

## **Opinion No. 62-97**

July 24, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General Mr. L. O. Strom, Chairman, State Board of Registration for Professional Engineers and Land Surveyors, P.O. Box 6247, Santa Fe, New Mexico

**TO:** Office of the Attorney General of New Mexico

### **QUESTION**

#### QUESTION

Is it required that a person testifying on engineering matters before the Oil Conservation Commission be a New Mexico registered professional engineer?

#### CONCLUSION

No.

### **OPINION**

#### ANALYSIS

Persons engaged in the "practice of engineering" must be licensed pursuant to the provisions of the Engineering Practice Act. Section 67-21-29, et seq., N.M.S.A., 1953 Compilation. The purpose for such requirement has been stated by the Legislature to be the safeguarding of life, health and property.

Section 67-21-31, N.M.S.A., 1953 Compilation defines the practice of engineering as follows:

"Practice engineering' and 'practice of engineering' mean the performance of any professional service or creative work requiring engineering education, training and experience, and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and assuring compliance with specifications and design, in connection with the utilization of the forces, energies, and the materials of nature in the development, production and functioning of engineering processes, apparatus, machines, equipment, facilities, structures, buildings, works, or utilities, or any combination or aggregations thereof employed in or devoted to public or private enterprise or uses and wherein the public welfare, or the safeguarding of life, health or property is concerned or involved. Such practice includes the performance of architectural work incidental to the practice of engineering. The terms 'practice engineering' and 'practice of engineering' also mean offering to practice engineering or

by verbal claim, sign, advertisement, letterhead, card, or in any other way representing oneself to be a professional engineer; or using the title 'engineer' or any other title which implies that one is a professional engineer, or holding oneself out as able to perform engineering work."

Perhaps it might be argued that a liberal reading of the above quoted statute would permit the conclusion that **testifying** on engineering matters is the "practice of engineering." However, it is our opinion that the Engineering Practice Act was not intended to apply to persons whose only "engineering" activity in this State is testimony before a court or administrative agency.

It has long been the rule that whether a witness possesses the qualifications to testify as an expert is a preliminary question for the court or administrative agency. **Bradford v. Missouri K & T Ry. Co.**, 64 Mo. App. 475. In the case of **Keller v. Federal Trade Commission**, 132 F.2d 59, 61, the qualifications of a witness who had testified at a Commission hearing as an expert were somewhat doubtful. However, the reviewing court had this to say:

"In this situation we think the question was not properly whether the witness was qualified to testify, but, rather, what weight was to be given his testimony."

The test used by courts and administrative agencies in determining the competency of a witness to testify as an expert is implied in the definition of expert evidence. The witness must have acquired special knowledge of the subject matter either by study of the recognized authorities in the field or by practical experience. **State v. Smoak**, 213 N.C. 79, 195 S.E. 70; **Rodgers on Expert Testimony**, p. 70, 3rd Ed.

Section 65-3-6, N.M.S.A., 1953 Compilation, grants the Oil Conservation Commission the power to "prescribe its rules of order or procedure in hearing or other proceedings before it." The Commission has not chosen to adopt any rule requiring that persons testifying on engineering matters be registered professional engineers.

As stated earlier the purpose of the Engineering Practice Act is to safeguard life, health, and property by ensuring that one who is engaged in the practice of engineering is fully qualified. In the case of the Oil Conservation Commission the qualifications of the expert witness are inquired into by either the examiner or the Commission. In most instances the examiner himself is an engineer. And the Commission's staff of engineers is available to advise the Commission at all of its hearings.

We might mention that in the case of the Oil Conservation Commission the question presented is largely academic. A vast majority of those testifying as engineering experts before the Commission or its examiners are engineers employed on a full-time basis by the various oil companies. And Section 67-21-47 E, N.M.S.A., 1953 Compilation, exempts such persons from the provisions of the Engineering Practice Act.