

MUST PROFESSIONAL ENGINEERS BE REGISTERED IN THE STATE OF THE COURT WHERE THEY ARE TO GIVE EXPERT TESTIMONY?

While it may not be a burning issue with professional engineers, the question is out there:

Must a professional engineer be licensed in the state in which he or she acts as an expert consultant or expert witness, or both?

Wisconsin defines professional engineering in § 443.01(6) in the Wisconsin Statutes:

(6) 'Practice of professional engineering' includes any professional service requiring the application of engineering principles and data, in which the public welfare or the safeguarding of life, health or property is concerned and involved, such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction, alteration, or operation, in connection with any public or private utilities, structures, projects, bridges, plants and buildings, machines, equipment, processes and works. A person offers to practice professional engineering if the person by verbal claim, sign, advertisement, letterhead, card or in any other way represents himself or herself to be a professional engineer; or who through the use of some other title implies that he or she is a professional engineer; or who holds himself or herself out as able to practice professional engineering.

Forensic work and expert testimony reasonably falls within the definition of "professional engineering." Section 443.02(1) and (2) provide:

(1) Any person practicing or offering to practice architecture or professional engineering in this state shall comply with this chapter.

(2) No person may practice architecture or professional engineering in this state unless the person has been duly registered, is exempt under s. 443.14 or has in effect a permit under s.443.10(1)(d).

Practicing professional engineering in Wisconsin without being registered pursuant to Chapter 443 of the Wisconsin Statutes constitutes a criminal act under § 443.18(1), and if any person or the examining board desires, they may bring in the name and on behalf of the state of Wisconsin an action to enjoin the unlicensed professional engineer from continuing the unlicensed professional service.

There are no reported Wisconsin decisions holding that a professional engineer

performing forensic work or providing expert testimony must be registered in Wisconsin. However, lawyers using professional engineers as expert witnesses or consultants have called upon professionals from other states to provide such services in Wisconsin, even though the professional engineer is not registered as a professional engineer in Wisconsin. This practice is primarily due to the fact that a separate chapter of the Wisconsin Statutes, Chapter 907, provides the authority for using expert opinions and testimony. Under § 907.02 of the Wisconsin Statutes, if scientific, technical or other specialized knowledge will assist the court or jury to understand the evidence or determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify by expressing an expert opinion. Nothing is said in that statute about the expert being licensed or registered in the state of Wisconsin. Under § 907.03 the facts or data upon which an expert relies may be those perceived by the expert at or before the hearing. The facts or data need not even be in evidence and need not be previously disclosed to the opposing party unless the court requires otherwise. However, it is common for the courts to order the exchange of expert witness curriculum vitae and opinions during discovery.

The parties may bring the expert witness' credentials and opinions to the court for evaluation before trial by appropriate motions. The court ultimately has the responsibility of either admitting or denying the expert's opinions into evidence. In determining whether or not to admit the expert's opinions, an objection can certainly be made that the expert should not be permitted to express engineering opinions because that expert is not registered as a professional engineer in Wisconsin. A similar objection can be made in another state when a Wisconsin registered professional engineer is engaged in forensic work or expert testimony in another state.

While there is not a great deal of law on this subject, in 2006 the Supreme Courts of

South Carolina, Illinois and Alabama issued decisions relating to whether or not a professional engineer licensing statute precludes the expert testimony of an engineer not licensed in the state where the testimony is given. The South Carolina Supreme Court reversed the trial court's ruling preventing the witness from testifying even though the South Carolina statutes defining "practice of engineering" included "expert technical testimony." The South Carolina Supreme Court felt that the definition of professional engineering was in conflict with the South Carolina rules of evidence which were similar to Wisconsin's, and gave precedent to the rules of evidence. The Supreme Court of Illinois held that the lack of an Illinois license to practice civil engineering did not prevent a civil engineer licensed in the District of Columbia from giving expert testimony in Illinois. The Illinois Supreme Court also held that whether the expert testimony was admissible was an issue for the Illinois rules of evidence, not for the statute's licensing of professional engineers.

On the other hand, the Alabama Supreme Court addressed a 1997 amendment to the Alabama Statutes which added the word "testimony" to the definition of "practice of engineering." The Alabama Supreme Court reversing the trial court held that an engineer testifying as to the negligent design, construction, operation and maintenance of a sanitary sewer system must be licensed in the state of Alabama in order to be admitted into evidence.

In all three of the state proceedings in South Carolina, Illinois and Alabama, the question could or likely did arise as to sanctions against the professional engineer for giving expert testimony and consultation without being registered in the forum state. In the Illinois case, the Supreme Court of Illinois acknowledged that an engineer who testified in Illinois without a license may be committing a criminal violation. While that litigation was pending, the Illinois Department of Professional Regulation issued a cease and desist order against the expert.

Consequently, that expert was placed between a rock and a hard place by facing a criminal act for giving expert testimony which the Illinois Supreme Court held was admissible.

No doubt the issue will eventually arise in Wisconsin involving a professional engineer and become the subject of a written appellate decision. In 2001, the Wisconsin Court of Appeals rejected the contention that a psychologist licensed only in Indiana should be prohibited from giving expert testimony in Wisconsin, citing § 907.02, the Wisconsin rules of evidence.

For now, it is evident that a Wisconsin professional engineer giving expert consultation or testimony on engineering issues in another state where he or she is not licensed should be aware of the potential dangerous consequences and should seek registration immediately upon undertaking the assignment for the lawyer. It should be relatively easy to obtain licensing by reciprocity, but easy or not, the need should not be overlooked.