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Opinion No. 00-175

Applicability of Private Investigators Licensure Requirements to Death Penalty Mitigation Experts Under Chapter No. 812, 2000 Public Acts.

QUESTION

Are death penalty mitigation experts exempt from the licensure requirements imposed on private investigators and investigations companies under the newly amended provisions of Tenn. Code Ann. § 62-26-223(b), which codifies Chapter No. 812, 2000 Public Acts?

OPINION

Yes, death penalty mitigation experts would generally be exempt from the licensure requirements. Although the work of death penalty mitigation experts is within the scope of "private investigator" and "investigations company" as defined in Tenn. Code Ann. § 62-26-203, new Code § 62-26-223(b) as amended by Chapter No. 812, 2000 Public Acts, provides an exception to the licensure requirement for attorneys and certain of their employees and agents. The new subsection 3(C) exempts consultants who are either retained by attorneys or appointed by the courts to make tests, conduct experiments, give reports, and render opinions - the typical activities that are engaged in by death penalty mitigation experts.

ANALYSIS

In Opinion No. 99-181 (September 17, 1999), this Office opined that death penalty mitigation experts were not exempt from the licensure requirements imposed on private investigators and private investigations companies. This earlier Opinion was based primarily on the fact that death penalty mitigation experts, who were clearly within the definition of "private investigators," did not have a clear exemption from the licensure requirements spelled out in the then current, applicable statute.

To answer this Opinion request, it is helpful to repeat some introductory material from the earlier Opinion. It is unlawful in the State of Tennessee for any person to act as an investigations company or private investigator without first obtaining a license from the Tennessee Private Investigations

Commission. Tenn. Code Ann. § 62-26-204. In Tenn. Code Ann. § 62-26-202(6) an "investigations company" is defined as

> any person who engages in the business or accepts employment to obtain or furnish information with reference to:
>
> (A) Crime or wrongs done or threatened against the United States or any state or territory of the United States;
>
> (B) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputations or character of any person . . .
>
> (E) The securing of evidence to be used before any court, board, commission, officer or investigating committee . . . .

Tenn. Code Ann. § 62-26-203(10) defines "private investigator" as any person who performs one or more of the services described in the above cited subdivision (6).

The Tennessee Code does not contain a definition for "death penalty mitigation expert." Whether or not a person is a private investigator or investigations company is controlled by what he does, not what he calls himself. This Office was informed as part of the earlier Opinion request that death penalty mitigation experts are employed by criminal defense counsel in cases where the death penalty is sought. These experts review the social, criminal, educational and psychological history of the defendant and help to prepare a defense against imposition of the death penalty. The expert usually must interview other persons and sometimes must review a wide variety of documents and records. Generally, an expert of this type will also give live in-court testimony. For purposes of this Opinion, it is assumed that death penalty mitigation experts perform functions that meet the definition of "investigations company" or "private investigator."

If death penalty mitigation experts are going to practice their profession legally without private investigators' licenses, they must be covered by an exception to the licensure requirement. As noted *supra*, the exemptions to the licensure requirements contained in Tenn. Code Ann. § 62-26-223(b) have been amended since this Office issued its earlier Opinion by Chapter No. 812, 2000 Public Acts. Tenn. Code Ann. § 62-26-223(b), which codifies this new Act, now contains the following exemptions to the private investigators' licensure requirements:

> (3)(A) An attorney-at-law; or
>
> (B) An employee of a single attorney or single law firm, who is acting within the scope of his employment for the attorney or law firm; or

(C) A consultant when such person is retained by an attorney or appointed by a court to make tests, conduct experiments, draw conclusions, render opinions, or make diagnoses, where such services require the use of training or experience in a technical, scientific or social science field.

(D) These exceptions do not apply to any other person or company who otherwise provides or offers to provide investigative services as described in Tennessee Code Annotated, Section 62-26-202(6).

The typical work of death penalty mitigation experts and the purposes for which they are utilized are described in Tennessee Code Annotated § 62-26-223(b)(3)(C). Therefore, death penalty mitigation experts, so long as their work does not extend beyond the specified services, are exempt from the licensure requirements imposed on private investigators. This Office cautions, however, that persons who are otherwise subject to the licensure requirements imposed on private investigators can not avoid these requirements by simply rendering services as death penalty mitigation experts as part of their ongoing work. If they engage in other private investigations work that is not specifically exempted, they must be licensed. This is clear from the language of Tenn. Code Ann. § 62-26-223(b)(3)(D) quoted *supra*.

Public Chapter No. 812, 2000 Public Acts also adds the following exemption to Tenn. Code Ann. § 62-26-223(b): "(8) Any person duly licensed by the State of Tennessee in another profession while said person is engaged in activities within the scope of that profession." This Office was advised by representatives of those attorneys who regularly use death penalty mitigation experts that such experts are often licensed psychologists. If a licensed psychologist is used as a death penalty mitigation expert to test, examine, and report on a convicted criminal defendant's psychological health and history, such a psychologist would obviously not need to be licensed as a private investigator. The same would be true of other licensed professionals who are used as death penalty mitigation experts so long as they are engaged in activities within the scope of their professions.

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