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Cleaning up in-house

By John S. Throckmorton

Imagine for a moment that in your role as general counsel for Omnicorp, you have found two great candidates for openings in your legal department. Candidate A recently graduated from a top law school, just passed the bar exam and has excellent references. Candidate B was previously at a prestigious law firm on the opposite coast, but left private practice several years ago to join Omnicorp's marketing department. He now wants to put his law degree back to work by joining your legal department. After offering them both positions, you realize that you forgot to check that A and B are legally entitled to practice law. Should you care?

California law does not have an express requirement that a client investigate the legal credentials of prospective counsel before engaging them to provide legal services or being entitled to the protections and benefits of an attorney-client relationship. For example, in California, the attorney-client privilege protects a client's communications with a lawyer, and a lawyer is broadly defined as "a person authorized, *or reasonably believed by the client to be authorized*, to practice law in any state or nation." *People v. Klvana*, 11 Cal. App. 4th 1679, 1724 (1992) (citing Evidence Code Section 950) (emphasis added). A client is not required take any specific steps to verify the status of the person they believe is licensed to practice law as long as the client's belief is reasonable. Most states have adopted an approach similar to that taken by California, recognizing the attorney-client privilege where the "client" "reasonably believes" that the "attorney" is licensed to practice law. See, e.g., Delaware Rule of Evidence 502(a)(3); Florida Rule of Evidence 502(1)(a); New Jersey Rule of Evidence 502(a)(3); Texas Rule of Evidence 503(a)(3). However, at least one federal district court decision suggests that corporate counsel, and the businesses they represent, run certain risks if they fail to investigate the credentials of the individuals they hire as in-house counsel or to monitor the status of lawyers already in their employ.

In Financial Technologies International, Inc. v. Smith, 2000 WL 1855131 (S.D.N.Y.), Peter Smith graduated from law school, passed the New York bar exam, and was hired by a corporation as legal counsel. The corporate employer believed that Smith was an attorney, but failed to conduct any investigation into whether he was licensed to practice in New York. When the corporation asserted the privilege over communications with Smith in litigation with a third party, the federal district court held that the corporation could not have "reasonably believed" Smith was a lawyer because it had done nothing to determine whether he was licensed. As a result, the corporation's communications with Smith were not privileged. The court reasoned that it would not be "unduly burdensome to require a corporation to determine whether their general counsel, or other individuals in their employ, are licensed to perform the functions for which they have been hired" and bluntly stated "corporations [will] have to make sure their attorneys are in fact attorneys."

Not all courts agree with the holding in *Financial Technologies*. In *Gucci America, Inc. v. Guess?, Inc.,* 2011 WL 9375 (S.D.N.Y.), for example, the court held that privilege extended to communications between a corporation and an in-house attorney even though he was on inactive status with the California State Bar. The corporation's belief that he was an attorney was reasonable in light of the facts that the company had previously paid his bar fees and he had performed his work competently for a number of years. But California courts have not yet directly addressed the issue raised in that case. California's public policy is to afford wide coverage to the attorney-client privilege, but in evaluating the risks of losing the privilege, in-house counsel should consider the fact that California courts often impose a standard of "heightened scrutiny" when privilege is claimed for communications involving in-house counsel. *Oracle America, Inc. v. Google, Inc.*, 2011 WL 3794892 (N.D. Cal.) (noting potential for abuse of privilege when claims are made for individuals acting in a business capacity). General Counsel should thus consider a vetting process which confirms that candidates for in-house legal positions are qualified to provide legal services. This will help to ensure that their confidential internal communications are0 afforded privileged status.

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For companies that operate solely in California, a quick check of the State Bar's website (www.calbar.org) is sufficient to determine whether an individual is licensed to practice in California. If a candidate is not admitted to the California Bar, that individual should not act as an attorney, nor be called an attorney, until he or she actually becomes legally entitled to practice in California — no matter how close they are to obtaining a license. While awaiting admission to the bar, however, an individual is permitted to perform law-related preparatory work, such as fact investigation or drafting standardized legal documents for attorney review, as long as the work is closely monitored and supervised by someone with an active license in this state. If the candidate is not admitted in California but is licensed in another U.S. jurisdiction, he or she may qualify to register as in-house counsel under California Rule of Court 9.46.

Checking credentials becomes a bit more complicated if your company operates in more than one state. You can conduct online searches of the admissions status of individuals on the websites of most state bars. If state law would require a candidate for a legal position to be licensed in a jurisdiction in which they are not admitted to the bar, they may be able to take advantage of a local rule or regulation that provides for limited in-house practice. For example, many states have adopted rules based on ABA Model Rule 5.5, which allows lawyers licensed out-of-state to provide certain legal services to their employer without obtaining a local license. Some states, including Texas, insist that out-of-state attorneys become full members of the local bar, but may waive the bar exam if an individual has practiced a number of years and meets other requirements. Other jurisdictions take the same approach as California, and allow attorneys licensed outside their own state to register to practice law in the state, but solely on behalf of their corporate employer. These states include Arizona, New York, Oregon and Virginia. The registration process can be highly technical and esoteric, and you may need someone with local knowledge or contacts to help navigate through the process. (Do not rely on information about rule requirements from the Internet — even bar websites sometimes have misleading and out-of-date information on this topic.)

Once you've established that in-house counsel are properly credentialed, you will want to continue to monitor their status on an on-going basis. For small entities, the task may be as easy as checking employees' admission status on the California Bar website each year. For larger companies operating in a number of jurisdictions, you might require attorneys to certify to the company that they are in compliance with local practice requirements. (Some bars require that legal professionals certify annually that they are in compliance with licensing rules, and it may make sense to adopt this practice internally as well.) If a company's legal operations are particularly complex, with legal operations located in multiple states and legal professionals migrating between different offices, it may be appropriate to conduct an annual self-reporting survey that tracks the kinds of work employees are engaged in as well as the location of their work, and to audit those responses to ensure that attorneys are in fact attorneys and that the corporation's interests are protected.

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