



## **BEWARE OF ETHICAL PITFALLS IN YOUR FAMILY LAW PRACTICE**

**And...Ethics Rules to Know**



# ISSUE ONE

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# Documents Received from your Client



- You send your client a ShareFile link and ask for all documents, pictures, audio video recordings, emails and texts that are relevant to your family law case.
- Included in the ShareFile link that you receive back from your client are copies of text messages that appear to be photos someone has taken.

# Should you have concerns?

## What do you see?

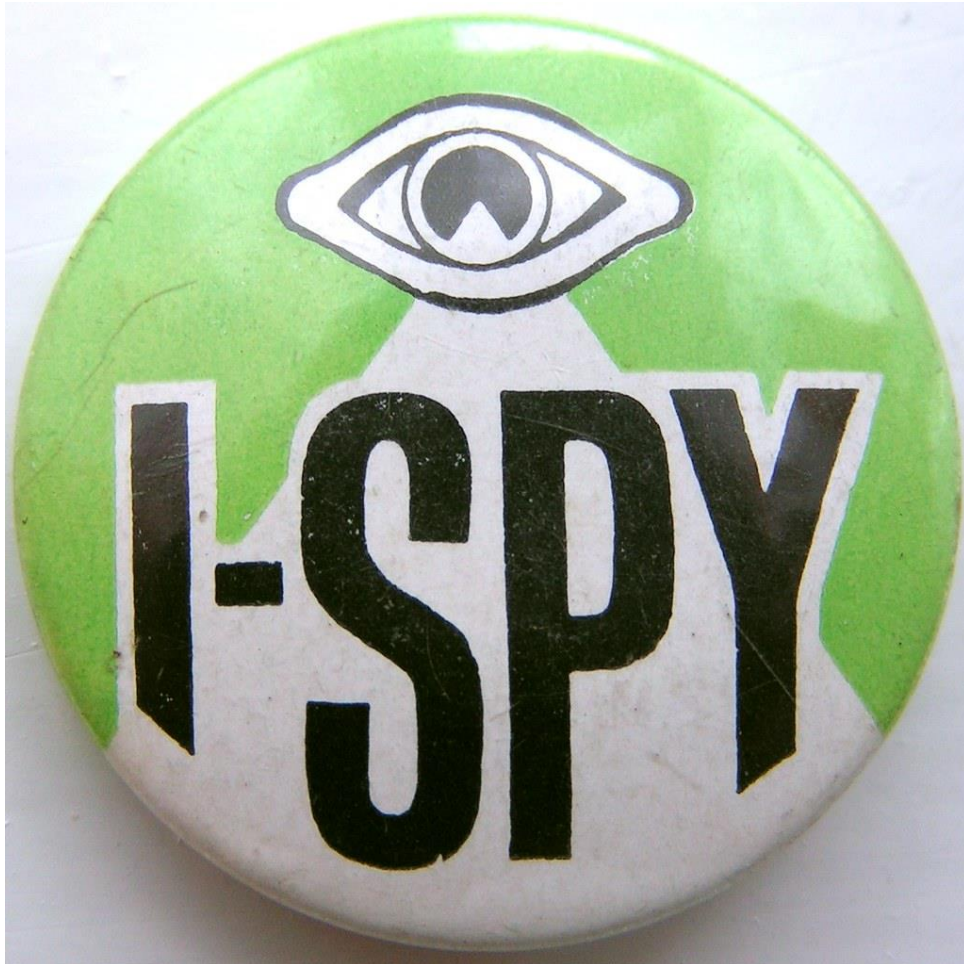
- A photo of a text message
- A communication between two people



10/4/2022

## What do you need to know?

- ✓ Why does your client have photographs of text messages?
- ✓ What does that indicate?
- ✓ Who are these communications between?
- ✓ Was your client a party to the communication?
- ✓ Who does the phone belong to?
- ✓ Where was the photo taken?
- ✓ When was it taken?



## ***Unlawful Interception of Communications***

**Section 123.002 of the Texas Civil Practice and Remedies Code** states a cause of action exists and a party may sue a person who:

- 1) intercepts, attempts to intercept, or employs or obtains another to intercept or attempt to intercept the communication; or
- 2) uses or divulges information that he knows or reasonably should know was obtained by interception of the communication.

**Section 123.004** states “A person who establishes a cause of action under this chapter is entitled to:

- 1) an injunction prohibiting a further interception, attempted interception, or divulgence or use of information obtained by an interception;
- 2) statutory damages of \$10,000 for each occurrence;
- 3) all actual damages in excess of \$10,000;
- 4) punitive damages in an amount determined by the court or jury; and
- 5) reasonable attorney's fees and costs.



# Section 16.02 of the Texas Penal Code

Under Section 16.02 of the Texas Penal Code, a person commits a violation of that section if the 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 to another person** the contents of a wire, oral, or electronic communications 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;
- (a) Knowingly or intentionally effects a covert entry for the purpose of interception wire, oral, or electronic communications without court order or authorization;
- (b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any interception device to intercept any oral communication when the device is: (A) affixed to, or otherwise transmits a signal through wire, cable or other communication used in wire communications; or (B) transmits communications by radio or interferes with the transmission of communications by radio.

Tex. Pen. Code §16.02(b)

“Electronic communication” means a “transfer of any signs, signals, writing, images, sounds, data, or intelligence transmitted wholly or partly by a wire, radio, electromagnetic, photoelectronic or photo-optical system.”  
TEX. PEN. CODE §16.02(a)(1).





# 18 U.S.C Sections 2510-2522

A violation of 18 U.S.C Sections 2510-2522 occurs when any person:

- a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication; 18 U.S.C Section 2511(1)(a);
- b) **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 the interception of a wire, oral, or electronic communication in violation of this subsection; 18 U.S.C Section 2511(1)(c);
- c) Intentionally uses or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection. 18 U.S.C Section 2511(1)(d).

## Great Paper and Resource

### **SPY TORTS & PRIVACY ISSUES IN FAMILY LAW**

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**CHAPTER 22**



# *Landry's v. Animal Legal Defense Fund*, --S.W.3d – (Tex. 2021)

The most important takeaway is this: if the Texas Supreme Court's recent decision in *Landry's v. Animal Legal Defense Fund*, --S.W.3d – (Tex. 2021) is any indication, the attorney immunity doctrine cannot be relied upon as an impenetrable defense. The proliferation of recording devices coupled with animosity in contentious divorce cases will inevitably place counsel in an uncomfortable position. No longer should a lawyer employ a “don't ask, don't tell” policy when receiving recordings or text messages of the opposing party.

# The Law has Changed as of May 6, 2022!

## Texas Supreme Court Case of Terisa Taylor v. Carl Tolbret, Nizzera Kimball and Vivian Robbins Cause Number 20-0727

- ...the standard for attorney immunity is easily satisfied on the pleaded allegations because Taylor's conduct was (1) within the scope of her representation of Broome in the modification proceeding and (2) not foreign to the duties of a lawyer.
- We hold that the Texas wiretap statute does not abrogate the[common-law defense of attorney immunity]...nothing in the Texas wiretap statute demonstrates clear legislative intent to preclude attorney immunity, the common-law defense applies, and Taylor is immune from civil liability under that statute.
- However, for reasons we explain below, we conclude that Texas's common-law attorney-immunity defense is unavailable under the federal statute.
- We conclude that attorney immunity, as recognized and defined under Texas law, is not a defense under the federal wiretap statute because, quite simply, a state's common-law defense does not apply to federal statutes. Further considerations that support our conclusion include (1) the federal statute's plain language, (2) federal authority declining to recognize extra-statutory defenses and immunities, and (3) Taylor's failure to identify a federal common-law defense that aligns with Texas's attorney-immunity defense that federal courts are likely to apply attorney-immunity defense that federal courts are likely to apply.

When we think of “hacking” we think of intrusion. The civil and criminal statutes are far broader in terms of “access” and “use” of digital information.

1. Using GPS (Life360, Find My Friends) to spy on spouse
2. Using children’s phones to gather information on spouse
3. Viewing Ring / Dropbox cameras in the marital residence
4. Accessing email and messaging accounts from shared devices
  - a. During marriage
  - b. During divorce proceedings where no longer reside in the home
  - c. After divorce has been finalized
5. Harassment through repeated text messages
6. Harassment through social media comments [new criminal statute]
7. Doxing / releasing otherwise private information publicly
8. Release of intimate visual material (revenge porn)
9. Resetting email accounts using information from password reset questions
10. Installation of hidden camera, audio recording device in home
11. Installation of keystroke copy software on laptop (“hacked my laptop”)
12. Installation of ghost phone software on cellphone (“hacked my cellphone”)
13. Physical installation of tracking device on spouse’s vehicle

# Things to consider....

Should you explain what illegal interception is to your client in your initial interview?

Should you explain what invasion of privacy is?

Should you explain the current state of the law and trend towards more protection for the expectation of privacy?

Should you tell your client you will not accept illegally obtained recordings and pictures?

What should you do if you receive illegally obtained evidence?

What happens to the lawyer if these documents are given to experts or used in court?



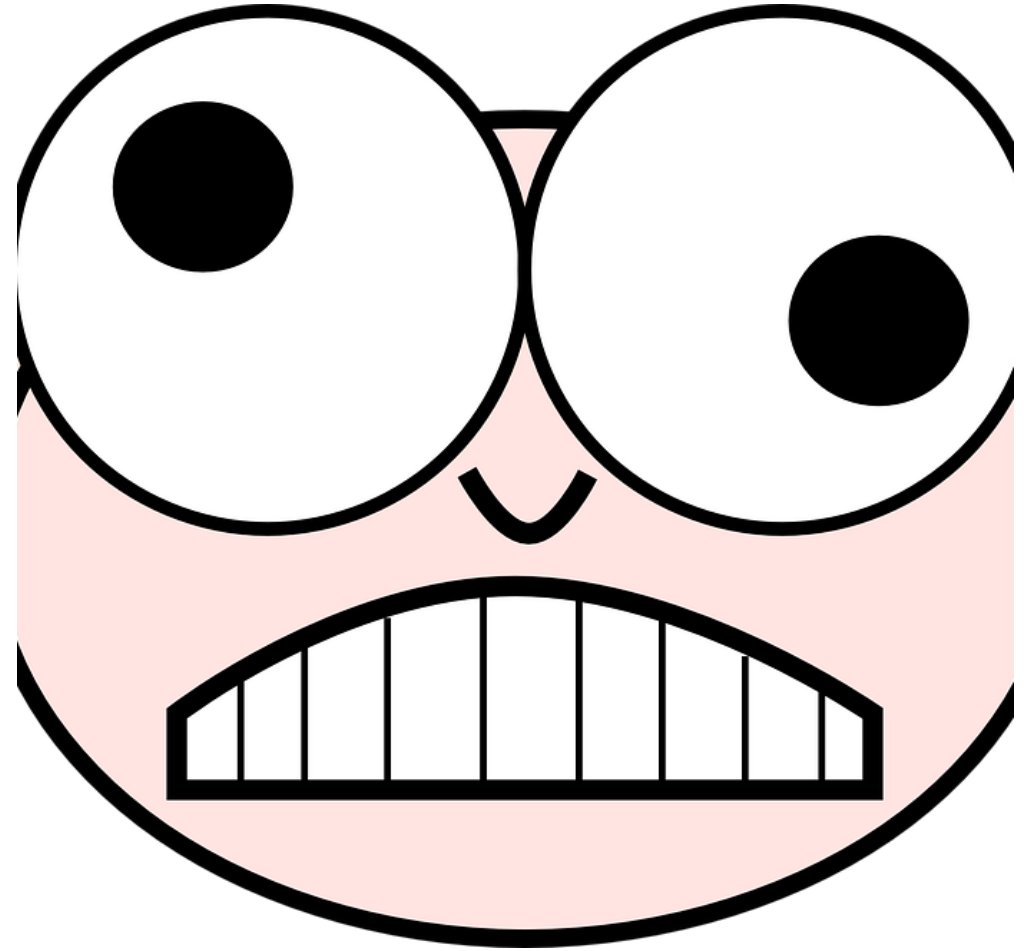


# ISSUE TWO

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# Houston, we have a problem!

- You have represented your client for 8 months.
- He is very volatile and has become more volatile throughout the course of the case.
- You are 75 days from trial.
- Your client suddenly sends you an email telling you that you are conspiring with the opposing counsel, he doesn't trust you, and he believes you are talking to his wife.



# TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

## Rule 1.15. Declining or Terminating Representation

A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if.....or

(7) other good cause for withdrawal exists.

A lawyer may reveal confidential information...

When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.

You should not want me to represent you if you believe I did those things.



I can no longer represent you if you believe I did those things.



Make sure your discovery disclosures are complete and accurate and don't charge your client for the motion to withdraw.

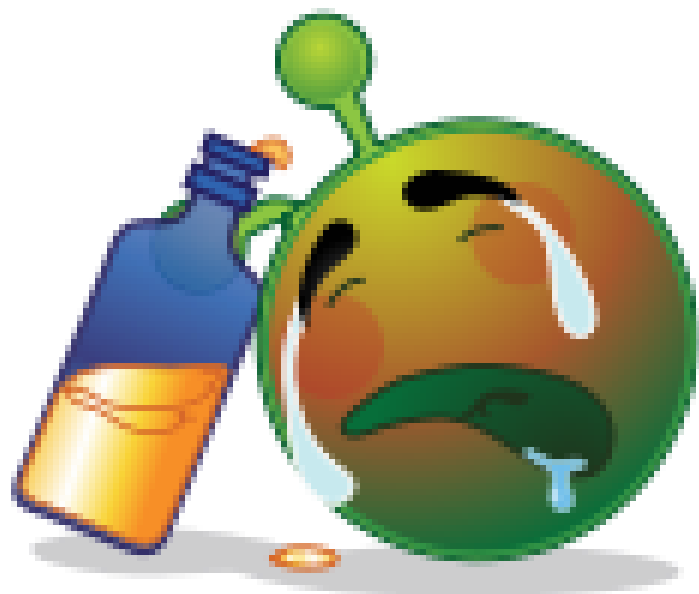
What if you are 60 or less from trial? File your motion for continuance with your motion to withdraw



# ISSUE THREE

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**HOW DO I RECOGNIZE PSYCHOLOGICAL ISSUES OR  
MENTAL ILLNESS THAT MAY IMPACT MY CLIENT?**

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# Start out on the right foot



## Extensive Client interview

- Make sure you reserve enough time
- Pick a comfortable place
- Have materials to share
- Take extensive notes
- Develop a database of resources for your clients – therapists, psychologists, psychiatrists, financial planners, life coaches, specialized lawyers



## Active listening

- Look at the speaker directly.
- Put aside distracting thoughts.
- Don't mentally prepare a rebuttal!
- Avoid being distracted by environmental factors. For example, cell phones.
- "**Listen**" to the speaker's body language
- Clarify what you are hearing by repeating what the speaker is saying
- Validate

# Some Warning Signs and Symptoms of Mental Illness You May Encounter...

Each illness has its own symptoms, but common signs of mental illness do exist

National Alliance  
on Mental Illness



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Excessive worrying or fear

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Prolonged feelings of sadness

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Confused thinking or problems concentrating

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Extreme mood changes, including uncontrollable "highs" or feelings of euphoria

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Prolonged irritability or explosive anger

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Difficulties understanding or relating to other people

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Changes in sleeping habits

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Difficulty perceiving reality - delusions or hallucinations

# TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

- Rule 1.16. Clients with Diminished Capacity

- Disclosure of the Client's Condition

- 9. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client. A disclosure of confidential information may be inadvisable if the third person's involvement in the matter is likely to turn confrontational.

- Rule 2.01. Advisor

- Comments

- 4. Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.





# ISSUE FOUR

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**HAVE YOU  
DONE A CONFLICT  
CHECK ON ALL  
CASE?**

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# Disciplinary Rule 1.06

Texas Disciplinary Rules of Professional Conduct Rule 1.06 addresses **conflict of interest as to current clients**. It prohibits a lawyer a from representing opposing parties, or a person in substantially related matter in which represented client's interest are materially and directly adverse to the interests of the another client. Tex. Disc. R. Prof'l Cond. 1.06(a) & (c).

If a violation of the Rule occurs, the lawyer **must** withdraw and the duty to withdraw extends to all lawyers associated with the conflicted lawyer Tex. Disc. R. Prof'l Cond. 1.09(e-f).

# Disciplinary Rule 1.09

Texas Disciplinary Rules of Professional Conduct Rule 1.09 prohibits a lawyer who personally has formerly represented a client in a matter from representing another person in a manner adverse to the former client (1) in which such other person questions the validity of the lawyer's services or work product for the former client; (2) if the representation in reasonable probability will involve a violation of rule 1.05; or (3) if it is the same or a substantially related matter. Tex. Disc. R. Prof'l Cond. 1.09; see also *In re Basco*, 221 S.W.3d 637, 638–39 (Tex. 2007) (orig. proceeding).

This Rule extends to all members of a law firm when one lawyer associated with that firm alone would be prohibited under subsection (a). *Id.*; see also Tex. Disc. R. Prof'l Cond. 1.09(b). Similarly, all lawyers associated with a firm, after a conflicted lawyer leaves that firm, are prohibited from representing another person “if the representation in reasonable probability will involve a violation of Rule 1.05.” *Id.* 1.09(c).



# Disciplinary Rule 1.05

Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct defines confidential information as both privileged and unprivileged client information. Tex. Disc. R. Prof'l Cond. 1.05(a). **Privileged information** refers to information protected under Rule 503 of the Texas Rules of Evidence. *Id.* Unprivileged client information “means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.” *Id.* Rule 1.05 **prohibits a lawyer from revealing confidential information, using confidential information** of a current or former client to the disadvantage of the current or former client unless the client consents after consultation or the information becomes generally known after representation is concluded and from using confidential information for the advantage of the lawyer or of a third person unless the client consents after consultation. *Id.* 1.05(b).



# CAN YOU CHINESE WALL AN ATTORNEY?

# Irrebuttable Presumption

If a lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtains confidential information during representation. *In re Columbia Valley Healthcare Sys., L.P.*, 320 S.W.3d 819, 824 (Tex. 2010). If the lawyer moves to another firm, and the second firm is representing an opposing party in ongoing litigation, a second irrebuttable presumption arises that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of that firm. *Id.* **Not even the erection of a “Chinese Wall” can rebut the presumption of shared confidences when a lawyer changes firms that is representing an adverse client.** *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295, 300 (Tex. App.—Dallas 1988, no writ).

Lawyers should not put themselves in the position where even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged, relationship. *Cochran v. Cochran*, 333 S.W.2d 635, 643 (Tex. Civ. App.—Houston 1960, writ ref’d n.r.e) (quotations omitted) (quoting *Watson v. Watson*, 171 Misc. 175, 11 N.Y.S.2d 537, 540 (N.Y. Sup. Ct. 1939)).

# Disqualification

Disqualification is appropriate when there is a *reasonable probability* of such information's being used or divulged. . . . The test for disqualification is met by demonstrating a genuine *threat* of disclosure, not an actual materialized disclosure.” *In re Hoar Const., L.L.C.*, 256 S.W.3d 790, 804–05 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (emphasis in original, quotations omitted) (quoting *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 467 (Tex.1994)).



# ISSUE FIVE

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10/4/2022

Laura Dale & Associates, P.C.





**KEEP YOUR CASES UPDATED, COMMUNICATE  
WITH YOUR CLIENT AND INVOICE IN DETAIL  
AND ON TIME!**