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William E. Flowers

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# The Practice of Law by Out-of-State Attorneys\*

## I. INTRODUCTION

Our nation is a unit economically and socially, with goods and people moving freely across the country. Yet legally it is fragmented with fifty states and their laws operative within one nation. Voltaire said of the France of his time that a traveler changed laws as often as he changed horses. We surpass France with its provinces of the Old Regime. The American cross-country traveller changes his law a dozen times without changing his coach or his plane.<sup>1</sup>

Multi-state legal problems are commonplace for the American attorney. In meeting the legal needs of the business and personal lives of his clients, he is confronted daily with laws of the several components of our federal system. Out-of-state litigation and office work situations constantly demand his presence in jurisdictions in which he is not admitted to practice. Yet present admission rules make his appearance in such litigation difficult at best, and render such office work virtually impossible. These restrictions on the interstate practice of law have become intolerable—in a legal, if not always a practical,<sup>2</sup> sense—in the context of our economy. Their re-examination is the subject of this note.

The broad issue presented is: when may a foreign attorney be admitted to the practice of law in a local jurisdiction?<sup>3</sup> An attorney

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\*The author of this note was co-recipient of the Dean's Award, given for the best senior dissertation submitted by a member of the graduating class.

1. Cheatham, Draft Foreword, proposed symposium on vertical conflict of laws, p. 1 (Vanderbilt University School of Law 1966). The symposium is scheduled for publication in 21 VAND. L. REV. issue 4 (May, 1968).

2. Admission restrictions may not be enforced in many situations concerning the foreign attorney. See 31 S. CAL. L. REV. 416, 420 (1958) (citing bar association questionnaire noting probability of non-enforcement based on hardship to clients in Alabama, Arkansas, Kentucky, Ohio, Oklahoma, Tennessee, Vermont, Virginia, New York City and Milwaukee). But see text accompanying note 132 *infra*. See also 78 HARV. L. REV. 1651 (1965).

3. The various subissues presented restate the central issue with varied characterizations of the terms "foreign attorney," "practice law," and "local jurisdiction." This central issue is raised most frequently by clients as a defense to attorneys' suits to recover for services rendered. See, e.g., *Spivak v. Sachs*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965). Bar association suits to enjoin local practice by the foreign attorney, or for contempt, are not uncommon. See *In re Bercu*, 299 N.Y. 728, 87 N.E.2d 451 (1949) (injunction and contempt proceeding); Application of New York County Lawyers' Ass'n, 207 Misc. 698, 139 N.Y.S.2d 714 (Sup. Ct. 1955) (contempt proceeding). Criminal prosecutions are also available. See, e.g., N.Y. PEN. LAW §§ 270, 272 (McKinney 1944, Supp. 1966) (misdemeanor). Findings of fact made in local jurisdictions may be the bases for disciplinary proceedings in foreign jurisdictions. See Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 COLUM. L. REV. 1039 (1952); cf. *In re Kent*, 39 N.J. 114, 187 A.2d 718 (1963) (N.J. attorney reprimanded for unethical practice in Pa.). For a discussion of

is "foreign" when he may not legally practice law within a jurisdiction without fulfilling certain conditions in addition to those he met for the privilege of holding himself out as an attorney. The admission problem of the foreign attorney would be academic, of course, if he could qualify as a local attorney without substantial difficulty. Unfortunately, such is not the case, and meeting the admission requirements in each necessary jurisdiction is quite impractical,<sup>4</sup> especially where the needs of the foreign attorney's clients touch several states. Without the alternative of admission to practice, then, the foreign attorney must find other means by which he may be permitted to practice in the local jurisdiction.

To focus the discussion on the foreign attorney, certain assumptions have been made. The practitioner with whom we shall be concerned will always be a lawyer. Thus, problems of the lay practitioner are outside the breadth of this note. The foreign attorney also will generally be assumed to be "practicing law" within the meaning of the local law. For the most part, then, no examination of what the practice of law consists will be necessary. Further, practice of foreign attorneys before administrative tribunals and other specialized or non-adversarial practice will not be discussed directly. Finally, no detailed consideration will be given to the effects on the attorney of non-compliance with admission standards.

## II. AUTHORITATIVE SOURCES FOR ADMISSION OF FOREIGN ATTORNEYS

The sources of authority to prescribe or limit rules governing the

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the ethical considerations involved, see Opinions of the Committee on Professional Ethics, *The Practice of Law Across State Lines*, 53 A.B.A.J. 353 (1967).

4. The usual qualification for a "local attorney" is that he be a member of the local bar. Membership is usually available for foreign attorneys without examination, but additional requirements of residency and active practice for a stated period make bar admission impractical for the usual interstate practitioner. See, e.g., CAL. BUS. & PROF. CODE ANN. § 6062(d) (West 1962) (three month residency); 6062(e) (active and substantial practice for four of prior six years); KY. CT. APP. R. 2.110 (active practice for five of seven preceding years); MICH. STAT. ANN. § 27A-946 (1962) (three of five preceding years' active practice and Michigan office, with intent to establish active practice); N.Y. CT. APP. R. VII-1 (five years of foreign practice and six months actual residency). Admission to the bar, however, does not always ensure that an attorney may practice without satisfying other conditions. He may be required to maintain an office or reside within the jurisdiction in order to practice without applying for permission. See S.D.N.Y. R. 4 (office within district or E.D.N.Y. for court appearance); KAN. SUP. CT. R. 54, interpreted in *Martin v. Walton*, 368 U.S. 25 (1961) (requiring association of local attorney for court appearance of Kansas attorney regularly practicing in Missouri). See generally Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711 (1967). Where an attorney is from a foreign country, bar admission is virtually foreclosed by requirements of American citizenship. See, e.g., CAL. BUS. & PROF. CODE ANN. § 6062(a) (West 1962); N.Y. CT. APP. R. VII-1.c. For a discussion of the admission problems of the international lawyer in a foreign country, see Note, *Foreign Branches of Law Firms: The Development of Lawyers to Handle International Practice*, 80 HARV. L. REV. 1284 (1967).

admission of foreign attorneys can be identified on two levels—that of the federal system, and that of the separation of powers. At the federal system level, state and federal constitutional law establish outer limits for the application of state and federal admission rules, and state and federal law are the primary relevant sources of such rules. Generally, state law governs admission to state practice, and federal law governs admission to federal practice.<sup>5</sup> Under certain circumstances, admission rules are also prescribed for state practice by federal constitutional law.<sup>6</sup> In addition to these prescribing functions, federal and state law perform significant limiting functions.<sup>7</sup>

Identification of these federal system sources, however, does not by itself explain the allocation of admission power among the parts of the federal system. The “practice” which is to be governed by rules arising from these sources must be defined. The separation of the state from the federal is easily accomplished in litigation practice, where the nature of the tribunal is conclusive.<sup>8</sup> State and federal practice cannot so easily be distinguished, however, in office practice situations, where the locus of performance is not helpful. Content of the law practiced is probably the significant differential, but federal exercise of power in this area has been limited thus far.<sup>9</sup>

The separation-of-powers level of authoritative sources reflects the distribution of federal and state rule-prescribing powers among the branches of the federal and state governments. Within the federal government, the executive branch has authority to deal with practice before its administrative agencies; the legislative branch can control practice before its committees; and the judicial branch has control

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5. “The several states, so the tenth amendment to the Constitution provides, are the residuary keepers of the governmental powers neither delegated to the nation, prohibited to the states, nor reserved to the people. In the absence of such delegation, prohibition, or reservation, the law applicable to the legal profession is state law.” Cheatham, *The Reach of Federal Action Over the Profession of Law*, 18 STAN. L. REV. 1288, 1290 (1966).

6. Admission of foreign attorneys to state practice as of right is discussed in Parts IV(a)(2) and V(B) *infra*.

7. For a discussion of the varieties of federal action, including proscribing and limiting law, see Cheatham, *supra* note 5, at 1290.

8. By virtue of the supremacy clause of the federal constitution, state admission rules are not binding in the federal courts. *In re McCue*, 211 Cal. 57, 293 P. 47 (1930) (state court refrained from applying state rules to preparation for federal litigation). *Cf.* note 166 *infra*. *See also* note 94 *infra*.

9. Concurrent federal power over office practice may have been recognized in *Sperry v. Florida*, 373 U.S. 379 (1963). The Supreme Court noted that a lay practitioner licensed by the federal Office of Patents was not subject to state unauthorized practice rules in preparing opinions as to patentability and in holding himself out as a patent specialist. 373 U.S. at 402 n.47. However, the Court also used more limiting language, stating that “registration in the Patent Office does not authorize the general practice of patent law, but sanctions only the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications.” 373 U.S. at 386.

over admission to practice before its courts. The allocation of federal power over office practice matters concerning federal law is not yet settled.<sup>10</sup> Within the states, there is a division of authority as to whether the legislature or the judiciary possesses ultimate authority over admission of attorneys.<sup>11</sup>

### III. POLICIES RELEVANT TO ADMISSION OF FOREIGN ATTORNEYS

The public interest<sup>12</sup> in representation by qualified counsel suggests the desirability of a policy favoring admission of foreign attorneys. Conflicting conceptions of this policy, however, are maintained by the interested public of the local jurisdiction and that of the entire country. The former, or local public, is said to have a strong interest in restricting admission of foreign attorneys, based on the need for protection from unethical and incompetent legal services.<sup>13</sup> The latter, or interstate public, has, on the other hand, an interest in the inter-

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10. See text accompanying notes 146-56 *infra*.

11. The usual state rule places control over bar admission in the legislature, and control over admission *pro hac vice* in the judiciary. See, e.g., *Freeling v. Tucker*, 49 Idaho 475, 289 P. 85 (1930); *In re Mock*, 146 Cal. 378, 80 P. 64 (1905). The inherent power of the highest state court occasionally governs all admission to the practice of law. See, e.g., *State ex rel. Green v. Brown*, 173 Ohio St. 114, 180 N.E.2d 157 (1962); N.J. CONST. art. 6, § 2, ¶ 3. Qualifications for admission *pro hac vice* as well as bar admission are controlled by the legislature in some states, with further rule-making powers delegated to the courts by statute. See, e.g., *Bradley v. Sudler*, 174 Kan. 293, 255 P.2d 650 (1953); KAN. STAT. ANN. §§ 7-103, 7-104 (1964); KAN. SUP. CT. R. 41, 54, cited in *Martin v. Walton*, 368 U.S. 25, 26 (1961).

12. Restrictive admission rules rest solely on the need for protection of the public interest. *Appell v. Reiner*, 43 N.J. 313, 316, 204 A.2d 146, 148 (1964). Protection of the bar is not a valid consideration. See *Darby v. Mississippi Bar Examiners*, 185 So. 2d 684, 687 (Miss. 1966); *People v. Alfani*, 227 N.Y. 334, 339, 125 N.E. 671, 673 (1919). Economic protection of local lawyers could only be valid insofar as the increased competition from foreign attorneys lowered the local bar's ethical standards. See 78 HARV. L. REV. 1651, 1652 (1965). "If it is this rationale that underlies the protectionist argument, however, there is an inconsistency with the unrestricted admission of residents who meet prescribed standards. If the state wishes to guarantee that local attorneys will have income sufficient to make unethical conduct unattractive, it would seem more logical to achieve this aim through restricted entry provisions applicable to all potential practitioners. Furthermore, to the extent that out-of-state attorneys would actually reduce the amount of local business, the reduction would not seem likely to affect those lawyers most susceptible to economic pressures. The more important threat to low-income attorneys is probably posed by nonlawyers, such as real estate agents and accountants, who often render legal advice as an incident to other services." *Id.*

13. "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (regulation of medical profession). See *Spivak v. Sachs*, *supra* note 3. "The [unauthorized practice] statute aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." *Id.* at 168, 211 N.E.2d at 331, 263 N.Y.S.2d at 956.

state availability of legal services, and thus in the freedom of movement of attorneys from one jurisdiction to another.<sup>14</sup>

The balance between these two conflicting forces is presently weighted heavily in favor of the local interests. But recent events, notably decisions in the New Jersey Supreme Court<sup>15</sup> and the United States Court of Appeals for the Second Circuit,<sup>16</sup> indicate that the interests of the interstate public are gaining new prominence. It is the thesis of this note that this trend is wise and important, and that the substantial reduction of restrictions on admission of foreign attorneys should be encouraged.

Other policies which affect the formulation and application of admission rules concerning the foreign attorney include those basic to the rights granted by the federal and state constitutions. Federal constitutional policies behind, for example, the right to counsel<sup>17</sup> and the privileges and immunities,<sup>18</sup> full faith and credit,<sup>19</sup> due process,<sup>20</sup> equal protection<sup>21</sup> and supremacy clauses<sup>22</sup> all may have application

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14. See *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966). The clearest confrontation between these two policies occurred in the case of *Appell v. Reiner*, 81 N.J. Super. 229, 195 A.2d 311 (1963), *rev'd*, 43 N.J. 313, 204 A.2d 146 (1964), where the New Jersey Supreme Court cast aside the restrictive local policies advocated by the lower court in favor of the liberal federal system policy of availability of interstate legal services. New York has recognized the possibility of such an exception, but has yet to create it. See *Spivak v. Saehs*, *supra* note 3 at 168, 211 N.E.2d at 331, 263 N.Y.S.2d at 956. See also text accompanying notes 136-42 *infra*.

15. *Appell v. Reiner*, *supra* note 14 (New York attorney permitted to conduct New Jersey office practice because of public interest in single counsel for substantially inter-related New York-New Jersey transactions).

16. *Spanos v. Skouras Theatres Corp.*, *supra* note 14 (California lawyer permitted to practice in federal court in New York without admission to bar of court, on privileges and immunities of client to be represented where federal claim or defense involved).

17. U.S. CONST. amend. IV. See *Cooper v. Hutchison*, 184 F.2d 119, 122 (3d Cir. 1950) (state capital prosecution); *United States v. Bergamo*, 154 F.2d 31 (3d Cir. 1946) (federal counterfeiting prosecution). For a general discussion of the constitutional considerations, see Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 COLUM. L. REV. 731 (1967).

18. U.S. CONST. art. IV, § 2, cl. 1. See *Spanos v. Skouras Theatres Corp.*, *supra* note 14, at 170.

19. U.S. CONST. art. IV, § 1. Explicit use of this clause has not occurred in an admission case, but the Second Circuit has spoken of the recognition of a "lawyer licensed by 'public act' of any other state," which is full faith and credit language. *Spanos v. Skouras Theatres Corp.*, *supra* note 14, at 170. Broader means of employing this provision are suggested in Part IV(A)(2) *infra*.

20. U.S. CONST. art. V, amend. XIV, § 1. Substantive due process was suggested in early cases, but is now generally disregarded. See *Dent v. West Virginia*, *supra* note 13, at 122. Procedural due process has been urged as the basis for a right to counsel of one's own choice. See *Cooper v. Hutchison*, *supra* note 17, at 121-22.

21. U.S. CONST. amend. XIV, § 1. See *Martin v. Walton*, *supra* note 4, at 28-29 (dissenting opinion).

22. U.S. CONST. art. VI, cl. 2. See *In re McCue*, *supra* note 8, at 66, 293 P. at 52 (federal district court practice); *Cowen v. Calabrese*, 230 Cal. App. 2d 870, 872-73, 41 Cal. Rptr. 441, 443 (1964) (federal bankruptcy court practice). Both cases spoke

to state and federal admission of foreign attorneys. In litigation practice, there may be a further policy of promoting administrative convenience with respect to such considerations as service of process and the procuring of attorneys at the call of the docket;<sup>23</sup> this interest argues, of course, for restrictions on admission of foreign attorneys.

The identification of each of these policies, combined with an understanding of the relevant authoritative sources, should provide a helpful guide for the evaluation of the rules governing admission of foreign attorneys.

#### IV. ADMISSION TO LITIGATION PRACTICE

An attorney desiring to represent a litigant generally cannot do so without meeting certain prerequisites. One type of such prerequisites entitles an attorney to engage in litigation practice without judicial permission; that is, to practice as a "local" attorney. These prerequisites vary from mere admission to the bar of the jurisdiction<sup>24</sup> to further requirements of residency in the state,<sup>25</sup> county,<sup>26</sup> or judicial district<sup>27</sup> of the court.<sup>28</sup> A second type of prerequisites exists for the non-local or "foreign" attorney. This section of the note will examine these

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of the state's failure to regulate, but the supremacy clause would seem to have been the authoritative source. See also *Sperry v. Florida*, *supra* note 9, at 384, 403.

23. *Martin v. Walton*, *supra* note 4, at 27 (dissenting opinion).

24. See, e.g., N.Y. JUDICIARY LAW § 90.1.a (McKinney Supp. 1967). The New York courts apparently have not added a requirement of residency at the time of practice, although residence is required for bar admission. Compare *In re Arnold's Will*, 125 N.Y.S.2d 782, 784 (Sur. Ct. 1953), with N.Y. CT. APP. R. VII-1.

25. See, e.g., *Anderson v. Coolin*, 27 Idaho 334, 338, 149 P. 286, 289 (1915).

26. See *Letaw v. Smith*, 223 Ark. 638, 268 S.W.2d 3 (1954) (county residence requirement invalid under state law); *Arthaud v. Criffin*, 202 Iowa 462, 210 N.W. 540 (1926) (county residence requirement upheld). Pennsylvania formerly required county residency and maintenance of a county law office for appearances without association of local counsel. See *Application of Christy*, 362 Pa. 347, 67 A.2d 85, cert. denied, 338 U.S. 869 (1949) (county requirements not violative of due process of law); *In re Rules of Court of Pike County*, 41 Pa. D. & C. 223, 54 (C.P. Pike County, 1941) (court can require bona fide residence in county for both admission to county court and continuation of privilege of local practice); PA. STAT. ANN. tit. 17, § 1602 (1962). Amendments in 1965 and 1966, however, have eliminated these conditions, and have made admission to the state bar sufficient for an attorney to appear in any county court without association of other counsel. See PA. SUP. CT. R. 14.

27. See *Bradley v. Sudler*, *supra* note 11 (associate counsel must be resident of and maintain law office in judicial district of the court). Kansas now requires only that associate counsel be members of the state bar. See KAN. STAT. ANN. § 7-104 (1964); KAN. SUP. CT. R. 54.

28. Some jurisdictions have also added a condition regarding maintenance of a law office within the state, county, or judicial district. See *Bradley v. Sudler*, *supra* note 11; *Application of Christy*, *supra* note 26. Some also require continued regular practice within the state's courts. See *Martin v. Davis*, 187 Kan. 473, 357 P.2d 782 (1960), *aff'd sub nom. Martin v. Walton*, *supra* note 4 (interpreting KAN. SUP. CT. R. 54 to require association of local counsel by Kansas attorneys regularly practicing out of state).

prerequisites, and their applicability to state and federal litigation.

Litigation practice is "practice of law" as regulated by court rules and statutes. It most obviously includes participation in proceedings before judicial tribunals. It also includes participation in the preparation for such proceedings, which extends to pre-litigation research as well as formal pre-trial conferences and deposition proceedings.<sup>29</sup> Generally, there is no quantitative test for classification of work as litigation practice;<sup>30</sup> any amount of such practice will constitute litigation as proscribed by unauthorized practice rules. For preparation to come within a state's prohibition, however, it must take place in the jurisdiction in which the cause of action is pending.<sup>31</sup>

### A. Admission to State Litigation Practice

1. *Practice with Permission of the Court—Pro Hac Vice.* (a) *Rules for State Admission Pro Hac Vice.*—The foreign attorney who has obtained permission of a court to appear in a particular litigation is said to have been admitted *pro hac vice*; that is, this attorney is permitted to practice only in one court for the occasion of a single lawsuit.<sup>32</sup> Admission *pro hac vice* is generally within the discretion of the court,<sup>33</sup> but that discretion is often not operative until various pre-

29. See *In re McCue*, *supra* note 8, at 68, 293 P. at 52 (deposition outside of court was "in fact a proceeding in court"); *Tuppela v. Mathison*, 291 F. 728 (9th Cir. 1923) (preparation is litigation practice).

30. See, e.g., ALA. CODE tit. 46, § 42 (1958) ("any act" in connection with court proceedings). This test is in contrast to that for office practice, which exempts isolated or incidental practice from the operation of unauthorized practice statutes. Cf. *Spivak v. Sachs*, *supra* note 3, at 166-68, 211 N.E.2d at 331, 263 N.Y.S.2d at 955-56 (single document for small fee or no fee is not law practice).

31. See *Spivak v. Sachs*, *supra* note 3 (office practice rules applied to New York preparation for Connecticut litigation); ALA. CODE tit. 46, § 42(a) (1958).

32. *Pro hac vice* literally means "for this turn" or "for this one particular occasion." BLACK'S LAW DICTIONARY 1363 (4th ed. 1951). This form of admission has also been termed "leave ex gratia for the occasion." See *Freeling v. Tucker*, *supra* note 11 at 479, 289 P. 86; *Tuppela v. Mathison*, *supra* note 29, at 730. The custom was apparently recognized in England as early as 1629. See *Thursby v. Warren*, 79 Eng. Rep. 738 (C.P. 1629), cited in *Cooper v. Hutchison*, *supra* note 17, at 122. And it was in general use in the United States by 1876. See *In re Mosness*, 39 Wis. 509 (1876), cited in *Cooper v. Hutchison*, *supra* note 17, at 122; Farley, *Attorney Admissions From Other Jurisdictions*, in SURVEY OF THE LEGAL PROFESSION, BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 165 (1952) ("Practically all states permit an attorney from another jurisdiction to appear *pro hac vice* . . ."). The general form of the rule was stated by the California Supreme Court as follows: "It is common practice, and one sustained by general usage in all of the states of this Union, we believe, to permit upon request an attorney holding a license to practice law from one state to appear in the courts of a sister state and there take part in the trial of an action pending in said courts." *In re McCue*, *supra* note 8, at 66, 293 P. at 51-52. In its form of *pro hac vice*, New York has explicitly recognized that such admission may be extended to attorneys from foreign countries. See N.Y. CT. APP. R. VII-4.

33. See ILL. SUP. CT. R. 707 ("foreign attorneys in isolated cases"), interpreted in *Robinson v. Hunt*, 211 La. 1019, 1044-46, 31 So. 2d 197, 201 (1947); N.Y. CT. APP. R. VII-4. But this discretion does not continue once the lawyer has been admitted.



requisites are met by the attorney seeking admission.<sup>34</sup> These prerequisites are usually embodied in a statute<sup>35</sup> or court rule<sup>36</sup> [hereinafter, "statute" will be used to designate both] that requires the foreign attorney to associate local counsel before admission *pro hac vice* will be granted. These rules vary according to the characterizations given the terms "foreign"<sup>37</sup> and "local"<sup>38</sup> attorneys.

At that time, he is said to have the same rights and duties as a local lawyer, and thus cannot be arbitrarily removed without denying his client his constitutional rights. See *Cooper v. Hutchison*, *supra* note 17, at 123 (defendants denied due process when foreign attorneys admitted *pro hac vice* were not permitted to represent defendants on remand of murder prosecution). Cf. *Faughnan v. City of Elizabeth*, 58 N.J.L. 309, 33 A. 212 (1895) (attorney who became nonresident during course of trial could properly continue representation).

34. As of 1952, sixteen states and the District of Columbia had such prerequisites. See Farley, *supra* note 32, at 165, 169 n.39. Depending upon a state's view of the judicial role in admissions *pro hac vice*, fulfillment of the admission prerequisites may give the applicant foreign attorney a right to *pro hac vice* admission. See LA. SUP. CT. R. XIV and LA. REV. STAT. ANN. §§ 37:214-15 (1964) (fulfillment of statutory association or reciprocity requirements is sole condition for admission). Where control over admission rests exclusively with the judiciary, though, courts probably have discretion to deny admission despite fulfillment of any prerequisites. See MISS. CODE ANN. § 8666 (1956) (association statute with condition that applicant be "of good moral character and familiar with the ethics, principles, practices, customs and usages of the legal profession" of Mississippi). Reciprocity *pro hac vice* statutes are also common. See, e.g., FLA. APP. R. 2.3.b; MO. SUPP. CT. R. 9.01; LA. REV. STAT. ANN. §§ 37:214-16 (1964); Farley, *supra* note 32, at 165 (citing Utah and Idaho; the listing of Idaho appears inaccurate in light of IDAHO R. CIV. P. 11(a) requiring signature of resident attorney on all pleadings).

35. See, e.g., IDAHO CODE § 5-701 (1948), and IDAHO R. CIV. P. 11(a) (pleadings must be signed by at least one resident attorney); LA. REV. STAT. ANN. § 37:214 (1964) (association of resident attorney required in absence of reciprocity with foreign state).

36. See, e.g., KAN. SUP. CT. R. 54.

37. Three types of qualifications may be found in the statutes that produce varying characterizations of the "foreign" attorney. These concern residency, bar admission, and nature of foreign practice. In some jurisdictions, applicability of the association statute turns strictly on the residency of the foreign attorney; that is, nonresident attorneys, whether or not admitted to the local state bar, must associate a resident member of the local bar before they may appear *pro hac vice*. See, e.g., IDAHO CODE § 5-701 (1948), and IDAHO R. CIV. P. 11(a); KAN. STAT. ANN. § 7-104 (1949) (non-residency one of several qualifications). Association has even been required for non-resident attorneys admitted and practicing in the state. See *Taylor v. Taylor*, 185 Kan. 324, 342 P.2d 190 (1959). Other states require association of local counsel only for attorneys not admitted to the local bar; residency is not a material consideration. See, e.g., *In re New Jersey Refrigerating Co.*, 96 N.J.Eq. 431, 126 A. 174 (1924) (apparently citing New Jersey rule of court). Kansas defines the "foreign attorney" as one who is "regularly practicing outside of this state." See KAN. SUP. CT. R. 54. This rule was held to have been properly applied to a resident Kansas attorney, who regularly practiced in Missouri. See *Martin v. Walton*, *supra* note 4, at 27 (dissenting opinion).

38. The characterization of the local "attorney" to be associated also is varied in the state rules of court and statutes. The universal qualification for the local attorney is that he be a member of the local state bar, which in some jurisdictions is the sole criterion. See, e.g., *In re New Jersey Refrigerating Co.*, *supra* note 37, at 435, 126 A. at 175. Other states require that the associated attorney be a resident, usually of the state, but occasionally of either the county or the judicial district where the court is sitting. See, e.g., *Letaw v. Smith*, 223 Ark. 638, 268 S.W.2d 3 (1954) (county resi-

(b) *Policies Behind State Association Requirements.*—Association court rules and statutes are peculiar in that they apply only to litigation practice. They would appear first to have been passed to guard the public against the danger of over-use of the *pro hac vice* power to the detriment of the ethical standards of state practice. Association of local counsel was to be the means to effect more direct control over the performance of legal services by foreign attorneys.<sup>39</sup> Since some states exempt from service of process attorneys within the state solely for judicial proceedings,<sup>40</sup> there probably is some need

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gency requirement violated state law; state residency proper qualification); *Bradley v. Sudler*, *supra* note 11 (judicial district residency upheld; now revised by KAN. SUP. CT. R. 54 to require only that associate reside within state); *Meyer v. Brinsky*, 129 Ohio St., 371, 195 N.E. 702 (1935) (county residency requirement invalid; state residency is correct qualification); *Arthaud v. Griffin*, 202 Iowa 462, 210 N.W. 540 (1926) (county residency is valid requirement for local associate); *Anderson v. Coolin*, 27 Idaho 334, 149 P. 286 (1915) (state residency); LA. REV. STAT. ANN. § 37:214 (1964) (state residency). A further qualification of the local associate is that he maintain an office within the state, county or judicial district. *See, e.g., Bradley v. Sudler*, *supra* note 11 (office within judicial district).

39. *See Anderson v. Coolin*, *supra* note 38. "This [association requirement] is intended to provide for the employment of a resident attorney of this state, who shall be held primarily responsible by, and answerable to, the courts of this state for all proceedings had in connection with the litigation before the courts. The employment of resident attorneys under this section is not to be considered as a mere subterfuge, or that there is a compliance with the spirit of said [association requirement], where an arrangement is made that the name of an attorney may be used as an accommodation only. The employment must be bona fide and in good faith. Courts will look to resident counsel in the first instance, and require at their hands the same careful consideration and attention to the business that is intrusted to their care, when associated with counsel of sister states or territories, as if they were conducting such cases alone." *Anderson v. Coolin*, *supra* note 38, at 340, 149 P. at 289. Another reason given for association statutes is that they are "conducive to convenient and orderly procedure" in that they ease problems of service of papers on foreign attorneys. *See Arthaud v. Griffin*, *supra* note 38, at 464, 210 N.W. at 541.

40. There is no agreement as to the immunity of foreign attorneys. In *Lamb v. Schmitt*, 285 U.S. 222 (1932), the privilege was denied to a non-resident attorney in order to restore to the court part of the fund in controversy which his client had transferred to him. The Supreme Court said that, "The test is whether the immunity itself, if allowed, would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it. That, as we have said, depends here upon the nature of the proceeding in which the service is made and its relation to the principal suit, both of which are disclosed by the pleadings." *Id.* at 228. The immunity was also denied a non-resident attorney in *Pitman v. Cunningham*, 100 N.H. 49, 118 A.2d 884 (1955), where the court seemed to establish a rebuttable presumption against immunity. "In the absence of some definite public benefit to be gained by the extension of the privilege to nonresident attorneys, we refuse to adopt it in 1955 merely because the privilege existed at the time of Blackstone." *Id.* at 52, 118 A.2d at 886. "[W]e are unable to see how in modern day practice the service of process on nonresident attorneys can be said to interfere with the dignity and authority of the court and administrative agency or with the performance of their duties." *Id.* at 51-52, 118 A.2d at 885. *But see Hoffman v. Bay Circuit Judge*, 113 Mich. 109, 71 N.W. 480 (1897), and *Ada Dairy Prods. v. Superior Court*, 258 P.2d 939 (Okla. 1953), both recognizing immunity for the foreign attorney. *See also State ex rel. Johnson v. Tautges, Rerat & Welch*, 146 Neb. 439, 20 N.W.2d 232 (1945). If the trend is toward denying the privilege for voluntary appearances, *see A. EHRLEN-*

for participation by an attorney subject to the jurisdiction of the court. This exemption, though, probably extends only to civil service of process, and jurisdiction over the non-resident attorney for criminal acts and for contempt of court could likely be found in his appearance in court.<sup>41</sup> Furthermore, the need for control is significantly lessened in litigation practice, which is subject to the constant scrutiny of the court.

Assuming that control is to some extent a valid justification for association statutes, some such statutes go beyond merely meeting this need. Non-resident attorneys admitted to the local bar, for example, need not associate resident counsel to be within the court's control. Such attorneys probably waive their privilege as non-residents by accepting admission to the local bar, and thus can be stripped of their privilege to practice in the state without any jurisdictional issues.<sup>42</sup> Further, they can undoubtedly be denied attorney's fees in the state, they should be denied fees in other states, and they are probably subject to civil and criminal liabilities for their acts.<sup>43</sup>

If partial justification for association statutes is control through the local associate attorney, attention should be given to the qualifications of that local attorney. Residence within the state would seem to be the only valid requirement. Certainly jurisdiction does not stop at county or judicial district borders, so rules requiring such residence cannot be explained upon the basis of control over the bar. Developing a statute solely on the policy of control, then, we might find some

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ZWEIG, CONFLICT OF LAWS § 31, at 108 (1962), non-resident attorneys will lose all immunity from civil service of process. See generally Ray, *Privilege of Non-Resident Attorney from Service of Civil Process*, 17 Ky. L.J. 197 (1929).

41. The immunity of parties, witnesses and attorneys from service of process was originally based on a fear of arrest and imprisonment. See Ray, *supra* note 40, at 198. Separate rules grew up when civil service of process came into general use. See Pitman v. Cunningham, *supra* note 40, at 51, 118 A.2d at 885 (distinguishing arrest from civil service). Criminal acts and actions in contempt of court, however, seem unrelated to any justification for the immunity, and should permit service on and arrest of foreign attorneys if necessary.

42. "When admitted to the Bar, attorneys at law become answerable to the rules and discipline of the court in all matters of order and procedure and to the supervision and control of the practice of law not in conflict with the constitution." Martin v. Davis, *supra* note 28, at 480, 357 P.2d at 788, *aff'd sub nom.* Martin v. Walton, *supra* note 4.

43. New York expressly prohibits the granting of fees, see N.Y. PEN. LAW § 272 (McKinney 1944), and imposes criminal liability, N.Y. PEN. LAW §§ 270, 272 (McKinney 1944), for unauthorized practice. Prosecutions probably are also available for contempt. Cf. *In re Bercu*, 299 N.Y. 728, 87 N.E.2d 451 (1949) (office practice case). The foreign attorney also is liable to his client for negligence. See Degen v. Steinbrink, 212 App. Div. 477, 195 N.Y.S. 810 (1922). The lawyer's home bar as well as may reprimand him for his out-of-state wrongdoing. See *In re Kent*, 39 N.J. 114, 187 A.2d 718 (1963). Some form of interstate cooperation in control of attorneys has also been suggested. See Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 COLUM. L. REV. 1039, 1052 (1952); 78 HARV. L. REV. 1651, 1662 (1965).

small justification for requiring non-resident attorneys not admitted to the local bar to associate local counsel residing within the state.

A second policy justification which might be advanced for association statutes is the preservation of the intellectual standards of the bar. With *pro hac vice* permitting foreign attorneys in the local courts, the states could thereby protect the public from practice below the standards of the local bar. The local associate could provide expertise in local substantive law and rules of practice and procedure. There is considerable doubt that the substantive knowledge of the local attorney, however, would be of significant benefit to the client or the foreign attorney. First, substantive law generally has followed parallel developments in the country, and the foreign lawyer would understand any conflicting lines of decision and could readily research the local law to determine the rule of the particular state. Second, foreign attorneys representing interstate corporations are often specialists in their field, and as such cannot be expected to gain appreciably by association with a general practitioner of the local jurisdiction.<sup>44</sup> Third, much of the law concerning interstate transactions is federal law;<sup>45</sup> to the extent that this law is tried in state litigation, then, there would be no gain by associating local counsel.<sup>46</sup>

Knowledge of local rules of practice and procedure, however, is a significant advantage obtained by associating local counsel.<sup>47</sup> Procedural variations are notorious among the states, and the unwary foreign attorney could easily fall victim to the local system without assistance from the local bar. Attorneys not admitted to the state bar would thus form the core of the "foreign" attorneys needing this local advice, but some members of the state bar may also need procedural counseling. Hence the non-residency criterion used by many states would appear to be much less satisfactory than a test based on the extent of an applicant's active practice within the state.

A number of policy considerations have been advanced to justify residency as the essential distinction between foreign and local attorneys for purposes of association. These are mostly matters of procedural convenience, since the non-resident attorney may be difficult to procure at the call of the court's docket, hard to serve without

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44. "[I]t would seem absurd that when the out-of-state trademark specialist goes to a local branch [of a corporation], he should be required to obtain the assistance of a resident general practitioner for whose views he would have little regard." *Spanos v. Skouras Theatres Corp.*, *supra* note 14, at 171.

45. For example, the states have jurisdiction to hear federal causes of action under § 22(a) of the Securities Act of 1933. 15 U.S.C. § 77v (1964).

46. See note 16 *infra* and accompanying text.

47. See *Martin v. Davis*, *supra* note 28, at 485, 357 P.2d at 790 (association rule needed because of "failure of [Missouri officed Kansas attorneys] to familiarize themselves with the rules of local practice and procedure by reason of their infrequent appearance before the courts and tribunals"); 78 HARV. L. REV. 1651 n.5 (1965).

proceedings in another state, unresponsive to calls to appear on matters of urgency, and as discussed earlier, unfamiliar with the local rules of practice and procedure because of their infrequent appearances in local courts.<sup>48</sup>

Viewed solely from the interests of the local public, then, the needs for control of attorneys, protection from ignorance of counsel, and procedural convenience point toward an association statute of the following character: "Foreign" attorneys should include all attorneys not admitted to the state bar plus those admitted who are not actively engaged in local practice, or alternatively, plus those who are non-residents. "Local" associate attorneys should include all attorneys not "foreign" attorneys, that is, lawyers admitted to the state bar who are actively engaged in state practice, or who are residents.

Some state and federal limitations on the content of association statutes should be mentioned. Depending upon the choice of authoritative sources within each state, conflicting judicial and legislative pronouncements on association requirements will be resolved in favor of the source of ultimate power over admission *pro hac vice*.<sup>49</sup> Always limiting this state allocation of powers, however, are the provisions of the state and federal constitutions. The reasonableness of most association statutes under state and federal due process requirements has either been satisfied or left unchallenged,<sup>50</sup> so that its outer limits are not very clear. In the one instance where due process was violated by an association statute, Arkansas found that a county-residence requirement for local attorneys violated the state constitution.<sup>51</sup> Federal due process limitations were not mentioned by the court; nor were they raised in an Iowa Supreme Court decision<sup>52</sup> sustaining a county-residence requirement for local associates. The

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48. See *Martin v. Davis*, *supra* note 28, at 495, 357 P.2d at 790.

49. "An examination of the authorities will show that principally three views have been taken in this country on that issue [of ultimate control of admission]: (1) that the power to prescribe rules for admission and for the regulation of professional conduct belongs to the legislative branch, with the duty of their enforcement lying within the province of the judiciary; (2) that the entire subject is one pertaining inherently to the judicial branch of the government; (3) that although the whole subject is a judicial one yet that branch of the government will respect reasonable regulations provided by the legislature so long as they are not restrictive." Harris, *The Louisiana Supreme Court and Bar Admissions*, 8 TUL. L. REV. 417, 418 (1934). See also note 11 *supra*.

50. See, e.g., *Martin v. Walton*, *supra* note 4 (Kansas association rule upheld); *Arthaud v. Griffin*, *supra* note 38 (Iowa statute upheld); MISS. CODE ANN. § 8666 (1956) (unchallenged); NEB. REV. STAT. ANN. § 7-103 (1962) (unchallenged); NEV. SUP. CR. R. 11 (Nevada rule apparently unchallenged).

51. *Letaw v. Smith*, *supra* note 38. The rule was unreasonable in that associated attorneys could be controlled by the court as easily if they resided outside the county, but within the state. An alternative holding was that the court rule conflicted with an existing state statute. *Letaw v. Smith*, *supra* note 38, at 642-43, 268 S.W. at 5.

52. *Arthaud v. Griffin*, *supra* note 38.

equal protection clause of the fourteenth amendment probably provides no limitation on association statutes, since the Supreme Court has ruled that discrimination in an association statute applying to non-resident lawyers produces only incidental individual inequality not violative of the fourteenth amendment.<sup>53</sup> A further test under the equal protection clause is that the requirements imposed on foreign attorneys and their local associates have a rational connection with those persons' fitness and capacity to practice law.<sup>54</sup>

(c) *Conclusions Regarding State Pro Hac Vice Admission.*—The controversy over the format and validity of association court rules and statutes has unfortunately led to a loss of perspective in the courts and state legislatures. Association statutes have been interpreted solely in light of protective local policies, being treated themselves as a basis for admission. In reality, though, association statutes are only limitations on the true basis for admission—the *pro hac vice* exception to the general prohibition against practice without admission to the state bar. The policy which lies beneath admission of foreign attorneys—the federal system policy of comity<sup>55</sup>—has been largely overlooked. The courts only rarely consider the public interest in having residents able to be represented by counsel of their own choice, whether local or foreign. Few courts or legislatures consider the desirability of a system of reciprocity in which attorneys could move freely from state to state; yet in a sense every local attorney is also a foreign attorney.<sup>56</sup> Perhaps the courts should begin with a presumption of admissibility of foreign attorneys, and construe strictly any association requirements.

This is not to disparage the local interest policies presently guiding the formulation and interpretation of association statutes. At present, these policies still have validity, although their significance will probably diminish in the near future.<sup>57</sup> All that is suggested here is that

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53. *Martin v. Walton*, *supra* note 4, at 26. The phrase "incidental individual equality" is taken from *Phelps v. Board of Educ.*, 300 U.S. 319 (1937), in which the Court sustained the subclassification of teachers for various percentage reductions in salaries. *Id.* at 324.

54. See *Martin v. Walton*, 368 U.S. 25 (1961) (dissenting opinion). "When Kansas denies [this foreign attorney] the right to pursue his livelihood, it destroys his competence for reasons that have no relation to competency." *Id.* at 28. The test is generally applied to bar, rather than *pro hac vice*, admission requirements. See *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

55. For an express recognition of comity within a *pro hac vice* rule, see G.A. SUP. CT. R. 2(a).

56. This is true, for example, whenever an attorney transacts business outside his own county at least to the extent that he is unfamiliar with practices and customs in the new environment. In addition, many local attorneys will at some time handle matters with foreign elements.

57. Local restrictions based on procedural complexities are losing force as the states increasingly adopt the philosophy and text of the Federal Rules of Civil

the courts avoid mechanical applications of association statutes, and move toward fuller consideration of the policies behind these statutes. By viewing *pro hac vice* as an underlying judicial prerogative, to be construed in light of association limitations, courts will have room to disregard the limitations where circumstances require. And as the social and economic forces in our country become further interrelated, the relative strengths of local and federal system policies can be properly reassessed, and a more reasonable administration of the *pro hac vice* power will result.

One further problem concerning *pro hac vice* admission deserves attention, although its full treatment is beyond the scope of this note. The power to admit *pro hac vice* ultimately resides in the discretion of the courts; as such, the vitality of this form of admission depends upon fair administration by the judiciary. Unfortunately, the recent increase in civil rights litigation at the state level<sup>58</sup> has brought to light instances of arbitrary denials of *pro hac vice* admission to attorneys representing unpopular defendants.<sup>59</sup> The discretionary nature of this type of admission makes such rulings virtually non-appealable, and frustrates statutory curatives. But this is not a defect in *pro hac vice* procedures; it is a defect inherent in the society which appoints to high places persons of questionable integrity.

2. *Admission Without Permission of the Court.*—Under certain circumstances, foreign attorneys may appear by right in local state litigation, without regard to *pro hac vice* requirements. This right, however, is never granted to the foreign attorney directly. It has long been held that the privilege to practice law in state courts is not a right granted by the federal constitution.<sup>60</sup> The foreign attorney's right to appear follows either from a broad right given laymen as well as attorneys, or from a particular right of his client.

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Procedure. Substantive knowledge of local law will be less basis for limiting practice by foreign attorneys as the range of federal law increases and as the states enact parallel statutes such as the Uniform Commercial Code. Further reason for the decrease in validity of local policies comes from the extension of service of process to the limits of the due process clause, through various forms of long-arm statutes. Increased recognition of foreign causes of action will also diminish the need for protective admissions rules.

58. See Brief of Lawyers Constitutional Defense Committee of ACLU as Amicus Curiae at 3, *Rowe v. Mississippi*, \_\_\_ F. Supp. \_\_\_ (N.D. Miss. 1967). The increase in state court handling of civil cases will continue as a result of the Supreme Court decision in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), which confirmed strict limits upon the right to remove civil rights cases to federal courts.

59. See Brief Amicus Curiae, *supra* note 58, at 4, 8-10, app. 5-8 (discussing recent unpopular-defendant cases).

60. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872); *Starr v. State Bd. of Law Examiners*, 159 F.2d 305 (7th Cir. 1947). Both of these are bar admission cases.

Among the rights of the first type is the right of foreign attorneys to appear *pro se* in state litigation; that is, they may represent themselves by the same rule that permits laymen to represent themselves.<sup>61</sup> Residents of the local jurisdiction probably derive this right at common law from the right to enforce obligations given under the local law. Most of the states have now made this right of residents to appear *pro se* explicit by statute.<sup>62</sup> Non-residents are guaranteed under the privileges and immunities clause the right to use the local courts to assert their right to the same extent as local residents.<sup>63</sup>

A second right to appear granted to laymen as well as attorneys is the right to represent others in courts of limited jurisdiction.<sup>64</sup> This right now has been virtually eliminated from the statutes, but its policy is important. The lack of danger from malpractice was thought to be so slight in such tribunals that formal representation was unnecessary.<sup>65</sup>

The theories for appearances of foreign attorneys through the rights of clients are still in the formative stages. The major sources for such rights lie in federal law. Among these sources are the supremacy clause, the full faith and credit clause, and the sixth and fourteenth amendments of the federal constitution. The premise must be established first, however, that the client has an absolute right to proceed in the particular jurisdiction. And this premise has not been entirely accepted by the state courts.<sup>66</sup>

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61. See *Arthaud v. Griffin*, *supra* note 38, at 464, 210 N.W. at 541, and cases cited therein (association statute not applicable "for the very obvious reason that the appellant appears as plaintiff in propria persona").

62. See, e.g., KAN. STAT. ANN. § 7-104 (1964); N.H. REV. STAT. ANN. § 311:1 (1966).

63. See *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934); *Richter v. East St. Louis & S. Ry.*, 20 F.2d 220 (E.D. Mo. 1927). The privileges and immunities clause is not applicable to corporations. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177-82 (1868).

64. See *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919). "All rules must have their limitations, according to circumstances, and as the evils disappear or lessen. Thus a man may plead his own case in court, or draft his own will or legal papers. Probably he may ask a friend or neighbor to assist him. We recognize that by [N.Y. PEN. LAW] section 270 and also 271 a person, not a lawyer, may appear for another in a court not a record outside cities of the first and second class." *Id.* at 341, 125 N.E. at 674. The sections of the N.Y. PEN. LAW discussed here have subsequently been repealed.

65. "The cases are generally of minor importance to the parties; such occasions are seldom frequent enough to make it a business, and the procedure is so informal as to constitute the judge really an arbiter in the dispute." *People v. Alfani*, *supra* note 64, at 341, 125 N.E. at 674. Some small claims courts might well adopt this policy.

66. Establishing this premise is a problem of substantive and judicial jurisdiction common to every litigant, and one beyond the scope of this note. For the foreign attorney, however, the problem is particularly acute. He must somehow have the jurisdictional issue resolved for purposes of his admission, so that he may represent his client on the argument of the jurisdictional issue for purposes of the lawsuit. Resolution of the first issue would probably not be binding as to the second.



In situations where the state jurisdiction intertwines with federal jurisdiction, the supremacy clause may be a source for the right of the foreign attorney to appear. For instance, the California Supreme Court<sup>67</sup> has recognized that a foreign attorney may appear as of right in a state court to file papers removing a cause of action to the federal courts. California had not tried to regulate such removal, but even if it had, the court said, it would have been acting beyond its authority.<sup>68</sup> The supremacy clause, by implication, was the basis for the decision.

Another possible source for a foreign attorney's right to appear in state litigation is the full faith and credit clause. One use of this source would challenge state power to refuse recognition to the public act<sup>69</sup> of a foreign state in admitting attorneys to practice law. However, the success of this argument would depend upon an analogy to the meager case law<sup>70</sup> recognizing foreign disbarment proceedings as binding in other states.

A second use of full faith and credit might be more fruitful. By this reasoning, where full faith and credit provides a client with an absolute right to proceed in state litigation, and that right would be denied if he were not represented by foreign counsel, a right of admission passes to the foreign counsel selected. Denial of admission of the foreign attorney would thus be considered an effective denial of full faith and credit.

Parallel logic would suggest that substantive due process would be denied a client where necessary representation by foreign counsel is refused, in that the client is thus effectively prevented from enforcing his rights. A third source made significant by similar reasoning

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67. *In re McCue*, 211 Cal. 57, 87-88, 293 P. 47, 52 (1930).

68. *Id.* at 68, 293 P. at 51. See also *Cowen v. Calabrese*, 230 Cal. App. 2d 870, 872-73, 41 Cal. Rptr. 441, 443 (1964) (supremacy clause impliedly used to make state law inapplicable to federal bankruptcy proceeding).

69. The Second Circuit recently found that where a right has been conferred by federal law, there is a "right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state. . . ." *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir.), cert. denied, 385 U.S. 987 (1966). The court's holding was based, however, on the privileges and immunities clause. *Id.* at 170. The suggested application of full faith and credit can be questioned on the ground that the act of licensing is a special public act not within the protection of art. IV, § 1. Further, the privilege to practice a profession in one state has been held to guarantee no similar privilege in another state. See *Rhode Island v. Rosenkrans*, 30 R.I. 374, 75 A. 491 (1910), *aff'd*, 225 U.S. 698 (1912) (dentistry). See generally Ross, "Full Faith and Credit" in a Federal System, 20 MINN. L. REV. 140 (1935).

70. *In re Van Bever*, 55 Ariz. 368, 101 P.2d 790 (1940); *In re Levenson*, 195 Minn. 42, 261 N.W. 480 (1935); *Copren v. State Bar*, 64 Nev. 364, 183 P.2d 833 (1947); *In re Brown*, 60 S.D. 628, 245 N.W. 824 (1932); *State Bd. of Law Examiners v. Brown*, 53 Wyo. 42, 77 P.2d 626 (1938). *Contra*, *In re Isserman*, 345 U.S. 286 (1953), set aside, 348 U.S. 1 (1954); *Florida Bar v. Wilkes*, 179 So. 2d 193 (Fla. 1965); *In re Porep*, 60 Nev. 393, 111 P.2d 533 (1941).

might be the right to effective representation by counsel,<sup>71</sup> guaranteed by the sixth and fourteenth amendments.

One difficulty with these approaches, however, may severely restrict their application, for each is premised on an ability to prove the inadequacy of local counsel. In civil rights or other unpopular-defendant cases, local antipathy might be so extreme as to make representation by foreign counsel a necessity. In highly specialized areas of the law, where only foreign counsel were truly qualified to provide effective representation, one of these theories might also be helpful.

A further alternative to the client seeking representation by foreign counsel is to insist that the right to counsel guarantees a right to counsel of one's own choosing.<sup>72</sup> This is much broader than the right to effective counsel, and if given effect, would do much toward eliminating state barriers to the interstate practice of law. In the 1950 case of *Cooper v. Hutchison*,<sup>73</sup> the United States Court of Appeals for the Third Circuit considered the argument. Counsel based their plea on *United States v. Bergamo*,<sup>74</sup> in which the same court had found a sixth amendment right to counsel of one's own choice in federal criminal prosecutions.<sup>75</sup> They urged<sup>76</sup> that, since their client had been tried for a capital crime in a state court, the Supreme Court's ruling in *Powell v. Alabama*<sup>77</sup> should grant him the same right to

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71. The right to effective counsel should be distinguished from the right to assistance of counsel at public expense. Compare *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (designation of counsel was "either so indefinite or so close upon trial as to amount to a denial of effective and substantial aid in that regard"), with *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of indigent defendant in criminal trial to assistance of counsel). The latter right accrues only in felony prosecutions, but the former may now be a part of one's right to employ counsel. See *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). In that case, the Supreme Court seemed to forbid any state interference with an individual's right to employ effective counsel. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . . and for them to associate together to help one another preserve and enforce rights granted to them under federal laws cannot be condemned as a threat to legal ethics. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Id.* at 7.

72. For an early use of the phraseology, see *Powell v. Alabama*, *supra* note 71, at 53 ("It is hardly necessary to say that . . . a defendant should be afforded a fair opportunity to secure counsel of his own choice.").

73. 184 F.2d 119 (3d Cir. 1950).

74. 154 F.2d 31 (3d Cir. 1946).

75. "To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment. Under the circumstances of the case at bar the defendants were deprived of the advice of counsel of their own choosing." *Id.* at 35.

76. *Cooper v. Hutchison*, *supra* note 73, at 121-22.

77. *Supra* note 71.

choose foreign counsel in a state prosecution as *Bergamo* granted in a federal trial. The Third Circuit did in fact permit the foreign attorney to practice as of right; but it do so on other grounds,<sup>78</sup> stating further that *Bergamo* was "not conclusive" since it only established qualifications for trials in the Third Circuit.<sup>79</sup>

With the 1963 extension, in *Gideon v. Wainwright*,<sup>80</sup> of the right to counsel in all state felony prosecutions, application of the *Bergamo* interpretation would permit foreign attorneys to practice as of right in any state or federal criminal prosecution. Indeed, this might not be an undesirable circumstance. In at least one case<sup>81</sup> since *Gideon*, the issue has presented itself. There, a foreign attorney selected by the defendant was permitted to represent him in a capital prosecution without association of local counsel as required by rule of court. However, the challenge was raised not by the state, but by the defendant himself subsequent to his conviction. The court avoided the issue by ruling that the defendant had "waived the right, if any he had,"<sup>82</sup> to local counsel.

These alternative theories under federal law to enable a foreign attorney to appear as of right in state litigation are especially significant in light of two recent Supreme Court decisions—*NAACP v. Button*<sup>83</sup> and *Brotherhood of Railroad Trainmen v. Virginia*.<sup>84</sup> These two cases upset the balance of policies formerly in favor of state control of the bar, and emphasize instead the constitutional rights of individuals.

A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest.<sup>85</sup>

In each case, the Court looked first to the constitutional right pro-

78. The court found that defendant's attorneys had been admitted *pro hac vice* on the first trial, and that their admission to practice could not arbitrarily be revoked on remand. *Cooper v. Hutchison*, *supra* note 73, at 122-23.

79. *Cooper v. Hutchison*, *supra* note 73, at 122. Cf. E.D. Mich. R. 1(2) (giving attorneys admitted to highest court of state of residence, United States Supreme Court, or any United States court of appeals or district court a right to appear in any criminal proceedings).

80. *Supra* note 71.

81. *Blakesley v. Crouse*, 332 F.2d 849 (10th Cir. 1964) (habeas corpus proceeding against Kansas warden based on failure of defendant's Missouri attorney, in Kansas trial, to associate Kansas counsel).

82. *Id.* at 850.

83. 371 U.S. 415 (1963) (Virginia unable to show substantial regulatory interest in denying NAACP right to provide counsel for Negroes involved in civil rights litigation).

84. *Supra* note 71 (Virginia unable to show substantial regulatory interest in denying railroad union's right to solicit attorneys to protect its members' federal rights).

85. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, *supra* note 71, at 7.

tected,<sup>86</sup> and then shifted the burden of proof to the state "to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."<sup>87</sup> It is submitted that the evils flowing from representation by foreign attorneys without permission of the court would not be sufficient, at least in state criminal prosecutions, to carry the burden.

### B. Admission to Federal Litigation Practice

The foreign attorney seeking admission to a federal court is confronted with three means of admission, none of which satisfies the needs of an interstate legal practice. Admission to practice generally before a particular federal court, although sometimes less stringent than its state practice variant,<sup>88</sup> usually requires admission to the bar of the state in which the court sits, and often residency or maintenance of an office within the judicial district.<sup>89</sup> This is not a practical alternative. In most federal jurisdictions, attorneys with only occasional practice before a particular federal court find admission *pro hac vice* a more realistic, although not entirely satisfactory, alternative. Association requirements and disqualification provisions often

86. In *Button*, the state regulation was found to have infringed on first and fourteenth amendments rights to enforce constitutional rights through litigation. 371 U.S. at 437, 441. It has been suggested that the decision could have been based on the ground that the NAACP "was engaged only in protecting political rights or on the correlative nature of Virginia's action stated in Mr. Justice Douglas' concurring opinion [371 U.S. at 445-46] as a thinly veiled part of Virginia's 'massive resistance' to the law of the land." See Cheatham, *The Supreme Court and the Profession of Law*, 14 CATHOLIC U.L. REV. 192, 194 (1965). In *Brotherhood*, the state regulation infringed on the first and fourteenth amendment guarantees of free speech, petition and assembly. 377 U.S. at 5.

87. NAACP v. *Button*, *supra* note 83, at 444, quoted in *Brotherhood of R.R. Trainmen*, *supra* note 71, at 8. The burden of "substantial regulatory interest" has yet to be clearly defined. See *Illinois State Bar Ass'n v. UMW*, District 12, 35 Ill. 2d 112, 219 N.E.2d 503 (1966), *cert. granted*, 386 U.S. 941 (1967) (state prohibited union from employing salaried attorney to prosecute workmen's compensation claims of members).

88. Compare S.D.N.Y. R. 3, with N.Y. Cr. App. R. VII-1. Foreign attorneys from New Jersey, Connecticut and Vermont, who are admitted to a local district court which has reciprocity with S.D.N.Y., are admitted to the bar of S.D.N.Y. on the same basis as New York lawyers of at least one year's membership in the New York bar. But foreign attorneys from those same states would have to reside in New York State for six months and have five years of foreign practice before they could be admitted to the New York State bar.

89. The requirements for bar admission of ten district courts have been selected as representative of the general pattern in this country. At least one court from each circuit except the Fourth and District of Columbia Circuits has been used. The ten district courts are those for the S.D. Cal.; D. Colo.; S.D. Fla.; N.D. Ill.; D. Mass.; E.D. Mich.; E.D. Mo.; D.N.J.; S.D.N.Y.; and the E.D. Pa. At least one major city is located within each district, so as to weight the sample towards the districts handling more interstate legal problems. Seven of the ten district courts require membership in the bar of the state in which they are sitting. See S.D. CAL. R. 1(c)(1); D. COLO. R. 4(b); S.D. FLA. R. 14; D. MASS. R. 2; E.D. MICH. R. 1(1) (automatic district court

limit its applicability.<sup>90</sup> Where neither form of admission by application to the court is available, foreign attorneys may avail themselves of a third means of participation—admission through the rights of

membership for all members of Michigan bar); E.D. Mo. R. II(1); D.N.J. R. 4(B). The other three districts permit applicants for bar admission to be members of either the state bar or some other bar. See N.D. ILL. R. 6(a) (members of bars of the "Supreme Court" [probably referring to Ill. Sup. Ct.], Wisconsin or Indiana); S.D.N.Y. R. 3(a) (members of New York bar and members of state and district court bars in Vermont, Connecticut and New Jersey whose district courts extend a corresponding privilege to attorneys of S.D.N.Y.); E.D. Pa. R. 5(a) (members of Pa. or U.S. Sup. Ct. bar). Two district courts permit bar admission without formal proceedings for attorneys from neighboring districts. See S.D. FLA. R. 14 (for attorneys from M.D. Fla. and N.D. Fla.); S.D.N.Y. R. 3(b) (for attorneys from E.D.N.Y.). Only two of the ten courts require some length of state bar membership. See D. Mass. R. 2 (one year); S.D.N.Y. R. 3(a) (one year for N.Y. bar members; no similar requirement for members of Vt., Conn., or N.J. bars). A majority of six of the district courts make no stipulation as to the residency of the applicant. See S.D. Fla.; N.D. Ill.; E.D. Mich.; S.D.N.Y.; D.N.J.; E.D. Pa. Two courts restrict admission to certain residents. See D. Mass. R. 2 (residents of state-district); E.D. Mo. R. II(1) (Mo. residents must reside within district; non-Mo. residents must reside within county adjacent to district for membership, but must associate a resident member for appearances). And two courts require either residency or maintenance of an office within the district. See S.D. CAL. R. 1(c)(1); D. COLO. R. 4(b). Three of the ten districts do not require a local office for applicants. See N.D. Ill.; D. Mass.; E.D. Mich. Three others require no local office for admission, but condition appearances upon presence before the court of a member with a local office. See S.D. FLA. R. 15 (office within state); D.N.J. R. 5 (office within state-district); S.D.N.Y. R. 4(a) (office within either S.D.N.Y. or E.D.N.Y.). One district court has no office requirement for members residing in the district, but does require the non-resident applicant himself to have an office within the judicial district. See E.D. Mo. R. II(1). The remaining three districts have some form of office requirement for admission of all applicants. In two, applicants must either have an office within the district or reside therein. See S.D. CAL. R. 1(c)(1); D. COLO. R. 4(b). In one, all applicants must maintain an office within the state. See E.D. Pa. R. 5(a). One of the ten district courts has special rules for admission of patent attorneys. See D.N.J. R. 4(E) (limited to U.S. patent attorneys, domiciled in N. J., who are admitted to a state or federal bar).

90. The same ten district courts considered in note 89 *supra* will be used to indicate the nature of federal *pro hac vice* admission requirements. Only one of the courts limits admission *pro hac vice* to members of a federal court. See S.D. FLA. R. 14 (any U.S. district court). The remaining nine courts extend this privilege to state, and sometimes territorial and foreign country attorneys, as well as those admitted to federal bars. See S.D. CAL. R. 1(d) (any U.S. court or highest court of any state, territory or insular possession); D. COLO. R. 4(d) (court of record of any state or territory); N.D. ILL. R. 6(b) (any U.S. district court or highest state court); D. Mass. R. 2 ("any court"); E.D. Mich. R. 1(2) (any U.S. court or highest court of state of residence); E.D. Mo. R. II(h) (any U.S. or highest state court); D.N.J. R. 4(c) (any U.S. or highest state court); S.D.N.Y. R. 3(c) (any U.S. district court or state court); E.D. Pa. R. 6(a) ("any attorney" not a member of the bar of E.D. Pa.). Seven of the ten district courts have an association rule, four of which require the associate attorney to have a local office. See S.D. CAL. R. 1(d) (in district); S.D. FLA. R. 14 (in district); S.D.N.Y. R. 4(a) (in district or in E.D.N.Y.); E.D. Pa. R. 6(a) (in state). The Colorado district court requires the local associate either to have an office in the state or to reside there. See D. COLO. R. 4(d). The other two districts with association rules demand that the associate attorney reside within the district. See E.D. Mo. R. II(h); D.N.J. R. 5. The three district courts without association rules are the N.D. Ill., D. Mass., and the E.D. Mich. Four district courts disqualify certain attorneys from application for *pro hac vice* admission. In three of those, the disqualified attorneys

their clients. However, the circumstances in which this right of admission may arise are extremely limited.<sup>91</sup>

1. *Authoritative Sources for Admission to Federal Courts.*—Federal tribunals are vested with their authority over admission of attorneys by their inherent powers to control the practice of law before them.<sup>92</sup> Since there is no general federal bar to which an attorney may be admitted, each court at each level of the federal judiciary establishes its own standards for admission.<sup>93</sup> The content of these rules is limited, of course, by federal constitutional provisions; but state standards of practice are not conclusive on their meaning.<sup>94</sup>

Federal law is the source for admission as of right for foreign attor-

are all those attorneys eligible for bar admission. See S.D. CAL. R. 1(d); D. COLO. R. 4(d); and D.N.J. R. 4(c). In the fourth court, only residents of the district are ineligible. See E.D. MO. R. II(1) (thus, residents of non-Missouri counties adjacent to the district can apply for both forms of admission). One district has explicitly rejected the logic of these courts. See D. MASS. R. 2 (residents and non-residents may apply for *pro hac vice* admission). Two of the courts have special *pro hac vice* rules. One limits admission, individually and by law firm, to three actions in a calendar year. See D.N.J. R. 4(c). The second district permits foreign attorneys to appear in any criminal proceedings without application to the court for admission. See E.D. MICH. R. 1(3) (non-Michigan attorneys who are admitted to highest court of state where they reside, or any U.S. court).

91. See text accompanying notes 95-97 *infra*.

92. "The Supreme Court of the United States, as the ultimate body in which is vested 'the judicial Power of the United States,' has inherent power over its own bar and over the bar of the other federal courts and tribunals as well." Cheatham, *The Reach of Federal Action Over the Profession of Law*, 18 STAN. L. REV. 1288, 1289 (1966). See also *Atchison, T. & S.F. Ry. v. Jackson*, 235 F.2d 390, 393 (10th Cir. 1956).

93. Congressional recognition of rule-making power in the Supreme Court and all courts established by Congress is found in 28 U.S.C. § 2071 (1964). For the text of the rules of each court, see 28 U.S.C.A. RULES—REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES (Supp. 1966); 28 U.S.C.A. RULES—UNITED STATES COURTS OF APPEALS RULES (1964), *as amended*, (Supp. 1966); FEDERAL LOCAL COURT RULES (Callaghan & Co. 1967).

94. By virtue of the supremacy clause of the federal constitution, federal courts are not bound by state rules. See *Spanos v. Skouras Theatres Corp.*, 235 F. Supp. 1, 13-14 (S.D.N.Y. 1964), *aff'd on rehearing*, *supra* note 69; *In re McCue*, *supra* note 67, at 68, 293 P. at 51. The same rule applies to federal tribunals. See *Sperry v. Florida*, 373 U.S. 379, 384 (1963) (state rules inapplicable only on exercise of federal power); *De Pass v. B. Harris Wool Co.*, 346 Mo. 1038, 144 S.W.2d 146 (1940) (state rules inapplicable to I.C.C. hearing). The federal courts, however, do in fact give much weight to state policies regarding admission of foreign attorneys. See *Spanos v. Skouras Theatres Corp.*, *supra* note 69, at 171 (following state association rule); *Id.* at 172 (dissenting opinion) (urging the honoring of New York's "strong public policy" of denying fees in such instances); *Application of Wasserman*, 240 F.2d 213, 215 (9th Cir. 1956) ("[R]ecognition by the United States District Court of the requirements of admission in the state courts and the policy behind this criminal statute is not only proper but highly commendable"); *Atchison, T. & S.F. Ry. Co. v. Jackson*, *supra* note 92, at 393 (advice of state bar association used by district court); *Spanos v. Skouras Theatres Corp.*, *supra* note 94, at 11-13 (following state's solitary incident rule); *Piorowski v. Arabian Am. Oil Co.*, 131 F. Supp. 553, 554 (S.D.N.Y. 1955) (borrowing of state characterization of word "office" for use in federal court rule).

neys. In this prescribing function, federal law has been found to permit representation by foreign counsel through the privileges and immunities clause wherever a federal claim or defense is involved, and where jurisdiction is based on a federal question.<sup>95</sup> The due process clause is probably the source of the attorney's right to appear *pro se*.<sup>96</sup> And the sixth amendment right to counsel in federal criminal proceedings apparently allows foreign attorneys to enter federal litigation as of right.<sup>97</sup>

2. *Policies Relevant to Admission to Federal Courts.*—The basic policies underlying federal rules of court again rest in the protection of the public from unethical and incompetent practice of law; and control of the bar through admission requirements is again the means used to effectuate these policies. Competency, however, is not assured entirely by federal procedures. Since passage of a general examination on federal law is not required for bar admission, the individual federal courts have had to rely upon state examinations<sup>98</sup> to designate the attorneys who may be admitted to practice generally. Federal court protections against incompetency among bar members may include some form of inquiry into an applicant's moral character,<sup>99</sup> and occasionally into his intellectual qualifications.<sup>100</sup> Except where this latter

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95. See *Spanos v. Skouras Theatres Corp.*, *supra* note 69, at 170. "For we hold 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 lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state." *Id.* The Second Circuit's conclusion is praiseworthy, but its reasoning is questionable. By employing the privileges and immunities clause, the court would appear to have given greater rights to natural persons who are clients than to corporate clients, since that clause of the constitution does not apply to corporations. See *Paul v. Virginia*, *supra* note 63, at 177-82. In *Spanos*, the court apparently considered the client to be the corporation's president; but such logic could always extend the protection of the privileges and immunities clause to corporations. This extension has never been attempted in the past.

96. See *Hightower v. Hawthorn*, 12 F. Cas. 142 (No. 6478b) (Ark. Super. Ct. 1826) (citing statutory and common law rights to appear *pro se*). The district courts often have special rules for *pro se* appearances. See, e.g., S.D.N.Y. R. 4(b); E.D. Pa. R. 11(b).

97. See *Cooper v. Hutchison*, *supra* note 73, at 121-23; *United States v. Bergamo*, *supra* note 74, at 35; E.D. Mich. R. 1(3). See also text accompanying notes 72-82 *supra*.

98. See note 94 *supra* for use of state bar admission by federal district courts. See also Crotty, *Requirements for Admission to Practice in Federal Courts*, SURVEY OF THE LEGAL PROFESSION, BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 144 (1952) (advocating that all district courts require only admission to bar of highest court of state in which they are sitting).

99. See e.g., S.D. CAL. R. 1(c) ("good moral character"); N.D. ILL. R. 6(a)(i), (ii) (requiring verified petition stating that applicant has read the Canons of Ethics and "will faithfully adhere thereto," and affidavits of others concerning the applicant's character). See also Crotty, *supra* note 98, at 132-33.

100. See, e.g., E.D. Mo. R. II(a), (b). See also Crotty, *supra* note 98, at 131-32 (listing districts with examinations in 1952). Cf. S.D.N.Y. R. 3(a), requiring applicant

inquiry consists of testing knowledge of federal substantive and procedural rules, the only assurance of competence given to the public is that admitted attorneys are familiar with state law and procedure. It would seem that foreign state attorneys are no less qualified to practice in federal courts than are local state attorneys.<sup>101</sup> Distinctions between these two types of attorneys, then, can hardly be based on protection of the public from incompetent practice of law. Perhaps admission to the bar of all federal courts through a federal law examination<sup>102</sup> would be a more effective and less cumbersome means of assuring the public of qualified attorneys practicing in federal courts.

Reliance upon state admission standards can be explained in part on the diversity jurisdiction feature<sup>103</sup> of the federal courts. Because much of the content of federal practice is state law, the states have a significant interest in having only qualified attorneys practice in federal courts. Since state citizens may have their state-created rights decided as conclusively in federal court as in state court, total disregard of state policies hardly seems justifiable solely on the citizenship of litigants and the amount in controversy.

The selection of the appropriate state policies to be considered, however, is a difficult matter. Present federal court rules generally reflect a policy of vertical uniformity within the jurisdictions, paying much respect to the policies of the states or territories in which the courts sit. Thus, admission to the local state bar is often required.<sup>104</sup> Policies of other states, however, may be more significant, as where all the contacts except the citizenship of one of the parties are with states other than the local state, and the law is that of another state. This problem could be resolved by a choice of law rule, weighing each of the various interests and selecting the state most significantly

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to submit a verified petition certifying that he has read and is familiar with, *inter alia*, the provisions of the Judicial Code (28 U.S.C.) which pertain to jurisdiction of the district courts, the federal rules of civil and criminal procedure, and the rules of the local district court.

101. This would be true except for those issues which involve only the law of the forum state. Otherwise, "I doubt whether many states make much, if any inquiry, as to what, if anything, applicants to their bar may know about federal law. Thus out-of-state lawyers advising in whole or in part on federal law would seem well advised not to apply for state admission or for federal court admission and thus avoid all possibility of supervision or check." *Spanos v. Skouras Theatres Corp.*, *supra* note 69, at 172 (dissenting opinion). Apparently at least Delaware includes questions concerning federal practice on its state bar examination. *See Crotty, supra* note 98, at 131.

102. The suggestion of a single federal bar for the federal courts originated with Professor Elliott E. Cheatham of the Vanderbilt University School of Law. Opposition to federal examinations, at least if varied for each court bar, has been based on the increased supervisory load on federal judges. *See Crotty, supra* note 98, at 145.

103. 28 U.S.C. § 1332 (1964).

104. *See* note 89 *supra*.



related to a particular case; however, such a rule would probably be too cumbersome for federal admission procedures. The issue would perhaps better be avoided than resolved, as by looking to the policy of horizontal uniformity, that is, among all of the federal courts, to permit disregard of all state policies despite diversity jurisdiction. The true determinant, though, is which type of rule would best serve the public interest.

As has been illustrated, the public interest in competent legal services within the federal courts is served equally poorly by requiring admission to the bar of the local state as by permitting members of foreign state bars to practice.<sup>105</sup> The public interest in the ethical practice of law is met when control over the attorneys is satisfactory. In federal litigation, much control over both foreign and local attorneys results from the direct supervision of the federal judge. The contempt power available to the court may be sufficient to prevent injustices to the clients. Criminal acts committed by attorneys in federal litigation would certainly not go uncontrolled, regardless of whether the attorney was from a foreign state or the local state. The only difficulties that might arise would be in civil suits, where jurisdiction over the wrongdoer might be difficult to obtain.

Thus, the local interest policies favoring restrictions on bar admission of foreign attorneys have little or no real validity.<sup>106</sup> The traditional local state definition of public interest is satisfied by the ordinary safeguards in federal litigation, and cannot justify greater restrictions on foreign attorneys than on local attorneys. Furthermore, the federal policies enumerated in Part III—right to counsel of one's own choosing, right to privileges and immunities of citizens of other states; full faith and credit protection of public acts, judgments and causes of action; supremacy of federal law over state law; and safeguards of due process and equal protection under the law—all these combine to emphasize the need for clients to have the same availability of counsel in each of the federal courts. Federal system policies also point towards equality among foreign and local attorneys practicing in the federal courts. Legal advice may be needed without the

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105. If the premise is correct that much state law is practiced in the federal courts, and that most of that state law is that of the forum state, then elimination of local state bar admission from federal admission rules must be even more contrary to the public interest in competent practice. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); and N.D. ILL. R. 6(a), S.D.N.Y. R. 3(a), and E.D. PA. R. 5(a) discussed in note 90, *supra*. However, the absence of any examination requirement in most states for foreign attorneys applying for bar admission indicates that knowledge of the minutiae of state law is not always a prerequisite of state bar admission. See, e.g., N.Y. Ct. App. R. VII ("Admission Without Examination").

106. One local policy does have validity, although it should restrict only appearances, not bar admission. This is the policy of procedural convenience, discussed in notes 110, 111 & 113 *infra*.

delay and expense incident to admission to federal court,<sup>107</sup> which is required for the foreign attorney meeting the litigation needs of his interstate client. For the federal system to function smoothly, without unduly restricting interstate legal services, ease of practice within all of the federal courts must be obtained.

3. *Conclusions on Admission to Federal Courts.*—The present standards for admission of foreign attorneys to federal litigation practice are unrelated to the basic policies underlying admission. Admission to the bar of each federal court is usually restricted to local state attorneys, although admission of foreign state attorneys would create no greater public danger of unethical or incompetent legal services. Federal bar admission suffers from the particularization of local rules for each federal court,<sup>108</sup> and from the lack of broad admission requirements to ensure the competency of practitioners in federal litigation.

Rather than meet these inconsistencies with a single admission policy and set of rules, the federal courts have adopted *pro hac vice* rules of court to permit some degree of entry to foreign attorneys. This circumstance, while appearing to ease the inequality between local and foreign attorneys in bar admission requirements, has three defects which make it inadequate. First, some local *pro hac vice* rules are severely restricted by various prerequisites to the court's exercise of its discretion to admit. Designation of local associate counsel is often such a prerequisite,<sup>109</sup> based more on a need for procedural convenience<sup>110</sup> than on benefit to the parties.<sup>111</sup> Second, even without such additional requirements, the time and expense of securing the permission of the court to appear *pro hac vice* may be unduly prejudicial to the client with foreign counsel.<sup>112</sup> Third, even were *pro hac vice* admission as available as bar admission, the public would not receive its needed

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107. See *Spanos v. Skouras Theatres Corp.*, *supra* note 69, at 170 (challenging dissenting opinion's suggestions that broadened admission requirements would satisfy needs of interstate practitioner).

108. The variation in federal admission rules should be apparent from notes 89 & 90 *supra*. Uniformity of rules is certainly a desirable end. See *Crotty*, *supra* note 98, at 145 (urging uniformity through elimination of local court examinations, and through use of single *pro hac vice* rule).

109. See local court rules cited note 90 *supra*.

110. See S.D. CAL. R. 1(d) (an associate "with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom papers shall be served"). See *also* text accompanying note 48 *supra*.

111. The countervailing interest with respect to association rules are considered in *Spanos v. Skouras Theatres Corp.*, *supra* note 69, at 171. Other restrictions on *pro hac vice* include the disqualification provisions for attorneys eligible for bar admission, and exclusion of attorneys not admitted to one of the designated bars. See note 90 *supra*. The last restriction may preclude any admission of foreign attorneys, who usually cannot qualify for state bar admission. See note 4 *supra*.

112. See *Spanos v. Skouras Theatres Corp.*, *supra* note 69, at 170.

protection from incompetent legal advice, for admission to a state bar is no assurance that the attorney is capable of handling federal litigation.

It is submitted that a federal bar having admission standards sufficient to select intellectually and morally qualified attorneys would more completely satisfy the public interest. Control over attorneys admitted to the federal bar could be facilitated by a rule that all attorneys appearing in federal court are subject to service of process throughout the nation for any cause of action or dereliction arising from participation in preparation or trial of a case in the court. Contempt power would be available as would liability for criminal wrongs. And local court rules could require designation of a location for service of papers within the district.<sup>113</sup> With such an admissions structure, admission *pro hac vice* would probably be used only sparingly, as for admission of attorneys from foreign countries.<sup>114</sup>

The admission standards for such a federal bar should be independent of state limitations, with one exception; admission to some state bar ought to be retained as a prerequisite to ensure some familiarity with non-federal substantive law which might arise in federal litigation. However, as has been already recognized by the courts,<sup>115</sup> disbarment from a state bar should not be conclusive on the federal courts.

#### V. ADMISSION TO OFFICE PRACTICE

Office practice of law—practice not pursuant to local litigation<sup>116</sup>—generally may not legally be undertaken by persons not admitted to

113. Most local court rules now require such a designation, although association of resident counsel or counsel with an office in the district may be viewed as enhancing the control of the court. See note 90 *supra* for listing of federal district court association rules. With control satisfied by other means, local associates would serve only the interests of procedural convenience. As such, any layman legally able to accept service and either living or working within the district should qualify as a local associate.

114. *Pro hac vice* might also be used regularly for attorneys who have not had an opportunity to be admitted to the federal bar, such as those recently admitted to their state bar. But there is no justification for disqualifying from use of *pro hac vice* those attorneys who have never taken advantage of their opportunity to gain federal bar admission.

115. See *Theard v. United States*, 354 U.S. 278 (1957); *Selling v. Radford*, 243 U.S. 46 (1917). But see D. COLO. R. 4(e) (automatic federal disbarment or suspension upon disbarment or suspension from practice in Colorado state courts).

116. Legal services performed with regard to prospective, pending, or past litigation are generally classified as litigation practice. Although differentiation may be difficult where a prospective lawsuit is not filed, office practice does include all other law practice. Thus, only attorneys admitted to practice in a jurisdiction may prepare legal instruments for others or give advice to clients on matters of law. See *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919); *In re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909); ALA. CODE tit. 46, § 42(c) (1958) (any act in a representative capacity). Counseling with regard to out-of-state litigation, however, may be considered local office practice. See *Spivak v. Sachs*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965) (advice in New York regarding Connecticut litigation).

the local bar.<sup>117</sup> The reason for such a harsh rule is said to lie in the grave public danger resulting from the absence of any direct judicial control or supervision over office practitioners,<sup>118</sup> and the resulting difficulty in detecting office practice violations. Much of this danger is attributable to the lay practitioner, who raises problems which are beyond the scope of this note. However, our concern is with the foreign attorney, and our inquiry is whether the public interest mentioned above justifies the virtual exclusion of foreign attorneys who are intellectually and morally qualified to conduct office practice. Central to this exclusion is the failure of the states to distinguish litigation practice from office practice. Bar admission, as we have seen, is generally an impracticable alternative for foreign attorneys; and admission to enough state bars adequately to serve the larger interstate client is impossible. Unfortunately, the established exceptions for litigation practice are not available to the foreign office practitioner. Admission *pro hac vice* is limited to litigation, and no parallels exist to the litigant-client's right to choose a foreign attorney.<sup>119</sup>

This problem has grown in recent years and hampers the legal services essential to much interstate and international commerce. The increase of non-litigation practice, together with the multiplication of interstate business and social connections, make out-of-court interstate legal services an everyday necessity. International transactions, which require office practice services, are also becoming commonplace, so that the attorneys from foreign countries are increasingly involved in office practice situations within American states. These attorneys have a more critical need for relaxed office practice rules than do American attorneys, because the alternative of bar admission is foreclosed in most states by the requirement of American citizenship.<sup>120</sup>

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117. New York first recognized office practice as forbidden to other than admitted attorneys in 1919 by statutory construction. See *People v. Alfani*, *supra* note 116, at 337, 125 N.E. at 673. Connecticut did so by statute in 1933. See *Taft v. Amsel*, 23 Conn. Supp. 225, 228, 180 A.2d 756, 757 (Super. Ct. 1962). Research has revealed no state that does not follow this rule.

118. "Is it only in court or in legal proceedings that danger lies from such evils? On the contrary, the danger there is at a minimum for a very little can go wrong in a court where the proceedings are public, and the presiding officer is generally a man of judgment and experience. Any judge of much active work on the bench has had frequent occasion to guide the young practitioner, or protect the client from the haste or folly of an older one. Not so in the office. Here the client is with his attorney alone, without the impartial supervision of the judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo." *People v. Alfani*, *supra* note 116, at 339-40, 125 N.E. at 673.

119. See note 143 *infra*.

120. See note 4 *supra*.

### A. *Authoritative Sources for Office Practice Admission Rules*

One major problem often bypassed by courts and legislatures in formulating and interpreting admission rules for foreign attorneys is defining the authoritative source for office practice rules. The body having primary jurisdiction over litigation practice is, of course, the court in which the litigation is being conducted. State and federal litigation rules have thus enjoyed relatively independent growth. Office practice, on the other hand, has, by definition, no court connections that would indicate whether federal or state law should govern. Locus of performance is not especially helpful, since office practice always takes place within a federal judicial district at the same time it takes place within a state. Present law apparently presupposes that federal rules apply only to federal court practice, leaving state rules to govern state litigation and all office practice. It is questionable, however, whether this state jurisdiction over office practice is truly exclusive; for federal jurisdiction would seem at least concurrent where solely federal law is practiced.<sup>121</sup> Resolution of this issue has not been attempted directly by the courts or the legislatures.<sup>122</sup>

### B. *Rules Governing Office Practice Admission*

The usual state rule forbids all office practice by persons who are not admitted to the bar of the state in which the practice takes place.<sup>123</sup> This rule holds true regardless of the content of the law to be practiced, whether local or foreign state law,<sup>124</sup> federal law,<sup>125</sup> or the law of another nation.<sup>126</sup>

Two state law exceptions do permit some office practice by the foreign attorney, but neither resolves the problem directly. The first, often referred to as the solitary incident or incidental services rule,<sup>127</sup>

121. Concurrent state and federal jurisdiction over the practice of federal law regarding patents was recognized in *Sperry v. Florida*, *supra* note 94, at 384, 403.

122. Whether office practice may in part be controlled by federal law is discussed in note 9 *supra*, and text accompanying notes 146-56 *infra*.

123. See, e.g., ALA. CODE tit. 46, §§ 31, 42(b)-(d) (1958); N.Y. PEN. LAW § 270 (McKinney 1944, Supp. 1966). Many jurisdictions equally condemn office practice by foreign attorneys and by laymen, as indicated in *Spivak v. Sachs*, *supra* note 116, at 168, 211 N.E.2d at 311, 263 N.Y.S.2d at 956: "The statute aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." See also *Harriman v. Strahan*, 47 Wyo. 208, 33 P.2d 1067 (1912).

124. See *Spivak v. Sachs*, *supra* note 116 (foreign state law); *People v. Alfani*, *supra* note 116 (local state law).

125. See *In re Bercu*, 299 N.Y. 728, 87 N.E.2d 451 (1949) (federal tax law).

126. See *In re Roel*, 3 N.Y.2d 244, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957) (Mexican law); *Application of N.Y. County Lawyers' Ass'n*, 207 Misc. 698, 139 N.Y.2d 714 (1955) (Mexican law).

127. See *Spivak v. Sachs*, *supra* note 116 (denying application of solitary incident rule); *Appell v. Reiner*, 43 N.J. 313, 317-18, 204 A.2d 146, 149 (1964) (urging application of solitary incident rule) (dissenting opinion); *Bennett v. Goldsmith*, 280 N.Y. 529, 19 N.E.2d 927 (1939) (applying solitary incident rule).

is really not an exception at all, for it is based on the premise that the practice permitted thereby does not constitute practice of law. However, its scope is very limited. The solitary incident rule, for example, will usually allow the preparation of a simple document for a small fee,<sup>128</sup> but each incident must be isolated in order to be legal;<sup>129</sup> a continuous pattern of such interstate office practice is outside the rule. Furthermore, the rule will not permit a lengthy stay in a state for the purpose of practicing law,<sup>130</sup> nor the drawing of a complex instrument,<sup>131</sup> nor any of the types of interstate practice associated with the constant legal needs of today's interstate travelers. Consequently, the solitary incident rule does not meet the needs of modern corporate law practice.

The second exception—failure of a state to enforce its office practice prohibitions against foreign attorneys<sup>132</sup>—is unsatisfactory because of its uncertainty. Non-enforcement would be most likely if the client's residence were out-of-state, the attorney's visit were of brief duration, the transaction were of an interstate character, a change of attorneys were impractical and would be detrimental to the client,<sup>133</sup> and the foreign attorney were limited to passive or consultative, rather than active, functions.<sup>134</sup> The foreign attorney thus permitted to conduct office practice is violating the literal language of the unauthorized practice rules; but his immunity from prosecution results from a recognition among members of the bar and state officials that present rules governing office practice are inequitable for the foreign attorney and should be only selectively enforced until the rules are revised. However, such violations are still an adequate defense to a client sued for services rendered.<sup>135</sup>

The first case that meets this problem squarely is *Appell v. Reiner*,<sup>136</sup>

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128. See *Bennett v. Goldsmith*, *supra* note 127; *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 371-72, 125 N.E. 666, 669 (1919).

129. *People v. Title Guarantee & Trust Co.*, *supra* note 128 at 373, 125 N.E. at 670 (concurring opinion).

130. See *Spivak v. Sachs*, *supra* note 116 (two-week stay outside of solitary incident rule).

131. See *People v. Title Guarantee & Trust Co.*, *supra* note 129, at 371, 125 N.E. at 669 (Chattel mortgage and bill of sale).

132. See 78 HARV. L. REV. 1651, 1653 (1965) (officials refrain from prosecuting); 31 S. CAL. L. REV. 416, 420 (1958) (describing questionnaires returned from eight states and two cities reporting non-enforcement to prevent hardship).

133. See 31 S. CAL. L. REV. 416, 420 (1958).

134. See 78 HARV. L. REV. 1651, 1653 (1965).

135. See *Spivak v. Sachs*, *supra* note 116. New York will also deny fees for office practice outside the state. In *Ginsberg v. Fahrney*, 45 Misc. 2d 777, 258 N.Y.S.2d 43 (Sup. Ct. 1965), plaintiff, a Pennsylvania attorney, was denied compensation for office services rendered in Illinois for a New York resident. Plaintiff was not qualified to practice in Illinois, but the court seemed to base its decision also on his failure to comply with New York law. See 45 Misc. 2d at 778, 258 N.Y.S.2d at 44. It is doubtful that New York could establish its legislative jurisdiction over this practice.

136. *Supra* note 129.

a recent decision by the New Jersey Supreme Court. Plaintiff, a New York lawyer not admitted to the New Jersey bar, sought compensation for services rendered defendants, two New Jersey residents. Plaintiff had attempted to solve his clients' financial problems, which involved numerous claims of New York and New Jersey creditors "so interwoven as to constitute an inseparable whole."<sup>137</sup> The lower court denied compensation,<sup>138</sup> finding that plaintiff violated the state's unauthorized practice law by not restricting his practice to New York claims. Negotiations with the New Jersey creditors were held to have tainted the entire relationship. The supreme court, *per* Justice Haneman, reversed, recognizing that in circumstances such as these, it is in the "public interest" to permit a foreign attorney to conduct office practice in the state. Several preconditions were established for the operation of the rule: the transaction involved must be of an interstate character; the various state connections must be closely interrelated; the foreign attorney must be admitted to the practice of law in one of the connected states; the substitution of local counsel for the foreign attorney for the local aspects of the transaction must be "grossly impractical and inefficient;" the retention of additional counsel must in all probability result in aggregate fees in excess of the reasonable compensation to which one attorney would legitimately be entitled; and no court proceedings may be involved.<sup>139</sup>

Despite its numerous requirements, the *Appell* exception is a bold and significant revision of modern office practice rules. The New Jersey court displayed great creativity, citing no cases in its recognition of new law to fit the changing patterns of our federal system. The New York Court of Appeals<sup>140</sup> has expressed its agreement with the *Appell* decision, noting the danger that the law "be stretched to outlaw customary and innocuous practices," and that it should not penalize "every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."<sup>141</sup> Nevertheless, New York applied its unauthorized practice statute, and denied compensation for legal advice given over a two-week period in New York. It is hoped, however, that the way is now open for courts of all the states to consider the validity of this true public interest in interstate availability of office practitioners.<sup>142</sup>

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137. *Appell v. Reiner*, *supra* note 127, at 315, 204 A.2d at 147.

138. *Appell v. Reiner*, 81 N.J. Super. 229, 195 A.2d 310 (1963), *rev'd*, *supra* note 127.

139. *Appell v. Reiner*, *supra* note 127, at 317, 204 A.2d at 148.

140. *Spivak v. Sachs*, *supra* note 116, at 168, 211 N.E.2d at 331, 263 N.Y.S.2d at 956.

141. *Id.*

142. The New Jersey Supreme Court has reaffirmed its position twice since its decision in *Appell*, once by a rule of court recognizing the validity of payments to a foreign attorney for services performed for estates probated in New Jersey, and the

With the exception of New Jersey, then, the states provide little relief for the foreign attorney desiring to engage in local office practice. Unfortunately, federal law is presently no more helpful, because most of the constitutional provisions relied upon to permit appearance as of right in litigation are not applicable to office practice situations.<sup>143</sup> Any federal exceptions to the state office practice prohibitions are only now reaching the formative stage. These exceptions might perhaps be based upon the supremacy clause, the privileges and immunities clause, and the public interest in representation by counsel, expressed in the *Button*<sup>144</sup> and *Brotherhood*<sup>145</sup> cases.

Office practice by foreign attorneys might be permitted under the supremacy clause if some types of office practice could be deemed to be controlled by federal law, either exclusively or concurrently with the states. Some cases have indicated that such a federal area of office practice may exist, but none have directly decided the point. In *Sperry v. Florida*,<sup>146</sup> the Supreme Court refused to enjoin a layman authorized to practice before the United States Patent Office from "performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications."<sup>147</sup> State power over the practice of law, although legitimately exercised, was required to yield to federal power since the state law was inconsistent with federal law.<sup>148</sup> The practices involved included consideration and advice as to the patentability of inventions and the advisability of relying upon alternative forms of protection under state law, as well as the actual drawing of patent applications and amendments.<sup>149</sup>

The Court treated these services, however, as those directly related to a federal administrative tribunal, much in the same manner that all practice pursuant to proceedings before the federal courts is regarded as independent of state control. The Court was careful to point out that registration in the Patent Office "does not authorize the general practice of patent law"<sup>150</sup> and that state control is preserved "except to the limited extent necessary for the accomplishment of federal objectives."<sup>151</sup> Rather than creating an area of federal office practice

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other time in a decision implementing that rule of court. See *In re Estate of Waring*, 47 N.J. 367, 221 A.2d 193 (1966).

143. Unavailable are the right to appear *pro se*, the sixth and fourteenth amendment rights to effective counsel and counsel of one's own choice, rights under the full faith and credit clause, and the procedural due process guarantees.

144. *NAACP v. Button*, 371 U.S. 415 (1963).

145. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). See text accompanying notes 83-87 *supra*.

146. 373 U.S. 379 (1963).

147. 373 U.S. at 386.

148. 373 U.S. at 384, citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

149. 373 U.S. at 383.

150. 373 U.S. at 386.

151. 373 U.S. at 402.



within which qualified foreign attorneys could render legal services, the Court merely carved out of state control the area surrounding a to a federal administrative tribunal. This exemption of persons practicing before such tribunals from state practice rules had earlier been recognized in *De Pass v. B. Harris Wool Co.*<sup>152</sup> There, a layman licensed to practice before the Interstate Commerce Commission was permitted to enforce his claims for services rendered before the I.C.C. sitting in Missouri, although the state law forbade practice by laymen.

*In re Bercu*<sup>153</sup> is the only case decided thus far that has involved an office practitioner of exclusively federal law. Bercu was a certified public accountant who was found to have "practiced law" within New York State in regard to federal tax matters. Without mentioning possible federal jurisdiction, the court found defendant to be in contempt and enjoined him from the practice of law.<sup>154</sup> In the absence of any federal exercise of power, the decision is unquestionably proper. However, it does not answer the question whether the federal government may exercise its powers over such office practice without violating the tenth amendment. *Sperry* recognized such power over practice as inherent in a federal administrative tribunal; whether some other exercise of federal power, such as the creation of a single federal bar, would displace state regulation of federal office practice is still uncertain.

The desirability of recognizing federal office practice is another matter. There is indeed a legitimate federal interest in determining who may practice federal law;<sup>155</sup> and state admission requirements are certainly inadequate as a guaranty of competent practitioners of federal law.<sup>156</sup> Moreover, in office practice matters, there is not the further check on a practitioner's qualifications which is available in the federal courts. However, the problem of defining the boundaries of federal office practice is not easily solved. The primary difficulty would be with the large part of federal office practice that is closely interrelated with state law matters. Counsel setting up a corporation are concerned with state blue sky and incorporation laws at the same time they are considering federal tax and securities regulations. Distinguishing various segments of such an operation for admission of foreign attorneys would be extremely impractical. Nevertheless, federal law specialists such as antitrust, securities, taxation, or

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152. 346 Mo. 1038, 144 S.W.2d 146 (1940).

153. *In re Bercu*, *supra* note 125.

154. The fact that Bercu was a layman does not make the case inapplicable, since New York treats foreign attorneys as laymen. See *Spivak v. Sachs*, *supra* note 116 at 168, 263 N.Y.S.2d at 956, 211 N.E.2d at 331.

155. See *Sperry v. Florida*, *supra* note 146, at 400-02; *Spanos v. Skouras Theatres Corp.*, 235 F. Supp. 1, 13-14 (S.D.N.Y. 1964), *aff'd on rehearing*, 364 F.2d 161 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966).

156. See note 101 *supra*.

patents<sup>157</sup> experts, would seem to have a case for a single admission under federal law. As in *Bercu*, though, state law probably will continue to govern even these areas of practice until the Congress acts.

Further problems will arise in the separation of office practice from litigation practice. The federal antitrust counselor who shifts to work upon prospective litigation would be practicing outside his federal office practice haven. But at what point would he seek admission to the court? Surely he cannot make application before a suit is filed; and if the suit is settled prior to filing, what rules are to govern? After the filing of the suit, compensation for his pre-filing services may become contingent upon his admission to the court, since all such services are then considered litigation services.<sup>158</sup> In state courts entertaining federal causes of action, a foreign attorney's inability to be admitted could cost him a fee for services that would have been legal if no suit had been filed. The likelihood of such an inconsistency in the federal courts, however, is much less in light of the Second Circuit's decision in *Spanos v. Skouras Theatres Corp.*,<sup>159</sup> which allowed compensation to an unadmitted foreign attorney for both pre-filing and post-filing services. With a single federal bar for litigation as well as office practice, of course, distinguishing office practice from litigation practice would be unnecessary.

A second source for federal exceptions to state office practice prohibitions might be the privileges and immunities clause, which was recently used to permit representation by foreign counsel in federal litigation involving a federal right.<sup>160</sup> It would seem that a client acting in reliance upon federal law, and employing counsel for office work to protect rights accorded by federal law, should have the same right to employ an attorney lawfully admitted to practice in any other state. For the most expert of all office practice is that which results in such unambiguous relationships that litigation is never required. A client seeking to file a registration statement under the Securities Act of 1933 should not be restricted to local counsel for the filing, and only be permitted foreign counsel when the registration statement is challenged. Such instances suggest that one asserts his federal "rights" in places other than the courtroom. And the privileges and immunities

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157. Cf. D.N.J. R. 4(E) (recognizing special admission rules for patent attorneys, although circumscribing them to such extent that their usefulness is extremely limited—that is, such attorneys must maintain domicile in New Jersey).

158. See *Tuppela v. Mathison*, 291 F. 728, 730 (9th Cir. 1923) (recovery for services rendered prior to litigation granted according to litigation practice rules).

159. 364 F.2d 161 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966). The facts illustrating the periods in which the services were rendered are best seen in the district court opinion, *supra* note 155, at 6-7 (suit filed in June 1953; services began at least by March 1953 and continued until October 1958).

160. *Spanos v. Skouras Theatres Corp.*, *supra* note 159, at 170.

clause perhaps extends a right of national citizenship to be free to choose counsel from any state in such office practice situations.

The *Button* and *Brotherhood* cases indicate a third possible federal exception to state office practice restrictions on the foreign attorney. As has been noted,<sup>161</sup> these cases shift to the states the burden of showing that the substantive evils flowing from the allegedly wrongful practices justify the restrictions imposed. When foreign attorneys who specialize in federal law or the law of their own state engage in office practice within their speciality, a state would have great difficulty in demonstrating any prejudicial aspects of the arrangement. Indeed, it is to the benefit of the resident client seeking advice on a merger, for example, to engage the best federal antitrust lawyers available, regardless of the bars to which those lawyers are admitted.<sup>162</sup> And similar reasoning would sustain, as within the public interest, office practice concerning their own substantive laws by foreign attorneys, both of other American states and foreign nations. It is acknowledged that a pressing need today is for more accurate and authoritative legal advice on foreign law.<sup>163</sup> This extension of the *Button* and *Brotherhood* rulings would provide the most sweeping of exceptions to the prohibitions presently inhibiting representation by foreign attorneys in office practice situations.

### C. Policies Relevant to Office Practice Admission

The same broad policy relevant to all admissions of foreign attorneys—that of the public interest—should guide the formulation and interpretation of office practice rules. The strictness of state rules against office practice by persons not admitted to the local bar has been explained in terms of the absence of direct supervision by a court and the resulting need for extraordinary precautions. The failure to distinguish office services of foreign attorneys from those of laymen had led to this misconception. The client employing foreign counsel does not usually run a high risk of incompetence, because he generally employs foreign counsel according to reputation, satisfactory past dealings, specialized abilities, or friendship<sup>164</sup>—all of which reduce

161. See text accompanying notes 83-87 *supra*.

162. "The problem is by no means limited to anti-trust litigation; similar requirements for specialized legal services frequently arise as to federal rights relating to such esoteric subjects as income taxation, patents, copyrights, trademarks, and securities and labor regulation." *Spanos v. Skouras Theatres Corp.*, *supra* note 159, at 170.

163. See *id.*; Application of N.Y. County Lawyers' Ass'n, *supra* note 126 (Mexican attorney to provide New York attorneys with advice on Mexican law); 31 S. CAL. L. REV. 416, 421 (1958) (suggesting alternative means of providing legal advice where physical presence is or is not required in foreign jurisdiction).

164. See *In re Estate of Waring*, *supra* note 142, at 373, 221 A.2d at 196 (New York counsel, who had represented decedent's financial matters for more than 50 years, not illegally practicing law in New Jersey in probate matter); *Taft v. Amsel*, *supra* note 117 at 266, 180 A.2d at 756 ("former family relationship" with summer neighbors); 78 HARV. L. REV. 1651 (1965).

the danger of incompetency. Unethical practices by such attorneys are not subject to contempt proceedings, it is true. But those practices would be a valid defense to a suit for services rendered, and could be cause for both criminal and civil liability of the attorney. Service of process presently is difficult to obtain, but some manner of substituted service of process, similar to that of the non-resident motor vehicle statutes, might be validly based upon the performance of legal services in the state. The real and vital public interest lies in increased availability of foreign counsel, as shown in the foregoing discussion of the growth of exceptions to the rigid office practice prohibitions.

#### D. Conclusions Regarding Admission to Office Practice

The development of improved rules to govern the office practice of law must begin with a view toward the policies behind restrictions on such practice. "Public interest" should be regarded as a flexible concept, subject to change in application as the balance between the needs for local restrictions and freedom of interstate office practice vary over time. Present distinctions between office practice and litigation practice should be recognized, and the increasing need for separate admission procedures for foreign office practitioners should be stressed. In evaluating the plight of the foreign attorney, lay practitioners should be excluded from consideration, thus acknowledging the variance in public dangers from each group.

Admission rules for foreign office practitioners should exist at both the local law and conflict of laws levels. Local admission rules should first include *pro-hac-vice*-type procedures for office practices by foreign attorneys.<sup>165</sup> Local courts should be designated for the hearing of applications for admission of foreign attorneys for particular office practice problems. Second, the local rules of practice should explicitly recognize a right of foreign attorneys to conduct office practice in the jurisdiction where the interstate character of a problem makes it impractical and inefficient to employ separate counsel for each jurisdiction involved. Third, these local rules should contain reciprocity provisions for office practice by lawyers from jurisdictions permitting unrestricted conduct of foreign office practice by local attorneys. Control over foreign attorneys conducting office practice should be furthered by rules making the act of practicing law within the state a basis of judicial jurisdiction, after appropriate notice, as to any cause of action or complaint against the lawyer arising out of his practice in the state.

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165. As with litigation practice, these *pro hac vice* rules should not be limited to American attorneys. Lawyers from foreign countries should be permitted to engage in office practice through *pro hac vice* procedures, especially in light of the policy of foreign nations' permitting American law firms to establish branch offices abroad.

In addition to these revitalized local law rules of practice, courts should recognize the conflict of laws aspects of admission of foreign attorneys. In litigation practice, the vertical conflict of laws rule has always been implied; the locus of performance of the services, that is, in federal or state court, dictates the choice of the proper local law governing admission.<sup>166</sup> In office practice, the absence of an entirely federal or state locus of performance requires that the vertical choice of law turn on the content of the law to be practiced. Exclusively federal law practice should be governed by federal rules of practice, at least to the extent that the Congress acts to establish admission procedures for federal office practice.

Horizontal conflict of laws rules should be developed for the states, and in the absence of a federal bar, for the federal courts also. The jurisdiction having the most significant contacts would seem most qualified to apply its local rules of practice. Among the contacts which could be considered would be the place where the most substantial legal services were rendered, the residence of the client,<sup>167</sup> the place where the attorney-client relationship was established, and the jurisdiction in which the issue of unauthorized practice arose. An alternative place of reference test<sup>168</sup> might be used to uphold the validity of the practice, if that practice is valid under the laws of any state which has a "normal relation" to the practice.

## VI. CONCLUSION

The public interest in interstate availability of legal services coupled with the loss of vitality of protective local interests demand reevaluation of the rules governing admission of foreign attorneys. Those decision-making bodies charged with the duty of formulating and applying these rules need a uniform framework within which to assess each of the relevant considerations. It is submitted that these considerations fall into four classifications—type of practice, locus

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166. Under some circumstances, locus of performance is not even helpful in litigation practice. Litigation began in state court may be removed to federal court, or a federal court may refrain from passing on a state question and refer the case to state court. See, e.g., *NAACP v. Button*, *supra* note 144 (federal suit; then state suit); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (U.S. Sup. Ct. certified question to Fla. Sup. Ct.). In the usual case, substitution of new counsel would be prejudicial to the client; in such instances, continuation of the same counsel would seem to be a right of the client, which right would pass to the attorney for purposes of admission.

167. In *Ginsberg v. Fahrney*, *supra* note 135, the court apparently considered the client's New York residency, which was the sole contact with that state aside from the attorney's suit to recover his fee, to be sufficient connection to apply New York law. If the law of the place of performance (Illinois) had permitted such practice, as it did not, New York would probably have been acting beyond its legislative jurisdiction.

168. Cf. *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); E. CHEATHAM, *PROBLEMS & METHODS IN CONFLICT OF LAWS* 316-17 (1960).

of performance, content of the law practiced, and status of the practitioner.<sup>169</sup>

The type of practice affected should be denominated as either office practice or litigation practice, with recognition given to the lack of procedural means for admission of foreign office practitioners as well as the dangers that accrue in the presence or absence of a supervisory tribunal. Further, civil and criminal litigation should be distinguished, with the special rules and policies that attach to the latter thus noted.

Locus of performance and content of the law practiced should assist in the indication of authoritative sources for litigation and office practice rules respectively. Generally, locus of performance will conclusively establish whether federal or state law will govern admission to litigation.<sup>170</sup> In office practice situations, the only guideline for finding an area of federal practice within the broad reach of state law is through the content of the law practiced. Exclusively federal practice over which Congress has exercised its concurrent powers will unquestionably indicate a federal authoritative source. Once the authoritative source for a particular situation has been determined, relevant policies bearing upon admission of foreign attorneys should be more clearly delineated.

In determining the status of the practitioner concerned, courts and legislatures should first distinguish between lay practitioners and foreign attorneys, and then proceed to an examination of the false assumption of danger to the public, which has so inhibited the growth of interstate practice by foreign attorneys. Among the attorneys considered, distinctions as to residency should be eliminated, and emphasis shifted instead to factors indicating competency and integrity. Thus, bar membership and extent of active practice would seem relevant considerations. Discrimination against lawyers from foreign nations should be eliminated, with association rules being enacted where necessary to ensure effective representation of the client. In sum, admission rules should consider the interest of clients in being free to select their legal counsel—and their freedom should not be unduly impaired.

WILLIAM E. FLOWERS

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169. Two other considerations might be the nature of the client and the forum in which the issue of unauthorized practice arises. Neither should be relevant, but each may in fact have some significance. For example, under the *Spanos* use of the privileges and immunities clause, some distinction may be required between corporate and individual clients. And occasionally a strong policy of the forum, especially as reflected in a choice of law rule, may determine the result in a particular instance. Cf. Ginsberg v. Fahrney, *supra* note 135.

170. See note 166 *supra*.