

Regulations and Policing of Experts

On March 22, 2007 I sent our expert readers the email you will find below. What follows is a compilation of some of the responses I received from readers. If you are concerned about this turn of events, I urge you to contact your professional association, your local/state bar association, and your elected representatives to find out what's happening in your area and to let them know how you feel about it.

Best of success to you,

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Email to our readers on March 22, 2007:

Many of you have been sending in some great information to help other experts. But knowing how we all suffer from information overload, I try to be very discerning about what I pass on and keep it to a minimum, sending only the most important or most helpful information.

The following is one I felt was important enough to send. Please read it and keep on top of the regulations affecting your region and area of expertise.

Warmest regards,

Meredith

I received the following in response to a blog post I made earlier this week about courts, state legislatures, and professional associations 'policing' experts and their testimony. I found this disturbing to say the least.

"Your blog post about the policing of experts is coincidentally timed. We were recently approached (as in - walked into our front office door and demanded loudly) by the Department of Agriculture and Consumer Affairs, and told that we are "officially in violation of State Policy" and could be ordered to abandon our practice immediately.

The "investigator" was kind enough to leave a printed copy of the statute, as well as highlighting the relevant portion. It seems that ANY expert who is not professionally licensed by the DPR (lawyer/doctor/CPA/Insurance Agents) is suddenly required to maintain a Private Investigator's license! This is based on the current Florida statute cited below.

According to the DACA's interpretation of the statute, this would include firms such as mine, handwriting analysis experts, mechanics, and more. Our firm has been providing E-Discovery, Data Recovery and Computer Forensic Expertise since 1998.

Now, after almost NINE YEARS, and being on constant retainer for several State Attorneys, the Federal Government, and countless Court Appointments, we are told that we could potentially be put out of business. The largest concern is that to obtain a PI license, an individual must "apprentice" for two years first.

Fla. Stat. 493.6101

(http://www.leg.state.fl.us/statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=493.6101&URL=CH0493/Sec6101.HTM)

(17) "Private investigation" means the investigation by a person or persons for the purpose of obtaining information with reference to any of the following matters:

(a) Crime or wrongs done or threatened against the United States or any state or territory of the United States, when operating under express written authority of the governmental official responsible for authorizing such investigation.

(b) The identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons.

(c) The credibility of witnesses or other persons.

(d) The whereabouts of missing persons, owners of unclaimed property or escheated property, or heirs to estates.

(e) The location or recovery of lost or stolen property.

(f) The causes and origin of, or responsibility for, fires, libels, slanders, losses, accidents, damage, or injuries to real or personal property.

(g) The business of securing evidence to be used before investigating committees or boards of award or arbitration or in the trial of civil or criminal cases and the preparation therefor.

Interesting, huh? It would seem that taken broadly enough, this would apply to paralegals and secretarial staff as well. I'd be interested to see how many other experts may fall victim to this.

I would add that in addition to the 2 year apprenticeship (internship), there's the insurance factor- as soon as you are a licensed PI you can no longer carry standard insurances (this according to our agent) because a PI carries a much higher liability.

[In my opinion] there is also an image factor involved. I know a lot of Law Enforcement and attorneys who despise PI's because they have long been stereotyped as "gumshoes" and "hired guns". And as you point out all the time (and we as experts well know) being a hired gun as an expert is suicide in court." - Expert reader

Selected responses from readers:

We had the same problem here in Texas but got the Texas Legislator to pass an exemption for CPAs a couple of years ago. The Florida Society of CPAs should contact the mucky-mucks at the Texas Society of CPAs to get some help dealing with the problem. See news release below.

CPA's Exempt from Private Security Act

May 19, 2005

The Texas Private Security Act requires individuals, including CPAs, that are involved in fraud investigations, or expert witness testimony about those investigations, to be a licensed private investigator. Since CPAs are frequently and routinely involved in fraud examinations and have responsibilities for discovering illegal acts during financial statement audits, there was an open issue about whether CPAs were required to become licensed private investigators. While the Private Security Act has never been enforced against CPAs, TSCPA believes CPAs should be exempt from the Act.

Today, House Bill 808 by Rep. Joe Driver (R-Garland) passed the Legislature exempting CPAs from the Private Security Act. The bill now goes to the governor for his signature.

Thanks to Driver and Sen. Kim Brimer (R-Fort Worth), who sponsored the bill in the Senate, for pushing this legislation through to passage. Driver was the author of the original Private Security Act legislation and agreed with TSCPA that it was never intended that CPAs be regulated under that Act.

Does this include medical professionals, like MDs, ARNPs etc?
Doesn't sound like it does, but I want to be sure.

It looks like we're being legislated out of business. Federal courts have Daubert, and States have (PI) licensing requirements, and professional organizations are tracking expert witnesses/consultants for members. Soon professional liability insurance costs will be out of sight. Too bad!

There is a similar law in Texas, but it is seldom enforced and few experts have a PI license.

Indeed, this is true of MOST states in the US. Arizona, Illinois, and Texas come immediately to mind.

Fortunately, in California there is an appellate court ruling that says if you are doing things of a technical nature, you do not have to have the PI license. I am afraid that it is going to take law suits (perhaps a class action FEDERAL lawsuit against the states for restraint of trade??) similar to the appellate case in California to resolve this issue. My reference to "Restraint of trade" above is due to the fact that most, if not all, of these states require that you have a PI license FROM THAT STATE in order to do any work there, even if you do not advertise, reside, or regularly work in that state.

It's too bad what your reader has been through, but perhaps some research and a call to the Florida Department of Agriculture and Consumer Services.

Attorneys, doctors, engineers, etc. are all licensed through Division of Licensing and Business and Professional Regulation, General Provisions, Chapter 455. They must all keep up with continuing education yearly and I think all pay additional insurances for their various field of practice. I do not see where any of these fields would need an "investigator" license. As for paralegals and secretarial staff, it spells out in the provisions that administrative staff are not under this jurisdiction.

Also, he might want to look at the website:

<http://licgweb.doacs.state.fl.us/> and

http://licgweb.doacs.state.fl.us/January2007/newsletter_January2007.pdf and

from what I read, the insurance part has been discontinued -

<http://licgweb.doacs.state.fl.us/news/PDFdocs/EliminationOfInsuranceReq.pdf>

- hope this helps.

Can you say: "Revenue enhancement?"

This kind of reg is on the books in Calif also and probably elsewhere;

we must simply be careful about our job descriptions, as always.

"They" will come up next with whatever enhances the income of the particular bureaucracy; this is the nature of all government programs, local to global. Nothing need surprise or be of concern to you, once you understand how government functions. "They" never have enough of a budget, since the response to more crime, poor people's needs etc. continues to be "not enough \$." Man's creativity is the only limit! Whew, you really got me started.

I suspect that this is more to generate tax/fee revenue than to police experts.

In any event, it would be a state based trend and may never have a national impact.

Has anyone ever actually purchased this type of insurance and would it be applicable throughout the USA ?

California has also had a similar requirement on the books for many years. However, there is a CA appellate case which ruled that if you are doing "an investigation of facts" for purposes of a scientific reason and you may incidentally talk to people only to clarify certain facts you are exempt from the requirement.

Some states also have similar laws to "protect" surveyors, so that an accident investigator/reconstructionist can not take measurements at a scene to obtain the measurements not obtained by the law enforcement personnel, such as lane widths, curb-to-curb widths, distance from POI to an intersection, etc. Anyone taking measurements for ANY reason is in violation of this category of law.

More and more states seem to be going this way, in spite of the violation to the U.S. Constitution's reserving laws affecting interstate commerce to the U.S. Congress. The interstate commerce clause would only apply to someone from one state being retained to work on a case in another state. However, if the out of state expert can beat this, then there is a violation of the equal opportunity laws for the in-state experts. These local laws will only be overcome when expert witnesses as a group collect enough money to challenge these laws in local and federal courts! This probably could be done as a class action, but I am not an attorney.

If carried far enough everyone in a state would be required to have a PI license including teachers and students from pre-school on up! This shows the power of a lobby (PI's here) combined with the stupidity of legislators and bureaucrats around the country.

I'm an engineering consultant offering expert witness services throughout the US. Although I am licensed a Professional Engineer (PE) in 4 states, I have never had my professional credentials challenged in states in which I

am not licensed. My experience has been that expert work is not generally considered the "practice" of engineering. However, recent activity in Alabama (and perhaps other states) suggests that local registration may be an evolving requirement enacted by the state's licensing board. This restriction, if successful, would greatly hamper the ability of an expert to work outside the states in which active licenses are held.

I noted that the key term was the term professionally licensed.

As a Licensed Professional Engineer, I am professionally licensed, albeit, not as a CPA, MD, Attorney, or Insurance Agent. Would I be bared by this statute, or would I be included as a Professional allowed to offer engineering inspection and investigative services?

As an aside, what is the DRP?

Unfortunately, this seems to be a trend. We in Texas have been faced with this since the statute 1702 of the Occupations Code in Texas were re-written. I feel sorry for the firm in the message and do understand their pain. I would like to see this stopped, but I do not believe it will be. Partly because of money (licensing fees etc.) and because some of our colleagues have no business doing this business and this almost the only remedy the states can concoct.

Please do tell the other readers to check with their insurance companies. We also have to be insured, but our normal business insurance coupled with an "Errors and Omissions" policy is very affordable. You will need to find an independent agent as most standard agencies (Allstate, Farmers, etc.) can not supply it. We use a national company and they are affordable. Besides, any expert should be carrying E&O insurance.

Also, the experience requirement is usually made up from the cases that have already been worked. At least in Texas that has been the case.

Lastly, there are PI's and then there are PI's. we have not found any stigma attached to us. It depends on what kind of PI you are licensed as. You do not have to be the weapon carrying, surveillance running, "gumshoe". In Texas there are several categories to choose from.

All in all, since it was implemented here we have seen 4 major benefits; 1. Unqualified "experts" have gone away and what is left are competent hard working individuals and companies; 2. Work has increased for those willing to get the license and insurance; 3. We don't have to worry about as many people that think they know what a forensic exam is just because they are someone's network administrator with no training in forensics or methodology; 4. It has actually decreased and helped to control the costs of work for our clients by not having to defend them against unproven, unqualified individuals that make mistakes or errors in judgment.