative statement regarding the validity of using a durable power of attorney for medical decision-making, he would advise hospitals to perform medical services only under the following circumstances: (1) with the patient's consent; (2) without consent in an emergency situation; and, (3) if the patient is incompetent or otherwise unable to consent, with the consent of the following person(s): the patient's parent, conservator, or other person authorized to consent pursuant to a court order.

The Commission is sympathetic to the concern of the medical profession that medical treatment be provided only where there clearly is lawful consent.

In furtherance of sound and established public policies, an amendment to the California Durable Power of Attorney Act is needed. Such an amendment would clear up any ambiguities in present law as to the legality of a principal's delegating medical decision-making authority to an agent of his or her choice. One public policy served thereby is the right of an individual to make his or her own medical decisions; another is the right of an individual to delegate medical decision-making authority; yet another is the need for efficiency and economy in health care services.

In 1976, the Legislature declared that each adult has the right to control the decisions relating to the rendering of his or her own medical care.[434] This declaration of public policy is one basis for the proposition that each adult should have the right, in advance of a crisis, to choose the person who would have the authority to make medical decisions on his or her behalf, should that adult become unable to render informed consent because of some disabling factor.

Presently, in a non-emergency situation, if an adult patient is unable to render informed consent on his or her own behalf, a doctor must allow the parent of the patient to give informed consent on behalf of the patient. If the parent is unavailable, the doctor must seek out the conservator or other person authorized by court order to render such consent, or proceed with the consent of the "closest available relative." Otherwise, a lawsuit must be initiated under one of the provisions of the Probate Code, such as the Conservatorship Act or the Medical Authorization Act.

In addition to the public policy favoring personal autonomy in medical decision-making, the Legislature has declared a policy to encourage economy and efficiency in the delivery of health care services.[435] The process of

initiating and conducting court proceedings to appoint someone to make health care decisions is both inefficient and costly, especially where a simple delegation of authority would suffice.

The Legislature has already specifically provided, in two areas, for the use of simple mechanisms to delegate medical decision-making authority and to declare medical instructions, thus setting decisional-privacy precedents.

Pursuant to the Natural Death Act, an adult person of sound mind can execute a "Directive to Physicians" providing instructions regarding the circumstances under which life-sustaining procedures are to be terminated.[436] In order to be legally binding, the instrument need be signed only by the would-be patient and two witnesses. No court proceedings are necessary; thus unnecessary costs are avoided.

Another example involves medical care for children. A parent or legal guardian of a minor may, without any cumbersome formalities, delegate the authority to give informed consent for a minor to any adult persons into whose care the minor has been entrusted.[437] The delegation need only be in writing and can be unwitnessed.

A significant number of individuals would benefit by a clarification of law specifically recognizing the Durable Power of Attorney as a proper instrument to delegate medical decision-making authority: (1) college students whose parents live at a great distance; (2) elderly persons who live alone and whose parents are deceased; (3) unmarried persons who have a "significant other" who is willing to accept such responsibility; (4) a divorced parent who would like to designate which one of his or her several children should have primary responsibility for making such decisions; and others.

The Commission finds that existing mechanisms for delegating medical decision-making authority are inadequate to protect freedom of medical choice. Proceedings under the Conservatorship Act -- even under the Medical Authorization Act -- can be costly and time consuming. Existing case law which states that a doctor may accept the informed consent of the "closest available relative" is vague and subject to arbitrary interpretation.

THE COMMISSION RECOMMENDS that the Durable Power of Attorney Act (Civil Code §§2400-2423) be amended to specify that a durable power of attorney may be used to delegate medical decision-making authority to an agent of the principal's choice. The Commission further recommends that such a delegation pursuant to a durable power of attorney be required to be witnessed and notarized.[437a]

The law regarding medical decision-making for minors can be summed up rather briefly. The consent of a parent or adult guardian is required in non-emergency situations prior to treating a minor.[438] A minor is defined by law as a person who is under 18 years of age.[439] As outlined below, under various circumstances parental consent is not required.

Authorized Treatment Without Parental Consent

- Regardless of age, minors in the following categories may receive hospital, medical, or surgical services without parental consent:

(1) lawfully married minors;[440]

(2) minors on active duty with armed services;[441]

(3) minors who seek medical services for the prevention or treatment of pregnancy (other than sterilization);[442]

(4) minors who have allegedly been sexually assaulted.[443]

- A minor who has reached the age of 15 and who is living separate from the parents, with or without their consent, and who is financially independent of the parents, may receive medical, hospital, or dental services without parental consent.[444]

- Minors who have reached the age of 12 may receive the following services without parental consent:

(1) mental health services on an outpatient basis, if the attending professional believes that the minor would present a serious danger without such services;[445]

(2) mental health services on an outpatient basis if a victim of incest or child abuse;[446]

(3) diagnosis or treatment for communicable or sexually transmitted diseases;[447]

(4) hospital, surgical, or medical services, if a victim of rape;[448]

(5) diagnosis or treatment of a drug or alcohol related problem.[449]

Until this year, a patient did not have a right of access to his or her own medical records. Under previous law, only an attorney for the patient had a right to obtain the patient's medical information.[450] Obviously, hiring an attorney to obtain one's medical records is not in furtherance of the public policy favoring efficiency and economy in health care.

Because of a bill enacted earlier this year (effective January 1, 1983), patients have a right of access to their own medical records -- without obtaining the services of attorneys.[451] The "Legislative Counsel's Digest" summarizes the significant provisions of this new law as follows:[452]

> This bill would, with specific exceptions, guarantee patients and former patients of specified health care providers, and certain representatives of patients and former patients, the right to inspect prescribed health care records within five days after presenting a written request and payment of reasonable clerical costs. This bill would require such a health care provider to supply copies of such records, upon request, to a patient, a former patient, or patient's representative within fifteen days after receiving a written request, a copying fee . . . and reasonable clerical costs. . . .
>
> Under this bill, a health care provider could refuse inspection or copying of defined mental health records if the provider determines that disclosure would adversely affect the patient or former patient, but a patient or former patient could designate a physician or psychologist to inspect and copy such records. . . .
>
> Any health care provider willfully violating the bill would be guilty of unprofessional conduct, as prescribed. Additionally, in a civil action brought to enforce the provisions of this bill, the court would have discretion to award attorney fees to the prevailing party.

The Confidentiality of Medical Information Act, adopted by the Legislature in 1981, governs disclosures of medical information to persons other than the patient.[453] Under this Act, no provider of health care shall disclose medical information regarding a patient without first obtaining an authorization, subject to certain exceptions.[454]

Under one set of exceptions, the provider must disclose information if it is compelled by a court order, authorized discovery proceedings, investigative

subpoena issued by an administrative agency, search warrant, or other provisions of law.[455] Under another set of exceptions, the provider may disclose the information under any of the following circumstances:[456]

> (1) To other health care providers or health professionals for the purpose of diagnosis or treatment of the patient;
>
> (2) To an entity responsible for paying for the health services rendered to the patient (such as an insurer, employee benefit plan, government agency, etc.) to the extent necessary to allow the payor to determine its responsibility for payment;
>
> (3) To entities providing billing and other administrative services to the payor, on condition that such service provider not disclose the information to anyone else;
>
> (4) To professional review committees that have the responsibility for defending professional liability that a provider may incur;
>
> (5) To public or private entities responsible for licensing or accrediting a health care provider;
>
> (6) To the county coroner's office;
>
> (7) To public or private nonprofit educational groups for bona fide research purposes, on condition that the information not be further disclosed;
>
> (8) To employers, under limited conditions, if the health care services are employment related and were performed at the specific request and expense of the employer;
>
> (9) To the administrator of an insurance plan if the services were performed at the request of and the expense of the plan for the purpose of evaluating the insured for coverage or benefits;
>
> (10) To a group practice prepayment health care service plan by providers that contract with the plan for the purpose of administering the plan; and
>
> (11) To other insurers in accordance with various provisions in the Insurance Code.

The Confidentiality of Medical Information Act also specifies the form and contents of an authorization for the release of medical information.[457]

Any recipient of health care information must adhere to any limitations imposed by statute or by an authorization for release, and must communicate any such limitations on use or further disclosure to others with whom the information is legitimately shared.[458]

Unless there is a specific written request by the client to the contrary, providers may release certain basic information about clients without client authorization, in the discretion of the provider, if an inquiry is made regarding the condition of the client.[459] This includes the client's (patient's) name, address, age, and sex; a general description of the reason for the treatment; the general nature of the injury, burn, poisoning, or other condition; the general condition of the patient; and any information that is not medical information as defined in this Act.

Chapter 3 of the Confidentiality of Medical Information Act imposes restrictions on the use and disclosure of medical information obtained by employers.[460] The following requirements are imposed by law: (1) each employer receiving medical information must establish appropriate procedures to ensure the confidentiality and protection from unauthorized disclosure and use of such information;[461] (2) no employer shall use or disclose medical information about an employee unless the employee has signed a written authorization;[462] (3) no adverse action may be taken against an employee for refusing to sign such an authorization, except that an employer may proceed to make necessary decisions without the medical information.[463] The Act contains additional provisions concerning employer-providers and employer-insurers.[464] This Act does not limit the newly enacted bill on patient access to medical records.

Visitation rights -- access to the patient by loved ones, family, and friends -- seems to be a matter of local hospital policy and not of state law. This Commission's Committee on Medical and Mental Health Services has received information that a significant number of patients have experienced visitation problems.[466] Whether a patient's "significant other," or whether a homosexual or heterosexual patient's "common law spouse" will be given privileged visitation status on par with blood relatives or next-of-kin, appears to depend on hospital policies, sensitivity of staff, and sometimes on whether blood relatives who arrive are hostile to the friend or lover of the patient.

Would-be patients should be able to designate visiting priority. A written declaration designating the patient's preference of visiting priority for family and friends should be binding on the health care provider.

The Commission finds that present law does not adequately protect the rights of patients to visitation with loved-ones of their choice. Hospital policies often give preferential visiting status to certain blood relatives to the exclusion of others, while "demoting" persons who actually have a more intimate association with the patient. These policies often ignore the existence of "alternate families" and may undercut the rights of a significant number of people who would choose to give preferred visiting status to "significant others" who do not legally fit the description of next-of-kin. Implementing freedom of intimate association in a hospital setting should not be left to the unbridled discretion of each hospital or to the possible prejudice of hospital staff.

THE COMMISSION RECOMMENDS that freedom of patient choice in hospital visiting privileges be deemed a personal right protected by the California Civil Code. A new statute on patient visiting rights should provide that: (1) if the patient is competent, the patient and not the hospital should have the right to designate whether someone is a member of his "immediate family" for visiting purposes; (2) if a hospital has a legitimate need to limit the number of visitors, a competent patient should be permitted to choose which individuals are to be given priority; and (3) if the patient is temporarily incompetent due to some disabling factor, a visitor presenting a declaration of visiting priority, previously executed by the patient, would receive priority status as specified in the declaration, notwithstanding hospital policies which establish different standards for priority. Such legislation should also require, as a routine admitting procedure, that hospitals notify patients of visiting restrictions and provide patients with a standard form for designating priority visiting privileges for a person or persons who are not given priority under existing hospital policies and practices.

Confidential communications between patient and physician are also a protected area of privacy.[467] Under the patient-physician privilege created by the Evidence Code, a patient generally has a privilege to refuse to disclose, and to prevent another from disclosing a confidential communication between patient and physician.

Thus, protecting the personal privacy of patients in medical care requires both the implementation of existing laws and the creation of a few new statutes as previously outlined, with respect to (1) participation in medical decision-making, (2) access to patient records, (3) visitation privileges, and (4) effectuating the physician-patient privilege.

Because laws and public policies regarding personal privacy rights of patients differ significantly for persons receiving medical care and those receiving mental health care, this section of the Commission's Report will concentrate solely on the latter. The primary legislative authority on this subject is found in the Lanterman-Petris-Short Act.[468]

A 1976 decision of the California Court of Appeal addressed the constitutionality of a number of the provisions of this Act.[469] As to distinctions between medical patients and mental patients, the Court stated:[470]

> Mental patients are distinct from other ill patients in two special circumstances. First, the competence to accede to treatment is more questionable than that of other patients. Mental patients' incompetence may not be presumed solely by their hospitalization (§5331), but it is common knowledge mentally ill persons are more likely to lack the ability to understand the nature of a medical procedure and appreciate its risks. Second, their ability to voluntarily accept treatment is questionable. The impossibility of an involuntarily detained person voluntarily giving informed consent to [some] medical procedures is fully treated in Kaimowitz v. Department of Mental Health for the State of Michigan, 2 Prison L. Rptr. 433, at p. 477. . . . "Voluntary" patients, newly included within the protection of the "Patients' Bill of Rights" (§5325), are susceptible to many of the pressures placed on involuntary patients. The Legislature's inclusion of these "voluntary" patients recognizes the fact the "voluntary" label is a creation of the Legislature, and often only means the patient did not formally protest hospitalization. These circumstances make the separate treatment of mental patients clearly rationally related to the object of insuring their rights to refuse treatment. The special regulation of psychosurgery and ECT is also a reasonable classification because these procedures, associated with mental illness, present a great danger of violating patient's rights.

The Court also answered objections to a legislative requirement that all possible risks and effects associated with ECT (electro-convulsive therapy) be

disclosed to a patient prior to that patient's being asked to give "informed consent." Some patients who preferred not to know these risks and effects claimed a right to refuse such information. To this argument the Court of Appeal responded:[471]

> Petitioners rely on Cobbs v. Grant [citation] contending that decision gives patients the right to refuse information.
>
> The court in Cobbs was concerned with the patient's right to express an informed consent before medical treatment. The petitioners rely on language which concerns a doctor's defenses to tort actions for battery or negligence. In the context of a malpractice suit, the patient's request to be left uninformed would be a defense to the doctor's nondisclosure. The court also said that the only time a patient should be "denied the opportunity to weigh the risks" is " . . . where it is evident that he cannot evaluate the data, as for example, where there is an emergency or the patient is a child or incompetent." [Citation.] Thus, a patient's request to be left uninformed may provide a doctor a defense to a tort action, but it does not obligate or constitutionally coerce a doctor into acceding to the patient's wishes. The Legislature has determined ECT and psychosurgery are such intrusive and hazardous procedures that informed consent is a mandatory prerequisite to treatment. Cobbs v. Grant [citation] does not prevent such a determination; it provides that, except in the instances of simple procedures, or where the patient is incompetent to make a decision, there is a right to full information. The right to fully informed consent protects the patient's constitutional rights.

The so-called "Patient's Bill of Rights," adopted by the Legislature for persons receiving mental health care, applies to persons involuntarily detained for treatment, voluntarily admitted for treatment, or developmentally disabled persons committed to a state hospital.[472] Under the provisions of the Lanterman-Petris-Short Act, such patients maintain basic rights, which must be posted in the facility and otherwise brought to the attention of patients, including the following personal privacy rights:[473] (1) storage space for private use; (2) visitors each day; (3) confidential telephone calls; (4) unopened correspondence; (5) dignity, privacy, and humane care; and (6) social interaction.

The Code also provides that treatment shall always be provided in ways that are least restrictive of the personal liberties of the individual.[474]

The professional person in charge of a mental health facility, or a designee, may, for good cause, deny a client any of these rights pursuant to regulations adopted by the Director of the Department of Mental Health.[475] Denial of a person's rights shall in all cases be entered into the person's treatment record.[476]

Quarterly, each local mental health director reports to the Director of Mental Health, by facility, the number of persons whose rights were denied, and the rights that were denied. These quarterly reports, except for the identity of the person whose rights were denied, are available, upon request, to members of the State Legislature, or a member of a county board of supervisors.[477]

On the subject of voluntary informed consent, the Department of Mental Health promulgates a standard written consent form setting forth the following information, which form is utilized by the treating physician:[478]

(1) Nature and seriousness of the patient's illness;
(2) Nature of the proposed treatment procedures;
(3) Probable effects of not receiving treatment;
(4) Nature and degree of probable side effects;
(5) Any division of medical opinion about the treatment;
(6) Reasonable alternatives to the proposed treatment;
(7) A right to refuse treatment or withdraw consent.

The treating physician must then supplement the standard consent form with details that pertain to the particular patient being treated.[479] The treating physician shall then present to the patient the supplemented form and orally and clearly explain all of the information to the patient. The total supplemented form shall then be signed by the patient, dated, and witnessed. The consent form shall be available to the patient, the patient's attorney, guardian, and conservator, and, if the patient consents, to a responsible relative of the patient's choosing.[480]

Additional safeguards are provided in situations where psychosurgery or convulsive treatment is being considered. A responsible relative of the patient's choice has a right to read the completed consent form and to receive additional information from the treating physician.[481] For purposes of informed consent for mental health treatment, including psychosurgery and convulsive treatment, the term "responsible relative" includes "the spouse, parent, adult child, or adult brother or sister of the person."[482]

The provision of the law authorizing limited participation in the decision-making process by a "responsible relative" of the patient's choosing is commendable. It enables the patient to discuss the possible treatment with someone the patient loves and trusts. It allows the doctor to disclose whatever information is necessary for the patient and the chosen relative to talk the matter over in private.

The Commission on Personal Privacy finds that the definition of "responsible relative" as it appears in the Welfare and Institutions Code is discriminatory in its effect on the patient's right of privacy. Limiting the definition of "responsible relative" to certain blood relatives shuts off other possibilities that many patients would choose. Some patients have been raised all of their lives in foster homes with loving and caring foster parents. Others may consider a favorite aunt with whom they have lived for many years as the "responsible relative" of their choosing. Many others may be members of the hundreds of thousands of California's "alternate families." For these patients, their closest relations may be with persons who have no blood relationship at all but who are nonetheless the patient's ongoing family.

THE COMMISSION RECOMMENDS that the phrase "responsible relative of the patient's choosing" as used in Welfare and Institutions Code section 5326 et seq. be replaced with the phrase "family member of the patient's choosing." For this purpose, the term "family member" should be defined as "any person related to the patient by blood, marriage, or adoption, or any person the patient has declared to be a member of his or her family." Sections 5326 et seq. establish a procedure for obtaining informed consent to psychiatric treatment and now require the treating physician to make the signed consent form available to a responsible relative of the patient's choosing. This amendment would broaden the class of persons the patient could designate as authorized to have access to the signed consent form. Such an amendment would protect the patient's freedom of family choice by removing arbitrary restrictions on whom may be considered a member of the patient's family.

Procedures to secure "informed consent" for patients who are incompetent depend on whether the treatment to be given is for medical care or for mental health care. If a patient has a conservator of the person, the conservator may consent to medical treatment. Also, any person who is authorized by court order pursuant to the provisions of the Medical Authorization Act may consent to medical treatment on behalf of an incompetent patient. Informed consent for mental health care for a patient,

whether voluntarily or involuntarily confined, is governed by the provisions of the Lanterman-Petris-Short Act.

A newly enacted bill (Assembly Bill 610 (981-82 Regular Session)) gives a patient a right of access to both medical and mental health records.[483] Access to mental health records is more limited than to medical records. Generally, the patient or the patient's representative has a right to inspect and copy patient records. The health care provider may decline to permit inspection or provide copies of such records to the patient when the provider determines that there is a substantial risk of significant adverse or detrimental consequences to a patient, subject to the following conditions:[484]

> (1) The provider shall make a written record of the request, noting the date of the request and explaining the reasons for denying it, including a specific description of the adverse or detrimental consequences which would occur should the records be provided;
>
> (2) The provider shall permit inspection and copying by a licensed physician and surgeon or a licensed psychologist designated by the patient; and,
>
> (3) The provider shall inform the patient of the right to have a licensed physician or psychologist inspect, should the provider decline to allow patient inspection.

THE COMMISSION RECOMMENDS that the definition of "patient's representative" as used in Statutes of 1982, Chapter 15 (AB 610) be amended to include "any other adult designated by the patient." This newly enacted statute gives patients a right of access to their medical and mental health records. Under its terms, the patient or the patient's representative has a right to inspect and copy such records. This statute now defines "patient representative" as being limited to a parent or guardian of a minor patient, or the guardian or conservator of an adult patient. The Commission finds this definition too restrictive. An adult patient who is not incompetent should be able to designate any other adult as his or her "representative" for purposes of gaining access to such records. To protect against possible fraud, it is also recommended that the law require the instrument signed by the patient for this purpose to be witnessed.

Confidentiality of mental health records of patients receiving treatment pursuant to the Lanterman-Petris-Short Act is governed by the Welfare and Institutions Code.[486] Information and records obtained in the course of

providing services to voluntary and involuntary patients are confidential.[487]

Under the Lanterman-Petris-Short Act, information and records may be disclosed only:[488]

> (1) In communications between professionals treating the patient or making referrals, provided that the consent of the patient is required if the communication is between a person employed by the facility in which the patient is being treated and a person in another facility;
>
> (2) When the patient designates persons with whom the information is to be shared, so long as a professional who is treating the patient agrees; provided that the professional need not share information with the patient that has been given to the professional by members of the patient's family;
>
> (3) To the extent necessary for a recipient to make a claim for insurance or medical assistance;
>
> (4) For research purposes, under very strict guidelines;
>
> (5) To the courts as necessary for the administration of justice;
>
> (6) To governmental authorities to the extent necessary for the protection of elected officials and their families;
>
> (7) To the Senate and Assembly Rules Committees for authorized investigations;
>
> (8) To insurers as designated by the patient;
>
> (9) To the patient's attorney.

Information may also be provided to law enforcement agencies with the consent of the patient or pursuant to a court order.[489]

A public or private mental health facility shall give the following information upon request by a member of a patient's family or other person designated by the patient and with the patient's prior authorization:[490]

- The patient's presence in a facility;
- Diagnosis, medication prescribed, and side effects;
- The patient's progress and the seriousness of illness.

If the patient is unable to consent to or refuse permission for such disclosure, after being notified that some person is seeking this information, the facility need not supply the information to the inquirer. However, if a request is made by the "spouse, parent, child, or sibling of the patient" and

the patient is unable to authorize the release of such information, the facility shall disclose to the requestor that the patient is present in the facility.

THE COMMISSION RECOMMENDS that section 5328.1 of the Welfare and Institutions Code be amended. That statute now requires a public or private mental health treatment facility to disclose to the "spouse, parent, child, or sibling" of the patient the fact that the patient is present in the facility. The Commission finds the class of persons who must be so informed to be too limited. Persons sharing a household with the patient are as likely to be alarmed by an unexplained absence as would relatives who do not reside with the patient. Therefore, the Commission recommends that the class of persons who must be so informed be expanded to include the "spouse, parent, child, sibling, and household member, as well as any person authorized by the patient to receive such information."

Confidentiality of information and records of patients receiving mental health care is governed by the Lanterman-Petris-Short Act if the patient has been voluntarily or involuntarily committed for treatment under the provisions of that Act. Otherwise, the recently enacted Confidentiality of Medical Information Act applies. Under the provisions of the latter Act, "medical information" means any individually identifiable information in possession of or derived from a provider of health care regarding a patient's medical history, mental or physical condition, or treatment.[491] The provisions of the Medical Information Act were previously discussed in the section of this Report entitled "Medical Care."

Both of these Acts have sections providing penalties for unauthorized disclosures of patient information or records. The Commission on Personal Privacy finds both of these remedial statutes to be inadequate to protect the privacy rights of patients receiving either medical or mental health care.

Section 56.35 of the Civil Code provides remedies for violations of the Confidentiality of Medical Information Act. In order to recover any damages, patients must prove economic loss or personal injury. If patients can meet this burden of proof, they may recover compensatory damages, plus not more than $3,000 punitive damages, plus attorney fees not to exceed $1,000, plus costs of litigation (attorney fees are not recoverable costs).

Persons who discover that a provider has wrongfully disclosed medical information may be unable to prove actual economic loss or personal injury. Wrongful disclosures may not cause such immediate consequences, although

economic loss may surface years later when the wrongfully disclosed information is misused by someone. Nonetheless, the patient may experience highly emotional reactions from a wrongful disclosure, including embarrassment and anxiety.

The purpose of punitive damages is to "punish" a wrongdoer who has willfully and knowingly violated the law. Generally, to calculate an amount that would be appropriate to punish a willful violator, the economic status of the wrongdoer must be considered. What will serve as punishment for a small business entity would not be an appropriate deterrent for a corporate conglomerate that has a gross income of millions of dollars in revenue each year. Limiting punitive damages to a maximum of $3,000 often does not create a meaningful deterrent.

The cost of hiring an attorney to bring suit against a large hospital, with its team of attorneys, could be very substantial. The provision for $1,000 in attorney fees to a patient prevailing in a suit against a provider is extremely unrealistic given the cost of legal services today.

THE COMMISSION RECOMMENDS that section 56.35 of the Civil Code be amended in the following ways to cure defects the Commission perceives in the damages sections of the Confidentiality of Medical Information Act. First, the law should provide for a minimum of $500 in damages for any negligent or intentional violation of this Act. Second, the present ceiling of $3,000 punitive damages for willful violations should be eliminated; instead, the trier of fact should assess the appropriate amount of any punitive damages to be imposed. Third, patients who prevail in litigation arising under this Act should be entitled to recover attorney fees and costs of litigation.

THE COMMISSION RECOMMENDS that the damages sections of the Lanterman-Petris-Short Act also be amended. Section 5330 of the Welfare and Institutions Code should be amended to provide that patients who prevail in litigation under this Act should be entitled to recover attorney fees and litigation costs.

The California Evidence Code creates evidentiary privileges for various forms of confidential communications. Confidential communications between a patient and a psychotherapist are privileged.[492] This privilege attaches to relevant communications between a patient or a patient's family, and a licensed psychiatrist, a licensed psychologist, a licensed clinical social worker, or other psychiatric personnel working under their direction.[493]

Minors receiving mental health treatment or counseling on an outpatient basis pursuant to the provisions of §25.9 of the Civil Code (minors over 12 without parental consent, with various restrictions) are covered by the psychotherapist-patient privilege in their communications with a variety of professional persons.[494]

Recently, the Legislature deemed "confidential" any information of a personal nature that is disclosed to a school counselor by a student 12 years old or older. The information may not be disclosed to anyone, except in a few compelling situations.[495]

The past few years have seen an increased sensitivity of elected representatives with respect to personal privacy rights of patients receiving medical and mental health care. In many cases, this heightened awareness has translated into the enactment of protective legislation. In the past two years alone, the Legislature has passed laws regulating medical decision-making, patient access to records, confidentiality of medical information, and other major aspects of privacy in the delivery of health care services.

The Commission on Personal Privacy commends the Legislature for its responsiveness to personal privacy problems in health care. Some fine tuning and a few amendments to the present legislative scheme in this area will help make California a model for the nation in protecting the personal privacy rights of patients.

Within its limited resources, the Commission has attempted to determine the level of "privacy-rights consciousness" of the persons who are charged with the actual delivery of professional and administrative health care services. Sound and progressive policies are an important first step, but effective implementation is essential for these policies to actually assist patients. Ongoing studying and monitoring of the health care industry will be required to assure personal privacy rights for patients. Educational and training programs for staff, audits of information practices and procedures, and a strong patients' rights assurance program are all critical in order for personal privacy to survive and flourish in medical and mental health care settings.

During the Public Hearings conducted by the Commission, several witnesses testified about invasions of privacy that have recently occurred and that are recurring problems in medical and mental health care in this state.[496]

Virgil Carpenter, representing the Patient's Rights Section of the Los

Angeles County Department of Mental Health Services, told the Commission about five major areas where the privacy of patients is regularly invaded.[497] First, she stated that third-party payors have not been restricted by law from releasing patient information. It appears that the Confidentiality of Medical Information Act, which went into effect just this year, may answer this concern -- if it is properly enforced.

The second problem she brought to the Commission's attention is the routine violation of confidentiality of correspondence. Ms. Carpenter told the Commission:[498]

> The second thing that I'd like to address your attention to is that currently many of the ex-patients are residing in board-and-care homes. . . . [T]he fact is that patients constantly complain that the mail is opened by management or owners of the homes. In particular, this is true when it appears to be mail of government origin or possibly containing checks . . . . We believe that these ex-patients should be permitted unopened correspondence and a violation or penalty ensued for anyone opening their mail.

Ms. Carpenter discussed the lack of privacy, particularly in bathroom facilities, for patients living in an in-patient facility. Very often, only large barracks-type facilities are provided, allowing for almost no personal privacy for patients in caring for intimate needs.

In the area of private communications with visitors or with other patients, there is a lack of private space provided. On this subject, she said:[499]

> We feel that people should have a right for some private setting within the facility for visits with their family or for visits with others outside the facility, as well as a right for private conversations with others who might be in the facility. Currently, what usually takes place is that any conversations must be held in a room with the doors open and they are under observation. We are requesting that some arrangements be considered for this.

Finally, Ms. Carpenter called for a statewide policy on personal searches of patients. Currently, many facilities conduct strip-searches of patients when they return from outside visitations. Los Angeles County has adopted a local policy that requires probable cause before such searches are

permitted. This policy basically outlaws systematic strip-searches of patients.[500]

Another witness at the Los Angeles Public Hearing testified about invasions of patient privacy by state investigators. Certain clinics, not the patients, were being investigated for possible Medi-Cal fraud. In the process many patients were subjected to privacy infringements. The witness told the Commission:[501]

> These women were contacted by telephone. They were searched out in their homes, in their places of employment, and also at schools and were interviewed by investigators who, many of the women stated, intimidated them to the point that they weren't sure whether or not they were under investigation. Many of these women were questioned in detail about the services that they received at the Health Center, and, since many of them received abortion services, you can imagine that this was a matter of grave privacy . . . .
>
> I am now aware that the Medi-Cal fraud unit is one of the largest units of the Investigations Department, and I also know there has been abuse of Medi-Cal. However, I don't think that that gives them the prerogative to violate the privacy of a patient. It is possible to get information about a person's services by getting a release from them, or by some other way than going to the home. Just to give you an example of how this was done: One woman had an investigator come to her home while she had a house full of relatives and this investigator was forcing her to talk about the details of her medical services in the presence of a number of other people.

From the testimony of this witness, it seemed that state officials had also leaked information to a news magazine regarding the investigation, including the names of some of the patients. The witness concluded her testimony on this subject by stating:[502]

> The interesting thing is that when we confronted them, in depositions with officials of the Department of Health, they did agree that patient confidentiality had not entered into their decision about our investigation or about the re-

lease of those particular affidavits, although they did admit that they do have policies about confidentiality, especially about patients.

Susan Knight, Director of the Sexuality and Disability Program at the University of California, San Francisco, testified about privacy, sexuality, and disability at the San Francisco Public Hearing. She made some important observations about privacy rights of the disabled:[503]

> Areas where privacy really becomes problematic, and especially in the area of sexuality and socialization, has to do with anyone who has to have attendant care, has to have assistance in meeting their daily needs. When that happens to a person, whether the attendant is hired by the institution or whether they, even through state aid, have the ability to hire their own attendants, they are, by and large, at the whim of that particular attendant's willingness to provide them with their privacy needs. . . .
>
> Another area in which privacy becomes very much encumbered is in institutional settings. That can be a chronic care facility [or state hospital] . . . . [A severely disabled and non-verbal patient], though there is in this State a law that says there has to be a room set aside for private visits, that person, without assistance, that person will not be able to have the privacy and the use of the privacy that they may want. For sexual activity or even socialization.
>
> Another area is the area of residential schools [for the deaf or blind]. . . . [T]here are incidents, for example, at the Berkeley Schools for the Deaf or Blind, where students are not allowed to hold hands. That is not seen as appropriate behavior. But if you go to the Berkeley Public Schools that is allowed and is seen as appropriate. . . .

In response to a question by a Commissioner regarding the level of training or education for institutional staff in the area of privacy or sexuality, Ms. Knight commented:[504]

> To my knowledge, the only state-mandated right that a patient in an institution has is to know that there is a room set aside for privacy, and staff people need to know that as

well. In my experience, I know of no formal training - I'm sure there is nothing mandated that speaks to continuing education for staff of institutions on sexuality or privacy.

Margaret Frazier, an attorney who is in charge of the Client's Rights Assurance Program of the Department of Developmental Services, also testified at the Commission's Public Hearing in San Francisco and stated:[505]

> There are certain specified rights in the Welfare and Institutions Code which the Legislature enacted in 1976 as a part of the Lanterman Developmental Disability Services Act. Historically, as our previous witness has testified, and currently, there are certain assumptions about persons who are developmentally disabled, that these individuals are incapable of exercising rights and therefore should be denied rights . . . consequently, the Legislature felt it was very important to specifically articulate rights, including the right to privacy.
>
> Naturally, these rights are not self-implementing. Those of you who are attorneys know very well that you can have guarantees of rights, but unless you have a way of implementing those rights, we can't be sure that they will be enforced or respected. Consequently, we have a Client's Rights Assurance Program under the Department of Developmental Services. We have Client's Rights Advocates in each of the nine State Hospitals under our jurisdiction, as well as twenty-one regional centers. . . .
>
> . . . [W]e serve more than 70,000 clients through the Department of Developmental Services -- 8,000 of whom I would say are directly in our care in the State Hospitals and the remainder live at home with their families, in independent living, and also in out-of-home placements, including licensed private health facilities and licensed community care facilities.
>
> Consequently, we can tell you about the laws and regulations which affect the privacy rights and also the sexuality rights of the clients of our system, but as you can tell, it's a fairly decentralized system and the practice and the implementation of those rights varies from place to place. Much, of course, depends on the sensitivity of the direct-care provider's staff.

Patty Blomberg, Family Life Coordinator for the Department of Developmental Services, also testified about privacy rights for the disabled. She told the Commission:[506]

> [T]here's a great deal of difference between the law as it is stated, and the practices as they are practiced in both regional centers and state hospitals. We've done a needs assessment of all the twenty-one Regional Centers, and over and over again they ask for training for residential facility operators in order to create an atmosphere for appropriate privacy and intimacy. The Care Providers Training Manual, which was mandated by Maxine Waters' bill of last year, has one section in it to teach care providers about sexuality.

When questioned by the Commission Chairperson as to whether she had any specific recommendations for the Commission, Ms. Blomberg stated:[507]

> My only comment to the Commission is that I would hope they would investigate and also work within the realms of the Legislature in trying to enact some laws to enable continuing education for people with developmental disabilities. There is nothing in the rights [as they are now stated] that mandate for a right to a private space or a right to access on sex education. They have a right to access on birth control and we have expanded upon that right as far as we can carry it to include birth control information and all sex education information.

Judy Williams, Education and Rehabilitation Coordinator of the Hearing Impaired Program at Sonoma Developmental Center, also testified about privacy and sexuality needs of clients. She told the Commission:[508]

> First, on the issue of privacy within state institutions, I'd like to say that it's very unfortunate to me that Sonoma is in the forefront on this issue, and I say unfortunate, because I do not feel that what we are doing anywhere meets the needs of our clients. At this particular time, we have just finished writing a policy on sex education which includes a section on privacy. The policy should be approved within three weeks and at that time, the privacy that will be allowed, hopefully, will be one room per unit. A unit holding

some 30 or 40 persons. One room for privacy reasons, be they sexual reasons or simply quiet reasons. The other state hospitals are waiting for our policy to come out, and at that time they have begged me to send it to them.

The second issue I would like to talk about is an attitudinal issue in terms of privacy and in terms of sexuality. And that is a very long-standing problem in the State Hospitals — staff attitudes toward the sexuality of our clients. I think that it has been said this afternoon that a lot of people refer to and see developmentally disabled clients as being asexual or non-sexual. This is obviously not true. . . .

I do not know what your mandate is, or how much power you have, but my only recommendation would be that, if you have some kind of power, you could have it mandated within the Department of Developmental Services that privacy rooms, and if there's a better term for it, I don't know what it is, that privacy rooms be available on all units at all State Hospitals.

In response to a question by a Commissioner as to the extent of education and training programs for hospital staff concerning both sexuality and personal privacy, Ms. Williams responded:[509]

Unfortunately, there is no mandate and this again is something I would like to address to the Commission. There is no mandate for any kind of training. For my own part, I feel I have trained the administrators and they have done very, very well in terms of support for us. But again, I'm telling you that Sonoma is in the forefront, and that is a very sad statement for me to make. Secondly, when this policy is approved, it is the committee's intention — and I'm speaking about a committee of some twenty people representing each program: the Chaplain's Office, the Client's Rights Office, the Citizen Advocate's Office, and we also have parents on the committee. It is the intention of that committee that all direct-care employees be trained in the policy so they will know what exactly the guidelines are. Beyond that, in terms of privacy rooms, the committee has requested the administration to talk not only to the clinical side of the house

but also the administrative side of the house: maintenance people who walk onto a unit to fix a toilet and just barge into the bathrooms. This can no longer be tolerated, and we are asking that those people be trained in terms of privacy.

These are only some of the witnesses who testified on the subject of privacy and patient's rights at the Public Hearings conducted by the Commission. A common theme runs through this testimony: sound policies are one thing, and implementing those policies is quite another. This testimony as well as other information received by the Commission through its consultation with a wide range of experts have caused the Commission to reach the following conclusions with respect to privacy in medical and mental health care settings:

- The Legislature has evidenced a willingness periodically to update privacy laws pertaining to health care.

- Additional legislation is needed to require ongoing training regarding personal privacy rights of clients for both clinical and non-clinical staff who work with clients in health care settings and residential facilities.

- There is a need for legislation requiring that all voluntary and involuntary patients receiving mental health care in an institutional setting on a long-range basis, as well as all similarly situated developmentally disabled clients, have an opportunity to participate in ongoing educational programs that focus on personal privacy rights of clients, including, but not limited to: use of private areas and rooms for socializing, visiting, recreation, or private sexual expression with other consenting adult partners; freedom of intimate association; sexuality education; privacy rights in personal communications conducted in person, by telephone, or by mail; rights to form and maintain personal associations and to express affection; right to be free from unwanted physical interference or abuse; access to patient records; confidentiality of communications with professional staff; and other significant areas where privacy invasions often occur.

- There is a tremendous need for state agencies providing health care services, or regulating or licensing pro-

viders of such services, to (a) develop comprehensive regulations and guidelines regarding personal privacy rights of clients receiving such services; (b) initiate intensive training programs to bring key personnel up to date on the present state of privacy law in California, especially for personnel charged with a responsibility to assure patients' or clients' rights; and (c) require minimum standards for continuing education in personal privacy for all licensed care providers.

- A need exists for state agencies who employ investigators . . . to provide continuing education programs for these employees on the personal privacy rights of persons who come into contact with the investigators in the course of their regular duties.

THE COMMISSION RECOMMENDS that the Legislature take the following actions with respect to the privacy rights of patients:

(1) Amend the Welfare and Institutions Code, particularly sections dealing with patients' rights, to specify that patients have a right to have private communications each day, both with visitors and with other patients, in rooms or areas designed to achieve the degree of privacy and intimacy that one would reasonably expect in a non-institutional setting.

(2) Amend the Welfare and Institutions Code to require that at least one privacy room be set aside in each unit of each state hospital for private use by the patients, for social, recreational, or other lawful purposes.

(3) Adopt a statewide policy setting standards for conducting searches, especially strip-searches, of patients. Los Angeles County has recently adopted standards requiring "probable cause" for such searches. Statewide standards are necessary so that patients' privacy rights are not dependent on the unbridled discretion of local administrators or service providers.

(4) Enact legislation requiring all key personnel in departments that (a) provide either medical or mental health services, (b) license or regulate such providers, or (c) administer health programs, to participate in ongoing educational programs pertaining to the personal privacy rights of patients. Included in this category would be the following personnel: licensed health care professionals, patients' rights advocates, departmental investigators, security personnel, program directors, and maintenance personnel who have access to areas normally considered private.

Because personal privacy law is rapidly changing and growing, each of these key personnel should be required to receive at least one full day of instruction every two years on the privacy rights of patients. The Legislature should require such educational programs to begin operating no later than January 1, 1984. Departments providing health care services or regulating the same should immediately begin developing these programs and creating instructional material.

(5) Amend Welfare and Institutions Code §5325 to include "access to sexuality education" in the list of rights of developmentally disabled clients.

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The following additional recommendations have been adopted by the Commission based upon its research and the materials located in the Supplements published herewith. (See the Report of the Committee on Aging and Disability and the Report of the Task Force on Aging.)

THE COMMISSION RECOMMENDS that the Governor issue an Executive Order creating an Inter-Agency Committee on Personal Privacy in Health and Social Services. The Inter-Agency Committee should consist of representatives from the following departments: Aging, Social Services, Health Services, Developmental Services, Rehabilitation, and Mental Health. The Director of one of these departments should serve as Chairperson, as designated by the Governor.

The Inter-Agency Committee, with appropriate staffing, should perform the following functions:

(1) Training: (a) develop, conduct, and evaluate training programs for service provider agencies regarding personal privacy rights, freedom of intimate association, including lawful sexual conduct, and protections against sexual orientation discrimination; (b) develop standardized training and materials that allow for updating as laws and regulations change, that are thorough in the areas identified; and (c) prepare the materials in the languages of the persons receiving the training if they are not conversant in the English language but are providing direct patient care.

(2) Regulation: (a) monitor the practices of providers as they impact consumers in the areas of privacy, sexuality, and

sexual orientation; (b) receive, investigate, and remedy complaints arising from invasions of privacy and sexual orientation discrimination; and (c) propose legislation and administrative regulations/amendments as needed to assure personal privacy protections.

During the 1983-84 budget year, the Inter-Agency Committee should function within the existing resources of its member departments. The Legislature should provide funds for its continued operation thereafter.

THE COMMISSION RECOMMENDS that all Boards under the jurisdiction of the Department of Consumer Affairs that license health care providers (such as physicians, nurses, psychologists, social workers, psychiatric technicians, etc.) amend their licensing requirements to include at least 6 hours of classroom training in these areas: personal privacy rights, freedom of intimate association, including lawful sexual conduct, and protections against sexual orientation discrimination. This 6-hour training should be required prior to initial award of licenses to these professionals. It is further recommended that these licensing boards require all health care providers currently holding licenses to show proof of completion of the 6-hour course within 3 years of the date of the expiration of their current licenses.

A model 6-hour training course entitled "Personal Privacy for Health Care Providers" is included as an attachment to the Report of the Task Force on Aging, located in a Supplement published herewith.

THE COMMISSION RECOMMENDS that the departments of Health Services, Social Services, and Mental Health add a training prerequisite for all non-professional staff with direct patient care responsibilities, similar to that now required for nursing assistants (Title 22, California Administrative Code, §76351). Relevant sections of Title 22 (such as §71519, §72501(e), §73529(a), and §74403(a)) should be amended as follows:

> In order to qualify for direct patient care responsibilities in non-licensed employment positions, all applicants must provide documentation proving completion of a 36-hour course of training, including 6 hours on personal privacy and sexual orientation discrimination protections. For persons currently employed in such non-licensed categories, these same training requirements must be met within one year of adoption of these regulations.

THE COMMISSION RECOMMENDS that the State Department of Health Services promulgate regulations amending the declaration of rights of patients in licensed health care facilities, community care facilities, and continuing care facilities, as listed in Title 22 of the California Administrative Code, as follows:

(1) Skilled Nursing Facilities: amend §72523(a)(10) to read, "To be treated with consideration, respect and full recognition of personal dignity and individuality, including privacy in treatment and in care for the individual's personal and sexual needs and preferences."

(2) Intermediate Care Facilities: amend §73523(a)(10) to read the same as the parrellel section for Skilled Nursing Facilities as designated in the preceding paragraph.

(3) Intermediate Care Facilities for the Developmentally Disabled: amend §76525(a)(14) to read "To dignity, privacy, respect, and humane care, including privacy in treatment and in care for the individual's personal and sexual needs and preferences."

(4) Acute Psychiatric Hospitals: amend §71507(a) to add a new subsection (10) to read, "To dignity, privacy, respect, and humane care, including privacy in treatment and in care for the individual's personal and sexual needs and preferences."

(5) Community Care Facilities: amend §80341(a) to add a new subsection (7) to read, "To dignity, privacy, respect, and humane care, including privacy in treatment and in care for the individual's personal and sexual needs and preferences."

(6) Foster Family Homes: amend §85131(a) to add a new subsection (8) to read, "Have privacy in personal hygiene, grooming, and related activities of personal care."

(7) Nondiscrimination Regulations: amend all nondiscrimination clauses contained in Title 22 for licensed health care, community care, and continuing care facilities and referral agencies, such as §80337, §84307, §85133, and §71515, to include "sexual orientation" as a prohibited basis of discrimination.

THE COMMISSION RECOMMENDS that state departments that license health care facilities, community care facilities, and continuing care facilities, such as the departments of Health Services, Social Services, and Mental Health, promulgate regulations amending Title 22 of the California Administrative Code to support the following legislatively mandated rights: (1) every adult person has the right to engage in consensual sexual conduct in the privacy of one's home or other private location; (2) every mentally ill and every developmentally disabled adult has the same rights as every other adult of the same age regardless of disability, unless medically contra-indicated; (3) every patient and other adult resident of licensed facilities has basic privacy rights; (4) a residential facility is reasonably considered to be the temporary or permanent home of an individual residing therein. Specific regulations are needed to articulate the following rights:

(1) Freedom of Association and Communication: amend sections or subsections of the declaration of patient's rights pertaining to freedom of association and communication for all licensed facilities (skilled nursing facilities, intermediate care facilities, intermediate care facilities for the developmentally disabled, acute psychiatric hospitals, community care facilities, and foster homes), such as §§72523(a)(12), 73523(a)(12), 76525(a)(24) and 71507(a)(3), to read, "To associate and communicate privately with persons of one's choice and to send and receive personal mail unopened unless medically contraindicated, and to be free from ridicule or criticism by staff for choice of association, frequency or duration of the visits or communications."

(2) Privacy in Intimate Associations: amend §72523(a)(15) of Skilled Nursing Facilities declaration of patient rights to read "Regardless of marital status, to be assured privacy for visits by a person or persons of one's choosing, and if they are patients in the facility, to be permitted to share a room, unless medically contraindicated." Amend or add similar subsections to the declaration of patient's rights or statement of personal rights for all other licensed health and community care facilities.

(3) Personal/Patient Rights: Every adult residing in a health care, community care, or continuing care facility, has the right to engage in private sexual conduct with other consenting adults. For this purpose, the location of the conduct shall be deemed "private" if it meets the following criteria: (1) the area is outside of the view of others; and (2) a more appropriate area within the facility is not available for such purpose, which is accessible to the patient/resident.

(4) Personal Accomodations: Marital status discrimination should be eliminated from sections of the code regulating equipment and supplies necessary for personal care and maintenance, such as §80404(a)(3)(A). Presently the code requires "[t]he licensee shall assure provision of . . . '[a] bed for each resident, except that married couples may be provided with one appropriate size bed.'" All sections regulating bed size selection should be free from marital status discrimination and should read as follows: "The licensee shall assure provision of 'a bed for each resident, except that consenting adult couples shall be provided with one appropriate size bed, regardless of the marital status or gender of the individuals, unless medically contraindicated.'"

THE COMMISSION RECOMMENDS that economic disincentives which penalize persons who are married and which discourage persons from becoming married be eliminated from health and welfare benefits programs operated by the federal government, such as Social Security, Supplemental Security, In-Home Supportive Services, Medicaid, and Medi-Care. The Commission urges members of California's congressional delegation who serve on committees that oversee these programs to review "marrige-penalty" regulations and propose remedial legislation.

THE COMMISSION RECOMMENDS that the departments of Developmental Services, Social Services, Health Services, Mental Health, and Rehabilitation take the following actions:

(1) require reviewers to utilize a comprehensive patients'rights checklist during the annual or periodic review of client/patient progress conducted for state licensed programs or facilities;

(2) require reviewers to utilize the department-approved checklist in the following manner: (a) each right specified in statutes and administrative regulations (as indicated on the checklist) should be individually communicated to the client; (b) after each right is so communicated, the reviewer should ask the client if this right has been denied or limited in any way since the last review; and (c) the reviewer should record the client's response separately for each right.

The Clients'/Patients' Rights Advocates within each of these depart-

ments should prepare a standard checklist to be used for the periodic reviews required by the department. The checklist should clearly indicate each patient right which has been legislatively or administratively declared. Routine use of such checklists should begin no later than January 1, 1984.

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The following additional recommendations have been adopted by the Commission based upon its research and the materials located in the Supplements published herewith. (See Report of the Task Force on Alcohol and Drug Abuse Programs.)

THE COMMISSION RECOMMENDS that the Department of Alcohol and Drug Programs require state licensed or funded programs to include the following procedures during the initial interview with a prospective client:

(a) provide all prospective clients with written information regarding personal rights, and the process for filing complaints should their rights be violated;

(b) provide information to all prospective clients about local programs targeted for special groups, including programs for lesbians and gay men.

THE COMMISSION RECOMMENDS that the Department of Alcohol and Drug Programs should require each state licensed or funded program to provide a private area for client intake interviews. Such an area should accommodate the need for confidentiality while maintaining sufficient safety standards for the intake interviewer.

THE COMMISSION RECOMMENDS that the Department of Alcohol and Drug Programs require that all telephone calls regarding a client's case which involve personnel at a state licensed or funded program must be documented with the following information: name and position of the caller/receiver and the facility represented; name of person releasing client information; date; and summary of information released. This safeguard will provide a safety check on the indiscriminate release of personal information concerning a client.

THE COMMISSION RECOMMENDS that the Department of Alcohol and Drug Programs study and monitor the assignment and use of client identification numbers by local ADP-funded agencies. Agencies which assign

identification numbers to clients, especially those using computerized systems, should be required to certify annually the security methods which are taken to insure confidentiality and privacy for client information and records.

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The research of the Commission has revealed employment as an area which involves a host of potential and actual privacy infringements.

The moment a person applies for a job or seeks the assistance of an employment agency, the applicant surrenders a bit of privacy. Obviously, prospective employers need information on which to base employment decisions, such as whether or not to hire an applicant. Employment applications, background checks, personal interviews, medical examinations, verifying references, psychological profiles, polygraph testing, and sometimes being subjected to sexual harassment - - these are a few of the methods of privacy invasion that go with the territory of job hunting.

Once the person is hired by an employer, there is no guarantee that the process of surrendering one's privacy will not continue. Many employees are given virtually no private space on the job and must work in the midst of noise and confusion. Some are subjected to routine video surveillance of their on-the-job activities; others may have their telephone calls surreptitiously monitored. If a theft or other problem occurs at work, the employer might request all employees to subject themselves to polygraph tests. Discrimination on the basis of marital status or lifestyle may occur in the form of limited benefits for those who do not live in a traditional marriage. Sexual harassment may also be experienced by employees seeking promotions or who appear to be easy targets for supervisors or co-workers. Unauthorized disclosures of information in personnel and medical files, as well as the accumulation of inaccurate data in such files, may be recurring personal privacy problems for many workers.

After termination from a job, a worker faces a new set of privacy problems. Interviews or investigations by state unemployment offices may be required. More medical tests and forms face those seeking disability benefits. Prospective employers will generally want access to previous job information.

Government employees have more protections against employment-related privacy invasions than do most employees in the private sector. Privacy protections which may limit intrusive practices by government employers include: (1) Fourth Amendment protections against unreasonable searches and seizures; (2) article 1, §13 of the state Constitution, which also limits searches and seizures; (3) article 1, §1 which protects privacy as an inalienable right; (4) federal, state, and local government merit systems;