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OPINION COMMITTEE

May 24, 2004

RQ-0232-GA

The Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Via Certified Mail, Return Receipt Requested
7003 2260 0000 7130 0016

Attn: Ms. Nancy Fuller, Chair, Opinion Committee

FILE # ML-43727-04
I.D. # 43727

Dear General Abbott:

This letter is a request for a written opinion pursuant to V.T.C.A., Government Code §402.042. During the 78th Regular Legislative Session, House Bill 1769 was enacted, amending Chapter 1702, Occupations Code with regard to licensing of private investigators by the Department of Public Safety. As added by House Bill 1769, §1702.323(e) states that:

This chapter applies to any person who conducts an investigation if the investigation involves a person, or the affairs of a person, who is not employed by the same employer as the person conducting the investigation and the investigation is not conducted on the premises of the employer.

A question has arisen as to whether §1702.323(e) applies to paralegals and others performing work under the direct supervision of attorneys. While the term "investigation" is not defined in Chapter 1702, the term "investigations company" is defined in §1702.104 as a person who, among other things, obtains or furnishes information related to:

- (A) crime or wrongs done or threatened against a state or the United States;
- (B) the identity, habits, business, occupation, knowledge, efficiency, loyalty, movement, location, affiliations, associations, transactions, acts, reputation, or character of a person;
- (C) the location, disposition, or recovery of lost or stolen property; or
- (D) the cause or responsibility for a fire, libel, loss, accident, damage, or injury to a person or to property

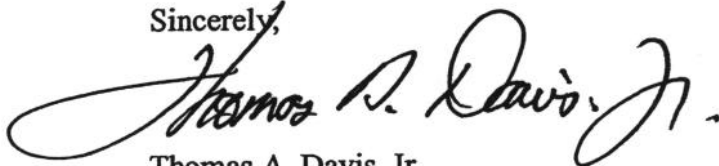
Please see the attached request from the State Bar of Texas, which sets out the questions raised by the enactment of §1702.323(e), as well as their arguments that the section is not applicable to paralegals, clerks, or other non-attorneys performing work for attorneys.

In addition to the information provided by the State Bar, the Department requests that you consider several related issues. The State Bar indicates in its request that the Department licenses private investigations companies rather than individuals. However, §1702.104 states that a "person" acts as an investigations company if the person meets the qualifications of that section. In addition, §1702.323(e) states that the chapter applies to a "person" who meets the requirements of that section. Therefore, despite the use of the term "investigations company", it is clear that Chapter 1702 anticipates the licensing of individuals as well as companies.

Further, the request from the State Bar indicates that paralegals under the direct supervision of an attorney should be excluded from licensing based on the exemption for attorneys found in §1702.324(b)(9). However, as stated in their request, the previous exemption for attorneys, which included "agents", was later modified by the Legislature to apply only to "an attorney while engaged in the practice of law." In addition, §1702.324(b) provides several other instances in which the Legislature has applied a listed exclusion specifically to both a professional and others working with the professional (see §1702.324(b)(1), "a manufacturer or a manufacturer's authorized distributor" and §1702.324(b)(6), "a licensed engineer practicing engineering or directly supervising engineering practice"). Therefore, it is not clear that §1702.324(b)(9) would exempt paralegals and others based on the exemption for attorneys.

The Department requests an official opinion by your office regarding whether §1702.323(e), Occupations Code applies to paralegals and others performing work under the direct supervision of attorneys. Thank you for your attention to this request. Please do not hesitate to contact the Department if you need additional information.

Sincerely,



Thomas A. Davis, Jr.
Director

TAD:VAF

cc: Antonio Alvarado
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April 29, 2004

Colonel Tommy Davis, Director
Texas Department of Public Safety
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RE: Request for Opinion Concerning Whether the Texas Commission on Private Security, as a Division of the Texas Department of Public Safety, Plans to Expand Its Licensure and Registration Efforts Under the Auspices of Recent Amendments to the Texas Private Security Act, to Mandate Licensure and Registration of Paralegals and Others Engaged in Legal Work Under the Direct Supervision of Licensed Attorneys.

Dear Colonel Davis:

I am writing to respectfully request that you comment on a question affecting the legal profession, legal consumers, and my official duties as Executive Director of the State Bar of Texas (hereinafter referred to as the "State Bar").

I. QUESTION

The Texas Commission on Private Security (hereinafter referred to as the "TCPS") is statutorily authorized to license and regulate certain security industry occupations in Texas under Chapter 1702 of the Texas Occupations Code, known as the Texas Private Security Act (hereinafter referred to as the "Act"). In conjunction with recent amendments to the Act by the 78th Texas Legislature, the TCPS became part of the Texas Department of Public Safety in September 2003. The integration of the TCPS and the TDPS, according to the December 2003 edition of the TDPS online newsletter, did not drastically alter the duties or power of the TCPS, responsible for licensing a reported 19,000 armed guards, 60,000 unarmed guards, and 3,800 security-related companies and regulating private investigators, armed couriers and personal protection officers. While the TDPS online newsletter mentioned increased regulation of locksmiths and electronic access control companies (handling products like hotel room keycards) by the TCPS by September 2004, it gave no indication that there were new occupational activities which

were formally unregulated by the TCPS for which an investigative or security license or registration would now be required. Due to the increasing number of questions which have come to my attention since the joinder of the TCPS to the TDPS, seeking clarification regarding any potential for expansion of powers which would directly impact paralegals, clerks and others providing similar non-lawyer legal-oriented services which are vital to the legal profession, the State Bar seeks an opinion concerning the following question:

- (1) Does the Texas Commission on Private Security, as a Division of the Texas Department of Public Safety, Plan to Expand Its Licensure and Registration Efforts Under Recent Amendments to the Texas Private Security Act, to Mandate Licensure and Registration of Paralegals and Others Engaged in Legal Work Under the Direct Supervision of Licensed Attorneys?

II. OVERVIEW

Until the publication of an article in the January 2004 edition of the Texas Bar Journal entitled "Licensed Investigators: New Bill Requires All Investigators Be Licensed," by the General Counsel for the Texas Association of Licensed Investigators, Jim Bearden, there was no question regarding possible overlap between the regulatory power of the TCPS and non-lawyer individuals involved in substantive legal work under the direct supervision of licensed Texas attorneys. Since the publication of Bearden's article, however, controversy has arisen. (See attached article from Tex. Bar Journal, January 2004, p. 51.)

I have been requested by a number of our members to seek clarification from you regarding the TDPS' position on the above-stated question sparked by Bearden's article, as well as confirmation regarding State Bar's understanding of the Act since the time of its original enactment. The State Bar has interpreted the Act to mean that to the extent that a paralegal, clerk or other non-lawyer is performing legal work under the direct supervision of a licensed Texas attorney engaged in the practice of law, or is performing some other function that does not require a license under the Act (i.e., cannot be characterized as in any way engaging in or accepting employment related to the business of private investigation or private security), that any attempt by the TCPS to impose license, registration, or commission requirements would be invalid. The remaining portion of this letter will set out the relevant statutory and other legal and policy considerations behind the State Bar's interpretation.

III. STATUTORY AUTHORITY AND INTERPRETATION

A. Regulation by the TCPS of paralegals, legal assistants, or other similarly employed who perform legal duties under the direct supervision of licensed Texas attorneys

engaged in the practice of law, or other functions not falling within the purview of the of the Act is not authorized by and is in fact inconsistent with the Act.

Under the Act, the TCPS licenses private investigations companies, as opposed to individual private investigators. As Mike Coffey, Communications Director for the North Texas Private Investigators Association has stated, "[u]nder Texas law, there is technically no such thing as a licensed private investigator." See www.ntpia.org/PIOverview. Subchapter F of the Act addresses licensing and duties of investigations companies rather than private investigators. Section 1702.101 prohibits an individual who does not hold an "investigations company" license from acting as an "investigations company," offering to perform the services of an investigations company, or engaging in a business activity for which a license is required. Tex. Occupations Code, Section 1702.101. For purposes of the Act, in order to be classified as an investigations company, a person must "engage in the business of" or "accept employment" related to specific areas. Under Section 1702.104, a person acts as an investigations company if the person: "(1) engages in the business of obtaining or furnishing, or accepts employment to obtain or furnish information related to (A) crime or wrongs done or threatened against a state or the United States; (B) the identity, habits, business, occupation, knowledge, efficiency, loyalty, movement, location, affiliations, associations, transactions, acts, reputation, or character of a person; (C) the location, disposition, or recovery of lost or stolen property; or (D) the cause or responsibility for a fire, libel, loss, accident, damage, or injury to a person or property; (2) engages in the business of securing, or accepts employment to secure, evidence for use before a court, board, officer, or investigating committee; (3) engages in the business of securing, or accepts employment to secure, the electronic tracking of the location of an individual or motor vehicle other than for criminal justice purposes by or on behalf of a governmental entity; or (4) engages in the business of protecting, or accepts employment to protect, an individual from bodily harm through the use of personal protection." Id. at Section 1702.104(1)-(4).

The Act's licensure requirements are similarly framed in terms of engaging in an investigative or security related employment or business endeavor. Without significant, continuous investigative experience, however, an individual would be unable to qualify for an investigations company license. Section 1702.114 requires that an investigative company license applicant have "three consecutive years' experience in the investigative field as an employee, manager, or owner of an investigations company or satisfy other requirements set by the [TCPS]" which would qualify the applicant "to engage in the business of an investigations company." Id. at Section 1702.114. The license holder's business must be operated under the direction and control of a qualified manager, who maintains a supervisory position on a daily basis for that company. Id. at 1702.119-1702.120. The company manager and each of the company's officers, owners and

employees must be registered (vs. licensed) with the TCPS. Id. at Sections 1702.110(5), 1702.127. Only a license holder or manager, or person authorized by a license holder or manager, may submit a written report to a client or employer. Id. at Section 1702.132.

An express authorization in the Act for regulation of paralegals, legal assistants and other non lawyer individuals performing work under the supervision of a licensed Texas attorney in the practice of law is nowhere to be found, and the amendments at issue do not appear to have ushered in an unprecedented expansion of rulemaking authority in this regard. The bill analysis of subsection 3(e) of Section 1702.383 of the Act (HB 1769), as found in the House Committee Report, reports as follows: "Changes the description of individuals to whom the provisions regarding the security department of a private business applies." The only rulemaking authority extended to the TCPS by HB 1769, according to the House Committee Report, concerns new requirements for continuing education instruction determined by the director of the TCPS. The bill analysis also notes that there is a new prohibition, preventing a person whose pocket card has not expired from receiving another pocket card. The language Bearden cites in Section 1702.386 actually predates the 78th Regular Legislative Session, dating from the 74th Regular Legislative Session. With the enactment of HB 713, language was added to Article 4413 (29bb), providing for third degree felony penalty for a repeat offender under the Act and a Class A misdemeanor penalty for anyone who knowingly hired a person operating under the Act without a license. These penalty provisions have been rearranged since their enactment, as part of major nonsubstantive revision of Texas law and relocation of the Act in the Texas Occupations Code. The meaning and legal effect of the penalty provisions, however, has not been altered over time. The TCPS's ability to sanction persons who fall within the regulatory sweep of the Act, but knowingly fail to comply with the Act's requirements, at least in terms of codification, is not a new development.

B. The work of paralegals, legal assistants, or other non-lawyers performing duties under the direct supervision of licensed attorneys engaged in the practice of law falls within the parameters of the Act's attorney exception, or assisting in other functions not falling within the Act's definition of private investigative or security business or services

Subchapter N of Chapter 1702 sets out exceptions to the Act, expressly excluding certain occupations and functions from the TCPS's statutory authority. For example, Section 1702.321 excludes government employees at the federal, state and local levels from licensure and regulation. Section 1702.324 contains a laundry list of other broad occupational categories beyond the statute's reach, denoting in general terms what does not constitute the business of or an activity connected to the business of private

investigation or private security. Those in the legal field expressly excluded include "an attorney while engaged in the practice of law" and "a person who obtains a document for use in litigation under an authorization or subpoena issued for a written or oral deposition." Id. at Section 1702.034(b)(9)(10). Other occupations excluded in Section 1702.324 include engaging in the business of: performing title and contract functions related to petroleum and mineral interests; obtaining and providing information pertaining to credit worthiness, debt collection, indemnity or surety bond, insurance applicant evaluation; and repossession of property secured by mortgage or other security interest. Id. at Section 1702.324(a),(b)(2)(3). Recognizing that some information is within the general public domain, Section 1702.034(b)(5) also excludes those who meet the following three prerequisites from Chapter 1702: (a) are not employed on a full-time basis by a license holder, (2) do not perform activities requiring a license; (3) and are engaged in obtaining information that would constitute publicly available information under the Texas Public Information Act.

The exception for attorneys located in Section 1702.324 of the Act stretches all the way back to the creation of the Texas Board of Private Detectives, Private Investigators, Private Patrolmen, and Private Guard Watchmen, by the 61st Texas Legislature (SB 164, 1969) and the commencement of organized licensing and regulation of persons and businesses in the private security industry. The rationale for the attorney exception stemmed from avoidance of jurisdictional overlap and duplication of efforts between the TCPS and other occupational licensing agencies. As a portion of an early report from of the Texas Board of Private Investigators and Private Security Agencies to the Sunset Advisory Commission by J.R. McWhirter shows: "An attorney is licensed by another state agency and part of his authority would be to investigate matters for clients as an attorney and not as a private investigator." From the outset, the state agency administering the Act, as well as the framers of the Act, made the distinction between the investigative search for relevant facts concomitant to rendering legal services and the business of private investigations and private security.

At the Act's inception, the attorney exemption crafted by the 61st Texas Legislature expressly provided for persons working with an attorney, reading "an attorney at law or his agent in performing his duties." The 76th Texas Legislature modified the attorney exception, changing it from "attorney-at-law in performing his duties" to "an attorney while engaged in the practice of law."

A look at the history of the Act and recent attempts to more logically order and streamline the Act's provisions, suggests that the key to the applicability question is not merely the absence or presence of an exclusion in the Act, but whether or not the individuals concerned are engaged in the business of or providing a service requiring a license under the Act. Being employed by an attorney, paid by an attorney, or being

an attorney's agent, for example, would not automatically shield someone from scrutiny and possible sanction if in reality he/she and/or the employer attorney were engaging in investigative activities as defined by the Act. However, if an individual is under the direct supervision of an attorney, the supervising attorney is engaged in the practice of law, and no conduct otherwise falling within the scope of the Act is being committed, the result should be different. In that case, the non-lawyer assistant should rightfully be excluded from the requirements of the Act, whether by implicit extension of the attorney exception or by virtue of the fact that the services being performed by the non-lawyer assistant are not within the TCPS's statutory authority.

IV. FURTHER LEGAL AND POLICY CONSIDERATIONS

There are legal and policy considerations which dictate against mandating licensure and registration of paralegals and others providing legal services under the direct supervision of Texas attorneys engaged in the practice of law. Under our reading of the Act, the statutory construction suggested by Bearden's article, would be contrary to Texas law and practice. Under long-recognized canons of statutory construction, a forced or strained reading of a statute, which effectively renders the statute inoperative or superfluous, is to be avoided. *Railroad Commission of Texas v. Miller*, 434 S.W.2d 670, 672 (Tex. 1968); *Gerst v. Oak Cliff Saving and Loan Association*, 432 S.W.2d 702 (Tex. 1968); *Spence v. Fenchler*, 180 S.W. 597 (Tex. 1915). An opinion by Texas Attorney General Greg Abbott, addressing the lack of TCPS's regulatory authority over funeral escort services, forecloses the possibility of taking provisions of the Act out of context and hastily applying the random pieces in an overbroad and unauthorized fashion. Opinion No. GA-00007 (2002) analyzed an analogous situation, ultimately rejecting an interpretation of the Act which would have extended the TCPS blanket authorization to apply rules pertaining to a uniformed motorcycle escort service to a private funeral escort service. In regard to Section 1702.323 of the Act, Attorney General Abbott emphasized basic principles of statutory construction:

"Subsections 1702.323(a) and (d), when read together, describe an employee who is subject to the requirements of chapter 1702: an individual "employed in an employee-employer relationship exclusively and regularly by one employer in connection with the affairs of the employer, who "works at a location that is open to the public," regularly comes into contact with the public, and wears a patch or apparel displaying the name of the employer on the patch or apparel. Read in isolation from the rest of the chapter 1702, these provisions could apply to a grocery store checker or cafeteria server. However, the legislative intent should be ascertained from the entire act, and not an isolated portion thereof. *Merchants Fast Motor Lines, Inc. v. R.R. Comm'n of Tex.*, 573 S.W.2d 502, 505 (Tex. 1978). When subsections 1702.323(a) and (d) are read together with the general description of the Commission's regulatory authority in section 1702.004, we see that individuals within subsection 1702.323(d) must be employed in a field connected to private investigation or private security, under the conditions stated in subsections 1702.323(a) and (d). See Tex. Occ. Code Ann. Sections 1702.104, .323 (Vernon 2003). Accordingly, a person who employs an individual to serve in a uniformed motorcycle escort to perform traffic control is not, for that reason, a "guard company" within the first branch of the section 1702.108 definition.

The general objectives of chapter 1702 involve the regulation of private investigation services and security services, not traffic control services. Accordingly, the Commission is not authorized to regulate uniformed motor vehicle escorts that perform only traffic control services, and to the extent its rules attempt to do so they are invalid. To the extent that a motorcycle escort service also engages in security functions within the Commission's statutory authority, the Commission does have authority to regulate those activities."

As Attorney General Opinion No. GA-00007 demonstrates, proper statutory construction demands analysis of the entire Act. As previously stated, in our opinion, the provisions cited in Bearden's article do not represent a radical departure from prior law, and do not grant TCPS additional authority over attorneys or paralegals and others employed by attorneys. To interpret these provisions otherwise risks rendering the Act inoperative and frustrating its general purposes.

There are also important policy factors weighing in support of continued interpretation of the Act in the same manner as the State Bar has done since 1969. As discussed above, part of the rationale for the attorney exception was the recognition that attorneys were regulated by another state agency and that a part of an attorney's duty to his/her client was to investigate matters as an attorney and not as a private investigator. The integrity of this rationale must be maintained to avoid unnecessary confusion, conflicts of interest, and duplication of efforts. The State Bar the Texas Disciplinary Rules of Professional Conduct set minimum standards for conduct for Texas attorneys. By law, every Texas attorney is subject to these disciplinary rules. See Tex. Gov't Code, State Bar Act, Chapter 81, Section 81.072, subsection (c). The State Bar is charged with providing and regulating the disciplinary and disability system for the legal profession in accordance with the State Bar Act and disciplinary rules. As such, an enforcement mechanism already exists which protects the public from unethical lawyers and the unauthorized practice of law, and serves as a disincentive for lawyers and others in the legal profession who contemplate violating applicable rules and laws. The standard of professional conduct specifically governing the responsibilities of lawyers with regard to non-lawyer assistants can be found in Rule 5.03 (The Rule and comments to the Rule are attached).

V. SUMMARY

Since 1969, the State Bar has interpreted and observed the Act with little or no ambiguity with regard to the breadth of its regulatory sweep. We are firm in our position that to the extent that a paralegal, legal assistant or other non-lawyer individual is performing legal work under the direct supervision of a licensed Texas attorney engaged in the practice of law, or is performing some other function outside the purview of the

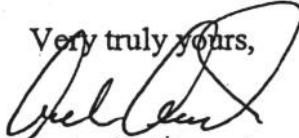
Colonel Tommy Davis, Director, DPS
April 29, 2004
Page 8 of 8

Act, no TCPS licensure or registration is necessary. This interpretation is consistent with the plain language, structure and legislative history of the Act, and in no way compromises the purpose, for which the TCPS was formed, to promote and ensure public safety.

We appreciate your attention to this request for clarification and confirmation that the applicability of the Act does not encompass paralegals, legal assistants or other non-lawyers individuals working under the direct supervision of a licensed Texas attorney who is in the practice of law.

Please feel free to call my office 512.475.0801 or e-mail me with any item on which I can be of assistance.

Very truly yours,



Antonio Alvarado

AA: LNY

Enclosures

Article from the Texas Bar Journal "Licensed Investigators"
Rule 5.03 Responsibilities Regarding Nonlawyer Assistants

cc: Mary Ann Courter, General Counsel, Texas Department of Public Safety
Michael Kelley, Legislative Liaison, Texas Department of Public Safety
Patricia Moore, General Counsel, State Bar of Texas
Dawn Miller, Chief Disciplinary Counsel