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TO LICENSE OR NOT TO LICENSE REEXAMINED: AN UPDATED REPORT ON STATE STATUTES REGARDING PRIVATE INVESTIGATORS AND DIGITAL EXAMINERS

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ABSTRACT

In this update to the 2012 year's study, the authors examine statutes that regulate, license, and enforce investigative functions in each US state. As before, the authors find that very few state statutes explicitly differentiate between Private Investigators and Digital Examiners. However, there is a small trend in which some states are changing definitions or moving to exempt DE from PI licensing requirements. We examine this trend as well as look at some additional information in terms of practicing attorney exemptions that may cloud the licensing waters.



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As with the previous research studies (Lonardo et al., 2008, 2009, 2012) the authors contacted all state regulatory agencies where statutory language was not explicit, and as a result, set forth the various state approaches to professional Digital Examiner licensing. Our recommendation remains the same: states must differentiate between Private Investigator and Digital Examiner licensing requirements and oversight.

Keywords: Digital Examiner, Computer Forensics, State Statutes, Private Investigator, Licensing Requirements

1. INTRODUCTION

When we started researching the diverse state licensing requirements for digital examiners and private investigators we determined the need to distinguish between the two professions. Our research unearthed more confusion than clarification as states either worked to apply outdated PI licensing requirements to burgeoning technical digital forensics profession or ignored licensing them altogether (Lonardo et al., 2008).

In just over a year we found more states willing to respond to our queries—from 19 to 3 non-responses—as well as more effort by states to address the licensing issue (Lonardo et al., 2009). Unfortunately, states decided to combine PI and DE licensing requirements (19) with only four making a distinction between the professions. Only 15 states either excluded DEs from licensing or did not require PI or DE licensing (Lonardo et al., 2009). What we did take note of was the movement to define the DE role.

However, our latest study found that although states were working to define digital examiner definitions and subsequent roles, states still conflate the licensing of the two professions; this led to situations in which technicians without PI licenses could be found culpable for examining hard drives (Lonardo et al., 2012). This being said more, rather than fewer, states required digital examiners to be licensed private investigators (20) with the same additional four states making a

distinction between the two professions in their licensing (Lonardo et al., 2012). Only 12 states either excluded DE from licensing or did not require PI or DE licensing (Lonardo et al., 2012). This is a reduction from previous years.

The shift in defining digital examiners yet still licensing them as private investigators led us along two paths:

To look elsewhere and determine where the increasing amount of digital evidence was being analyzed (Shavers, 2013). Were more PIs moving into the digital forensics field or are different professionals examining digital evidence?

To look at changes in state digital examiner licensing definitions or classifications from our last study (Lonardo et al., 2012). Our research shows some states changing definitions or moving to exempt DE from PI licensing requirements.

2. THE PRACTICING ATTORNEY UMBRELLA

Although digital evidence processing under an attorney's practice does not supersede state regulations for PI/DE licensing in our opinion, it does muddy the waters somewhat because much of what a digital examiner does as it relates to legal proceedings occurs when the DE would likely work in tandem with an attorney.



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As such, a review of the attorney exemption from licensing (if applicable) for those states where a PI license for DEs is believed to be required is important so that DEs are aware of the potential certification issues.

2.1 Three Categories of Exemptions

The categories of attorney exemptions generally fall into three categories: 1. exclusively limited to attorneys (**Table 1**); 2. attorneys and any employees exclusively working for the attorney (**Table 2**); and 3. attorneys, attorney's employees, or independent contractors working for the attorney (**Table 3**).

The first category is self-explanatory. Only the attorney is exempt from the licensing. Potential implications and complications come into play whether the DE would or should be allowed to practice in the context of a legal proceeding because in many cases this is where much of the DE's work would be conducted. In effect, an attorney can directly perform any investigation, including extraction of digital evidence, in preparation for a legal case/proceeding that a PI may undertake in the PI's normal course of their licensed profession.

However, if an attorney needs to review or have data extracted from a hard drive, email account, or any digital device he/she would most likely need to hire a digital forensics examiner. Even if the attorney is a skilled technician who can extract the digital evidence, the attorney would not be in a position to enter the digitally retrieved information as evidence since he/she extracted it and not a third party expert witness who can validate and "sponsor" such evidence at trial independently. Therefore, the value of the PI certification exemption from a digital evidence extraction and potential expert testimony perspective becomes greatly diminished in a trial's context.

If an attorney in these states needs DE services, his/her hiring choices are restricted to only those who have a PI license. The situation potentially precludes the attorney from hiring a DE who is highly regarded and possesses a particular area of technical expertise and proficiency if he/she is not a licensed PI. The result might compromise the attorney's case and result in a disservice to the attorney's client. In the end, the "direct attorney" PI license exemption, from a digital examination perspective, has little practical impact because an attorney would most likely hire a DE who possesses a PI license in order to have the strongest case for his/her client.



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Table 1

Exclusively Limited to Attorneys in their Practice of Law

California	An attorney-at-law in performing his or her duties as an attorney-at-law.
Florida	Any attorney in the regular practice of her or his profession.
Hawaii	An attorney-at-law in performing the attorney's duties as such attorney-at-law. §463-13
Iowa	An attorney licensed to practice in Iowa, while performing duties as an attorney. 80A.2(4)
Louisiana	An attorney-at-law licensed to practice in this state and his employees.
Maine	An attorney admitted to practice law in the State acting in a professional capacity.
Michigan	An attorney admitted to practice in this state in performing his or her duties as an attorney-at-law.
Minnesota	An attorney-at-law while performing the duties of an attorney-at-law or an investigator employed exclusively by an attorney or a law firm engaged in investigating legal matters.
South Carolina	An attorney-at-law while in the performance of his duties.
Tennessee	An attorney-at-law in good standing and licensed to practice law.

The second classification might be some cause for concern. We question whether this means a full-time digital examiner for a particular law firm might be exempt from licensing. If the person performing digital examinations is an employee then that person may perform the examination as a result of the exemption. Whether a person is an "employee" (versus sub-contractor) has been subject to numerous tests under federal case law interpretation of various federal statutes. The IRS follows the "common Law" classification based on the totality of the circumstances in determining the degree of control over the person performing the services by the employer:

Under common-law rules, anyone who performs services for you is your employee ***if you can control what will be done and how it will be done.*** This is so even when you give the employee freedom of action. What

matters is that you have the right to control the details of how the services are performed. (IRS, 2014)

The IRS uses a 20-factor analysis to apply this test. In other circumstances the "Economic Realities" test is applied. In the Economic Realities test the degree of ongoing economic dependence on the employer is reviewed and depending on the statute in question, courts--to include some state courts--utilize a hybrid of the Common Law and Economic Realities test (Houseman, 1999; Muhl, 2002).

Ultimately, the practitioner needs to review the relevant state law regarding how an employee is defined. For all intents, the practical implication would be that unless an attorney or law firm has an employee who is a DE, they would need to hire a DE who is licensed under the state certification statute.



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Table 2

Attorneys and Employees Exclusively Working for the Attorney

Arizona	A practicing attorney involved in a case for which the attorney has been retained or a person employed under an employee-employer relationship with a practicing attorney, in the employee's performance of duties related to a case for which the attorney has been retained.
Arkansas	An attorney-at-law in performing his or her duties or an employee of an attorney-at-law, only in connection with providing investigative services to the attorney and his or her practice. A.C.A. §17-40-103 (a)(6)
Indiana	An attorney or employee of an attorney to the extent that the person is engaged in investigative matters incident to the delivery of professional services that constitute the practice of law.
Maryland	A lawyer, while performing any activity that relates to the lawyer's regular practice of law in the State; to an individual who, as a regular part-time or full-time employee of a lawyer, provides services that relate to the lawyer's regular practice of law in the State.
Missouri	An attorney performing duties as an attorney, or an attorney's paralegal or employee retained by such attorney assisting in the performance of such duties or investigation on behalf of such attorney.
New Hampshire	Attorneys, and employees of their law firms acting as their agents, exercising legal rights to investigate on behalf of their clients
New York	...nor shall anything in this article contained be construed to affect in any way attorneys or counselors at law in the regular practice of their profession, but such exemption shall not inure to the benefit of any employee or representative of such attorney or counselor at law who is not employed solely, exclusively and regularly by such attorney or counselor at law. Article 7 §83
Oregon	An attorney admitted to practice law in this state performing the attorney's duties as an attorney. A legal assistant or paralegal engaged in activity for which the person is employed by an attorney admitted to practice law in this state.
Tennessee	An employee of a single attorney or single law firm who is acting within the employee's scope of employment for the attorney or law firm.
Wisconsin	...to attorneys, law students or law school graduates employed by an attorney.



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This category would definitely cause some issues. For example, would a digital examiner working on a consulting basis be included? Moreover, there are potential issues with

Georgia's statute as it relates to a "Bona Fide Legal Assistant" and North Dakota's "legal assistant" (**Table 3**).

Table 3
Attorneys, Employees of the Attorney or Independent Contractors Working for the Attorney

Ohio	Attorneys at law or any expert hired by an attorney-at-law for consultation or litigation purposes.
Georgia	An attorney-at-law or a bona fide legal assistant in performing his or her duties. §43-38-14(3)
North Dakota	Any attorneys or counselors at law in the regular practice of their profession and any paralegal or legal assistant employed by an attorney or law firm when the attorney or law firm retains complete responsibility for the work product of the paralegal or legal assistant.
Tennessee	A consultant when the person is retained by an attorney or appointed by a court to make tests, conduct experiments, draw conclusions, render opinions or make diagnoses, where those services require the use of training or experience in a technical, scientific or social science field.
West Virginia	Attorneys or counselors-at-law or any employee or representative of such attorney or counselor.

From a statutory interpretation perspective under the Georgia statute, the term "Bona Fide Legal Assistant," and North Dakota's "legal assistant" may be open to interpretation that could include an independent consultant. However, we urge caution in accepting this view. The traditional role of a legal assistant is one who works exclusively for a lawyer or law firm in assisting the attorney or law firm in various legal matters such as research, drafting and review of legal documents and other legal administrative support and not performing forensic analysis.

In fact, in looking to the United States Department of Labor Statistics (DOLS), the description of a Legal Assistant and Paralegal are treated virtually the same. As the DOLS website states "Paralegals and legal assistants are found in all types of organizations, but most work for law firms, corporate legal departments, and government agencies. They usually work full time, and overtime is

sometimes needed to meet deadlines" (BLS, 2014).

Ultimately, when a practitioner is hired by an attorney to perform DE duties that are precluded by the state PI statute in question, it is important that the practitioner not only determine how the state distinguishes the "employee" vs. sub-contractor status but also look how the state courts strictly enforce expert usage by attorneys in court proceedings as well as in what context the PI statute applies in the administration of justice.

3. PI/DE STATE CLASSIFICATION CHANGES

The question of attorney/employee/consultant exemptions most likely will lead to more confusion than clarification. However, digital examiners need to be aware of state response and statute changes that might cause licensing



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Table 4
State Licensing Statutes

State	Authors' Belief	
	(S) By Statute	(O) By Opinion
State	Statute	Statute
Alabama	(S) No PI Licensing Requirement	§34-25B-24 et seq
Alaska	No PI Licensing Statute	NA
Arizona	(O) PI Licensing Requirement	§24-32-2401 et seq
Arkansas	(O) PI Licensing Requirement	§17-2-40 et seq
California	(O) Licensing Requirement - Ltd. Exclusion	§11.3-7512 et seq
Colorado	(S) Licensing Requirement - Ltd. Exclusion	§12-58.5-101 et seq
Connecticut	(O) No PI Licensing Requirement	Chapter 534 C.G.S 29-152u et seq See also declaratory ruling 8/4/08
Delaware	(S) No PI Licensing Requirement	§24-12-1301-1341
District of Columbia	(O) PI Licensing Requirement	§47-2839
Florida	(O) PI Licensing Requirement	§493.6201 et seq
Georgia	(O) PI Licensing Requirement	§43-38-1-17 et seq
Hawaii	(O) No PI Licensing Requirement	§463-1 et seq and §16-97-1-50 et seq
Idaho	No PI Licensing Statute	NA
Illinois	(S) No PI Licensing Requirement	225 ILCS 447 et seq
Indiana	(O) PI Licensing Requirement *	IC 25-0.5-3-19 et seq
Iowa	(O) PI Licensing Requirement	80A.1-18 et seq
Kansas	(O) No PI Licensing Requirement	§75-7b01 et seq
Kentucky	(O) PI Licensing Requirement *	KRS §329A.010 et seq
Louisiana	(S) Limited No Licensing Requirement	La. R.S. §37:3500 et seq
Maine	(O) Licensing Requirement - Ltd. Exclusion	§32-89-8101 et seq
Maryland	(O) PI Licensing Requirement	§13.101 et seq
Massachusetts	(O) PI Licensing Requirement *	§147-22 et seq
Michigan	(S) PI Licensing Requirement	§338.821 et seq
Minnesota	(O) PI Licensing Requirement	326.32 et seq
Mississippi	No PI Licensing Statute	NA
Missouri	(S) Licensing Requirement - Ltd. Exclusion	§324.1100 et seq
Montana	(S) No PI Licensing Requirement	§37-60-101 et seq



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State	Authors' Belief (S) By Statute (O) By Opinion	Statute
Nebraska	(O) PI Licensing Requirement	§71-3201 et seq
Nevada	(S) No PI Licensing Requirement	§NRS 648.005 et seq
New Hampshire	(O) PI Licensing Requirement	§106-F:1 et seq
New Jersey	(O) PI Licensing Requirement *	§45:19-9 et seq
New Mexico	(O) PI Licensing Requirement *	§61-27B-1 et seq
New York	(O) PI Licensing Requirement	§7-70 et seq
North Carolina	(S) No PI Licensing Requirement	§74C-1 et seq
North Dakota	(O) Licensing Requirement - Ltd. Exclusion	§43-30-01 et seq
Ohio	(S) Licensing Requirement - Ltd. Exclusion	§4749.01 et seq
Oklahoma	(O) PI Licensing Requirement	§59-42a-1750.02 et seq
Oregon	(O) PI Licensing Requirement *	§703.401 et seq
Pennsylvania	(S) Licensing Requirement by County	NA
Rhode Island	(S) No PI Licensing Requirement	§5-5-1 et seq
South Carolina	(O) PI Licensing Requirement	§40-18-20 et seq
South Dakota	No PI Licensing Statute	NA
Tennessee	(O) Licensing Requirement - Ltd. Exclusion	§62-35-01 et seq
Texas	(S) PI Licensing Requirement	§1702.001 et seq
Utah	(O) No PI Licensing Requirement	§53-9-101 et seq
Vermont	(O) No PI Licensing Requirement	§26-59-3151 et seq
Virginia	(S) No PI Licensing Requirement	§9.1-138 et seq
Washington	(S) No PI Licensing Requirement	RCW §18.165.010 et seq
West Virginia	(O) Licensing Requirement - Ltd. Exclusion	§30-18-1
Wisconsin	(S) Licensing Requirement - Ltd. Exclusion	§440.26
Wyoming	No PI Licensing Statute	NA

* No Response

3.1 Changes in Classifications

A troubling change from our last study occurred with states that previously rendered an opinion as to the statute's applicability and now either declined to render an opinion (in such cases a default position of a license requirement is noted if there are no applicable exemptions) or the opinion varied from the previous opinion.

In Oklahoma the regulatory body of private investigators--the Council on Law Enforcement Education and Training (CLEET)--previously stated the PI licensing did not apply to Digital Examiners. However CLEET's legal counsel has responded that the attorney who rendered the previous response for CLEET is no longer with the council. He indicated further that he does not give legal opinions as to the applicability of certain



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Indiana has not responded to our inquiry update. The response in the past has been to decline an opinion (Lonardo et al., 2008).

States, such as Oklahoma and Indiana, which do not render an opinion, create a "trap for the unwary." Digital Examiners who work in these states that believe in good faith that they would not be subject to the PI licensing requirements may later discover through a violation citation that a PI license is required. We recommend caution.

Conversely, potential practitioners may decide to go through the time and expense to qualify under a PI statute to ultimately find out they do not need a PI license. Withholding such guidance creates confusion and uncertainty, and is problematic for digital examiners who may want to practice in these states. As always, we recommend more statute and licensing clarification from these states.

3.2 Amended Statutes to Exempt Digital Examiners

Since our last report on certification findings, three states have clarified their statutes to exempt Digital Examiners either directly or by virtue of the nature of the exemption (**Table 5**).

Exempting Digital Examiners is a move in the correct direction when it comes to licensing requirements that conflate the PI/DE role. However, we argue that DE licensing is desirable as long as the licensing is distinguished from PI licensing and the DE licensing statutes include reasonable and meaningful criteria with an eye towards protecting the public as well as the integrity of the profession.

3.3 Limited Exemptions to Licensing

We have amended some of our findings to move certain state positions to the "Limited Exclusion" classification. The states with limited exemptions include those mentioned in **Table 3** "Attorneys, Employees of the Attorney or Independent Contractors Working for the Attorney." For consistency and ease of reference this classification is included in **Table 6**.

In many cases the determination as to whether a state PI license is required is dependent on a number of factors including: (1) the specific function(s) and tasks performed by the DE; (2) who has hired the DE and for what purpose; (3) the status as an expert in the eyes of a court; and (4) the specific inclusion or exclusion by the states PI statute. The DE practitioner must identify their engagement status and seek legal guidance if there is any question in this regard.



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Table 5

Exempt Digital Examiners

Alabama	SB 172 specifically exempts according to section (9): Any individual engaged in the following:(a) Computer or digital forensic services (b)The acquisition, review, or analysis of digital or computer-based information for evidentiary or other purposes or to provide expert testimony before any court, board, officer or investigating committee. (c) Network or system vulnerability testing, including network scans and risk assessment and analysis of computers connected to a network.
Illinois	225 ILCS 447/15-5 A person, firm, or other entity engaged in providing computer forensics services so long as the person, firm, or other entity does not hold himself or herself out to be a private detective. For the purposes of this item (5), "computer forensics services" means a branch of forensic science pertaining to the recovery and analysis of electronically stored information.
Nevada	NRS 648.012 "Private investigator" defined. "Private investigator" means any person who for any consideration engages in business or accepts employment to furnish, or agrees to make or makes any investigation for the purpose of obtaining, including, without limitation, through the review, analysis and investigation of computerized data not available to the public, information with reference to: 4. A crime or tort that has been committed, attempted, threatened or suspected, except an expert witness or a consultant who is retained for litigation or a trial, or in anticipation of litigation or a trial, and who performs duties and tasks within his or her field of expertise that are necessary to form his or her opinion; (emphasis added)

Table 6

Limited Exclusions

California	Not required for data extraction: Required if inquiries or communications to anyone.
Colorado	An attorney licensed to practice law in this state, an employee of a licensed attorney, or a person under contract to perform paralegal services for a licensed attorney. 12-58.5-105c
Ohio	Attorneys at law or any expert hired by an attorney-at-law for consultation or litigation purposes
Georgia	An attorney-at-law or a bona fide legal assistant in performing his or her duties. §43-38-14(3)
Louisiana	Not required for "technical experts".
Maine	Required for data extraction: Not required for offering Expert Testimony.
Missouri	Expert witness exception.
North Dakota	Any attorneys or counselors at law in the regular practice of their profession and any paralegal or legal assistant employed by an attorney or law firm when the attorney or law firm retains complete responsibility for the work product of the paralegal or legal assistant. Not required for data extraction: Required if inquiries or communications to anyone.
Oregon	407 Expert witness exception. The licensing requirement of ORS 703.405 does not apply to a person while the person is:(1) Providing testimony in a court as an expert under ORS 40.410 ; or (2) Conducting investigations or reviews or engaging in other activities in preparation for providing testimony in a court as an expert under ORS 40.410 .
Tennessee	Not required for attorneys, employees of attorneys or consultants hired by attorneys.
West Virginia	Attorneys or counselors-at-law or any employee or representative of such attorney or counselor.



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4. CONCLUSION

The trend examined in our prior research holds true: states continue to approach the issue of licensing DEs under PI statutes in varied approaches and regulatory interpretations of statutes. As before, we have relied on documented findings such as statutes and written (email) regulatory opinions and feedback. However, a major challenge lies with our reliance on regulatory authorities to provide "unofficial" or official feedback responses as to how they handle the licensing issue under their relevant PI statute.

For the vast majority of inquiries the appropriate authority has been responsive and accommodating in communicating their interpretation of the regulatory boundaries set forth in their respective statutes. In some cases it is quite clear as the statute provides straight forward guidance. However, in a few cases--as noted above--the regulatory body either declined feedback on the statute's applicability or simply referred us back to the PI statute, leaving us to make our own interpretation. In these cases if it is not absolutely clear in the statute we determined a PI license is required.

Ultimately, a total of 18 states rendered an opinion as to the applicability of the statute. Not surprising 14 of the 18 opinions indicated a PI license is required. Some regulatory authorities indicated that even if the statute could lean either way they would err on the side of caution and require a license. This degree of subjectivity would be alleviated if there were clearer and unambiguous statutes dealing specifically with DE licensing.

Finally an area of concern and one for our future research is the state or federal court prospective regarding whether there is a conflict between the rules of evidence dealing with the allowance of expert witnesses (particularly DEs) vs. the PI licensing requirements. This issue is particularly acute where, as is the case with many PI statutes, a PI license is required in order to testify before a court or tribunal as an expert supporting evidence. This paper is limited to the statutory requirements only and as such no research or findings either way has been determined, but is planned for a future paper.



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