

Is Sub Rosa Considered Stalking?

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Is Sub Rosa considered stalking? It's a question I get quite often when conducting trainings in investigation and fraud. The short answer is no. But of course, I think what they are really asking is a bit more complicated. Is the act of watching someone without their knowledge legal? So I thought I'd try to cover some issues on stalking.

We conduct Sub Rosa on a Claimant because an adjuster suspects fraud or malingering. In this capacity we serve as the agent of the insurance company, because **Surveillance is permissible if supported by an articulable suspicion per the California civil code 1708.8(g)** *This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an **articulable suspicion**, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity, the suspected violation of any administrative rule or regulation, a **suspected fraudulent insurance claim, or any other suspected fraudulent conduct or activity involving a violation of law or pattern of business practices adversely affecting the public health or safety.***

<http://law.onecle.com/california/civil/1708.8.html>

1708.8 was constructed in 1998 and referred to as the Anti-Stalking Bill. This came on the heels of problems with Paparazzi encroachments of celebrities' privacy.

But what constitutes stalking?

Almost all of the states have stalking laws on the books and there are even federal laws that cover this action. The first high profile case to receive national attention was in 1980 when John Lennon was killed by a stalker in New York.

California was the first state to pass an anti-stalking law in 1990 when actress Rebecca Schaeffer was murdered by a stalker. Remember that one? A PI was hired by an avid fan to attempt locating Ms. Schaeffer's residence. The PI ran DMV databases and was able to locate an address. As a result of this action, Ms. Schaeffer met with her demise. Things changed for the good guys at that point, wherein DMV established administrative policy precluding access of address information to Private Investigators in most cases, qualifying a "Permissive Use" doctrine. Hence, your investigators are now required to access addresses in skip-tracing those elusive Claimants by other means.

The definition of stalking can vary, however. In California, stalking is defined by **(Penal Code 646.9)** *Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.*

Sub Rosa is not intended to maliciously harass or threaten to harm. It is used as a tool to gather evidence. But it is not to say that while gathering evidence an investigator can still over step the bounds of law. One example is in **Tunnell v. School Insurance Program for Employees, 157 Cal App. 4th 1056 (Court of Appeal, Second Appellate District 2007)**

In this case a school district hired an investigator to video tape the Claimant's private by invitation-only wedding and reception, and then the honeymoon. He might have gotten away with it if not for the pictures of the Claimant sun bathing on the balcony of her honeymoon suite.

While the public entity involved as a defendant in this case was found to be immune from liability, there is no doubt that the investigator's blatant invasion of privacy violation far outweighed the benefit of the videotaped activities.

You cannot film a subject in a private location unless the activity can be seen from a public vantage point.

So the answer to the "Is Sub Rosa considered stalking?" - is still no, but there are rules that must be followed to obtain the film.

Next month I'll continue the column on stalking in more depth.