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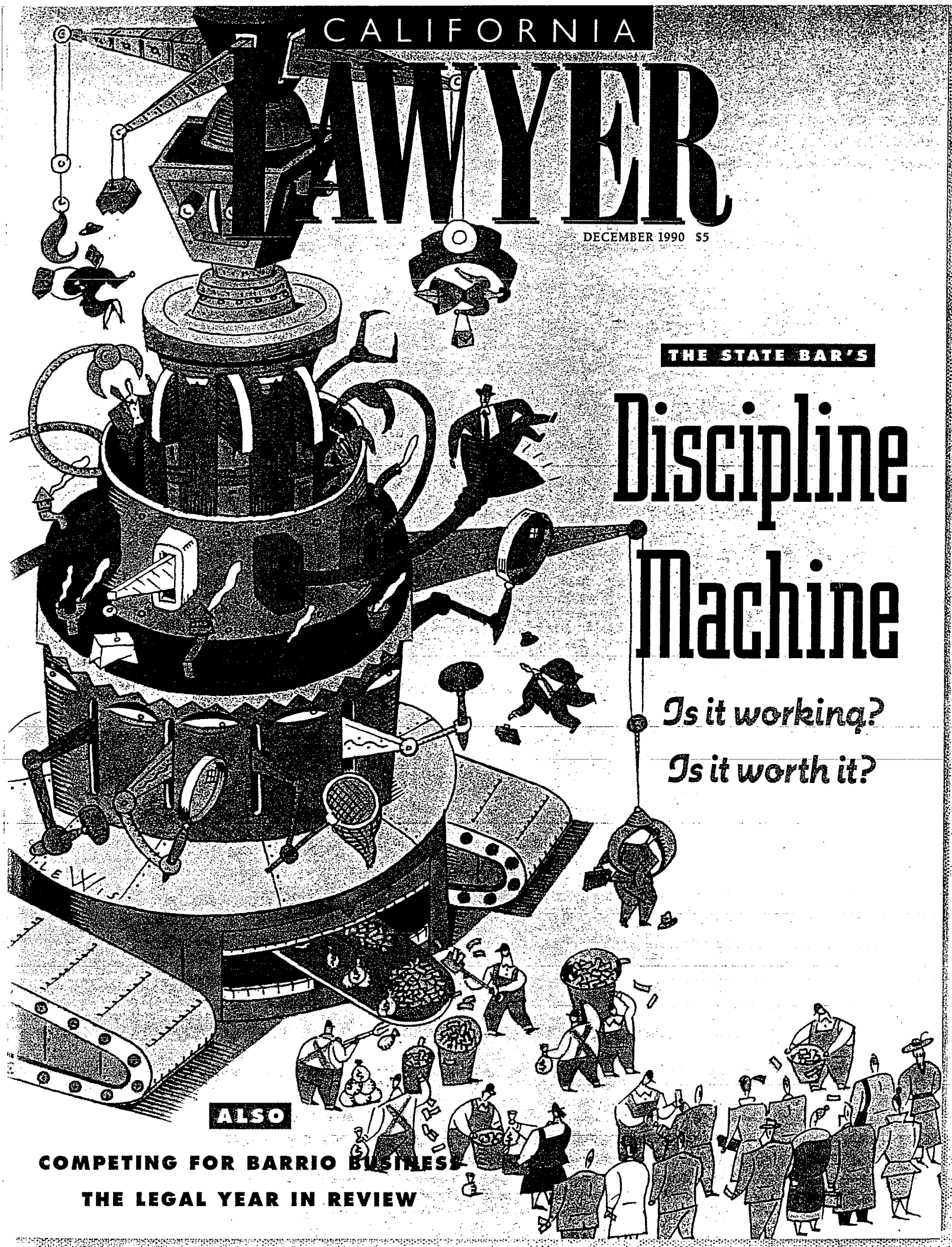

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The State Bar Act seems to prohibit nonadmitted general counsel from practicing law in California, but no one knows for sure

BY RICHARD A. ZITRIN

MORE THAN 8,000 of the 125,000 members of the State Bar of California work as in-house corporate counsel. In addition, corporate employers transfer out-of-state lawyers in and out of their law departments every day. But many of these lawyers are not members of the California bar. Are they engaged on a daily basis in the unauthorized practice of law? The answer is far from clear.

At first glance, the State Bar Act's statements on unauthorized practice of law appear unambiguous. Business and Professions Code section 6125 reads, "No person shall practice law in this state unless he is a member of the State Bar." Section 6126 states that holding oneself out as a lawyer or "otherwise practicing law" is a misdemeanor.

The widespread use of paralegals and the related debate over the appropriate role of legal technicians has put the definition of "practicing law" into question. But very little of this debate has focused on out-of-state attorneys employed in California corporate law departments.

For these lawyers the questions are many: Is the prohibition against practicing law limited to appearing before a California court or tribunal? Does it include preparation of court-related documents? Or does the prohibition extend to the preparation of all legal instruments, even to giving advice and counsel?

On a more mundane level, may nonadmitted corporate counsel use business cards identifying themselves as "associate general counsel" or have their names included on the general counsel's stationery?

A few years ago these issues were the focus of intense public debate among corporate counsel. But the problem was never resolved, leaving the matter to simmer just below the surface in many corporate law departments.

The State Bar takes a broad view of what constitutes unauthorized practice of law. David Bell, senior staff attorney of the State Bar's Office of Professional Competence, points to two Board of Governors resolutions as the bar's last words.

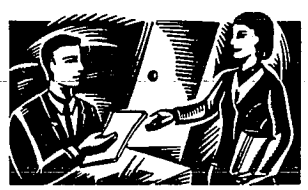
In 1966 the board held that all employees of a law department "who perform legal services" while residing in California must be State Bar members "whether or not they hold themselves out as counsel." In 1967 the board resolved that only active State Bar members may use the term "general counsel."

Along with the resolutions, Bell cites a longstanding series of cases stemming from *People v Merchants Protective Corp.* (1922) 189 C 531, that interpreted the phrase "practice of law" broadly. The court in 1922 interpreted the phrase to mean not only services in court but also "legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured."

But none of the subsequent cases specifically addressed the permissible scope of duties of nonadmitted corporate counsel. When the State Bar directly addressed this question in 1966, it defined practicing law as "performing legal services"—a phrase that is no more specific and thus no more helpful.

Neither Bell nor the State Bar's Office of Trial Counsel can point to any disciplinary proceedings arising from the resolutions. When the bar stopped funding its unauthorized practice investigations unit in January 1985, enforcement was left entirely to local district attorneys.

In 1985 the bar stopped investigating unauthorized practice cases, leaving the task to local district attorneys.



But according to Peter Aviles, who heads the San Francisco district attorney's consumer fraud and special prosecutions units, district attorneys have little inclination to pursue such investigations without an actual victim, especially when the rules are "ambiguous." Aviles cannot recall a single case where a law department attorney has been prosecuted for unauthorized practice.

Still, the statutory prohibitions against the practice of law by those not admitted to the State Bar remain on the books. In 1976 the California Supreme Court, analyzing the unauthorized practice of an already-suspended lawyer (*Farnham v State Bar*, 17 C3d 605), reiterated the broad prohibitions set forth in *Merchants Protective Corp.*

Two years later the state Supreme Court specifically discussed whether corporate personnel other than State Bar members could appear in court (*Merco Constr. Engineers, Inc. v Municipal Court* (1978) 21 C3d 724). In a 4-3 decision, the court declared unconstitutional Code of Civil Procedure section 90 (now section 87), which specifically permitted corporations to appear *in propria persona* in municipal courts through a representative. The court concluded that to extend the legal fiction equating corporations with persons by permitting their nonadmitted representatives to appear in court would foster unauthorized practice, since under the separation of powers clause of the state constitution only the judiciary determines who may practice law.

NONENFORCEMENT of the statutes and the imprecision of the State Bar resolutions leave corporate law departments in a quandary. They want to avoid intentional violations of law, but they also want to hire, promote and transfer attorneys just as they would other personnel. And they want all general counsel located in California to provide a full range of legal services without waiting until each is admitted to the State Bar. Finally, they are acutely aware of the enormous gulf between the State Bar's words and its practice. In such an environment, offices of general counsel tend to make up their own rules.

For instance, when Robert V. Dalenberg arrived from Illinois in 1972 to work in the general counsel's office of Pacific Telesis, his immediate task was to pass the California bar exam. PacTel, its business inexorably related to California state regulations, had long required bar membership of all in-house counsel. Dalenberg notes that to this day out-of-state lawyers at PacTel essentially work as law clerks until they pass the exam.

Not all corporations are this strict. Dalenberg, who retired as PacTel general counsel in 1988, remembers raising the issue of required bar membership at a meeting of the General Counsel of Bay Area Companies, only to find that many chief general counsel themselves were not members of the California bar and had no intention of joining it.

Robert W. Williams, regional counsel of Chevron USA, says it's unfair to burden all staff counsel with taking the California exam, since many lawyers are transferred to the West Coast only for a short time or are near the end of their careers. Pointing to California's lack of reciprocity and the more liberal policies of most other states, he asks, "Why is our bar better than any other?"

Indeed, two cases now before the Ninth Circuit U.S. Court of Appeals, *Giannini v Real,* 89-55466, and *Maynard v U.S. District Court,* 89-55741, challenge the extent to which the State Bar and local federal court rules may limit the practice of out-of-state lawyers.

Williams notes that nonadmitted attorneys can limit their practice to giving advice not tied to California law. Many firms, he notes, are concerned primarily with federal law and regulation. Dalenberg concurs. "If corporate counsel is really working internally," he says, "there ought to be some freedom" from State Bar membership.

But the view that California's rules should be liberalized is by no means unanimous. David Hardy, former deputy general counsel at McKesson Corp. who served as chairman of the American Bar Association's committee on corporate counsel, says even if a firm deals almost entirely with federal law, its local contracts are governed by California law. Hardy, a partner in San Francisco's Buchman & O'Brien, adds that state remedies may apply to federal law violations. To allow non-California lawyers to deal with any legal issue is asking for trouble, he says, because "you can't put law in little drawers and just pull one out."

Indeed, both Williams and Dalenberg recognize that even if corporate law departments attempt in good faith to distinguish permitted from prohibited conduct, the lines quickly can become blurred when attorneys are performing daily work under pressure.

Hardy raises two other issues: Who will discipline nonadmitted attorneys if they transgress? And does the attorney-client privilege apply to discussions between corporate personnel and nonadmitted counsel, who by statute may not practice law? When asked what tasks nonadmitted attorneys may perform in California, Hardy suggests, "They can put stamps on envelopes."

IN THE MID-1980s the State Bar made an attempt to bridge the gap between the practical needs of corporate law departments and the technical requirements of California law. The Board of Governors' Committee on Professional Standards proposed a rule of court establishing "registered in-house counsel"—full-time general counsel who were not admitted to practice in California but were bar members in other states.

The registered counsel would have been certified to advise their employers on their "legal rights and obligations," "prepare documents which affect the same" and represent the entity in "nego-

tiations" and "transactions." Registered counsel would not go to court or "otherwise practice law."

The Board of Governors revised and considered the registered in-house counsel rule several times between 1985 and 1987. Ultimately, in May 1987, the board voted against the proposed rule. Deborah L. Fulton, then staff attorney for the bar's Office of Professional Standards, remembers the rule as controversial in those corporate law departments most affected by it. She says more general counsel opposed the rule than supported it, frequently contending that registration was tantamount to second-class citizenship. The issue, Fulton recalls, was "an emotional one."

Failure to pass the proposed rule brought the debate back to square one. Today the faint rumblings of constitutional questions—freedom of speech and association, the right to travel, federal supremacy—have complicated the issue. But the practical dilemma remains: Corporate law departments must reconcile sound business practice with obedience to the law. In this endeavor they are neither afforded a middle ground nor given any guidance by the bar or the courts.

Rules that prevent nonadmitted lawyers from taking depositions or appearing in state court are far easier to justify than regulations prohibiting in-house advice on matters not related to California law. But until either the State Bar or the court draws a line somewhere between these extremes, thousands of California law department counsel will never be sure whether they are engaging on a daily basis in the unauthorized practice of law.

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