

Paralegal or Investigator?

New law may require paralegals to be licensed to do investigations.

by Jim Bearden

Your paralegal leaves the law office as she has done for the last 10 years. She swings by the auto pound, snaps a few photos of your newest client's damaged car, goes by the courthouse to check records on opposing parties and then drops by to interview neighbors in a domestic relations case. She has done it for years, she is good at it, and you rely heavily upon her. After lunch, you get a phone call begging you to come down and bail her out of jail. What did she do wrong? She may have violated the investigator's statute that could require paralegals to be licensed as investigators when conducting investigations.

In 2003, HB 1769 amended portions of Texas Occupations Code Chapter 1702 ("the Act"), which regulates investigators, security officers, and other occupations. The 2003 changes are only the latest changes in a wholesale streamlining of the Act, which has been rewritten in light of the post-9/11 environment, the shifting of substantial amounts of governmental investigative activities to the private sector, and need to get a better grip on unlicensed, untrained, and possibly unethical investigators operating in Texas. The amendment states:

"This chapter applies to any person that 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 prem-

ises of the employer. Premises of the employer include walkways, parking areas and other areas related to the affairs of the employer."

Although HB 1769 was not intentionally written to affect paralegals or other legal service providers, paralegals fall within the ambit of persons who conduct investigations.

Since its inception in 1969, the Act created an enforcement scheme requiring anyone conducting an investigation to be licensed unless they fell under what, at one time, amounted to more than 35 specifically exempted occupations. Previously, two of the most important exceptions to licensure were attorneys and any employee in a direct employee/employer relationship involved in investigating the affairs of his or her employer.

Attorneys retained their exemption to licensure, but HB 1769 affected paralegals conducting investigations off premises.

For many years, paralegals could lawfully conduct investigations without being licensed as investigators, even though they often performed the same actions – not because they worked for attorneys but simply because they were working for a single employer investigating the affairs of that employer/attorney. In the HB 1769 amendment, the exception for an employee/paralegal investigating the affairs of his employer without being licensed still exists, but it limits the paralegal's ability to conduct investigations only on the employer's premises.

HB 1769 apparently intended to bring the large number of unlicensed, unregulated, and often unsupervised investigators, clerks, paralegals, security personnel, and others who may work for corporations, banks, law firms, utilities, and other entities under the control of the Act. Contemporaneously, the Private Security Board (PSB) was converted from an independent agency to a division of the Texas Department of Public Safety. That means eventually some violations of Chapter 1702 may be investigated by DPS troopers with statewide law enforcement powers.

So what investigations may a paralegal perform? Clearly, while working in their employer's law office, they can conduct any investigation on their employer's premises. But can the paralegal take photographs of an accident scene, interview witnesses, or research records at the courthouse? And, most importantly, can a paralegal interview a potential client outside of the office? The Attorney General will soon let us know.

Shortly after the consequences of HB 1769 became known, the State Bar asked the Texas Department of Public Safety to request an Attorney General's opinion as to HB 1769's applicability to paralegals; the DPS did so in Request No. 0232-GA, dated May 27, 2004. DPS instructed the Private Security Board to place a temporary moratorium on prosecuting paralegals found to be in violation of the statute. An answer from the Attorney General's office is expected by November 23, 2004.

least for now, that he or she will not be locked up by the Department of Public Safety. However, individual law enforcement agencies may choose to act on their own in enforcing a statute and may not be bound by DPS's moratorium.

Many law offices have begun the process of licensing their paralegals as investigators. Some firms have considered shifting investigative costs from overhead to an expense which can be recouped. Some attorneys have found they feel uncomfortable charging for in-house paralegals, but not for properly licensed investigators.

Criminal violations of the Act exist. If the Attorney General finds that the legislature did not intend to exempt paralegals, criminal cases can be brought either in Travis County or in local counties. Further, there may be no defense for attorneys who allow paralegals to bear the risk themselves. Section 1702.386 makes it an offense for any person "who employs a person who is required to hold a license, registration, certificate or commission under this Chapter, knowing that the person does not hold the required license, registration, certificate or commission, or who otherwise, at the time of the contract or employment is in violation of this Chapter."

Therefore, even if attorneys are willing to allow their paralegals to spend some vacation time in the local jail, they may not be able to do it with impunity. Your paralegal might be able to look through the cell bars and see you sitting in the next cell. **HN**