

What does Oregon Revised Statute (ORS) 703.407 state regarding an expert witness exemption?

The current language regarding the exemption state: “The licensing requirement of ORS 703.405¹ does not apply to a person while the person is:

- (1) Providing testimony in a court as an expert under ORS 40.410²; 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.”

An individual that was hired as an expert may conduct investigations, or review or engage in other activities in preparation for providing testimony in court meets the exemption and therefore would not require certification. The person must either be providing testimony in court as an expert witness or preparing to provide testimony in court as an expert witness.

Who determines an expert witness?

DPSST does not determine who qualifies as an expert witness. A trial court applies ORS 40.410 Oregon Evidence Code (OEC) Rule 702 to decide whether an expert is qualified to give testimony relative to a particular topic.

What is the new language that was added to OAR pertaining to the expert witness exemption?

The Oregon Administrative Rules (OAR) was amended to clarify that, the expert witness exemption to private investigator licensing requirements found in ORS 703.407 does not apply to an individual hired as an investigator to obtain or furnish information who later testifies as to the factual information obtained during the investigation.

Why is this new language being added to the current OAR?

In 2012 DPSST received a constituent request to provide DPSST’s interpretation and application of the expert witness exemption [ORS 703.407].

DPSST requested and received a legal interpretation from the Department of Justice (DOJ) in March 2015. DPSST facilitated the rule making process with the Private Investigator Subcommittee, the Private Security Investigator Policy Committee and the Board to amend OAR 259-061-0018 with the intention of providing clarifying rule language regarding the expert witness exemption from licensure as a private investigator. A Notice of Proposed Rule Making for OAR 259-061-0018 was filed on October 26, 2015.

Significant public comment was received during the public comment period. The public comments received identified that the proposed language filed in October 2015 could be interpreted as DPSST’s

¹ ORS 703.405 License requirement. A person may not act as an investigator or represent that the person is an investigator unless that person is licensed under ORS 703.430. [1997 c.870 §2; 2001 c.838 §2]

² ORS 40.410 Rule 702. Testimony by experts. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. [1981 c.892 §58]

administrative rule redefining an expert witness and that the interpretation would inaccurately require individuals providing expert witness testimony to be licensed as private investigators. After reviewing the public comments, DPSST returned to DOJ for additional guidance in amending the proposed language.

It is important to note that because the Department requested and received an interpretation from DOJ, the administrative rule language must be amended to reflect the interpretation provided.

How will the Department view this interpretation?

In the recommended language provided by DOJ, the application of the administrative rule would be centered on the intent of employment when an individual is *“hired as an investigator to obtain or furnish information.”*

- If an individual is hired to obtain or furnish information, then they meet the definition of a private investigator and must be licensed.
- If an individual is hired to be a witness and provide an opinion or interpretation of collected data, then the individual does not meet the definition of a private investigator because they are not obtaining or furnishing the information. Discovery of new information based on an individual’s review of information in order to make a witness statement would not require the individual to be licensed as a private investigator because the individual was not hired to obtain or furnish the information. An expert witness may gather information to form their opinion. An expert witness performs duties and task within his or her field to verify or obtain information necessary to form the basis for the opinion testimony.

DPSST would not focus on whether or not the individual is a witness because they may or may not be used as a witness and may or may not be considered an expert witness by the court. DPSST would focus on what the individual was hired to do. The exemption would be monitored through the complaint and compliance process.

What if an individual believes a person is acting as investigator per ORS 703.401 and has not obtained licensure?

Fill out a professional standards complaint form. If DPSST received a complaint that an individual was performing investigative duties without a license, the complaint would be reviewed and investigated. If the complaint resulted in a determination that the individual met the definition of a private investigator and is required to be licensed, the requirement would be handled through the compliance process.

How does the compliance team review each complaint made against an individual that has not obtained licensure and tries to exercise the expert witness exemption?

The compliance team reviews all complaints that are received including complaints regarding the expert witness exemption. As part of the investigative review the Department will first determine whether or not the person was hired as an expert witness with the intent to testify as an expert witness or was the individual hired as investigator to obtain and furnish information.

Founded violation

- If an individual hired as investigator to obtain and furnish information, the individual is testifying to factual information obtained during the investigation; licensure is required.
- If the person has not yet been retained for a case, the person is performing investigations outside the scope of the exemption; licensure is required.

Unfounded violation

- If a person has been retained as an expert witness and subsequently must perform investigative activities to get ready to testify in court as an expert, that person is exempt from the private investigator licensing requirements.
- The person who is preparing to testify as an expert witness is preparing testimony in relation to a particular case, that person is exempt from the private investigator licensing requirements.

DPSST will deal with these matters on a case by case basis to determine if, at the commencement of the engagement, the intent is to hire the investigator for the sole purpose of providing expert testimony. If the work is merely investigatory, or if there is a possibility the investigator may testify as a fact witness, it is best practice that individuals obtain a license as investigator as the statutory exception would not apply.