

# Don't Let License Rules Snuff Out Your Fire Expert

By **John Patterson, Chelsea Smith and Joe Manno** (May 14, 2019)

Consumer product manufacturers and their attorneys frequently manage claims and lawsuits pending in multiple jurisdictions involving significant property damage due to fire. Such matters often require the retention of an expert to investigate the origin and cause of the fire. A scene inspection will typically take place almost immediately after the fire occurs, to put all interested parties on notice and allow them to collect data that will aid in the determination of the origin and cause of the fire.

If you or your client receive a notice of a scene inspection and choose to attend, it is important to consider the jurisdiction's licensing requirements for privately retained fire investigators. While this simple step could be easily overlooked, particularly since you or your client will likely retain a certified fire investigator or certified fire and explosion investigator, seemingly benign state or local licensing requirements could have disastrous consequences should the matter proceed to trial.

A qualified fire investigator should be familiar with NFPA 921, Guide for Fire and Explosion Investigations (National Fire Protection Association, 2017 edition), which specifically addresses this issue:

Authority to Conduct the Investigation. The investigator should ascertain the basis and extent of which his or her authority to conduct the investigation. The authority to investigate is given to police officers, fire fighters, and fire marshals according to the law of the jurisdiction. Private fire investigators receive their authority by contract or consent ... Proper identification of the basis of authority will assist the investigator in complying with applicable legal requirements and limitations. The scope of authority granted to investigators from the public or governmental sectors is usually specified within the codified laws of each jurisdiction, as supplemented by applicable local, agency, and department rules and regulations. *Many states and local jurisdictions (i.e., cities, towns, or counties) have licensing or certification requirements for investigators. If such requirements are not followed, the results of the investigation may not be admissible and the investigator may face sanctions.*[1]

Although a potential expert should notify you or your client if he or she does not hold the requisite license(s) necessary to legally investigate the scene of the fire in a specific jurisdiction, you and your client should also be aware of the jurisdiction's licensing requirements to ensure that you retain the appropriate expert to investigate the fire scene. Otherwise, you and your client run the risk that your expert's opinion as to the origin and cause of the fire will be excluded from evidence at trial.

One particular jurisdictional quirk this article addresses is the requirement in many states that the fire scene investigator hold a private investigator's license. Some states, such as Ohio, have gone as far as excluding an expert's cause and origin opinions because he or she did not hold a private investigator license in the state or qualify for any statutory exceptions to this requirement.



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Even though these types of requirements may be reminiscent of archaic policies designed for protectionist professional goals and requiring the payment of local licensing fees, these statutes could negatively impact your case if your expert does not comply. This article reviews the licensing requirements for fire scene inspection of all 50 states to provide an overview of the types of licensing quirks that you may encounter when defending a fire case.

### **No License Required by the State**

Alaska, Idaho, Mississippi, South Dakota and Wyoming do not have a state licensure requirement for private investigators. Note, however, that municipalities may have their own ordinances relating to the licensing requirements of someone investigating the origin and cause of a fire.

New Hampshire, Wisconsin, Nebraska and Rhode Island all have limited definitions of a "private investigator" or "private detective" that do not include investigation into the origin or cause of a fire.

### **No License Required for the Purpose of Litigation**

Some states explicitly exclude expert witnesses from the definition of a "private investigator" who would otherwise need a state license to investigate the origin and cause of a fire.

Maine does not require "A person acting within the scope of the person's professional practice to analyze facts, evidence or other data for the purposes of supplying expert testimony in a legal proceeding" to obtain a private investigator license.[2]

Missouri excludes "private fire investigators" whose "primary purpose of employment is the determination of the origin, nature, cause, or calculation of losses relevant to a fire (any person who receives any consideration either directly or indirectly, for engaging in private fire investigation), and expert witnesses who have been certified or accredited by a national or state association associated with the expert's scope of expertise" from its licensure requirement.[3]

The Nevada Supreme Court has held that an investigator engaged for the purpose of expert testimony for fire investigation is not required to obtain a Nevada private investigator license.[4]

Similarly, some states do not require certain categories of individuals to have a private investigating license so long as they are investigating the origin and/or cause of the fire as part of their professional duties. Hawaii excludes attorneys from its definition of a "private investigator," while Arizona, Georgia, Iowa, Kansas, Louisiana, Maryland and Minnesota exclude both attorneys and insurance adjusters.

Arkansas, California, Colorado, Indiana, Michigan and Massachusetts extend their statutory exclusions to attorneys, insurance adjusters and licensed engineers. Montana, Pennsylvania, Vermont, Tennessee, Virginia and Washington exclude individuals hired by either an attorney or insurance adjuster, as well as the attorneys or adjusters themselves.

### **Expert Excluded from Trial for Failing to Comply With Licensing Requirement**

## **Ohio**

Ohio law provides one of the harshest examples of one's failure to comply with the occupational licensing statute. Under R.C. § 4749.01, an expert that investigates the cause of or responsibility of a fire must be a licensed private investigator in the state of Ohio. Ohio, like many other states, does provide for exceptions that allow an expert hired by an attorney or that holds professional engineer license to conduct an investigation. However, there is no exception for an expert that is hired by a claims processor (or a nonattorney) who does not otherwise meet another exception.

At least two reported Ohio decisions excluded an expert's testimony because the expert failed to meet the licensing requirements of R.C. § 4749.01. In *McKeegan v. Sears, Roebuck & Company*,<sup>[5]</sup> the Eighth District Court of Appeals affirmed the trial court's exclusion of a cause and origin expert because the expert did not have a private investigator's license.<sup>[6]</sup> The court held that, "[w]ithout this licensing, [the plaintiff's expert] was precluded, by statute, from engaging in the business of private investigation to determine the origin of fires."<sup>[7]</sup><sup>[8]</sup>

## **Alabama**

Alabama Code §§ 34-25B-2(2)(d) and 34-25B-3 require that a person engaging in the business of obtaining or furnishing information relating to the cause or responsibility of a fire must be a private investigator licensed in Alabama. Although there is no specific case applying the private investigator statute to a cause and origin expert, there is precedent for prohibiting expert testimony that does not comply with an occupational licensure requirement.

For example, in *Board of Water and Sewer Commissioners of City of Mobile v. Hunter*,<sup>[9]</sup> the court held that an individual could not provide expert opinions in the field of engineering without a proper engineering license. In excluding that expert's testimony, the court held that "the legislature has established that the minimum level of expertise required to qualify as an expert on engineering matters within Alabama is the same level required to obtain a license in Alabama. The legislature has the power to establish such standards."<sup>[10]</sup> Thus, a logical extension of the *Hunter* case could be applied to exclude a cause and origin expert that did not obtain a proper license before conducting the investigation.

## **Failure to Comply With State Licensing Requirements Goes to the Weight of the Expert's Qualifications**

### **Florida**

Florida Statute § 493.6100 requires an individual conducting an investigation for the purpose of obtaining the cause and origin of, or responsibility for, a fire to hold a private investigator's license. However, citing *Thompson*,<sup>[11]</sup> the United States District Court for the Middle District of Florida held that a witness could still testify as an expert even after violating the statute by conducting a cause and origin inspection without a proper license.<sup>[12]</sup>

### **Illinois**

Illinois law likewise requires a person hold a private investigator's license in order to conduct an investigation into the cause and origin of a fire for monetary gain.<sup>[13]</sup> It is a class four felony to violate this provision. The code, however, provides a number of

exclusions, one of which is for individuals who is licensed by statute to practice professional engineering.[14]

For over a decade, an origin and cause investigation by an individual who was not a licensed private investigator under the act, or met an exception, would destine his or her expert testimony for exclusion. In *People v. West*,<sup>[15]</sup> the 5th District Appellate Court held that it “could not 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.”<sup>[16]</sup> Thus, the court did not allow a witness who had investigated the scene of a fire but did not have a private investigator’s license to testify at trial because if it did, “the State and the court were permitting a continuation of a commission of a crime.”<sup>[17]</sup>

West’s blanket exclusion of experts that did not hold a private investigator’s license lived for 12 years, until the Illinois Supreme Court overruled such a harsh application of 25 ILCS 445/2(h)(4), 3, 4. In *Thompson v. Gordon*,<sup>[18]</sup> the Illinois Supreme Court held that the licensing requirements of any Illinois statute should be one consideration in determining the qualification of the expert, but “[t]o the extent that *West* may be read as holding that licensing is a prerequisite to the admissibility of expert testimony rather than a factor to be weighed in considering expert qualification, we overrule that portion of the *West* decision.”<sup>[19]</sup> Thus, although no longer the end-all-be-all of expert testimony, it remains important for a cause and origin expert conducting an inspection to be licensed in Illinois, as he or she could continue to face the potential for committing a class four felony.

### ***Kentucky***

Kentucky Statute 329A.010 requires persons investigating the “cause or responsibility” for fires to obtain a state private investigator license. The Kentucky Court of Appeals has held that, “Reading the plain language of the statutes, we believe the General Assembly meant only to prohibit an unlicensed individual from offering private investigation services to the public; hence, the prohibition against ‘hold[ing oneself] out to the public as a private investigator[.]’ KRS 329A.015. Providing testimony in a court proceeding is not the equivalent of selling the public one’s services as a private detective.”<sup>[20]</sup>

The court noted, however, that licensure may be a factor to be considered in determining whether an expert meets the requirements of Kentucky Rule of Evidence 702.<sup>[21]</sup><sup>[22]</sup>

### ***Texas***

Texas Occupations Code section 1702.101 and 1702.104(1)(D) prohibit a person from conducting an investigation into, among other things, the cause or responsibility for a fire unless the person holds an investigations’ company license. A person who is not licensed under Chapter 1702 and who violates the chapter may be assessed a penalty of \$10,000. However, Texas courts have not gone as far as excluding expert testimony based on a violation of the statute.

For example, in *Orr v. Texas*,<sup>[23]</sup> the Court of Appeals for Forth Worth held that an expert who was not properly licensed under Tex.Occ.Code §§1702.101 and 1702.104(1)(D) should not have been excluded from testifying at trial.<sup>[24]</sup> Rather, the only remedy for a violation of this chapter was a fine payable to the state.<sup>[25]</sup><sup>[26]</sup>

## **Requiring Experts in Litigation to Hold a Private Investigator’s License With Uncertain Application**

Some jurisdictions have licensing requirements that apply to experts in litigation, but there is no clear case law outlining the ramifications if that expert does not comply. Connecticut, Delaware, North Carolina, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina and West Virginia are good examples. It is unclear if these jurisdictions would apply a strict rule like Ohio and Alabama, or allow the fact to go to the weight of the evidence.

Regardless, there is some case law that supports the proposition that your expert would be fined for failing to comply with the state licensing statutes.[27] The best practice regardless is for the expert to comply with all private investigator licensing requirements.

In sum, it is important that you and your expert know the specific licensing requirements of the jurisdiction where the fire occurred prior to the scene inspection. Although this article focuses specifically on private investigator licensure requirements, there may be additional statutory requirements for professional engineers or other experts investigating the origin and cause of a fire.

Although some jurisdictions may recognize that the statutory requirements for licensure do not affect the legal determination of an expert witness, it is important not to place this decision into the hands of the court or open your expert witness up to potential criminal charges.

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[1] See NFPA 921, Ch. 12, § 12.3.1. (emphasis added).

[2] M.R.S. § 8103.

[3] M.R.S. § 324.1100.

[4] See *State v. Tatalovich*, 129 Nev. 588 (2013).

[5] *McKeegan v. Sears, Roebuck & Company*, No. 6811, 1995 WL 527441 (8th Dist. September 7, 1995)

[6] *McKeegan*, 1995 WL 527441 at \*1.

[7] *Id.*

[8] See also *Pennsylvania Lumbermens Insurance Corp. v. Landmark Electric, Inc.*, No. 13882, 1993 WL 541644 (Montgomery App. Dec. 29, 1993) (holding that a witness who did not meet the requirements of the private investigator statute was not qualified to be an expert).

[9] *Board of Water and Sewer Com'rs of City of Mobile v. Hunter*, 956 So.2d 403 (Ala. 2006)

[10] Hunter, 956 So.2d at 421.

[11] 221 Ill.2d 414 (2006)

[12] St. CYR v. Flying J Inc., Np. 3:06-cv-13-J-33TEM, 2007 WL 2406999 (M.D. Fla).

[13] 225 ILCS 445/2(h)(4), 3, 4.

[14] 225 ILCS 325/4(m).

[15] People v. West, 264 Ill.App.3d 176 (5th Dist. 1994)

[16] West, 264 Ill.App.3d at 185.

[17] Id.

[18] Thompson v. Gordon, 221 Ill.2d 414 (2006)

[19] Thompson, 221 Ill.2d at 431.

[20] Lukjan v. Com., 358 S.W.3d 33 (Ky.App. 2012).

[21] Id.

[22] See also Hincapie v. Charron, Case No. 2005-CA-00342-MR, 2006 WL 1947765, \*3 (Ky.App. 2006) (“KRE 702, which governs the admissibility of experts, does not require any particular licensure. After conducting a Daubert hearing, the trial court concluded that [the witness] was qualified as an expert, and this Court will not disturb that ruling solely on the grounds of licensure in the face of this expert’s knowledge, skill, experience, training, and education.”)

[23] Orr v. Texas, 306 S.W.3d 380 (2010)

[24] Orr, 306 S.W.3d at 401.

[25] Id.

[26] See also Chambers v. Troy-Bilt, LLC, No. 3:14-cv-569, 2016 WL 5085776 (N.D. Tex 2016).

[27] See Carroll v. Department of Public Safety Standards and Training, 285 Or.App. 556 (2017) (Affirming the fine of an investigator conducting an investigation when unlicensed).