Does Your Expert Engineer Need To Be “Licensed” To Testify On Your Behalf?

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When hiring an engineer for a construction project, an owner or contractor typically considers many factors to ensure that it is contracting the best person or firm for the job. For instance, one usually takes into account the candidate’s education and training, makes sure that he or she has relevant experience, that the references check out and other such credentials. In addition to these considerations, an owner or contractor should ensure that any engineer it engages on a project is properly licensed to provide engineering services in the jurisdiction where the project is located. In fact, most construction contracts contain a clause requiring such licensure. Do you, however, conduct the same evaluation when you engage an engineer to testify as an expert on your client’s behalf in an administrative hearing or a court of law? Are you prepared to respond to your opponent’s challenge that the same licensing requirements for an engineer performing design services apply to your engineer actions as an expert witness in a construction dispute? Most state courts addressing the issue have said no, but as discussed in further detail below, the practical answer is maybe.

Generally, most, if not all states require engineers to obtain some form of a professional state license in order to perform engineering services in that state. To become licensed, an engineer, typically, must satisfy certain minimum education, experience and testing requirements. Courts, on the other hand, do not typically require an engineer to jump through those same hoops in order to provide expert testimony in litigation. The standard is much more different. First, the decision whether to allow expert testimony in a case is within the sound discretion of the trial court. A court will usually permit expert testimony if the expert’s experience and qualifications afford him or her knowledge beyond that of a layperson, the subject of the expert testimony is within the expert’s area of expertise, disclosure requirements have been met and the testimony will assist the judge or jury in reaching a conclusion in the case. Here, there is no predetermined formula for how an expert gains his or her experience or specialized knowledge. Thus, an expert will, typically be allowed to testify on the basis of knowledge gained through practical experience, scientific study, education, training, research, or any combination thereof.

So you may wonder where state licensing requirements and regulations enter the equation and whether an engineer should be allowed to testify as an expert in a court of law? Typically, licensing regulations do not affect a court’s determination whether to permit expert testimony. It is not entirely unheard of, however, that licensing is an issue, particularly when a state statute more or less explicitly requires a license in order to provide expert testimony in judicial proceedings. See e.g., Bd. of Water & Sewer Comm’rs of the City of Mobile v.
Hunter, No. 1050067, 2006 WL 2089914 (Ala. July 28, 2006). Even in the absence of such a statute, however, state licensing regulations may be raised by your opponent in a challenge to preclude your expert’s testimony when that expert is not licensed in the relevant jurisdiction. In fact, state licensing requirements collided with the court’s broad guidelines for permitting expert testimony in Thompson v. Gordon, 851 N.E. 2d 1231 (Ill. 2006), a case which proceeded all the way to the state supreme court. The Illinois Supreme Court sides with allowing the expert (licensed elsewhere) to testify, but the Illinois licensing agency apparently had the final say.

**Thompson v. Gordon**

In this case, the trial court struck the plaintiff’s submission of its expert engineer’s affidavit on the grounds that the engineer was not licensed as a professional engineer in the state. In so doing, the trial court held that an engineer could not participate as an expert witness in any pending litigation in the State of Illinois unless the expert was a licensed engineer of the state. The trial court reasoned that providing testimony before the court would constitute the practice of professional engineering, and to do so without a license would violate the state’s Engineering Act. The Illinois appellate and supreme courts later overruled the trial court’s decision. To the contrary, these courts held that a witness’ compliance with a licensing requirement is not a prerequisite to admissibility of the witness’ expert testimony. Instead, Illinois’ appellate and supreme courts found that licensure is merely another factor to be weighed in considering whether the witness is qualified as an expert, like the factors of his or her education and experience. Despite the higher courts’ rulings in the plaintiff’s favor, the licensing agency’s actions seem to have precluded the plaintiff’s presentation of the testimony of its out-of-state licensed engineer.

- **The Background**

This case involved a fatal car accident in Gurnee, Illinois. Thompson and one of his passengers died as a result of the collision. After the accident, Thompson’s estate filed suit against various persons and entities, including the two engineering firms that had designed the intersection where the accident occurred. The plaintiff alleged that the accident occurred in part because of the defendant engineering firms’ negligence in the design of the roadway. In support of its position, the plaintiff submitted to the trial court an affidavit from its expert engineer witness, Andrew Ramisch (“Ramisch”). Ramisch was a civil engineer with over 30 years of experience in the analysis, design and construction of roadways. It was Ramisch’s opinion that the defendant engineering firms had failed to meet the ordinary standard of care in failing to design a Jersey median barrier which would have prevented the defendant driver’s vehicle from crossing into the westbound lanes and colliding with Thompson.

The defendants asked the court to strike Ramisch’s affidavit because he was not licensed in the State of Illinois. The defendants contended that Ramisch was not
qualified to render professional services, including expert testimony, in Illinois because he was not licensed in the State. As stated above, the trial court granted the defendants’ motion and held that an engineer had to be licensed in the State of Illinois to provide expert testimony in the courts of that state. The plaintiff appealed.

- The Appeal

The Illinois Court of Appeal reversed the trial court’s finding and ruled that an Illinois engineer license is not a prerequisite to being qualified as an expert engineer witness. The court remanded the case for further proceedings, and instructed the trial court that Ramisch’s lack of an Illinois engineer license merely affected the weight of his testimony, not his competency.

During the appeals process, however, the Illinois Department of Financial and Professional Regulation ("Department") learned of the dispute and ultimately issued a cease and desist order against Ramisch, barring him from testifying as a professional engineer without an Illinois license. The Department found that, by testifying, Ramisch was engaged in the practice of professional engineering in the State of Illinois, which required a license. As a result of the Department’s action, including the cease and desist order, the defendants appealed the court of appeal’s decision to the state supreme court.

The Illinois Supreme Court denied the defendants’ petition for appeal, but directed the court of appeal to vacate its prior judgment and to reconsider its judgment in light of the cease and desist order. In response, the court of appeal reaffirmed its previous judgment holding that the cease and desist order did not alter its analysis or decision. In that regard, the court explained that it was not bound by the findings of an administrative body. Again, the court noted that the standard that the court uses to determine whether a witness is qualified to testify as an expert was well established. The court wrote:

The trial court’s gatekeeping function is to determine whether an individual is qualified to be an expert, not merely by determining whether that individual took an exam and can display a piece of paper showing a passing mark, but by reviewing the individual’s credentials, experience, and knowledge of the subject matter. The trial court’s function is also to determine whether that expert’s testimony would assist the trier of fact.

827 N.E 2d 983, 994-95 (Ill. App. 2005). Further, the court found that the trial court erred in striking Ramisch’s affidavit based solely upon his lack of state licensure. The trial court had failed to even consider that Ramisch, among other credentials, was a civil engineer licensed in the District of Columbia, with over 30 years of relevant experience. Thus, the appellate court again reversed the trial court’s order striking Ramisch’s affidavit, and remanded the case for further proceedings.
Subsequently, the supreme court granted the defendants’ petition for appeal and affirmed the appellate court’s judgment. In addition, the supreme court rejected the defendants’ contention that its ruling in any way authorized the perpetuation of an illegal act, i.e., violation of the Engineering Act, which may constitute a misdemeanor or a felony in the state. The supreme court noted that though it found that licensure was not a prerequisite to providing testimony to the court, it was entirely possible that, applying the proper standard, the trial court could legitimately find that Ramisch was not qualified as an expert, or it was equally possible that Ramisch would choose not to testify in light of the fact that he would be subject to criminal penalties for violating the Department’s cease and desist order.

**Conclusion**

*Thompson v. Gordon*, 851 N.E. 2d 1231 (Ill. 2006) illustrates the conflict that may arise between a state’s licensing regulations and a court’s general guidelines for permitting your engineer to provide expert testimony. As noted above, the vast majority of states, like in *Thompson*, hold that licensure in a state is not a prerequisite to admissibility of an engineer witness’ expert testimony. Nonetheless, as reflected above, there are also practical matters to be considered. To the extent that you need to, or choose to, use an expert that is not licensed in the particular state where testimony is to be given, familiarize yourself with that state’s licensing regulations. Does the relevant statute include “testimony” in its definition of performing or practicing “professional engineering services” which requires a license? Even in the absence of such relevant statutory language, you should consider the likelihood that your opponent will raise the issue if your expert is without a relevant state license, and be prepared to address that issue.

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