Show Me Your License and Registration:

Reasons to Be Concerned About

In-House Bar Admissions

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Introduction

An in-house counsel who is not admitted to the bar of the state in which he or she works must consider the implications of being unlicensed to practice in that state. The in-house counsel may face criminal, ethical, and privilege problems if he or she does not earn admission.

Of course, the situation can often be rectified by a limited admission as an in-house counsel in the states that permit such admission, or by waiving in for full admission. Unfortunately, in some states, the in-house counsel may have to take the state's bar examination.

Moreover, even if a supervisor in a corporate legal department is admitted to the bar, he or she cannot ignore the status of those under the supervisor's direction. The supervisor has a responsibility to monitor the admission of the attorneys under his or her direction. Importantly, supervisors have a recognized ethical duty to ensure that subordinate lawyers conform to the Rules of Professional Conduct.[1]

This article discusses the major reasons to be mindful of bar admissions — for yourself and your colleagues. These questions should be considered if an in-house counsel is not admitted to the bar in the state in which he or she is practicing, or otherwise is not paying attention to the state's bar admission rules:

1. Is the In-House Counsel Committing a Crime?

2. Is the In-House Counsel violating the State's Disciplinary Rules?

[1] See N.Y. Rule of Prof'l Conduct, Rule 5.1 (providing that a lawyer with management responsibility shall make reasonable efforts to ensure that other lawyers in the office conform to the Rules, and a lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to the Rules).

3. Does the Attorney-Client Privilege Apply to the In-House Counsel's Communications?

4. Does the Attorney Work Product Doctrine Apply to the In-House Counsel's Communications?

5. Can the In-House Counsel Provide Legal Advice to Third Persons?

6. Will the Advice of Counsel Defense Be Available in Future Litigations?

7. Can the In-House Counsel Appear in Court?

Authorized practice as an in-house counsel can occur in at least three ways: (1) general admission through application to the bar or reciprocity through admission on motion; (2) *pro hac vice* status on discrete matters; and (3) a limited in-house counsel license (where permitted).

Cleary it is each state's goal to protect "the public against rendition of legal services by unqualified persons."[2] A state court can therefore regulate attorneys within its jurisdiction and can subject its attorneys to discipline for unethical practices. Historically, to effectively do so, attorneys licensed in one state could not freely engage in legal practice in another state. However, with so many attorneys – both in-house and outside – engaging in national practices, the concept of a "national" license, with limited state registration requirements, has gained greater acceptance.

The Association of Corporate Counsel (ACC)[3] has been at the forefront of efforts to pass in-house counsel limited licensing rules to allow attorneys admitted in one jurisdiction to safely practice in another jurisdiction. ACC encourages legislators and judges to understand that this license is practical and necessary in view of the modern-day national practice of law, that it will improve legal practice by allowing out-of-state

[2] Model Rule of Prof'l Conduct R. 5.5, cmt. 2.
[3] ACC has an excellent resource which, among other things, provides the status of multi-jurisdictional bar admissions in the various states: http://www.acc.com/advocacy/keyissues/mjp.cfm.

sophisticated and specialized practitioners to contribute to that state's bar, and that it will not compromise the efficacy and integrity of practice. Advocates of the exception have pointed out that the consumer protections typically provided by the standard bar rules are generally unnecessary for in-house attorneys and their corporate client – their only client.

Unfortunately, many states, including New York, do not have special licenses for in-house attorneys. And, there are in-house counsel in New York who have not gone through the steps required for admission, which may require taking the New York bar examination. Consideration of the following questions demonstrates the risks and uncertainties surrounding practicing without a New York license. These issues underscore the importance of ACC's efforts toward state adoption of limited licensing rules.[4]

1. Is the In-House Counsel Committing a Crime?

In-house counsel, working in a given jurisdiction without admission to that state's bar, may be engaging in the unauthorized practice of law. Each state defines the "unauthorized practice" differently, yet companies should be aware that unauthorized practice may subject their in-house counsel to sanctions including criminal and civil penalties, disbarment, other ethical sanctions, and adverse reputational effects.

In New York, under N.Y. Jud. Law § 478[5] and N.Y. Rules of Professional Conduct, Rule 5.5, persons providing legal counsel and engaged in a client relationship

[4] In this article, we focus on New York law, with some reference to New Jersey, our neighbor; however, because each state has its own unique bar admission rules, in-house counsel should of course inquire and follow the rules adopted in the states in which they are working.

[5] N.Y.Jud. Law § 478 states, "It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or

are required to gain to the New York bar either through examination or reciprocity. This is because the A.B.A. Model Rule 5.5(d) permitting a limited license for corporate counsel has not been adopted. Importantly, persons who practice in violation of §478 are guilty of a misdemeanor.[6]

It should be noted that the New York Bar Association had proposed a Rule consistent with Model Rule 5.5(d) providing that an attorney admitted and in good standing in another state could provide legal services if the services "are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission." The Bar proposal, which was not adopted in the 2009 revised rules, was supported by a Comment which stated: "The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work."

Thus, an in-house counsel who works in New York and is not admitted to the New York bar should be aware of the implications of not being admitted. Indeed, even if the unlicensed in-house lawyer seldom engages in actual legal work, such counsel may be "engaged in the practice of law."[7] For example, in Spivak v. Sachs, the Court of Appeals dismissed a California attorney's claims for legal fees finding that he practiced law in

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counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath."

[6] N.Y. Jud. Law § 485. See also ABA/BNA Lawyers' Manual on Prof'l Conduct, Vol. 20, Number 8.

[7] Spivak v. Sachs, 16 N.Y.2d 163, 136 N.Y.S.2d 953 (1965); People of the State of N.Y. v. Alfani, 227 N.Y. 334 (1919); Ginsburg v. Fahrney, 45 Misc.2d 777, 258 N.Y.S.2d 43 (Sup. Ct., N.Y. Co. 1965).

New York without a license and was therefore not eligible to collect fees. The defendant argued that he did not "practice" in New York but merely offered services in an "isolated incident." The court disagreed and found that offering legal advice and assistance regarding divorce, pending litigation, and custody over a two-week period was the unauthorized practice in New York.

Additionally, merely having a physical office in the jurisdiction may constitute "unauthorized practice," even when advising only on federal or foreign law.[8]

On the other hand, an in-house counsel who comes into New York on an occasional basis may not be in violation of the state's rules. The Spivak court recognized that with the "numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."[9] Thus, in some cases, a very limited practice has been authorized.[10]

2. Is the In-House Counsel violating the State's Disciplinary Rules?

The New York Rule of Professional Conduct, Rule 5.5, is quite clear: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession

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[8] Servidone v. St. Paul Fire and Marine Insurance Co., 911 F. Supp. 560 (N.D.N.Y. 1995) (finding that maintaining an office in New York as a sole practitioner when unlicensed is "unauthorized practice" even if only advising on federal contract law).

[9] Spivak, 16 N.Y.2d at 168 (citing Appell v. Reiner, 43 N.J. 313 (1964)).

[10] E.g., El Gemayel v. Seaman, 72 N.Y.2d 701, 536 N.Y.S.2d 406 (1988) (holding that plaintiff attorney can recover fees and did not engage in unauthorized practice when he was licensed in Lebanon and the legal work was done in Lebanon; his telephone calls to New York and one meeting in New York were "incidental and innocuous"); Williamson v. Quinn Construction Corp., 537 F.Supp. 613 (S.D. N.Y. 1982) (allowing appearance of an out-of-state counsel before an arbitration panel when the client authorized the separate representation by the out-of-state firm); see Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1965) (permitting a non-New York admitted lawyer to collect fees for his work in a federal antitrust action that lasted six years; yet limiting the holding to this case only; noting that "we in no way sanction a practice whereby a lawyer not admitted to practice by a state maintains an office there and holds himself out to give advice to all comers on federal matters").

in that jurisdiction." Similarly, an out-of-state lawyer practicing in New York is subject to New York professional conduct rules.[11] Indeed, an attorney engaging in unauthorized practice could be subject to penalty in both the state of licensure and the state where the attorney violated the rules of multi-jurisdictional practice.

New Jersey has tried to accommodate in-house counsel who do not want to be burdened by the New Jersey bar exam. The state adopted an in-house counsel limited license.[12] Unfortunately, the New Jersey system for licensing in-house counsel has been criticized as being onerous, and extremely time-consuming.[13]

3. Does the Attorney-Client Privilege Apply to the In-House Counsel's Communications?

By way of background, courts have long recognized that in-house lawyers deserve the same treatment as outside lawyers for purposes of the attorney-client privilege.[14] The Restatement 3d of the Law Governing Lawyers comments that, "inside legal counsel to a corporation or similar organization is fully empowered to engage in privileged communications,"[15] and this principle is well-settled in New York.[16] It is also noteworthy that the leading attorney-client privilege case involved in-house counsel: Upjohn Co. v. United States.[17]

However, only certain communications between an attorney and his or her client are covered by the attorney-client privilege. The communication must be confidential

[11] See N.Y. Rules of Prof'l Conduct, Rule 8.5.
[12] N.J. Court Rule 1:27-2.
[13] Letter from Ass'n of Corp. Counsel to Am. Bar Ass'n (Oct. 10, 2007) *available at* http://www.acc.com/vl/public/PolicyStatement/upload/ACCCommentLetterReABAModelRuleforRegistrationofInHouse.pdf (the registration system has become the bane of the in-house bar in the state).
[14] E. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, ABA Section of Litigation, 5th Ed., 2007, at 199 et seq.
[15] Restatement (Third) of the Law Governing Lawyers, § 72, note e.
[16] E.g. Rossi v. Blue Cross and Blue Shield, 73 N.Y.2d 588, 542 N.Y.S.2d 508 (1989); Nicolo v. Greenfield, 163 A.D.2d 837, 558 N.Y.S. 2d 371 (4th Dep't 1990).
[17] 449 U.S. 383 (1981).

and for the purpose of obtaining legal advice. It will only apply where the counsel is performing legal, as opposed to business, duties.[18] The privilege may not apply when a lawyer is acting as a political advisor, public relations specialist, accountant, investment advisor, or other non-lawyer roles. When confronted with a situation where a lawyer is engaged in a mixed legal-business communication, courts will apply the "primary purpose" test to determine whether the attorney-client privilege should be available. [19]

Admission to the bar is significant in determining whether the privilege applies to communications involving an attorney. The courts have held that mere graduation from a law school is not enough to claim the privilege; admission to the bar is required.[20] "[O]ne element of the attorney-client privilege is that the 'attorney' must actually be admitted to the bar of a state or federal court . . . . Although, the privilege has been extended to cover communications with an attorney's subordinate, . . . the privilege requires that there be a communication intended to reach, either directly or indirectly, an attorney admitted to practice. Thus, in the absence of an excusable mistake of fact, even if all the other requirements of the privilege are met, communications between a 'client' and an unadmitted law school graduate are not privileged even where the putative 'attorney' has passed the bar examination." [21]

And, admission to the bar of the state in which the in-house counsel is practicing may be a factor that a court will consider in determining whether services were legal for the purposes of the privilege. For example, in Allendale Mut. Ins. Co. v. Bull Data

[18] Sackman v. The Liggett Group, Inc., 920 F. Sup. 357, 365 (E.D. N.Y. 1996).
[19] Thomas E. Spahn, Business Lawyers: Listen Up, ABA Section of Business Law, Volume 14, Number 5 (May/June 2005).
[20] See Malletier v. Dooney & Bourke, 2006 U.S. Dist. LEXIS 87096 (S.D.N.Y. 2006); A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 2002 U.S. Dist. LEXIS 20107 (S.D.N.Y. 2002).
[21] A.I.A. Holdings, S.A. v. Lehman Bros. Inc., Id.

Systems, Inc., in determining whether communications with two attorneys identified on privilege logs were protected, the court concluded that it was "doubtful that either was acting as a lawyer in the communications" because neither was a member of the legal department, and neither was licensed to practice in the state where the corporation was located.[22]

Fortunately for those who are not admitted to the specific state's bar, there is precedent upholding the privilege where the in-house lawyer is representing the lawyer's corporate employer in a state in which the lawyer is not licensed. Georgia-Pacific Plywood Co. v. United States Plywood Corp.,[23] for example, addressed the issue of whether the attorney-client privilege applies to communications with an in-house counsel who was not licensed in New York, the venue of the litigation. The court, Judge Irving R. Kaufman, held that the privilege applied and stated that "if a person is authorized 'to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer,' that person is a lawyer within the privilege."[24] The court also observed that "[s]ince corporate counsel will often be required to spend a great deal of time in different localities, the client may be deprived of the security of the attorney-client privilege unless counsel devotes himself almost entirely to studying for bar examinations."[25] Similarly, in Panduit Corp. v. Burndy Corp., the court stated, "[w]hile it appears that defendant's house counsel is not

[22] 152 F.R.D. 132, 138 (N.D. Ill. 1993).
[23] 18 F.R.D. 463 (S.D.N.Y. 1956).
[24] Id. at 466.
[25] Id. at 465–66.

admitted to practice law in the state of his employment, Connecticut, he is admitted to the bar of New York. This is sufficient for the purpose of the attorney-client privilege."[26]

4. Does the Attorney Work Product Doctrine Apply to the In-House Counsel's Communications?

Of equal concern, the in-house counsel should consider whether his or her work will be covered by the work product doctrine. This doctrine protects work created in anticipation of litigation by a party or by or for the party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).[27] Similar to the analysis above, the attorney work product doctrine will apply to work produced by admitted in-house lawyers so long as the work was related to litigation and not of a business nature.[28] Here again, an in-house counsel needs to be concerned about bar admission to justify the application of the doctrine.[29]

5. Can the In-House Counsel Provide Legal Advice to Third Persons?

New York attorneys with full admission can provide legal advice to clients outside their employment so long as the practice is permitted by the employer. In New Jersey, the limited license allows its holder to work exclusively for the one organization/employer noted in the license application. As discussed below, for attorneys in New York who are not members of the New York bar, and corporate attorneys in New Jersey who have a limited license, the attorney cannot represent third persons unless the attorney is admitted *pro hac vice*.

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[26] 172 U.S.P.Q. 46, 47 (N.D. Ill. 1971).
[27] Fed. R. Civ. P. 26(b)(3).
[28] See Rossi v. Blue Cross and Blue Shield, 73 N.Y.2d 588, 542 N.Y.S.2d 508 (1989) (holding that memoranda prepared by defendant's in house counsel was protected from disclosure by the work product doctrine); Gulf Ins. Co. v. Transatlantic Reinsurance Co., 13 A.D.3d 278, 788 N.Y.S.2d 44 (1st Dep't. 2004).
[29] See A.I.A. Holdings, S.A. v. Lehman Bros., Inc.

In New Jersey, should employment terminate, Court Rule 1:27-2 provides that the limited license lapses within ninety days. However, in June 2009 and in light of the current economic situation, the Supreme Court relaxed this time frame and temporarily granted holders of the limited license one year to find a new job without having to reapply for the license. The temporary allowance requires that in-house counsels notify the Court of an employment change within ninety days of that change. This relaxed rule remains in effect until further notice.[30]

6. Will the Advice of Counsel Defense Be Available in Future Litigations?

Bar admission may also be important if the client seeks to assert an advice of counsel defense. Generally, parties are entitled to assert the advice of in-house counsel defense in the same way they may assert the advice of outside counsel defense.[31] Here again, in-house counsel who is not admitted should consider whether this defense will be available to provide his or her employer the required protection.

7. Can the In-House Counsel Appear in Court?

In New York, an in-house counsel admitted to the state's bar may of course appear in court. If the attorney is practicing in another jurisdiction and is not admitted in New York, he or she may appear *pro hac vice*. New Jersey in-house counsel, authorized under the limited license, may appear for their clients and *pro hac vice*.[32]

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[30] N.J. BOARD OF BAR EXAMINERS, Notice to the Bar: Amendments to Supreme Court Supplemental Administrative Determinations Regarding In-House Counsel Licensure Pursuant to Rule 1:27-2 (June 2009), *at* http://www.judiciary.state.nj.us/notices/2009/n090608a.pdf.

[31] E.g. EchoStar Commc'n Corp., 448 F.3d 1294 (Fed. Cir. 2006) ("Whether counsel is employed by the client or hired by outside contract, the offered advice or opinion is advice of counsel or an opinion of counsel. Use of in-house counsel may affect the strength of the defense, but it does not affect the legal nature of the advice.")

[32] N.J. Court R.1:27-2(d). "In-house counsel shall not appear as Attorney of Record for his or her employer, its parent, subsidiary, affiliated entities or any of their constituents in any case or matter pending before the courts of this State, except pursuant to R. 1:21-1(c) and R. 1:21-2." Id.

Conclusion

In summary, corporate legal departments are encouraged to remain cognizant of these issues and require state bar licensing and compliance of all their staff. Many states have adopted in-house licensing rules, yet the rules are not uniform, and many other states have not recognized the need for this license at all. While multi-jurisdictional practice rules remains a murky area, in-house counsel can best protect themselves by earning admission to the bar in the state in which they practice.