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Plaintiff, a licensed California attorney, came to New York at the request of the defendant to give advice concerning the possible institution of an antitrust suit in the federal district court. He participated with licensed New York attorneys in extensive pretrial preparations, but was discharged prior to the commencement of the antitrust suit. The plaintiff subsequently brought this action to receive payment for services rendered. The United States Court of Appeals for the Second Circuit, on rehearing en banc, *held* that although the plaintiff was not admitted to the New York bar and had not sought the permission of the federal court to appear in the action, the implied contract for services rendered was enforceable. The Court predicated its holding upon two grounds: (1) the plaintiff probably would have been granted permission to practice if he had requested it, and (2) the privileges and immunities clause prohibits a state from restricting a citizen from retaining an out-of-state attorney to collaborate with a local attorney regarding a federal claim or defense. *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir.), *cert. denied*, — U.S. — , 87 Sup. Ct. 597 (1966).

The need for regulating the legal profession in order to prevent unqualified persons from practicing law was recognized at an early date.[1] Section 270 of the New York Penal Law [2] makes it unlawful for a natural person to practice or appear as an attorney for one other than himself, or furnish legal services, or hold himself out to the public as entitled to practice, or advertise as an attorney, without having been admitted or licensed. As do similar statutes of other jurisdictions,[3] this section seeks to protect the public by confining the practice of law to licensed members of the bar of the particular jurisdiction who are subject to the supervision and control of that state's highest judicial authority.[4] In *People v. Alfani*,[5] the New York Court of Appeals held that section 270 prohibits one who is not licensed in New York from holding himself out as an attorney and executing legal documents and instruments. The Court there concluded that much of the work of an attorney occurs outside the courtroom, and that the legislature did not intend to omit such conduct from the restrictions of this section.[6] In *In the case of Roel*,[7] the Court

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[1] See 1 POLLACK & MAITLAND, THE HISTORY OF ENGLISH LAW 216 (2d ed. 1899).

[2] This section has been re-enacted without change as N.Y. JUDICIARY LAW § 78.

[3] For a discussion of a similar statute of another state see Gardner v. Conway, 234 Minn. 468, 476, 48 N.W.2d 788, 794 (1951).

[4] People v. Black, 156 Misc. 516, 282 N.Y. Supp. 197 (Sup. Ct. 1935).

[5] 227 N.Y. 334, 125 N.E. 671 (1919).

[6] *Accord*, Fein v. Ellenbogen, 84 N.Y.S.2d 787 (1st Dep't 1948) (the appellants violated § 270 by coming to New York and preparing property agreements without being licensed in New York); People v. Collins, 271 App. Div. 887, 67 N.Y.S.2d 53 (1st Dep't 1946) (the defendant violated § 270 by representing falsely that he was a licensed attorney). See also People v. Hanham, 266 N.Y. 573 (1935) (memorandum decision) (a layman represented himself as an attorney, took the necessary steps prior to instituting a negligence suit, and was held to have violated § 270); *In re* Clark, 256 App. Div. 674, 11 N.Y.S.2d 432 (1st Dep't 1939) (a layman violated § 270 by preparing a pamphlet explaining how to make a will without legal aid); *In re* Wenger, 186 Misc. 966, 61 N.Y.S.2d 686 (Sup. Ct. 1946) (memorandum decision) (the defendant violated § 270

of Appeals extended section 270 to include the conduct of a licensed Mexican attorney who maintained an office in New York for the purpose of advising clients and drafting legal documents relating to Mexican divorce law. The fact that the attorney gave no advice concerning New York law did not preclude the Court from finding a violation of this section.

As comprehensive licensing requirements became common, the courts, to deter the unlicensed practice of law, permitted a party contracting with an unlicensed attorney to defend on the ground of illegality of contract in any action by the attorney for compensation for services rendered.[8] Thus, any person not duly qualified under the laws of the particular jurisdiction was deprived of the means to enforce his right to compensation. Since complete deprivation of compensation was often a severe sanction, the courts developed an exception to this rule under the "isolated transaction" doctrine. This doctrine allowed an unlicensed attorney to obtain compensation for such practice of law which could be classified as a single, isolated act of professional service.[9] Although the New York courts initially utilized the "isolated transaction" theory to excuse what would have been a violation of section 270, they gradually yielded to the strong public policy to construe this statute strictly.[10]

In what appeared to be a reversal of this trend, the appellate division, in *Spivak v. Sachs*,[11] held that a California attorney, unlicensed in New York, could recover on a contract for services rendered in New York. The attorney's conduct involved what the court considered to be a solitary incident and, therefore, did not constitute the unlawful practice of law under section 270. The litigation involved a matrimonial action in which the attorney's services included the rendering of opinions regarding financial settlements, custody of children, and a jurisdictional issue. When *Spivak* reached the Court of Appeals, the decision of the appellate division was reversed.[12] The Court held that section 270 makes the giving of legal advice unlawful, and, therefore, the acts of the California attorney were sufficient to violate this section. However, the Court implied that the "isolated transaction" doctrine still has life where a *layman* drafts a single legal instrument, but neither pretends to be an attorney nor exacts a large fee.[13] Thus, it is apparent that section 270 has a very broad scope, including many incidental and out-of-court activities in its definition of the practice of law.

In addition to state regulation, attorneys are governed by the federal courts before which they appear. Each of the district and circuit courts has full authority to determine both the qualifications of its at-

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by taking care of the dispossession proceedings for a landlord).

[7] 3 N.Y.2d 234, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957).

[8] *E.g.*, Tuppela v. Matheson, 291 Fed. 728 (9th Cir. 1923).

[9] Note, 43 VA. L. REV. 411, 416-17 (1957).

[10] People v. Goldsmith, 249 N.Y. 586 (1928) (memorandum decision); People v. Weil, 237 App. Div. 118, 260 N.Y. Supp. 658 (1st Dep't 1932).

[11] 21 App. Div. 2d 348, 250 N.Y.S.2d 666 (1st Dep't 1964).

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

[13] *Id.* at 167, 211 N.E.2d at 331, 263 N.Y.S.2d at 956.

torneys and the procedure to be followed in screening and admitting them. The common characteristic of these rules of the federal courts is that they are flexible and practical. In many of the circuit courts it is required that an attorney already admitted to the court make the proper motion seeking the admittance of another attorney.[14] Others allow the applicant for admission to make the motion and require only an appropriate certificate from a member of the bar.[15] In addition, the rules for the southern and eastern district courts of New York provide that:

> a member in good standing of the bar of any state . . . may upon motion be permitted to argue or try a particular cause in whole or in part as counsel or advocate.[16]

While the rules of the various federal courts are basically similar, certain variances make it evident that the particular procedures demanded by some are more burdensome than others. Thus, the ease with which a client may retain an attorney from another state may depend, in part, upon the complexity of the local rules and the ability of the party to comply with them. However, just as a state may not utilize its power of regulation of attorneys to infringe the rights of individuals,[17] it is clear that neither may district court rules abridge the rights of a class of litigants to use the federal courts.[18]

The concurrent interest of the state and federal judicial systems in regulating the attorneys who practice before them gave rise to the question of whether an attorney, who wishes to appear in a federal court and has complied with its rules, must also comply with the appropriate laws and rules of the state in which the federal court sits. An analogous question was presented to the United States Supreme Court in *Sperry v. Florida*,[19] wherein the Court held that where a party was not a lawyer, but was qualified to appear before the United States Patent Office to represent a patent applicant pursuant to federal law, the state could not prohibit activity pursuant to the application as unlawful under state laws governing the practice of law. It was conceded that the party was not a licensed Florida attorney and was practicing law in Florida within the terms of a statute similar to New York's section 270. However, the Court held that where an "attorney" [20] has complied with the

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[14] F.C.A. Rules c, Fourth Circuit, Rule 6, p. 120; F.C.A. Rules c, Sixth Circuit, Rule 7, pp. 139-40; F.C.A. Rules c, Eighth Circuit, Rule 6, p. 159; F.C.A. Rules c, Tenth Circuit, Rule 7, pp. 183-84.

[15] F.C.A. Rules c, Third Circuit, Rule 8, p. 105.

[16] Rules of the United States District Court for the Southern and Eastern Districts of New York, Rule 3(c), p. 16. In these districts, when an applicant for admission is a member of the New York State bar or is admitted to practice before any of the district courts of New Jersey, Connecticut, or Vermont, no court motion, but a simple petition and affidavit is the only requirement with which these applicants must comply. *Id.*, Rule 3(a), pp. 15-16. Other rules of the Southern and Eastern Districts of New York relate to the provisions of designating an office and a party within the district for the acceptance of service during the litigation. *Id.*, Rule 4(a), (b), p. 17.

[17] Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1965).

[18] Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964).

[19] 373 U.S. 379 (1963).

[20] *Id.* at 384. The term "attorney" here encompasses an agent, attorney at law or other person eligible to practice before the Patent Office.

rules of a particular federal agency, he can not be hindered by the laws of the state in which the administrative tribunal sits.[21]

In the instant case, plaintiff, a California attorney, sued to recover for legal services rendered in New York in the prosecution of a federal antitrust claim. Defendant argued that since plaintiff was not a licensed New York attorney and did not comply with the rules of admission of the federal court, their contract was unlawful and unenforceable.[22] However, the trial court held that plaintiff could recover for his services because his conduct constituted "solitary incident," and, therefore, was not a violation of Section 270 of the New York Penal Law as interpreted by the appellate division in *Spivak v. Sachs*.[23] The fact that plaintiff had not complied with the rules of admission of the federal court was found not to be conclusive against the plaintiff. The court pointed out that it was the responsibility of the defendant's New York attorneys to make the motion for plaintiff's admission.[24] Although this motion had never been made, the court in the exercise of its discretion chose not to require it. When the case was appealed to the three-judge panel of the court of appeals, the *Spivak* decision relied upon by the district court had been reversed by the New York Court of Appeals. Therefore, the circuit court reversed the district court, and found plaintiff's conduct to be unlawful under Section 270 of the Penal Law. Consequently, it prohibited his recovery of compensation for services rendered. Upon rehearing, the court of appeals, en banc, affirmed the district court's decision without relying upon the *Spivak* case. Analyzing the nature of the contract under which plaintiff was employed, the Court reasoned that since the defendants contemplated the necessity of court appearances by plaintiff, they impliedly promised to make all the motions needed to make such court appearances lawful. If the motions had been made, there was no reason to believe that plaintiff would not have been admitted. Hence, the Court continued, plaintiff's conduct would have been immune from the prohibitions of Section 270 of the Penal Law rendering the contract fully enforceable. Since Spanos' conduct would have been incident to the activities authorized by his compliance with the district court rules, the contract was a legal bargain susceptible of being lawfully performed without his being admitted to the New York bar. Thus, the Court found that an attorney practicing before a federal court need not comply with the rules of the particular state in which the federal court sits. The Court considered defendant's failure to make the motion for plaintiff to be a breach of its promissory duty, and found in favor of plaintiff under the rule that if a party unjustly prevents the performance of a condition of his own promissory duty, he eliminates that performance as a condition.

While the Court noted that the above analysis would normally be sufficient to dispose of the case, the importance of the

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[21] *Accord*, People v. Miller, 23 App. Div. 2d 144, 259 N.Y.S.2d 647 (1st Dep't 1965).

[22] Spanos v. Skouras Theatres Corp., 235 F. Supp. 1, 14 (S.D.N.Y. 1964), *aff'd*, 364 F.2d 161 (2d Cir. 1966).

[23] 21 App. Div. 2d 348, 250 N.Y.S.2d 666 (1st Dep't 1964).

[24] Spanos v. Skouras Theatres Corp., *supra* note 22, at 12.

problem warranted the further holding that under the privileges and immunities clause of the Constitution, no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state attorney to collaborate with a local attorney and give advice concerning that claim or defense within the state. The Court recognized the reluctance of the judiciary to expand the applicability of the privileges and immunities clause by enlarging the concept of national citizenship, but pointed out that a citizen must be able to exercise a right conferred by federal law by the use of necessary and appropriate means. Thus, the right to defend oneself in an antitrust case necessarily includes the right to seek the aid of a nonresident specialist in this field. The Court emphasized that this right is especially necessary in light of the specialization required in complex fields such as antitrust. Coincident with the right to hire an out-of-state expert is the duty to pay him for his services, and, therefore, the plaintiff was entitled to compensation for services rendered.[25]

The Court pointed out that a liberalization of the district court rules would not be a sufficient solution to the problem since some situations would not require the out-of-state attorney to appear in the federal court to perform his services. Thus, he would not seek admission to the federal court and his conduct would be held in violation of a statute similar to Section 270 of the New York Penal Law. Thus, the Court felt a need to apply the privileges and immunity clause to insure the rights of both the local citizen and the foreign attorney in such a situation.

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

The dissenting opinion emphasized that plaintiff had practiced law contrary to the prohibitions of Section 270 of the Penal Law since he was not admitted to the New York bar and had not complied with the rules of the district court.[26] The dissent saw no reason to ignore the public policy of New York by allowing plaintiff to recover. In disputing the application of the privileges and immunities clause to the facts of this case, the dissenting judge pointed out that New York did not prohibit defendant from retaining plaintiff. Furthermore, granting that the defendant has a federal right to retain an out-of-state counsel, the dissenting opinion reasoned that the privileges and immunities clause does not give the retained counsel a right to recover for his services. In conclusion, the dissent suggested that the majority's holding would destroy the power of any court to exercise control over those who practice before it.[27]

The Court in the instant case took an unusual step when it construed the privileges and immunities clause of the fourteenth amendment of the Constitution to include the right to retain an out-of-state attorney. The privileges and immunities clause forbids a state from enacting legislation abridging the privileges of United States citizenship. In the *Slaughter House Cases*,[28] the Supreme Court of the United States distinguished state and federal citizenship and the rights and privileges derived from each.[29] In *Crandall v. Nevada*,[30]

[26] *Id.* at 171.
[27] *Id.* at 172.
[28] 83 U.S. (16 Wall.) 36 (1872).
[29] Implicit in this distinction is the fact that a state may abridge privileges of state citizenship providing no other portions of the federal or state constitutions or laws are thereby violated.

the Court discussed those privileges which derive from federal citizenship.[31] Unless a particular privilege is a unique result of federal citizenship, it is not protected from state infringement under the privileges and immunities clause of the fourteenth amendment. Attempts to extend the purview of this clause to include a right not directly resulting from federal citizenship have been suppressed by the courts.[32] Thus, the privileges and immunities clause has been applied only restrictively, and only to those rather unique rights derived from federal citizenship.[33]

The majority was careful to limit its application of the privileges and immunities clause to the particular facts presented, *i.e.,* where a foreign attorney was retained by a client to come to his state to work with an attorney licensed in that particular state, in the preparation of a case having a federal claim or defense. However, the Court did not discuss the applicability of its holding to a case where federal jurisdiction is based only on diversity of citizenship, or where the foreign attorney did not collaborate with a local attorney. In applying the privileges and immunities clause to a new area, the Court established stringent conditions based upon the facts of this case. By so doing, the Court has sought to avoid becoming the subject of widespread criticism for extending a constitutional clause which has been narrowly interpreted in the past. Rather than allowing each federal court to apply its own procedural rules in similar cases, the Court, in basing its holding on the privileges and immunities clause, has attempted to formulate a rule applicable to all federal courts. This result is perhaps necessary due to the broad application and the complex nature of modern federal law, which can not be universally applied in all states without allowing every litigant equal access to the best legal advice available.

It seems clear that the *Spanos* case did not alter the concept that each court has the power to regulate the admission of

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The Supreme Court has consistently held that Congress did not seek to bring the whole spectrum of civil rights under control of the federal government and thereby censor all rights derived from state citizenship (Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867)). The privileges derived from state citizenship are those fundamental rights which belong to citizens of all free governments. These rights include the protection of the government, the rights of property, and the pursuit of happiness under protection of law.

[30] 73 U.S. (6 Wall.) 35 (1867).

[31] The Court included the following as privileges derived from federal citizenship: the right to come to the seat of government to transact business, share its offices and seek its protection; the free access to seaports and protection on the high seas or in a foreign nation; the right to petition for a redress of grievances; and the rights derived from federal treaties. In Twining v. New Jersey, 211 U.S. 78 (1908), the Court expanded the rights of national citizenship to include the right to vote for national officers, to protection under the custody of United States marshalls, and to enter public lands.

[32] In Colgate v. Harvey, 296 U.S. 404 (1935), it was held that the right of a citizen of one state to enter into a contract with a citizen of another state is a privilege of United States citizenship. However, Madden v. Kentucky, 309 U.S. 226 (1964), overruled this holding and stated that the right to carry on one's trade or business was not a privilege of federal citizenship.

[33] In contrast, the due process clause of the fourteenth amendment has been expanded to include many of the rights guaranteed by the Bill of Rights. See Palko v. Connecticut, 302 U.S. 319 (1937); Adamson v. California, 332 U.S. 46 (1947).

its attorneys. The public policy to protect citizens from fraudulent and incompetent legal advice remains an essential consideration. It is outweighed, however, by the necessity of affording all citizens an equal opportunity to obtain expert advice concerning complex federal laws and regulations. Although the holding of the present case makes a significant inroad into the province of state regulation of all attorneys within its geographic bounds, it does not undermine the state's power to regulate the activities of attorneys in any critical fashion. Since the great majority of legal problems arising within a state will of necessity concern state, rather than federal, law, all attorneys advising in these matters will continue to be closely regulated by their state. Those crossing state lines to advise on merely federal matters will tend to be attorneys whose opinion and reputation are valued and whose advice is competent. Furthermore, the actual practice of law before federal courts remains completely subject to the judicial regulations of the particular courts, and properly so, in order to prevent any significant deterioration in the quality of the federal bar.

Homosexual Resident Alien Deportable as a Psychopathic Personality

Petitioner, a resident alien, was ordered deported on the ground that, being a homosexual at the time of his entry into the United States, he was excludable under Section 212(a)(4) of the Immigration and Naturalization Act of 1952 [1] as a "psychopathic personality." On appeal, the Court of Appeals for the Second Circuit affirmed, *holding* that the term "psychopathic personality" was a legal word of art which was clearly intended to include homosexuals, and, therefore, was not unconstitutionally vague. *Boutilier v. Immigration and Naturalization Serv.*, 363 F.2d 488 (2d Cir.), *cert. granted*, — U.S. —, 87 Sup. Ct. 285 (1966).

The power to deport is a weapon of defense and reprisal and is inherent in every sovereign state.[2] Congress, by virtue of its constitutional authority to regulate foreign commerce, has the power of deportation.[3] In order to supplement this power, Congress may also deny a person admission to the United States, or impose such reasonable restrictions on his admission as it deems proper.[4]

This power to exclude and deport has been utilized from the outset of our government, and, to date, the basic pattern of the procedure has remained essentially the same.[5] The deportation of undesirable aliens, however, became dormant after 1798, and the practice was not re-established until 1888.[6] Criteria for

[1] Immigration & Naturalization Act of 1952, § 212(a) (4), 66 Stat. 182, 8 U.S.C. § 1182(a) (4) (1964).

[2] Harisiades v. Shaughnessy, 342 U.S. 580, 587-88 (1952).

[3] Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889).

[4] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[5] *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 644-45 (1953).

[6] *Id.* at 646.