

April 23, 2007

Major Mark A. Keel, Chief of Staff
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Dear Major Keel:

In a letter to this office you questioned whether S.C. Code Ann. §§ 40-18-20, 40-18-30 and 40-18-70 require an individual or company now selling their services in South Carolina as “computer forensics” experts to secure licenses as private investigators. You indicated that such individuals and firms accept fees to examine and copy computer hard-drives to extract information to be reported to clients and to be presented in courts as evidence and/or testimony in civil and criminal actions. You indicated further that such individuals and firms are hired primarily by law firms to conduct examinations of computer hard-drives and act as expert witnesses.

Section 40-18-20(A) states that “private investigation business” means

...engaging in business or accepting employment to obtain or furnish information with reference to the:

- (1) identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person;
- (2) location, disposition, or recovery of lost or stolen property;
- (3) cause or responsibility for fires, libels, losses, accidents, damage, or injury to persons or property; or
- (4) securing of evidence to be used in a criminal or civil proceeding, or before a board, an administrative agency, an officer, or investigating committee.

Pursuant to Section 40-18-30(B), SLED is authorized “to determine the qualifications of applicants for licenses or registration under this chapter...(and)...promulgate regulations necessary to carry out this chapter.” Section 40-18-70 sets forth the requirements for obtaining a private investigation

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license from SLED. By Section 40-18-70(A), “[a] person who desires to operate a private investigation business in this State must apply for a Private Investigation License from SLED and pay an annual license fee which must be set by SLED regulation.”

In your letter you stated that the above-referenced statutory provisions were drafted by SLED and approved by the General Assembly in 2000. You indicated that “[t]he law was sought because, in the area of regulatory responsibility, the SLED mission, in part, is to protect potential clients and the public from unqualified, poorly-trained or unscrupulous practitioners. It was the clear and conscious intent of the drafters of the statutory law that the law requires computer forensics investigators to meet qualifications for private investigation licenses and be required to secure such licenses. It is our conclusion that the relevant statutes clearly do so.”

According to your letter,

...the act of *gathering* (obtaining) information of specifically defined types [in Section 40-18-20(A)] is *securing evidence*, and/or (2) the information is gathered for use in a criminal or civil proceeding or before some other body [40-18-20(A)(4)].

You stated that “[a] conscious effort was made by the SLED drafters to limit the reach of the relevant statutory law so as to exclude from licensing requirements those persons who act as mere consultants, that is, who accept a fee to merely furnish opinions about information or evidence gathered by someone different. The emphasis was placed on requiring licensing of those who solicit fees while holding themselves out to prospective clients and the public as an “expert” in the field, and to require them to meet some professional standards.” Referencing such, you have questioned whether SLED is correct in its conclusion that the activities described above constitute “private investigation business” as defined in Section 40-18-20.

Several court decisions have recognized the science of computer forensic examination. For instance, in the case of Commonwealth v. Koehler, 914 A.2d 427 (Pa. 2006), reference was made to the computer forensic examination of a computer hard-drive for the purpose of creating and utilizing an image of the hard-drive so as to avoid corrupting and contamination of the original. An examination of the hard-drive resulted in the discovery of child pornography. In its decision in State v. Peterson, 634 S.E.2d 594 (N.C. 2006), the North Carolina court of appeals referred to the testimony of an expert in computer forensic examinations who had examined a disk drive to a computer and identified a particular email referenced in testimony along with furnishing testimony regarding recovered pictures of sexual activity. In Butera and Andrews v. International Business Machines Corp., 456 F.Supp. 104 (D.C. 2006), reference was made to the retaining of a private investigative firm which specialized in computer forensics and security. That firm monitored an attempt by an unauthorized party to obtain access to another party’s e-mail server. In People v. Etheridge, 12 Misc.3d 1196(A) (N.Y. 2006) reference was made to an individual extensively trained and experienced in the area of computer forensics. That individual testified to examining the contents of a computer hard- drive in the course of his investigation. Such investigation led to the

discovery of sexual content. In People v. Gariano, 852 N.E.2d 344 (Ill. 2006), a case involving the indecent solicitation of a child to commit criminal sexual abuse, a witness recognized as an expert in computer forensics testified to methods of communication on America Online and to the usage of instant messaging.

Consistent with such, clearly there exists the science of computer forensic examination. Furthermore, as is evidenced by the cited cases, computer forensics may be utilized to secure evidence which may be utilized in court proceedings consistent with Section 40-18-20(A)(4). Also, arguably, such testimony could go to the identification, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person as referenced in Section 40-18-20(A)(1). See: Cooper Linse Hallman Capital Management, Inc. v. Hallman, 856 N.E.2d 585 (Ill. 2006) (testimony regarding hired computer forensics expert who discovered company's business plan on a computer along with experimentation regarding possible advertisements). Presumably, such testimony or evidence could, in the appropriate cases, also go to the location, disposition, or recovery of lost or stolen property or the cause or responsibility for fires, libels, losses, accidents, damage, or injury to persons or property as set forth in Sections 40-18-20(A)(2) and (3).

As stated in a prior opinion of this office dated September 22, 1994, "...courts of this state give great weight to the interpretation of statutes by the agency charged with the enforcement of such statutes...." As stated by the State Supreme Court in Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 540, 230 S.E.2d 219, 221 (1976),

[t]he construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons.

See also: Dunton v. South Carolina Board of Examiners in Optometry, 291 S.C. 221, 353 S.E.2d 132 (1987). Consistent with such, in the opinion of this office, the better reading of Sections 40-18-20, 40-18-30 and 40-18-70 support the conclusion that such provisions require that an individual or company selling their services in South Carolina as "computer forensics" experts secure licenses as private investigators. Such determination would be applicable to individuals who accept fees to examine and copy computer hard-drives to extract information to be reported to clients and to be presented in courts as evidence and/or testimony in civil and criminal actions. The duties performed by such individuals or companies would appear to meet the definition of "private investigation business."

You next questioned whether SLED is authorized to draft administrative regulations setting standards for the background, training and operation of computer forensics businesses in this State. As referenced above, pursuant to Section 40-18-30, SLED is authorized "to determine the qualifications of applicants for licenses or registration under this chapter...(and)...promulgate

regulations necessary to carry out this chapter.” Consistent with such, SLED would be authorized to promulgate regulations which would establish standards for the background, training and operation of computer forensics businesses in South Carolina.

You last questioned whether enforcement by SLED so as to require individuals selling their services as “computer forensics” experts to obtain licenses as private investigators would constitute an unlawful restraint of trade or be in violation of any laws regarding interstate commerce inasmuch as most of these individuals would be associated with out-of-state companies. As to any assertion of restraint of trade, it has been recognized that federal antitrust laws do not prohibit a state from imposing certain anticompetitive restraints as an act of government. Parker v. Brown, 317 U.S. 341, 352 (1943). In Parker, it was acknowledged that the federal Sherman Anti-Trust Act was not “...intended to restrain state action or official action directed by a state.” 317 U.S. at 351. As stated by the Tennessee Attorney General in an opinion dated September 8, 1983, the United States Supreme Court in Parker determined that the Sherman Act

...is directed against “individual and not state action” and concluded that state regulatory programs cannot violate it...The immunity for state regulatory schemes is grounded in our federal structure.

As stated by the Connecticut Attorney General in an opinion dated March 26, 1971,

...state statutes licensing members of a profession and regulating their conduct have been held not to be violative of anti-trust laws...(citing Olsen v. Smith, 195 U.S. 332, 335)...Also, the regulation itself constitutes state action which is not encompassed by the operation of anti-trust statutes...(citing Parker v. Brown).

Therefore, there would be no restraint of trade issue with regard to the requirement of licensing by individuals as private investigators.

As to any possible violations of laws regarding interstate commerce, in Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 186-187 (1950), it was stated that

[i]t is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce...The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in prevention of state restrictions....

In Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970), the United States Supreme Court indicated that

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[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

See also: People of State of California v. Thompson, 313 U.S. 109 (1941)(Court upheld a statute requiring transportation agents to procure a license from the State Railroad Commission and pay a license fee determining that such did not violate the commerce clause in absence of pertinent regulation by Congress and where regulation did not unnecessarily obstruct interstate commerce and affected matter of local concern); Mercer v. Hemmings, 170 So.2d 33 (Fla. 1964)(statute which required out of state CPAs to obtain certificate to practice in Florida did not violate commerce clause due to state's legitimate interest in maintaining standards of that profession). Consistent with such, in the opinion of this office, the requirement of registration as private investigators of individuals selling their services as "computer forensics" experts would not be violative of any laws regarding interstate commerce even where most of these individuals would be associated with out-of-state companies. It may be reasoned that this State has a legitimate public interest in licensing such individuals who work in this State.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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