

THE IMPACT OF PROFESSIONAL LICENSURE REQUIREMENTS
UPON A FIRE INVESTIGATOR'S QUALIFICATION
TO TESTIFY AS AN EXPERT
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I Licensure Requirements for Fire Investigators

Those who investigate the cause and origin of fires in Pennsylvania, New Jersey, and the majority of other states are required to be licensed as private detectives, subject to certain exceptions and exemptions. In Pennsylvania, 22 P.S. § 13(a) requires any person, partnership, association or corporation engaged in the private detective business to hold a license issued pursuant to the provisions of The Private Detective Act of 1953, 42 P.S. § 11 *et seq.* The “private detective business” is defined at 42 P.S. § 12(b)(6) to include, among other things, any investigation for the purpose of obtaining information with reference to “the causes and origin of, or responsibility for, fires.” New Jersey and most other states have private detective licensure requirements virtually identical in scope to that of Pennsylvania.¹

¹ See, e.g. N.J.S.A. §§ 45:19-10 and 45:19-9(a)(6); Del. Code §§ 24-1302(3)d and 1303(a); Maryland B.O.P. Code § 13-101(i) 6A and 13-401; Virginia Code §§ 9-183-1 and 183-3; 225 Ill.C.S. 446/10 and 446/5(4); N.Y. Gen. Bus. Law §§ 70-71; Ohio Revised Code §§ 4749.03 and 4749.01(B); Mich. C.L.A. §§ 338.823 and 338.822(b)(iv); Tenn. Code Ann. §§ 62-26-204(a) and 62-26-202(5)(D). The following is a listing of the 13 states which apparently have no statewide licensure requirements applicable to fire cause and origin investigators: Alabama, Alaska, Colorado, Idaho, Kentucky, Massachusetts, Mississippi, Missouri, Oregon, Rhode Island, South Dakota, Wisconsin and Wyoming. This list was provided courtesy of Investigative Resources Global, Inc., 7621 Little Avenue, Suite 426, Charlotte, NC 28226, a firm with investigators licensed in many states.

Private detective or private investigator licensing statutes usually require individual applicants for licenses, or principals of corporate applicants,² to have a minimum number of years of law enforcement or other investigative experience and to submit to character and background investigations (See, e.g. 22 P.S. § 14-16; N.J.S.A. 45:19-11 and 45:19-12). In some jurisdictions, applicants are also required to pass a written examination (See, e.g. N.Y. Gen. Bus. Law § 72; 225 ILCS 446/95). In most states, violation of the licensure requirements is a crime (See, e.g. 22 P.S. § 26.1; N.J.S.A. 45:19-10; Del. Code §24-1303(b)).

II. Is Professional Licensure Required in Order to Testify as a Fire Expert?

The typical private detective or private investigator licensing statute, including those in force in Pennsylvania and New Jersey, do not explicitly state that a witness must be licensed under the statute in order to render expert testimony as to the cause and origin of fires. From the standpoint of a strictly evidentiary analysis, the requirements for qualification of expert witnesses which have evolved in modern American jurisprudence would suggest that professional licensure or registration should not be a prerequisite for qualification of a witness as a fire cause and origin expert, or any other expert, for that matter. Rule 702 of the Federal Rules of Evidence, which has counterparts in many, if not most, state jurisdictions, aptly encapsulates the modern standard for qualifying a witness as an expert. That standard provides that “a witness

² Typically, employees of licensed private detectives or private detective businesses are authorized to assist in carrying on the business without themselves being licensed, so long as certain statutory requirements are met (see, e.g. 22 P.S. §23; N.J.S.A. 45:19-15). For purposes of further discussion, an “unlicensed” investigator refers to an individual who does not personally hold a license, and is not acting as the employee of a licensed investigator within the authority of the applicable statutes.

qualified as an expert by knowledge, skill, experience, training or education” may testify as an expert if such “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 may qualify as an expert on any one of the five listed grounds. U.S. v. Paiva, 892 F.2d 148, 160 (1st Cir. 1989).

Rule 702 of the New Jersey Rules of Evidence is identical to Federal Rule 702, and is consistent with long-standing New Jersey precedent. See, e.g. Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625, 629 (1961). The standard for qualification of an expert witness under Pennsylvania law is at least as liberal. “If a witness ‘has any reasonable pretension to specialized knowledge on the subject under investigation’ he may testify, and the weight to be given to his [testimony] is for the jury.” Kuisis v. Baldwin-Lima-Hamilton Corporation, 457 Pa. 321, 338, 319 A.2d 914, 924 (1974).

Following the standards of Federal Rule 702 and its state counterparts, a witness who otherwise has appropriate training or experience should be capable of offering opinions that would “assist” the trier of fact, irrespective of whether the witness happens to hold the “ticket” required to practice a profession or trade in a particular jurisdiction. While the expert’s conduct in investigating a matter, or even in testifying, might violate state licensure requirements, such violations would logically affect only the weight of the expert’s opinions, if anything, but should not deprive the expert’s testimony of all probative value. See, e.g. Bowser v. Publicker Industries, Inc., 101 F. Supp. 386, 388 (E.D. Pa. 1951) affirmed 192 F.2d 933 (3d Cir. 1951), where the court held that the fact that the plaintiff’s expert was not a registered electrical engineer was proper for the jury to consider in weighing the witness’ opinions, but did not render him incompetent to testify as an expert. Accord Eagle Pet Service v. Pacific Employers

Insurance Co., 175 A.D. 2d 471, 572 N.Y.S. 2d 623 (3d Dept. 1991) motion for leave to appeal denied 580 N.Y. 2d 199; 79 N.Y.S. 2d 753, 588 N.E. 2d 97 (1992); Owens v. Payless Cashways, Inc., 670 A. 2d 1240 (R.I. 1996).

A. Cases Holding Licensure is Required

“Since witness disqualification tends to lead toward the suppression of the truth... any claim of disqualification must be strictly construed in favor of the admission of pertinent testimony that the witness might offer.” Mizrahi v. Allstate Insurance Co., 276 N.J. Super. 112, 647 A.2d 486, 488 (L.Div. 1994) (citations omitted). However, such an approach holds up only so long as evidentiary rules are regarded solely as a mechanism for assisting the trier of fact in the search for the truth. When courts treat rules regarding the admission or exclusion of evidence — including the qualification of expert witnesses — as instruments of public policy, the search for the truth sometimes gives way. This explains the decision of an Illinois intermediate appellate court in People v. West, 264 Ill. App. 3d 176, 201 Ill. Dec. 807, 636 N.E. 2d 1239 (5th District 1994) appeal denied 157 Ill. 2d 519, 205 Ill. Dec. 183, 642 N.E. 2d 1300 (1994).

In People v. West, the court reversed an arson conviction on the grounds that the trial court abused its discretion by allowing Walker, an out-of-state fire cause and origin investigator who was not licensed under the Illinois private detective licensing statute, to testify as an expert witness on behalf of the State. The trial court had recognized that Walker’s actions in investigating the fire at issue on behalf of a property insurance carrier were in violation of Illinois law, but concluded that a witness need not be licensed to qualify as an expert. 636 N.E. 2d at 1239.

Initially, the appellate court in People v. West recited a standard for qualifying a witness as an expert under Illinois law that should sound familiar to attorneys practicing in virtually any jurisdiction in the country:

“Generally, to qualify a witness as an expert, it must be shown that the witness’ experience and qualifications afford him knowledge which is not common to lay persons, and the testimony must aid the trier of fact in reaching a conclusion.” 636 N.E. 2d at 1244.

Notably, the Illinois standard for qualification of experts as articulated by the People v. West court, which is quite similar to the standard under Federal Rule 702, contains no requirement that expert witnesses hold professional licenses or registrations. As in Pennsylvania and New Jersey and other jurisdictions, the Illinois private detective statute itself contained no provision expressly disqualifying unlicensed individuals from offering expert testimony as to matters within the scope of the statute. Nevertheless, the court implied the existence of such a requirement for cause and origin experts on the basis of the legislature’s enactment of a statute requiring fire investigators to hold private detective licenses:

“Because of this legislation, the courts cannot ignore the licensing requirement in qualifying a witness as an expert, particularly where such conduct by the witness could subject the witness to criminal prosecution.” 636 N.E. 2d at 1245.

Thus, even though the court found that it was “clear that Walker had experience and training that exceeded that of the normal lay person in determining the cause and origin of a fire” (636 N.E. 2d at 1245), the court held that Walker could not be qualified as an expert because, as the court stated, “although Walker may have had extensive experience, it is also a requirement under the law that an expert have the requisite statutory qualifications.” 636 N.E. 2d at 1245. This statement was made without citation of supporting authority, and in seeming contradiction of the

court's own articulation of the Illinois standard for qualification of experts as quoted above. In its expression of the public policy rationale for its decision, the court stated that "by allowing Walker to testify, the State and the [trial] court were permitting a continuation of a commission of a crime that should have been enjoined."³ 636 N.E. 2d at 1239.

Although the rationale — such as it is — of the People v. West decision would apply equally in a civil case, it is nevertheless important to recognize that the decision involved the review of a criminal conviction, and might well have reflected a reaction to what the court characterized as the State's reliance upon or allowance of "a witness to commit a felony in order to obtain evidence against a defendant." 636 N.E. 2d at 1245. This inflammatory and somewhat skewed⁴ description of the situation suggests that the decision was motivated by concerns over curbing prosecutorial action that would not apply in the typical civil case. Unfortunately, now

³ The court's characterization of Walker's testimony at trial as a "continuation" of his crime indicates that the court regarded the statute's prohibition of unlicensed individuals from conducting investigations as also prohibiting the rendition of expert testimony regarding the results of such investigations. compare Geophysical Systems Corp. v. Seismograph Service Corp., 738 F.Supp. 348, 349 (C.D. Cal. 1990) ("the rendering of expert geophysical testimony in court does not constitute the practice of geophysics" within the scope of a California licensing statute), accord Lance v. Luzerne County Manufacturers Assn., 366 Pa. 398, 77 A.2d 386 (1951) (rendition of expert witness services did not constitute the "practice of engineering").

⁴ There was no suggestion that the State directed or had any other role in Walker's hiring or activities, or that the State even had any knowledge of Walker's investigation before it was completed. Therefore, it is questionable whether the court accurately described the State as "relying upon" Walker to commit a felony, or even "allowed" him to do so.

that the decision is on the books, there is no principled basis to argue that it should not apply equally in a civil context.⁵

In an unpublished Ohio intermediate appellate decision, Pennsylvania Lumbermens Insurance Corporation v. Landmark Electric, Inc., 1993 W.L. 541644 (Ohio App. 2d Dist. 1993), the court held that the trial court in a fire subrogation action could properly exercise its discretion to prohibit witnesses who were not licensed under Ohio's private investigator licensing statute from offering expert testimony as to the cause of the fire, to the extent that the activities of the witnesses fell within the scope of the statute. Ironically, the appellate court held that the trial court erroneously prohibited one of the experts from testifying, because that witness never visited the fire scene and therefore did not "conduct an investigation" within the scope of the licensing statute, but instead "relied solely upon the reports and observations of others to form his opinion as to the cause of the fire." 1993 W.L. 541644, *4.⁶

⁵ In the epilogue to the appellate proceedings in People v. West, West was reportedly convicted again on retrial, without Walker's testimony. A civil action West had brought against Walker and Walker's employer was dismissed.

⁶ The Pennsylvania Lumbermens opinion does not elaborate upon whether the "reports and observations of others" included reports and observations from another unlicensed witness who "spent three days at the fire scene collecting evidence, observing the scene, and interviewing witnesses". The testimony from this other witness was excluded because the court found that he did "conduct an investigation" in violation of the private investigator licensing statute. In sufficiently dire circumstances, another licensed or otherwise qualified expert might serve as a vehicle for bringing the results of an excluded expert's investigation before the fact finder under Rule 703 of the Federal Rules of Evidence, or its state counterparts. Rule 703 does not require the facts or data upon which an expert bases his or her opinions to be independently admissible in evidence, so long as they are "of a type reasonably relied upon by experts in the particular field."

Therefore, the one witness who arguably had the weakest factual foundation for his opinions was determined to be the only expert witness who would be allowed to assist the fact finder in the search for the truth. The Ohio court's resolution of the issue would most frequently benefit the defense in fire subrogation and other third-party fire liability litigation, since defense experts in such cases often, of necessity, rely "solely upon reports and observations of others" because the fire scene is no longer available for a first hand investigation. The Pennsylvania Lumbermens ruling would allow defendants in such circumstances to continue to rely upon a broad array of unlicensed experts, including the defendant's favorite "hired guns" from outside the jurisdiction.

In McKeegan v. Sears, Roebuck & Co., 1995 W.L. 527441 (Ohio App., 8th Dist. 1995), appeal not allowed 74 Ohio St. 3d 1513, 659 N.E. 2d 1289 (1996) reconsideration denied 75 Ohio St. 3d, 414, 661 N.E. 2d 761 (1996), another Ohio intermediate appellate court followed Pennsylvania Lumbermens in holding that a trial court did not abuse its discretion in holding that an apparently abundantly qualified professor of electrical engineering was precluded from testifying to an "ultimate opinion of the cause and origin of the fire" at issue, because the witness was not licensed as a private investigator under the Ohio statute. The appellate court agreed that the plain language and broad scope of the statute precluded even thoroughly qualified but unlicensed witnesses from offering expert testimony as to the cause and origin of fires.

B. Cases Holding Licensure is Not Required

Courts in other jurisdictions have given short shrift to the argument that fire investigators must comply with state licensing requirements in order to qualify as expert witnesses. In Doochin v. USF&G, 854 S.W. 2d 109, 114-115 (Tenn. App. 1993), the court

rejected a contention that a cause and origin investigator should not have been permitted to testify because he was not licensed under Tennessee's private investigator licensing statute. The court noted that no authority had been cited "for the position that a person who comes within the definition of the [private investigator licensing] Act, but does not have a license, is disqualified as a witness." 854 S.W. 2d at 115. The court expressed doubt as to the applicability of the statute to the witness, but further stated that even if the statute applied, "a license is only one factor affecting [the witness'] expertise." *Id.*

Similarly, in Eagle Pet Service Co., Inc. v. Pacific Employers Insurance Company, 175 A.D. 2d 471, 572 N.Y.S. 2d 623 (3d Dept. 1991) motion for appeal denied 580 N.Y. 2d 199; 79 N.Y.S. 2d 753, 588 N.E. 2d 97, (1992), the court rejected a contention that a fire cause and origin investigator should not have been permitted to testify as an expert witness because the witness did not hold a New York license for such an investigation. The court stated that the witness had sufficient experience as an investigator to qualify as an expert, and that "the fact that he lacked a license from this State to investigate fires does not affect his ability to testify, but only the weight to be afforded his testimony." 572 N.Y.S. 2d at 624.

C. Relevant Pennsylvania and New Jersey Cases

As noted previously, the private detective licensing statutes in Pennsylvania and New Jersey also encompass the investigation of the "causes and origin of, or responsibility for, fires." There is no judicial precedent directly on point in either state, so that an order precluding an unlicensed witness from testifying as an expert in an appropriate case is a possibility. However, based upon judicial pronouncements on related issues, the exclusion of an expert based upon the violation of professional licensure requirements is significantly less likely in

Pennsylvania than in New Jersey. In the first place, the Pennsylvania private detective licensing statute contains an express exemption for “persons engaged in the business of investigators for or adjusters for insurance companies.” 22 P.S. §§ 12(b) and 13(c). This language should moot the licensure issue in most fire subrogation cases and in other cases where an investigator is working for an insurance company client in Pennsylvania.

Even in circumstances where the Pennsylvania Private Detective Act or other professional licensure requirements might apply, there are a number of cases that suggest that the Pennsylvania courts would take the more orthodox approach and not view professional licensure or registration as a litmus test for qualification of a witness as an expert. For example, in Lance v. Luzerne County Manufacturers Assoc., 366 Pa. 398, 77 A.2d 386 (1951), a case involving a suit by the plaintiffs to recover fees for expert witness and consulting services rendered on behalf of the defendants in a proceeding before the Pennsylvania Public Service Commission, the defendants asserted that the plaintiffs were not registered as professional engineers under the applicable Pennsylvania statutes. The Pennsylvania Supreme Court held that the rendition of expert testimony did not constitute the “practice of engineering” within the meaning of the statute governing registration of professional engineers. More importantly, the Court made it clear that whether or not the plaintiffs were registered as professional engineers was essentially irrelevant to the determination whether or not the plaintiffs were qualified to testify as expert witnesses.

“The justification for a statute requiring the registration of engineers by the State as a valid exercise of the police power rests upon considerations other than an engineer’s ability to testify as an expert before some tribunal... On the basis of the plaintiffs’ knowledge acquired by education, training and experience, they were deemed competent by the Public Service Commission to

render opinions material to the inquiry which the Commission was conducting; and their claim is for services in such regard under alleged employment by the defendants which is the usual and recognized way of procuring expert testimony... Whether the plaintiffs were qualified as experts was for the Public Service Commission to determine and the conclusion with respect thereto depended upon the witnesses' knowledge and not upon whether they were registered with the State Registration Board." 77 A.2d at 388.

In Kuisis v. Baldwin-Lima Hamilton Corp., 475 Pa. 321, 319 A.2d 914 (Pa. 1974), the Pennsylvania Supreme Court cited Lance in support of its holding that a self-described "safety engineer" was qualified to offer expert testimony regarding a crane brake locking mechanism even though the expert was not registered to practice mechanical engineering, noting that "an engineer need not be registered as such in order to testify as an expert if his education and experience so qualify him." 319 A.2d at 924.⁷ In Commonwealth v. Davenport, 295 A.2d 596 (Pa. 1972), the Pennsylvania Supreme Court held that a recently graduated physician who was an intern at the time he examined the defendant and a resident at the time of an evidence suppression hearing should have been permitted to testify regarding the defendant's state of mind at the suppression hearing, noting that "the mere fact the witness was not licensed to practice medicine in Pennsylvania did not ipso facto render him incompetent as a matter of law." 295 A.2d at 600.

⁷ The Rhode Island Supreme Court's very recent decision in Owens v. Payless Cashways, Inc., 670 A. 2d 1240 (R.I. 1996) reached the same conclusion as the Pennsylvania courts did in the Lance and Kuisis cases, based upon similar reasoning. In Owens, the court held that a proposed expert in a product liability case who had ample education and experience in the field of engineering should not have been precluded from testifying, merely because the witness was not registered as a professional engineer in Rhode Island.

Finally, in Morris v. Board of Property Assessment, 209 Pa. Super. 97, 224 A.2d 772 (1966), the Superior Court held that a witness was qualified to testify as an expert on real estate values even though he was not a licensed broker, because the witness testified that he had spent most of his time for the past thirty years buying and selling property for himself, and was in touch with the local real estate market on a daily basis.⁸

It is more difficult to predict how a New Jersey court would respond to a challenge to an expert's qualifications based upon the lack of an appropriate license. In Mizrahi v. Allstate Insurance Co., 276 N.J. Super. 112, 647 A.2d 486 (L.Div. 1994), a New Jersey trial court held that witnesses who were not licensed as "insurance consultants" under New Jersey's Insurance Producer Licensing Act were prohibited from offering expert testimony on behalf of the plaintiff in an insurance coverage action. The Mizrahi decision can be viewed narrowly to the extent that the court acknowledged that "it goes against the grain of prior precedents to find that a witness is not competent to testify because of the lack of a license" (647 A.2d at 489), but purportedly found explicit statutory language requiring "one who claims to be an insurance

⁸ In Lee Gardens Arlington Limited Partnership v. Arlington County Board, 250 Va. 534, 463 S.E. 2d 646 (1995), the Virginia Supreme Court held that a witness could not testify as an expert on real estate valuation when the witness did not hold a real estate appraiser's license. However, unlike the licensing statutes that would typically apply to fire experts, the Lee Gardens court had rather explicitly statutory support for the exclusion of expert testimony on real estate values from an unlicensed witness, because the statute requiring a license in order to engage in "the appraisal of real estate" expressly defined "appraisal" to include "any opinion or conclusion about the value of real property." 463 S.E. 2d at 648. In fact, in another recent case, the Virginia Court of Appeals specifically rejected the argument "that an otherwise qualified professional called as an expert must be licensed to practice in Virginia," in holding that an unlicensed psychologist could properly testify as an expert. Fowler v. Manassas Department of Social Services, 1995 W.L. 16575 (Va. App. 1995).

expert to obtain a license as a prerequisite to testifying in a court of law in this state.” 657 A.2d at 490. The court thus concluded that the specific statutory directive overrode the more general standards for qualification of experts embodied in Rule 702 of the New Jersey Rules of Evidence.

Unfortunately, the Mizrahi court’s statutory interpretation is somewhat dubious, as the court derived the legislative mandate to disqualify unlicensed individuals from testifying as insurance experts from general language prohibiting unlicensed individuals from offering “advice, counsel, opinion or service” with respect to the “advantages or disadvantages” of an insurance policy. The murky statutory interpretation therefore leaves room to argue that Mizrahi supports disqualification of any witness who is not licensed in a profession encompassing the subject matter of the proposed expert testimony. However, there are New Jersey appellate decisions suggesting otherwise.

In Sanzari v. Rosenfeld, 34 N.J. 128, 167 A.2d 625 (1961), the New Jersey Supreme Court stated that it “is generally held that the witness must be a licensed member of the profession whose standards he professes to know.” 167 A.2d at 629. However, the court then ignored this general proposition in holding that the trial court erred in refusing to allow a witness to testify to the standard of care among dentists in the community regarding the administration of anesthesia merely because the witness was not a licensed dentist, where the witness was a physician with special training and experience in dental anesthesiology.

The Sanzari court thus disregarded its own pronouncement as to the relevance of professional licensure to an expert’s qualification as a witness, as was noted by the Appellate Division in Hudgins v. Serrano, 186 N.J. Super. 465, 474-75, 453 A.2d 218, 223-224 (App. Div.

1982), where the court held that a medical doctor was properly allowed to offer expert testimony, even though the witness was not licensed to practice medicine in New Jersey or elsewhere. The Hudgins decision specifically stated that the “general rule” articulated but ignored in the New Jersey Supreme Court’s Sanzari decision should not be applied rigidly, to the extent that it qualifies as a “rule” at all.

III. Strategies for Avoiding Preclusion of Unlicensed Experts’ Opinions

A. Hire Only Appropriately Licensed Experts (Often Easier Said Than Done)

Given the potentially devastating impact of having an expert precluded from testifying because he or she does not hold an appropriate license, the prudent course is to avoid such problems at the outset by hiring only those individuals as consultants or investigators who have appropriate professional licenses in the jurisdiction. However, this theoretically ideal goal may often be difficult to accomplish in practice. Even if qualified and appropriately licensed experts were always readily available in a particular jurisdiction, problems arise when the expert’s activities perhaps necessarily drift into inter-disciplinary gray areas. For example, consulting engineers often play a critical role in determining the cause and origin of and responsibility for fires, in that they lend expertise that may be beyond the knowledge of the typical cause and origin investigator. However, registration as a professional engineer does not necessarily immunize a witness from the licensure requirements applicable to private detectives and investigators. In Pennsylvania Lumbermens Insurance Corporation v. Landmark Electric, Inc., 1993 W.L. 541644 (Ohio App. 2d Dist. 1993), the court rejected the contention that a registered professional engineer’s investigation constituted the “practice of engineering” such that the witness, Rubin, should have been exempted from the licensure requirements applicable

to private investigators in Ohio. The court noted that the statutory qualifications of a private investigator, on the one hand, and the statutory qualifications of a professional engineer, on the other hand, were mutually exclusive of one another:

“‘Professional services’ include such activities as consultation, investigation and evaluation. In order for Rubin’s activity to have been within the scope of the practice of engineering, that activity must have required the special qualifications of an engineer that are necessary to protect the public welfare or to safeguard life, health, or property. The very existence of the private investigators license, which gives people license to investigate the cause of any fire without the qualifications of an engineer, implies that the specialized qualifications of an engineer are not required to render an evaluation of the cause of a fire. Since these qualifications were not required, Rubin’s determination of the cause of the fire was not within the practice of engineering, and his registration as a professional engineer does not speak to his authority to determine the cause of this fire. Therefore, he is not exempt from the private investigator licensing requirement by virtue of being a registered professional engineer.” 1993 W.L. 541644, *4.

Dicta in the Illinois appellate court’s decision in People v. West, supra, similarly suggests that even registered professional engineers and other licensed professionals are precluded from investigating fires — or at least “conducting the primary investigation” — unless they are licensed private detectives, although they may be allowed to perform certain “lab work”:

“We note that by our holding we are not prohibiting witnesses from testifying as experts if the experts were not engaged as ‘private detectives’ and simply were conducting tests within their field of expertise that may be used in trials. We see nothing to indicate that the legislature intended for all chemists, engineers, physicists, and architects, or any other experts that do lab work on items that may have been involved in fires, accidents, or injuries to real or personal property, to be licensed ‘private detectives’ before they would be allowed to examine, test, and testify about the design, structure, and composition of the items.

The problem in the instant case is that the expert was actually practicing or conducting the primary investigation.” 636 N.E. 2d at 1246.

The potential problem may be obvious when the engineer is conducting the “primary investigation” within the meaning of the People v. West opinion. However, that is not the only possible issue. The quoted passage suggests that engineers and other technical experts should have rather free rein to testify to conclusions and observations reached while cloistered away in their “labs”, which are normally located off-site. This would presumably encompass the examination of physical evidence secured from the site. However, what if an item of physical evidence cannot feasibly be removed from the site for the engineer’s examination due to its size, or logistical, timing, or evidence spoliation concerns (for example, examination of a large furnace to rule it out as a potential fire cause)? Is the engineer allowed to conduct the same “lab work” on the evidence at the site that he or she would have conducted in the lab? What if, during the on-site “lab work” on the evidence, the engineer’s eyes stray from the physical artifacts to take in overall burn patterns to assist in identifying or ruling out potential fire causes? What if the engineer feels compelled to speak to knowledgeable witnesses?

The practical response to these issues is that attorneys and their clients must recognize and remain alert to the potential problems, not only when experts are selected for an investigation, but also throughout the course of the investigation, and must use common sense to conduct as thorough an investigation as possible that is as immune as possible to challenges based upon the experts’ licensure or qualifications. This includes, to the extent it is practicable to do so, confining the role of each expert to his or her traditional area of expertise.

B. Argue that Licensing Statutes are not Applicable

In contrast to the Pennsylvania Lumbermens and People v. West decisions, in Kennard v. Rosenberg, 127 Cal. App. 2d 340, 273 P.2d 839 (4th Dist. 1954), an action by expert consultants to collect fees for services rendered on behalf of the defendant in an arson prosecution, the appellate court held that the trial court properly instructed the jury that California's private investigator licensing statute was not applicable to the plaintiffs' consulting activities on behalf of the defendant. Two of the three plaintiffs were registered chemical engineers, and the third, Wolfe, was a retired firefighter and former arson investigator for the Los Angeles Fire Department. None of the plaintiffs were licensed private investigators, as required by the California statute for persons engaged in the business of investigating fires.⁹ Even though all three plaintiffs had examined the defendant's premises for purposes of determining whether the fire at issue was incendiary in origin, and the engineers also "made many tests, took samples from the premises, examined photographs, conducted experiments in their laboratories and on the premises, and prepared many exhibits for use in court," the court held that "none of the plaintiffs herein were engaged in the private detective business or represented themselves to be so engaged. Plaintiffs Kennard and Drake were licensed engineers and as such were authorized to make investigations in connection with that profession... It seems quite clear that the private detective license law was not intended by the legislature to place a limitation on the right of professional engineers to make chemical tests, conduct experiments and to testify in court as to

⁹ The scope of the California private investigator licensing statute, as it pertained to the investigation of fires, was essentially identical to the Illinois and Ohio statutes involved in People v. West and Pennsylvania Lumberman's, as well as, for that matter, the Pennsylvania and New Jersey and most other states' licensing statutes.

the results thereof. A physician, geologist, accountant, engineer, surveyor or a handwriting expert, undoubtedly, may lawfully testify in court in connection with his findings without first procuring a license as a private detective and, as in the instant case, a photographer may be employed to take photographs of damaged premises for use in court without procuring such a license.” 127 Cal. App. 2d at 344-345, 273 P.2d at 841.

Even as to Wolfe, the former firefighter and arson investigator, whose credentials and activities seemed to fit squarely those of the typical cause and origin investigator, the court stated that Wolfe “was hired as a consultant and expert, and not as a private detective and investigator [and] was not required to have a license as such before being permitted to testify in court as an expert.” *Id.* The court concluded “that it was the intent of the legislature to require those who engage in business as private investigators and detectives to first procure a license so to do; that the statute was enacted to regulate and control this business in the public interest; that it was not intended to apply to persons who, as experts, where [sic] employed as here, to make tests, conduct experiments and act as consultants in a case requiring the use of technical knowledge.” 127 Cal. App. 2d at 345-436, 273 P.2d at 842.

The court offered no further explanation for its holding as it pertained to the non-engineer investigator. In the face of the language of the California private investigator licensing statute, the scope of which is virtually identical to the statutes involved in People v. West and Pennsylvania Lumbermens (and the Pennsylvania and New Jersey statutes), it is difficult to fathom a rationale that would support the holding that Wolfe, in particular, was not engaged in an “investigation for the purpose of obtaining information with reference to... the cause or responsibility for a fire” within the language of the statute. Nevertheless, Kennard can be a

useful case to cite in support of the proposition that a cause and origin expert “was hired as a consultant and expert and not as a private detective and investigator” and therefore not subject to licensing requirements, thereby mooted any challenge to the expert’s qualifications on that basis.

A Michigan Attorney General’s Opinion cited what it characterized as the “compelling” analysis in Kennard in support of the conclusion that “persons who, because of their technical knowledge and expertise, are hired to provide testimony as expert witnesses in civil or criminal lawsuits, are not required to be licensed as private detectives under the provisions of ‘Michigan’s Private Detective Licensing Act’.” 1989-1990 Michigan OAG No. 6605, 1989 W.L. 445979. The Kansas Attorney General also relied upon Kennard to reach the same conclusion in an opinion specifically discussing the inapplicability of the Kansas private detective licensing statute to “out-of-state arson investigators”. Kansas Atty. Gen. Op. No. 87-138, 1987 WL 290366.

In Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct. App. 1969) cert. denied 458 P.2d 860, which involved a challenge to a registered professional engineer’s qualifications to testify as an automobile accident reconstruction expert, the court held that the engineer was not required to be licensed as a private investigator because the New Mexico private investigator licensing statute expressly exempted “a person engaged exclusively in a profession licensed by a board of this state.” No similar express exemption appears in the Pennsylvania or New Jersey private detective licensing statutes. However, there was apparently also no such exemption in the California statute involved in the Kennard case, but the court implied the existence of such an exemption for a professional or other expert acting within the scope of his or her profession or

expertise. The question still remains whether an engineer engaged in the investigation of a fire is acting within the scope of his or her profession. The Kennard and Pennsylvania Lumbermens decisions are in seemingly irreconcilable conflict on this point.

As noted previously, the Pennsylvania private detective licensing statute contains an exemption for “persons engaged in the business of investigators or adjusters for insurance companies.” 22 P.S. §§ 22(b) and 13(c). The New Jersey licensing statute does not contain such a broad-based exemption, although there are exemptions for “persons employed by” attorneys and for “employees or licensed agents” of insurers. N.J.S.A. 45:19-9(a). These exemptions normally would not apply to cause and origin investigators, who are usually independent contractors hired by insurers or their counsel on a case-by-case basis rather than the legal “employees” of their insurance company clients. See Pennsylvania Lumbermens v. Landmark Electric, supra, where the court rejected a contention that independent investigators acted as “employees” of the insurance company plaintiff within the scope of a similar exemption to Ohio’s private investigator licensing requirements. However, this exemption, which again has counterparts in many licensing statutes, should at least encompass in-house cause and origin investigators who are employed in the Special Investigations Units of many insurers.

After following the People v. West decision, the Illinois legislature expanded an exemption in the Illinois private detective licensing statute for adjusters engaged in activities “directly connected with adjustment of claims against an insurance company” to include independent as well as staff adjusters. 225 Ill. C.S. 445/30(4). Some other states also expressly exempt both staff and independent adjusters from private investigator licensure requirements. See, e.g. N.Y. Gen. Bus. Law § 70; Va. Code § 9-183.2(7); Md. B.O.P. Code § 13-102(5) and

(6). However, while there may be an argument to the contrary, it is extremely questionable whether the Illinois legislature can be regarded as having statutorily overruled the People v. West decision, or whether cause and origin experts could ever legitimately claim to fall within a statutory exemption specifically applicable to “insurance adjusters”.

C. File Suit in Federal Court

In addition to utilizing only licensed investigators, or arguing that the licensure requirements do not apply to an expert in a particular case, or even attempting to “bootstrap” an unlicensed investigator’s findings into evidence through another qualified expert pursuant to F.R.E. 703 or its state counterparts¹⁰, potential issues arising from an expert’s lack of a license may be avoided simply by filing suit in federal court where diversity jurisdiction exists. “Unlike evidentiary rules concerning burdens of proof or presumptions, the admissibility of expert testimony in a federal court sitting in the diversity jurisdiction is controlled by federal law. State law, whatever it may be, is irrelevant.” Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1054 (4th Cir. 1986); accord Garwood v. International Paper Co., 666 F.2d 217, 223 (5th Cir. 1982). “Thus, state law cannot disable an expert witness from testifying in federal court.” Geophysical Systems v. Seismograph Service, 738 F.Supp. 348, 349 (C.D. Cal. 1990). “Licensure in the discipline or specialty which is the subject of expert opinion is not a requirement under the Federal Rules of Evidence.” Doe v. Cutter Biological, Inc., 971 F.2d 375 (9th Cir. 1992); accord Geophysical System v. Seismograph Service, *supra*; Bowser v. Publicker Industries, 101 F.Supp. 386 (E.D. Pa. 1951) affirmed 192 F.2d 933 (3rd Cir. 1951).

¹⁰ See discussion at Footnote 6, above.

IV. Licensure Does Not Guarantee That a Witness is Qualified as an Expert

What about the flip side of the coin? Should professional licensure alone be sufficient to establish that a witness is qualified to testify as an expert in a particular field? From the standpoint of logic and consistency, the answer should be “no”. Common sense and practical experience supports this conclusion. A common complaint among fire investigators who face private investigator licensing requirements is that the testing and other procedures required to procure a license do not even address fire investigation practices and procedures or the applicant’s knowledge and experience in the field of fire investigation, but instead focus upon the applicant’s experience and knowledge regarding general law enforcement and investigative procedures. Thus, while a private detective’s license may be statutorily required in order to investigate fires, such licenses can be and are obtained by many individuals who could not claim a “reasonable pretension” of expertise in the field of fire investigation.

There are undoubtedly some instances where the standards or criteria for issuance of a professional license or registration are so congruent with the standards for qualification as an expert witness in a particular field that the holder of a license should be regarded as *ipso facto* qualified to testify as an expert in that field. In such cases, however, the expert would almost invariably qualify as an expert under traditional standards, such as those embodied in Rule 702 of the Federal Rules of Evidence, in any event.

V. Conclusion

Decisions such as People v. West and Pennsylvania Lumbermens defeat rather than serve the interest of justice. Such decisions can deprive the trier of fact of the assistance of testimony from the most knowledgeable and qualified witnesses, and thereby impede the search for the

truth. While the authors of those decisions adeptly avoided any hint of provincialism, it hardly seems coincidental that such rulings can effectively close a state's borders to out-of-state experts in particular fields.

Impeding the search for the truth in the name of public policy is bad policy. Requiring professional licensure as a condition for qualifying a witness as an expert affords no additional assurance that only qualified persons will investigate fires, because: (1) professional licensure does not guarantee that an individual is qualified to render opinions regarding the cause and origin of fires; and (2) trial courts already have the authority and the obligation to preclude unqualified witnesses from testifying as experts, regardless of whether those witnesses are licensed or not. Even if there was any legitimate public policy rationale for excluding testimony of unlicensed experts, the courts should defer those policy decisions to the legislatures. No court in a jurisdiction that has adopted an evidentiary rule comparable to Federal Rule 702 can claim a legislative mandate to exclude an expert's testimony based solely on the lack of a license.

Because the problem exists, it is incumbent upon lawyers and their clients to be aware of the problem and take steps to avoid it and, when the problem cannot be avoided, to develop strategies and arguments for bringing the results of an unlicensed investigator's activities before the trier of fact.

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