



# Court Room Testimony

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# Introductions



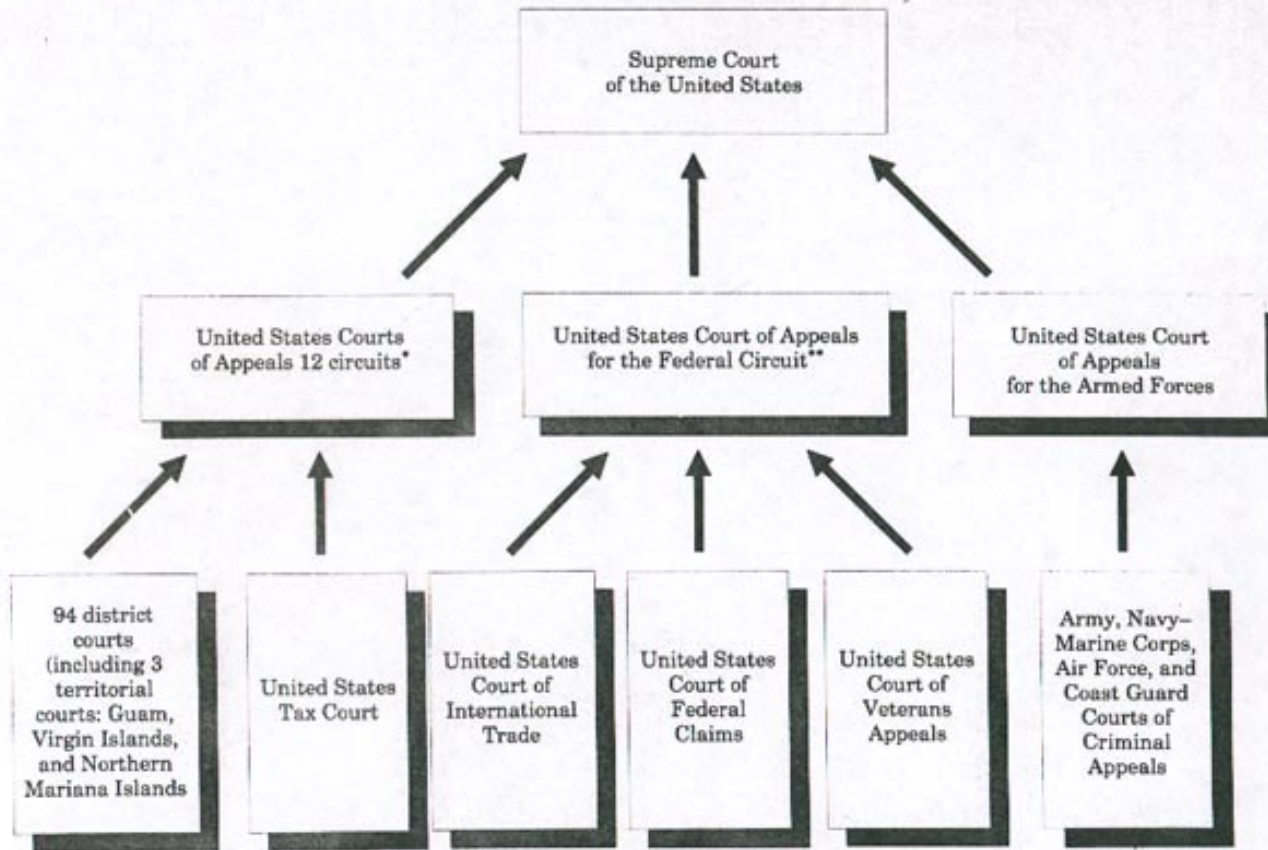
JW BEARDEN  
—  
& ASSOCIATES, PLLC





# Agenda

## The United States Court System



\* The 12 regional courts of appeals also receive cases from a number of federal agencies.

\*\* The Court of Appeals for the Federal Circuit also receives cases from the International Trade Commission, the Merit Systems Protection Board, the Patent and Trademark Office, and the Board of Contract Appeals.

# US Court System



# Article I v. Article III Courts

- ▶ Article I Courts – Less than full power. Legislative Courts.
  - ▶ Bankruptcy, FISA, Tax, International Trade
- ▶ Article III Courts – Tenure for Life. Most District Courts.
- ▶ Elected v. Appointed Judges.
  - ▶ Magistrates, Associates, ALJs, Special Masters.
- ▶ Court Records PACER?



# Open Courts Act

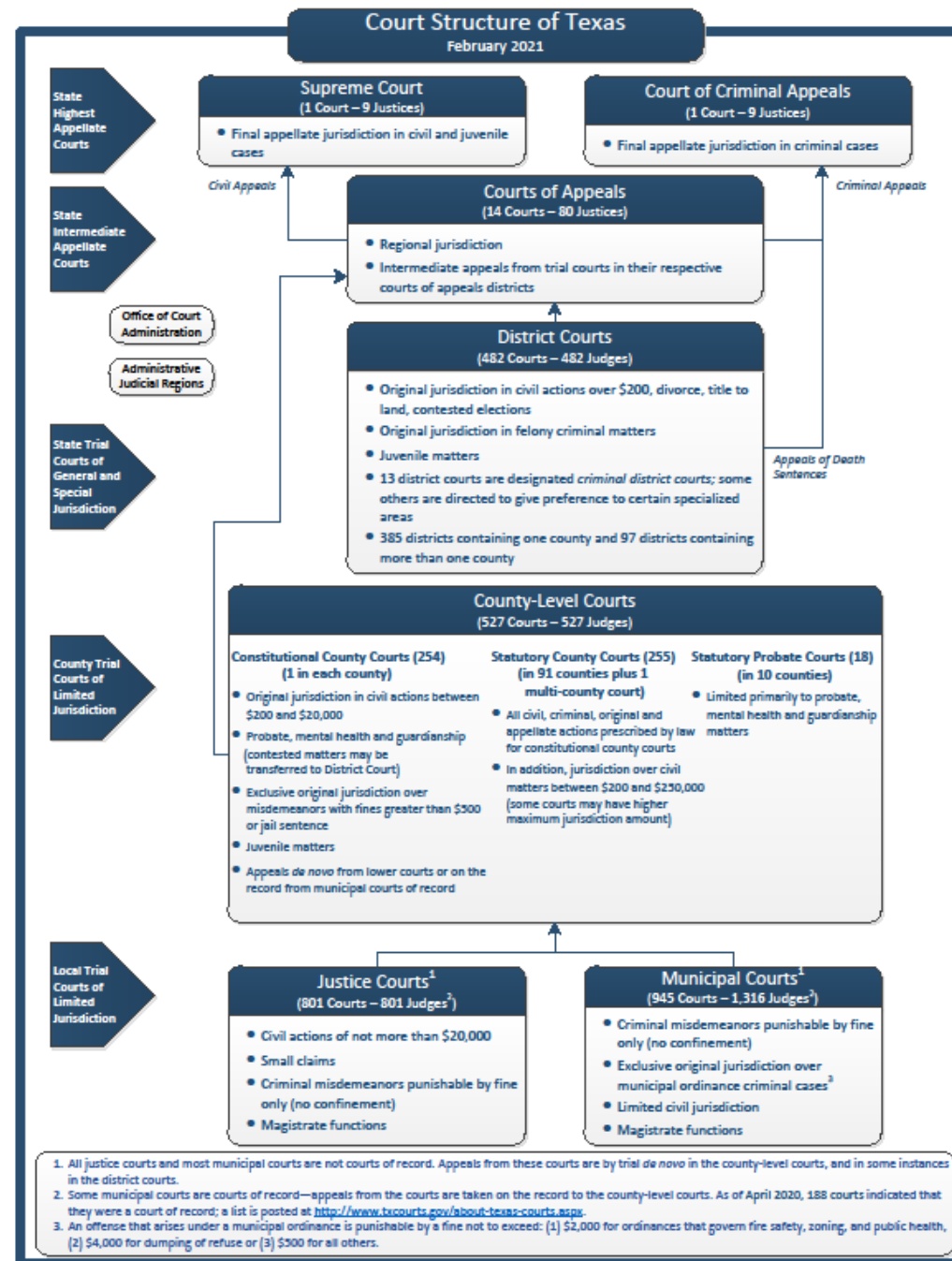
- ▶ HR 8235 – Passed House.
- ▶ S.4988 – Introduced in Senate.
- ▶ Bipartisan effort to:
  1. Eliminate or Reduce PACER fees.
  2. Potential for some additional identification information.
  3. May take some time (2025) to institute.



# Administrative Hearings

- ▶ Department of Labor – ALJs, Whistleblowers, EEOC, Discrimination.
- ▶ FCC – Communications Disputes.
- ▶ Finra – Broker regulation and enforcement.
- ▶ Social Security Administration – Disability or SSI benefits.
- ▶ Environmental Protection Agency – AL hearings on civil penalties.
- ▶ Plus so many more!!!!

# Texas Court Structure





# SOAH & Other Administrative Bodies

- ▶ <https://www.soah.texas.gov/>
- ▶ Appraisal Review Board
- ▶ Driver's License
- ▶ TCEQ
- ▶ PSB
- ▶ Professional Licensing
- ▶ Child Support Review
- ▶ LOTS and LOTS OF OTHERS.



State Office of  
Administrative Hearings

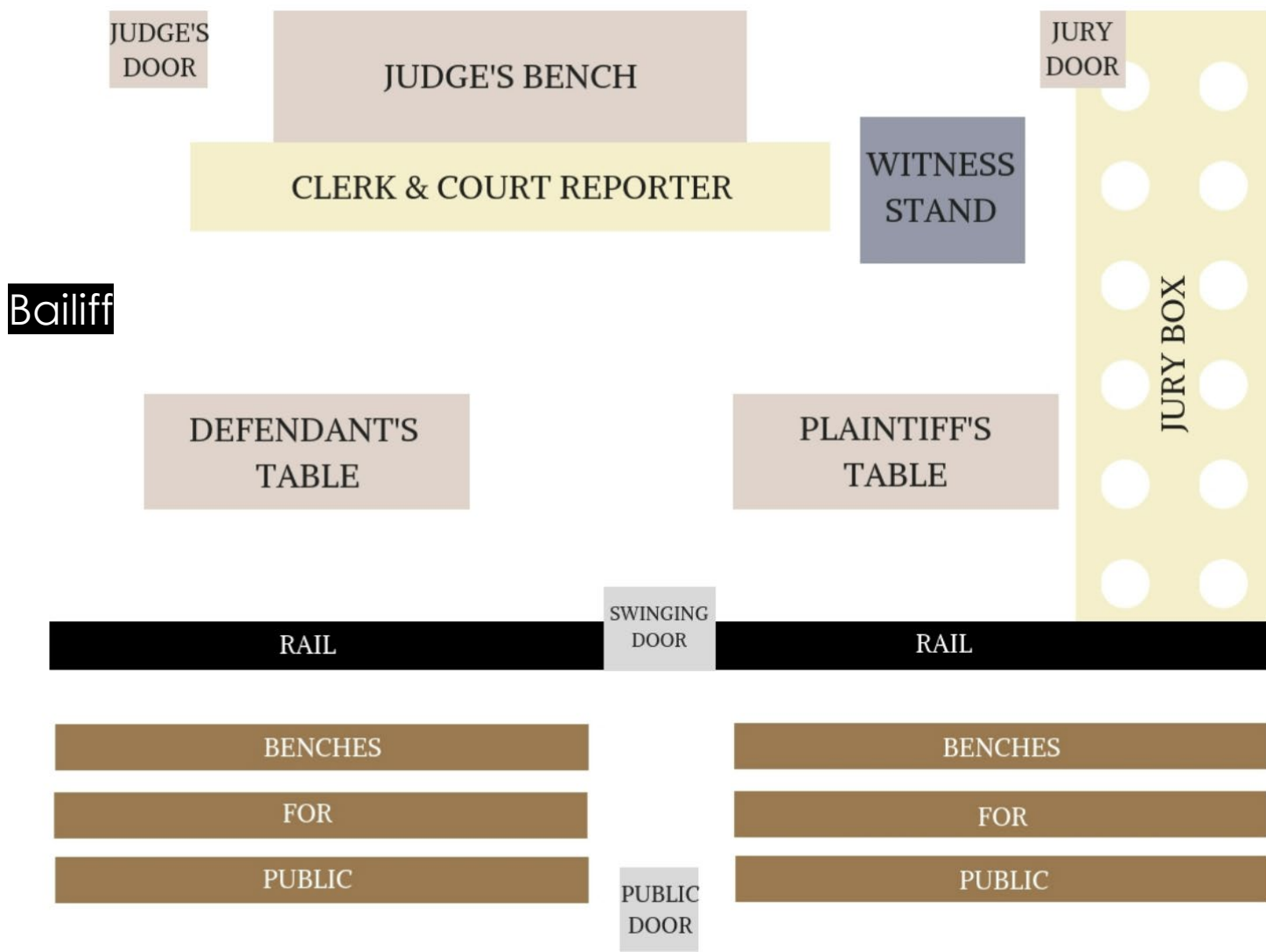
# Mediation and Arbitration

Mediation v. Arbitration



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# Texas Rules of Evidence

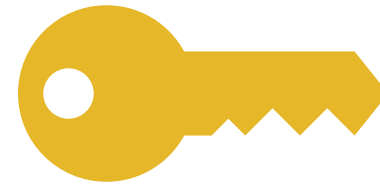
- ▶ TRE v. Texas Rules of Civil Procedure ("TRCP"), Texas Code of Criminal Procedure ("CCP"), Texas Civil Practice and Remedies Code ("CPRC").
- ▶ Article I. General Provisions
- ▶ Article II. Judicial Notice
- ▶ Article III. Presumptions
- ▶ Article IV. Relevancy And Its Limits
- ▶ Article V. Privileges
- ▶ Article VI. Witnesses
- ▶ Article VII. Opinions And Expert Testimony
- ▶ Article VIII. Hearsay
- ▶ Article IX. Authentication And Identification
- ▶ Article X. Contents Of Writings, Recording And Photographs



# EVIDENCE



Four Types of traditional types of evidence: real, demonstrative, documentary, and testimonial.



Three keys to admissibility: relevance, materiality, and competence.

# Witnesses

TRE 601 (a) In General. Every person is competent to be a witness unless these rules provide otherwise. The following witnesses are incompetent:

- ▶ (1) Insane Persons. A person who is now insane or was insane at the time of the events about which the person is called to testify.
- ▶ (2) Persons Lacking Sufficient Intellect. A child—or any other person—whom the court examines and finds lacks sufficient intellect to testify concerning the matters in issue.



# Child Witnesses? Can you interview?

Does the kid have?

- ▶ (1.) the ability to intelligently observe the events in question at the time of the occurrence;
  - ▶ (2.) the capacity to recollect the events, and
  - ▶ (3.) the capacity to narrate the events. *Davis v. State*, 268 S.W.3d 683 (Tex. App.—Fort Worth 2008).
- 
- ▶ Affidavit? No difference. Court found that an affidavit of a 12-year old stating that there was no cautioning sign in her father's slip in fall case was competent testimony. *Pipkin v. Kroger Tex., L.P.*, 383 S.W.3d 655 (Tex. App.—Houston [14th Dist.] 2012).

# Expert Witnesses – Texas

- ▶ TRE 702 - A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.





# Expert Witness FRE 702

- ▶ A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
  - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  - (b) the testimony is based on sufficient facts or data;
  - (c) the testimony is the product of reliable principles and methods; and
  - (d) the expert has reliably applied the principles and methods to the facts of the case.

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).



Can a Lay Witness Offer an Opinion?



# YES YOU CAN!!!!

- ▶ FRE 701 - If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
  - (a) rationally based on the witness's perception;
  - (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
  - (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

# Crime Scene Investigator

- ▶ Where crime scene specialist who collected evidence testified that blood stain on back of victim's shirt appeared to have been made by someone wiping bloody knife off on shirt, specialist made layperson observations about shirt and knife, and therefore did not provide expert testimony; thus, no Fed. R. Crim. P. 16 notice was required with respect to testimony. *United States v. Lecroy*, 441 F.3d 914 (11th Cir. 2006), reh'g, en banc, denied, 186 Fed. Appx. 984, (11th Cir. 2006), cert. denied, 550 U.S. 905 (2007).



# Child Interview?

- ▶ Forensic interviewer properly gave lay opinion testimony as to forensic process and personal opinions of victim's interview because she relied exclusively on experience observing other sexually abused children and personal perceptions and did not refer to any scientific, technical, or other specialized knowledge in stating opinion. *United States v. Oldrock*, 867 F.3d 934 (8th Cir. 2017).

# Drugs? If Code Words? Maybe.

- ▶ Sufficient evidence supported defendant's conspiracy to distribute cocaine conviction pursuant to 21 USCS § 846 as it was for jury to determine weight to be given to drug enforcement agent's testimony and whether recorded wiretap conversations were "drug talk"; further, informant could testify with as to meanings of "code words" because his testimony satisfied requirements of Fed. R. Evid. 701. *United States v. Grullon*, 545 F.3d 93 (1st Cir. 2008).
- ▶ Government agent witness did not give improper overview testimony; he appropriately testified from personal knowledge and explained drug activity and coded language to jury, based on his experience. *United States v. Rosado-Perez*, 605 F.3d 48, 2010 U.S. App. LEXIS 9922 (1st Cir. 2010).



# Computer Expert? Possibly.

- ▶ Lay witness was properly allowed to testify as to whether appearance of document found on defendant's computer was consistent with what would happen if document had been scanned and converted; testimony fell within witness's personal knowledge as employee who was familiar with software in question. *United States v. Davis*, 524 Fed. Appx. 835 (3d Cir. 2013).
- ▶ Exclusion of testimony in employment discrimination and retaliation case was proper because employee and coworker could not give lay opinion testimony in describing computer malfunction they claimed to have observed; such knowledge, derived from previous professional experience, required expert testimony. *Garcia v. City of Farmington*, 715 Fed. Appx. 810, 2017 U.S. App. LEXIS 20597 (10th Cir. 2017).

# Can I become a Consulting Witness?

- ▶ TRCP 192.3 (C) Permissible Discovery.
- ▶ (c) Persons with Knowledge of Relevant Facts. --A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained first-hand or if it was not obtained in preparation for trial or in anticipation of litigation.



# Can I be paid to Testify?

## Can I get my fees?

- ▶ 1. Yes! You can pay for your fee to testify or prepare to testify. But, make sure you are ready to explain it.
- ▶ 2. Yes! But, may require an intervention of a claim to enforce your fees. If no contract, may be by Quantum Meruit. So, be smart and get you \$\$\$ up front if possible.

# Getting Your Evidence In and Keeping You Out of Trouble!

# Electronic Communications Privacy Act of 1986 – “ECPA”

- ▶ Also known as the Federal Wiretap Act.
- ▶ The ECPA was an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1986. Codified at 18 U.S.C. § 2510 et seq.
- ▶ Protects wire, oral and electronic communications while in transit from interception by a third party.
- ▶ Prohibits the interception of oral or wire communication by use of any electronic, mechanical or other device.





# § 2511

- (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
- *Campbell v. Facebook, Inc.*, 951 F.3d 1106 (9th Cir. 2020) (communications can be urls in private messenger). Great comparison of statutes to common law.



# Violating the ECPA

- ▶ Federal Exclusionary Rule – Federal Statute prohibits the use of intercepted wire or oral communications as evidence in Court or any administrative action. 18 U.S.C.A. § 2515.
- ▶ Criminal Penalty – The penalty for a violation of the ECPA is a fine or imprisonment for up to five years, or both.
- ▶ Federal Civil Remedies – Allows for actual and punitive damages for violation of the wiretap act. The Federal Statute allows for minimal liquidated damages of \$10,000 for violation of the Federal Act but most courts use discretion and have refused to award damages for de minimis violations.

# Can you admit illegally obtained evidence in a Texas civil case? Criminal Case?

▶ “the provisions for a cause of action for divulging wiretap information and the injunctive remedies provided in [Civil Practice and Remedies Code] section 123.004 are sufficient to rebut the presumption of admissibility under rule [of Evidence] 402. Because the tapes were illegally obtained under the federal and state statutes, the trial court should not have admitted them into evidence on the issue of custody.” Collins, 904 S.W.2d at 799.

▶ BUT SEE, Allen v. Mancini, 170 S.W.3d 167, 172- 73 (Tex. App.—Eastland 2005, pet. denied)





# Exceptions to Federal Wiretap Act



## ▶ Federal Interspousal Exception

▶ The Second & Fifth Circuit created an implied exception for interspousal wiretapping. See *Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir. 1974) Congress did not intend the act to regulate marital controversies or override state inter-spousal tort immunity.

▶ The Fourth, Sixth, Eighth, Tenth and Eleventh circuits have rejected *Simpson*, e.g., *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989) (holding husband's taping of wife's phone conversations in the marital home is not protected under Title III).

▶ USC has not yet addressed the split in the federal circuits on the issue. MS may be only state that also recognizes exception. But, in other states be wary of state rule.

# Exceptions to Federal Wiretap Act

- ▶ Federal Extension Phone Exception - 18 U.S.C. § 2510(5)(a)(i)

- ▶ The "extension telephone" exemption, also known as the "ordinary course of business exemption," expressly exempts from coverage "any telephone or telegraph instrument, equipment or facility or any component thereof...being used by the subscriber or user in the ordinary course of its business...." 18 U.S.C. § 2510(5)(a)(i)

- ▶ Very narrow interpretation; Is the extension phone being used by subscriber "in ordinary course of business"

- ▶ Anderson v. City of Columbus, 374 F. Supp. 2d 1240 (M.D. Ga. 2005).

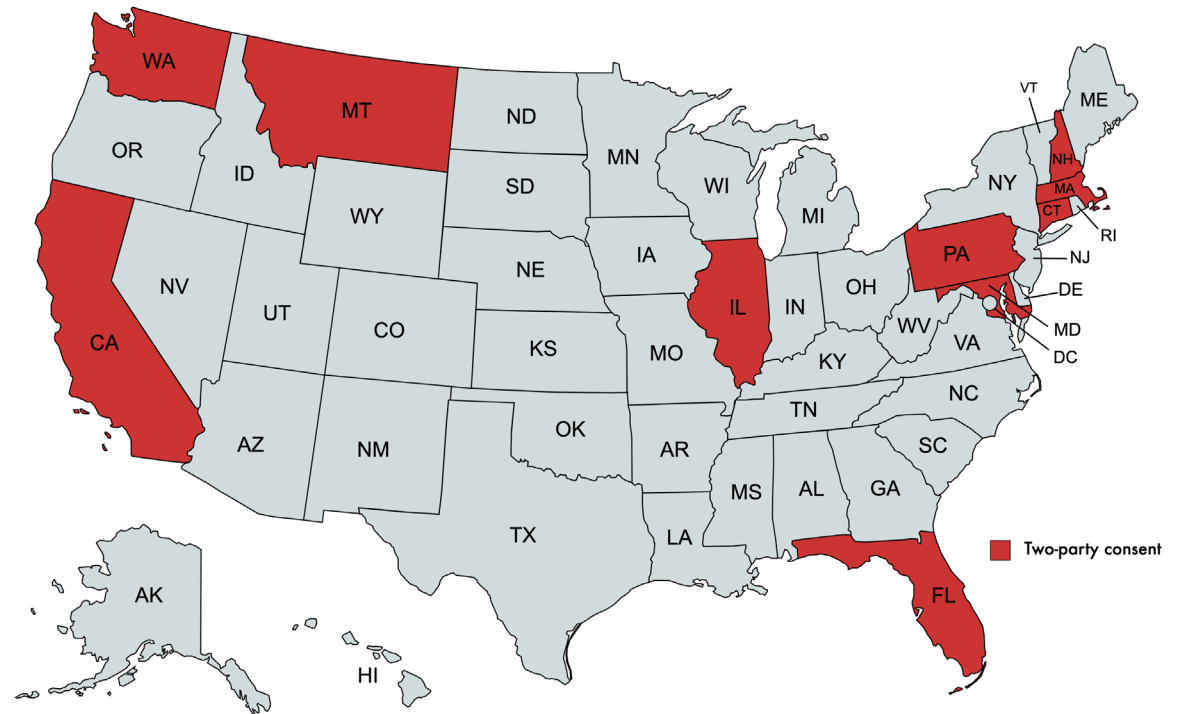
# Federal Wiretap Act and State Law

- Preempts state law that provides less security. Tex. Penal Code 16.02.
- States may provide more protection, e.g. “two-party consent” states.
- Majority of states require “one party consent” where a person may record a conversation:
  - If the person recording the conversation is a party to that conversation or
  - If the person recording is not a party, one of the parties has given prior consent.



# Two-Party Consent States

- ▶ California
- ▶ Connecticut
- ▶ Florida
- ▶ Illinois
- ▶ Maryland
- ▶ Massachusetts
- ▶ Montana
- ▶ New Hampshire
- ▶ Pennsylvania
- ▶ Washington



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# Two-party consent, continued

States with complicated and ambiguous statutes:

- **Illinois** - 720 Ill. Comp. Stat. Ann. 5/14-2 prohibits recording of a private conversation;
- **Hawaii** - Haw. Rev. Stat. Ann. § 711-1111 requires two-party consent if the recording device is installed in a private place;
- **Massachusetts** - Haw. Rev. Stat. Ann. § 711-1111;
- **Washington** - Wash. Rev. Code Ann. § 9.73.030 requires recorded notice and announcement indicating all parties consent;
- **Montana** - Mont. Code Ann. § 45-8-213 requires warning with an announce provision.

Be aware that the law can change...

# And, they can Change...Maybe...

AFT Mich. v. Project Veritas (In re Certified Questions from the U.S. Dist. Court), 951 N.W.2d 904 (Mich. 2020) – Michigan has traditionally been a one-party state. Plaintiffs now argue that the language has been interpreted incorrectly all these years. Federal Court in the Eastern District of Michigan has thus asked for Certification to the Michigan Supremes to decide the issue.

*Fisher v. Perron*, No. 20-12403, 2021 U.S. Dist. LEXIS 5524 (E.D. Mich. 2021) – Another court in the same district, finds that in state wiretap act dispute citing same reasoning that Michigan will likely decide that the years of cases relied upon will be upheld.





# ECPA Cross- Border Issues

# Cross Border Issue = Conflict of Laws Issue

- Usually, the "most significant relationship" test is part of this analysis. The Restatement 2d of Conflict of Laws § § 6, 145 (2nd 1988). § 6 is general principles and § 145 is the factual considerations:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

# Cross Border Continue...

*Xcentric Ventures, L.L.C. v. Borodkin*, No. CV-11-01426-PHX-GMS, 2013 U.S. Dist. LEXIS 3359 (D. Ariz. 2013) (holding Arizona law controlled when California resident called into recorded line).

*Becker v. Comput. Scis. Corp.*, 541 F. Supp. 694 (S.D. Tex. 1982) (holding Texas law applied to Texas based Plaintiff who recorded California employer).



# Vicarious Consent

*Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998).

[T]hat as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

- *State v. Morrison*, 203 Ariz. 489, 56 P.3d 63, 64 (Ariz. App. 2002); *Commonwealth v. Barboza*, 54 Mass. App. Ct. 99, 763 N.E.2d 547, 549, 552-53 (Mass. App. 2002); *State v. Diaz*, 308 N.J. Super. 504, 706 A.2d 264, 270 (N.J. Super. Ct. App. Div. 1998); *Alameda v. State*, 181 S.W.3d 772, 778 (Tex. App. 2005).



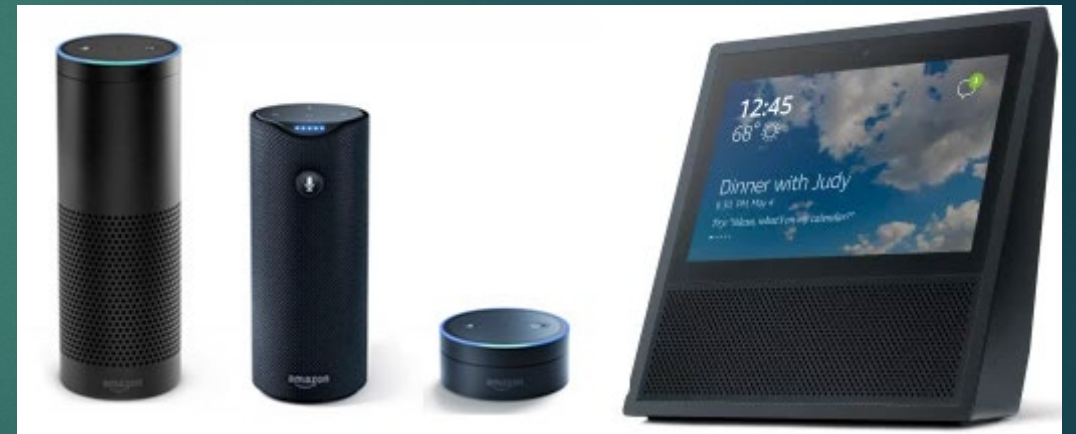


# What are the best interest of the child?

- *Dahl v. Dahl*, No. 2:11-CV-949-TC, 2013 U.S. Dist. LEXIS 22365 (D. Utah 2013) (coaxing the daughter to take prescription pain killers, graphically discussing a miscarriage with the daughter, telling the daughter that she is the spirit of a dead baby, and telling her daughter that something was wrong with the girl's "biorhythm").
- *Smith v. Smith*, 2004-2168 ( La. App. 1 Cir 9/28/05), 923 So. 2d 732 (telling the child to lie to court, fail school to make Dad look bad, lie to custody evaluator, take pictures of "messy" house, keep track of every argument, etc..)



*B.F. v. Amazon.com Inc.*, No. 20-35359, 2021 U.S.  
App. LEXIS 12092 (9th Cir. 2021).







# Implied Consent

*Escalona v. State*, 2014 Tex. App. LEXIS 2008 (Tex. App. Dallas Feb. 20, 2014).



# Public Recordings Considerations

1. the volume of the communication or conversation;
2. the proximity or potential of other individuals to overhear the conversation;
3. the potential for communications to be reported;
4. the affirmative actions taken by the speakers to shield their privacy;
5. the need for technological enhancements to hear the communications; and
6. the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.



*Stephens v. Dolcefino*, 126 S.W.3d 120  
(Tex. App.—Houston [1<sup>st</sup> Dist.] 2003).

*Kee v. City of Rowlett*, 247 F3d 206 (5th  
Cir. 2001).



# Using Audio Recordings

► TRE 901(b)(5) Opinion About a Voice. --An opinion identifying a person's voice - whether heard firsthand or through mechanical or electronic transmission or recording - based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

OR, **TRE 613** Witness's Prior Statement and Bias or Interest

# Impeachment Generally

► “There are five major forms of impeachment: two are specific, and three are nonspecific. The two specific forms of impeachment are impeachment by prior inconsistent statements . . . And impeachment by another witness. The three non-specific forms of impeachment are impeachment through bias or motive or interest, impeachment by highlighting testimonial defects, and impeachment by general credibility or lack of truthfulness. Specific impeachment is an attack on the accuracy of the specific testimony (i.e., the witness may normally be a truth teller, but she is wrong about X), while non-specific impeachment is an attack on the witness generally (the witness is a liar, therefore she is wrong about X).” *Michael v. State*, 235 S.W.3d 723, 725–26 (Tex. Crim. App. 2007)



Should I Record my Interviews?



# Audio Recordings Discoverability

- ▶ 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.

Tuesday, June 22, 2021

2:01P.M:

The investigator arrived at Mr. [REDACTED] residence located at:



The investigator introduced himself to Mr. [REDACTED], as a licensed private investigator employed by the defendant. Mr. [REDACTED] is described as an approximately 50-year-old white male with salt and pepper hair and brown eye glasses. Mr. [REDACTED] agreed to be interviewed regarding the accident of Mr. [REDACTED]. Mr. [REDACTED] stated the following during the course of the interview.

1. This investigator asked Mr. [REDACTED] if he knew Mr. [REDACTED] and if Mr. [REDACTED] still worked for the company. Mr. [REDACTED] stated that he remembered [REDACTED] but he didn't know if he still worked for the company since his (Mr. [REDACTED]) retirement March 26, 2021.
2. This investigator asked Mr. [REDACTED] if he remembered what Mr. [REDACTED] did at the company and if he saw the accident occur. He stated Mr. [REDACTED] was a driver and he was told he was notified about the incident by other dock area employees. Mr. [REDACTED] stated you have to open your doors before you back into the docks. He stated there was a propane cage that holds propane bottles there. The guy that fills up the propane bottles ([REDACTED]) was backing up and Mr. [REDACTED] was taking his door around and whenever he was taking his door around he was facing the door going around with it so he couldn't see around the other side and the guy in the truck backed up, hit that door and knocked him back around.



What happens if you find the tap?



# Technical Surveillance Countermeasures (“TSCM”) – “Debugging”

- **Tex. Penal Code § 16.02** (g) A person commits an offense if, knowing that a government attorney or an investigative or law enforcement officer has been authorized or has applied for authorization to intercept wire, electronic, or oral communications, the person obstructs, impedes, prevents, gives notice to another of, or attempts to give notice to another of the interception.
- **Tex. Occ. Code § 1702.133 . CONFIDENTIALITY; INFORMATION RELATING TO CRIMINAL OFFENSE.** (b) A company license holder or an officer, director, or partner of a company license holder shall disclose to a law enforcement officer or a district attorney, or that individual's representative, information the person obtains that relates to a criminal offense. A private investigator who is working under the direct supervision of a licensed attorney satisfies this requirement by disclosing the information to the supervising attorney.
- See *also* **18 U.S.C. § 2518** for the procedure law enforcement must follow.



# Video Surveillance

- ECPA does not prohibit video surveillance that is non audio recorded.
- Few statutes deal on point with video surveillance. But, be wary of:
  - Video Voyeurism - Ky. Rev. Stat. § 531.100.
  - Revenge Porn Statutes - § 784.049, Fla. Stat.
  - Texas Penal Code § 21.01

Reasonable Expectation of Privacy. *In re Marriage of Tigges*, 758 N.W.2d 824 (Iowa 2008) (finding that spouse did not give up her reasonable expectation of privacy through marriage). *Clayton v. Richards*, 47 S.W.3d 149 (Tex. App. 2001).



# Evidentiary Issues?

***Diamond Offshore Servs. v. Williams*, 542 S.W.3d 539 (Tex. 2018)** (holding that it is an abuse of discretion for court to deny admissibility to surveillance video without even looking at it).

Spells out the argument under TRE 403 that the prejudicial value outweighs the probative value.

Was the video cumulative of other evidence? Including P testimony?

Was the video misleading for not showing total circumstances?

- ▶ Discusses the authentication and predicate of the video.
- ▶ Difference in arguing the substance v. the admissibility of video.
- ▶ Discuss the optional completeness rule and selected recordings. Both Defense and Day-in-the-Life Video analyses.
- ▶ Analyzes the admission based on impeachment versus evidence in chief.



# How to use your recorded evidence?

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How do you intend to use the evidence  
and for what purpose?

---

What form do you want the evidence?  
Video? Report? Affidavit? Testimony?

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Do you want to impeach or use in case in  
chief. Or, both?

---

When do you want to disclose? Discovery,  
Summary Judgment, Trial, Informally?

---

When do you have to disclose?

---

Do you want the lie or the admission?

# Business Records Affidavit

► Tex. R. Evid. 803(6) - A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. - POLICE REPORTS.

► BUT SEE Campos v. State, 317 S.W.3d 768 (Tex. App.—Houston [1st Dist.] 2010) Inventory of stolen items after fact was done in anticipation of litigation.

6:53 P.M.:

The Subject, the subject's son, [REDACTED], and an unidentified female were observed to exit from the elevator bank of the hotel. The unknown female can be identified as a Caucasian female in her late 40s approximately 5 to 5 1/2 feet tall with blonde hair about 4 inches past her shoulders. In addition to the Subject, [REDACTED] and the unknown female, an older couple believed to be in their 70s joined them in the lobby of the hotel. The older couple was subsequently believed to be the parents of the Subject. While in the lobby of the hotel, all the individuals were talking and smiling and appeared to be getting along very cordially. During this time, the Subject appeared to be orienting himself with surroundings and directions to lead the group to another location. After a short discussion, all five individuals began walking in a south westerly direction through the Central Business District and towards the general area of the New Orleans Convention Center.

While walking this long route in the direction of the convention center, the subject and unknown female were observed holding hands and interlacing fingers together during the long walk. The unknown female at times was observed holding on to the Subject's arm in an affectionate, romantic manner. See Exhibit B-400.



|  
7:21 P.M.:

The Subject, the Subject's son, the Subject's parents and the unknown female arrived at [REDACTED]  
[REDACTED] Restaurant, which is located at:

[REDACTED]  
[REDACTED]  
[REDACTED]

This location is a popular tourist destination and is a Cajun restaurant located across the street from the New Orleans Convention Center. Immediately upon arrival, the party of five was seated at a table near the live band and dance floor. The Subject and unknown female were seated on the same side of the table sitting next to each other facing the Subject's parents. The Subject was seated at the head of the table facing the live band. After being seated, they were served by wait staff and ordered dinner.

All the above individuals remained at this location for an extended period of time. During surveillance, the Subject and unidentified female were observed to be embracing, hugging and kissing each other and being romantically affectionate. All the above activity was done in direct view of the Subject's son and parents. Investigator B-142 documented this behavior in clear public view. See Exhibit B-400.

10:16 A.M.

Investigator B-142 observed Mr. John and Mr. Joe both dressed in blue business suits with dark colored ties and black dress shoes enter the coffee shop and proceed to order grande size coffees. They appeared to be nervous and hesitantly looking around. They then proceeded to sit in the far west corner of the coffee shop anticipating arrival of an additional subject, Mr. Andy. Both Subjects had papers they were executing, in a hurriedly manner prior to the arrival of Mr. Andy.





But,  
beware the  
Ring...





# Stored Communications Act

- Designed to protect intrusions into the phone company, Internet Service Provider (ISP), or electronic bulletin board system.
- Prohibiting the access of (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17).

*Garcia v. City of Laredo*, 702 F.3d 788 (5th Cir. 2012) (SCA does not protect the files on your mobile phone). But, 4<sup>th</sup> amendment does. *Riley v. California*, 134 S. Ct. 2473 (2014) (holding digital data in inventory search needs a warrant).



# Federal Wiretap Act v. Stored Communications Act

- EMPLOYER / EMPLOYEE - *Rene v. G.F. Fischers, Inc.*, 817 F.Supp.2d 1090 (S.D. Ind. 2011) (Keylogger not covered by the SCA because messages not contemporaneously intercepted in transit. However, use of that information to log onto her internet email and bank account was a violation of SCA).
  - FAMILY REALTIONSHIP - *Bailey v. Bailey*, No. 07-11672, 2008 U.S. Dist. LEXIS 8565 (E.D. Mich. 2008) (Holding keylogger scheme placed on ex-wifes machine did NOT violate FWA or State Wiretap Act but did violate SCA and viable invasion of privacy action).
- 
- *Luis v. Zang*, No. 1:12-cv-629, 2018 U.S. Dist. LEXIS 58753 (S.D. Ohio Apr. 6, 2018) (Spyware = same result).





But See...

State Statutes *may* include:

- Use of Numbers
- Breach of Computer Security
- Online Impersonation
- Unauthorized Use of a Computer
- Computer Trespass
- Computer Tampering
- Harmful Access Computer Act – Texas Tex. Penal Code 33
- Computer Fraud and Abuse Act – BUT, must meet \$5k pecuniary threshold.



*Miller v. Talley Dunn Gallery LLC*, No. 05-15-00444-CV, 2016 WL 836775 (Tex. App.—Dallas Mar. 3, 2016,no pet.) (mem. op.).

Wife owned an art gallery. Husband believed wife was cheating on him with one of the gallery's contributors. Husband took photographs of text messages on wife's cell phone between her and the other individual. Husband also placed a recording device in wife's car and recorded conversations she had in the car. Husband also recorded conversations between himself and wife at their home. About a year later, wife filed for divorce. Just before wife filed for divorce, the art gallery sued husband for using confidential information that he accessed on wife's cell phone, claiming that he was using it to interfere with the business. The gallery obtained an injunction that prohibited husband from using or disclosing the information he had obtained and from obtaining any more information. Husband claimed that the photographs were not accessing the phone and, further, that wife's cell phone was community property that he had consent to use. The court of appeals held that the photographs themselves did not violate the Harmful Access by Computer Act (HACA) but that retrieving the text messages did. The court reasoned that, because the cell phone belonged to wife, she used it on a daily basis, it was the only way to reach her, she had the right to password protect it, and restricted access to it by password protection, husband had no rightful access to the phone, and HACA makes no distinction between community and separate property. Furthermore, the recordings in the car, which husband was not a party to, violated the Interception of Communication Act (ICA) because wife did not consent to those recordings. The court of appeals also held that the other recordings husband made between him and wife at their home invaded wife's privacy under that common-law cause of action, even though the recordings did not violate the ICA. The court modified the injunction but upheld the sections pertaining to privacy and disclosing and obtaining confidential information.



# Best Civil Remedy?

Intrusion on Seclusion (Invasion of Privacy), Restatement 2d of Torts § 652b

- The defendant intruded on the plaintiff's solitude, seclusion, or private affairs;
- the intrusion would be highly offensive to a reasonable person, and;
- the plaintiff suffered some injury as a result .



# Invasion of Privacy Cases.

- Open Windows? – *Vaughn v. Drennon*, 202 S.W.3d 308 (Tex. App. – Tyler 2006, no pet.) (holding no invasion); *Baugh v. Fleming*, No. 03-08-00321-CV, 2009 Tex., App. LEXIS 9847 (Tex. App.-Austin 2009) (holding invasion).
- Home Computer or Cell? – *White v. White*, 344 N.J. Super. 211, 781 A.2d 85 (N.J. Super Ct. App Div. 2001) (holding no invasion in non password protected post transmission emails); *Sneed v. Sei/Aaron's, Inc.*, No. 1:13-CV-982-TWT, 2013 U.S. Dist. LEXIS 177266 (N.D. Ga. Dec. 18, 2013) (holding invasion claim on leased computer).
- Audio Recordings – *Parker v. Parker*, 897 S.W.2d 918 (Tex. App. – Fort Worth 1995, writ denied) (invasion of wiretap phone upheld). *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 Tex. App. LEXIS 2280 (Tex. App. Mar. 3, 2016) (holding that conversations within wiretap statute may still hold invasion claim).



# Abandoned Trash as Evidence





# Can you use discarded garbage as evidence?

► *Greenwood v. California*, 486 U.S. 35, 108 S. Ct. 1625 (1988).

Police officers twice obtain garbage bags left on the curb of a defendant's house. Based on drug paraphernalia within the bags, officers obtain a search warrant for the residence which eventually led to the defendant's arrest. Defendant complains that the warrantless search of his discarded trash violates his 4<sup>th</sup> Amendment right against unreasonable search and seizure.



# Greenwood v. California, 486 U.S. 35, 108 S. Ct. 1625 (1988).

- ▶ Court held that “society would not accept as reasonable respondents’ claim to an expectation of privacy in trash left for collection in an area accessible to the public....” *Id* at 41.
- ▶ Although 4<sup>th</sup> Amendment case, the Court clearly indicates that the method is used by others. (i.e. journalists, investigators, police, scavengers, snoops, etc.. )And that by depositing their garbage “in an area particularly suited for public inspection... and public consumption, for the express purpose of having strangers take it,” there is no reasonable expectation of privacy in the discarded materials. *quoting US v. Reichert*, 647 F.2d 397, 399 (3<sup>rd</sup> Cir. 1981).



# Curtilage?

- ▶ Typically, the "area [that] harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326 (1987).
- ▶ In garbage cases, Fourth Amendment reasonableness "turns on public accessibility to the trash." *United States v. Comeaux*, 955 F.2d 586, 589 (8th Cir. 1992).



# When is it abandoned? Or, where is the curtilage at?

- ▶ Placing the trashcan adjacent to the sidewalk? = OK.  
*United States v. Jackson*, 728 F.3d 367 (4th Cir. 2013).
- ▶ Placing dumpster that hundreds of people have access to? = OK.  
*United States v. Dunkel*, 900 F.2d 105 (7th Cir. 1990).
- ▶ Investigator's entry into a fenced area to pull trash? = OK.  
*United States v. Reed*, 733 F. 2d 492 (8th Cir. 1984).
- ▶ Pull from office trash bag placed in a building trash room? = OK.  
*Danai v. Canal Square & Assoc.*, 862 A.2d 395 (D.C. 2004).  
*See also Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053 (D.C. 2014).



What  
happens  
when you  
find  
something  
you don't  
want?

2 Ethical Scenarios to Watch out for:

1. Defense attorney or you takes possession of incriminating evidence.
2. You find materials that are privileged communications.



# Dealing with Special Criminal Evidence

Special Criminal Evidence varies by jurisdiction, but generally includes contraband, the instrumentalities of a crime, or the fruits of a crime. Can include guns, drugs, documents and more. Requires a turnover to prosecution or law enforcement. See *Rubin v. State*, 325 Md. 552, 602 A.2d 677 (1992); Tex. Prof. Ethics Comm., Op. 690 (October 2020).

See District of Columbia Rules of Professional Conduct, Rule 3.4, Comment 5 (D.C. Office of Bar Counsel may accept evidence and turn it over to proper authorities without revealing its source, thereby preserving the defense lawyer's obligation of confidentiality).

- [https://www.abajournal.com/magazine/article/hand\\_it\\_over](https://www.abajournal.com/magazine/article/hand_it_over)



# Ethics Rules for Privileged Communications

- ▶ Depends on whether your state adopted ABA Model Rule 4.4(b) and the analyses under withdrawn opinion ABA Opinion 04-381 (1994).
- ▶ Above rule is now more about inadvertent disclosure not abandoned. Further, the below points to obtaining outside the scope of discovery.
- ▶ Some jurisdictions have rejected those rules. *In re Meador*, 968 S.W.2d 346 (Tex. 1998) (holding attorneys should aspire to the ABA rule but that no specific Texas Disciplinary Rules apply to the circumstance of this case).



Monday, January 20, 2020.

On this date, Investigator V-291 conducted a surveillance at [REDACTED] residence which is located at:



The residence was observed to be a modern two-story structure located in a middle-income community. The residence has a two-vehicle attached garage located in the rear of the residence. The landscaping is well maintained. There is rear access via an alleyway. The plastic refuse bags were located in the rear of the property, facing the alley. Investigator V-291 also observed that all residences have their refuse bags in the same manner consistent with a scheduled refuse collection via alleyway access. Investigator V-291 conducted a curbside evidence retrieval in accordance with *Greenwood v. California* and its progeny. Investigator V-291 retrieved the curbside evidence and brought it back to the office where its contents were examined and analyzed. Investigator V-291 then checked the originals of the evidence retrieved into this agency's evidence locker under filings number E-59796. After processing the trash Investigator V-291 located a number of items of refuse including rotten food and fast food paper bags, which was discarded. After examining and analyzing the contents

The following items were located:

1. One (1) empty prescription bottle of [REDACTED] prescribed to [REDACTED] from [REDACTED]. [REDACTED] is prescribed for depression, obsessive-compulsive disorder (OCD), Posttraumatic stress disorder (PTSD), premenstrual dysphoric disorder (PMDD), social anxiety disorder and panic disorder.

# TRACKING DEVICE 4<sup>TH</sup> AMENDMENT CONCERNS

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*United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945 (2012) (holding warrant required for GPS monitoring). Decided under trespass reasoning and reasonable expectation of privacy test. Multiple concurring opinions

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*Carpenter v. United States*, 138 S. Ct. 2206 (2018) (holding that warrant required for cell site information). 5-4 decision that argues *Katz* test. Dissent holds on to trespass and that defendant didn't "own" these records.



# State Tracking Device Laws

## Three Types of State Tracking Laws:

1. Silent or part of the Stalking Statute. Ariz. Rev. Stat. § 13-2923.  
But, beware of invasion of privacy. *Demo v. Kirksey*, Civil Action No. 8:18-cv-00716-PX, 2018 U.S. Dist. LEXIS 194973 (D. Md. 2018).
2. Clear, absent either consent or ownership, makes it illegal. Cal. Penal Code § 637.7.
3. One whose ambiguous language is left to interpretation.  
Texas???



# Unlawful Installation of Tracking Device.

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...(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. Tex. Penal Code §16.06.

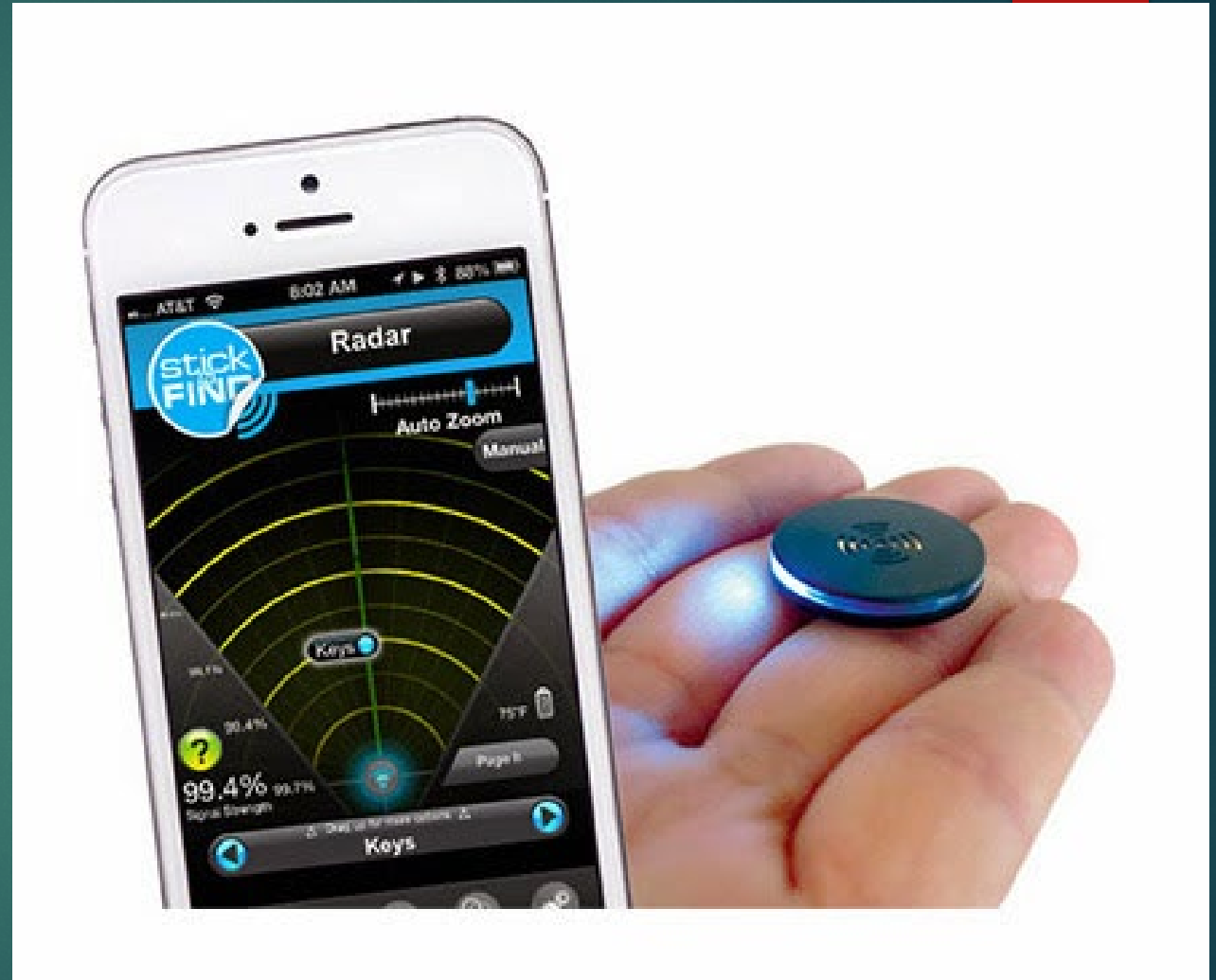
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*Ex parte Dishman*, No. 09-18-00301-CR, 2018 Tex. App. LEXIS 10193 (Tex. App.—Beaumont Dec. 12, 2018)(holding Penal Code Definition as opposed to Family Code community property controlled and was a fact driven inquiry). Who has a superior right to possession?



# Tracking Devices.

- ▶ Federal Effort The Geolocation Privacy and Surveillance Act, S. 395 and H.R. 1062 - Last really seen in 2017. But, beware US Data Privacy Act to come.



# What to do?

2 types of routine uses:

1. Commercial Property Cases – Tracking of boats, planes, trains, trucks, inventory, etc...
1. Family Law Cases – Tracking of people for the purposes to gather private information.







Is this old  
technology?  
How old?  
and  
Why do we  
care?



# License Plate Recognition

- ▶ *People v. Bushey*, 2017 NY Slip Op 03560, 29 N.Y.3d 158, 53 N.Y.S.3d 604, 75 N.E.3d 1165 (2017)(holding that LPR is not a search protected by the fourth amendment).
- ▶ *Neal v. Fairfax Cty. Police Dep't*, 299 Va. 253, 849 S.E.2d 123 (2020) (finding that Virginia Data Act did not apply to LPR activities of law enforcement agency).







# LPRs Next Technological Advancement?

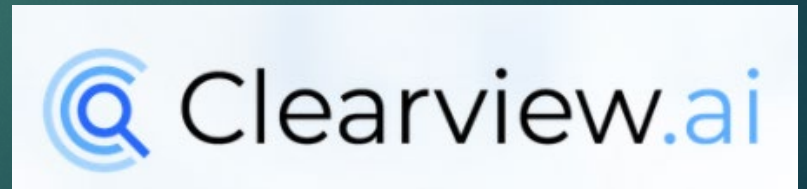
Database and Public Record  
Integration

# LPR v. Facial Recognition?

Amazon Rekognition – Media and Content Use, Security Identification, PPE Use, Content Production, Workplace Safety. Purchased Ring software for emotions.

3 months ago, confirmed indefinite moratorium ban for law enforcement.

- ▶ *Pruitt v. Par-A-Dice Hotel Casino*, Civil Action No. 1:20-cv-1084-JES-JEH, 2020 U.S. Dist. LEXIS 158025 (C.D. Ill. 2020) (alleges violation of Illinois Biometric Act).







Can you interview a  
represented subject of  
your investigation?

# Texas Disciplinary Rules of Professional Conduct

- ▶ RULE 4.02 Communication with One Represented by Counsel - ... lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- ▶ PLUS, RULE 5.03 Responsibilities Regarding Nonlawyer Assistants - ... lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; "Says Investigator in Comments"





# SOCIAL MEDIA ISSUES

- ▶ *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013) (holding that a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel).
- ▶ False Friending - James F. McCarty, *Cuyahoga County Prosecutor Fired After Posing as an Accused Killer's Girlfriend on Facebook to Try to Get Alibi Witnesses to Change Their Testimony*, Cleveland Plain Dealer, June 6, 2013, available at [http://www.cleveland.com/metro/index.ssf/2013/06/cuyahoga\\_county\\_prosecutor\\_fir.html](http://www.cleveland.com/metro/index.ssf/2013/06/cuyahoga_county_prosecutor_fir.html)

# Social Media Authentication.

- ▶ Texas courts have held that you should try and present evidence of corroboration to that the social media is what it is supposed to be. *Tienda v. Texas*, 358 S.W.3d 633 (Tex. Crim. App. 2012). What does that evidence look like?

1. Meta Data – Try to obtain and preserve the meta data from the post including the author, location, date, and time by printing out and storing such information.

2. Screen Shot – Screen shots help capture data and show that the data and post was not modified from the date of capture. Or, image it.

3. Witness / Investigator – Use a witness, witnesses, or investigator to act as a trial witness to buttress the authenticity of the message. Although objectionable, put some thought into the idea of creating a standardized social media report. Then try and admit it through the business records affidavit.



# Drones



Texas Privacy Act, Chapter 423,  
Government Code.

§ 934.50, Fla. Stat.

N.H. Rev. Stat. Ann. § 207:57 (Hunting  
Statute).

Miss. Code 97-29-61 (Video  
Voyeurism).

NYC Administrative Code § 10-126(c)





# The PRO Act

The Protecting the Right to  
Organize Act.

H.R.842 - Protecting the Right  
to Organize Act of 2021.

S.420 - Now in Senate  
Committee on Health,  
Education, Labor and Pensions.

# The bill would amend the National Labor Relations Act to define an employee as ABC:

An individual performing any service shall be considered an employee and **NOT** an independent contractor, unless—

- (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
- (B) the service is performed outside the usual course of the business of the employer; and
- (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.





# Federal Privacy Bill

- ▶ GDPR – Europe's framework regarding Data Privacy.
- ▶ CCPA – Mimics GDPR but, on a limited scale.
- ▶ NY, TX, VA – Currently state proposals on state, CCPA like, privacy bills.
- ▶ VA has passed its bill!