Finding Money Without Getting Disbarred: Ethical DOs and DON’Ts in Asset Searches

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She has personally investigated hundreds of frauds in a wide variety of industries, including cases of embezzlement, financial statement fraud, investment fraud, divorce, and insurance fraud. She has also served as an expert witness in numerous cases involving damage calculations, commercial contract disputes, shareholder disputes and criminal defense.

Tracy has been an adjunct instructor at Marquette University, adjunct professor at Concordia University, and adjunct faculty member for the Association of Certified Fraud Examiners (ACFE). She is the author of three books, *Expert Fraud Investigation: A Step-by-Step Guide*, *Essentials of Corporate Fraud*, and *Lifestyle Analysis in Divorce Cases: Investigating Spending and Finding Hidden Income and Assets*.

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Chris Kung is a staff attorney in the Pasadena Office of the nonprofit organization Peace Over Violence. His practice focuses on family law and domestic violence restraining order litigation.

In particular, Mr. Kung regularly represents low income and modest means individuals who are survivors of domestic violence and sexual assault. He also has experience representing clients with immigration, housing, and public benefit issues.

In addition to his client work, Mr. Kung serves as a 2018 to 2019 Diversity Fellow for the American Bar Association Family Law Section. He is an active participant in the custody and visitation, domestic violence, and modest means committees at the ABA Family Law Conferences. His organization is also a member of the Los Angeles County Domestic Violence Council, where Mr. Kung acts as a representative.

Mr. Kung believes it is important to give back to the community, and volunteers at several nonprofit organizations, including the Harriet Buhai Family Law Center, Asian Pacific American Bar Association Legal Clinics, and Asian Americans Advancing Justice.

Mr. Kung graduated from the University of Denver Law School in 2010.

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Philip Segal is a New York lawyer and Managing Member of Charles Griffin Intelligence LLC. His firm performs fact-finding for lawyers in litigation, M&A and high value asset identification. Segal lectures to bar associations across the country on investigative techniques and ethics, and has taught fact investigation at Cardozo Law School. He is the author of *The Art of Fact Investigation* (Ignaz Press, 2016) and forthcoming article in the Savannah Law Review, “Legal Jobs in the Age of Artificial Intelligence: Moving from Today’s Limited Universe of Data Toward the Great Beyond.”
The Lawyer’s Duty to Supervise

You have the duty to supervise an asset investigator, even one who is not a lawyer. An instruction to “follow the rules” is not sufficient. See ABA Model Rule 5.3 (c) (1). There is case law on attorneys who used stolen information they should have known was improperly obtained. In one case the entire action was dismissed because of the attorney’s willful blindness: Schlesinger v. Walt Disney 155 Cal.App.4th 736 (2007). Other courts may impose sanctions, exclude evidence or both.

It doesn’t matter if you know didn’t order the misconduct. Even without actual knowledge of it, ratification of improper conduct by an agent can be as disastrous as if you had ordered it. To make things worse, you may not be able to make use of malpractice insurance to defend yourself if the bad behavior imputed to you involves knowingly deceiving others. You also open yourself up to charges of negligent hiring.

Among the most important rules the agents of an attorney need to know about are:

Do I have the right to look at this source of information?

- Without a court order you can’t get bank records (subject to some exception for collecting child support payments. Gramm Leach Bliley Act (15 USC 6801).

- Medical records Health Insurance Portability and Accountability Act (“HIPAA”), now codified at 42 USC § 201 et seq.

- Cell phone records (numbers called). Telephone Records and Privacy Protection Act of 2006 (18 USC 1039). You can buy cell phone records on the web. All you need to do to do it yourself is to pretend to be the subscriber and get the address on the account changed. That’s why these are...
so easy to buy. Don’t do this or buy these records despite the temptation. You are trafficking in illegal information if you do.

- Laptops and phones contain a lot of good information, but you need to be sure you have the right to examine these devices without a court order. Even if you have the right to do so, some software that captures email conversations and sends them to your account has been found to constitute wiretapping. Luis v. Zang, No. 14-3601 (6th Cir. 2016). See also Zaratzian v. Abadir, No.10-09049, S.D.N.Y 2010 (email forwarding a matter for the jury on wiretapping); U.S. v. Szymuszkiewicz 622 F.3d 701, 703 (7th Cir. 2010) held that automatic forwarding of Outlook messages constitutes contemporaneous interception.

- Social Network searching can be productive, but it is held to be unethical in a number of jurisdictions to “friend” or otherwise correspond with parties on social media using fake personae. Browsing what is publicly available to any user is permitted.

- Recording phone conversations can be perilous. Some states require both parties be aware of a recording taking place. Even calls made in “one-party” states can become “two-party” calls if the call is received in a two-party state by cell phone or a forwarded land line. Many state bars frown on otherwise lawful recording of phone calls by attorneys or their agents.

**Do I Have the Right to Speak to This Person? (The No-contact Rule, ABA Model Rule 4.2)**

It’s good practice to use an interview template when interviewing people, which includes a warning not to divulge privileged information or trade secrets, and to ask before the interview begins whether the person is represented by an attorney. Remember, Rule 4.2 says you can’t talk to someone you know is represented, but you have a duty to inquire. Comment 8 to the rule says that knowledge the person is represented “means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.” I take that to mean that if it’s possible the person is represented, it’s good practice to ask.

If they say they are unrepresented and it turns out that they did have a lawyer, the effort you went to in an attempt not to violate the no-contact rule could save you from a professional discipline. If the subject says they are represented, terminate the call and note that you did so, so that if the other side complains you can say you acted in good faith and did not solicit any information once you knew the other side had a lawyer.

Make sure to ask your potential investigator what happens under the following fact pattern: At the beginning of a phone interview a person said he was not represented, but during the course of the conversation he remembers that he did in fact talk to a lawyer but can’t remember what they talked about. He also remembers that he signed something before he left company under discussion, but he can’t remember what that document was. He thinks it was a confidentiality agreement. What would the investigator do then?

If the investigator says, “He said at first they didn’t have a lawyer or a confidentiality agreement, so it’s all fair game,” get another investigator.
The investigator you want would tell the interview subject that he (the investigator) needs to stop the interview and talk to his client. The investigator should also say, “Could you find out what you signed and who hired this lawyer? I may be back to you.”

How Would I Pretext My Way into Trouble?

Pretexting has been defined as “the use of impersonation or fraud to trick another person into releasing personal information.” ABA model rule 8.4 (c) says a lawyer shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Rule 4.1 forbids the knowing making of a false statement of fact.

This is the main way people illegally get hold of records they should not. Lawyers and their agents may not do this. If you have an agent who claims to be able to get bank account information, cell phone records or medical records without a court order, chances are they are pretending to be the owner of that data.

The question arises: where does permissible dissembling end and fraud begin? Dissembling is the polite word for what lawyers are allowed to do when they hold back the entire truth. They don’t lie but can be vague as long as they are not misleading. Pretending to be someone you are not in order to get someone to talk to you is much more than being vague. Telling someone you have a client who wants to know more about a certain person, but you can’t divulge that client’s identity, is permissible vague. If the person concludes your client is Mr. X when it is not, you have a duty to correct that misperception.

Some other practical examples.

- You want to know whether the salesman at a car dealership knows much about the ex-husband who is a former employee of that dealership. Walking in and asking questions about the newest models as if you are a buyer misleads the salesman as to your purpose but does not cross an ethical line if you should strike up a conversation about the former employee/ex-husband, where he is now and what he was like to worth with.

- You walk into that same car dealership, claim to be a postal inspector who is trying to track down the ex-employee on a government matter. This is untruthful, but it’s also unethical because it’s the illegal impersonation of an official. What if you then demand to see the mail he left behind? The felonies multiply.

You should run these scenarios by an untested investigator and see what their responses are. Do not hire them unless you’re happy you’re hiring a cautious person who knows -- and will abide by -- the rules.

Finally, at the risk of being repetitive, if someone insists they can legally get banking, cell phone or medical records, they need to tell you how they do that. If they tell you they are pretexting but nobody ever gets prosecuted, hire someone else. If they tell you they are pretexting but it’s legal, hire someone else. If they tell you they are not pretexting but that how they come by their information is a “trade secret,” then ... hire someone else!

Sources of Private Records

Private records are the lifeblood of the financial portion of the family law case. It is therefore important to know the primary sources of records and why they are important. Roadblocks during discovery can be
more easily removed if the attorney understands the importance of the documents, what they are commonly called, and where they are held.

**Banks, Brokerages, and Credit Card Companies**

Records held by banks, brokerages, and credit card companies may be some of the most important documents in a financial investigation for a family law case. These documents provide the details of sources and uses of funds, and they do not lie. They are often the key to finding hidden sources of income and hidden assets. In addition to subpoenaing documents related to known accounts, it is important to ensure that the document request includes general language that requires disclosure of all accounts and related documents.

Parties to a divorce sometimes do not know which banks to subpoena, particularly if there is a suspicion of hidden accounts. In this case, financial investigators look for clues to banking relationships. The most obvious place to look for bank names is the tax return, as it often includes line items for interest income or mortgage interest expense.

A search for real estate transaction recordings should be done, as mortgage companies will be identified. A search for other credit facilities secured by real estate, inventory, or other assets should also be done. These will identify the lenders. An evaluation of bank statements, brokerage statements, and credit card statements for known accounts may reveal additional undisclosed accounts, as the statements may show transfers or other transactions involving other banks.

When these avenues have been exhausted, the spouse and attorney may simply guess at which banks to subpoena. An educated guess at a favorite bank for a spouse may yield results. Worst case scenario, the guess is wrong and the bank responds that no records are available.

**Lenders**

Loan applications related to home mortgages, automobile loans or leases, personal loans, or commercial loans can provide a wealth of information. Assets, liabilities, and income sources must be disclosed, and sometimes supporting documentation is required. Individuals applying for loans may be motivated to make the financial picture look as positive as possible. The applicant may fully disclose all income sources and assets to the lender.

The loan application may look different from the financial disclosures in divorce, as divorcing parties are sometimes motivated to hide income and assets in the divorce. This is obviously an important issue to evaluate during divorce. It is also important to consider whether assets used to secure a loan may belong in the marital estate.

Loan applications can be acquired by sending subpoenas to banks and lending institutions. If the spouse attempts to quash the subpoena, this is a sign that there may be very interesting information in the loan documents. Courts are not always willing to use data on loan applications as evidence of assets to be divided in the divorce, especially if the applicant testifies that the application is not completely accurate. However, at the very least, that spouse can be shown to be dishonest and that could call into question other representations made during the family law case.

**Taxing Authorities**

The parties to a divorce or child support action often have copies of their income tax returns, and those should be produced during discovery. However, sometimes the parties do not have copies of the tax
returns or one party disputes the authenticity of the tax returns. In these cases, the income tax returns can be retrieved from the taxing authorities directly by filling out the proper forms and having the proper signatures. Usually the parties will seek out the federal income tax return, which is requested with Form 4506, Request for Copy of a Tax Return, but state tax returns may be sought as well.

Income tax returns are not the only tax documents that can be obtained from the government. Estates and trusts may file tax returns that have important information. Businesses may file several different types of tax forms with state or local governments, including sales tax returns, payroll tax returns, personal property tax returns, manufacturing property tax returns, fuel tax returns, and more. These documents can provide information that may be helpful when evaluating financial disclosures made during the family law case.

Credit Reporting Agencies

It is important to obtain credit reports for both spouses during the divorce process. The credit reports will ensure that the parties are aware of all credit accounts in their names and may also help point to previously unknown assets or liabilities. Further, a review of credit reports will help the spouses identify any derogatory information that may limit opportunities to get credit in the future.

Accountants

It may be advisable to subpoena an accountant who has prepared tax returns or financial statements for the divorcing couple. It is sometimes easier to get the documents from the accountant than from the spouse. Ensure that the subpoena includes not only the income tax returns or financial statements that were prepared but also all supporting documentation, work papers, and any correspondence. Essentially, everything in the possession of the accountant must be subpoenaed.

Employers

Employment records can be obtained directly from an employer with a subpoena. Why might these records be important? They will help confirm hours worked, rates of pay, gross pay, deductions, and more. Important information can be discovered about the spouse’s work history and benefits (such as perks, stock options, bonuses, and retirement). When details of the family’s finances are in question, employment records can be helpful to confirm the financial facts.

Other Private Records

In rare cases, the sources of documents discussed to this point are insufficient to fully untangle the financial web. The holders of the records may be uncooperative, or they simply may not have what is needed. This is when counsel and the financial expert need to get creative to find other sources of records that may provide clues about assets, earnings, and spending. A few examples of alternative sources of data include telephone companies, shipping companies like United Parcel Service or FedEx, utilities, airlines, and automobile dealerships. Information from these sources can point to business relationships, business activity such as sales and shipments to customers, travel activity, and major expenditures.

Caution!

Be wary of private investigators who claim they can access private records for a fee. The techniques they use may not be legal and could damage the credibility of your case. Accessing financial records and other private records using false pretenses and/or without proper authorization could be unlawful. Even
though obtaining information may be critical, it is ill-advised to risk damaging the credibility of the client and the case in the pursuit of this information.

Sources of Public Records

Public records can provide a tremendous amount of information for use in family law proceedings. The previously discussed private records are often the best sources of information used to find hidden assets when performing a lifestyle analysis; however, many other public records can also provide valuable information. The most common public records relate to real estate and mortgages. In addition, other publicly available information can help provide background on a spouse and his or her business ventures. Key relationships can be uncovered in public records as well.

Real Estate Records

Real estate records, including property transfer, ownership, and tax records, are best used to help identify undisclosed assets. Property ownership records are found at the recorder’s office (register of deeds), whereas property tax records are found at the assessor’s office. These records will document ownership of the property (both past and present), legal descriptions, buildings on the property, sales price and date, assessed value of the property, tax bills, tax payments, and mortgages on the property. In addition, real estate records might provide clues about people and their relationships.

Court Records

Court records can provide information on people, companies, relationships, and financial matters. Names of individuals as well as the companies they are associated with should be searched for both civil and criminal records. Civil cases often include financial matters, so there is often information on the existence and value of assets and the profitability of business ventures in the court filings. The records often point to related parties such as relatives, friends, coworkers, or business associates. An investigation into these related parties may uncover previously unknown assets or business ventures.

Bankruptcy court records provide tremendous amounts of financial information. Both personal and business bankruptcy records should be searched for evidence of undisclosed assets, business interests, or other property of value.

Probate court records can provide information on assets and related parties, which may point to previously undisclosed assets. These records may be helpful for uncovering business interests, investments, and other valuable assets that may have been inherited.

Note that many court records can be found online. Many state and local courts provide online access to records, with documents ranging from basic docket information to actual documents filed in cases. Courts that do not provide copies of documents filed in cases online often provide them via fax or mail with a proper request (and usually a nominal fee). U.S. federal courts provide filings online through PACER (Public Access to Electronic Court Records), which are available for relatively nominal fees.

Corporate Records

Corporate records are maintained by states and include registration of corporations, partnerships, and limited liability companies. Some state or local governments also require registration of individuals or entities doing business as (DBA) an entity that is not one of the three basic types. Corporate record keepers collect registration information including the name of the business, the registered agent, and
Uniform Commercial Code Records

Uniform Commercial Code (UCC) filings are made when businesses receive financing that is secured by business assets such as equipment, inventory, accounts receivable, furniture, or fixtures. A mortgage is filed for financing related to real estate, while a UCC filing is for financing linked to personal property. UCC filings can help identify assets owned by a company, find the lenders, and determine who might have rights to the company’s assets. These filings are recorded with the county Register of Deeds or with the state UCC office, depending on the state in which the filing occurred and the type of collateral.

Tax Liens

Tax liens can be filed for unpaid real estate, sales, income, withholding, unemployment, or personal property taxes. Liens are filed against property owned by the taxpayer who owes the debt and are generally not released until the lien is satisfied.

Many tax records related to the liens are generally private, but the filing of a lien for unpaid taxes is usually public. States have also taken to publishing databases of tax “deadbeats,” citing individuals and businesses who have the largest unpaid tax bills. A tax lien may indicate the existence of previously unknown income or assets and may provide clues about the financial health of a business or person.

Databases

Several companies provide access to data aggregated from many different databases. The databases include information from credit‐reporting agencies, public records, court records, and more. The databases can provide information on a person’s current and former addresses, vehicle ownership, relatives and associates, real estate ownership, business affiliations, and more.

Even though these databases provide a lot of information on people, the information is not always accurate, so it should be checked against source documents if it is going to be used substantively in the divorce case. Also, note that the information is rarely complete, so it should not be the sole source of information about the spouses.

Motor Vehicle Records

Motor vehicle records provide the name, address, vehicle identification number, and titleholder of a vehicle. These records are sometimes difficult to access, but it is often advisable to attempt to get them in order to identify valuable assets.

Professional Licensing

States require licenses for a variety of professionals, including doctors, attorneys, private detectives, physical therapists, accountants, cosmetologists, and massage therapists. The licensing and credential data are generally available to the public and may include information about employers and disciplinary proceedings.
Stock Ownership

The Securities and Exchange Commission maintains buy and sell information for stockholders with more than a 10 percent interest in public companies. Stock ownership records are also maintained for the officers and directors of public companies. The records are in searchable databases and may be helpful to uncover significant ownership interests in public companies.

Unfortunately, data on stock ownership for private companies is not publicly available. That is one of the advantages to being a private company.

Intellectual Property

Information on copyrights, patents, and trademarks for which companies apply can be found at the U.S. Patent and Trademark Office. This information may be important in finding undisclosed business interests or intellectual property that may not be disclosed in the divorce. These items could have substantial value.

Business and Industry Databases

Hoovers and Dun & Bradstreet have amassed data on companies and the industries in which they operate. The databases contain information on the owners, officers, executive compensation, company financial statements, key ratios, and creditors.

Internet and Search Engines

A simple search engine has made it easy to find information on people and companies. Effectively using search engines can result in valuable information about relationships between people, the existence of assets and business ventures, and the particulars about businesses. This information may be useful in a contentious divorce case.

Effectively using search engines has become an art, with users making searches broader or narrower based on the number and quality of results that are returned to them. For example, suppose you are searching for information about a man with a fairly common last name. A search using just his name will yield too many results to be useful. The search should be narrowed using unique pieces of information known about the person. Those identifiers that help your search efforts may be an employer, a job title, a name of a friend or relative, a hobby, or anything that might help identify the correct man with the common last name.

Although it may take some time to find information pertaining to the spouse in question, the effort is often worthwhile, especially if the spouse is suspected of hiding assets, income, or business relationships and involvements.

Social Networking Sites

Social networking sites have created additional sources of information for family law cases. People create detailed profiles including friends, vital statistics, work and education history, and other private information. They may post status updates that include their whereabouts, relationships with others, and photographs of activities.

Inferences might be drawn about personal relationships and business ventures, with clues about them often revealed on social networking sites. The expert is cautioned to use the information carefully and
to attempt to validate and verify any information that may become important to the family law case. Counsel is cautioned against creating fake profiles on social media sites to attempt to gain access to others’ accounts under false pretenses. Being dishonest in order to get information from a social media site may damage credibility or taint the information retrieved.

**Uncovering Hidden Assets**

In general, the most common way hidden assets are discovered in a divorce case is through a detailed analysis of financial documents. Often clues are left behind by the spouse hiding the assets. No matter how careful the spouse may be, it is common that at least some evidence remains of the existence of the assets. Thus, expenditures should be detailed, and the financial expert should complete a careful analysis of suspicious transactions.

Financial documents such as cash receipts, canceled checks, money order receipts, and other receipts may help uncover hidden assets. A search for the “second set of books” may yield valuable information that points to hidden assets.

**Income Tax Returns**

A personal income tax return can be an excellent starting point for identifying hidden assets. Certain income and expense items will be reported to the Internal Revenue Service, and therefore must be included on an individual’s tax return. Income and expenses reported on a tax return should be traced back to the underlying assets.

The following are items on a personal federal income tax return, along with the assets whose existence may be indicated by the data on the tax returns.

- **Interest** - May indicate the existence of bank accounts, certificates of deposits, bonds, investment accounts, or loans receivable.
- **Dividends** – Indicates the existence of bank accounts, investment accounts, stocks, or other investments in business entities.
- **Business Income or Loss** – Signifies sole proprietorships or other sources of income, such as royalties.
- **Capital Gain or Loss** – May point to investment accounts, stocks, business interests, or other investments.
- **IRA Distributions, Pensions, Annuities** – Points to the existence of retirement accounts, annuities, or other valuable retirement assets.
- **Rental Real Estate, Royalties, Partnerships, S Corporations, Trusts** – Indicates the existence of income-producing assets (real estate or business) or an interest in estates or trusts.
- **Farm Income** - Points to farming activities, including valuable assets such as real estate and livestock.
- **Health Savings Account Deduction** – Signifies the existence of a medical-related savings account.
- **SEP, SIMPLE, Qualified Plans** – Indicates retirement accounts for self-employed individuals.
• IRA deduction – May also signify the existence of retirement accounts.

• Foreign tax credit – This signifies investment accounts with foreign holdings, or investments in foreign countries.

• Income Tax Withheld and Estimated Tax Payments – These items should be evaluated to determine whether excessive amounts are being withheld or paid as a method of hiding assets.

• Penalty on Early Withdrawal of Savings – The disposition of the withdrawn funds should be investigated.

• The following items on Schedule A (also in the appendix) may also indicate the existence of assets.

• General Sales Taxes – This could point to the purchase of substantial assets.

• Real Estate Taxes – May indicate the existence of real estate.

• Personal property taxes – Could point to the existence of an automobile.

• Home Mortgage Interest – May also indicate the existence of real estate.

• Mortgage Insurance Premiums – Points to real estate.

• Investment Interest Paid – Can indicate the existence of investment accounts.

• Other Expenses (Investment, Safe Deposit Box, etc.) – This may point to investment accounts, safe deposit boxes at banks, or the like.

Bank, Brokerage, and Credit Card Account Records

Like hidden income, hidden assets can be uncovered through a detailed analysis of transactions in known bank, brokerage, and credit card accounts. Large cash withdrawals or transfers could be used to purchase hidden assets.

Expenditures funded by bank, brokerage, or credit card accounts may indicate the existence of assets. For example, repeated travel to a particular location may indicate business interest or assets owned there. Checks made out to a utility company may relate to a piece of real estate owned. A check to an appraiser or a title company also could suggest the existence of real estate.

Look for instances in which cash appears to disappear into thin air. Cash withdrawals (including both counter withdrawals and ATM withdrawals), cash received back when depositing checks, or the sale of assets with no paper trail or deposit to known bank accounts, are all suspicious.

Credit Reports

Credit reports provide a wealth of information about individuals and their financial histories. They include current and previous employers, addresses, and credit accounts including real estate loans, automobile loans, and credit cards. Limits and balances on those credit accounts might provide hints about credit usage, potentially signaling hidden assets purchased on credit now or in the past.
Bankruptcies, tax liens, and judgments will also be found on a credit report, and an analysis of the source documents related to them may provide information on assets owned.

Prior to litigation it may be difficult to obtain a credit report. You can still search for bankruptcies as well as tax and commercial liens using a variety of databases and public records.

**Detailed Accounting Records**

Detailed accounting records related to personal or business financial matters can provide hints to the ownership of assets. These records may include check registers and general ledgers, among other things.

**Miscellaneous Records**

There is no limit to the creativity that can be used to find clues to the existence of assets. Such records may include:

- Telephone records
- Emails
- Photographs
- Personal and business calendars
The Ethical DOs and DON'Ts in Asset Searches
Finding Money Without Getting Disbarred
Philip Segal
Charles Griffin Intelligence
Tracy Coenen
Sequence Inc. Forensic Accounting

Presentation Agenda
- Finding money and assets ethically
- Introductions
- What do you need to find?
- Where can you find it?
- How do you stay out of trouble?
- Questions

Philip Segal
Investigations Attorney
Due Diligence
Asset Searches

Tracy Coenen
Forensic Accountant
Lifestyle Analysis
Fraud Investigations
How do I make sure I'm covered if my investigator does something stupid, unethical, or illegal?

The Reckless Approach:
“Just don’t break any laws out there.”

Agency Principle
A lawyer is responsible for a nonlawyer's conduct that violates the rules if the lawyer (a) orders or, with the knowledge of the specific conduct, ratifies the conduct involved.”
Agency Principle

• If an investigator works for a lawyer, he is the lawyer's agent.
• Lawyers have a duty to supervise their agents.

You have to look like you're trying.

But my other investigator got that for me.
Banks, Brokerages, Credit Cards

- Details to determine “sources and uses of funds”
- Where did the money go?
- Find hidden income and assets
- Legal access if your name is on the account - you can request records
- Otherwise, subpoena

Mystery of Bank Accounts

How can we find secret accounts?

What we do is completely legal. We just won’t tell you how we do it.

Exceptions:
- Garbage abandoned on public property
- Credit header information (with a permissible purpose)

Your Client’s LEGAL Access

- Their own credit report (not their spouse’s)
- Joint bank, investment, credit card accounts
- Businesses with an ownership interest
- Email, social media accounts, websites which they are authorized to access
- Google search history for account which they are authorized to access
• Income taxes, payroll taxes, sales taxes
• Verify income and expenses reported
• Compare to other financial information
• May find clues to asset ownership (real estate taxes, interest/dividends on bank/investment accounts, mortgage interest, K-1 for business interests)
• Lots of information to be found beyond wages and itemized deductions; if you know what to look for

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**Tax Returns**

- Get both federal and state
- Form 4506 - Request for Copy of a Tax Return ($50 per return; up to 6 years back; any personal or business returns)
- Form 4506-T - Request for Tax Transcript (free; up to 3 years back; personal returns only)
- Can get transcripts online with correct information

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**Credit Reports**

- Identify all credit accounts
- Potentially identify undisclosed assets or liabilities
- Can only get your own report
- NOT allowed to get spouse’s credit report
Business Records

- Financial statements
- Employment records
- Ownership records
- Board minutes and other records

Private

Public
- Business registration (corporation, partnership, LLC, DBA)
- Uniform Commercial Code (UCC)
- Stock ownership (public companies)
- Patents, copyrights, trademarks

No Contact Rule

Rule 4.2 – No Contact
- Restricts a lawyer’s ability to communicate with a represented person about the subject of the lawyers’ representation of his client.
- When a party or subject is a corporation, rule extends to employees who supervise, direct, bind.

Varying Treatments of Rule 4.2
- Harsh view of any level of contact, plus phone recording. Also quoted 8.4 on deceitful conduct.
Interview Template

- Prior agreement about how investigator represents himself
- Make sure person he is talking to is not represented by counsel
- Tell the person we don’t want them to disclose confidential information or trade secrets
- Ensures investigator asks the right questions

Pretexting

- I’m calling people for information. It would be so much easier if I could just pretend I’m someone else. Can’t I just pretend I’m the Washington Post or the local NBC affiliate?
- Pretexting: The use of impersonation or fraud to trick another person into releasing personal information.
- (This is how they get cell phone and banking records)
- If they can’t tell you how they do it, something is wrong.

ABA Model Rules of Professional Conduct

- RULE 4.1 - Truthfulness in Statements to Others
  - In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.
- Rule 8.4(c)
  - It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
- Question: Where does permissible dissembling end and fraud begin?
- Statutory breach for getting bank records (Gramm Leach Bliley) and cell phone records (Telephone Records and Privacy Protection Act)
Social Networking

- Facebook, Instagram, Twitter, LinkedIn, Snap Chat, dating sites
- Profiles include things like friends, vital statistics, work, education, relationships
- Can see places traveled to and with whom
- Clues to business ventures, property ownership, areas where business is cultivated

Social Networking

- There is great material against the plaintiffs on Facebook. Can we look and can we friend them?
- Made-up person reaching out to “friend” someone is held in some places to be unethical.
- A real person friending for untrue purposes is also frowned upon in some jurisdictions.

Social Networking

- NYCSBA Formal Opinion 2010-2: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.
- Philadelphia Bar 2009: Agents who tell the truth but misled as to their purpose may not “friend” unrepresented persons.
Accessing Computers and Mobile Devices

- Desktop and laptop computers
- Tablets/iPads
- Mobile phones
- Emails
- Photographs
- Calendars
- Text messages
- Social media posts and private messages

What about the “family” iPad that somehow synced with the spouse’s iPhone?

Reading someone else’s email or other private data on a computer:
• If imaging, do you have permission to access the device?
• Computer Fraud and Abuse Act (18 USC 1030(b))
• Put it on the client in your engagement letter
Accessing Computers and Mobile Devices

- Stored Communications Act (18 USC 2701) – don’t hack into databases
- Wiretap Act (18 USC 2510) – US v. Christiansen (PI to the stars and lawyer went to jail for wiretapping) and Luis v. Zang (contemporary interception)

Telephones

- Cell phone records - Telephone Records and Privacy Protection Act of 2006
- Recording phone calls
  - You can do it in a one-party state
  - What if you call a two-party state?
  - Even if it is legal, is it professionally ethical?
  - Issue in Arctic Cat and Uber
- Phone pinging – GPS tracking via satellite
  - Telecommunication Act of 1996
  - Telephone Records and Privacy Protection Act of 2006
  - Working with police – is it a search? (US v. Caraballo)

GPS Tracking

If tracking the phone is out, what about a GPS tracking device on the car?

- GPS tracking devices – constitutional for now by private parties, but authorities need a warrant under US v. Jones
- Some states currently limit the practice
- Check state law and get permission from car owner
GPS Workarounds

• Cell phone paid for by your client?
• Toll records?
• Insurance safe driving tracker?
• Database of car locations.