California's "Unauthorized Practice of Law" Trap

By June Lin

Introduction

Imagine that you are a lawyer admitted to practice law in New York. Your New York client has a California subsidiary which requests that you provide it with advice on certain contract claims. Your client knows that no one in your firm is licensed to practice law in California. You travel to California to meet with the California subsidiary and negotiate a settlement on its behalf. The California subsidiary is unhappy with your advice and sues you for malpractice. You counterclaim for fees for your work done in New York and California, but the court finds that you engaged in the unauthorized practice of law in California and cannot recover over $1 million of legal fees for your services rendered in California. True story? Yes – as exemplified in the landmark 1998 California Supreme Court case, *Birbrower, Montalbano, Condo & Frank v. Superior Court of Santa Clara County* [1].

Birbrower Ban on Attorney Fees

The Birbrower law firm was located in New York and represented a California subsidiary of a New York client in settling a contract dispute in California. Birbrower sent its lawyers to California on several occasions, despite the fact that the firm's lawyers were not licensed in California and did not associate themselves with local counsel. During these trips Birbrower lawyers met with officers of their California client, filed a claim with the American Arbitration Association in San Francisco and interviewed potential arbitrators. Birbrower lawyers also participated in negotiating the eventual settlement of the dispute. The California Supreme Court found that the firm violated a statute making the unauthorized practice of law a misdemeanor

[1] 17 Cal.4th 119, 70 Cal.Rptr.2d 304, 949 P.2d 1 (1998).

criminal offense, and the firm was barred from recovering any fees for work performed in California for its California client since neither the firm nor the lawyers involved were licensed in California. The court ruled that out-of-state lawyers without California licenses are engaging in the unauthorized practice of law if they participate in "sufficient activities in the state" or create a "continuing relationship with a California client that includes legal duties and obligations." In dicta, the court stated a lawyer could be engaged in the unauthorized practice of law even without being physically present in California, simply by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means.

Aftermath of *Birbrower*

Birbrower generated a great deal of controversy and concern among lawyers and created uncertainty about what level of legal work and activity would constitute the unlawful practice of law. Critics of *Birbrower* claimed that its holding was unnecessarily restrictive. Various courts have attempted to diverge from *Bribrower* without completely overruling it.

For example, in *Condon v. McHenry* [2] the California Court of Appeal found that a Colorado probate lawyer did not violate the California unauthorized practice of law statute in rendering services to a Colorado co-executor under a will written in Colorado for a California resident and which bequeathed California property. The court ultimately decided the case on the basis that a nonresident of California was not in need of, nor entitled to, the protection of the California unauthorized practice of law statute. The court also found that the record did not reflect the practice of "California law" by the Colorado firm, since the Colorado firm's primary representation focused on the implementation of various agreements drafted in Colorado. However the court went further to state that it was insular to assume only California lawyers

[2] 65 Cal.App.4th 1138, 76 Cal.Rptr.2d 922 (1998).

could be trained in California law, and the citizens of states outside of California should not have to retain California lawyers to advise them on California law.

More recently, the Ninth Circuit declined to follow California's definition of unauthorized practice of law in *Winterrowd v. American General Annuity Insurance Co.* [3] A divided federal appeals court panel ruled that a prominent Oregon lawyer who helped his son litigate a federal insurance coverage case in California was entitled to attorney fees even though he was not admitted to practice in California and had not applied for *pro hac vice* admission. The court held that state law – specifically *Birbrower* – does not govern practice of law in federal court. But the court went further to state that even under *Birbrower*, awarding fees for the Oregon lawyer's work would be appropriate. The court found that the *Birbrower* ban on attorney fees being paid to an unadmitted lawyer did not apply because the out-of-state attorney was supervised by his son, a California licensed attorney, while working on the case, and therefore the out-of-state attorney's work was filtered through a licensed in-state attorney. The court differentiated *Birbrower* by noting that in *Birbrower*, New York attorneys made multiple visits to California to advise a California client directly on California law without the help of any lawyer admitted in California. In the *Winterrowd* case, the California client engaged a California lawyer who engaged the Oregon lawyer, the Oregon lawyer performed all of his services remotely from Oregon, and the Oregon lawyer worked primarily on an issue of federal law rather California law. The opinion also noted that the out-of-state attorney had no courtroom role, did not sign pleadings, and had minimal contact with the client and opposing counsel. Therefore, the Oregon lawyer merely supported California litigation but did not make an appearance in the litigation before the district court.

[3] 321 F.3d 933 (9th Cir. 2009).

Soon after the *Birbrower* decision the California legislature opened the field of private arbitration to out-of-state lawyers, effectively overruling that aspect of *Birbrower,* by enacting a law providing for *pro hace vice* admission in arbitration.[4] As a result of the new law, a lawyer admitted to the bar of any state outside California may represent a party to an arbitration within California, provided that the lawyer files a timely certificate and the appearance is approved by the arbitrator. This law was subject to a sunset clause effective January 1, 2007, which was subsequently extended to January 1, 2011.

Conclusion

As the Birbrower law firm discovered the hard way, when it comes to the definition of "unauthorized practice of law," it pays to know what you are doing. The best risk management practice involves carefully analyzing unauthorized practice of law exposure when engaged in interstate practice. The extreme decision in *Birbrower* erects a substantial barrier to the representation of a California-based client by an out-of-state lawyer who is not a member of the state bar of California. If the law of California has a significant impact on the transaction and you are advising a California resident, it may be advisable to get local counsel.

This article is intended to provide a general summary and should not be construed as a legal opinion nor a complete legal analysis of the subject matter. June Lin is an attorney at Niesar & Vestal LLP in San Francisco, a law firm specializing in business law and corporate finance.

[4] Cal. Code Civ. Pro. Section 1282.4; Cal. Ct. Rule 983.4.