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Attorney and Client--Admission of Nonresidents--Federal Courts

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committee but also to policemen, firemen, applicants to the bar, and others who appear before investigatory committees.

Although many undoubtedly disfavor the *Spevack* approach in the expansion of due process because of conflicting interests, it seems reasonable to assume that, in light of recent Supreme Court decisions, the Court will continue to make fully meaningful those individual rights granted by the Constitution.

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ATTORNEY AND CLIENT — ADMISSION OF NONRESIDENTS — FEDERAL COURTS

Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir.), *cert. denied*, 35 U.S.L. WEEK 3210 (U.S. Dec. 12, 1966).

Because of the growing complexity of the law, attorneys who specialize in narrow areas of litigation have increasingly been called upon to conduct litigation in a number of states; consequently, problems arise regarding admission to practice. One question relates to whether, in light of the *Erie* doctrine,[1] an out-of-state attorney may be permitted to practice in a federal court situated in a state which has a strong policy against permitting practice by attorneys who have not been licensed locally.

Historically, admission of attorneys to practice was controlled through the rule-making power of each court,[2] a practice which is still followed in the federal system.[3] By virtue of their power to enact rules governing practice, the federal courts have generally assumed the authority to admit out-of-state attorneys regardless of local policy.[4] Typically, a district court's rules provide that an out-of-state attorney may participate in a particular case through special

[1] The doctrine embodies more than the mandates of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See generally WRIGHT, FEDERAL COURTS § 59 (1963).

[2] State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 232, 140 A.2d 863, 869 (1958); POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 100 (1953).

[3] FED. R. CIV. P. 83.

[4] Several district courts grant general admission to other than those admitted to the state bar of the district. See, *e.g.*, D. CONN. R. 2(a); N.D. ILL. R. 6(a); S.D. IND. R. 1(b); D. MD. R. 2; D. MASS. R. 2. Those with more restrictive admission policies generally provide for special admission. See, *e.g.*, D. KAN. R. 3(f); E.D. MICH. R. 1(2); W.D. TENN. R. 1(b).

admission. This generally requires that he associate himself with a local counsel who is an attorney of record in the case[5] and that the local counsel file a motion stating that the applicant is admitted to the courts of his home state or to some United States court.[6] However, the rules among the district courts are not uniform,[7] and some courts have no rules whatsoever.[8]

Spanos v. Skouras Theatres Corp.,[9] a recent New York federal case, brought to light a deficiency in the procedure for special admission. The defendant, president of a New York movie theater corporation which was bringing an antitrust suit against several major movie producers, sought the aid of the plaintiff, a California attorney who had earned a reputation as an expert in the field of movie industry antitrust litigation.[10] After some persuasion by the defendant, the plaintiff associated himself with one of the defendant's New York lawyers.[11] After several years the local attorney with whom plaintiff had associated himself withdrew from the case, and subsequently the plaintiff's activities diminished greatly although the defendant never discharged him.[12] After the defendant's attorneys eventually negotiated a settlement, the plaintiff requested payment of his contingency fee,[13] but the defendant refused to pay and discharged him.[14] The plaintiff subsequently filed a diversity suit in New York federal district court to recover his fee in quantum meruit,[15] even though he at no time had sought special admission to the New York district court.[16]

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[5] FED. R. CIV. P. 7(b)(2) and 11 jointly provide that only an attorney of record may file motions in an action. Thus, in order to validate his status, an out-of-state attorney must rely upon the local counsel to act.

[6] See, *e.g.*, N.D. GA. R. 1(d); W.D. KY. R. 2(b), (c); D. MONT. R. 1(c).

[7] Application of Wasserman, 240 F.2d 213, 215 (9th Cir. 1956); Crotty, *Requirements for Admission To Practice in the Federal Courts*, in BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 123 (1952); Williamson, *A Curious Checkerboard: Disparate Rules of Admission in Federal Courts*, 42 A.B.A.J. 720 (1956). The disparity is demonstrated in material quoted note 34 *infra*.

[8] For examples, see FEDERAL LOCAL COURT RULES xi-xiv, contained in FED. RULES SERV. (1964).

[9] 364 F.2d 161 (2d Cir.), *cert. denied*, 35 U.S.L. WEEK 3210 (U.S. Dec. 12, 1966).

[10] *Id.* at 163.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] Spanos v. Skouras Theatres Corp., 235 F. Supp. 1 (S.D.N.Y. 1964), *aff'd*, 364 F.2d 161 (2d Cir.), *cert. denied*, 35 U.S.L. WEEK 3210 (U.S. Dec. 12, 1966).

[16] 364 F.2d at 164.

That court was faced with New York's strong statutory policy against permitting any practice by attorneys not admitted to the state courts.[17] The lower court decided, however, that the plaintiff's activities were "isolated incidents"[18] rather than the practice of law and, in rendering judgment for the plaintiff,[19] held that such incidents were excepted from the statute by the recent New York case of *Spivak v. Sachs*.[20] In the alternative, the lower court held that the statute was inapplicable to an attorney working on a matter of federal law to be tried in federal court.[21]

The defendant appealed, and because in the interim the New York Court of Appeals had overturned[22] the *Spivak* case, the Court of Appeals for the Second Circuit reversed[23] but granted the requested rehearing. The appellate court, sitting en banc, reinstated the district court's judgment,[24] implying that New York state law was inapplicable because the statute was designed to protect New York citizens from attorneys of dubious qualifications who are unfamiliar with New York law.[25] The plaintiff's qualifications were undisputed,[26] and his activities were related solely to federal law. The district judge had found that had the plaintiff moved for special admission, there was no doubt that the request would have been granted.[27] Since such admission would have insulated the plaintiff entirely from the effects of New York law,[28] the contract between the plaintiff and the defendant was not an illegal bargain because

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17 N.Y. PENAL LAW § 270.

18 Spanos v. Skouras Theatres Corp., 235 F. Supp. 1, 13 (S.D.N.Y. 1964). The court explained:

> It would seem that the "solitary incident" means a specific matter for one client, as opposed to "a continuing course of conduct" to which the Court had earlier referred. In context, it appears that the "continuing course of conduct" refers to representing a number of different clients in different matters and thus approximating the normal activities of an admitted lawyer practicing in New York. *Ibid.*

19 *Id.* at 18.

20 21 App. Div. 2d 348, 250 N.Y.S.2d 666, *rev'd*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).

21 Spanos v. Skouras Theatres Corp., 235 F. Supp. 1, 13 (S.D.N.Y. 1964).

22 Spivak v. Sachs, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).

23 Spanos v. Skouras Theatres Corp., 364 F.2d 161, 164-67 (2d Cir. 1966).

24 *Id.* at 168.

25 *Id.* at 164. (opinion of the panel).

26 Judge Wyatt had "found that Spanos 'is well trained in law and is a member in good standing of the California bar,' [and] that there was no suggestion of any unlawyerlike conduct on his part." *Id.* at 168.

27 *Ibid.*

28 *Id.* at 169.

it was capable of being performed lawfully.[29] The defendant was estopped from asserting the illegality of the bargain as a defense because, by discharging the plaintiff, he had terminated the latter's right to request special admission and had thus precipitated the illegality.[30]

Although this reasoning would have been sufficient to dispose of the case, the court went on in dictum to state that under the privileges and immunities clause, no state can prohibit its citizens from seeking the aid of an out-of-state attorney to give advice in conjunction with local counsel on a federal claim or defense.[31] Reluctance was expressed at thus increasing the incidents of national citizenship; however, the court was convinced "that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion."[32] The present admission policy of the district court was considered sufficient to assure this constitutional guarantee:

> The federal matter on which the help of a non-resident specialist is sought may be pending in a different state or may not be a suit at all, and specialized legal advice may be needed without the delay or expense incident to admission by a federal court before which the attorney may not have any intention of practicing, even if that were available and would afford sufficient validation.[33]

The court thus felt justified in dispensing with the necessity for special admission.

The difficulty with the court's holding is that while it encourages interstate federal practice, all control over such practice is effectively eliminated. Unless the court is willing to wait until a suit for fees is brought before determining whether an attorney is qualified to practice, both incompetents and experts must be treated alike. Under the court's decision, an attorney need only be admitted to the courts of his home state in order to practice in federal court. It was apparently assumed that all states have high standards for admission to practice and that such admission alone qualifies one to advise on federal law. On the other hand, the present district court rules recognize the great lack of uniformity of bar admission re-

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29 *Ibid.*

30 *Ibid.*

31 *Id.* at 170.

32 *Ibid.*

33 *Ibid.*

quirements from state to state.[34] Thus the court's assumption would appear to have no basis in fact.

Moreover, although the present admission rules are aimed at assuring federal litigants representation by attorneys of reasonably high qualifications, the *Spanos*[35] rule seems to thwart this objective by permitting out-of-state attorneys to practice federal law with no control by the federal courts whatsoever. Such a policy discriminates against local attorneys who are subject to more rigorous admission requirements and invites exploitation by migrant attorneys who have made themselves unwelcome before their home bars.[36]

A further difficulty presented by *Spanos* is the court's assumption that federal law is an entity isolated from local law. This is not generally true, as was recognized in *Ginsburg v. Kovrak.*[37] There, the defendant was licensed to practice generally before several Pennsylvania federal courts as well as the United States Supreme Court but had no license to practice in Pennsylvania.[38] The local bar association brought suit to enjoin him from practice in the state courts of Pennsylvania.[39] The Pennsylvania court issued the injunction[40] and rejected the defense that the defendant practiced only federal law, pointing out that in reality no clear distinction exists between state and federal law; matters of due process and taxation permeate all state law.[41] Furthermore, in certain cases, pendant jurisdiction[42] could bring into federal court an actual state matter when it is related to a federal cause of action. Thus, the distinction

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[34] This deficiency was established in Application of Wasserman, 240 F.2d 213 (9th Cir. 1956) in which the court stated:

> [T]he separate United States District Courts do not recognize a comity in this regard [admissions] with each other or with the appellate courts. Each is a separate tribunal governed by its own rules. Some . . . do not recognize admission to the courts of the state in which they are situated as the test for admission to their own bars. . . . Some . . . give general admission to lawyers who are nonresidents of the state in which the . . . Court sits. But there is no requirement . . . that this be done. *Id.* at 215.

[35] Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966).

[36] Application of Wasserman, 240 F.2d 214, 216 (9th Cir. 1956).

[37] 139 A.2d 889 (Pa. C.P. 1957), *aff'd per curiam*, 392 Pa. 143, 139 A.2d 893 (1958).

[38] *Id.* at 890.

[39] *Ibid.*

[40] *Id.* at 891-92.

[41] *Id.* at 893.

[42] When a federal court acquires jurisdiction over a federal question case where diversity is lacking, it may dispose of the entire matter despite the fact that certain aspects of the case are purely matters for a state court to decide. See generally WRIGHT, *op. cit. supra* note 1, § 19.

between state and federal law is not meaningful for the purpose of delineating the limits of a law practice.

Analogizing to practice before the Patent Office may illustrate the weaknesses of the *Spanos*[43] rule. In *Sperry v. Florida ex rel. Florida Bar*,[44] the Supreme Court dealt with the question of whether a state could enjoin the practice of a nonlawyer patent agent authorized to practice by the Patent Office.[45] Under state law the practice was clearly prohibited.[46] The Court held[47] that Congress had pre-empted state control by specifically authorizing such practice, and, more importantly, it was pointed out that the Patent Office has the power to police the activities of such agents[48] and that not infrequently their expertise may become equal to that of a patent attorney.[49]

It is clear that these factors were not present in the *Spanos* case. The limits of patent practice are more easily determined because the delineation between patent practice and nonpatent practice is far sharper than that between state and federal practice. Furthermore, the Patent Office licenses patent agents, but under the *Spanos* rule, an attorney needs no such explicit authority from a federal court before he can act.

Because these countervailing arguments were disregarded, the *Spanos* court apparently felt compelled to favor the policy of free interstate law practice above all policies. The court emphasized the need for eliminating barriers to the quick availability of expert legal advice.[50] In light of the facts in *Spanos*, this argument seems most unpersuasive; it is hard to believe that during the course of a five-year employment involving upwards of $100,000 in compensation,[51] an attorney should find it too inconvenient, time-consuming, or expensive to obtain special admission to the federal district court. Moreover, it does not seem reasonable to permit expediency of interstate federal practice to so drastically undercut the state's valid interest in prohibiting unauthorized practice.

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[43] Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966).

[44] 373 U.S. 379 (1963).

[45] *Id.* at 381.

[46] *Id.* at 382-83.

[47] *Id.* at 403.

[48] *Id.* at 388-89.

[49] *Id.* at 392.

[50] This need is set forth in text accompanying note 33 *supra.*

[51] The plaintiff actively participated in the litigation for this period of time and for this amount. Spanos v. Skouras Theatres Corp., 364 F.2d 161, 163 (2d Cir. 1966).

Possible solutions to the problem must strike a balance between the state's interest in protecting its citizens from the unauthorized practice of law and the federal interest in the expeditious administration of federal law. Presently, most federal courts solve the problem through special admission. Such admission, however, is not necessary until the attorney physically makes a court appearance.[52] Thus, both the present practice and the *Spanos* rule seem to tip the balance too far in favor of the federal interest.

A solution proposed by one writer is a uniform state bar examination as a minimum prerequisite to law practice in each state.[53] States could supplement the examination if they wished, but under a uniform bar, a reciprocity would be established whereby all states could be assured that an attorney had at least met certain minimum standards. This solution seems to miss the mark. It fails to solve the problem of attorneys who have changed their residence in order to escape a bad reputation, and it fails to guarantee that an attorney is well-trained in federal law. Furthermore, this solution contains no assurance that an out-of-state attorney will be familiar with local law.

A uniform federal bar examination would be little better. Such an examination would be difficult to create, and few attorneys, not to mention graduating law students, are familiar with all areas of federal law. In addition, such a proposal also leaves unsolved the problem of migratory attorneys and fails to assure familiarity with local law.

In view of the shortcomings inherent in the various proposals, the real solution lies in reform of the present system. Most of the difficulty arises from the lack of uniformity in district court rules. If special admission were permitted by all the federal district courts and the procedures and requirements were uniform, as they would be under the proposed uniform rule below,[54] all parties concerned

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[52] *Id.* at 167.

[53] See generally Coffman, *A Uniform National Bar Examination*, 23 ROCKY MT. L. REV. 93 (1950).

[54] The following is set forth as a suggested uniform rule:

> A nonresident attorney not admitted to the courts of this state or district and who acts as counsel in a particular transaction or case for a client within this district shall be required to present himself before this court within the first week after his arrival within this district on which this court is in session and to offer an affidavit stating that he is admitted to practice and is in good standing before the courts of the state or district wherein he resides and that he has not been and is not now subject to disciplinary proceedings by the courts or bar of any state or district. When this court is not in session, such affidavit is to be filed along with written request for admission with the senior