

ingston, and State Bar President Betsy Whitaker. Also in attendance were survivors of domestic violence who escaped violence with the help of legal aid.

A new television public service campaign and a specially commissioned video documentary narrated by PBS journalist Bill Moyers are the major components of the outreach effort aimed at increasing funding to help ensure civil legal services for more Texans in need.

**Emily Jones** is the director of Texas Lawyers Care, the pro bono and legal services support department of the State Bar of Texas.

## Licensed Investigators

### *New Bill Requires All Investigators Be Licensed*

**By Jim Bearden**

It is a common scenario: you send your paralegal out to interview witnesses to a car wreck, take photographs, or research records on your case. Perhaps you hire your brother-in-law to moonlight locating witnesses or missing clients. Maybe you have a full-time employee who conducts investigations on your cases or takes statements from witnesses. All of them do their job ethically and under your close supervision. How could that possibly get you in trouble?

In 2003, the legislature amended several portions of Chapter 1702 of the Texas Occupations Code, which regulates most job positions providing security and investigative services in Texas through the Texas Commission on Private Security (TCPS). In the last several years, a rewrite of the Texas Private Security Act and the move of TCPS to division status under the Texas Department of Public Safety have foreshadowed far stricter guidelines for persons who conduct investigations, as well as for those who hire them.

A recent expansion of the powers of the Texas Security Act has a direct impact on law offices and their employees, contractors, and client offices. HB 1769 amended §1702.323 of the Occupations Code by adding §3(e), which states:

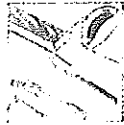
This Chapter applies to any person who conducts an investigation if the investigation involves a person, or the affairs of a person, who is not employed by the same employer as the person conducting the investigation, and the investigation is not conducted on the premises of the employer. Premises of the employer include walkways, parking areas, and other areas related to the affairs of the employer.

This amendment, for the first time, makes every person conducting an inves-

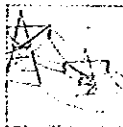
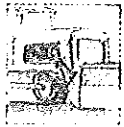
tigation, whether for remuneration or not, who is not employed by the same employer as the person being investigated (e.g., Kmart security investigating Kmart employees), conducting an investigation on the employer's premises (e.g., Kmart agents investigating shoplifters in Kmart stores), or properly licensed subject to a Class A misdemeanor offense.

The legislature clearly intended to bring the huge number of unlicensed, unregulated, and often unsupervised investigators, clerks, paralegals and others who may work for corporations, law firms, utilities, and other entities, under the control of TCPS. The Texas Private Security Act initially proscribes that all defined investigative and security functions, unless excepted, require a license issued by TCPS. Exceptions to licensing under the act include attorneys (§1702.324(b)10), land men, insurance adjustors, agents, brokers, certain manufacturers, repossessioners, professional engineers, and persons who obtain documents for use in litigation under an authorization or subpoena issued for a written or oral deposition. If a trade or profession is not excepted under the broad definitions activities contained within the code, a license is required. Failure to license is subject to civil and criminal penalties.

Criminal violation of the Occupations Code is a Class A misdemeanor except for certain sections for which specific criminal penalties up through felony grade offenses are proscribed. Criminal offenses may be prosecuted in either Travis County (which *will* prosecute such offenses) or the county in which the offense occurred (which often *will not* prosecute such offenses). Most worrisome to attorneys, who may be perfectly willing to allow paralegals



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and others to proceed at their own risk of criminal prosecution, is §1702.386:

(a) A person commits an offense when the person contracts with or 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.

(b) An offense under this subsection (a) is a Class A Misdemeanor.

An attorney who hires an unlicensed investigator, sends a person from the firm's office to conduct an investigation, or fails to properly license a person designated as an investigator, might have committed a Class A misdemeanor, as might the person who actually conducted the investigation.

It seems clear that attorneys and corporations should be licensing their in-house investigations personnel and should be extremely careful about hiring contract investigators. Licensed investigators are required by law to list their license number in all advertisements and on their business cards. No license number on printed material probably means the party is not properly licensed. If you use a properly licensed investigator, ask him or her to name you as an additional insured on his or her mandatory liability insur-

ance policy. If the investigator has liability insurance, he or she is far more likely to be properly licensed and you may have some protection, as an additional insured, for any misconduct on the investigator's part.

An additional reason for TCPS's seeking to expand its registration effort is that for years licensed investigators have fallen victim to unethical, unlicensed investigators. A significant amount of state resources are spent tracking down unlicensed investigators who violate state law and who historically

would not be prosecuted in their home counties. The legislature has now authorized prosecution in Travis County, and state investigators for TCPS are now licensed peace officers that can bring criminal cases directly to district attorney offices and grand juries. As of Sept. 1, 2003, TCPS is a division of the Texas Department of Public Safety, with a greatly expanded criminal investigation force.

To ensure that your investigators and personnel are properly licensed, obtain a copy of registration and licensure forms from [www.teps.state.tx.us](http://www.teps.state.tx.us). You can use the same website, or that of the Texas Association of Licensed Investigators, [www.tali.org](http://www.tali.org), to report unlicensed persons soliciting or conducting investigations and help ensure that all persons conducting investigations are licensed, insured, and properly supervised.

**Jim Bearden**, a private practitioner in Arlington, serves as general counsel for the Texas Association of Licensed Investigators. Bearden has been a licensed investigator for 34 years and carries the highest designation (Texas Certified Investigator) issued by the Texas Association of Licensed Investigators.

## Litigation

### *Narrowing the Broad-form Submission* By **Alistair Dawson and Joseph F. Brophy**

In 2003, Texas attorneys raced to stay abreast of the sea changes taking place in the litigation landscape as House Bill 4, Proposition 12, and limitations on referral fees occupied the spotlight in the legal community. Less noticeable was a more prosaic but significant change wrought by the Texas Supreme Court in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). Decided in late December of 2002, *Smith* dealt another blow to the broad-

form jury charge by extending the reasoning of *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). Because of its potentially sweeping implications, *Smith* is required reading for litigators — both for plaintiffs' attorneys who want to preserve their verdicts and for defense attorneys seeking possible grounds for appeal.

With *Casteel*, the court signaled a retreat from the broad-form submission, holding that "[w]hen a single