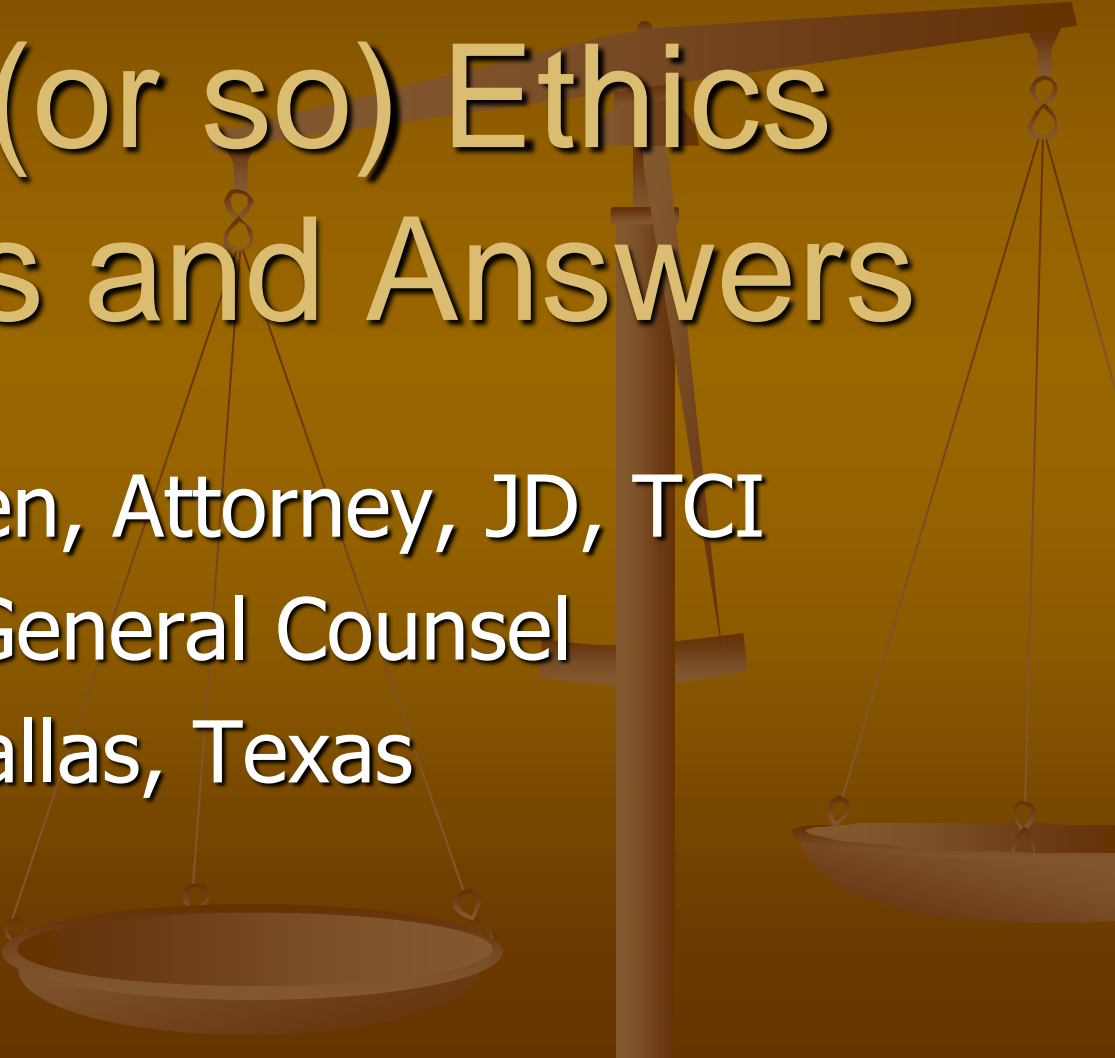


# Top 10 (or so) Ethics Questions and Answers

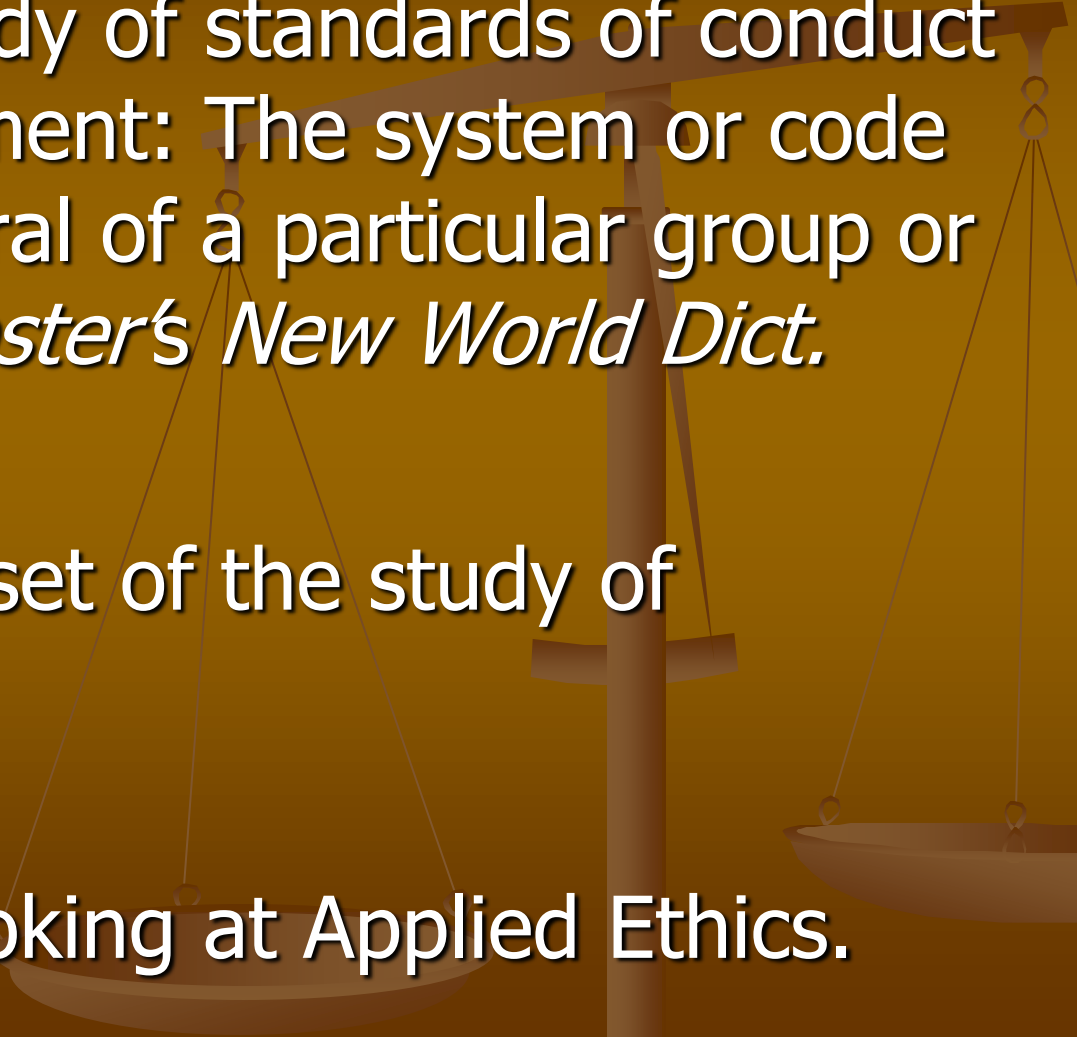


Wes Bearden, Attorney, JD, TCI  
TALI General Counsel  
Dallas, Texas

# What are Ethics???

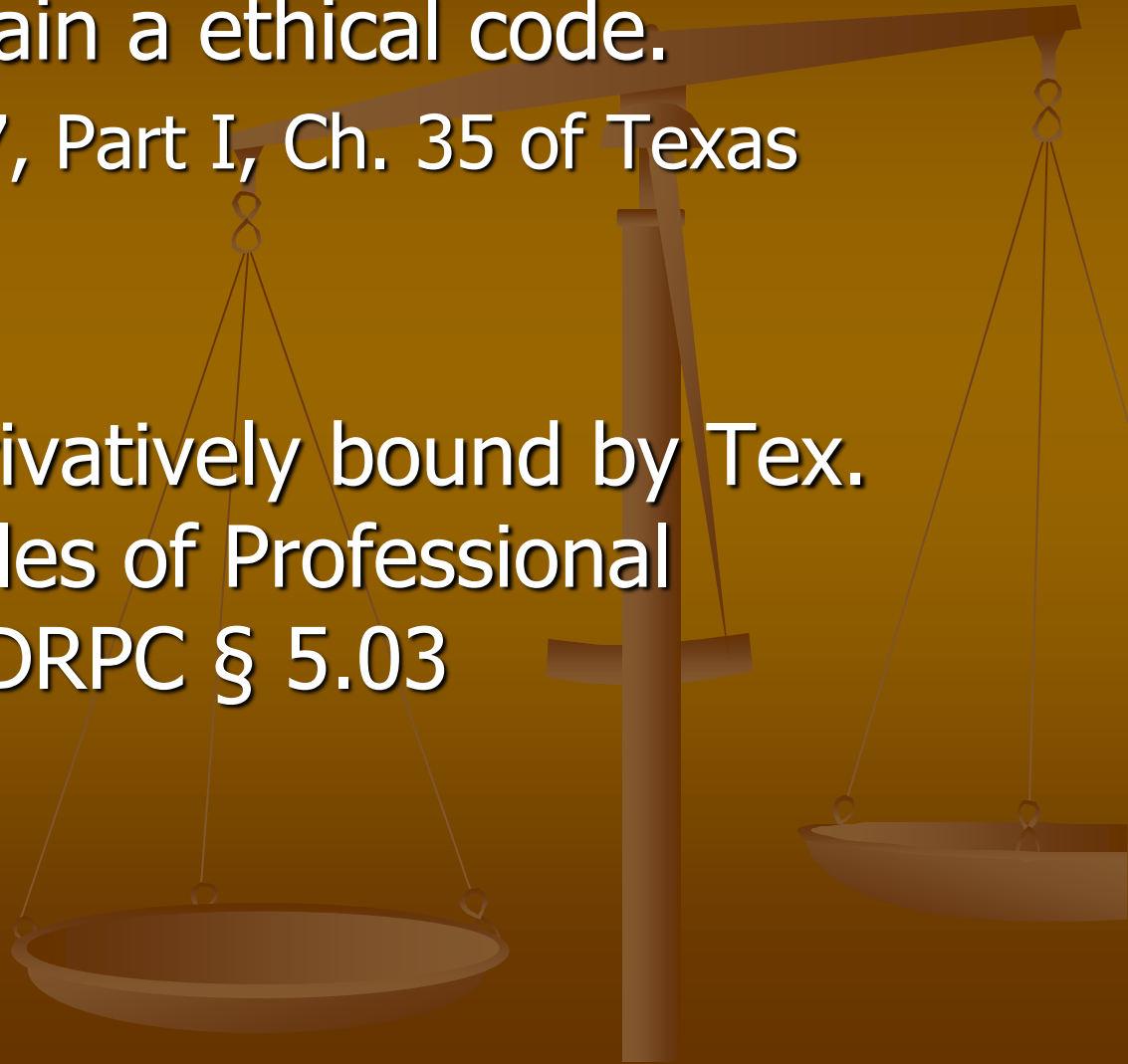


# What are Ethics???

- Ethics – The study of standards of conduct and moral judgment: The system or code of morals of moral of a particular group or profession. *Webster's New World Dict.*
  - Ethics are a subset of the study of philosophy.
  - We are really looking at Applied Ethics.
- 

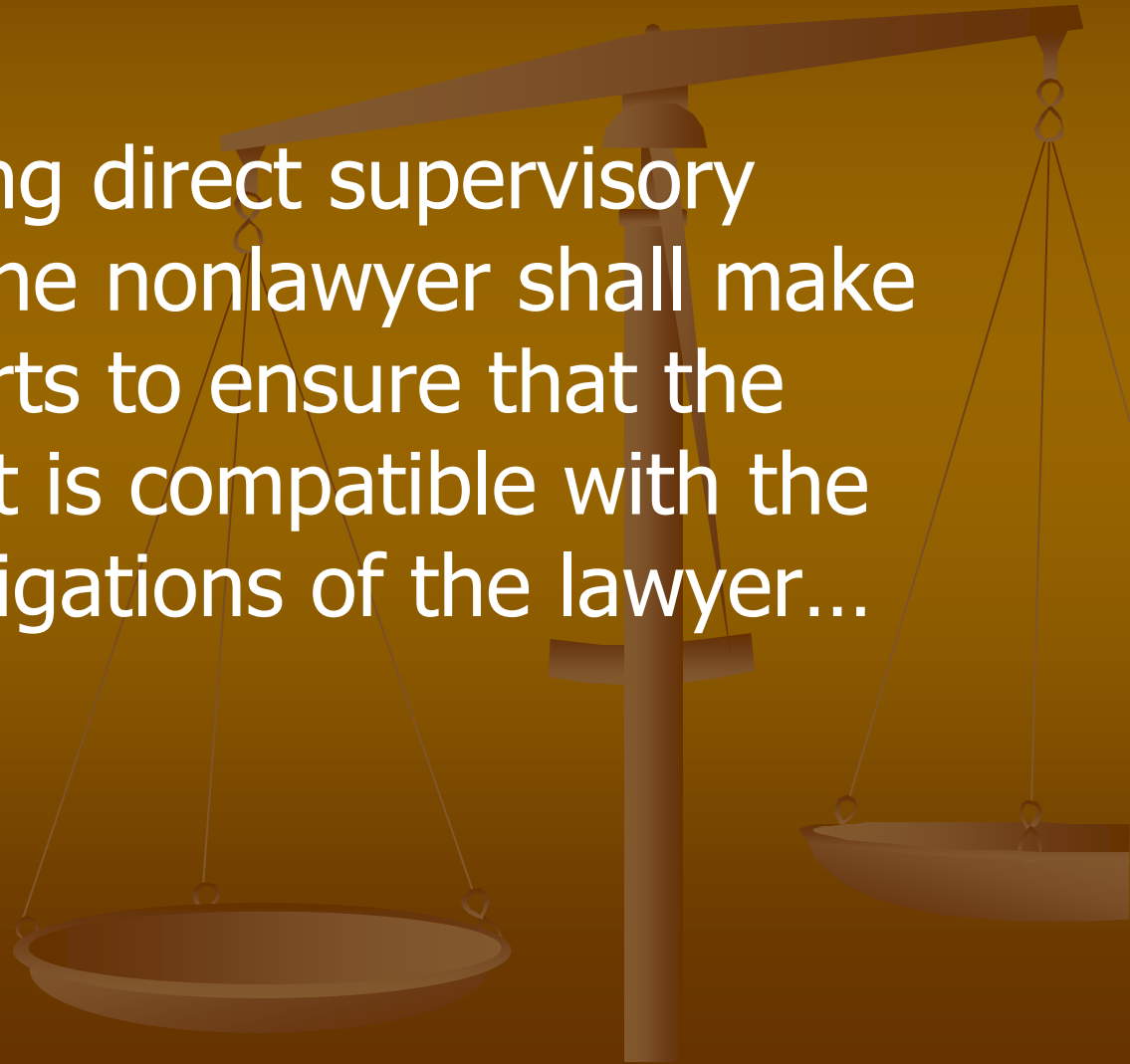
# Where are PI's Ethics?

- PI's don't maintain a ethical code.
  - But *See* Title 37, Part I, Ch. 35 of Texas Admin. Code.
- You may be derivatively bound by Tex. Disciplinary Rules of Professional Conduct. *See* TDRPC § 5.03

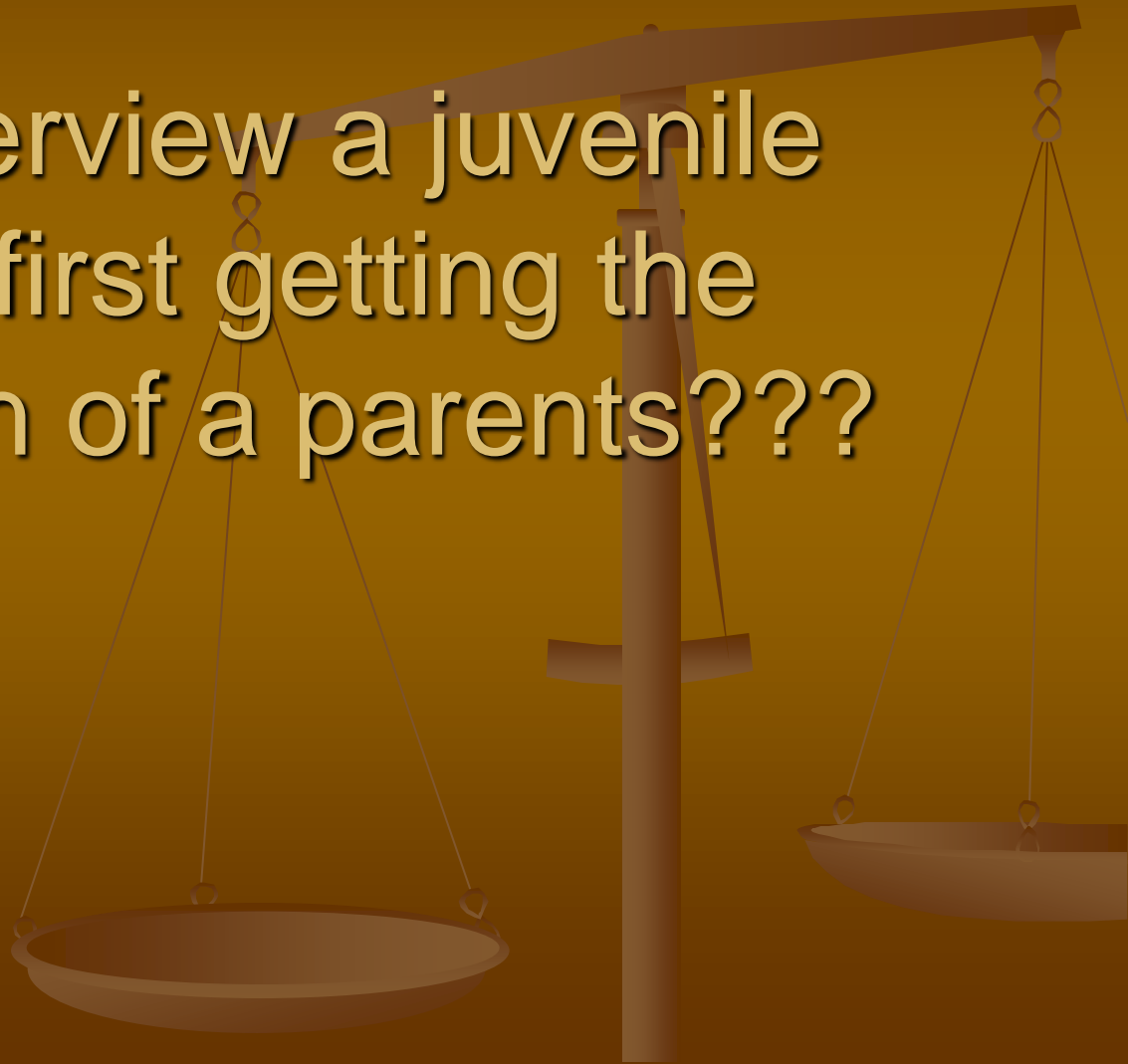


# Rule 5.03 Responsibilities / Nonlawyers

- ...a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the persons conduct is compatible with the professional obligations of the lawyer...



Can I interview a juvenile  
without first getting the  
permission of a parents???



# Juveniles?

- Depends, but generally as a witness there are really no rules regarding an informal interview.
- As a suspect, children are governed by Title 3 of the Family Code. So, be careful if you are working as representative of Police, Court, Prob. Officer, DPRS, TYC, School, Facility.

# Suspect = Avoid Like Plague

- Why, because of the stringent requirements of Title 5 of TFC.
  - *See* TFC § 52.02 Release or Delivery to Court.
  - *See Baptist Vie Le v. State*, Statement taken in Violation of TFC Reversed. *Roquemore v. State*, Unnecessary Delay.
  - *Must* notify parents without delay TFC § 52.02(b).
  - Right to have parent present TFC § 52.025(c).
  - Right of Access to Child TFC § 61.103.
  - Search and Seizures more stringent, Consent may not be enough. *See* TFC § 52.02(c)-(d); *Bilbrey v. Brown*, 738 F.2d 1462.

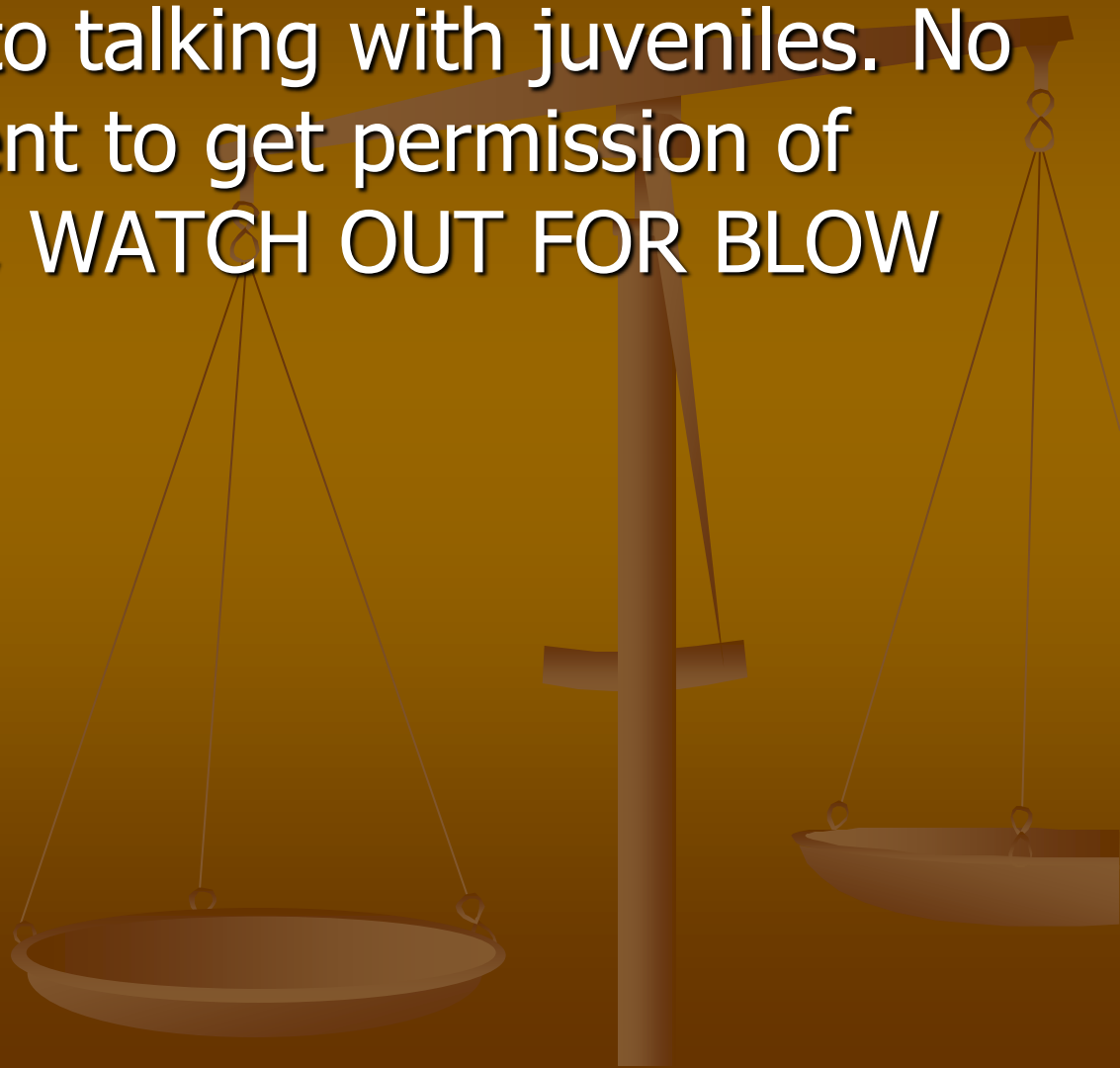


# Juveniles

- Again, this if only if the child is a suspect.
  - And, generally you are in some role. i.e. representative of:
    - DFPRS
    - Police
    - Probation
    - Detention facility
    - School (sort of)
    - Psychologist (sort of)
    - Polygraphers (sort of)
- But still, a good test for the yellow light. **THIS IS ONLY THE TIP OF THE ICEBERG ON JUVENILE SUSPECTS. BE CAREFUL. IF A SUSPECT CALL IN THE LEGAL CALVARY!!!**
- Great source: *Police Interactions with Juveniles*, Hon. Pat Garza.

# What about Juvenile Witnesses?

- No prohibition to talking with juveniles. No legal requirement to get permission of parents.....BUT, WATCH OUT FOR BLOW BACK.

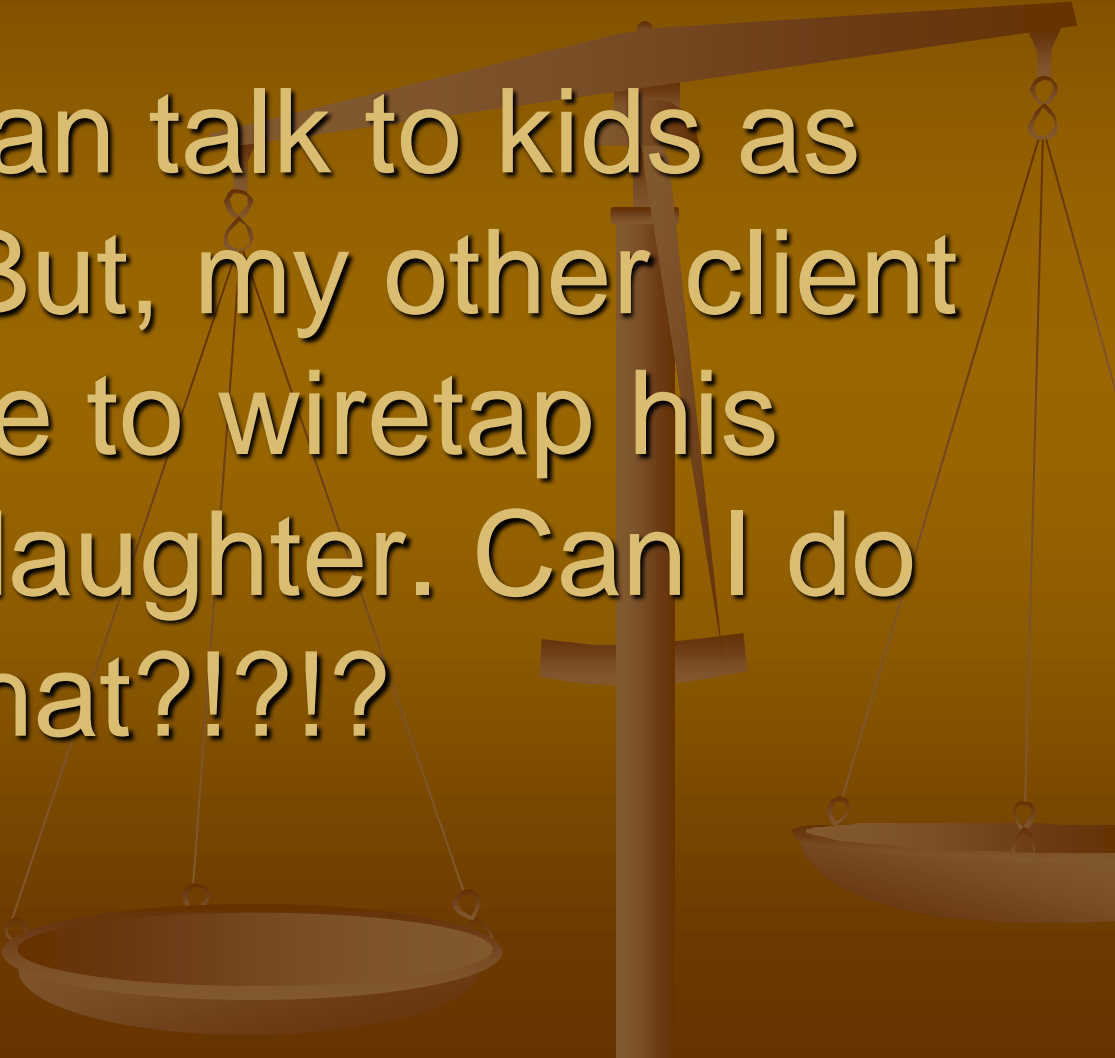


# Can I use it in Court?

- If they are deemed competent to testify under TRE 601 (presumption is YES).
  - Trial courts are going to consider 3 elements in determining whether a witness is competent:
    - 1. Witness ability to observe intelligently the events in questions at the time of their occurrence;
    - 2. Their capacity to recollect or recall events, AND;
    - 3. Their capacity to narrate events, including the ability to understand questions asked, frame intelligent answers, and to tell the truth. *Watson v. State*, 596 S.W.2d 867 (Tex. Crim App. 1980).
- Usually, done outside of jury by judge. Child has to satisfy the above by basic understanding.

# Child Witness

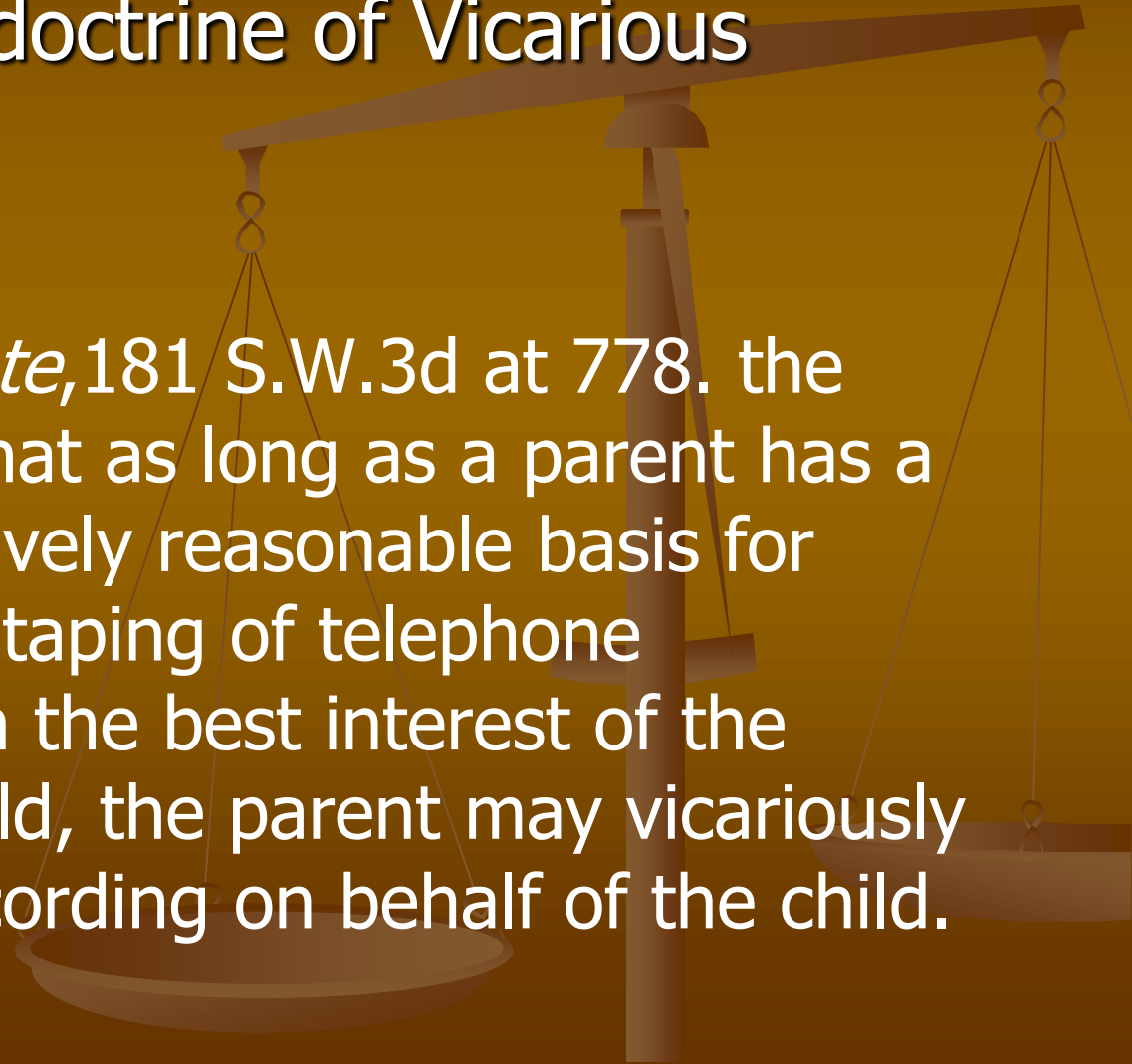
- There is no age under which a witness is automatically deemed incompetent to testify. *Fields v. State*, 500 S.W.2d 500.
- Beware, *may* be testifying with aids or under CCTV (See Art. 38.071, C.C.P. et seq. )
- Recordings (which are normally hearsay) may be used at trial as opposed to live testimony only under very limited circumstances. See *Coronado v. State* 351 S.W.3d 315 (Tex. Crim. App. 2011)



OK, so I can talk to kids as witnesses. But, my other client wants me to wiretap his underage daughter. Can I do that?!?!?

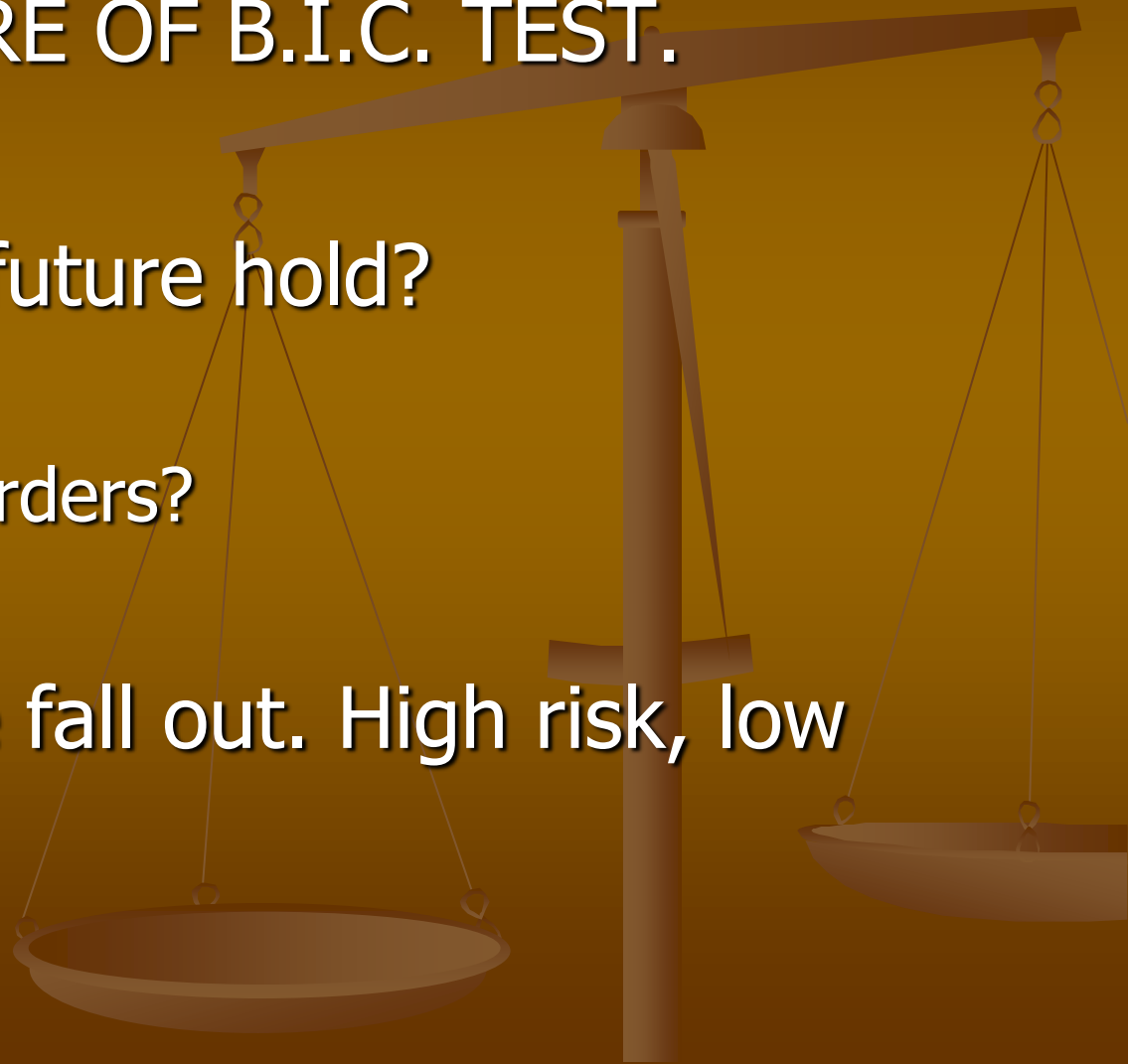
# MAYBE

- Yes, under the doctrine of Vicarious Consent.
- In *Alameda v. State*, 181 S.W.3d at 778. the court concluded that as long as a parent has a good faith, objectively reasonable basis for believing that the taping of telephone conversations is in the best interest of the parent's minor child, the parent may vicariously consent to the recording on behalf of the child.

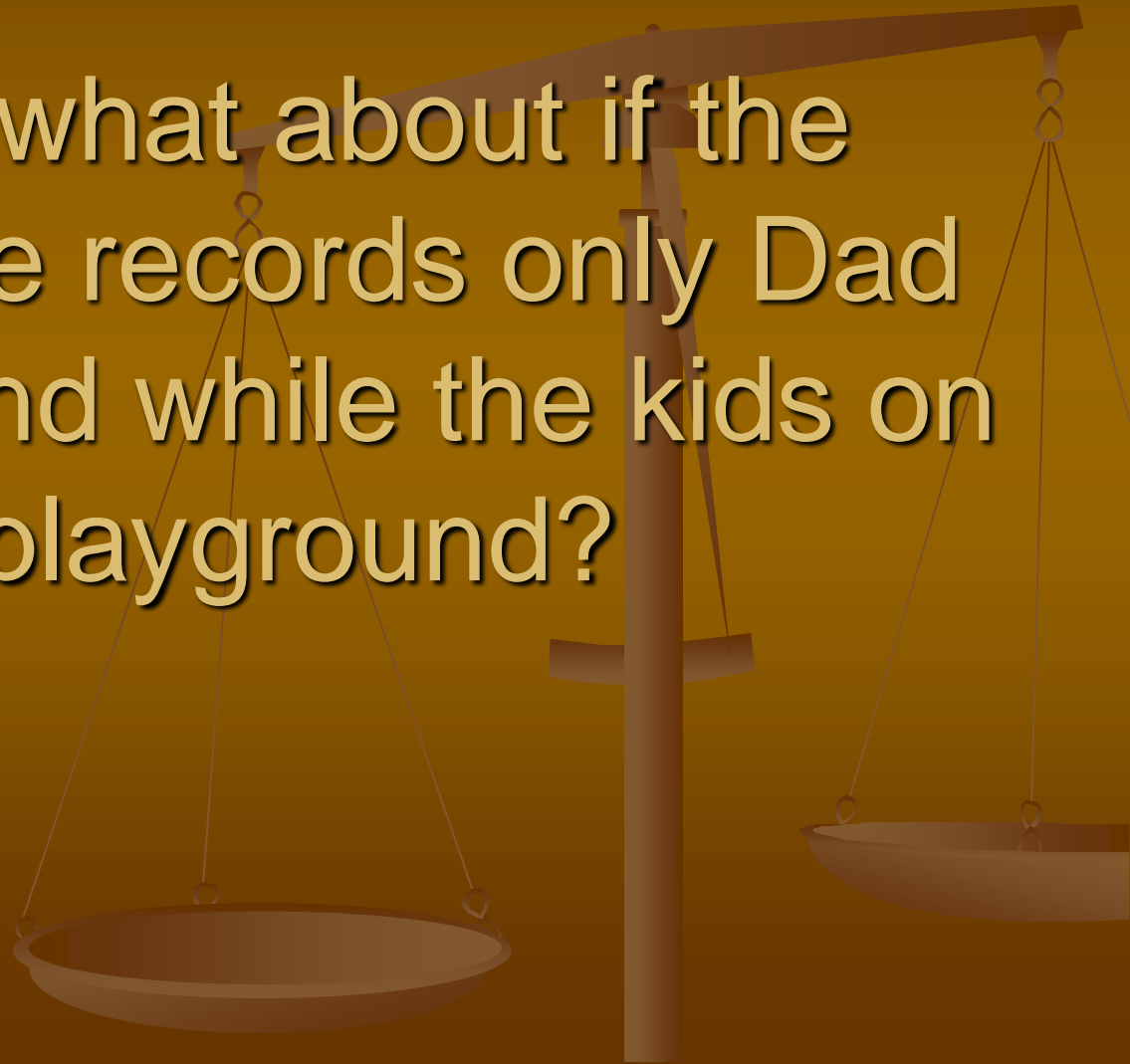


# I can do it!!! Are you sure??

- Yes, But BEWARE OF B.I.C. TEST.
- What does the future hold?
  - GPS?
  - On person recorders?
- Think about the fall out. High risk, low gain.



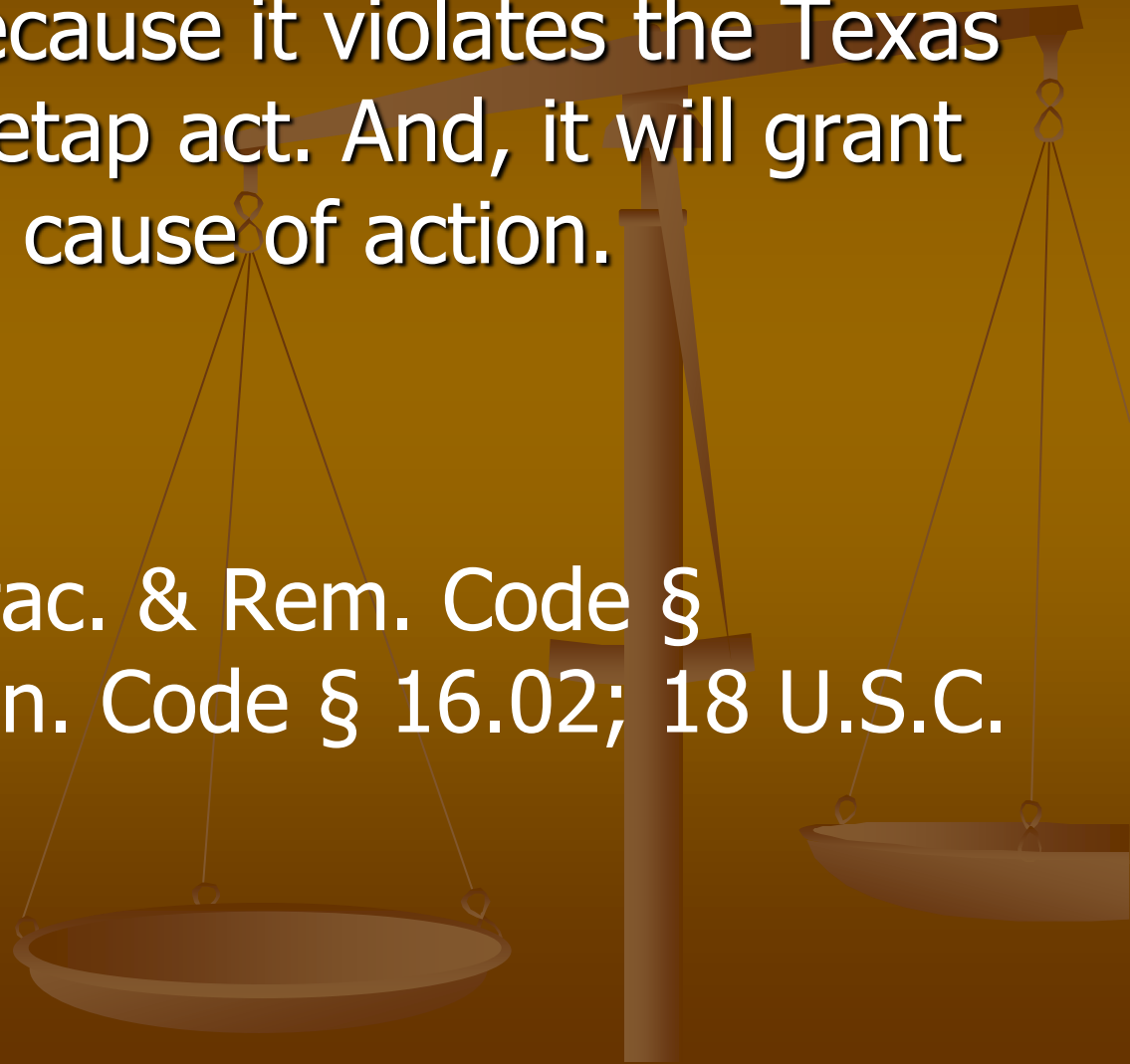
Ok, well what about if the  
microphone records only Dad  
and Girlfriend while the kids on  
the playground?



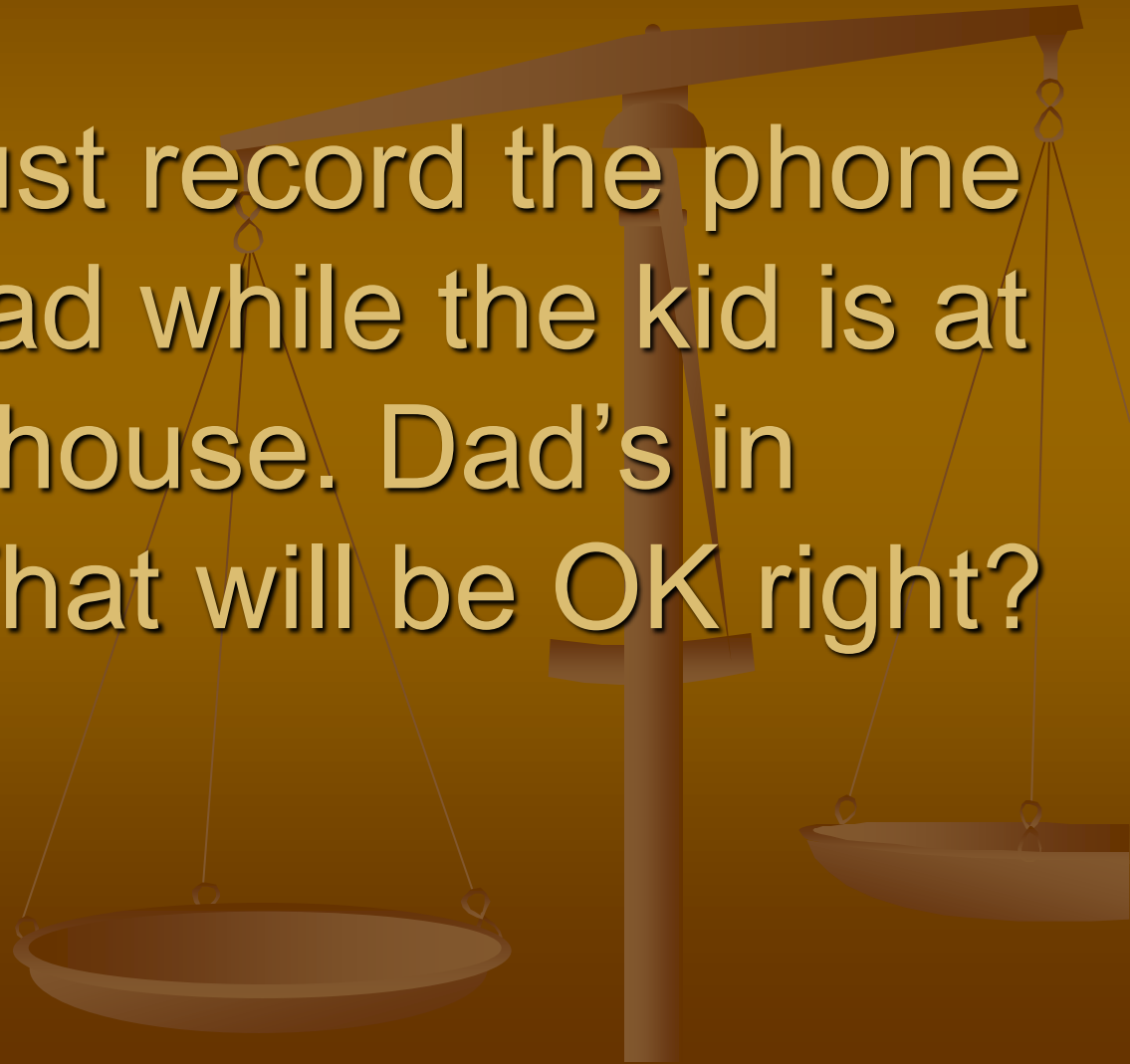


# Violation of TX and Federal Law

- Can't do that because it violates the Texas and Federal wiretap act. And, it will grant the other side a cause of action.
- *See* Tex. Civ. Prac. & Rem. Code § 123.02; Tex. Pen. Code § 16.02; 18 U.S.C. § 2511, 2702.



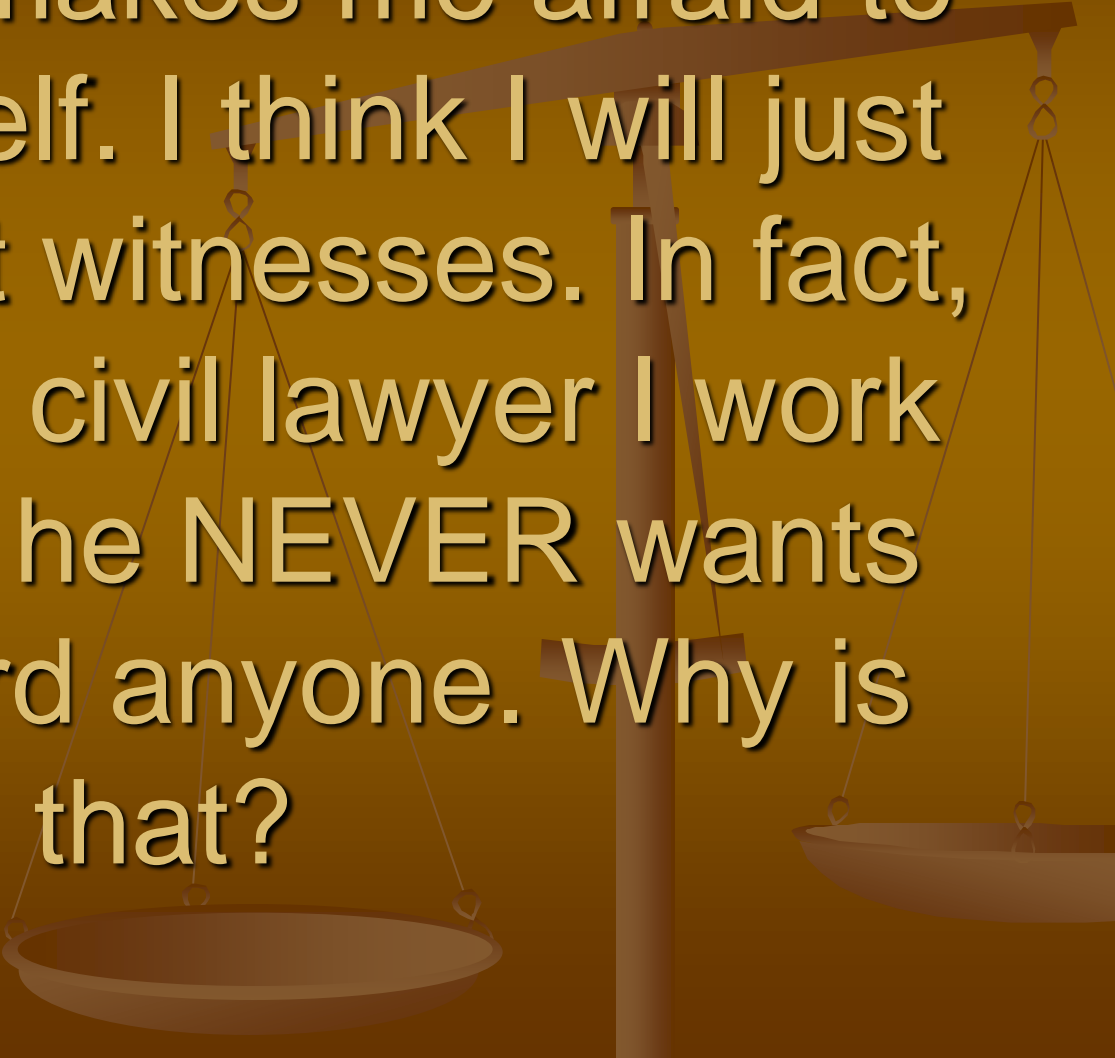
OK, so I'll just record the phone calls with Dad while the kid is at Mom's house. Dad's in California. That will be OK right?



# Yes. If you meet vicarious consent.

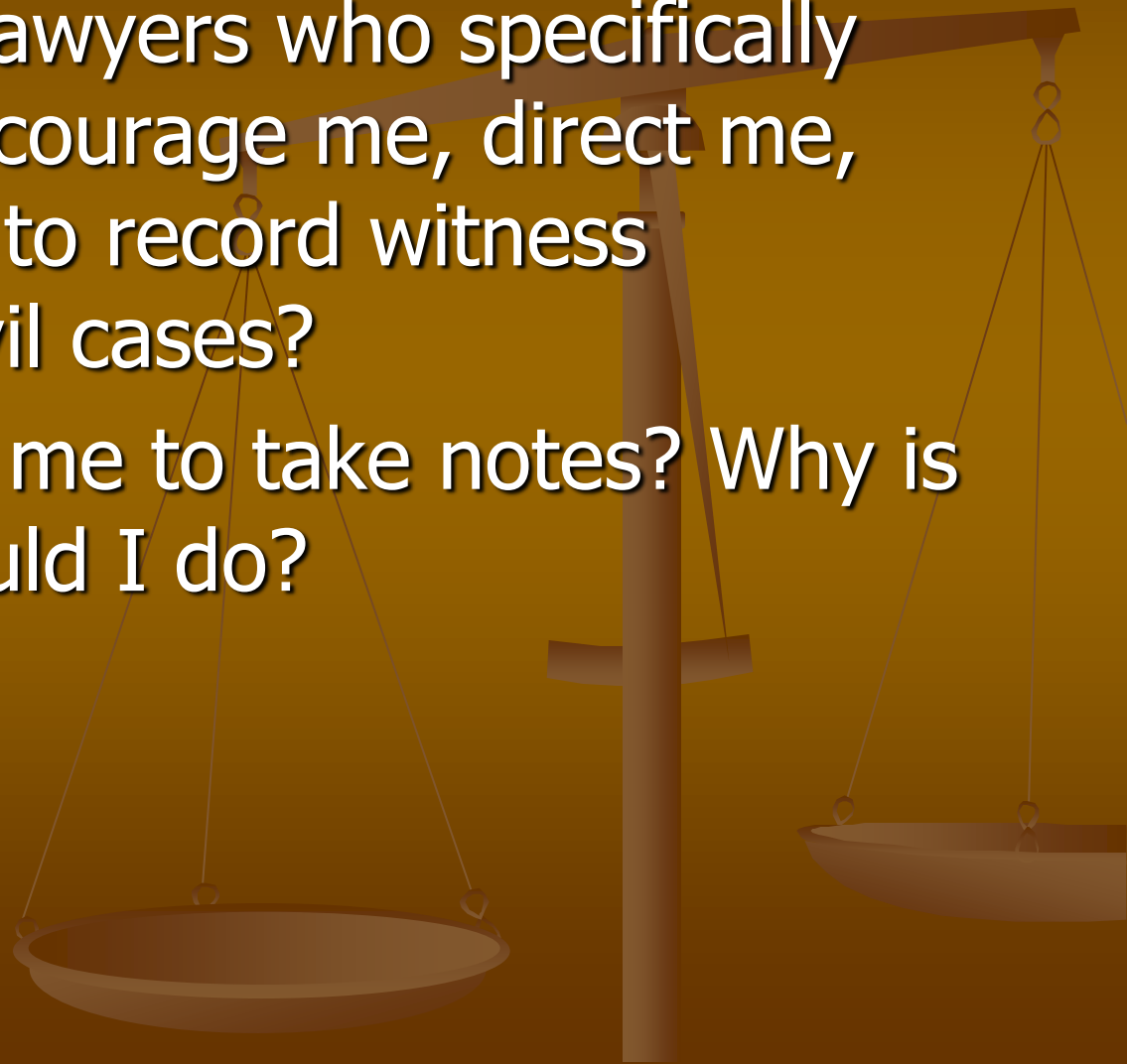
- Again, mom has to consent vicariously for the kid and meet the above test. (BTW, I would get this in SUPER WRITING.)
- When calls are between a 1 party state and a 2 party state, the Generally, the Federal rule combined with where the call is located applies (1 party) and you can record. THIS IS MORE COMPLEX THAN IT MAY SEEM. BUT BE CAREFUL FOR USE IN 2 PARTY STATE.

Wow. This makes me afraid to record myself. I think I will just stick to adult witnesses. In fact, the big time civil lawyer I work for tells me he NEVER wants me to record anyone. Why is that?



# To Record or Not To Record, That is the Question.

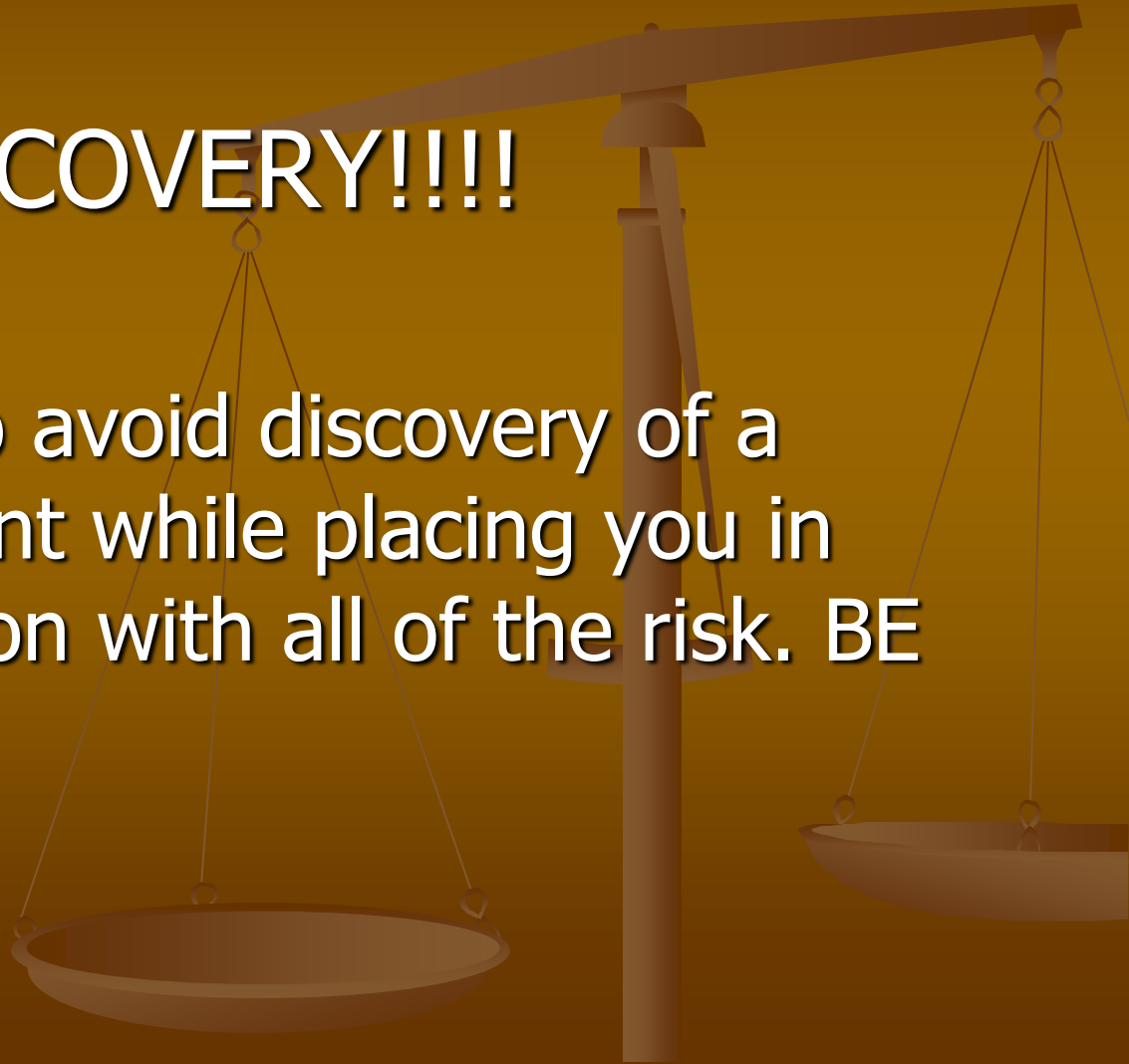
- Why are there lawyers who specifically now tell me, encourage me, direct me, request me not to record witness interviews in civil cases?
- They only want me to take notes? Why is that? What should I do?



# Answer

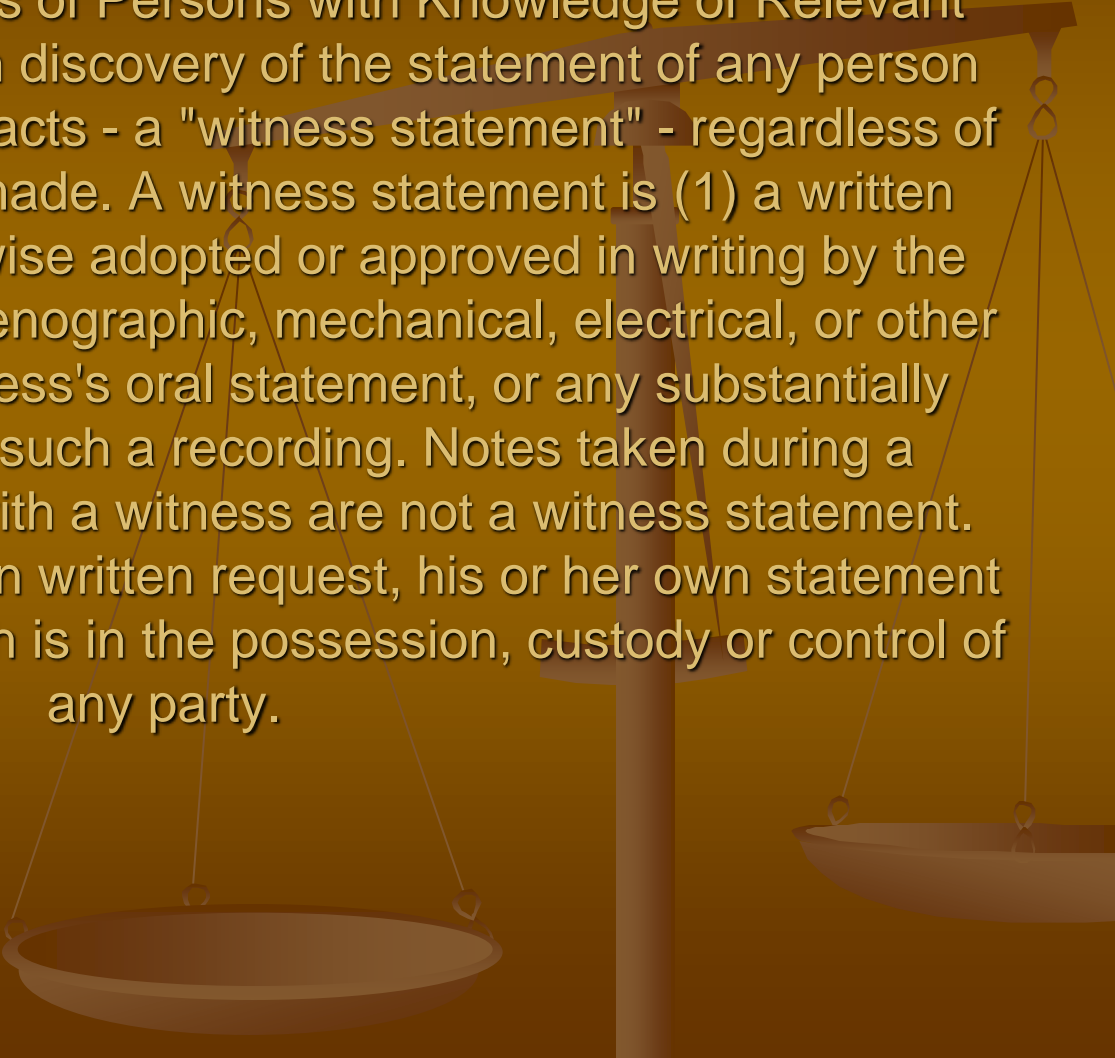
**DISCOVERY!!!!**

They are trying to avoid discovery of a recorded statement while placing you in dangerous situation with all of the risk. BE CAREFUL.

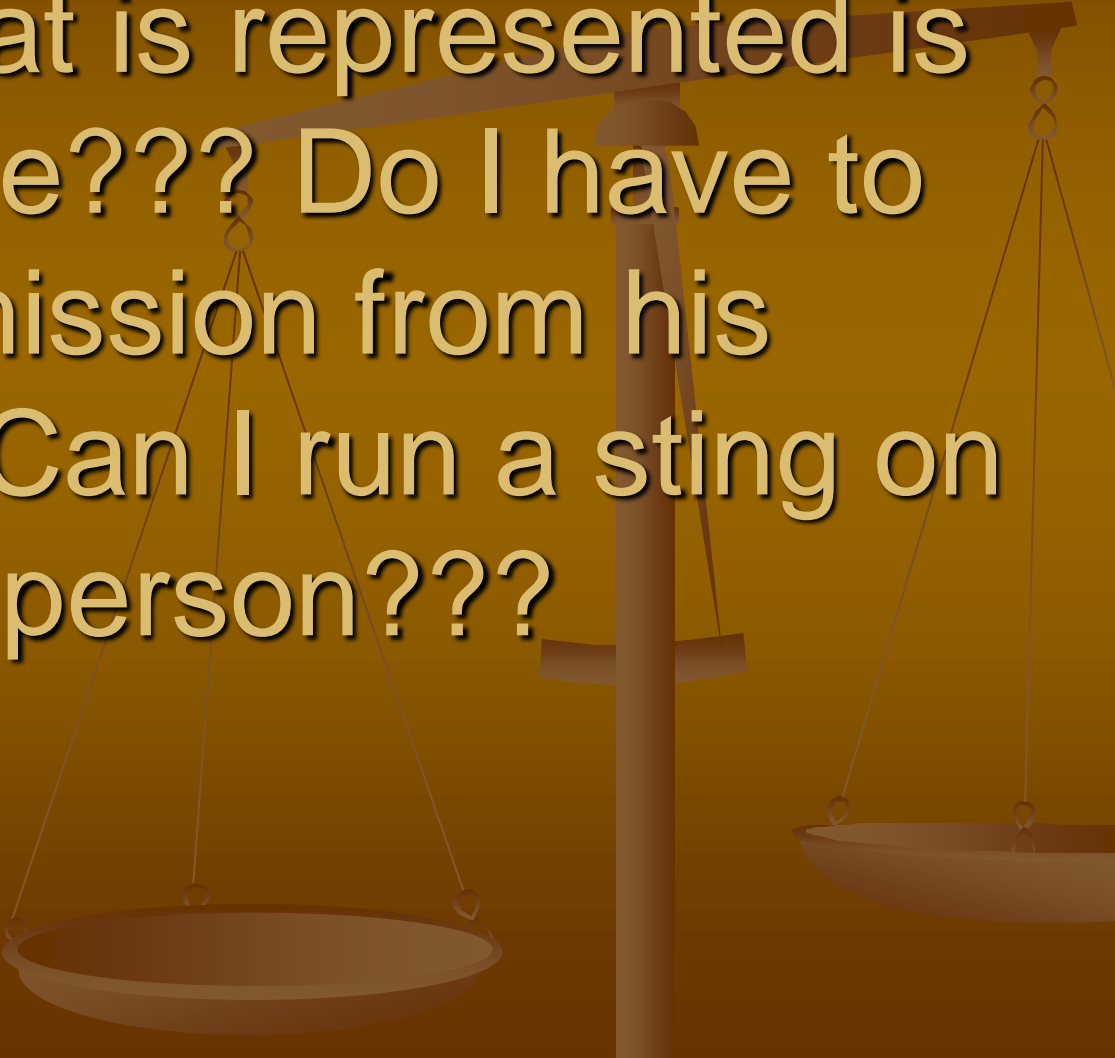


# Scope of Discovery

TRCP 192.3(h) Statements of Persons with Knowledge of Relevant Facts. --A party may obtain discovery of the statement of any person with knowledge of relevant facts - a "witness statement" - regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.



OK, so now I just want to talk to  
a witness that is represented is  
that possible??? Do I have to  
get permission from his  
attorney??? Can I run a sting on  
that person???





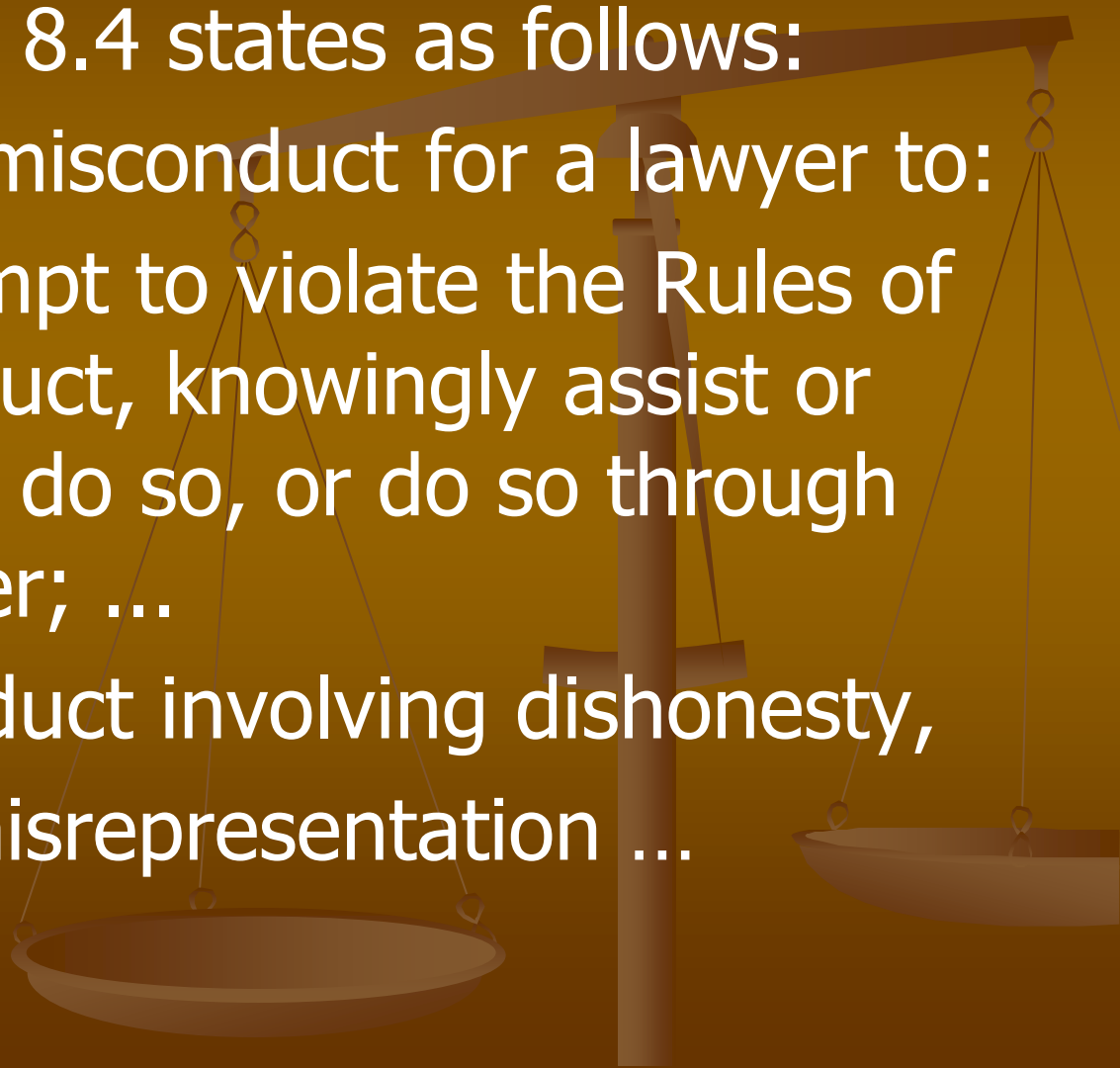
# Bright Line Rule

- ABA Model Rule 8.4 states as follows:

It is professional misconduct for a lawyer to:

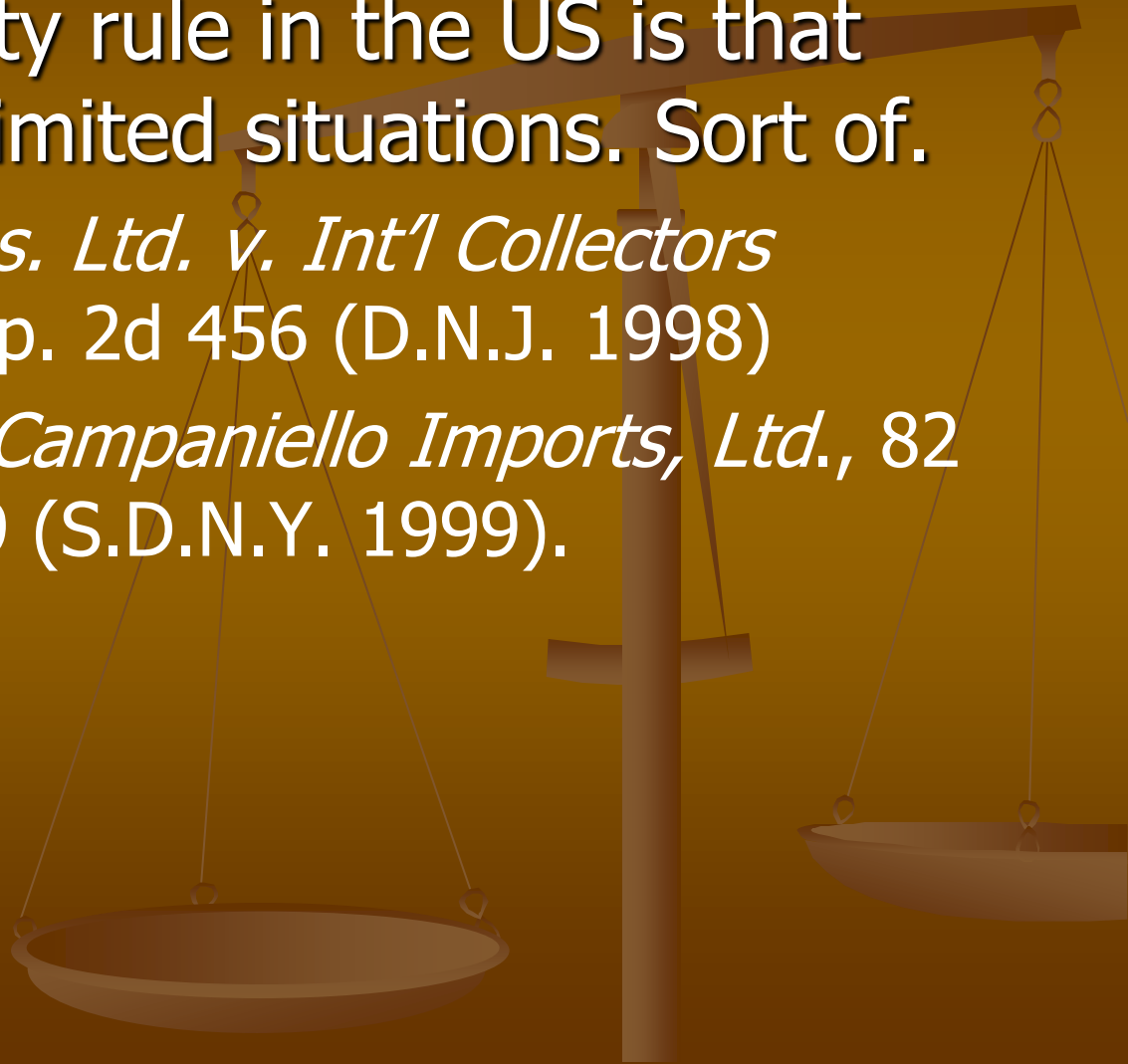
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

(b) engage in conduct involving dishonesty, fraud, deceit or misrepresentation ...



# Represented Persons.

- The now majority rule in the US is that you can under limited situations. Sort of.
  - See *Apple Corps. Ltd. v. Int'l Collectors Society*, 15 Supp. 2d 456 (D.N.J. 1998)
  - See *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999).



# Represented Persons.

- The limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal law or civil rights law enforcement. The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means. *Apple Corps. Ltd.*

# But, Again, Caution

- Contact must be limited and not of the litigation control group.
- Can't be as an attorney.
- Best application is lower level employees.
- There is the minority rule. South Dakota.
  - See *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (D.S.D. 2001), aff'd, 347 F.3d 693 (8th Cir. 2003).