Unauthorized Practice of Law--Practice before the United States Patent Office

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Recommended Citation
Respondent, Alexander Sperry, was admitted to practice before the United States Patent Office in 1928. Although not a member of the Florida Bar, he maintained a Tampa office on the door of which appeared the words, “Patent Attorney.” From this office he represented Florida clients before the Patent Office, performing such functions as the drafting of applications and amendments to applications for patents filed in the Patent Office in Washington, D.C. Petitioner sought an injunction to prevent Sperry from further performance of these functions. Respondent asserted in defense that he acted within the authority conferred upon him by the Patent Office and that the acts performed by him did not constitute the unauthorized practice of law. The Florida Supreme Court granted the petition enjoining Sperry from practicing before the Patent Office in Florida.

The most significant question raised by the Sperry case is whether the respondent, by virtue of his admission to practice before the Patent Office, has the right to perform such functions in Florida without being admitted to the Florida Bar.

Before answering this question, the court had to determine whether the acts of the respondent constituted the practice of law. This was an issue of first impression in Florida. If, of course, practice before the Patent Office, a federal administrative agency, is not the practice of law, the court has no basis for granting the petition.

Generally, a state acting pursuant to its police power has the right to define the practice of law and to determine who is qualified to practice within its borders. This power has been extended to prevent the prac-
tice of law by those who are not admitted to the state bar since the usefulness of licensed attorneys would be otherwise destroyed.\textsuperscript{3}

In the \textit{Sperry} case, the court agreed that federal agencies, such as the Patent Office, are authorized to determine who shall be permitted to practice before them. However, the court did not agree that this authority gives these agencies the power to determine that those licensed by it have the right to practice law, in the particular field involved, in Florida. The Florida Supreme Court had previously held that practice before the Tax Court and the Treasury Department "may constitute the practice of law which may be enjoined if attempted by one not admitted to practice."\textsuperscript{4}

In the \textit{Sperry} case, the court concluded that respondent's activities constituted the practice of law,\textsuperscript{6} and the fact that the activities were carried out before a federal administrative agency rather than a court did not change the character of the acts from legal to non-legal.\textsuperscript{8}

Ohio has taken a different view. The Franklin County Court of Appeals reversed and dismissed two lower court decisions\textsuperscript{7} which held that the preparation, filing, and prosecution of patent applications in the Patent Office constituted the unauthorized practice of law.\textsuperscript{8} It ruled that the federal government has "pre-empted" the regulation of Patent Office practice, leaving the states no power to superimpose their own requirements.\textsuperscript{9}

\textsuperscript{3} People \textit{ex rel.} Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937); Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n of City of Richmond, 167 Va. 327, 189 S.E. 153 (1937); West Virginia State Bar v. Earley, 109 S.E.2d 420 (W. Va. 1959).

\textsuperscript{4} Petition of Kearney, 63 So. 2d 630, 630 (Fla. 1953). The court also ruled that one who holds himself out to the practice "in any phase of law" must be a member of the Florida Bar. \textit{Id.} at 631.

\textsuperscript{5} The court followed the rule that "if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services \ldots constitute the practice of law." 140 So. 2d 587, 591 (Fla. 1962).

\textsuperscript{6} \textit{Id.} at 591.

\textsuperscript{7} \textit{In re} Battelle Memorial Institute, 172 N.E.2d 917 (Ohio C.P. 1960); Battelle Memorial Institute v. Green, 172 N.E.2d 201 (Ohio C.P. 1960).

Another decision which was, in effect, overruled by the court of appeals was Marshall v. New Inventors Club, Inc., 117 N.E.2d 737 (Ohio C.P. 1953).


\textsuperscript{9} "For the reasons set forth, we conclude that control of practice before the U.S. Patent Office is a superior right vested exclusively by the United States Constitution and by acts of Congress in the Commissioner of Patents, subject to appeal to the federal courts, and the state
In some jurisdictions, the practice of "patent law" is not the "practice of law." Courts in other jurisdictions have adopted the Ohio approach, holding that where a federal agency licenses a layman to practice before it, a state may not prevent the layman from engaging in such practice within the state.

The control of admissions to the practice of law, the discipline of those who are admitted, and the prohibition from practice of those who have not been examined and admitted by the courts is acknowledged to be for the protection of the public. The decision in the Sperry case indicates that the court was motivated by this "public service" theory.

While it is true that the preparation and prosecution of a patent application requires legal knowledge and skill in excess of that possessed by the layman, it is also true that these activities may require scientific knowledge and skill in excess of that possessed by the majority of the attorneys who are members of the Bar. It is submitted that member-