LICENSURE AND PRIVILEGE: Bar Membership and the Right of the Corporate Client to Assert the Attorney-Client Privilege

YOU ARE TRANSFERRED FROM THE HOME OFFICE IN COLORADO, where you are a member of the bar, to a division office in Florida, where you are not licensed. You allow your Colorado bar membership to lapse, expecting, eventually, to join the Florida bar. Time passes. Like every other lawyer, you procrastinate. Now you are not an active member of any bar. Your corporate client doesn't care (or even know) because you never go to court anyway. What does it matter?

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Corporate lawyers have been preoccupied with the question of whether, in a multijurisdictional corporate practice, they must become a member of every state bar where their legal services may be said to affect that state.[1] Although this issue may be of concern, the likelihood of serious adverse consequences has, as a practical matter, been quite limited.[2] The corporate client (arguably the only victim with *standing*) is extremely unlikely to complain, and even if some person did complain, overburdened disciplinary authorities seldom pursue these complaints except, occasionally, to make an example. There have been few reported instances of disciplinary actions for unauthorized practice of law against corporate counsel.

Lost in the shuffle has been the much more serious risk to the corporate client when it appears that the lawyer is no longer a member of *any* state bar. In that circumstance, the corporation and its lawyer may find to their dismay that courts are unwilling to recognize the attorney-client privilege for communications between the corporation and the "putative" corporate lawyer. More importantly, these challenges can come from opposing parties in litigation, and they are much more potent and motivated adversaries in these circumstances than disciplinary panels. A corporate lawyer whose procrastination and failure to become licensed has waived the corporation's privilege and possibly jeopardized a major case may find this predicament much more painful.

Let us begin with the general—albeit little known—rule that an individual client who reasonably believes that a person is a lawyer may protect otherwise privileged statements made to the "lawyer" even if it turns out that the "lawyer" was not licensed (or even was an impostor). The theory is that individual clients are not required to investigate the license status of those people who reasonably claim to be lawyers. Thus, the individual client should not be penalized by having his or her privileged communications disclosed just because the lawyer is unlicensed or even a fraud. This charitable view, however, is not extended to corporate clients, according to *Financial Technologies International, Inc. v. Smith*,[3] a recent decision in the Southern District of New York.

Financial Technologies involved an action for breach of contract and misappropriation of trade secrets arising out of a consulting agreement between the plaintiff, a corporation having its principal place of business in New York City, and the defendants. During the course of discovery, the defendants deposed Peter Smith, the secretary and legal counsel of the plaintiff corporation. At the deposition, Smith indicated that he had been admitted to the New York bar and was accordingly instructed by plaintiff's counsel not to respond to certain questions on the grounds that the information sought to be elicited was protected under the attorney-client privilege.[4] Following the deposition, the defendants discovered, and the plaintiff conceded, that Smith was not a licensed attorney in New York *or in any other state*.[5] The defendants subse-

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quently challenged the plaintiff's invocation of the attorney-client privilege based on Smith's status as an unlicensed attorney in New York.[6] In opposition, the plaintiff asserted that this protection applied, notwithstanding Smith's unlicensed status, because the plaintiff corporation had *reasonably believed* that it was communicating with an attorney when it conferred with Smith.[7]

In considering the challenge before it, the district court noted that the question of whether the attorney-client privilege was available under the doctrine of "reasonable belief" had not been addressed by the New York Court of Appeals.[8] In the absence of controlling New York authority, the court first looked to pertinent federal law and then to related state authority to ascertain how a New York court would determine the issue.[9] Based on its review of these sources, the court concluded that application of the attorney-client privilege in situations in which the client had a bona fide belief in the status of his or her counsel as a duly admittted attorney is authorized—*but only when the client is an individual and not a corporate employer.*[10]

As noted by the *Financial Technologies* court,[11] few reported cases address the application of what may be characterized as a "putative attorney" concept to the attorney-client privilege.[12] The cases that have recognized this concept have done so with respect to *individual* clients on the public policy ground that the client who mistakenly, but reasonably, believes that the person consulted for legal advice is, in fact, an attorney "should not be compelled to bear the risk of his 'attorney's' deception."[13] Additional support for this position, the court continued, appears in secondary legal authority, such as treatises covering civil practice in New York[14] and in other jurisdictions.[15] According to one authority, in cases in which a person intends to employ a licensed attorney and exercises "a respectable degree of precaution in seeking one . . . he is entitled to peace of mind, and need not take the risk of deception or of the defective professional title."[16]

Relying on the foregoing authority, the court in *Financial Technologies* found that an individual who seeks an attorney for a specific problem should be afforded a measure of protection when he or she consults with a person whom the individual reasonably believes is a duly admitted attorney. Otherwise, the court observed, the individual would be forced to conduct a background check of a prospective attorney, a potentially lengthy process that could deprive the individual of the timely and effective assistance of legal advice.[17]

Unlike individuals, however, corporations hire in-house counsel as salaried employees because of the anticipated need for legal advice on an ongoing basis. Because background investigations of prospective employees constitute a customary employment practice, the court continued, 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."[18] Moreover, because corporations generally use attorneys more regularly than individuals, corporations can more easily investigate one or more attorneys on short notice without any resulting prejudice. As further explained by the court, corporations enjoy a "distinctly different vantage point" from that of the general public, whose lack of knowledge and sophistication with respect to the practice of law constitutes one of the justifications for recognizing the "putative attorney" concept.[19] For these reasons, the court concluded, corporations may not assert a reasonable belief in their in-house counsel's status as duly admitted attorneys, but must "make sure that their attorneys are in fact attorneys,"[20] in order to preserve the protections of the attorney-client privilege.[21]

Financial Technologies is a narrow holding in that it applies only to situations in which the corporate counsel is not licensed in any state. The broader significance of the decision, however, is in the court's willingness to impose sanctions (here waiver of attor-

ney-client privilege) on the corporate client for failure to police the license status of corporate counsel. It is not a large leap to apply the same principle to corporations that allow corporate counsel licensed in one jurisdiction to practice in other jurisdictions without adequate licensure. If that principle takes hold and opposing parties realize its potential effects in litigation, the stakes for the multijurisdictional licensure issues will become much higher.

NOTES

1. State licensing requirements for attorneys employed full-time as in-house corporate counsel vary, as do state rules governing what constitutes the unauthorized practice of law. For an extended discussion of these matters, *see* John K. Villa, *Corporate Counsel Guidelines*, § 3.02 (West Group 1999).
2. Sanctions for the unauthorized practice of law, like the rules defining this conduct, differ from jurisdiction to jurisdiction, with some jurisdictions subjecting counsel to disciplinary action and other jurisdictions subjecting counsel to prosecution for the commission of a misdemeanor. *See id.*
3. No. 99 CIV. 9351 GEL RLE, 2000 WL 1855131 (S.D.N.Y. Dec. 19, 2000).
4. The plaintiffs also asserted the protections of the work-product doctrine, which the court found inapplicable primarily because the questions either sought documents that were not in the witness' possession or merely sought the discovery of facts that are not protected by the doctrine. *See* Financial Technologies International, Inc. v. Smith, *supra*, 2000 WL 1855131, at *7–*8.
5. Mr. Smith had passed the New York State Bar Examination, but had never been admitted to the bar because he had failed to submit the required paperwork. *Id.*, at *1.
6. Under New York law, the law applicable in this diversity action, *see id.*, at *2, one of the requirements for application of the attorney-client privilege is the existence of a communication by a client to "a member of the bar of a court, or his subordinate." *People v. Belge*, 59 A.D.2d 307, 309, 399 N.Y.S.2d 539 (4th Dep't 1977).
7. Financial Technologies International, Inc. v. Smith, *supra*, 2000 WL 1855131, at *2.
8. *Id.*, at *3.
9. *Id.*, at *4–*5.
10. *Id.*, at *7. The court focused its attention on cases dealing with the same facts as the case before it—that is, a person who had not been duly admitted as an attorney in any jurisdiction. The court distinguished cases relied upon by the plaintiff as supportive of its position, *see* Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); United States v. Ostrer, 422 F. Supp. 93 (S.D.N.Y. 1976), because those cases involved the application of the privilege to in-house attorneys who had been admitted to practice law although not in the state in which they were acting as counsel on behalf of the corporation. Thus, there was no question as to the individual's status as an attorney. See Financial Technologies International, Inc. v. Smith, *supra*, at *4.
11. *Id.*, at *4.
12. *See, e.g.*, United States v. Mullen & Co., 776 F. Supp. 620, 621 (D. Mass. 1991); United States v. Tyler, 745 F. Supp. 423, 425 (W.D. Mich. 1990); United States v. Boffa, 513 F. Supp. 517, 523 (D. Del. 1981).
13. United States v. Tyler, *supra*. In Dabney v. Investment Corp. of America, 82 F.R.D. 464 (E.D. Pa. 1979), the corporation argued that the "putative attorney" exception applied to the deposition testimony of its in-house counsel who, with respect to the matters sought to be disclosed, had been a law student working on the house counsel's staff. Because it was undisputed that the corporation knew of the deponent's status as a law student, the exception was held inapplicable. *Id.* at 465.
14. *See* 9 Weinstein, Korn & Miller, *New York Civil Practice* § 4503.03.
15. *See* 8 *Wigmore on Evidence* § 2302.
16. *Id.*, at 584.
17. Financial Technologies International, Inc. v. Smith, *supra*, at *6.
18. *Id.*
19. *Id.*(citing Weinstein, Korn & Miller, *supra*, at 45–130).
20. *Id.*, at *7.
21. *Id.*, at *8 (ordering the re-deposition of Peter Smith, at the cost of the plaintiff corporation, and prohibiting the assertion of the attorney-client privilege premised on his status as a putative attorney).

From this point on . . .
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