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### EFFECT OF STATE LICENSING STATUTES ON QUALIFICATION OF EXPERTS TO TESTIFY

by *Carl Robin Teague*

Imagine that the witness, an engineer registered in Oklahoma, is the world's leading expert in accident reconstruction of fires and has been retained to investigate the cause of a fire that led to the suit in Texas. Or imagine that the expert is a medical doctor licensed in Oregon and is expected to testify in your case in New York. Or that a world-renowned private investigator from Nevada has been employed to investigate and testify about a faked death, which led to a suit in California for recovery of life insurance proceeds. What do these fairly typical situations have in common? Out of state experts! Surely you would not, but your opponent might move to disqualify the experts because they are not licensed or registered in the forum state. How will the court rule?

Let us consider a case where one of the parties is taking the position that the experts for the other side lack the necessary qualifications to have conducted an investigation into the cause or responsibility for the fire in question. That party has moved

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### DISCOVERY OF FACTS AND OPINIONS FROM NON-TESTIFYING EXPERTS UNDER RULE 26(B)(4)(B)

by *Atleen Kaur*

Modern litigation, especially "high-stakes" litigation, usually involves a fleet of experts. Not all of these experts testify in court. A party may retain one or two testifying experts who are usually well-known academics in their field, and who rely on non-testifying experts to perform the basic research and analysis on which they base their opinions and expert reports. The use of non-testifying experts can be efficient for various reasons. First, high profile academics, albeit well qualified and able to lend credibility to the analysis, have various competing pressures on their time and cannot devote the multiple hours necessary to conduct the entire analysis for every case in which they are retained. The testifying expert may rely on non-testifying experts to conduct some basic research and analysis as long as he or she understands and approves the methodology. Second, the basic analysis can often be performed by non-testifying experts at lower cost. Finally, in certain cases, if the consultant expert performs part of the work, it may lend more credibility to the testifying expert's analysis. For instance, an expert in data collection could perform data collection and recording from a particular source, and that data could be analyzed by the testifying expert without any hint of data doctoring.

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## A Note from the Editors

This issue of *Expert Alert* offers something for every litigator.

Young lawyers – who are frequently charged with vetting expert candidates and investigating experts designated by another party – will especially benefit from David V.

Dilenschneider's article, *Tips for Young Lawyers: Becoming an Expert (Researcher) When It Comes to Experts*.

More senior attorneys, for whom law school is a somewhat hazy memory, will appreciate two articles that focus on specific Federal Rules of Civil Procedure related to expert discovery and admissibility of expert testimony. First, in *Discovery of Facts and Opinions From Non-Testifying Experts Under Rule 26(b)(4)(B)*, Atleen Kaur gives readers a primer on how to protect your consulting expert from discovery. Second, in *Cold War or Peaceful Coexistence? Federal Rule of Evidence 703 in the Post-Daubert Era*, Christine Boyd and Randall L. Jackson conduct an in-depth analysis of the interaction between the court's gatekeeping function under *Daubert* and Rule 703's limitations on the facts and data on which an expert may rely when forming an opinion.

Even lawyers with extensive experience should educate themselves about the emerging issues discussed in Carl Robin Teague's article, *Effect of State Licensing Statutes on Qualification of Experts to Testify*. In particular, Teague discusses the potential negative (and severe) ramifications of hiring a testifying expert who is not licensed within the forum state.

We hope that this issue succeeds in complementing the practice of every one of our readers.

Finally, you may have noticed the new look of *Expert Alert*. Many thanks to Vicki Campbell at Carrington Coleman for helping us update the appearance of the newsletter. We hope you will now find it even easier to read these great articles on expert witness issues.

We welcome article suggestions and submissions. If you encounter an intriguing expert issue in your practice, we encourage you to notify us so that we can include it in a future issue of *Expert Alert*. We accept submissions from attorneys of all levels and backgrounds and especially encourage articles geared toward young lawyers. We look forward to hearing from you.

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the court to disqualify the experts on the sole basis of the experts' failure to register or comply with the forum state's licensing and registration statutes.

At least two questions are presented by such a motion to disqualify. One is whether the experts are qualified to testify in the case. A second is whether the forum state requires licensing or registration before an expert may lawfully work in the state. The second question should be resolved by state law or the state agency which administers the regulations. Should, however, the answer to the first question be found in the rules of evidence?

Different statutes may provide disparate answers to the second question. For instance, the Texas Engineering Practice Act may be typical of statutes regulating that practice. The Act provides in part:

This chapter does not: ... (2) prohibit or otherwise restrict a person from giving testimony or preparing an exhibit or document for the sole purpose of being placed in evidence before an administrative or judicial tribunal, subject to the board's disciplinary powers under Subchapter J regarding negligence, incompetency, or misconduct in the practice of engineering....<sup>1</sup>

But may an out of state engineer lawfully investigate, or perform tests in the forum state if not registered in the forum state? Probably not.<sup>2</sup> May the engineer even lawfully provide expert testimony, as distinguished from lay-fact testimony? Perhaps not.<sup>3</sup>

The Texas Private Security Act governs private investigators. That Act may also be typical of other state statutes. Under

that Act, persons who engage in the business of obtaining or furnishing information related to the cause or responsibility for a fire, loss, accident, damage or injury to person or property, or who engage in the business of securing evidence for use in a court, must be licensed in Texas as an "investigations company," unless, for example, the investigator is a licensed engineer practicing engineering under the Texas Engineering Practice Act.<sup>4</sup> This and similar statutes create the same kinds of problems for out of state investigators as does the act governing the practice of engineering.

On the first question, relating to qualifications of experts to testify, the party moving for disqualification has support in a few opinions. The court in *Donegal Mutual Ins. Co. v. White Consolidated Industries, Inc.*, held that the "trial court abuses its discretion when it permits, over objection, the expert testimony of an unlicensed fire inspector as to the cause of a fire."<sup>5</sup> One Ohio Court of Appeals did, however, seem troubled by such a ruling, stating:

Due to the broad effect on the testimony of all types of hired experts not licensed, further legislative review may be in order.<sup>6</sup>

Another opinion which has been cited in support of a motion to disqualify is *American Family Ins. Group v. J.V.C. Americas Corp.*<sup>7</sup> In that case, the defendant manufacturer challenged the qualifications of an electrical engineer to provide expert testimony on cause and origin of a fire. The court pointed out that the engineer "is not a certified fire investigator," but did not indicate that certification is a requirement for qualification to testify.

Federal Rule of Evidence 702 provides:

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Although the rule refers to knowledge, skill and expertise, derived from education, training and experience, it does not refer to licenses or registration.

The Fifth Circuit has cautioned "that although credentials can be significant, they alone are not necessarily determinative.... This is because the inquiry must be into actual qualification...."<sup>8</sup> In other words, the mere fact that a witness in the suit is a certified fire investigator does not qualify that witness to testify as an expert.

Just as "credentials" do not necessarily qualify, lack of "credentials" does not necessarily disqualify:

Licensure in the discipline or specialty which is the subject of expert opinion is not a requirement under the Federal Rules of Evidence. See *Geophysical Sys. Corp. v. Seismograph Serv. Corp.*, 738 F.Supp. 348 (C.D.Cal. 1990).<sup>9</sup>

Thus,

[e]xperience alone can qualify a witness to give testimony. See *Famer v. Paccar, Inc.* 562 F.2d 518, 528-29 (8th Cir. 1977); *Cunningham v. Gans*, 507 F. 2d 496, 500 (2d Cir. 1974).<sup>10</sup>

Some lawyers might consider such a motion to disqualify to be a cheap shot, especially if the expert is registered or licensed in another state, or is a scholar in the subject. Think about it: under this argument, Albert Einstein could have been disqualified as a witness on a

**The judge may permit your witness to testify, but at what cost? A forum state license may be the only means of protection from these dire consequences. Be safe. Ask your consultant, "Are you licensed in this state?"**

subject involving physics. Those lawyers might consider other means of attack. They might cross-examine on non-licensure, and argue that non-licensure affects credibility and the weight to be given the expert's testimony.<sup>11</sup> But a lawyer could take an even more extreme approach - he might file a criminal complaint against the witness or you that could lead to an arrest and prosecution.<sup>12</sup> The judge may permit your witness to testify, but at what cost? A forum state

license may be the only means of protection from these dire circumstances. Be safe. Ask your consultant, "Are you licensed in this state?" •

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1. Texas Engineering Practice Act, Texas Occupations Code §1001.004(e).
2. See *id.* §§1001.003(c)(1).
3. See *id.*
4. See Texas Private Security Act, Texas Occupations Code §§1702.002(10) and (18), 1702.104(1)(D) and (2), and 1702.324(b).
5. 795 N.E. 2d 133 (Ohio App. 2d Dist. 2003); see also *Grindstaff v. Coleman*, 681 F. 2d 740 (11th Cir. 1982) (indicating that an expert need not be licensed at the time the questioned event occurred); *but cf. Am. States Ins. Co. v. Caputo*, 710 N.E. 2d 731 (Ohio App. 8th Dist. 1998) (holding that trial court did not abuse discretion by permitting expert to testify because he was licensed when he compiled his report).
6. *McKeegan v. Sears, Roebuck and Co.*, 1995 WL 527441 (Ohio App. 8th Dist. 1995).
7. 2001 WL 1618454 (D. Minn. 2001).
8. *Christophersen v. Allied - Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991).
9. *Doe v. Cutter Biological, Inc.*, 971 F.2d 375 (9th Cir. 1992); *Geophysical Sys. Corp. v. Seismograph Serv. Corp.*, 738 F. Supp. 348 (C. D. Cal. 1990) ("Plaintiff has offered no policy reason why an out-of-state expert should be required to comply with local professional licensure rules as a per se condition precedent to testifying as an expert, regardless of the witness' other qualifications."); *Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin*, 247 Conn. 48, 717 A.2d 724 (1998) (upholding previous opinion that "it is not essential that an expert witness possess any particular credential, such as a license, in order to be qualified to testify, so long as his education or experience indicate that he has knowledge on a relevant subject significantly greater than that of persons lacking such education or experience"); *State of Indiana v. William*, 423 N.E. 2d 668 (Ind.

- App. 1st Dist. 1981) (holding out-of-state engineer was qualified, and providing extensive discussion of cases); *Carvell v. Winn*, 154 So. 2d 788 (La. App. 3d Cir. 1963) (holding that "the fact that a witness is not licensed to practice under the laws of the jurisdiction is immaterial insofar as concerns his competency to testify as an expert"); *Hall v. Hilburn*, 466 So. 2d. 856 (Miss. 1985) ("Generally, where the expert lives or where he or she practices his or her profession has no relevance *per se* with respect to whether a person may be qualified and accepted by the court as an expert witness."); *Wright v. Las Vegas Hacienda, Inc.*, 720 P. 2d 696 (Nev. 1986) (holding that "[a] witness need not be licensed to practice in a given field in order to be qualified to testify as an expert"); *Doochin v. U.S. Fidelity and Guaranty Co.*, 854 S.W. 2d 109 (Tenn. App. 1993) ("The appellant cites no authority for the position that a person who comes within the definition of the [Investigations Company Act] but does not have a license is disqualified as a witness."); *Gregory v. State*, 56 S.W. 3d 164 (Tex. App.-Houston [14th Dist.] 2001) (permitting licensed nurse to testify even though not a licensed medical doctor), *pet. dismiss'd* (Tex. Crim. App. 2002) (*per curiam*, unpublished opinion on other grounds), *cert. denied*, 538 U.S. 978 (2003); *State of Texas v. Northborough Center, Inc.*, 987 S.W. 2d 187 (Tex. App.-Houston [14th Dist.] 1999, *no pet.*) (stating that "there is no language in Rule 702 which can be construed as requiring a witness to have a license in order to testify as an expert"); Hon. Harvey Brown, Eight Gates for Expert Witnesses, 36 Hous. L. Rev. 743 (1999); 88 Opinions of the Attorney General, State of Maryland [Opinion no. 03-019 (December 9, 2003), 2003 WL 22942972]; *but cf. Grindstaff*, 681 F. 2d 740 (indicating that an expert need not be licensed at the time the questioned event occurred).
10. *United States v. Markum*, 4 F.3d 891 (10th Cir. 1993); see also *Beverly Hills Concepts*, 717 A.2d 724; *William*, 423 N.E.2d 668; *Carvell*, 154 So. 2d 788.
  11. *Malbrough v. State Farm Fire and Casualty Co.*, 1996 WL 565819 (E.D. La. 1996).
  12. Joseph L. Lanza, Should Your Next Expert Witness be a Licensed Private Investigator?, 68 Texas Bar Journal 118 (February, 2005).