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Comment: The Attorney's Dilemma - Practice of Law in a Foreign State

than the courts to solve their property, support and custody problems. If this is so, the separation agreement seems to be a functionally adequate vehicle which will satisfy the needs of the involved parties, the courts and society at large.

COMMENT: The Attorney's Dilemma —Practice of Law in a Foreign State

Introduction

The exigencies of today's advanced society with its highly complex industrialization, transportation and communication have initiated a liberalization of the historically strict application of the concepts of state boundaries and individual state sovereignty. Our way of life is dependent upon the constant involvement and interaction among the states themselves and among individuals of each state. The members of the legal profession have, for the most part, been able to keep pace with this trend and have helped to eliminate many of the difficulties that would have arisen had each state refused to recognize the practical advantages of interstate activity.

In marked contrast is the practice of law itself. Under "illegal practice of law" statutes,[1] the states have prohibited out-of-state attorneys from practicing law within their jurisdictions. In this area, the concept of each state being a closed, separate and distinct unit has remained almost completely intact. An attorney must tred warily, limiting his legal activity when venturing out of the state in which he has been admitted. The purpose of this note is to consider the justification and soundness of this situation in light of present legal thinking and developments.

The Present Situation

The common law, with its technical and intricate legal system, soon recognized that the layman was ill-equipped to handle legal problems.[2] To prevent the layman from so acting and to protect the public in general, individuals were required to obtain a royal writ before engaging in the practice of law.[3] This requirement has evolved into present day restrictions whereby virtually every state confines the practice of law within its borders to those individuals it has qualified as attorneys-at-law. These restrictions are enforced in the majority of states by statutes which make it illegal for a person not certified or admitted to the bar to so practice.[4]

While the term "practice of law" has not been precisely defined it certainly includes out-of-court as well as courtroom activity.[5] For example, this term has been construed to encompass: (1) a single act or transaction;[6] (2) holding oneself out as a licensed attorney;[7] and (3) a con-

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[1] See, *e.g.*, N.Y. PEN. LAW §§ 270, 271; CAL. BUS. CODE ANN. § 6125; WASH. REV. CODE § 9.23.010 (1951).

[2] 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1899).

[3] PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 217-18 (5th ed. 1956).

[4] See statutes cited note 1 *supra*.

[5] Eley v. Miller, 7 Ind. App. 529,—, 34 N.E. 836, 837-38 (1893).

[6] *In re* Baker, 8 N.J. 321,—, 85 A.2d 505, 513-14 (1951).

[7] Brooks v. Volunteer Harbor No. 4, 233 Mass. 168,—, 123 N.E. 511, 512 (1919).

tinuous course of action.[8]

Once a certified attorney leaves his "home" state he loses his professional identity and is considered a layman in the foreign state.[9] If he were found practicing law in such foreign jurisdiction, in addition to losing his fee he could be held in criminal contempt,[10] fined,[11] enjoined from similar action in the future[12] and possibly disbarred in his "home" state.[13]

There is, however, an exception to the above general rule. Most states will allow an out-of-state attorney to appear in its courtrooms *pro hac vice*—with the permission of the court.[14] This exception is limited to actual courtroom litigation and, in many instances the out-of-state attorney must associate himself with an attorney who is a member of the local bar.[15]

Practice and Problems

The interpretations given to "illegal practice" statutes are by no means uniform. Some states are less strict than others in subjecting the out-of-state attorney to the prohibitions of their statutes. For example, Wyoming, taking the most restrictive position, ascribes the following as its reason for forbidding in-state practice by out-of-state attorneys:

> [E]ven if we could properly draw a dividing line between those who have been admitted to practice somewhere and those who have not, it would still be inadvisable and contrary to the public interests to have in the state a body of men, engaged in the practice of law, who are not amenable to the same disciplinary measures as men who have been regularly admitted.[16]

Other states construe their "illegal practice" statutes as directed at those who falsely represent either that they are attorneys or that they are certified to practice law within the state.[17] Hence, in such jurisdictions an out-of-state attorney could render legal services for a client and not be in violation of the law so long as he informed the client that he was not certified in that state.

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[8] Spivak v. Sachs, 21 App. Div. 2d 348, 350, 250 N.Y.S.2d 666, 668 (1st Dep't 1964).

[9] Matter of New York County Lawyers Ass'n (Roel), 3 N.Y.2d 224, 231, 144 N.E.2d 24, 28, 165 N.Y.S.2d 31, 37 (1957).

[10] *Cf.* Matter of New York County Lawyers Ass'n (Cool), 181 Misc. 718, 47 N.Y.S.2d 397 (Sup. Ct.), *aff'd*, 268 App. Div. 901, 51 N.Y.S.2d 640 (1st Dep't 1944), *aff'd*, 294 N.Y. 853, 62 N.E.2d 398 (1945); *In re* Baker, *supra* note 6.

[11] *Cf.* Clements v. State, 141 Tex. Crim. 91, 147 S.W.2d 483 (1940).

[12] Matter of New York County Lawyers Ass'n (Anon.), 207 Misc. 698, 139 N.Y.S.2d 714 (Sup. Ct. 1955).

[13] Since most states make the illegal practice of law a misdemeanor, and since conviction of a misdemeanor is generally regarded as a ground for disbarment, it would appear that a foreign state's determination of "illegal practice of law" could warrant disbarment in the attorney's "home" state. See Matter of McGlynn, 15 App. Div. 2d 683, 244 N.Y.S.2d 324 (2d Dep't 1962); N.Y. JUD. LAW § 90(2).

[14] *E.g.*, N.Y. CT. OF APP. R. VII-4. See Finnerty v. Siegal, 168 Misc. 476, 5 N.Y.S.2d 309 (Sup. Ct. 1938). The generally accepted position is that the rule allowing an attorney from a foreign state to appear in a given case upon application to the court is strictly a privilege and not granted as a matter of right, but simply as an act of courtesy. Browne v. Phelps, 211 Mass. 376, —, 97 N.E. 762, 764 (1912).

[15] Bradley v. Sudler, 172 Kan. 367, 239 P.2d 921 (1952); *In re* New Jersey Refrigerating Co., 97 N.J. Eq. 431, 126 Atl. 174 (1924).

[16] Harriman v. Strahan, 47 Wyo. 208, —, 33 P.2d 1067, 1069 (1934).

[17] Brooks v. Volunteer Harbor No. 4, *supra* note 7. Massachusetts formerly took a stricter position on the legal activities of out-of-state attorneys. See Browne v. Phelps, *supra* note 14.

Strict limitations on out-of-state practice are incongruous with modern developments, legal and otherwise. Today, in order to best serve a client, the attorney may have to engage in some practice of law outside his "home" state. This is true in several areas of legal practice, but none so evident as when the attorney deals with clients in the present commercial setting.

In this setting, while business crosses state lines readily, the attorney representing such business interest cannot. Such was the case in *Taft v. Amsel,*[18] wherein the plaintiff, a New York attorney, was engaged by defendants, Connecticut residents, to advise them in setting up a nationwide trucking concern. The services were rendered primarily in Connecticut. The court denied the attorney's claim for legal fees stating that its "illegal practice" statute forbade the practice of law, in or out of court, by persons not admitted as attorneys in its state.[19]

Because of its harsh effects, this view has been rejected under certain circumstances. Thus, in *Appell v. Reiner,*[20] wherein a New Jersey businessman retained a New York lawyer to obtain extensions of credit and compromises from creditors both in New Jersey and New York, the court allowed recovery of legal fees. While there was no doubt that the New York attorney was practicing law in New Jersey without its certification and that ordinarily such practice would bar a recovery, the court noted that there were unusual situations in which strict application of the statute would not be in the public interest.[21] The court reasoned that the client's obligations were so interwoven and entwined between the two states as to be inseparable. Confusion, impracticality and a waste of the client's money would have resulted if two attorneys—one from each state—were required. The court concluded that "recognition must be given to the numerous multi-state transactions arising in modern times," noting that this was particularly true of New Jersey, "situated as it is in the midst of the financial and manufacturing center of the nation."[22] Although the court allowed recovery upon the specific facts of *Appell,* its opinion was narrow and evidenced its reluctance to deviate from the traditional concepts of "illegal practice."

Other modern commercial developments make a liberal approach desirable. Uniform laws, for example, were born out of a desire for fluidity in commerce between the states. This movement toward uniformity has fostered a need for a legal practice that is, at the very least, greater than merely statewide.

Further justification for a lenient approach lies in the growing prominence of the specialist in all areas of the legal profession. Should not a client be allowed to retain the best attorney in a particular field of law even though the attorney comes from outside the state? This problem was treated in the recent case of *Spivak v. Sachs,*[23] wherein a New York court awarded

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[18] 23 Conn. Supp. 225, 180 A.2d 756 (Super. Ct. 1962).

[19] *Id.* at —, 180 A.2d at 757.

[20] 43 N.J. 313, 204 A.2d 146 (1964).

[21] Appell v. Reiner, 43 N.J. 313, —, 204 A.2d 146, 148 (1964).

[22] *Ibid.*

[23] 21 App. Div. 2d 348, 250 N.Y.S.2d 666 (1st Dep't 1964). At the time of this writing the case is before the court of appeals for final determination. Prior to this case New York had held that an attorney could not recover for services if not admitted to practice law in the state. Fein v. Ellenbogen, 84 N.Y.S.2d 787 (Sup. Ct. 1948).

a judgment to a California attorney for services rendered in a New York matrimonial action. The attorney informed his client that his services would be limited because he was not admitted to practice in New York. The attorney remained in New York for two weeks, advising and consulting with the defendant and her New York attorney. The court considered the services rendered, taken as a whole, to be a single act and not a continuous course of conduct or an attempt to mislead the client in violation of the state's "illegal practice" statute. The court remarked: "With business activities crossing state lines and with communication and travel facilitated it is usual for lawyers to accompany their clients for purposes of consultation and advice."[24] However, the court qualified this stand and stressed that out-of-state attorneys should not feel free to engage in legal activities in the state. "It is true that in any such situation where the acts tend to become regular, a question of degree can arise as to whether this constitutes practice,"[25] and hence found to be illegal under the statute.

In two other areas, the barriers erected by the states toward the practice of law by an out-of-state attorney have been hurdled to some extent with the help of the federal constitution. In the first area, that of criminal law, it is well settled that the sixth amendment, providing for the right to counsel in criminal cases, applies to the states by virtue of the due process clause of the fourteenth amendment.[26] It is also well settled that due process includes the right to counsel of defendant's own choosing.[27] In *United States v. Bergamo,*[28] a federal criminal prosecution, "right to counsel" was interpreted to mean the right to employ any counsel, from any state, regardless of whether the attorney was admitted to practice before the federal courts of the state in which the prosecution was being conducted. When this question arose, a federal court avoided applying the *Bergamo* rule to state criminal prosecutions.[29] However, since there is a constitutional right to counsel of one's own choice,[30] it should follow that a state's "illegal practice" statute, which attempts to restrict that choice, would be unconstitutional. Should this position be adopted by the Supreme Court, the criminal attorney, once chosen by a client, would have to be permitted to practice without any limitations in any state.

The second area, where state limitations on legal practice have been reduced, is the practice of patent law. In the case of *Sperry v. Florida,*[31] which involved the practice of patent law by a layman authorized to practice before the United States Patent Office, the Florida Supreme Court had held that the layman's conduct constituted the unauthorized practice of law which the state could prohibit.[32]

The United States Supreme Court vacated this prohibition, holding that while

[24] *Supra* note 8, at 350, 250 N.Y.S.2d at 668.
[25] *Ibid.*
[26] Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).
[27] Glasser v. United States, 315 U.S. 60, 70 (1941).
[28] 154 F.2d 31 (3d Cir. 1946).
[29] Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950).
[30] *Supra* notes 26 and 27.
[31] 373 U.S. 379 (1963).
[32] One does not have to be an attorney to practice before the United States Patent Office. 35 U.S.C. § 1.31 (1958).

under Florida statutes the layman, preparing and prosecuting patent applications, was engaged in the practice of law illegally, the state law, under the Constitution, must yield before federal legislation which permits such conduct. Regardless of the fact that a state would treat an out-of-state attorney as a layman, such an attorney, if certified to practice before a court of a special branch of the federal government, *e.g.*, the tax court or customs court, would not be bound by the "illegal practice" statute of the state.

Conclusion

Change is necessary in the laws that treat the out-of-state attorney as a layman and severely restrict his practice of law to his "home" state. Modern developments have made strict application of "illegal practice" statutes anachronistic.

For example, at one time there was great apprehension that an out-of-state attorney would have inferior legal knowledge as compared to his counter-part certified within the state. The standards among the states for admission to the bar varied greatly. While this remains partly true today, the general trend toward uniformity is evident. A factor mitigating the remaining inconsistency of standards is the change in legal education. Attendance at a law school is now the dominant form of legal education prerequisite to admission to the bar, and most law schools are either nationally accredited or accredited on a state-by-state basis. Attending a law school outside of one's "home" state is commonplace. In line with this, most law schools today deemphasize local law and stress the underlying theories of common law or civil law. Thus, the lack of an adequate legal background is perhaps no longer a logical reason for treating the out-of-state attorney as a layman under "illegal practice" statutes.

Another factor, which has lost much of its vigor, is the historic inability of a state to exercise control over foreign attorneys. Today, the ability of a state to exercise personal jurisdiction over non-residents is well established.[33] At the present time many states already possess a statutory scheme which would make an out-of-state attorney amenable to suit—*e.g.*, malpractice—within the state in which the legal activity in question was performed.[34] Those states that do not have such a statute could pass one that would make the non-resident attorney subject to the personal jurisdiction of the state. In addition, relatively simple legislation could require the attorney to conform to the standards of ethics set up for those attorneys who are licensed and practicing within the state. If the public can receive adequate protection against out-of-state attorneys, as it now does against local attorneys, the justification for classifying them as laymen, prohibited from practicing law, is indeed weakened.

Perhaps the only remaining justification for not allowing a less restricted interstate legal practice is that the law in each state differs in both its substantive and procedural aspects. While there is much validity in this position, a client should be allowed to assume the risk that his attorney will not be able to adequately perform his services by reason of these differences.

The regulation of the practice of law is absolutely necessary. This can best be ac-

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[33] See, *e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927); International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[34] See, *e.g.*, CPLR 302(a).

complished by the particular state wherein this practice occurs. However, the demands and needs of a modern society call for a change in the present thinking on the part of the states. To treat an attorney, admitted to the bar of another state, as a layman when he leaves that state is both unrealistic and impractical in the present setting. The limitations placed on the out-of-state attorney should be minimal. He should be free to engage in legal activities outside his "home" state as long as those who are affected by such activities are adequately protected.