

A woman in a white wedding dress stands in a stone archway, leaning against a wooden door. The background shows a stone wall and a doorway with flowers.

The Texas Investigator

The Voice of the
Texas Association of Licensed Investigators

Fall 2009
Volume XIV, Issue 3

Spousal Surveillance Laws in Texas

Presented By:



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Editorial Staff

Sheryl M. Jackson
Executive Editor

Edmond J. Martin, CFE, TCI
Chair, Article Review Committee

Advertising
William C. Asher

Editorial/Advertising/Administrative Office
PO Box 670344, Dallas, TX 75367-0344
877-444-TALI; fax-877-445-TALI
editor@tali.org

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| | | | |
|---|-------|-------------------------------------|----|
| <i>The President</i> | 6 | <i>TCI Application</i> | 34 |
| <i>TALI Code of Ethics</i> | 7 | <i>Upcoming Events</i> | 36 |
| <i>TCI Update</i> | 21 | <i>Advertiser Index</i> | 36 |
| <i>TALI-Sponsored Texas Civil Process Classes</i> | 30 | <i>Membership Application</i> | 37 |
| <i>Welcome New Members</i> | 32-33 | | |

on the Cover

14 **Spousal Surveillance Law in Texas**
Wes Bearden, TPLI, TCI

Feature Articles

8 **The Future of Investigations**
Eugene Ferraro

22 **Credibility**
Kirk Menard

12 **Tech Bits**
Gregg Marshall

24 **New Laws in Texas**

13 **Failure to Investigate Fully**
Kitty Hailey, CLI

27 **Handwriting Analysis or Document Examination?**
Peggy Walla, TPLI

20 **Meet TALI's President-Elect**
Abby Golman, TCI

28 **Civilian vs. Military Courts**
Ron Sievert



The Future of Investigations

Eugene F. Ferraro, CPP, PCI, CFE

An investigation is best defined as the logical collection of information through inquiry and examination for the purpose of gathering reliable evidence in order to solve problems.

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The problems that investigations solve vary in complexity and magnitude. Whether driven by the need to enforce the law or not, all proper investigations must have legitimate objectives, be fair, impartial and conducted within the boundaries of the law. For the practitioner in the free, industrialized world, these fundamentals have changed little in the last ninety years. What has changed, are the expectations of the benefactors of the modern investigation and those of the trier-of-fact. Modernity has raised the bar and there is no indication that the future will lower it.

Long gone are the days of the seedy private eye, renegade detective or jaw-breaking cop. Today's investigators are almost exclusively an educated, disciplined, and professional class. Unarguably, command of current civil and criminal law, a strong appreciation for civil rights and privacy, and a solid grasp of modern technology and science are essential attributes of the modern investigator. Recent history has shown that those who have been unable to adapt, soon become obsolete. The future will be more of the same.

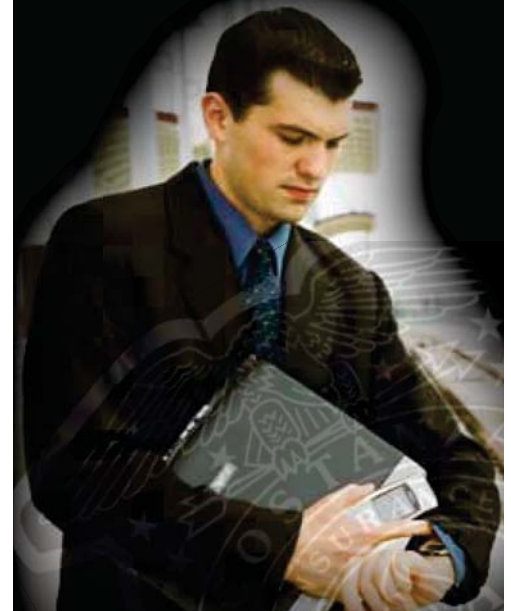
Foregoing an empirical analysis, a quick look at legislation and case law over the last two decades suggests the modern investigator ought to conclude:

1. Investigations of all types will remain important well into the foreseeable future;
2. Those who conduct investigations will need greater legal and technological skills;
3. The safe-guarding of the rights of suspected wrong-doers will grow in importance;
4. The public's preoccupation with privacy and its desire to protect it will birth new legislation and regulation;
5. The triers-of-fact regardless of stripe, will increase their demand for higher quality investigations and better proof emanating from them.

Predictably, these conclusions foretell the future. And when collectively considered, it is reasonable to expect that the net effect will be more structured, technical investigations and the requirement for far more resources to conduct them. Simply put, investigations of the future will be more demanding and more expensive. Let's take a closer look and examine each of these elements.

Investigations of all types will remain important well into the foreseeable future:

Because investigations serve a useful purpose and have become such an integral component of so many modern processes, it is unlikely that they will soon become obsolete. What's more, the civil and criminal legal systems of all of the free, industrialized nations rely upon fair, impartial and professional investigations in order to properly function. Without an alternative means to gather facts, collect evidence and solve crimes and other problems, modern societies depend on reliable and proper investigations at many levels. The absence of an effective method of fact-finding, for whatever purpose, is almost unimaginable. That said, investigations and the methods by which they are conducted will continue to evolve. The future will likely see all credible societies expand their use and increasingly benefit from them.



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A G E N C Y



Failure to Investigate Fully

Kitty Hailey, CLI

Looking for an excellent marketing topic? How about this headline from The New Jersey Law Journal: “Late tort claim filing inexcusable where lawyer didn’t investigate.” The essence of the case was simple. An attorney’s client had a trip and fall accident. The client did not speak English and so the attorney relied upon an interpreter to describe the accident and scene as told by the client. No effort was made to personally look at the offensive area. Had the attorney thought to send an investigator to the scene to ascertain the situation he would have found that a very visible metal shut-off valve protruded from the ground and was easily identifiable as belonging to a water supply system. The attorney assumed (wrongly) that the accident occurred on private property. The obvious debacle that followed can be further understood by reading *Blank v City of Elizabeth* (A-88-98).

The Model Rules of Professional Conduct and the Code of Ethical Responsibility state that an attorney has an obligation to “investigate fully” each and every matter that he or she is asked to litigate. As part of the section on Attorney-Client Relations, investigation ranks along with competence, knowledge and preparation as a tenant of the responsible legal practitioner. A qualified legal investigator provides the necessary expertise to gather evidence and complete a thorough investigation. Not only are the needs of the client satisfied, but also the attorney can comfortably avoid the ever-present onus of malpractice by dotting each “I” and crossing each “T.”


It always amazes me that members of the legal profession will hire an expert to evaluate a medical problem

or calculate the economic losses of a client. These same individuals will then ask their secretary’s husband to take pictures of an accident scene and pick up a police report to avoid the cost of a professional investigator. It is obviously irresponsible not to use a qualified investigator who knows what to look for, who to interview and how to properly photograph and diagram an accident scene. I realize I am preaching to the choir as this information is being disseminated to investigators, not attorneys. However, it is important for all investigators to understand the obligation their attorney/clients have to the individuals they represent.

Perhaps a well worded letter or simply stated paragraph in your marketing literature will help to get the message across. Feel free to use New Jersey’s *Blank v City of Elizabeth* as a citation (but please, read it first). Or use any of the numerous other cases where attorneys have failed to fulfill their duties. Remind them that we as a profession are not only essential to the client, but to the proper responsibilities and canons of ethics of a member of the legal profession.

Kitty Hailey, CLI, may be contacted at kittycli@aol.com.





**It's
Midnight...
do you
know where
your spouse**

Spousal Surveillance Law in Texas

This article by Wes Bearden, CEO of Bearden Investigative Agency Inc., attempts to help draw the lines of privacy rights and surveillance laws in the marital relationship. A thorough discussion will be given of where the law stands on video surveillance, and vehicle tracking. Another article will follow on spousal wiretaps, and email monitoring.

For instance, the article will discuss a relatively new Texas penal statute, which makes it a crime to place a tracking device on someone else's vehicle. The statute does create an exception to allow an "owner" of the vehicle to track the vehicle's location. Can the exception be construed to allow one spouse to track a vehicle of the other under Texas community property rules? Even during separation and divorce?

Video Surveillance and Physical Surveillance

"Look, I found...them."

Video and physical surveillance may just be the best and safest way for a spouse to investigate the other. Yet, there are restrictions on such surveillance. Namely, the consideration of invasion of privacy claims. In Texas, we generally recognize three different types of actions for invasion of privacy.¹ They include an action for intrusion into the plaintiff's seclusion, the right to be free from public disclosure of embarrassing private facts, and the right to be protected against the appropriation of a name or likeness of the plaintiff.² Although the last two causes of action are of importance when disclosing information, the first type of invasion of privacy, and most common in a family law situation, will be the cause of action for intrusion on seclusion.³

In an intrusion on seclusion action, the plaintiff's injury is solely the intentional interference with his interest in solitude or seclusion of a kind, which is highly offense to a reasonable person.⁴ The ultimate test is whether the injured party had a subjective and objective reasonable expectation of privacy, which should be protected.⁵ Obviously, surveillance in a public place would normally be allowed. When that surveillance enters a family residence and intrudes on the marital bedroom, determining what expectation of privacy spouses have in the room they share becomes more difficult.

In Clayton, Gary Clayton alleged that his estranged wife Marie Clayton retained an investigator to assist her

Wes Bearden, TCI

In an age when privacy rights are constantly in dispute, ascertaining the boundaries of those rights are at many times impossible.

in placing a video camera that recorded images in the Clayton bedroom.⁶ Marie had contacted a private investigator and requested that the private investigator rent and install a long duration covert camera in the spare bedroom of the residence.⁷ During the divorce, the investigator's actions came to light and the husband sued his estranged wife and the investigator for invasion of privacy.⁸

The court found that spouses share equal rights in the privacy of the bedroom.⁹ Both spouses relinquish some of his or her rights to seclusion by entering in the bedroom.¹⁰ However, the court made clear that an individual upon entering the bedroom has a right to an expectation of privacy.¹¹ Furthermore, the court found that a covert video recording of someone in their bedroom could be found to be highly offensive to a reasonable person.¹² For all of these reasons, the court reversed a summary judgment dismissing the action and remanded the cause for trial.¹³

Although cameras in the bedroom may be too invasive, public surveillance by one who is authorized under law to do so presents a much more attractive solution. An investigator using a standard camcorder to document his subject's activities might be the best solution. Obvi-

ously, the investigator can become a critical fact witness and help provide more detail than any camera, wiretap, or computer. Accompanied by a written report and videotape, the investigator's testimony and credibility may win out as the best evidence of the day.

Vehicle Tracking Devices

"Where did he say he was?"

In 1999, the Texas legislature enacted House Bill 1001, which made it unlawful for a person to knowingly install a tracking device on a vehicle owned or leased by another person.¹⁴ An offense committed under the statute was classified as a class A misdemeanor.¹⁵ Additionally, the legislature created four affirmative defenses to prosecution. This relatively simple and short statute reads:

(a) In this section:

(1) "Electronic or mechanical tracking device" means 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.

(2) "Motor vehicle" has the meaning assigned by Section 501.002, Transportation Code.

(b) 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. (c) An offense under this section is a Class A misdemeanor.

(d) It is an affirmative defense to prosecution under this section that the person:

(1) obtained the effective consent of the owner or lessee of the motor vehicle before the electronic or mechanical tracking device was installed;

(2) was a peace officer who installed the device in the course of a criminal investigation or pursuant to an order of a court to gather information for a law enforcement agency;

(3) assisted another whom the person reasonably believed



Handwriting Analysis or Document Examination?

Peggy Walla, TPLI

What is the difference between handwriting analysis and document examination?

Document examination involves, but is not limited to, the comparison of questioned handwriting on documents with known handwriting. This may also include:

- Genuineness of a document, or an entry to a document
- Written over or obliterated or white out – reveal the original record
- Sequencing documents – (time records)
- May involve ink examination
- Examination of substituted documents used to cover up a crime or partial documents using ultra violet lighting
- Watermarks
- Signatures / handwriting

Following are two fundamental laws of handwriting:

- No two people write exactly alike
- No one person can write the same thing exactly alike twice

Handwriting can be compared or can be considered a forensic science—useful to identify humans; much like the non-changing DNA/blood analysis and/or fingerprints, handwriting can and does change. Handwriting is a form of behavioral science, a movement activity done by humans. Changes can happen due to internal conditions (caffeine, drugs, fatigue, age) and/or external conditions (weather, writing surface, writing instrument). Changes in handwriting can also be deliberate—simply the changing of the hand which is used to write.

I, as a forensic document examiner, under examination, using lights, magnification, measuring devices, etc., can decipher if: (1) the document has been altered; or (2) the authenticity of a handwriting.

I find interesting facts on why and how this useful knowledge of handwriting is used.



Peggy Walla

**Certified Forensic
Document/Handwriting
Examiner
Private Investigator**

TX DPS-PSB License A15090

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Document Examiner**

**Certified
Questioned Documents**

**Certified
Handwriting Analyst**

**Director of
Forensic Sciences
for the
Coalition of Handwriting
Analysts International**

Remember:

- * **No two people write exactly alike.**
- * **No one person can write the same thing exactly alike twice!**

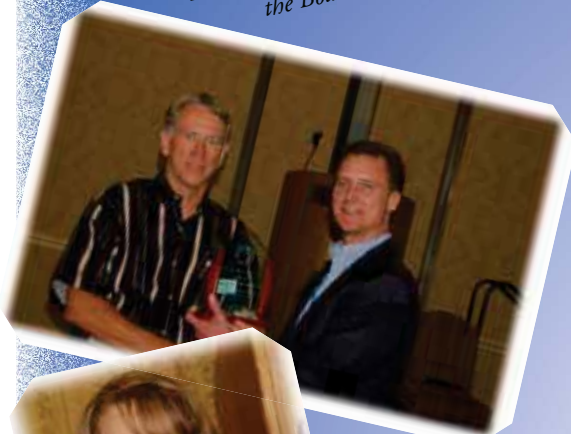
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pwalla@hughes.net**



Brad Bacom, TCI, returns to the TALI Board as Chairman; Carla Hunt joins the Board as Region 3 Director.



TALI President Randy Kildow, TCI with Keynote Speaker Kirk Bloodsworth.



TALI President Randy Kildow, TCI, presented President's Awards to Program Chair Ken Heldenfels (above), TALI Vendor Coordinator Macklyn Smith, TCI (center), and TALI General Counsel Jim Bearden, JD, TCI, (below).



TALI's treasured Hudgins-Sallee Award was presented to Paul Hulsey, TCI, Past Treasurer, Vice President, President, and Chairman of the Board.

Convention 2009

TALI Members Receive Meritorious Service Awards

(Left) Willie Fabila, TPLI, for extraordinary investigative skill that resulted in the exoneration of a 17 year old suspect who was charged with aggravated robbery with a deadly weapon for shooting a victim in the face. Mr. Fabila investigated until he found the real shooter and the innocent suspect avoided a possible sentence of up to 99 years in prison.

(Right) Les Johnson, TPLI, whose work helped exonerate David Lozano in a 2007 shootout with an Austin police officer. Les' client, David, expressed his heartfelt thanks in person as Les was presented with this prestigious award.





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