ILLEGAL ELECTRONIC EVIDENCE

by Greg Enos ***January 2010***

The Federal Wiretap Act - 18 U.S.C. §§ 2510-2520

Under the Federal Wiretap Act, 18 U.S.C. 2511(1), a person commits a crime if he or she:

(1) *intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;*

(2) *intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication (when the device is used in wire communication, radio communication, is sent through the mail or transported in interstate or foreign commerce, or involves a business affecting interstate or foreign commerce);*

(3) *intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through interception in violation of the statue;*

(4) *intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication with knowledge it was obtained in violation of the statute; or*

(5) *intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by the criminal investigation provisions of the statute.*

It is not a crime "for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception..." 18 U.S.C. § 2511(2)(d).

Texas Crime: Unlawful Interception, Use or Disclosure of Wire, Oral or Electronic Communications - Texas Penal Code § 16.02

The Texas Penal Code Sec. 16.02(b) largely copies the federal law and makes it a second degree felony if a person:

a. *Intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;*

b. *Intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.*

c. *Intentionally uses or endeavors to use the contents of a wire, oral, or electronic communication if the person knows or is reckless about whether the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;*

d. Knowingly or intentionally effects a covert entry for the purpose of intercepting wire, oral, or electronic communication without court order or authorization; or

e. Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when the device:

1. Is affixed to, or otherwise transmits a signal through a wire, cable, or other connection used in wire communications; or

2. Transmits communications by radio or interferes with the transmission of communication by radio.

It is an affirmative defense if a person who is a party to the communication intercepts the communication or if one of the parties to the communication has given prior consent to the interception. Sec. 16.02(c)(4).

Illegally Obtained Communications Are Not Admissible

Texas Code of Criminal Procedure Sec. 18.20(2), which by its own words clearly applies to civil cases, states:

Prohibition of Use as Evidence of Intercepted Communications

Sec. 2. (a) The contents of an intercepted communication and evidence derived from an intercepted communication may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States or of this state or a political subdivision of this state unless:

(1) the communication was intercepted in violation of this article, Section 16.02, Penal Code, or federal law; or
(2) the disclosure of the contents of the intercepted communication or evidence derived from the communication would be in violation of this article, Section 16.02, Penal Code, or federal law.

(b) The contents of an intercepted communication and evidence derived from an intercepted communication may be received in a civil trial, hearing, or other proceeding only if the civil trial, hearing, or other proceeding arises out of a violation of a penal law.

(c) This section does not prohibit the use or admissibility of the contents of a communication or evidence derived from the communication if the communication was intercepted in a jurisdiction outside this state in compliance with the law of that jurisdiction.

The definitions of "intercept" and "electronic communication" in Sec. 18.20(1) make it clear that an illegally intercepted email or other electronic communication would not be admissible under Sec. 18.20(2).

This part of the Code of Criminal Procedure thus says an intercepted communication is admissible unless it was obtained in violation of the Texas or federal wiretap laws (which both outlaw the exact same actions and provide the exact same exception if a party to the communication consents to the recording).

Texas courts have held that illegally obtained phone recordings are inadmissible. In Collins v. Collins, 904 S.W.2d 792, 799 (Tex. App. - Houston [1st Dist.] 1995, writ denied), the court of appeals held that tape recordings the husband made between his wife and their child, his wife and her boyfriend and his wife and her

lawyer and the transcripts of the conversations should not have been admitted into evidence or given to mental health experts for them to consider. The custody award to the husband based in part on the tapes was reversed. (Collins did not address Tex. Code Crim. Proc. 18.20 § 2(a) quoted above, or the Vicarious Consent Doctrine, discussed below). The court in Collins stated:

> *"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. The tape-recorded conversations were not admissible because the criminal statute dealing with the use of the intercepted communications criminalizes their dissemination, and the civil statute provides a method to prevent dissemination. To permit such evidence to be introduced at trial when it is illegal to disseminate it would make the court a partner to the illegal conduct the statute seeks to proscribe."*

Communications Obtained Legally are Admissible

In Kotrla v. Kotrla, 718 S.W.2d 853, 855 (Tex. App. - Corpus Christi 1986, writ ref'd n.r.e.), the husband tape recorded an in-person talk with his wife in which she admitted using drugs. The tape was properly admitted into evidence because the husband was a party to the conversation.

In Texas, A Parent May Consent for His or Her Child and Secretly Record the Child and the Other Parent

Texas Penal Code, Sec.16.02(c) states:

(c) It is an affirmative defense to prosecution under Subsection (b) that:

....

(4) a person not acting under color of law intercepts a wire, oral, or electronic communication, if:

(A) the person is a party to the communication; or

(B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act;

In interpreting Sec. 16.02(c)(4)(B), Texas has joined a growing number of jurisdictions which recognize the Doctrine of Vicarious Consent, which allows a parent to consent on behalf of his or her child and secretly record the child without being part of the conversation if the parent has a good faith and objectively reasonable basis for believing the recording is in the child's best interests.[1]

In Allen v. Mancini, 170 S.W.3d 167 (Tex. App. - Eastland 2005, pet. denied), the father tape-recorded his child talking on the phone with the mother, and the court of appeals upheld the admissibility of the tape recordings made by the father of his child and the child's mother. The court of appeals stated:

> *Mancini also served as joint managing conservator of L.M.M. at the time the conversations were recorded between L.M.M. and Allen. As managing conservator, Mancini had the authority to consent to medical, dental, surgical, psychiatric, and psychological treatment and also to marriage or enlistment in the armed forces of the United States. We find that Mancini also had the authority to consent on behalf of L.M.M. to the tape recording of conversations between L.M.M. and Allen.*

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[1] A 2005 law review article reviews this doctrine in detail: Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 968-89 (2005).

Further, even if [Texas Civil Practice and Remedies Code] Chapter 123 is applicable to the admissibility of the tape recording in this case, Allen would have to show that an "interception" occurred. By definition, in order to show that an interception occurred, Allen first would have to show that the tape recording was made without the consent of a party to the communication. Sections 123.001(2) & 123.002. Allen did not meet that burden at trial.

Allen makes the same arguments regarding the federal wiretap laws as she does the state wiretap laws....We hold that, even if the federal wiretap laws are applicable here, Mancini was entitled to consent to the tape recording, both for himself and for L.M.M. as her joint managing conservator, under the criteria set forth in Pollock. Because there was consent to the tape recording, federal wiretap laws did not prohibit the introduction of the tape recording in this case.

For all of the above reasons, we hold that the trial court did not abuse its discretion when it admitted the tape recording. Allen's third issue on appeal is overruled.

The Texas Court of Criminal Appeals has held that a parent may give vicarious consent to record a child's telephone conversations if the parent has a good-faith basis for believing that the recording is in the best interest of the child. Alameda v. State, 235 S.W.3d 218, 223 (Tex. Crim. App. 2007). There, the suspicious mother secretly recorded phone conversations between her 12 year old daughter and an adult man. The recordings were used to convict the man of aggravated sexual assault of a child.

The Court of Criminal Appeals held:

Because no Texas cases have addressed a parent's ability to vicariously consent to the recording of a child's telephone conversations, and the federal wiretap statute is substantively the same as the Texas statute, we look to the Sixth Circuit's decision in Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998), which is the leading case regarding the vicarious-consent doctrine in the context of the federal wiretap statute. In Pollock, the plaintiff was the child's stepmother and the defendant was the child's mother. The stepmother appealed the trial court's determination that the mother had not violated Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511 when she recorded conversations between her daughter and the plaintiff. In upholding the trial court's decision, the court of appeals looked to federal and state case law in which the vicarious-consent doctrine had been applied to both federal and state wiretap statutes. Pollock, 154 F.3d at 608-610.

The court adopted the rule set out in Thompson v. Dulaney, 838 F.Supp. 1535, 1544 (D. Utah 1993), and held that:

> *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.*

Pollock 154 F.3d at 608-610. Unlike adults, minors do not have the legal ability to consent in most situations. As the Thompson court noted, the vicarious-consent doctrine was necessary because children lack both "the capacity to consent and the ability to give actual consent."

Id. at 222-223.

The Alameda court concluded:

We agree with the court of appeals that Deborah had an objectively reasonable, good-faith basis for believing that recording the conversations was in J.H.'s best interest. Because the recording of the

conversations meets the standards set out in Pollock, the vicarious-consent given by Deborah satisfies the exception to the Texas wiretap statute. And, since it is not a violation of Penal Code section 16.02 to intentionally intercept an oral communication if one party consented, no law was broken, and article 38.23 does not render the evidence inadmissible.

Id. at 223.

The Texas Court of Criminal Appeals followed the federal decision in Pollock v. Pollock, 154 F.3d 601, 608-10 (6th Cir. 1998), which held:

Accordingly, we adopt the standard set forth by the district court in Thompson and hold that 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.

Other state and federal courts have adopted the Vicarious Consent Doctrine when a parent secretly records his or her child.[2] Only an intermediate appellate court in Michigan has declined to adopt the Vicarious Consent Doctrine.[3] As recently as November 2010, the Tennessee Court of Appeals adopted the doctrine in Lawrence v. Lawrence, __ S.W.3d __ (Tenn. App. 11/29/2010) as did the Supreme Court of Iowa in 2007. State v. Spencer, 737 N.W.2d 124, 129 (Iowa 2007)

Predicate for Admission of a Recording

Tex. Rule of Evidence 901 governs the authentication of tape recordings and electronic data and not the old cases usually cited for authentication of tape recordings, which were decided before the Texas Rules of Evidence were adopted.

Most evidence predicate guides cite Seymour v. Gillespie, 608 S.W.2d 897, 898 (Tex. 1980) and Edwards v. State, 552 S.W.2d 731,733 (Tex. Crim. App. 1977) for the admissibility of tape recordings. These cases required: (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

However, Tex. R. Evid. 901 greatly relaxes these requirements, as the Court of Criminal Appeals recognized in Angleton v. State, 971 S.W.2d 65, 69 (Tex. Crim. App. 1988). There, a police officer who did not make the recording and who was not present when it was made was allowed to authenticate an "enhanced" copy of a tape recording of the defendants discussing their crime, which had been altered to eliminate background sounds. The Court of Criminal Appeals said that authentication would require answering just

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[2] In Campbell v. Price, 2 F.Supp.2d 1186 (E.D.Ark.1998), a father, who had custody of his twelve-year-old daughter, tape-recorded conversations between the child and her mother because the father observed that his daughter "would cry and become upset after talking with her mother on the phone," and he was concerned that the mother was emotionally abusing the child. See also State v. Diaz, 308 N.J.Super. 504, 706 A.2d 264 (1998); Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993).

[3] Williams v. Williams, 229 Mich.App. 318, 581 N.W.2d 777 (1998)(the decision noted it was declining to follow all of the other jurisdictions which have addressed the issue).

three questions:

> *Thus, in this case the authentication question has three parts: (1) whether the "enhanced" copy accurately depicts the contents of the original tape, (2) whether the voices on the tape are those of Roger and appellant, and (3) whether the depiction of the conversation on the tape as a continuous conversation between the participants is accurate(i.e. the conversation on the tape is not the result of splicing or some other alteration).*

The Court of Criminal Appeals specifically rejected the argument that a tape recording can only be authenticated if all seven prongs of the old pre-rule cases were proven, stating:

> *While the Edwards test and other pre-rules case law may often yield the same results and may sometimes employ similar reasoning to that required under Rule 901, that is not invariably the case. And, we find that attempting to cling to the Edwards test after the enactment of Rule 901 will result in unwarranted confusion for practitioners, trial courts, and appellate courts. Rule 901 is straightforward, containing clear language and understandable illustrations. Kephart is overruled.*[4]

971 S.W.2d at 69

This ruling was applied to civil cases in Larson v. Family Violence & Sexual Assault Prevention Center of South Texas, 64 S.W.3d 506, 511 (Tex. App. - Corpus Christi 2001, pet. denied).

Texas Rule of Evidence 901 states in part:

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General Provision. **The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.**

(b) Illustrations. **By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:**

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

. . . .

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) in the case of a person, circumstances, including self-identification, show the person

[4] Kephart v. State 875 S.W.2d 319 (Tex. Crim. App. 1994) held that the seven prongs of required under the pre-rule cases applied to authentication under Rule 901.

answering to be the one called; or

(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

. . . .

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

Case Law on Federal and Texas Wiretap Statutes

- "Electronic communication" includes e-mails. Steve Jackson Games, Inc. V. U.S. Secret Service, 36 F.3d 457, 461 (5th Cir. 1994).

- The Fifth and Second Circuits have held that there is an interspousal exception to the Federal Wiretap Act. Simpson v. Simpson, 490 F.2d 803, 809 (5th Cir. 1974); Anonymous v. Anonymous, 558 F.2d 677, 679 (2nd Cir. 1977), but those rulings were rejected by almost all federal cases since. See e.g., Heggy v. Heggy, 944 F.2d 1537, 1539 (10th Cir. 1991). Note: Texas is in the Fifth Circuit!

- Texas appellate courts have held there is no interspousal exception to the Federal Wiretap Act or Texas Statute. Collins v. Collins, 904 S.W.2d 792, 796-7 (Tex. App. - Houston [1st Dist.] 1995, writ denied)**;** Duffy v. State, 33 S.W.3d 17, 23-24 (Tex. App. - El Paso 2000, no pet.).

Federal Electronic Communications Privacy Act - 18 U.S.C. §§ 2701-2711

The "Electronic Communications Privacy Act applies to "electronic communications" the same protections against unauthorized interceptions that the wiretap law provide for "oral" and "wire" communications via common carrier transmissions. Brown v. Waddell, 50 F.3d 285 (4th Cir. 1995). It is a federal crime to intercept electronic mail while it is stored, in route, or after receipt. The ECPA protects cell phone conversations but text messages on a cell phone are not protected under the wiretapping or stored communications statute. See U.S. v. Jones, 451 F. Supp. 2d 71 (D.D.C. 2006)

The Federal Stored Communications Act - 18 U.S.C. § 2701

The Stored Communications Act prohibits conduct that: (a) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (b) intentionally exceeds an authorization to access that facility; and thereby obtains, alters or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished. 18 U.S.C. § 2701.

Texas Crime: Unlawful Access to Stored Communications - Texas Penal Code § 16.04

A person commits a Class A misdemeanor under Texas Penal Code Sec. 16.04(b) if the person obtains,

alters, or prevents authorized access to a wire or electronic communication while the communication is in electronic storage by: (1) intentionally obtaining access without authorization to a facility through which a wire or electronic communications service is provided; or (2) intentionally exceeding an authorization for

access to a facility through which a wire or electronic communications service is provided. Section 16.04(d) creates an affirmative defense if the conduct was authorized by: (1) the provider of the wire or electronic

communications service; (2) the user of the wire or electronic communications service; (3) the addressee or intended recipient of the wire or electronic communication; or (4) Article 18.21, Code of Criminal Procedure (relating to access by peace officers to stored communications.

Texas Crime: Breach of Computer Security - Texas Penal Code § 33.02

A person may commit a misdemeanor or felony (depending on the amount of money involved) if the person if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.

Statutory Causes of Action for Illegal Wiretapping

- The Federal Wiretap Act imposes civil liability when a person intentionally intercepts a wire, oral or electronic communication. 18 U.S.C. § 2520(a)

- Texas Code of Criminal Procedure Sec. 18.20(16) states, "A person whose wire, oral or electronic communication is intercepted, disclosed or used in violation of this article or in violation of Chapter 16, Penal Code, has a civil cause of action against any person who intercepts, discloses or uses or solicits another person to intercept, disclose or use the communication an dis entitled to recover" actual damages not less than liquidated damages of $100 per day for each day of violation of $1,000, whichever is higher, punitive damages and attorney's fees and litigation costs

Cause of Action: Invasion of Privacy

One form of the tort of invasion of privacy recognized in Texas is intrusion upon seclusion, the elements of which are:

1. The defendant intentionally intruded upon 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. Wisener, 190 S.W.3d 865, 696 (Tex. App. - Tyler 2005, pet. denied).

Recoverable damages in a suit for intrusion upon seclusion are actual damages (mental anguish, loss of earning capacity, etc), nominal damages, exemplary damages and equitable relief. O'Connor's Texas Causes of Action 2007, page 364.

The following was part of an excellent 2007 paper "Spy Torts" by John Nichols, Sr., et al for a State Bar of Texas CLE Webcast:

Examples of successful claims for intrusion on seclusion in Texas courts include:
(1) Wiretapping. In *Billings v. Atkinson* was the first case in Texas to recognize a cause of action for willful invasion of privacy. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973). *Billings* involved surveillance by a third party. Mrs. Billings was in a conversation with a neighbor on the telephone when she heard strange noises on her telephone line. She hung up and went outside to see if she could determine the cause of the noise. Mr. Atkinson, a telephone repairman, was working on the terminal box behind her house. The following day, another telephone repairman visited the same terminal box and discovered a wire-tapping device attached to Mrs. Billings' telephone line. The Billings sued Atkinson for mental anguish. The Supreme Court found that the unwarranted invasion of an individual's privacy is a tort. *Id*.
(2) Videotaping. The defendant was found liable for videotaping the plaintiff's bedroom without the plaintiff's permission. *Clayton v. Richards*, 47 S.W.3d 149,156 (Tex. App.—Texarkana 2001, pet. denied). The court stated, "The videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters, which could later be exposed to the public eye." *Id*.
(3) Videotaping. Defendant's secret video taping of himself and plaintiff engaging in intercourse that was later aired for third parties was an invasion of plaintiff's privacy. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).
(4) Privacy at Home. A telephone company was found liable when their employee was found entering the plaintiff's home without their permission. *Gonzales v. Southwestern Bell Tel. Co.*, 555 S.W2d 219, 222 (Tex. App.-Corpus Christi 1977, no writ). The court stated, "we follow the rule that an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted." *Id*.
(5) Surveillance. The defendant following and spying on the plaintiff. *Kramer v. Downey*, 680 S.W2d 524, 525 (Tex. App.-Dallas 1984, writ ref'd n.r.e.). The court stated, "we now hold that the right to privacy is broad enough to include the right to be free of those willful intrusions into one's personal life at home and at work, which occurred in this case." *Id*.
(6) Privacy at Work. Defendant searching an employee's personal locker that was locked. *K-Mart Corp. v. Trotti*, 677 S.W. 2d 632, 637 (Tex. App.-Houston [1st 23 Dist.] 1984), *writ ref d n.re.*, 686 S.W2d 593 (Tex.1985). The court stated, "Where, as in the instant case, however, the employee purchases and uses his own lock on the lockers, with the employer's knowledge, the fact finder is justified in concluding that the employee manifested, and the employer recognized, an exception that the locker and its contents would be free form intrusion and interference." *Id*.
(7) Privacy in Public. The court held that a conversation held in a public place was still considered a private conversation with which no implied consent was given

to listen or record the conversation. The court based the decision on the fact that the parties to the conversation used hushed voices, stood away from other people, and stood in close proximity to each other. *Stephens v. Dolcefino*, 126 S.W.3d 120 (Tex. App.—Houston [1st Dist.] 2003).

(8) Discarded Trash. Because the court held that there is no expectation of privacy in regards to trash left at the curb of your house. *California v. Greenwood*, 486 U.S. 35 (1988). The court stated, "a person has no legitimate expectation of privacy with information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 785 (1979).

Attorneys Can Ethically Record Phone Conversations

In November 2006, the Texas Center for Legal Ethics and Professionalism issued Opinion 575 which reversed three prior opinions that had held since 1953 that Texas attorneys could not ethically record phone conversations. Opinion 575 allows a lawyer to ethically record conversations and states in part:

> *Accordingly, subject to the qualifications discussed in the next paragraph, the undisclosed recording of telephone conversations by a Texas lawyer should not be treated as a violation of the Texas Disciplinary Rules of Professional Conduct.*
>
> *The Committee notes several qualifications to the conclusion reached above. First, in view of the rights of a client to the lawyer's protection of confidential client information as provided in Rule 1.05 and the client's rights against a lawyer's involvement in an impermissible conflict of interest contrary to Rule 1.06, a lawyer should make an undisclosed recording of telephone conversations involving a client only if there is a legitimate reason to make the recording in terms of protection of the legitimate interests of the client or of the lawyer. Second, a lawyer should not make a recording of a telephone conversation with a client unless the lawyer can and does take appropriate steps consistent with the requirements of Rule 1.05 to safeguard confidential information that may be included in the recording of the telephone conversation. Third, in view of the requirement of Rule 8.04(a)(2) that a lawyer not be involved in the commission of a serious crime, a lawyer should not make an undisclosed recording of a telephone conversation if the telephone conversation proposed to be recorded by a lawyer is subject to other laws (for instance the laws of another state) that make such a recording a serious criminal offense. Finally, regardless of whether the client is involved in the telephone conversation or has consented to the recording, the lawyer may not under Rule 8.04(a)(3) make a recording of a telephone conversation if the making of such a recording would be contrary to a representation made by the lawyer to any person.*

Does your computer expert have to be a licensed private investigator?

Texas Occupations Code Sec. 1702.104 defines an "investigations company" that must be licensed by the state:

> *§ 1702.104. INVESTIGATIONS COMPANY. A person acts as an investigations company for the purposes 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) crime or wrongs done or threatened against a 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, libel, 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 a 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.

Section 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 contract or employment, is in violation of this chapter."

Sec. 1702.104(2) would seem to include psychologists who perform custody evaluations, business and real estate appraisers and even our law firm employees if they "engage in the business of securing...evidence for use before a court..." There is no appellate case law applying this restriction to computer technicians who examine computers. One way around this possible problem would be to clearly contract with the technician as follows:

> You are being hired to examine the following computers to advise this law firm on the contents of the computer and how it has been used. You are not retained for the purpose of securing evidence for use before a court. However, we are engaged in litigation and it is always possible that one side to this case may request or require your testimony in court based on your work and findings.

The Texas Department of Public Safety is definitely taking the position that a person who is paid to examine a computer and possibly give testimony in court must be a licensed private investigator.