

LOOK BEFORE YOU SNOOP
A Practical Guide for Hiring and Directing Private Investigators in
Family Law Practice

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State Bar of Texas
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CHAPTER 36

Curriculum Vitae

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EDUCATION:

Texas Wesleyan University School of Law- J.D.

University of Texas at Arlington - B.A.

University of Texas at Arlington Graduate Course Work MBA Finance

University of Texas at Arlington Graduate Course Work MPA

Texas Real Estate Commission - Full Broker Course Work

Approximately **9,000 classroom hours** of Law/Investigation / Law Enforcement Training

LICENSES:

(Historical Listing-All licenses may not be maintained)

State Bar of Texas-Licensed as an Attorney at Law under Bar Card No. 24034318

United States District Courts for the Eastern District of Texas-admitted

United States District Courts for the Northern District of Texas-admitted

Texas Real Estate Commission

Broker -1972/Present

State Board of Insurance -

- Local Recording Agent's License 1972/1996
- 02 Solicitor's License 1972/1997
- 06 Solicitor's License 1976/1989
- 0559 Approved Continuing Education Provider

Texas Commission on Private Security

- Owner/Officer/Director/Manager License - 1972/Present
- Licensed Private Investigator - 1972/Present
- Commissioned Security Officer - 1976/Present
- Licensed School Director - 1976/Present
- Branch Office Manager - 1974/Present
- Level 3 Commission School Instructor - 1980/Present
- Level 4 Instructor of Personal Protection Officers
- Approved Level 4 (PPO) School Director and instructor
- Licensed Personal Protection Officer
- Texas Certified Investigator (TCI) designation
- Approved TCPS continuing Education Instructor

California Board of Regulations - 1986/1992 - Owner/Officer/Manager of a P.I. Company

Oklahoma Board of Private Investigators - 1993/94 - Approved Continuing Education Instructor

Texas Education Agency - 1976/85 - Approved School and Director. Approved for VA funding.

Texas Department of Public Safety- Concealed handgun license

INSTRUCTIONAL EXPERIENCE:

1991/96 University of Texas Arlington Legal Assistant Program
1983/91 Fun Ed - CEU Course - 'How To Be a PI'
1984 Texas A&M University - Investigative Procedure - Interview Techniques
1986 University of Texas - Investigative Procedure
1987 UCLA - Investigative Procedure
1994 UTA - Investigative Classes
1990/93 US Department of Justice AUSA Training Sessions
1990 Dept of Labor & EEOC Contract Training
1994 US Department of Labor - TITLE 7&9 Investigative Training

Resume of Jim Bearden (12-31-04)

1991 US Department of Treasury - Customs/Border Patrol/Secret Service Contract Training
1972/Present Texas Commission on Private Security - Approved 30 Hour Training Course.
1980/90 North Texas Regional Police Academy
1984/86 Texas A&M Extension Service Regional Police Academy
1986/91 Dallas Sheriff's Academy - Occasional Lecturer
1991/95 State Insurance Board - How To Recognize a Fraudulent Claim
1991/95 State Board of Insurance - Subrogation and Asset Location
1972/76 Texas Real Estate Commission - Real Estate Principals and Practices
1985/Present Topical Speeches to Organizations
1996/Present TCPS MCE 'Mini-Academy' - 15 Hours Continuing Education
1996/Present Personal Protection Officer Training

EMPLOYMENT:

2003-Present Attorney-Jim Bearden & Associates, PLLC
2001-2003 Attorney-Burleson, Pate & Gibson LLP --Litigation attorney
1973-Present *President - CEO-* Bearden Investigative Agency, Inc. - An Investor Owned Corporation with a national reputation Dealing in sophisticated Investigations for Attorneys, Private and Governmental Clients.
1991-1993 - *Retired -engaged in non-profit entity management*
1972-1991 - *Founded* and Managed Private Investigative and Security Firm - Employed up to 600 People. Sold to public corporation.
1972-1984 - BEI, Inc. - *COB* of Commercial Construction and Real Estate Development Firm
1976-1984 - Center City Mortgage Corp. - **Co-Founder** and **Director** of this residential mortgage origination and wholesale purchaser of residential mortgages - Sold to National Mortgage Company in 1984
1974/76 - Lakeside Development Corporation - *Vice President/Director* of a Residential Construction Company.
1971/73 - *US Intelligence agency* - Special Operations Officer on Both Foreign and Domestic Assignment.

AWARDS & RECOGNITION:

2004/5 **State Bar of Texas-Legal Assistant Committee Member**
2003/04 **Chairman of Criminal Justice Advisory committee-Everest College**
2003/04 **Chairman Ethics Advisory Board-Texas Association of Licensed Investigators**
1993/4 **Chairman of the Board** - Texas State Museum of History
1993 **Vice Chairman** - Leonard Music Institute For Children
1991 **Director** -Presidential appointee- University of Texas at Arlington Alumni Association
1982/96 **Who's Who** in the Southwest, **Who's Who** in the US - Business - Multiple Years
1972 **City Council** Candidate - City of Arlington - 1972
1969 **Mayor's Commission** for Goals For Dallas
1980 **Presidential Certificate** of Appreciation
1995 **Committee Chairman** - Boy Scouts of America - Longhorn Council
1994 **Leadership Arlington**
1996 **US Olympic Committee Selection** as '**Community Hero**' **Torchbearer** of Olympic Flame
1997 **Ranked** as *twenty-fourth* (24th) **fastest growing** privately held firm in Texas (of 80,000 eligible) by the SMU Caruth School of Business CEO Institute of Dallas.
1981 Considered for appointment to the **White House** Staff.
1999/Present **Board Member-** City of Arlington Business Loan Review Committee and Property Rehabilitation Board
1972/ 1999 **Movies-** Approximately 25+ cases on which BIA worked have been made into movies
1972/1999 **Books-** Over 30 cases that BIA has worked on have had books written about them.

PROFESSIONAL ORGANIZATIONS AND AFFILIATIONS

(historical listing)

State Bar of Texas

American Bar Association

Texas Trial Lawyer

Admitted before the United States District Court for the Northern & Eastern Districts of Texas

Resume of Jim Bearden (12-31-04)

Texas Association of Licensed Investigators
Association of Certified Fraud Examiners
California Association of Investigators
Association of Licensed Investigators of New York
North Texas Private Investigators Association
American Society of Industrial Security
Professional Insurance Agents Association
National Association of Chiefs of Police
International Society for Professional Hypnosis
Leadership Arlington
Goals for Dallas
United States Process Servers Association
Delta Tau Delta Fraternity
The Leadership Council
The American Inns of Court-Judge Eldon D. Mahon chapter
Delta Theta Phi Law Fraternity
University of Texas at Arlington Alumni Board Member
Moot Court Society
Texas Certified Investigator (TCI) Professional Designation -TALI
TALI Professional Licensed Investigator (TPLI)
Leonard Music Institute-Vice Chairman
Texas State Museum of History-Chairman
Everest College-Advisory Board

ARTICLES AND PUBLISHED WORKS

Licensed Investigators, New bill requires all investigators be licensed, Texas Bar Journal, January 2004 ,Volume 67, Number 1.

Texas Divorce Law, The Texas Investigator, March 2001 Volume 7, number 3

The Texas Investigator, Quarterly Article as General Counsel to the Texas Association of Licensed Investigators on matters of significance to the profession.

Paralegal or Investigator? New law may require paralegals to be licensed to do investigations, Dallas Bar Association Headnotes, Volume 28, No. 8, August 1, 2004.

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LOOK BEFORE YOU SNOOP
A Practical Guide for Hiring and Directing Private
Investigators in Family Law Practice

By: Jim Bearden, TCI, JD, TLPI

Before becoming an attorney, Jim Bearden was a nationally known private investigator who was president of one of the largest private investigative firms in Texas. Jim Bearden has worked cases representing President Nixon in Watergate, Cullin Davis in nine separate trials, John DeLorean, Michael Irvin, represented parts of the British and Saudi Arabian royal families, and has been involved in cases that have been written about in approximately 35 books and approximately 30 movies over a 35 year career as a private investigator. He currently serves as the General Counsel for the Texas Association of Licensed Investigators.

You've seen the picture. Humphrey Bogart dressed in a shoddy suit, drinking whiskey in a dusty office in a third floor walk up. He's tough and persistent and he solves the case because he pulled a gun or scared a witness into confessing. Is that really what being a private eye is all about?

Without a doubt, many long time attorneys will swear that private investigators are more trouble than they are worth. Those attorneys will complain about the private investigator's illegal conduct, the poor evidence collection or the embarrassing statements on the stand. A previous offering before the advanced family law seminar even warned attorneys to stay away from investigators because of certain characteristics that were perceived to be incompatible with lawyers' needs. Is that a valid approach to the use of investigators in family law or other matters? Well, to be truthful, in a very few instances the answer would be "yes". Like any profession there a few bad apples, but the private investigative industry in Texas has changed remarkably over the last 25 years to one of the nation's leading and most professional private investigatory groups and one that is often used as a pattern for other states' licensing and regulation.

Private investigators are like any other experts. They have to receive clear and understandable directions from the attorney so that they understand the use of their work and the issues that are at play and how those issues will be presented by the attorney. Almost every time in the last 35 years that I have become aware of a private investigator who hurt his client's case, it evolved from an issue of communication between the attorney, the client and the investigator. Often, attorneys might expect unrealistic results for the amount of money authorized. Probably more frequently, attorneys contact investigators at the last moment and impress upon them the urgency of the task without any limitations on the method or manner

of accomplishing the task. Private investigators rarely violate the law, but many investigators don't have the sensitivity to the presentation of the results of their investigation in a court that the attorney should impart to them as part of the chartering process.

Yet, without question there have been some private investigators who truly engage in illegal acts. As this paper is published, a famous private investigator in California, who billed himself for years as "the investigator to the stars" has been indicted on dozens of counts of illegal wiretapping, fraud and assault in a highly publicized case. That type of behavior is more the exception than the rule in Texas but many ethical investigators have been tainted with the allegations. Few private investigators will risk engaging in the felony act of wiretapping any longer after passage of the Omnibus Crime Act Bill in 1968 which made such acts both a state and federal crime (TEX. PEN. CODE § 16.02, 18 USC 2510-2521). However, private investigators do often work the other side of that problem and regularly uncover scores of wiretaps illegally placed by a spouse in family law cases. Qualified private investigators now serve a limited law enforcement function in locating such wiretaps since almost no local police departments have resources or personnel available to do such sweeps in private matters.

In fact, most licensed (as opposed to registered) private investigators in Texas are a more pristine group than most police. In Texas, to receive a private investigator's license is technically statutorily more difficult than becoming a police officer, attorney or CPA. Private investigators are now a regulated part of the Texas Department of Public Safety and violations of the licensing act are often filed as criminal cases when applicable. Private investigators are also more affluent than most people believe. In a recent poll taken by the Texas Association of Licensed Investigators, the average private investigator grossed between \$150,000 to \$300,000 per year. Mean net personal income was in excess of \$60,000. Mean net worth for licensees was close to \$500,000. Approximately 65% of private investigators have college degrees, about 20% have advanced degrees and about 40% were formerly employed as state or federal law enforcement officers. Private investigators have requirements for minimum continuing education and have their criminal histories run at least every two years. Violation of their licensing statute is automatically referred to a division of the Texas Department of Public Safety and is then investigated by DPS troopers. The Private Security Board of the Texas Department of Public Safety regularly brings criminal cases against licensees for even relatively mundane technical violations.

There are currently approximately 2,000 persons in Texas lawfully licensed to conduct investigations

with approximately double that number of people showing as registered investigators or listed as support personnel. However, there remains a constant problem with unlicensed investigators, including police officers, illegally offering to conduct investigations for attorneys or friends and it is the unlicensed investigators who you normally hear about violating laws or in derogatory reports in the media.

Be careful when you hire any expert, including private investigators. However, hiring a private investigator, if done wisely, can give you the biggest bang for your buck and level the playing field in your family law cases when needed.

1. WHY USE AN INVESTIGATOR?

The overwhelming majority of divorces and family law matters are for poor or marginally employed parties. Each party will have bad things to say about the other party and many fine family law attorneys will “drink the wine” of their client’s fervent charges and assurances and go into court with nothing more than a swearing match amongst spouses and family members. That of course is not a totally bad thing if you happen to have the spouse or parent who will come off as more believable. Unfortunately, when a swearing match just won’t do, you need to get some facts on your side.

a) Facts v. Law.

Many attorneys seem to forget that family law cases involve facts as well as law. Certainly, law trumps fact and when law is on your side you may be able to rest easy. However, if the law is not clear or if you are before a judge who is known to have strong feelings about certain issues or to have a perceived bias towards a gender, employment, etc., you may need an expert to actually obtain some favorable facts. While private investigators are certainly good at documenting infidelity, drug use or child dumping, the most common uses of investigators, they can also be very influential in obtaining documentation regarding lifestyle, assets, income, roommates, friends, paramours and parents including their criminal history, work history, demonstrating hidden affluence, locating and interviewing witnesses, and obtaining information regarding abuse or neglect. Few attorneys actually go out into the field to interview neighbors, police officers, mailmen or landlords who won’t come into the lawyer’s office. Typically, only the most biased and committed witnesses will volunteer to interview with an attorney prior to hearing or trial. An attorney has to be pretty naive to believe family law cases, in which typical written discovery is at a much lower intensity level than in comparable civil disputes, that the attorney is likely to obtain documents from the opposing party that hurts that party’s case. Modern private investigators have become experts in not only

surveillances and other typical “gumshoe” traits but also the use of public open records acts to obtain governmental records, use of internet information to obtain deep background research at minimal cost and often are able to even rebuild wiped computer hard drives that may contain paramour contact, pornography or child sexual predator information. Of course by hiring an investigator to do interviews, the attorney avoids the risk of becoming a witness in the same case or having to put herself on the stand to prove a witness changed his or her story.

Family cases are as fact driven as law driven and the family law attorney may find that using qualified private investigators is a way to obtain the biggest bang for the buck for the client and to have a convenient means to impeach witnesses or to drive home a point from a third party viewpoint

b) Family courts are courts of equity.

Family courts are given broad discretion under the family code to exercise equity by use of the “Just and right” distribution of property and the “best interest of the child rule” in custody cases as well as many other areas of the code. The overwhelming majority of family court cases consist of the parties testifying, a few family members testifying and whatever other witnesses can be hop-scotched together. Since family court judges are not Solomon, they often tend to try to limit their decisions to a statutory minimum because they assume that one or more likely both parties are not being truthful. However, if large civil cases and criminal cases find a need for private investigators in their more restrictive venues where equity does not play a significant part, doesn’t it make sense that the appropriate use of private investigators to develop facts persuasive to a court of equity might be a good investment?

c) Good source of business.

Besides being an expense, investigators can be a terrific source of business for the family law attorney. In our society, virtually every citizen knows that if they are arrested, the first person they need to contact is their attorney. If a citizen is sued in a civil case, citizens know to contact an attorney. However, when it comes to family matters, to a huge number of people, they are hesitant to contact an attorney until they have determined that their suspicions are confirmed. Consequently, private investigator firms receive a large number of family law inquiries, the majority of which have not yet contacted attorneys. Commonly, callers to private investigative firms say that they don’t want to hire an attorney “and start the divorce” until they know for sure about their spouse’s fidelity, drug use or other issue. Developing a relationship with an investigator who advertises in the local yellow pages or is well known can be a boon for referrals. Once

infidelity or other issues are confirmed, the client is then willing or compelled to move forward. Bearden Investigative Agency, which I serve as Chairman, will make as many as 50 referrals a week for various clients that have contacted them about family law matters. Simply asking to be a member of the referral base is certainly possible, but most investigative firms are going to refer their clients to people they know and feel confident about how they pursue family law matters.

Few people have a family law attorney in mind when they hire a private investigative firm. The recommendation of the private investigative firm can be a strong basis for them to contact your office and generate revenue for you in a professional business relationship.

d) Get the advantage.

In every case there is an issue of fact and law. When you walk in the door of the court room, you should know what the parties have on each side. The case outcome can then become less the art of persuasion by the attorney than the presentation of compelling facts to invoke an area of law or to emote equity when fairness is required and can be factually demonstrated.

2. HOW TO SELECT AN INVESTIGATOR

Certainly, the best way to select and hire an investigator is to find someone referred to you by another lawyer. If family law lawyers don't use investigators in your locale, contact a local criminal defense lawyer, they will usually have someone they can refer. Alternately, most criminal courts maintain a list of court appointed investigators or as a last resort you can check your local yellow page listings. Those investigators in the yellow pages are typically the investigators who do more family law work.

There are several advanced categories of investigators promulgated by various associations including the generally accepted highest designation of Texas Certified Investigators (TCI) offered by the Texas Association of Licensed Investigators. There are currently only about 50 TCI's in the State of Texas. The TCI program requires publication of a white paper, a two day testing process and a minimum of five years experience. Other nationwide associations offer the PLI (professional licensed investigator), the "CLI" (certified legal investigator) and other designations that meet their particular organization's criteria. Obtaining any of these designations is difficult and will typically indicate an investigator with advanced training or education.

a) License required.

In Texas, a license is required to conduct investigations unless specifically exempted by TEX. OCC. CODE Chapter 1702. Section 1702.104 of the

Texas Occupations Code defines an investigations company as:

"A person acts as an investigations company for the purpose of this chapter if the person:

- (1) engages in the business of obtaining or furnishing, or accepts employment to obtain or furnish, information related to:

 - (a) crimes or wrongs done to or threatened against the state or the United States;*
 - (b) the identity, habits, business, occupation, knowledge, efficiency, loyalty, movement, location, affiliations, associations, transactions, acts, reputation, or character of a person;*
 - (c) the location, disposition, or recovery of lost or stolen property; or*
 - (d) the cause or responsibility for a fire, liable, loss, accident, damage, or injury to a person or to property;**
- (2) engages in the business of securing, or accepts employment to secure, evidence for use before court, board, officer, or investigating committee;*
- (3) engages in the business of securing, or accepts employment to secure, the electronic tracking of the location of an individual or motor vehicle other than for criminal justice purposes by or on behalf of a governmental entity; or*
- (4) engages in the business of protecting, or accepts employment to protect, an individual from bodily harm through the use of a personal protection officer."*

b) The licensing scheme.

If you conduct investigations in Texas, whether for remuneration or not, a license is required unless you fall within a statutory exception discussed below. The Texas Department of Public Safety-Private Security Board issues three general classifications of licenses:

- Class A License - for companies providing investigations only;
- Class B License - for companies providing security services only. This includes guards, patrol, locksmiths, alarm companies and certain other technical fields;
- Class C License - companies providing both security and investigative services.

There are currently approximately 5,000 licensees under the Class A and Class C license categories employing approximately thousands of employees in Texas.

The licensing scheme for the private security and investigative industry is similar to that between a real estate broker and a real estate salesman. A real estate salesman working for Century 21 Realtors can do everything that the owner of the company can do for a customer. However, the salesman cannot solicit business in her own name and is under the direction and supervision of the broker. Similarly, Licensees are the “brokers” of the investigative or security business. They meet a much higher standard of experience, are required to take and pass a test issued by the Department of Public Safety, they are required to be insured and to strictly supervise each registered (think salesman) investigator working for them. (TEX. OCC. CODE § 1702.119) Licensees generally must be at least 18 years of age (but pragmatically because of a three year experience requirement at least 21) and:

- (1) not have been convicted in any jurisdiction of a Class A misdemeanor or equivalent offense or a greater offense, unless the full pardon has been granted for reasons relating to a wrongful conviction;
- (2) not have been convicted in any jurisdiction of a Class B misdemeanor or equivalent offense for which the fifth anniversary of the date of conviction has not occurred before the date of application unless a full pardon has been granted for reasons relating to a wrongful conviction;
- (3) not have been found by a court to be incompetent by reason of a mental defect or disease and not have been restored to competency;
- (4) be suffering from habitual drunkenness or from narcotics addiction or dependence; or
- (5) have been discharged from the United States Armed Forces under other than honorable conditions. (TEX. OCC. CODE 1702.113)

Further, a licensee may be denied a license if the applicant has been convicted in any jurisdiction of a Class B misdemeanor or equivalent offense if the fifth anniversary of the date of conviction has occurred before the date of application unless a full pardon has been granted for reasons relating to wrongful conviction. (TEX. OCC. CODE § 1702.113(b)) Additionally, an applicant for an investigation license has to have three consecutive years experience in the investigative field as an employee, manager or owner of an investigation company or satisfy other requirements set by the commission. Applicant must pass a test issued by the Texas Department of Public

Safety-Private Security Bureau with greater than 75% grading average or more and maintain on file with the board liability insurance in the minimum amount of \$100,000/50,000/\$200,000. Corporate investigative firms must designate a manager who must meet all those requirements above as though they were independently licensed. (TEX. OCC. CODE § 1702.119)

All new hires and terminations in a regulated position must be reported to the Department of Public Safety no later than 14 days after the date of hire or termination.

Registered investigators are investigators working for the company owner or company manager. The company manager is directly liable to the Department of Public Safety and the client for any violations of conduct by a registered investigator licensed under him. The manager is required to be involved in overseeing the activities of the investigators and authorizing reports to be prepared. Registered investigators must be at least 18 years of age, meet all of the prohibitions on criminal convictions spread throughout Chapter 1702 of the Occupations Code and registered investigators cannot have been convicted of anything but non-violent Class C misdemeanors that did not involve weapons. Any other conviction will limit their ability to be registered through the private security board. However, once conducting investigations, the registered investigator can do anything the manager or Licensee can lawfully do as long as it is under the manager’s direction and control. Investigators are required to place their license number on all advertisements. It would not be wise to hire an investigator that does not exhibit a state license number that will start with an A, B or C and have four or five following digits. As a litmus test, determine whether the business card or brochure provided by an investigator lists his license number. If not, he may not be in compliance with the law and you should consider that in your hiring decision.

Private investigators are prohibited from “engaging in fraud, deceit or misrepresentation” at the risk of their license being suspended. This has not traditionally been interpreted by the Private Security Board as prohibiting the use of pretext or “sting” operations by investigators. However, for an unlicensed investigator to state untruthfully that he is licensed or within an exception to licensure is a Class A misdemeanor. TEX. OCC. CODE §1702.365 makes it a violation allowing the Private Security Board to have a license revoked if an investigator engages in or assists the abduction or attempted abduction or the threat of force or the use of misrepresentation, stealth or unlawful entry to abduct a child who at the time of the abduction or attempt is under the care and control of a person who has custody

or physical possession of the child under a court order or is exercising possessory control.

c) Lawyer Beware!

TEXAS OCCUPATION CODE §1702.386 makes it a Class A misdemeanor if a person “contracts with or employs a person who is required to hold a license, registration, certificate, or commission under this chapter knowing that the person does not hold the required license, registration, certificate or commission or who otherwise, at the time of the contract or employment is in violation of this chapter.”

Therefore, an attorney who hires an unlicensed investigator in violation of Texas Occupation Code 1702.386 could be charged with a Class A misdemeanor. At the time of the writing of this article, I am aware of at least two cases where the Department of Public Safety officers are currently trying to make criminal cases against attorneys under this section. Private investigators have a special status under the law (Tex. Occ. Code 1702.3863) to arrest bail jumpers (Tex. Occ. Code 1702.3863). A person commits a Class A misdemeanor if they impersonate a security officer or intentionally violates Article 1702. (1702.3875, 1702.388)

d) Your rights when hiring an investigator.

You have specific rights when hiring an investigator. These rights include that the private investigator must offer you a written contract at the time of contracting the service. It is not mandatory that you actually sign a contract unless the investigator requires that as part of his routine business practice. He must simply offer the contract to the client or his representative. Licensees must carry out any contract for services entered into with the client except for reasons deemed to be unlawful. If at any time there is a fee dispute, you may request a copy of a contract which must be provided to you within seven days. Each such contract must contain the contact information for filing a complaint with the Private Security Board. Upon request, a written report shall be furnished by the licensed company to the client within seven days after a written request is received from the client. (Tex. Admin. Code Title 37, Part 1, Chapter 35, Subchapter C, Rule 35.34 et seq.)

e) Exceptions to the need to be licensed.

As stated above, to conduct an investigation in Texas you must either be licensed or fall within one of the stated exceptions in Chapter 1702 of the Texas Occupations Code. There is a large laundry list of exceptions but I will deal with those in the investigative field that deal primarily with exceptions for licensing of investigators

- a. Government employees while acting as a government employee.
- b. Peace officers acting as a peace officer or while working in an employer/employee capacity as a security guard, watchman or patrolman for a private entity but not as an investigator. There is no exception for police officers in Texas to conduct private investigations unless they are in a direct employer/employee relationship with the client (ie: meets the IRS guidelines for employees) or they are properly licensed.
- c. Credit bureaus or debt collectors.
- d. Repossessors.
- e. Companies involved in psychological testing or interview services to determine attitudes, honesty, intelligence, personality or skills for pre-employment purposes.
- f. Persons engaged in obtaining information under the Public Information Act.
- g. Licensed engineers.
- h. Employees of Cattle Associations who inspect livestock brands.
- i. Land men performing activities in the course and scope of the land men’s business.
- j. **Attorneys** while engaged in the practice of law.
- k. Records retrieval companies.
- l. Insurance adjustors, insurance agents or insurance brokers licensed by the State Board of Insurance conducting duties in connection with insurance transacted by that person.
- m. An individual employed in an employee-employer relationship exclusively and regularly by one employer in connection with the affairs of the employer. (Section 1702.323) and other specific exceptions.

f) Attorney exception.

Since the initiation of the regulation of investigations in Texas in 1971, attorneys have received a broad exemption from any licensing scheme. The exemption is based upon the legislative recognition that attorneys have a duty to investigate cases in which they are representing parties. The current exemption for attorneys have remained substantially unchanged since 1979. Texas Attorney General Opinion LO-98-005 noted “*the exception for an attorney at law in performing his duties appears to allow attorneys to perform the type of investigative work normally required in the course of rendering legal services, such as the discovery of evidence, witnesses, and facts, without having to be licensed as investigators under the act.*”

g) Paralegal exception.

In 2004, your author wrote an article for the Texas Bar Journal noting that a 2003 change to Texas Occupation Code §1702.323(e) omitted a previous exemption granting an exception for employees engaged in an employer-employee relationship conducting investigations for the employer's business. As a result, the Department of Public Safety requested an Attorney General's opinion subsequently rendered under Opinion GA-0275 on November 24, 2004 which held by a convoluted process that paralegals were not intended to be excluded and thus were not required to be licensed as investigators by the legislature. Although the rationale for this Attorney General's opinion rendered to the State Bar of Texas is suspect, the Attorney General's opinion forestalled any action to prescribe mandatory licensure of paralegals as investigators in Texas as long as they are involved in conducting investigations under the direction of attorneys and they are in some sort of employer-employee relationship to the attorney.

h) Use of Police Officers as Private Investigators

As mentioned above, particularly in Southeast Texas, a large number of police officers conduct investigations for attorneys when they are not properly licensed and thus are in violation of the law. At one time, Harris County itself had about 200 licensed private investigators and almost 4,000 unlicensed police officers and constables conducting illegal investigations. Police officers cannot conduct investigations without being licensed or registered or otherwise falling within one of the exemptions within Chapter 1702 of the Texas Occupations Code. Remember that it can be a Class A misdemeanor to knowingly hire someone to conduct an investigation who is not properly licensed. Further, as discussed below, there is a growing history of courts not allowing unlicensed investigators to testify in cases because to so testify would be a criminal admission. Also, careful examination of the exemption articles should be undertaken to determine if a hostile expert had to conduct an investigation to reach his opinion. Subchapter N of the occupations code (Texas Occupation Code §1702.321 et seq) details all of the variations of occupations that receive an exception and do not have to be licensed to conduct an investigation. Only Professional Engineers have a blanket expert exception to the requirement to be licensed and if a witness had to conduct an illegal investigation to reach a conclusion, his testimony may be barred.

i) Consider your needs.**i) Energy v. Experience.**

Experienced investigators tend to be more expensive but, somewhat by nature, they tend to be older and somewhat less energetic. While everyone

would love to hire the most experienced investigators, you may not always be able to do so. Consider whether the investigation you are requesting requires analysis abilities or simply significant energy to interview a large number of witnesses, conduct surveillances or operate in difficult physical circumstances. The younger more energetic investigators may substitute experience with training, education or good instincts. However you may feel that you need a more experienced investigator to handle more complex cases while assigning more energetic, and perhaps more enthusiastic, investigators to cases where energy is an important commodity. Think what you will need in your investigation. Investigators, like attorneys, often have mentors and have several mechanisms to communicate amongst a large number of investigators in the state. Therefore, even a less experienced investigator can often get on an electronic bulletin board to contact a more experienced investigator who will almost always try to assist him/her if needed.

ii) Cost estimates.

Costs for private investigators vary widely across the state. A recent survey of the Texas Association of Licensed Investigators revealed an average hourly rate of approximately \$85.00 per hour with mileage rates at \$0.40 per mile but rates range from \$35 to 150 per hour. Most investigators have billing practices very similar to attorneys so that they bill for travel time, consult time and research time as well as all expenses including even office overhead. (Fall 2005 TALI survey) Investigators in smaller towns charge less than the average while investigators in major metropolitan areas may routinely charge as high as \$125.00 per hour or more. The average for an infidelity surveillance will typically run about \$3,500 to have a real chance of likely success. However, in unusual circumstances it can go much higher or, if lucky, much less. Proper background vetting of parties or witnesses will run from about \$100.00 per name to \$1,000 per name depending upon the depth, scope and geographical reference involved. To limit costs in surveillances, I suggest the following:

1. See if your client can ascertain a pattern of behavior of the subject. It's rare that affairs happen spontaneously or on a whim. For two people to get together in our busy society requires planning and some manipulation of a schedule. Therefore, interludes tend to occur in some pattern. If your client will carefully think about them, he/she can often discern them.
2. If no pattern presents itself, a good investigator should be able to look at the gender, age, race, economic and work

situation of the person and come up with likely times for them to be getting together. Make decisions based on experience in your locale and not on urban myths. For instance, Sexual interludes occur very rarely on lunch breaks. Actually having sex or sexual contact in the work place is a relatively rare phenomena. However, early morning rendezvous prior to work, are very common as well as immediate post-work rendezvous. Let an uninvolved party decide when it would be best to watch. It is not wise for an attorney to speculate what or when you would do a certain act. Let someone with more experience in such things make the call.

Have your clients look for the following to tip them that an affair may be occurring:

For women:

1. Look for a purchase in lingerie or a change to more exotic undergarments
2. Look for an enhanced desire to look good when leaving the house.
3. See if the female stops telling her spouse she loves him. Women typically “love” only one man at a time. When the switch flips from husband to another, women tend not to lie about loving the husband.
4. Look for a pattern of hiding or hoarding money. Women tend to be insecure before leaving a relationship.
5. Watch for a decrease in sexual desire towards the spouse.
6. Look for a desire to not be seen in public with the spouse.
7. Look for replacement clothes carried in her car.
8. Look for an increase in volume and amounts of ATM withdrawals.
9. Look for a shift in parental duties to the husband.
10. Watch for a newfound health spree or loss in weight. Women involved in affairs often obsess about their physical appearance.
11. Watch for failure to talk or think in terms of future goals and promises.
12. Watch for a change in friends, particularly from married friends to single friends.
13. Look for a change in schedule, longer work hours, unusual shopping sprees or “girl get-togethers” when the women are not known to the husband.
14. Watch for locked cars or a hesitancy or resistance to giving keys to her car to her spouse.

15. Watch for cell phone records and charge card bill copies to disappear.

Women often won't be as stealthy as males about a romantic relationship. They often get caught up in the romance and future of the relationship and care little what others may know.

For males who might be having an affair:

1. Look for a change in schedule, particularly overtime not reflected on paychecks or sudden projects or work emergencies that don't seem real.
2. Look for increased or decreased sexual frequency. Many men get excited by the concept of having two women and sexual frequency will actually increase rather than decrease according to myth.
3. Watch for secret withdrawals of money or failure to deposit checks. If the man can control the flow of money, watch for him suddenly saying he is losing money or times are tough.
4. Watch for change of credit card bills, cellular phone bills, etc. from a home address to a post office box or office address. If so, there is some reason why he wants to keep that information secret.
5. Look for the man who comes in smelling newly showered after a hard day's work.
6. Watch for a change in drinking or drug habits.
7. Monitor cell phone use. There is no reason why a spouse should take cell phone calls outside or in the bathroom unless it is clearly someone he does not want his wife to hear. Alternately, watch for his refusal to answer his cell phone in the spouse' presence.
8. Watch for transfer of assets. Most men operate on the theory of “your kids, my money”.
9. Watch for the husband to have a separate relationship with his children that does not include his wife. He may be beginning to feel guilty.
10. Look for sudden weight loss, new haircuts, new clothes or anything else that will make the male feel younger or more attractive.
11. Alternately, look for outward signs of affluence that the male has not exhibited before. He may want to flaunt his ability to adequately provide a lifestyle
12. Watch for a disconnect between the husband and his long time married friends or a change in his weekend leisure habits.

13. Look for lockers at clubs, post office boxes, locked cars or locked briefcases that signal he has documents or correspondence he does not want his spouse to see.
14. Watch for new sexual techniques that he suggests or tries out. He learned it somewhere!

However, men and women have fundamentally different approaches to sexual liaisons. While it is always dangerous to generalize, women tend to tie sex to love and have affairs because of romantic involvement or perceived love. Women tend to love one man at a time and when the switch flips from one man to another, they can be very harsh, calculating and unrepentant.

Men, on the other hand, see sex as a sport akin to football or baseball where it is important to have a high score. Many men often have little emotional involvement with the other woman even when having a seemingly torrid affair. However, men in our society embrace duty above almost all other emotions. After all, it's men who will fight or die for their religion, their government, their way of life or their families. Response to duty is an accepted John Wayne characteristic of Texans. Men who get caught having affairs usually feel extremely guilty and feel that they still have a strong financial duty to their spouse and family. They often truly don't understand why a wife would leave them "*just for having an affair*". Accordingly, until they can convince themselves they have somehow been wronged or their bad acts were the result of the acts of the spouse, men tend to be very malleable and may often be manipulated to agree to disproportionate divisions of property because of their guilt and belief that they need to provide for their children and the children's mother.

iii) Define your needs.

When hiring a private investigator take some time to explain your case, its strengths and its weaknesses to the investigator. Make sure that you explain the history of the case, the temperament of the judge and what you think will help you most in your case. The more an investigator knows the better he can help you. In every investigation, a decision tree has to be navigated by the investigator to try to obtain useful information. If he/she has a better idea of what will help you, they can more accurately manipulate that decision tree to get you results.

iv) Don't just go for the known. Win with the unknown.

Be specific when describing your needs for your case but be careful not to constrict the investigator's options too narrowly. People are complex animals who do totally absurd things. Don't assume that the

subject of your investigation has always behaved or is behaving in accordance with his public persona. We all have dark sides and each reader of this has secrets that have not been divulged to their closest friend or spouse. Leave enough latitude with your investigator to find those surprising things.

3. A PRIMER ON INVESTIGATIONS.

The "experience" that investigators brag so much about or that attorneys or other clients desire largely results from two basic fonts of wisdom: understanding human nature and relationships and secondly, understanding the thought process of conducting an investigation. Governmental investigators with their power of subpoena, arrest, search and seizure tend to approach investigative issues far more directly and with the use of force. Persons in the private sector, who do not have the ready access to search and seizure, arrest or even effective discovery techniques have to be more focused on the techniques they use to achieve a desired goal.

When given broad definitions, every technique of investigation that you have ever heard of, used, seen on TV, CSI or used in sophisticated governmental investigations falls into three basic categories. It is the effective use and interplay of those three basic categories which allows the investigator to achieve a desired result. This article can't deal with all of the different recipes of interplay between these three basic techniques of investigation but at least understanding the techniques will allow an attorney to discuss with an investigator the approach to more complex issues.

a. Three general techniques of investigation.

Every investigative technique that you can imagine would broadly fall into either the interview, surveillance or research categories. Given the broad definitions discussed herein, and understanding the strengths and weaknesses of these three techniques can yield good strategy to achieve desired results.

- (i) **Research** - If we define research as any inquiry into any past documented event, research covers a broad spectrum. We never research the future. We may research the past to anticipate what will happen in the future but in this case the word "anticipate" is synonymous with "guess". You can only research that which has already happened. Research can involve such divergent areas as courthouse records (there are over 1,100 different types of courthouse records filed in every courthouse in Texas), public record requests, scientific inquiry, examination of documents and hundreds of other acts. It is a truism that there is nothing of lasting importance that happens to a person that is not documented by some governmental record. Births, deaths,

divorces, lawsuits, voting patterns, real estate, purchases, letters, tax, documents and other matters are all documented. The issue with research is less the question of do documents exist but the issue of where are those documents? In 1988, a government agency estimated that the average adult American had the equivalent of a stack of papers 16 foot high related to them simply at the Federal level. Add on all the state, local and county records and imagine the volume of documents ultimately available and the availability of records is endemic. Additionally, factor in the internet, libraries and the plethora of databases available to the public and there is relatively little in many people's lives that is not documented in some written or electronic format. The Internal Revenue Service is building a comprehensive database that will eventually tie every check written, every deposit made, every credit card charge, every loan issued, every court filing, every wire transfer together with criminal records, your tax returns and other documents that will give an extraordinary view to the government of your daily behavior and patterns. Such records are not readily available to non-governmental sources but can often be obtained by Freedom of Information Act requests or subpoenas in litigation.

- (ii) **Surveillance** - A broad definition of surveillance includes not only what's seen or videotaped by an investigator but also drive by of locations, audio surveillance on authorized wiretaps to shopping mall video cameras. It simply includes the use of audio, sensory or visual devices to ascertain activity. When one thinks about how often during the day you are on video camera and the almost absolute lack of control over either knowing you are being watched or who has control of the tape or digital image can be daunting. Certainly lawyers who go into big city courthouses or any Federal courthouse should recognize they are on video tape for a substantial portion of the time they are in the courthouse. Many cities have red light cameras which can be accessed from the internet, many bars and restaurants have a similar feature which allows the owner or manager to watch the restaurant and his employees and customers without either knowing of the existence of the surveillance. Accessing such locations can be very useful if a favorite restaurant is identified.. In Family Law investigations, surveillance often still means the physical act of following someone to see where they go, who they see and what they do in a given time span.
- (iii) **Interview** - An interview can be any sort of interpersonal communication. It can be in person, it can be by reading a deposition, a telephone

conversation, email or hundreds of other formats where individuals share information by personal communications. Few attorneys reading this will think that they are not good interviewers. But interviewing someone in their living room has nothing to do with cross examination skills or court room demeanor. About the quickest way to be invited out of a potentially favorable witness' house is to lapse into court room demeanor. It just doesn't work in another person's castle. Professional interviewers use a variety of techniques to get information and to impart information often without the subject even being aware that they have given valuable information.

Using an interplay of research, surveillance and interview is what every investigator does in every case. Think in terms of what your case needs before you make strategic decisions either hiring an investigator or the track that you authorize the investigator to proceed upon.

This forum is not a primer to teach attorneys how to do investigations. It is simply a means of trying to qualitatively make decisions in a case where you think an investigation might be useful.

b. Techniques of Investigation.

There are a lot of issues that have to be considered by the attorney and investigator to both obtain information and to make it permissible.

On some of the more common techniques of investigation itemized below, I'll summarize the general rule and then give detail for those innumerable little exceptions.

i) Surveillance.

General rule: You can surveil anyone in public as long as they have no objective expectation of privacy and as long as the surveillance does not become harassment.

Although there are four distinct torts of invasion of privacy, Texas recognizes only three:

1. Intrusion on seclusion
2. Public disclosure of private facts
3. Appropriation of name or likeness
4. Texas does not recognize at this time the tort of invasion of privacy by false light.

Cain v. Hearst Corp., 878 S.W.2d 577,578 (Tex. 1994).

Of the above three, surveillance itself typically implicates the tort of intrusion on seclusion. The basic elements of intrusion on seclusion include:

1. The defendant intentionally intruded on the plaintiff's solitude, seclusion, or private affairs;
2. The intrusion would be highly offensive to a reasonable person and;
3. The plaintiff suffered an injury as a result of the defendant's intrusion.

Clayton v. Weisner, No. 12-03-00251-CV; 6-15-05(Tex. App.–Tyler 2005, Pet. Filed 11/10/05); *Billings v. Atkinson*, 49 S.W.2d 858,859-60 (Tex. 1973); *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993).

However, intrusion upon seclusion requires an actual intrusion either physically or otherwise. *Valenzuela* 653 S.W.2d 513. Non physical intrusion can be by non-physical means such as wiretapping or eavesdropping. *GTE Mobilenet v. Pascouet*, 61 S.W.3rd 599, 618 (Tex. App.–Houston[14th Dist.] 2001, Pet. Denied) Intrusion on seclusion is a quasi trespass tort and typically involves activity such as wiretapping, burglary or opening private mail or email. *Dove v. United States*, 83F.Supp. 2d 833, 840 (S.D. Tex. 2000). To prove an action for invasion of privacy by intrusion on seclusion, the plaintiff must establish the defendant's intrusion would be highly offensive to a reasonable person. *Valenzuela* 853 S.W.2d 513. The intrusion must be substantial enough that an ordinary person would feel severely offended, humiliated, or outraged. *K-Mart Corp. v. Trotti*, 677 S.W.2d 632, 637 (Tex. App.–Houston[1st Dist.]1984).

Publication of private information in this tort requires publication to a large group or disseminated to so many people that it becomes public knowledge. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682 (Tex. 1976).

To prove an action for invasion of privacy by intrusion on seclusion, the defendant must intrude on the plaintiff's private place or private matters. If the intrusion involves a public place or public matters, the defendant is not liable for invasion of privacy. *Floyd v. Park Cities People*, 685 S.W.2d 96, 97-98 (Tex. App.–Dallas 1985, *no writ*)(no invasion of privacy when photographed standing in his front yard). The courts have also required the intrusion to be unreasonable, unjustified or unwarranted. *Mobile Video Tapes*, 43 S.W. 3rd 48; *Household Credit*, 989 S.W.2d 84; *Farrington v. Sysco Food Servs*, 865 S.W.2d 247 (Tex. App.–Houston[1st Dist.] 1993, writ denied). If the plaintiff has a reduced expectation of privacy the defendant is not liable for invasion of privacy. *Thomas v. Allsip*, 836 S.W.2d 825, 828(Tex. App.–Tyler 1992, *no writ*). Conducting an investigation of employees during work hours corresponds to a reduced expectation of privacy when done during normal business hours and on business premises. *Patton v. UPS*, 910 F.Supp. 1250, 1276(S.D.

Tex. 1995) Some examples of intrusion on seclusion include:

1. Wiretapping. *Collins v. Collins*, 904 S.W.2d 792,796 (Tex. App.–Houston [1st Dist.] 1995)
2. Entering a plaintiff's home without permission. *Gonzales v. Southwestern Bell Tel. Co.*, 555 S.W.2d 219 (Tex. App.–Corpus Christi 1977, *no writ*)
3. Burglarizing a plaintiff's office. *Trevino v. Southwestern Bell Tel. Co.*, 582 S.W.2d 582, 585(Tex. App.–Corpus Christi 1979, *no writ*)
4. Blatantly following, harassing or spying upon a subject with the intent to annoy. *Kramer v. Downey*, 680 S.W.2d 524 (Tex. App.–Dallas 1984, writ ref'd n.r.e.)
5. Intentionally videotaping sex between consenting adults. *Boyles v. Kerr*, 806 S.W.2d 255, 259 (Tex. App.–Texarkana 1991) *Rev'd on other grounds*, 855 S.W.2d 593 (Tex. 1993)
6. Setting up video camera in a residence without the resident's permission *Trevino v. Southwestern Bell Tel. Co.*, 582 S.W.2d 582, 585(Tex. App.–Corpus Christi 1979, *no writ*)
7. Following, spying on and intentionally being seen by the plaintiff or harassing the plaintiff. *Kramer v. Downey*, 680 S.W.2d 524, 525 (Tex. App.–Dallas 1984, writ ref'd n.r.e.)

In Texas, it is not the manner of intrusion upon seclusion that constitutes the offense but the intrusion itself. Whether the intrusion is by video camera, technical device or simply by eyesight, does not appear to be an issue. The manner of recording or documenting activity is not material unless there is an actual intrusion on seclusion, and then the intrusion itself is the offense and not the manner of its implementation. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682 (Tex. 1976).

Additionally, a large number of cases involved the intrusion upon seclusion in a tort in a different context such as criminal filings, employer actions, public policy concerns, etc. Essentially, there are some places that have widely been proscribed from surveillance even though some of those areas may be open to the public such as: bathrooms, gyms or spas, bedrooms, hotel rooms, medical offices, changing rooms, private clubs and other locations unless a participant, owner or resident permits the intrusion.

ii) Trash Pickup.

Private investigators often find treasure troves in trash collection of subject's trash. Although definitely not a pleasant thing to do, such evidence is regularly collected and introduced as evidence in criminal and

civil proceedings throughout the US. In *California v. Greenwood*, 486 US 35 (1988) the United States Supreme Court considered in a criminal case the parties ability to introduce trash produced by an individual and seized by an opponent when discarded. This case remains the seminal case in this field. Although rendered in a criminal case, the acceptance of such evidence in a far more structured criminal evidentiary setting than in most Family Law cases is sufficient to justifying such evidence to be introduced. In the criminal context, the searches were permitted even when seemingly in violation of the Fourth Amendment which proscribes warrantless searches and seizures by police. However, the case discusses the expectation of privacy of Greenwood and finds that no reasonable expectation of privacy can be expected when one places their trash in plastic bags on the curb. To assert a reasonable expectation of privacy in your garbage, there has to be both an objective third party expectation of privacy under the circumstances as well as a subjective expectation of privacy. The Supreme Court held that “a person has no legitimate expectation of privacy and information he voluntarily turns over to third parties”. *Smith v. Maryland*, 442 US 785 (1979). However, the trash must be taken from outside the curtilage of the home or from a public area. It’s noteworthy that in most cities, the property owned as a right of way by the city will extend approximately 13 feet from the curb. Certain subdivisions may vary but most trash is put out on publicly owned property to be picked up, even if it may not appear to be so on first glance. More complex issues arise when trash is recovered from dumpsters, incinerators or other items. The issue of payment for recyclables as well as the shredding of documents may express a higher expectation or interest in privacy. However, in Greenwood the court stated “*our conclusion that society would not accept as reasonable respondent’s claim to an expectation of privacy and trash left for collection in an area accessible to the public is reinforced by the unanimous rejection of similar claims by the Federal Courts of Appeals. In addition, those appellate courts that have considered the issue, the vast majority have held that the police may conduct warrant less searches and seizures of garbage discarded in public areas.*”

Accordingly, as long as trespass does not occur, the trash is not maintained within the curtilage of the residence or there is an obvious greater expectation of privacy, trash may be obtained and used in formal proceedings.

iii) People/vehicle tracking.

What was once the province of comics and cartoons is now the technology available to investigators. Massive advances in the use of GPS systems and the attendant miniaturization of the

necessary components have created an opportunity for high tech tracking of cars, people and objects by investigators and law enforcement officers while sitting at their desks. There was a time when Sean Connery in an early James Bond flick opened his glove compartment and had a beeping dot going down the road which showed the location of the bad guy. Those type of tracking devices are routine today and can create unique opportunities as well as unique problems in the Family Law context. Car tracking devices cost as little as \$250. They run for a week on a battery charge, attach magnetically to the bottom of a vehicle and can be tracked by a person sitting at a computer with real time signal. Even cheaper are GPS tracking devices that are put on cars, log locations and are removed later, downloaded to a computer and give a historical perspective on the travel. Investigators routinely wear watches that have built in GPS tracking, emergency notification, and up to seven days of audio recording in what seems to be an average watch. Belt buckles are made for children, shirt buttons have the ability to respond to locator beacons and the miniaturization and tracking of our society becomes ever more concerning. Most modern cell phones can be located within a few feet by “cell phone pinging” by federal and local authorities. The very fact that a cell phone is turned on means it is in communication with a tower and its location can either be triangulated to within about 100 feet , if an older cell phone, or, if a newer GPS style cell phone, it can be located within as little as seven feet. Certain shipping containers have built in “tracking dots” that respond to signals on highways and intersections to track that parcel as it moves across the country. While these tracking devices have tremendous uses for the security of our children and our property, they are certainly available for abuse.

Texas, unlike most states, has responded by creating Texas Penal Code §16.06: *Unlawful Installation of a Tracking Device*. That statute defines a tracking device as “a device capable of emitting an electronic frequency or other signal that may be used by a person to identify, monitor or record the location of another person or object.” It then creates the offense “a person commits an offense, if the person knowingly installs an electronic or mechanical tracking device on a motor vehicle owned or leased by another person.” This Class A misdemeanor offense then has several affirmative defenses to prosecution which include obtaining the effective consent of the owner before the device was installed, use by a police officer, or 16.06(d)(4) when it was “a private investigator licensed under Chapter 1702, Occupations Code who installed the device; a) with written consent: i) to install the device given by the owner or lessee of the motor vehicle; and ii) to enter private residential property, if that entry was necessary to install the

device, given by the owner or lessee of the property.” There is a paucity of cases involving this Penal Code Section in the appellate history. However, it seems fertile ground for future Family Law decisions regarding whether a motor vehicle is “owned or leased by another person” in the community property context. A good argument is that separately managed community property vehicles are still community property and that the tracking device is less to track a spouse than to track assets of the marriage.

While the use of GPS and tracking devices makes it theoretically easier to surveil the location of persons or things, such GPS tracking devices are often not nearly so accurate that they can actually be used to find someone’s current location absent large amounts of time. Additionally, while it may tell you that a person’s vehicle is at an apartment complex, it does not tell you who in that complex they are seeing or what they are doing there. At the end of the day, manned surveillance, although typically more expensive, can be and is a far better manner of surveilling persons and gathering evidence.

(3) Cell Phone “Pinging”

As a result of the series of unfortunate accidents involving lost persons with cell phones who called 911 operators, the US Congress in the Wireless Communication and Public Safety Act of 1999, subsequently codified in part at 47 USCA 222 amended the telecommunications act to require the technology to locate geographically individual cell phones on a nationwide basis. The 2001 Patriot Act also greatly expanded the concept and expedited the implementation of technology so that individual cell towers can be polled by local 911 operations as well as Federal authorities to identify the location of a specific cell phone. However, Section 5 of 47 USCA 222 amended the telecommunications act to extend privacy protection for the call location information of a cell phone user. 47 USCA 222(5)(f) *authority to use wireless location information-without the express prior authorization of the customer* states a customer shall not be considered to have approved the use or disclosure of or access to call location information concerning the user of a commercial mobile service. In other words location of a specific cell phone is a special class of customer information which can only be used or disclosed in an emergency situation, absent express prior consent by the customer. The 5th Circuit in *Re: Pin Register & Trap/Trace Device with Cell Sight Location Authorization*, 396 F.Supp.2d 747; 2005 (S D. of Tex–Houston, decided October 14, 2005) held that a cell phone user may very well have an objectively reasonable expectation of privacy in its location information and cell phone pinging or location is illegal. Since this technique is apparently on its way to being outlawed in the US, several out of country

database operators have offered to be able to trace cell phones to a specific geographical location by “pinging” a cell phone. “Pinging” entails sending a signal to a cell phone that does not result in a ring but allows GPS or triangulation of the location of that cell phone when it replies. In 2004 and 2005, such services were available and routinely offered to various police departments and private investigative agencies. However, subsequently most police departments have determined that such location services are not accurate and that the technology simply does not exist to assist them in crowded urban areas by locating a cell phone. However, the US Marshall’s Service has moved forward with technology and has enhanced their ability to use such cell phone “pinging” for fugitive recovery. Additionally, it appears that if such cell phone “pinging” is utilized in the family law context, it may violate the Wireless Communications and Public Safety Act of 1999 and such a violation of the expectation of privacy may open users to the tort of intrusion on seclusion.

(4) Cell Phone GPS.

However what has become increasingly popular is for spouses, employers or partners to provide cell phones with built in GPS software which covertly allows the monitoring of the cell phone’s location. Normally, in these cases, the cell phone is actually owned by the community estate or employer and often the user of the phone will not know of the capabilities of the phone. No Texas cases could be found on this scenario once again showing that technology often outpaces law. Many parents give children GPS phones in order to determine whether their child is being truthful as to their location. The minimal cost (as low as \$25 per month) and anonymous nature of the GPS feature on the phone, creates real risks for the non-tech savvy party. A trend that has become very common, is for a controlling spouse to claim the other spouse’s phone is acting up and needs to be replaced. It is then replaced with a GPS enabled phone which for a very minimal fee allows the installing spouse to sit at a computer screen and see movement throughout the day in real time.

Additionally, some cell phones now have the capability to be programmed to automatically forward all text messages to another location. A new breed of sophisticated phones largely designed for business and conference calling can allow an employer or spouse to dial in and hear a cell phone conversation while it is occurring without either communicating parties giving their permission or having knowledge. (See wiretapping below).

iv) Wiretapping.

Traditionally, the term “wiretapping” referred to the interception of a conversation that was transmitted

over a telephone wire. Today, the term has a much broader application including not only the interception of telephone calls, but also the interception of oral private conversations and electronic communications such as emails and computer to computer transfers. Three different acts allow for different remedies for wiretapping in Texas:

1. The Texas Criminal Wiretap Act (Tex. Pen. Code §16.02 and Tex. Code Crim. Proc. art.18.20)
2. The Texas Civil Wiretap Act (Tex. Civil Practices & Remedies Code, Chapter 123), and
3. The Federal Wiretap Act (18USC § 2510 et seq).

Although two of these acts are criminal in nature (1 & 3) each also allows civil remedies.

It is noteworthy that under the three acts, 1 and 3 allow criminal and civil prosecution for interception of oral communications, all three allow civil claims for interception of wire communications but again only 1 and 3 allow civil remedies for interception of data as opposed to oral communications. No. 1 and 2 above allow civil actions not only for the actual interceptor but for the one who obtains another to intercept the communication. Additionally a cause of action for wiretap can arise when one simply uses an improperly obtained communication or when such improperly obtained communication is disclosed.

The Texas Penal Code criminalizes the intentional interception, disclosure or use of wire, oral or electronic communications. Tex. Pen. Code § 16.02 (b). The Texas Code of Criminal Procedure makes a person subject to civil liability for committing the same offenses. Tex. Code Crim. Proc. art. 1820 § 16(a).

Rule: It is illegal and civilly improper to knowingly or intentionally intercept wire, oral or electronic communications to which the interceptor is not a party to the conversation or in which he has not received the permission of one of the parties to the conversation.

While the manner of transmission is important, (electronic, oral, wire, etc) the manner of interception is not distinguishable (intentionally picking up a receiver, placing a recording device, placing a remote broadcast device) to the subsequent criminal or civil prosecution. The elements of wiretapping under the Texas Criminal Statutes which allow for civil recovery are:

- 1) the plaintiff or victim made a wire, oral or electronic communication; and
- 2) the defendant did any of the following:

- a) intentionally intercepted or solicited another to intercept the plaintiff's communication;
- b) intentionally disclosed the plaintiff's communication to another when the defendant knew or had reason to know the information was obtained through an illegal interception;
- c) intentionally used the contents of the plaintiff's communication when the defendant knew or was reckless about whether the information was obtained through an illegal interception, or
- d) intentionally used or solicited another to use a device to intercept the plaintiff's oral communication.

Of course, in the family law field things are never quite as simple as they are in the criminal context.

Can a spouse intentionally wiretap the other spouse? There is still a grey area under Texas and federal law regarding the criminal liability for wiretapping another spouse and the admissibility of such wiretapped tapes. **The general Rule is that at least two appellate courts in Texas have held that there is no immunity and that interceptions by one spouse on another spouse violated both the Federal Criminal Wiretap Statute and the Texas Criminal Wiretap Statute.** *Collins v. Collins*, 904 S.W.2d 792, 296-97 (Tex. App.–Houston [1st Dist.] 1999); *Turner v. PV International Corp.*, 765 S.W.2d 455, 470 (Tex. App.–Dallas 1988); *Simpson v. Simpson*, 490 F.2d 803, 809-10 (5th Cir.) cert. denied, 419 US 897 (1974). In two criminal cases for spousal interception of wiretaps the court found that there was no exception for interspousal wiretaps. Further, in *Duffy v. State*, 33 S.W.3rd 17, 25 (Tex. App.–El Paso 2000, no pet.) the court held that “*the common law constitutional right of privacy recognized by Texas Courts is not limited to unmarried individuals, and therefore, a spouse has a right to privacy under Section 16.02 (Penal Code). Section 16.02 must be applied in all circumstances not specifically excepted.*”

The grey part of wiretapping law comes in that in *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), cert. denied, 419 US 897 (1974) the 5th Circuit and the Supreme Court held that the Federal Wiretap Act was not intended to make it a crime or a civil cause of action for a person to intercept a family member's phone conversations by use of an extension phone. However, the *Simpson v. Simpson* case has been subsequently interpreted as the Federal courts opining that Congress did not intend the act to extend into the area of the marital home amid domestic conflicts which is normally left to the states. Clearly, *Simpson v. Simpson* limits applicability of the Federal Wiretap Act in domestic interception but the wording of that

decision was intended to deal with the specific facts in *Simpson*, where a husband listened in on a extension phone to his wife's conversations.

Essentially, the Texas and Federal Courts have generally held that unless there is a specific exemption contained in Section 16.02 of the Penal Code, no spousal exemption applies. However, juveniles may differ.

May a parent intercept a telephone conversations of a minor?

General rule: Yes, if a parent has good faith, objectively reasonable basis for believing that the taping of a telephone conversation is in the best interest of the parent's minor child, the parent may vicariously consent to the recording on behalf of the child. In the recent criminal case of *Alemeda v. State*, 181 S.W.3d 772 (Tex. App.--Fort Worth, Nov 23, 2005) the Fort Worth Court of Appeals reaffirmed the criminal conviction of a father for sexual assault of a child in a circumstance where a mother intercepted by recording a conversation between her child and the convicted child abuser. Essentially, the court found that a parent has a right to wiretap the child as long as the parent has a good faith, objectively reasonable basis for believing that the taping of telephone conversations is in the best interests of the parent's minor child, pursuant to Texas Family Code § 153.002 and 156.101. Tape recordings so obtained may be admitted. *Allen v. Mancini*, 170 S.W.3rd 167, (Tex. App--Eastland, June 30, 2005). Further, the Federal Courts in *Pollock v. Pollock*, 154 F.3rd 601 (6th Cir. 1998) promulgated the same standard that Texas has now adopted from *Pollock*. While *Alemeda*, *Duffy* and *Polick* each adopt the same standard, it should be noted that *the Alemeda* case has been accepted for discretionary review by the Court of Criminal Appeals which may render an adverse opinion. The Court of Criminal Appeals will deal with the admissibility of the tapes in this criminal proceeding but may also impact the good faith basis allowing a parent to tape record or monitor the conversations of a minor child in their care. *The Alemeda* doctrine has been promulgated because a court noted that parents have a statutory duty of care, control and protection of their children under Tex. Fam. Code §151.001(a)(2). The court also noted that parents have the right to make "decisions of substantial legal significance concerning [their] child". Tex. Fam. Code §151.001(a)(7). Obviously however, problems will arise given the fact that the age of consent in Texas is 17 and that same person adult enough to consent to sexual conduct remains a child until she is 18. Tex. Penal Code §22.011(c)(1).

- v) Computer Traipsing.
What is Spyware?

With the prevalence of the internet and computers in almost every home the evidentiary value of computers, email and electronic documents has seen an enormous increase. Nobody quite agrees on a definition of spyware, but generally, spyware is software or occasionally hardware, installed in a computer without the user's knowledge and meant to monitor the user's conduct. Most of the time, in Family Law cases, the target is email and web browsing activities but spyware can record everything the user does on the computer, including every keystroke and also take periodic "photographs" of the pictures which are being seen on a web page. Spyware ranges from the innocuous "cookie" to spyware used to gather personal identifying information such as passwords, credit card numbers and social security numbers used in fraud and identity theft. In the Family Law context, we are seeing an increased use by individuals of internet purchased spyware to allow them identify passwords and see email and instant message communications over the internet. Today, there are so many spyware manufacturers that it is almost impossible to list them all. Each have different features and slightly different operating characteristics but they are intended to spy on someone else's computer use and to document that use.

Some of the programs act like cameras, taking a picture of whatever is on the screen every few seconds and others simply log keystrokes and letter and number sequences. Such spyware rarely costs more than \$100 and the more sophisticated usages allow spyware to capture the information and then email it onto another email location to be viewed by the surreptitious intruder.

Part of what makes the use of spyware so prevalent is that there are no clear Federal anti-spyware laws. The US House of Representatives Energy and Commerce Committee has undertaken to rewrite several laws that have not yet been passed. At the time this article goes to press, however, final votes are scheduled on several conference committee bills. Generally, the US Senate has been less receptive to a blanket ban of spyware because of the huge businesses who rely on spyware and cookies to manage the internet. One pending bill known as *The Spy Act* (HR 2929) has passed the House but has not yet passed the Senate. The *Spy Act* requires businesses to obtain permission before placing computer programs on people's computers, as an opt in procedure. If ultimately passed by the Congress, businesses could be charged up to \$3 million per violation. Additionally, Title 18 of the Federal Code is proposed to be amended in HR 4661, the *Internet Spyware Prevention Act* currently pending before the Senate. If eventually passed, this bill will provide massive criminal penalties for installation of spyware on a computer without the user's knowledge. These type of bills however seem to

be getting a cold reception in the Senate and it's unlikely that they will be passed in the immediate future.

Does this mean that spyware is legal? Probably not. *The Electronic Communications Privacy Act of 1986* prohibits the interception and disclosure of wire and electronic communications. It also applies to those who use information they know or have reason to know was intercepted. However, the application of this act is definitely grey. Several cases have been filed under the *Federal Wiretap Act* but successful prosecutions have been rare. The Federal Wiretap Act was not designed for email and there are technical deficiencies in it for prosecution.

Additionally, the *Stored Communications Act* prohibits the unauthorized access of stored communications. Of course, if those communications are stored on a computer jointly owned by the perpetrator, the applicability becomes suspect.

The *Computer Fraud and Abuse Act* prohibits a person from accessing a computer without authorization, or from exceeding authorized access and thereby obtaining certain governmental, financial or consumer information. This act probably is applicable when obtaining that information from data stored on an internet server but may not be applicable when obtaining information stored on a community estate computer so that the access does not implicate interstate commerce.

Ethics concern:

The Texas Disciplinary Rules of Professional Conduct, Rule 1.02 (c) (Scope and Objectives of Representation) requires "*a lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent.*" Be cautious on what you encourage or suggest. You may of course discuss the subject of spyware with the client who might have used it or is considering using it but only for the purpose of explaining it's probable illegal nature.

Under Rule 1.06, a lawyer is released from the attorney client privilege and may reveal, as a lawyer believes necessary, "*such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party of fraud related to the subject matter of the representation.*"

Certainly, very experienced lawyers passionately argue that spyware may not be illegal, especially when state law does not specifically define spyware. However, the grey field of Federal legislation is likely to be clarified with a single Federal Court decision and clients will be put at risk. Attorneys should be aware that they should not continue to represent a client who uses spyware after receiving the attorney's advice that the use of such software may be illegal. Further, the use of illegally intercepted communications or information gleaned from an unauthorized access to a computer or illegal monitoring of communications may

create both an ethical and criminal dilemma for both the attorney and the client.

- (1) **Spousal privacy on the community computer.** Significant law exists at both the Federal and State level noting that community property does not include personal privacy. The general rule is that a person who creates a computer password to shield their computer communications from the prying eyes of another spouse (outside of the work environment where the employer has a right to monitor computer conduct), has created a reasonable expectation of privacy and by his/her act to deny authorized access to anyone who has not been given the password.

What if your client thinks spyware has been used against him? Most sophisticated spyware programs cannot be removed by a casual computer user. They often change their file names every few seconds and it becomes almost impossible, absent sophisticated computer forensic searching to identify the offending programs. Further, computer forensic technologists can sometimes place "tags" on information to ascertain where the information is being sent once it leaves the target network.

How to legally obtain evidence from a marital computer.

Don't use spyware! If anything, get a computer forensic technologist to mirror the hard drive to create a copy of all of the information on the hard drive. Then, seek a court order for inspection or an order to divulge a password. However, it is important that the first effort be to duplicate the hard drive and get it put away in a safe place. That way, the hard drive cannot be reformatted and information lost. To be able to use information you gather, seek either an order of inspection of the computer hard drive or a subpoena directed to third parties who may be in possession of the forwarded information. The cheapest way may be to obtain an order of the court to order divulgence of the current password for the offending spouse's secreted computer.

- vi) Cell Phone Records.

An area that burgeoned in 2004 and 2005 was the private acquisition of confidential cell phone records. As this article goes to court, the US House of Representatives Committee on Energy and Commerce has passed legislation unanimously in the House with a bill being sent to the Senate which will make such acts illegal. In the midst of prohibiting the acquisition of cell phone records without permission of the owner of the records, the National Security Agency's massive acquisition of phone records was revealed. Accordingly, both the House and the Senate have temporarily stopped action on criminal statutes

amending Title 18 of the Federal Code providing for draconian criminal penalties for private obtaining cell phone records. Congress will have had hearings on June 22, 2006 relating to passage of a compromise bill between the Senate and House making the obtaining cell phone records by use of pretext illegal.

However, many Family Law clients are able to obtain cellular phone records simply by looking in their paid bills file. Alternately, they may be able to download them from online billing systems. There is no bright line rule or law that details the applicability of privacy to cell phone billing records between spouses. However, many people's cell phones are paid by their employer and a spouse likely will not have lawful access to those phone records.

Far and away the preferable way of obtaining cell phone records is to simply subpoena the records from the cellular provider and/or from the opposing party.

When reviewing the cellular phone records, instead of trying to identify every phone number called which can be a relatively expensive task, look for calls made while traveling between home and work or work and home and Middle of the night phone calls or calls immediately responding to a voice mail message. Look for long phone calls or phone calls made in the middle of the night (when your client is asleep).

The current rule is that you can't hire an outside firm to obtain cell phone records for you. If such records are obtained, you may be exposing yourself to criminal conduct. Further, there are lawful ways to obtain cellular records including simply requesting an additional copy be mailed to your client's house if the original records have been destroyed. Most cellular carriers provide a charge of \$5.00 for each month so requested.

Be careful with cell phone numbers obtained through anything other than normal conduct. This is a hot area for Congress and likely Federal prosecution in the short term.

4. DISCOVERY: WHEN MUST AN ATTORNEY GIVE UP INVESTIGATIVE REPORTS IN DISCOVERY?

It depends on the status of the investigator. If the investigator is likely to testify as to what they have observed on a surveillance, it is personal knowledge and they are simply a fact witness who must be disclosed in discovery requests. However, if the nature of the investigation has been either research or interviews, such that the investigator has no first hand personal knowledge, the investigator becomes a consulting expert and the investigator's identity may be withheld. TX. R. CIV. P. 192.7(d). *See also: In Re city of Georgetown*, 53 S.W.3rd 328, 334 (Tex. 2001). The identity, mental impressions and opinions of an expert used for consultation only are not discoverable unless a consulting expert's opinion or impressions

have been reviewed by a testifying expert. TX. R. CIV. P. 192.3(e). To avoid the necessity to provide written documents submitted by the investigator pursuant to TX. R. Civ. P. 192.3(a) all written reports should go directly to the attorney with the notation that they are privileged attorney client communications. Unfortunately, if a report is delivered to an individual client instead of directly to the attorney, that may subject the investigator to the parties' control with all reports being discoverable.

The issue of discovery is determined by the following analysis: Is the investigator acting as a consulting expert or a fact witness. If fact witness, the investigator's name and contact information should be disclosed in discovery. An investigators written reports of a surveillance are the statements, memorandum or notes of a witness that need be disclosed to the other side under TX. R. CIV. P.192.3(a). However, research or interview work may not need to be disclosed if there is no personal knowledge, the investigator is submitting written reports to the attorney after notice of litigation has been received and thus the attorney client privilege attaches as a representative of the attorney.

As a general rule, it is generally best for the attorney to exercise all control over the investigator. Funds should flow through the attorney's trust fund to the investigator by way of a retainer or payment of invoices. All written reports should go to the attorney. Surveillances that yield nothing should not have written reports provided to the attorney. I always tell my clients who believe they are being followed to use the surveillance as an opportunity rather than a burden. I instruct them to drive to the nearest church, enter and prop open the door and kneel and pray while the video camera runs. Multiple occasions of documenting near sainthood can sometimes overcome one or two instances of being a devil. Experienced investigators tend not to create surveillance reports where nothing of substance occurs because the actions are not likely to be relevant or material.

Of course, if you receive a specific request for production of investigative reports, the attorney who has such reports in their possession, even if of a consulting report nature may have to file a privilege log and fight the production as a privileged communication. However, investigator's reports more often than not will not be core work product which is not discoverable. TX. R. CIV. P.192.5(b)(1), *see also, Good v. Shoukfeh*, 943 S.W.2d 441, 449 (Tex. 1997) and *Occidental Chem. Corp. v. Banalez*, 907 S.W. 2d 488, 490 (Tex. 1995).

However, requests for a party to produce "a description and/or photograph of each and every exhibit that you intend to introduce in evidence" at trial was found improper because it was directed at the attorney's mental process and trial strategy. Certain

investigator reports and evidence may fall within this exception. *Texas Tech Univ. Health Sciences Ctr. v. Schild*, 828 S.W. 2d 502, 503-04 (Tex. App.–El Paso 1992, orig proceeding).

5. CAN THE ATTORNEY BE RESPONSIBLE FOR THE ERRANT ACTIONS OF AN INVESTIGATOR?

Attorneys are subject to a code of professional responsibility and they must adhere to the moral standards prescribed by rules of ethics governing litigation and attorneys. Compliance with the rules of professional responsibility is a personal duty of each attorney, and in no instance can an attorney delegate the final responsibility of his/her personal compliance with the professional standards to office staff or other professional colleagues. Consequently, attorneys should be familiar with the law and seek to understand the obligations and duties that the code places on them. Therefore, attorneys accept some risk when they micro manage investigations since that may vitiate the sub contractor status of private investigators. Generally, if private investigators are properly licensed and are not direct employees of the lawyer or law firm, their bad acts do not pass through to the attorney unless of course the attorney has authorized, ratified or was previously aware of the bad acts. A significant risk exists for negligent referral or negligent retention cases in such situations so the attorney should satisfy himself that the investigator is licensed, experienced, acting as a subcontractor and without micro management. Additionally, an attorney who uses a regular investigator should request that he be named an additional insured by the investigator so that the investigator's liability policy will defend the attorney should the attorney be sued. Realize that the investigator will have to pay a fee to an insurance company so be prepared to have that amount tacked on to your bill.