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Unauthorized Practice

By Richard A. Zitrin

The California Supreme Court's recent opinion in *Birbrower v Superior Court* (1998) 17 C4th 119, an unauthorized practice of law case, has attracted the attention of the California bar—and aroused even more interest from *non*-California counsel.

In a 6-to-1 opinion, the *Birbrower* court agreed with real party in interest ESQ Business Services, Inc. that ESQ's New York counsel—lawyers not admitted in California—were not entitled to compensation under their fee agreement for work done "in California." Lawyers from the Birbrower firm came to California to help ESQ prepare for an arbitration over a disputed high-tech business deal. Although the case was eventually settled before arbitration, ESQ complained about the nature and quality of the work done by the firm. ESQ won a summary judgment motion in the trial court that, as affirmed and amended by the Supreme Court, left the New York lawyers with only *quantum meruit* claims for their services in California.

Why is this case important to house counsel? Although *Birbrower* does not deal directly with the role of in-house lawyers, it stands as a clear reaffirmation of two points. First, California's definition of "the practice of law" will continue to be broad. Second, California will continue to be one of the nation's most protective venues when it comes to limiting the ability of those not licensed by the state to perform legal services.

California's State Bar Act is clear. Business & Professions Code section 6125 reads, "No person shall practice law in California unless the person is an active member of the State Bar." Section 6126 states that holding oneself out as a lawyer or "otherwise practicing law" is a misdemeanor. In the 1922 case *People v Merchants Protective Corp.* (1922) 189 C 531, 535, the phrase "practice of law" was broadly construed to mean not just services in court, but also any "legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured." *Birbrower* referred to this language with approval, as has virtually every case on unauthorized practice of law in the last three-quarters of a century.

The American Corporate Counsel Association, which filed an amicus brief urging the U.S. Supreme Court to review *Birbrower,* claims that the California rule is "burdening the interstate client's choice of out-of-state counsel to advise or represent it." But almost every state has at least some such limitation.

"I don't think *Birbrower* directly affects house counsel at all," says ESQ's lawyer, Jon Michaelson of San Jose's Hopkins & Carley. "But it is a useful reminder." Indeed, though *Birbrower* breaks no new ground in defining the roles of either in-house counsel or outside general counsel, it should serve as a wake-up call that California courts continue to maintain strict views on limiting legal practice.

Thousands of lawyers work in-house for corporate law departments in California. Thousands more work outside the state—both in house and as outside general counsel—for multistate and multinational corporations that do business in California. In today's global economy, lawyers transfer in and out of California every day. But *Birbrower* has made it clear that practicing in California "does not necessarily depend on or require the unlicensed lawyer's physical presence in the state" (though it left unclear what the phrase "in California" *does* depend on). One thing is certain: All non-California attorneys are now on notice until a future decision of a California court defines the breadth of what "practicing law" means.

The *Birbrower* opinion is a reminder that the bench watches out for the California bar.

Whether this changes how in-house and outside general counsel behave depends more on their behavior to date than any new ground *Birbrower* may have broken. Most California unauthorized practice cases have focused on nonlawyer scam artists, professionals in other fields such as accountancy, or lawyers in private practice in other states. Many, if not most, of these cases cite a concern for protecting the public. See, for example, *Agran v Shapiro*

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(1954) 127 CA2d Supp 807, finding that an accountant was illegally practicing law because he gave advice on "difficult or doubtful legal questions ... which, to safeguard the public, reasonably demand the application of a trained legal mind."

It's not surprising that corporate law departments and out-of-state outside general counsel have not been a hot-button unauthorized practice issue. In fact, in the mid- to late 1980s, the State Bar and groups of corporate general counsel had all but worked out an agreement to allow in-house lawyers who were admitted in other states to become "registered in-house counsel" without fulfilling all the State Bar membership requirements—or taking the bar exam.

The State Bar Board Committee on Professional Standards actually approved a proposed Rule of Court that would have authorized a registration procedure similar to the one available for foreign lawyers. These "registered counsel" would have been certified to advise their employers on "legal rights and obligations," "prepare documents which affect the same," and represent the entity in negotiations and transactions. But registered counsel could not go to court or "otherwise practice law."

Between 1985 and 1987 the registered in-house counsel rule was revised and considered several times by the State Bar Board of Governors. In May 1987 the board voted against the proposed rule, ostensibly to protect the public and to prevent certain lawyers from effectively practicing law in California without having fulfilled all the requirements for licensure. But according to State Bar staff familiar with the events, another important factor was the controversy among the corporate law departments most affected by the rule. Many counsel were in favor of the rule but even more were opposed, feeling that registration conveyed second-class citizenship.

All this leaves today's house counsel in the same boat as any other lawyer not admitted in California. And yet, it may well be that ESQ attorney Michaelson is correct when he says that *Birbrower* has no direct effect on in-house counsel. In February, just a month after *Birbrower* was decided, the Hawaii Supreme Court decided *Fought & Co. v Steel Engineering and Erection, Inc.* (1998) 951 P2d 487.

Fought addressed the issue of whether Fought's general counsel (in this case, outside general counsel) could recover attorneys fees when Fought prevailed in a construction dispute against Steel Engineering and others. Fought's general counsel was admitted in Oregon—Fought's home state—but not in Hawaii. Unlike the *Birbrower* firm, however, Fought's Oregon lawyers did not litigate the Hawaii case or even make a formal appearance. Rather, they limited their role to assisting Hawaii counsel in preparing for a mediation, analyzing briefs and papers submitted by other parties, doing research, and the like.

The Hawaii Supreme Court recognized that defining the phrase governing practice in Hawaii, "within the jurisdiction," made the case one of first impression. The court then carefully parsed *Birbrower,* realizing that "within the jurisdiction" meant essentially the same thing as California's "in California."

Using *Birbrower* as a guide, the Hawaii court acknowledged the possibility raised in *Birbrower* of "virtually entering" a state, but gave this concept practical application. Recognizing the vagaries of modern multijurisdictional litigation, the *Fought* court rejected as "imprudent ... at best" a blanket rule prohibiting the use of non-Hawaii counsel.

The court said that a commercial entity that serves interstate and/or international markets is likely to receive more effective and efficient representation when its general counsel, who is based close to its home office or headquarters and is familiar with the details of its operations, supervised the work of local counsel. "In many instances involving complex litigation among parties domiciled in different jurisdictions," the court stated, "competent representation undoubtedly *requires* consultation with legal counsel licensed to practice in another jurisdiction."

Where does this leave California's nonlicensed general counsel? Roughly in the same place as before *Birbrower.* The new California case may change little for the state's in-house counsel, but the Hawaii case—though a well-reasoned analysis covering significant territory—may change things even less. It is not, after all, a California case, and it expressly deals with out-of-state counsel who had locally admitted lawyers on site to make all appearances—a protection the Birbrower firm foolishly failed to take.

The most careful and conservative California in-house law departments will continue to get this protection by associating California counsel for all litigation and formal ADR purposes and will ask their long-term out-of-state transferees to take California's bar exam. They'd also be wise to have the work of those lawyers not yet admitted directly supervised by members of the California bar.

Is there an alternative to the conservative approach? There may be for some. De facto comfort may come from these facts: Corporate law departments have almost always flown beneath the State Bar's radar; there is no obvious issue of public protection; the State Bar had for years virtually abandoned unauthorized practice claims even before it was defunded; and local district attorneys are disinclined to pick up the slack, particularly for seemingly technical, victimless offenses. Yet nonadmitted house counsel practice law in California at their peril—unless and until the de facto reality of their daily work is squared with a de jure formalization of rules by which they can advise their employer/clients without danger *and* without a State Bar card. ❑