

# Newly licensed or recently trained expert witness may face exclusion

Nothing in the Illinois Rules of Evidence specifically requires an expert witness to hold a professional license in his or her claimed area of expertise. In addition, Illinois case law provides that whether an expert witness holds a professional license is just one factor (although perhaps a relatively important factor) to consider in determining whether the expert is qualified to testify. Indeed, Illinois case law specifically recognizes that experience, as opposed to formal training or licensure, may qualify one to testify as an expert.

Yet, a recent appellate court decision suggests that an expert who had been trained and received her professional license, but did so only after the occurrence giving rise to the lawsuit, may need to clear a particular hurdle that is not readily apparent.

In *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624 (June 26, 2012), the plaintiff sued the defendant hair salon for its negligence in recommending and administering a "Vitamin C facial" after she had complained of skin irritation following a previous "seaweed facial." Id. Paragraphs 1, 4.

She claimed that the "Vitamin C facial" worsened skin irritation that followed the "seaweed facial." Id. She received the Vitamin C treatment in 2004. Id. Paragraph 1. The aesthetician expert witness whom she designated, however, graduated from a training program and received her aesthetician license in 2006. Id. Paragraphs 9, 16.

In her affidavit, the expert witness testified that the defendant violated the applicable standard of care by administering the second facial. Id. Paragraph 15. The expert further said that the standard of care required the defendant to refer the plaintiff to a physician once she complained of skin irritation following the first facial. Id.

The circuit court barred the plaintiff's aesthetician expert witness and granted summary judgment to the defendant. Id. Paragraph 1. That court noted that the plaintiff's expert did not complete her training or receive her license until after 2004. Id. Paragraph 16. It reasoned that the expert's affidavit did not state that she had "knowledge as to the standard for aestheticians in 2004; nor does she state a basis for her knowledge of standards that existed in 2004." Id. Paragraph 16 (quoting the circuit court's order).

The appellate court affirmed the circuit court's exclusion of the plaintiff's expert witness and the award of summary judgment. Id. Paragraphs 30, 43. The appellate court reasoned that, because the plaintiff's expert did not receive her aesthetician license until 2006, "it was critical for plaintiff to establish how [the expert] became an expert on the standard of care as it existed in 2004." Id. Paragraphs 28. The expert's affidavit failed to make this showing. Id. While the expert stated in her affidavit "that she had experience using various products and techniques" in the field, "she did not state whether the same products and techniques were used in 2004." Id.

The appellate court acknowledged that the expert's "lack of a license or a specialized degree in 2004 did not automatically disqualify her from testifying as an expert to the standard of care in 2004." Id. Paragraph 26. Nevertheless, "it was the plaintiff's burden to present sufficient evidence to the court to establish her qualifications" to so testify and the plaintiff "simply did not present sufficient information to satisfy the court that [the expert] was qualified to give her opinion on the standard of care for an aesthetician in 2004." Id. Paragraph 27. Notably, the expert stated in her affidavit that a certain manual on the fundamentals of aesthet-

## THE BOTTOM LINE

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ics, as well as the defendant's own aesthetics training manual, supported her opinions, but this was deemed insufficient because the expert's affidavit "did not state whether those materials had been published prior to 2004 or that they established the standard of care in 2004." Id. Paragraph 28. Also, those materials were not included in the record. Id.

In some ways, *Colburn* is a straightforward application of the basic principle that a party bears the burden of establishing that its proffered expert witness is qualified to testify to the relevant standard of care in a negligence case.

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On another level, however, *Colburn* is surprising. Nothing in the appellate court's opinion suggests any reason to believe that the standard of care for aestheticians changed at all between 2004 and 2006. Indeed, while most people would agree that a physician who received her medical license in 2012 might not be qualified to testify to the standard of care for physicians in 1950, neither the nature of the field (aesthetics) nor the span of time (two years) lends itself to a particularly strong inference that *Colburn's* expert was unqualified. Granted, the Vitamin C facial might be a recent development in the field of aesthetics, but the opinion offered by the plaintiff's expert — specifically, that a customer at a hair salon should be referred to a doctor if she complains of skin irritation after receiving a facial and should not be given a second facial under those circumstances — does not smack of a brand-new discovery in the field.

*Colburn* thus offers an important lesson to Illinois litigators. If a controlled expert witness received a professional license or professional training after the occurrence that gave rise to the lawsuit, then that expert's Rule 213(f)(3) disclosures should clearly explain why the expert is nonetheless qualified to testify about something that occurred before she received the license or training.

If the expert acquired substantial experience in the field prior to earning her license or receiving formal training, or if the expert's training leads her to conclude that the standards about which she intends to testify have not changed since the occurrence that gave rise to the lawsuit, then her Rule 213(f)(3) disclosures should clearly and persuasively say so.

Failure to do so may lead to the expert's exclusion. Unfortunately for her, *Colburn* learned this lesson the hard way.