

THE ROLE OF A PRIVATE INVESTIGATOR IN FAMILY LAW CASES

BY: JAMES A. DAVIS

November 5, 2020

About
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Mr. Davis is a North Carolina Board Certified Specialist in Federal and State Criminal Law with a trial practice in criminal, domestic, and general litigation. He is deeply committed to excellence and professionalism in the practice of law, having served on the North Carolina State Bar Specialization Criminal Law Committee, the North Carolina State Bar Board of Continuing Legal Education, the North Carolina State Bar Disciplinary Hearing Commission, and was Issue Planning Editor of the Law Review at Regent University. James also lectures at criminal, family law, and trial practice continuing legal education (CLE) programs, and is regularly designated by the Capital Defender as lead counsel in capital murders.

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This paper is an original and designed to be a useful outline, adding to your functional knowledge derived from nearly 200 CLEs, consulting.

The materials are designed to aid private investigators with the information which will assist attorneys with their case. As always, I utilize many CLEs, observations of great lawyers, and, most importantly, trial experience in approximately 100 jury trials ranging from capital murder, personal injury, torts, to an array of civil trials. As a result, I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, drug trafficking, and a myriad of other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious

prosecution, assault, and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: if it does not work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.



Did You Know?

The number of private investigators is projected to increase by approximately fourteen percent from 2016 to 2026 in North Carolina. See *How to Become a Private Detective through Training and Certification in North Carolina*, PRIVATE INVESTIGATOR EDU <https://privateinvestigatoredu.org/north-carolina/>.

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This paper is intended to provide current and helpful information, designed to assist with professional competence. This paper is for educational purposes only and does not constitute legal advice or services or an attorney-client relationship.

YOU MATTER

In the last week, I have examined two private investigators in family law trials. In the first trial, the investigator did not have a report; had no photographic evidence; could not remember dates, times, or other specific information; came without a subpoena; had not consulted with his client or the client's attorney before testifying; and was being paid for his attendance. His testimony was discredited. In the second trial, the investigator—a young man in his very first case—met with me twice in advance of the hearing; prepared a report; consulted with an experienced, retired criminal investigator; was prepped for objections and proper responses; and conducted himself professionally. His testimony was deemed credible by the court.

Permission is granted for copying of pages or portions of pages of this paper by or under the direction of licensed attorneys for use in the practice of law. No other use is permitted without express written consent.

The following is an outline of relevant law and practice tips to skillfully assist the family law practitioner. I wish to acknowledge Timothy J. Readling, Esq., for his part in researching, drafting, and editing this presentation.

I. ALIENATION OF AFFECTION

In North Carolina, a cause of action for Alienation of Affection requires:

1. Plaintiff and spouse were happily married with genuine love and affection existing between them;
2. The love and affection was alienated and destroyed; and
3. The wrongful and malicious acts of Defendant produced and brought about the loss and alienation of said love and affection.

See Pharr v. Beck, 147 N.C. App. 268 (2001).

Defenses:

1. Plaintiff's consent (connivance).
2. Statute of Limitations.
3. Contest elements of the claim.
4. Defendant did not know of marital status (no malice).

Proof Issues:

1. Inclination and opportunity. A good rule of thumb is to catch people three times. Inclination is proof of affection (flowers, love notes, etc.). Opportunity is going somewhere alone (hotel, residence, etc.).
2. Wrongful means that Defendant intentionally acted in a manner likely to affect the marital relationship. *See Nunn v. Allen*, 154 N.C. App. 523 (2002). Malice means knowledge of the marriage. *See id.*
3. Video and photograph evidence.
 - A. Authenticity: A necessary precondition for admissibility; however, courts have required a low threshold for admissibility. *State v. Mercer*, 89 N.C. App. 714 (1988) (a *prima facie* showing such that a reasonable fact finder could find authenticity is enough); *Horne v. Vassey*, 157 N.C. App. 681 (2003) (authenticity is a low threshold, and questions about accuracy generally go to weight, not admissibility). First, authentication is a subset of relevancy, requiring the writing to be linked to the draftsman, else having no probative value. *U.S. v. Branch*, 970 F.2d 1368, 1370 (4th Cir. 1992). Second, the proponent must offer admissible evidence sufficient to find the matter is what the proponent claims. N.C. R. Evid. 901(a); N.C. R. Evid. 104(b) (conditional relevance requires the same).
 - B. Once authenticated and filtered through rules like OPRAH (original writing, privilege, relevance, authentication, and hearsay), electronic writings may be admitted for illustrative or substantive purposes, or both. Additional rules may apply when the source of this type of evidence is gleaned from social media rather than a witness.
 - C. Photographs: When the witness has first-hand knowledge of the photographs, authentication for illustrative purposes only requires the witness's recitation that (a) he was present when the photographs were taken and (b) the photographs "fairly and accurately depict" what the witness saw. *See State v. Vick*, 341 N.C. 569 (1995). This requirement is the same for digital photographs and film photography.
 - D. Video recordings: When the witness observes the conduct in question, a video may be admitted to illustrate the witness's testimony based on evidence (1) the recording fairly and accurately depicts what the witness observed, (2) the recording would help illustrate the witness's testimony. *State v. Vick*, 341 N.C. 569 (1995). A recent case held the proponent is only required to testify

the video “fairly and accurately” illustrates the events recorded. *State v. Fleming*, 247 N.C. App. 812 (2016).

To admit for substantive purposes, the witness must additionally testify (3) the recording device was in good working operation and (4) the recordings introduced at trial are the same the witness recorded (or were the same as when inspected immediately thereafter). *See State v. Snead*, 368 N.C. 811 (2016).

A video may be authenticated as the accurate result of an automated process. N.C. R. Evid. 902(b)(9). Evidence that (1) the recording process is reliable and (2) the video introduced at trial is the same video produced by the recording process is sufficient to authenticate the video. *See State v. Snead*, 368 N.C. 811 (2016).

- E. **TIP:** One may authenticate photographs and video recordings without first-hand knowledge. Authentication requires (1) testimony from one familiar with the system, (2) how the camera was functioning at the time of recording, and (3) how the photograph or video was copied from the system and preserved unaltered for trial. *Bowman v. Cox Toyota Scion*, 224 N.C. App. 1 (2012). Courts have admitted recordings in a silent witness situation, or where a camera captures conduct that no human witness saw.
 - F. **TIP:** Chain of custody evidence is unnecessary absent a concern about alteration. *See State v. Snead*, 368 N.C. 811 (2016).
 - G. **TIP:** With photos and videos within electronic communications (e.g., emails, text messages, Facebook, etc.), although digital images can be altered, one might argue (a) the fact the picture was on a parties’ Facebook page and (b) the relationship between the picture and other content on the electronic communication tends to support its authenticity. *See* Jeff Welty, *Authenticating Photographs Taken from Social Media Sites* (May 19, 2014), <http://nccriminallaw.sog.unc.edu/authenticating-photographs-taken-from-social-media-sites/> (last visited November 3, 2020).
 - H. **TIP:** For those with means, a witness with proper expertise might review the metadata to see if the picture has been altered.
- 4. Emails, text messages, and phone calls. This is common and good evidence. Please note the evidence rules above.
 - 5. GPS tracking. A good, practical tool to locate parties. *See U.S. v. Jones*, 565 U.S. 400 (2012) (holding an individual does not have a reasonable expectation of privacy to the movements of a vehicle). However, this a difficult area of expert evidence as the rigors of Rule 702 and applicable case apply. *See* James A. Davis, *Walk Through an Expert Tender and*

Exclusion (Sept. 13, 2019), <https://www.davislawfirmnc.com/wp-content/uploads/sites/231/2019/09/Walk-Through-an-Expert-Tender-and-Exclusion.pdf>.

6. Deposition evidence. Defendant's invocation of the Fifth Amendment gives rise to an adverse inference of adultery which bars an alimony claim. *See Cantwell v. Cantwell*, 109 N.C. App. 395 (1993); *see also* N.C. Gen. Stat. § 14-184.
7. Asset searches may be helpful in determining whether to sue the paramour or wrongdoer.

Helpful Evidence:

1. Can only sue a natural person, not a business entity (protects employees from being sued in workplace romances). *See* N.C. Gen. Stat. § 52-13(c).
2. No act of Defendant shall give rise to the cause of action of Alienation of Affection or Criminal Conversation that occurs after Plaintiff and Plaintiff's spouse physically separate with intent of either one for the separation to be permanent. *See* N.C. Gen. Stat. § 52-13. Post-separation evidence may only be used to corroborate pre-separation evidence.
3. The statute of limitations for Alienation of Affection and Criminal Conversation is three years from the last act of Defendant giving rise to the cause of action. *See* N.C. Gen. Stat. § 52-13.
4. For out-of-state residents, you need personal jurisdiction over Defendant (unless served in North Carolina). *See* N.C. Gen. Stat. § 1-75.4(1)(a); *Jenkins v. Jenkins*, 89 N.C. App. 705 (1988) (holding a "minimum contacts" analysis need not occur where non-resident defendant served with process while temporarily in North Carolina for a brief visit related to his employment).

Five factors are:

1. Quantity of contacts;
2. Nature and quality of contacts;
3. Nexus or connection between the contacts and the cause of action;
4. North Carolina's interest; and
5. Interest of, convenience to, and fairness to the parties.

See Bell v. Mozley, 216 N.C. App. 540 (2011) (holding defendant did not have sufficient minimum contacts with North Carolina for the court to exercise personal jurisdiction over him after the record indicated he (1) was a resident of South Carolina, (2) was present in North Carolina with Plaintiff's spouse only one time at a party, (3) had intercourse with

Plaintiff's spouse in states other than North Carolina, and (4) was in North Carolina approximately six times per year for business purposes).

Did You Know?



A recent landmark opinion from the N.C. Court of Appeals would not have been a factual possibility without a private investigator. *Huml v. Huml*, 264 N.C. App. 376 (2019). In *Huml*, a party hired a private investigator to observe the opposing party's compliance with the controlling custody order, requiring visitations in a public setting. The investigator reported multiple instances of the opposing party removing the child from those settings as well as an angry outburst.

The investigator's reports played a pivotal role in the trial court modifying the custody order, providing the opposing party with no custodial time with the child. The N.C. Court of Appeals affirmed the trial court's order, noting the "best interest" standard applies between two natural or adoptive parents even though the same was "the functional equivalent of the termination of his parental rights."

II. CRIMINAL CONVERSATION

In North Carolina, a cause of action for Criminal Conversation requires:

1. A marriage between the spouses; and
2. Sexual intercourse between Defendant and Plaintiff's spouse during the marriage and prior to the Date of Separation.

See Sebastian v. Klutz, 6 N.C. App. 201 (1969).

Defenses:

1. Plaintiff's consent (connivance).
2. Statute of Limitations.
3. Conduct occurred post-separation.
4. Contest elements of the claim.

See Section I. Alienation of Affection regarding proof issues and helpful evidence.

Did You Know?



The N.C. Court of Appeals and N.C. Supreme Court have issued exactly ninety-nine opinions referencing private investigators since January 1, 2000. The power of skilled private investigative work can swing the outcome of a case.

For example, in *Rea v. Rea*, 262 N.C. App. 421 (2018), a private investigator witnessed and photographed an opposing party kissing a woman not his spouse prior to the date of separation. Ten days following the date of separation, the investigator witnessed the vehicles of the opposing party and woman parked outside of a hotel overnight on two separate occasions.

The N.C. Court of Appeals affirmed the trial court's award of alimony to the spouse of the opposing party, finding that the opposing party committed acts of "illicit sexual behavior" as defined by N.C. Gen. Stat. § 50-16.1A(3)a. The court noted incidents of post-date of separation marital misconduct may serve as corroborating evidence which supports other evidence that marital misconduct occurred prior to the date of separation.

III. POST-SEPARATION SUPPORT

In North Carolina, a cause of action for Post-Separation Support requires:

1. The trial court finds one spouse is a dependent spouse as defined by N.C. Gen. Stat. § 50-16.1A(2);
2. The trial court finds the other spouse is a supporting spouse as defined by N.C. Gen. Stat. § 50-16.1A(5);
3. The resources of a dependent spouse are not adequate to meet his or her reasonable needs;
4. The supporting spouse has the ability to pay; and
5. A trial court determines the foregoing after considering the factors set forth in N.C. Gen. Stat. § 50-16.2A(b) (providing: (1) the financial needs of the parties, (2) the parties' accustomed standard of living, (3) the present employment income and other recurring earnings of each party from any source, (4) their income-earning abilities, (5) the separate and marital debt service obligations, (6) those expenses reasonably necessary to support each of the parties, and (7) each party's respective legal obligations to support any other persons).

See N.C. Gen. Stat. § 50-16.2A.

Defenses:

1. Waiver (by contract).
2. Marital misconduct. N.C. Gen. Stat. § 50-16.2A(d). Judge shall consider whether marital misconduct occurred prior to the date of separation by the dependent spouse. If so, the judge shall consider whether the same is true of the supporting spouse. Post-Separation Support is **not** automatically barred by illicit sexual behavior by the dependent spouse. However, Alimony **is** so barred. *See* N.C. Gen. Stat. § 50-16.3A(a). Illicit sexual behavior, a subset of “marital misconduct,” is defined as “acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse.” *See* N.C. Gen. Stat. § 50-16.1A(3)a.
3. Entry of absolute divorce (without a pending Alimony claim).

Proof Issues:

1. For illicit sexual behavior, a form of marital misconduct, you rarely catch people in the act. Therefore, parties generally use inclination and opportunity. A good rule of thumb is to catch people three times. Inclination is proof of affection (flowers, love notes, etc.). Opportunity is going somewhere alone (hotel, residence, etc.).
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- E. **TIP:** One may authenticate photographs and video recordings without first-hand knowledge. Authentication requires (1) testimony from one familiar with the system, (2) how the camera was functioning at the time of recording, and (3) how the photograph or video was copied from the system and preserved unaltered for trial. *See generally Bowman v. Cox Toyota Scion*, 224 N.C. App. 1 (2012). Courts have admitted recordings in a silent witness situation, or where a camera captures conduct that no human witness saw.
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 5. Deposition evidence. Defendant's invocation of the Fifth Amendment gives rise to an adverse inference of adultery which bars an alimony claim. *See Cantwell v. Cantwell*, 109 N.C. App. 395 (1993); *see also* N.C. Gen. Stat. § 14-184.

Helpful Evidence:

1. For subject matter jurisdiction, the parties must be physically separated. *Baumann-Chacon v. Baumann*, 212 N.C. App. 137 (2011).
2. A common defense for the supporting spouse is the loss of a job or inability to work. Evidence negating these claims are critical in court. Therefore, interviews of past employers and surveillance of parties are important.
3. For marital misconduct, the court may consider nine fault-based grounds set forth in N.C. Gen. Stat. § 50-16.3A(b)(1). For you, evidence of physical or mental cruelty, abusive language, forced removal from the home, concealment of assets, excessive use of alcohol or drugs, among other issues, serve as important evidence. *Panhorst v. Panhorst*, 277 N.C. 664 (1971); *Evans v. Evans*, 169 N.C. App. 358 (2005).
4. Post-Separation Support hearings are rare as decisions may be made upon verified pleading, verified motion, or affidavit of the moving party. *See* N.C. Gen. Stat. § 50-16.2A(a).

Did You Know?



There may not be a more on point case showing the potency of private investigators than *Essex Group, Inc. v. Express Wire Servs.*, 157 N.C. App. 360 (2003).

In *Essex Group*, an employer sued two former employees for claims relating to breach of an intellectual property agreement, prohibiting workers from disseminating business information and trade secrets. After the lawsuit was filed, the employer's private investigator witnessed an opposing party pushing a cart of files from the competitor's business to a storage facility. Days later, the opposing party testified at a deposition that he had not removed any files from the competitor's business on said day. The next day, the investigator witnessed him loading boxes from the storage facility to a vehicle and confronted him on video. The opposing party admitted his deception to the trial court. The N.C. Court of Appeals affirmed the trial court's sanctions under Rule 37 of the N.C. Rules of Civil Procedure, striking their filed pleading and entering a default judgment and an order to pay attorney fees.

IV. ALIMONY

In North Carolina, a cause of action for Alimony requires:

1. The trial court finds one spouse is a dependent spouse as defined by N.C. Gen. Stat. § 50-16.1A(2);
2. The trial court finds the other spouse is a supporting spouse as defined by N.C. Gen. Stat. § 50-16.1A(5); and
3. A trial court determines an award of alimony is equitable after considering the factors set forth in N.C. Gen. Stat. § 50-16.3A(b) (providing a list of sixteen factors, including (1) the relative earnings and earning capacities of the spouses; (3) the ages and the physical, mental, and emotional conditions of the spouses; (4) standard of living during the marriage; and (5) the duration of the marriage, among others).

See N.C. Gen. Stat. § 50-16.3A.

Defenses:

1. Waiver (by contract).
2. Marital misconduct. N.C. Gen. Stat. § 50-16.2A(d). Judge shall consider whether marital misconduct occurred prior to the date of separation by the dependent spouse. If so, the judge shall consider whether the same is true of the supporting spouse. Post-Separation Support is **not** automatically barred by illicit sexual behavior by the dependent spouse. However,

Alimony **is** so barred. See N.C. Gen. Stat. § 50-16.3A(a). Illicit sexual behavior, a subset of “marital misconduct,” is defined as “acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse.” See N.C. Gen. Stat. § 50-16.1A(3)a.

3. Entry of absolute divorce (without a pending Alimony claim).

Proof Issues:

1. For illicit sexual behavior, a form of marital misconduct, you rarely catch people in the act. Therefore, parties generally use inclination and opportunity. A good rule of thumb is to catch people three times. Inclination is proof of affection (flowers, love notes, etc.). Opportunity is going somewhere alone (hotel, residence, etc.).
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Helpful Evidence:

1. For subject matter jurisdiction, the parties must be physically separated. *Baumann-Chacon v. Baumann*, 212 N.C. App. 137 (2011).
2. A common defense for the supporting spouse is the loss of a job or inability to work. Evidence negating these claims are critical in court. Therefore, interviews of past employers and surveillance of parties are important.
3. For marital misconduct, the court may consider nine fault-based grounds set forth in N.C. Gen. Stat. § 50-16.3A(b)(1). For you, evidence of physical or mental cruelty, abusive language, forced removal from the home, concealment of assets, excessive use of alcohol or drugs, among other issues, serve as important evidence. *Panhorst v. Panhorst*, 277 N.C. 664 (1971); *Evans v. Evans*, 169 N.C. App. 358 (2005). Interestingly, a party may request a jury trial regarding marital misconduct for alimony. *See* N.C. Gen. Stat. § 50-16.3A(d).
4. A reconciliation or resumption of the marriage as well as cohabitation with a third party may terminate spousal support. A reconciliation is the voluntary renewal of the husband-wife relationship as shown by the totality of the circumstances. N.C. Gen. Stat. § 52-10.2. Cohabitation is the act of two adults dwelling together continuously and habitually in a private relationship evidenced by the voluntary mutual assumption of the marital rights, duties, and obligations usually manifested by married people to include sexual relations. N.C. Gen. Stat. § 50-16.9(b). For you, evidence of the two adults eating dinner together; having overnight visits, sleeping together, or moving one's belongings into a home; the paramour maintaining a separate residence; and going on dates, trips, or in public together.

5. Alimony can be permanent or rehabilitative, meaning short-term. Trials are common. Private investigator evidence can be crucial to the duration and amount of the award; truthfully, your evidence may be the difference in a lifetime of work or leisure.

V. CHILD SUPPORT

In North Carolina, a cause of action for Child Support generally requires:

1. A parent, *et al.*, having custody of the minor child;
2. Absent unusual circumstances, the father and mother shall be primarily liable for the support of a minor child;
3. Child Support ordered shall be in such amount as to meet the minor child's reasonable needs for health, education, and maintenance after considering the factors set forth in N.C. Gen. Stat. § 50-13.4(c); and
4. The trial court shall determine the amount of Child Support by applying the presumptive guidelines established pursuant to the N.C. Child Support Guidelines as provided by N.C. Gen. Stat. § 50-13.4(c1).

See N.C. Gen. Stat. § 50-13.4.

Helpful Evidence:

1. Income may be imputed when a party operates in bad faith or in deliberate suppression of one's income. *See Lasecki v. Lasecki*, 246 N.C. App. 518 (2016). Potential income may not be imputed to parent who is physically or mentally incapacitated as established in the N.C. Child Support Guidelines. N.C. Gen. Stat. § 50-13.4(c1). For you, evidence gathering may include facts regarding voluntary unemployment or a party's recent work history.
2. Income may include worker's compensation benefits, disability pay, etc. For you, evidence gathering may include surveillance of a party's physical activities.
3. The reasonable needs of the child are the bedrock of child support. Support should be set in an amount that meets the reasonable needs of the child for health, education, and maintenance, having due regard for the conditions of the parties, accustomed standard of living of the child and parties, *et al.*, and other particular facts of the case. N.C. Gen. Stat. § 50-13.4(c). For you, evidence gathering may include a comprehensive and particularized assessment of the child's physical and educational needs. *See McGee v. McGee*, 118 N.C. App. 19 (1995).
4. Reasonable child care costs may be added to child support which are paid by a parent due to employment or job search or when incurred by the custodial parent while attending school. For you, surveillance of these issues may be important.

VI. CHILD CUSTODY

In North Carolina, a cause of action for Child Custody requires:

1. In general, a parent claiming the right to custody of the minor child.

See N.C. Gen. Stat. § 50-13.1.

Important Point: Between two natural parents, the “best interest of the child” test must be applied. *See* *Everette v. Collins*, 176 N.C. App. 168 (2006). Indeed, custody is to be awarded to the person who “will best promote the interest and welfare” of the minor child. N.C. Gen. Stat. § 50-13.2(a). The trial court must determine the environment that will “best encourage full development of the child’s physical, mental, emotional, moral and spiritual faculties.” *In re Peal*, 305 N.C. 640 (1982).

Helpful Evidence:

My own nine-point outline of evidence in this area follows:

1. The responsible parent for primary caretaking duties (medical, school, extracurricular, etc.).
2. The parents’ work schedules (second or third shift, weekend, out of town, etc.).
3. Fitness of the home (number of bedrooms and bathrooms, number of residents, etc.).
4. Family support network (grandparents, extended family, close friends, etc.).
5. Criminal records of important caregivers.
6. Substance abuse history of important caregivers.
7. Mental health history of important caregivers.
8. Wishes of a child of suitable age and discretion.
9. Catch-all (e.g., Eagle Scout, multiple residences and jobs, no driver’s license, no vehicle, live-in partners, dangerous dogs, dangerous associates, smoking habits, etc.).

Experience shows that investigator evidence may be important in child custody exchanges, domestic violence, substance abuse, and proof of dangerous associates or conditions.

VII. EQUITABLE DISTRIBUTION

In North Carolina, a cause of action for Equitable Distribution requires:

1. The Court is to classify marital, divisible, or separate property; determine the net value of marital and divisible property; and distribute marital and divisible property. N.C. Gen. Stat. § 50-20(a)-(c).
2. The procedures for Equitable Distribution are defined by statute and case law. *See* N.C. Gen. Stat. § 50-21.

Defenses:

1. Waiver (by contract).
2. Entry of absolute divorce (without a pending Equitable Distribution claim).

Helpful Evidence:

1. Discovery of the removal of property and ascertaining the location of secreted property are ongoing issues in Equitable Distribution cases. A private investigator once helped us find highly expensive personal property located in the basement of a building in a remote city.
2. Asset searches via tax records and other sources may be helpful.

VIII. WIRETAPPING

1. In North Carolina, wiretapping includes the (a) contemporaneous interception of oral, wire, or electronic communications and (b) unauthorized access of electronic communications held in storage by a communications storage provider. N.C. Gen. Stat. § 15A-286, *et seq.*; 18 U.S.C. § 2511, *et seq.*
2. The most common example is the recording of an oral communication without consent of at least one party to the conversation (e.g., one spouse records the conversation of the other spouse and third party without consent). This is a Class H Felony in North Carolina.
3. There are several misdemeanor crimes commonly at issue: (1) a person may commit the crime of Unauthorized Computer Access by willfully, and without authority, accessing a computer program. *See* N.C. Gen. Stat. § 14-454. In other words, one spouse may commit this crime by accessing the other spouse's computer or cell phone to see its contents without permission; (2) a person may commit the crime of Computer Trespass by the unauthorized removal or copy of computer data. *See* N.C. Gen. Stat. § 14-458. This crime may occur when one spouse uses the

other spouse's password without authority or their logged-in computer, removing or copying information therefrom; and (3) a person may commit the crime of Cyberstalking by using social media to threaten or harass another person. *See* N.C. Gen. Stat. § 14-196.3. *See, e.g., Evans v. Evans*, 169 N.C. App. 358 (2005) (holding husband's recovery of sexually explicit emails from the family computer proving an adulterous relationship between the wife and another man failed because the emails were stored on the family computer and not contemporaneously intercepted). The wife should have made a Title II claim.

4. North Carolina is a one-party consent state, meaning one party to a recorded conversation must know that the recording is occurring. **Practice tip:** one party consent may be insufficient as some states are two-party consent states, such as Maryland and Texas. As an example, husband, residing in North Carolina, violates the law by recording his conversation unbeknownst to his separated spouse while she is living in Maryland.
5. There is a Vicarious Consent Exemption when a custodial parent records a minor child's conversation in good faith with an objectively reasonable belief it is necessary for and in the best interest of the child.
6. These violations have criminal punishments and civil relief in state and federal courts.

IX. SERVICE OF COURT FILINGS

1. In North Carolina, if service of process (i.e., the summons and complaint) is served by a person, only the sheriff where service is to occur may first attempt service. *See* N.C. R. Civ. Pro. 4(a); *B. Kelley Enters., Inc. v. Vitacost.com, Inc.*, 211 N.C. App. 592 (2011). However, when the sheriff refuses or neglects serving process, the clerk may appoint a private process server. *See Williams v. Williams*, 113 N.C. App. 226, (1994). If process is returned unexecuted by the sheriff, service may occur by anyone (1) not a party, (2) unrelated by blood or marriage to a party or the person served, and (3) 21 years of age or older. *See* N.C. R. Civ. Pro. 4(h1).
2. In North Carolina, service of subpoenas may be served by any person who is (1) not a party and (2) not less than 18 years of age. *See* N.C. R. Civ. Pro. 45(b)(1).

X. MY SHORT BUCKET LIST

I want:

1. An accurate, written report.
2. Videos and photographs (clearly identifying the relevant people and actions).
3. Meetings for evidence discussion and trial preparation (meeting with the attorney to decide the critical evidence).
4. Well-written affidavits (accurate facts, cogent chronology, proper grammar and punctuation, etc.).
5. Professional appearance (judges expect professionalism).
6. Factual, non-argumentative testimony (admit the obvious and be fair).
7. Know the case start to finish, including the small details (the devil is in the details).
8. Attend under subpoena (mitigates the bias argument).
9. Be punctual (do not make the judge wait on you).
10. Know the role for which you were hired (avoid accusations of an officious intermeddler).
11. Be available when you are called to help (evidence, especially memory, disappears quickly).
12. Be hired under the attorney-client privilege (have a written contract for same).
13. Be clear on the contractual duties and obligations (does the attorney or client pay you, etc.).
14. Be ready for the unexpected (have immediate access to a video and audio recorder, an exit strategy, etc.).

In short, every witness—including you—is on trial.

EPILOGUE

“You don’t learn to walk by following rules. You learn by doing, and by falling over.”

- Richard Branson

“The young man knows the rules, but the old man knows the exceptions.”

- Oliver Wendell Holmes, Sr.