

PRODUCT LIABILITY

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A number of courts have recently addressed the interplay of state engineering licensure statutes and the admissibility of expert engineering testimony. This edition of the newsletter takes a look at the varying results those courts have reached in Mississippi and elsewhere.

The Mississippi Supreme Court Issues A Get-Out-of-Jail Card to Unlicensed Engineers Offering Expert Testimony

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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership.

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They're bound to get you, 'cause they got a curfew,

And you go to the Starkville City Jail.

- Johnny Cash, "Starkville[Mississippi] Jail"

I. INTRODUCTION

With varying results, a number of courts have recently addressed the interplay of state engineering licensure statutes and the admissibility of expert engineering testimony. On one end of the spectrum, states where the engineering licensure statute defines the "practice of engineering" to include "testimony," some courts have declined to impose the statute as a barrier to admissibility of otherwise qualified expert testimony where the proffered engineer was not licensed in that state. *See, e.g., Baggerly v. CSX Transportation Co.*, 635 S.E.2d 97, 103-4 (S.C. 2006)("refus[ing] to endorse an interpretation of the professional engineering licensing statute" that would prevent out-of-state engineers from testifying in South Carolina courts and characterizing as "absurd" the application of engineering statute to restrict admissibility of testimony); *Thompson v. Gordon*, 851 N.E.2d 1231, 1233 (Ill. 2006), *rev'd on other grounds*, (holding that trial court abused discretion in excluding expert engineering testimony solely on grounds that expert lacked Illinois engineering license); *see also Baerwald v. Flores*, 930 P.2d 816, 819 (N.M. Ct. App. 1996).

On the other end of the spectrum, courts have, in fact, excluded expert engineers from testifying because they were not licensed in the state where the testimony had been proffered. *See, e.g., Board of Water & Sewer Commissioners of the City of Mobile v. Hunter*, 956 So. 2d 403 (Ala. 2006)(excluding highly qualified but unlicensed engineer's

expert testimony, rationalizing that in adopting the Licensure Act, Alabama legislature had "superimposed the licensing requirement onto Rule 702" of the Alabama Rules of Evidence).¹

II. MISSISSIPPI DECLINES TO "SUPERIMPOSE" ITS ENGINEERING LICENSURE STATUTE ONTO RULE 702

In a case of first impression, the Mississippi Supreme Court recently addressed the issue of whether the statutory prohibition against an engineer's providing "expert technical testimony" without a Mississippi engineering license should justify exclusion of the proffered testimony. In *Tellus Operating Grp., LLC v. Texas Petrol. Invest. Co.*, 2009-CA-01174-SCT ¶12, __ So. 3d __ (Miss. Oct. 4, 2012), the Mississippi Supreme Court held that the trial court properly admitted testimony of two petroleum engineers even though neither held a Mississippi license and both were arguably committing a misdemeanor by providing engineering testimony without a license.

Pursuant to Mississippi's engineering statute, the "practice of engineering" includes "expert technical testimony evaluation." *See* Miss. Code § 73-13-3. Under the statute, it is a misdemeanor "to practice, or offer to practice engineering in this state without being licensed." *See* Miss. Code § 73-13-39. The punishment for practicing engineering without a license may include a fine of \$5,000, investigation expenses, court costs,

¹ In response to fallout from the *Hunter* decision, the Alabama Legislature modified the engineering "Licensure Act" to remove "testimony" from the Act's definition of the "practice of engineering." *See* Ala. Code § 34-11-1(7). As a result, the modified Act superseded the *Hunter* case.

and imprisonment for up to three (3) months.
See Miss. Code § 73-13-39.

At the outset, the Court noted having “consistently [] held that a witness may be qualified to provide expert testimony regardless of his or her professional licensure status.” *Tellus*, 2009-CA-01174-SCT ¶12.

However, the specific issue before the Court was whether this rule changed when the proffered expert testimony is criminal. *Id.* at ¶13.

The Mississippi Supreme Court affirmed the trial court’s admission of the engineering testimony because the statutory prohibition had no bearing on whether the experts were qualified under Mississippi Rule of Evidence 702. *Id.* at ¶16. The Court reasoned that the purpose of the engineering licensure statute was “to safeguard life, health, and property and to promote the public welfare ... [t]his explicit objective is not furthered by restricting evidence in a judicial proceeding between private parties.” *Id.* In further justification of its holding, the Court relied heavily on similar rulings from New Mexico and South Carolina—the only other states to have similar statutes criminalizing the act of an engineer testifying without an in-state license. *Id.* at ¶¶13-15. *See Baggerly*, 635 S.E.2d at 103-4; *Baerwald*, 930 P.2d at 819. Therefore, the Court concluded that in the courtroom “our rules of evidence govern, and we find no error in the admission of the expert testimony, despite the statutory prohibition.” *Id.* at ¶16.

III. CONCLUSION

Following the growing trend in other states, Mississippi has now made certain that in its courtrooms, the rules of evidence—and not its engineering licensure statute—govern the admissibility of an out-of-state engineer’s expert opinions. While one’s expert may not

be barred from testifying in a Mississippi judicial proceeding based on whether he or she holds a Mississippi engineering license, it is still arguably an enforceable misdemeanor to allow one’s expert to testify without a temporary Mississippi license. Consequently, practitioners are wise to counsel their retained experts to obtain temporary licensure if planning to testify in any Mississippi judicial or administrative proceeding.²

²Temporary licenses are easily obtained if the engineer is licensed in another state at the following: http://www.pepls.state.ms.us/pepls/web.nsf/webpages/LN_LINFO_PAGE_LINFO?OpenDocument.

Regardless, when hiring a testifying expert in Mississippi, one should make clear in your engagement letter that the engineer will not be paid his hourly rates while the engineer serves his three (3) month jail sentence for practicing engineering in Mississippi without a license.

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