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Are you a broadcast engineer or a consultant?

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I realized recently while reading an issue of *Radio World* that I had been around the broadcast industry quite a long time. I was reading about State Registration of broadcast engineers, something I hadn't seen much about in the trade press for some time. It is, though, an issue that keeps coming up periodically, almost cyclically, and within an association like SBE, if you are around long enough, almost all issues come around again sooner or later. It is to me a fascinating topic because, unusually in legal matters, State registration statutes vary from State to State, and so does the level of enforcement of the statutes. So, every once in a while, SBE is asked to participate in regulatory proceedings in which a broadcast engineer is told that he or she can't call himself or herself an engineer, or worse, that the person can't do what he or she does for a living without a P.E. registration. We have been involved in dozens of such cases (with notable success and no notable defeats) since the early 1980s. SBE participated actively and successfully in appellate litigation on the issue in Illinois in 1998, in a very interesting case.

I have upset more than a few P.E.'s over time as a result of advocating SBE's position on State registration. Quite a few years ago, a very competent P.E. consulting engineer who I considered a good friend sent me a letter (as it turned out, the last one he ever wrote to me) in response to a piece I had written in some publication defending a broadcast engineer's right to practice broadcast engineering without passing a P.E. exam and becoming registered in the State. He told me that, the next time I was traveling to (his State) and needed brain surgery, I should go to a person who was not a licensed M.D. and see what kind of result I got. My friend's point, though more than a bit overstated, was an arguable one: perhaps a person should not be called a "consulting engineer" without being a registered P.E. in the State in which they practice. Longstanding SBE policy does not necessarily conflict with this. But State registration statutes aren't limited to regulating consulting engineers. The statutes are much broader than that, and, though they vary widely, they typically prohibit a person who considers himself or herself to be a "broadcast engineer" from utilizing that title, or worse.

There are two basic types of state statutes regulating the practice of "engineering". One type of statute says, in essence, that you can do what you want to professionally, but if you call yourself an engineer, you must have P.E. registration. The other is far more insidious: it says that you can't do certain things that constitute the practice of engineering - regardless of what you call yourself - if you aren't a registered P.E. in that State. It is my contention that this latter type of statute potentially is unconstitutional for several reasons, because it unreasonably restricts interstate commerce, and because many of the descriptions of what constitutes the practice of engineering are overly broad and vague. Pure legalities aside, many engineers tell me

that in their experience there is not a telecommunications element to the P.E. exam anyway, so what they do at broadcast stations is not enhanced by virtue of having demonstrated qualifications to become registered as a P.E. in the state in which their station is located.

Telecommunications Consulting Engineers who represent themselves to the general public as practicing "engineering" (assuming that the term is defined properly) are arguably reasonably subject to state registration statutes. The statutes, after all, are designed to protect the general public from unqualified persons performing various types of professional services (typically, State registration statutes apply to engineers, architects and surveyors). The 10th Amendment to the United States Constitution allows the states to exercise the "police power" jurisdiction that is reserved to them in order to protect the health, safety and general welfare of the citizens of that State. So, since a telecommunications consulting engineer hangs out a shingle and tells the public "come on in, I am able to help everyone who needs my services", then the State has an interest in protecting the general public by establishing a minimum performance test for those persons practicing "engineering". On that theory, a consulting engineer should be a registered P.E. I would feel better about that argument if indeed there was some relevance of the P.E. exam to the type of professional engineering that telecommunications consulting engineers really do. Perhaps by now the exams have incorporated a telecommunications element; I don't know.

However, let's talk about broadcast engineers for a moment. By this term, I mean employees of broadcast station licensees, or contract engineers who work exclusively for licensees of broadcast stations. These are not people who hold themselves out to the general public as practicing engineering (or in the vernacular of some State statutes, "professional engineering" which we will get to in a minute). Rather, their work is exclusively on instrumentalities of interstate commerce, which are regulated exclusively by the Federal government. Surely enough, the FCC has never itself licensed engineers. It has, however, always regulated all of the technical aspects of radio communications and has broad powers in that connection. The states have no concurrent jurisdiction. The FCC, pursuant to international treaty, Federal statutes, and its own regulations, has and is required to license and determine the capabilities of operators of transmitting equipment under its jurisdiction. In two places in the Communications Act, the FCC is charged with the responsibility to determine the qualifications of station operators, to classify them according to the duties performed, to fix the forms for such operators, and to issue them to those who are found qualified by the FCC. Section 318 of the Act says that the actual operation of all transmitting apparatus in any radio station for which a station license is required shall be carried on by a person holding an operator's license issued by the FCC.

FCC's deregulation of broadcast licensing over the years was not an invitation to the states to regulate the practice of broadcast

engineering. It is the FCC's job to do that, by whatever means it finds necessary. This, combined with the complete and exclusive authority of the FCC over technical aspects of communications provides a most compelling argument for Federal preemption of state regulation of those who perform technical functions at licensed, or FCC controlled, radio facilities. Arguably, this would include those who prepare FCC applications for filing with the agency.

The FCC's order eliminating the First Class Radiotelephone License years ago indicates that the FCC agrees with the argument above. FCC said in the order in Docket 20817:

There were a number of miscellaneous comments to the effect that a non-licensing regime would have other drawbacks. For example, APCO was concerned that, in the absence of Federal licensing, a hodge-podge of non-uniform state licensing requirements would be implemented. However, radio communications, since its inception, and by its very nature has always extended across state lines. The states have never concerned themselves with radio operator licensing. APCO gave no indication that the individual states might be inclined to begin any form of radio related regulation.

While the FCC's cavalier dismissal of APCO's concern wasn't entirely justified (as evidenced by the periodic cases of attempted regulation by the States of broadcast engineers over the past 25 years), it is true that, when challenged, state regulators have (generally speaking) not been willing to test the state registration statutes against broadcast engineers. SBE has been successful in numerous states in causing enforcement cases to be terminated. The typical scenario is where (most often based on a complaint from a P.E.) a broadcast engineer who is not a registered P.E. in that State has used that term to describe himself or herself and who has been issued a cease and desist order by a state registration board. Most enforcement cases (and most State registration statutes) are based on the use of the term "engineer" rather than an effort to regulate the function of a broadcast engineer. Even the regulation of the term, however, is a matter that affects broadcast engineers' careers and is a major problem. Often, a consulting engineer located in one of these "title" type states (or the District of Columbia, as an example) who is not a registered P.E. will use the title "technical consultant" to avoid the statutory restriction entirely (a "rose by any other name..."). However, in SBE's view, even if a broadcast engineer is not a registered P.E., he or she should be able to use the term "broadcast engineer" or similar.

If the States want to regulate what one calls himself or herself, how far does that go? If I hold a bachelor's degree in electrical engineering, isn't it reasonable that I should be able to call myself an engineer? If not, why not? If I am an SBE-certified broadcast engineer (in one of the categories of SBE certification that incorporates the term "broadcast engineer"), shouldn't I be able to use that term in describing my profession? SBE certification is the standard in the broadcast industry evidencing competence in broadcast engineering. The P.E. registration examination, frankly, is not. An analogy is my own profession, communications law. I am a lawyer by trade, and I call myself a lawyer. I can't practice law without a license (I can practice communications law before the FCC, however, by virtue of being licensed to practice law in any State or in the District of Columbia, even if my office is in a State in which I am not licensed to practice law). But I can call myself a lawyer even if I don't practice

law per se.

In 1998, SBE, together with Novell, Inc., challenged (on behalf of its members) a cease and desist order of the Department of Professional Regulation of the State of Illinois claiming that Novell's trademarked "Certified NetWare Engineer" program constituted the practice of "professional engineering" in violation of the registration statute. The Court of Appeals of Illinois held that the use of the term "engineer" by itself was not misleading and was not subject to regulation by Illinois, because it did not denote the practice of "professional engineering" which was defined in Illinois in a way that did not include software (or broadcast) engineering. Instead, the term applied to large scale public operations. SBE argued in its brief, and the Court ultimately agreed, that "other states have recognized the commonsense notion that professional registration statutes, like the Illinois act, are designed to prohibit only unlicensed practice of the types of vocational activities which have far-reaching effects on the public's well-being. They have allowed use of the generic term "engineer" in business contexts in which no professional engineering occurs if the use of the term does not reasonably imply state licensure as a professional engineer." In other cases, it has been uniformly held that a complete restriction on the use of the term "engineer" and "engineering", without more, would be an overly broad interpretation of a registration statute, far exceeding the intent of the legislature. Based on this interpretation, SBE policy is that a broadcast engineer should be able to use the terms "broadcast engineer" and "broadcast engineering" to describe his or her profession, and may also make reference to the type of SBE certification that he or she holds, which indicates that the person is an engineer with the qualifications indicated.

So, while of course no one should ignore or act contrary to what is on the books in the state in which broadcast engineers work, the State registration statute may or may not be enforceable. In any case, it may not be enforced as a practical matter, due to a very real fear that the registration statute might be invalidated in the broadcast engineering context. There is a thorough, though somewhat dated GAO report on this subject, which may still be available: it is called "Issues Concerning Licensing of Telecommunications Engineers and Technicians", GAO/RCED-90-106FS, released March 1990. It is a fact sheet for Congressional requesters. SBE contributed to this document and it is a reasonably comprehensive analysis of the subject. SBE will also assemble some of the landmark cases on the subject and make them available to members. In the meantime, if you have a question about this, let us know in an e-mail to SBE headquarters and we will see what we can do to assist you.

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