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Attorney-Client-Client's Right To Engage Out-of-State Attorney for Advice Concerning Federal Claim Is a Privilege and Immunity of National Citizenship--*Spanos v. Skouras Theatre Corp.*

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RECENT DEVELOPMENTS

ATTORNEY-CLIENT—Client's Right To Engage Out-of-State Attorney for Advice Concerning Federal Claim Is a Privilege and Immunity of National Citizenship—*Spanos v. Skouras Theatre Corp.**

The state and federal courts, existing side by side within the boundaries of each state, separately control admission to practice law before their respective bars.[1] Although membership in a state bar is generally a prerequisite for admission to the bar of a federal court,[2] the two systems do function under separate and distinct ground rules, and they appear to have done so with a minimum of friction.[3] However, the principal case is indicative of the problems that may arise when state policy on the right to practice law within the state conflicts with federal policy.

Defendant operated a chain of movie houses in and around New York City and planned to bring an antitrust action (known as the "industry suit") against the major movie producers for violation of the antitrust laws. Defendant retained three New York law firms, but also desired the services of plaintiff, an expert on antitrust problems of the motion picture industry. Since plaintiff was not a member of the New York bar, he agreed to work with one of defendant's New York lawyers and began work on the industry suit in March, 1953. Plaintiff never applied for admission to either the bar of New York State or of the federal court, but nonetheless continued to work on the suit for the next five years. After plaintiff learned that defendant had settled part of the suit, he wrote defendant demanding payment of his contingent fee. Defendant discharged plaintiff without paying the fee, and plaintiff brought suit in the Federal District Court for

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* 364 F.2d 161 (2d Cir. 1966), *cert. denied*, 87 Sup. Ct. 597 (1966) [hereinafter referred to as principal case].

1. It is clear that a state may regulate the admission of attorneys to practice before the courts of the state. See, *e.g.*, Brents v. Stone, 60 F. Supp. 82 (E.D. Ill. 1945); State *ex rel.* Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942). The Supreme Court, moreover, has interpreted section 1654 of the Judicial Code, 28 U.S.C. 1654 (1964), as a legislative authorization for the federal courts to prescribe their own rules of practice. United States v. Hvass, 355 U.S. 570, 574-76 (1958). 28 U.S.C. 1654 states that "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

2. See, *e.g.*, Kovrak v. Ginsburg, 280 F.2d 209, 211 (3d Cir. 1960).

3. See Ginsburg v. Kovrak, 392 Pa. 143, 139 A.2d 889 (1958), in which the court enjoined from the practice of law in Pennsylvania an attorney who had not been admitted to practice before any court of record in Pennsylvania. However, the court noted that the injunction in "no way effect(ed) the appellant's rights to engage in the practice of law . . . or to try cases in the United States District Court for the Eastern District of Pennsylvania . . . ." *Id.* at 145.

the Southern District of New York.[4] The district court allowed recovery, stating that under local court rules[5] admission of plaintiff *pro hac vice* would have been authorized had he applied, and his failure to comply with formalities should thus not bar recovery. Moreover, the court noted, plaintiff's services were rendered in connection with an action in a federal court for alleged violation of a federal law and, had plaintiff been admitted to the district court, his right to recover could not be defeated because he had practiced in New York contrary to New York law. The court thus concluded that New York policy could not obstruct the administration of federal questions in the federal courts.

A majority of a three-judge panel of the Second Circuit overruled the district court's granting of recovery, stating that since plaintiff had not been admitted to practice before the federal court, there was no federal law governing his status and consequently New York law determined his right to recover. The panel determined that the New York courts would be required to refuse recovery in light of *Spivak v. Sachs*,[6] a case in which an out-of-state lawyer who came to New York and advised a client on New York law was found to have violated section 270 of the New York Penal Law[7] which forbids the practice of law by all but duly licensed New York attorneys. The majority acknowledged that when state law conflicts with federal law,[8] the former must yield and that had plaintiff successfully applied for leave to appear before the district court, he could have recovered despite New York law to the contrary. However, plaintiff failed to apply, and given New York's strong policy of not allowing attorneys who are not licensed in New York to practice law in the state, the court concluded that such failure could not be considered a mere formality.

The Second Circuit sitting *en banc*, speaking through Judge Friendly, reversed the decision of the panel and affirmed the decision of the district court. The court based its decision on the district court's interpretation of the local court rule and on a contract theory.

4. For a thorough statement of the facts of the principal case, see Spanos v. Skouras, 235 F. Supp. 1, 3-10 (S.D.N.Y. 1964).

5. S.D.N.Y. Ct. R. 3(c). For the substance of rule 3(c), see text accompanying note 9.

6. 16 N.Y.2d 163, 211 N.E.2d 329 (1965).

7. New York Penal Law § 270 provides in part:

> It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as attorney and counselor-at-law for a person other than himself in a court of record in this state or in any court in the city of New York, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, . . . or to assume, use, or advertize the title of lawyer, or attorney and counselor-at-law . . . in such manner as to convey the impression that he is a legal practitioner of law . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state . . . .

8. 28 U.S.C. § 1654 (1964) is the relevant federal legislation. See note 1 *supra*.

Rule 3(c) of the District Court for the Southern District of New York provides that "a member in good standing of the bar of any state . . . may upon motion be permitted to argue or try a particular cause in whole or in part as counsel or advocate."[9] Although section 1654 of the Judicial Code, which authorizes federal courts to establish such rules, appears to limit the application of such rules to the practice of law before the court,[10] Judge Friendly interpreted its scope as reaching beyond the court room. He asserted that a grant of leave to appear under section 1654 would encompass plaintiff's services outside the courtroom and thus insulate him from any effects of New York Penal Law section 270.[11] The majority also held that it was irrelevant that plaintiff did not apply, since he surely would have been admitted had he applied.[12] Moreover, the court found that, by engaging plaintiff to give advice in the antitrust action, defendant impliedly assumed the obligation of having the New York lawyers make any necessary motions for admission *pro hac vice*. Thus, the contract could be lawfully performed, and defendant could not render the contract unenforceable by discharging plaintiff in an attempt to deprive him of his opportunity to validate his status through a *pro hac vice* admission procedure.

Due to the "importance of the problem, and the desirability of furnishing guidance to the bar,"[13] the court also based recovery on an alternative ground. The court stated that it was not necessary to predict whether New York courts would hold plaintiff's conduct illegal under section 270:

> 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.[14]

The court then noted that "where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion."[15] Such a right therefore should encompass the hiring of an out-of-state attorney to assist a resident attorney in whatever manner is chosen, subject only to the rules of the court concerning practice before it. Thus, the court concluded that defendant had exercised its constitutional right to obtain expert legal assistance, and it cannot now be heard to object to paying the bill.

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9. S.D.N.Y. Ct. R. 3(c).
10. See note 1 *supra*.
11. Principal case at 169.
12. See text accompanying note 9 *supra*.
13. Principal case at 169.
14. *Id.* at 170.
15. *Ibid.*

By using the privileges and immunities rationale, the principal case raises, but fails to solve, several problems with respect to the multi-state practice of law. Of the two privileges and immunities clauses in the Constitution, it is clear that the court was referring to the one found in section one of the fourteenth amendment,[16] which declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[17] In the *Slaughter-House Cases*,[18] the Court distinguished between citizenship of the United States and citizenship of the states, and held that the fourteenth amendment protects only the privileges and immunities of national citizenship. These privileges and immunities were defined as those rights which owe their existence "to the federal government, its National character, its Constitution, or its laws."[19] The Court refused to extend the protection of the privileges and immunities clause to ordinary civil rights, declaring that such a construction would revolutionize the constitutional system by transferring to the federal government the protection of those basic rights of person and property which have always been secured by the states.[20] Ultimately, the *Slaughter-House* interpretation of the privileges and immunities clause added little to what had already

16. The court's language goes to this clause. Moreover, Adamson v. California, 332 U.S. 46 (1947), Madden v. Kentucky, 309 U.S. 83 (1940), and Colgate v. Harvey, 296 U.S. 404 (1935), cases cited by the court, discuss the fourteenth amendment's privileges and immunities clause. The clause in article IV, section 2 is not relevant to the issue in the principal case. Article IV, section 2 states that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the Several States," and has been interpreted to mean that a state may not discriminate against citizens of another state. KAUPER, CASES ON CONSTITUTIONAL LAW 1225 (3d ed. 1966). It is submitted that the state statute involved in the principal case, N.Y. PEN. LAW § 270, applies equally to residents and non-residents, and thus does not discriminate against non-residents.

17. A threshold question that must be answered is the dissent's charge that a privilege and immunities argument is not relevant, since no one, least of all the state of New York, interfered with defendant's right to engage plaintiff. Principal case at 172. The privilege and immunities theory is relevant, however, in that protection of the client's right to make a binding contract also protects the attorney's ability to collect his fee. The attorney asserts his right to fees, and the court grants recovery by asserting the client's ability to make a binding contract. See Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

18. 83 U.S. (16 Wall.) 36 (1873).

19. *Id.* at 79. Similar definitions have been advanced in subsequent cases. See, *e.g.*, Colgate v. Harvey, 296 U.S. 404, 444 (1935); Twining v. New Jersey, 211 U.S. 78, 97 (1908).

20. 83 U.S. at 78. See 9 GEO. WASH. L. REV. 106, 114 (1940). In Corfield v. Coryell, 6 Fed. Cas. 546, 551 (No. 3230) (C.C.E.D. Pa. 1823), Mr. Justice Washington described the privileges and immunities of *state* citizens as those

> which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be comprehended under the following heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

been declared to be the law of the land. In *Crandall v. Nevada*,[21] decided before the adoption of the fourteenth amendment, the Court had affirmed the existence of the right to travel to the seat of the federal government to assert a claim against that government, stating that such a right could be inferred from the Constitution and the republican form of government which it established. Furthermore, if rights of national citizenship are derived from the Constitution and the legislative enactments under it, as stated in the *Slaughter-House Cases*,[22] those rights may be protected by the supremacy clause without resort to the privileges and immunities clause.[23]

The result of the *Slaughter-House Cases* has been that few rights have been held to be privileges and immunities of national citizenship. Since the adoption of the fourteenth amendment, the Supreme Court has considered over fifty cases in which a state statute has been attacked as violating the privileges and immunities clause.[24] In only one case was an abridgment found,[25] and that case was quickly overruled.[26] In the *Slaughter-House Cases*, Mr. Justice Miller suggested some privileges and immunities of national citizenship: the right to the protection of the federal government when on the high seas or within the jurisdiction of a foreign government; the right to peacefully assemble and petition for redress of grievances; the right to use the navigable waters of the United States; and the right to become a citizen of any state. Other cases have offered additional examples: the right both to come to the seat of government to assert a claim against the government and to have free access to the federal government's judicial tribunals and public offices in every state and in the District of Columbia;[27] the right to vote for national officers;[28] the right to enter public lands;[29] and the right to protection against violence while in the lawful custody of a United States marshall.[30]

Given the lack of preciseness in the defining of the privileges and immunities of national citizenship, it can be argued that the right of a party in an action involving a federal claim to engage an out-of-state attorney is such a privilege. The court's rationale was that "a right has been conferred on citizens by federal law (and) the constitutional guarantee against its abridgment must be read

21. 73 U.S. (6 Wall.) 35 (1868).

22. See note 18 *supra*, and accompanying text.

23. See Lomen, *Privileges and Immunities Under the Fourteenth Amendment*, 18 WASH. L. REV. 120, 124 (1943).

24. Most of these cases are listed in note 2 of Mr. Justice Stone's dissenting opinion in Colgate v. Harvey, 296 U.S. 404, 445 (1935), and in note 1 of his opinion in Hague v. CIO, 307 U.S. 496, 520 (1939).

25. Colgate v. Harvey, *supra* note 24.

26. Madden v. Kentucky, 309 U.S. 83 (1940).

27. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

28. *Ex parte* Yarbrough, 110 U.S. 651 (1884).

29. United States v. Waddell, 112 U.S. 76 (1884).

30. Logan v. United States, 144 U.S. 263 (1892).

to include what is necessary and appropriate for its assertion."[31] Presumably, the court had determined that the federal anti-trust laws under which defendant brought the industry suit conferred upon him the right to engage out-of-state counsel. However, the court apparently failed to consider the implications of *United States v. Cruikshank*, in which the Court deleted reference to federal laws and indicated that a privilege and immunity must flow from the "very idea of a government, republic in form . . . ."[32] Thus, one could argue that only those rights owing their existence to the federal government and its national character are protected by the privileges and immunities clause. In addition, looking at the rights which historically have been considered privileges and immunities of national citizenship, it is apparent that the court's finding of a privilege and immunity in the principal case is an unprecedented use of that clause. The right of a client with a federal claim or defense to engage an out-of-state attorney does not resemble such rights as peaceful assembly and petition or voting for national officers, which arguably can be thought of as flowing from the very nature of our form of government.

Nevertheless, in light of the efforts of a minority of the Justices of the Supreme Court over the past two decades to revive the privileges and immunities clause, it is possible that the Court might look favorably on the Second Circuit's use of the clause. However, the cases that occasioned the attempted revival were cases involving civil liberties, and it has been urged that the "intensely personal" privileges and immunities clause is peculiarly applicable to civil liberties.[33] Involved in these cases were the right to be served in places of public accommodation,[34] the right of public assembly to discuss rights conferred by the National Labor Relations Act,[35] and, finally, a state statute designed to prevent non-resident indigents from entering the state.[36] The principal case, on the other hand, does not present a civil liberties issue, for the defendant was not prevented from obtaining the expert legal advice necessary to protect his rights. Moreover, since even in the three cases discussed above the majority ruled on grounds other than the privileges and immunities clause, the "ghost clause"[37] has enjoyed at best only a minority renaissance.

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31. Principal case at 170.

32. 92 U.S. 542, 553 (1876).

33. The desire of at least some of the members of the Court to rest cases involving civil liberties on clauses of more human connotation (than the due process clause) is therefore understandable. The privileges and immunities clause is an intensely human clause.
Weihofen, *The Ghost Clause Walks Again*, 14 ROCKY MT. L. REV. 77, 83 (1942).

34. Bell v. Maryland, 378 U.S. 226 (1964).

35. Hague v. CIO, 307 U.S. 496 (1939).

36. Edwards v. California, 314 U.S. 160 (1941).

37. Weihofen, *supra* note 33.

Assuming, *arguendo*, that the hiring of an attorney is a privilege of national citizenship, many cases have held that state regulation of the practice of law itself is not a violation of the privileges and immunities clause, "for a license to practice law is not a privilege within the purview of any constitutional provision."[38] In the absence of a federal rule or statute dealing with the conduct of a lawyer before the federal courts, it is difficult to see why a state rule regulating the practice of law in the state, including practice in the federal courts, would not apply. Thus, the privilege to engage a non-resident attorney, if such a privilege existed, would have little significance if the attorney did not meet the court's standard of admission and was thus barred from appearing before the court.

The brief for the Association of the Bar of the City of New York offers another rationale for invoking the privileges and immunities clause in the principal case: Access to the public institutions throughout the several states, including the national courts, was recognized in *Crandall v. Nevada*[39] as a right of national citizenship; that right is impaired when one is unable to retain experts of his own choice on matters committed by the Constitution to the federal courts.[40] However, it is difficult to see how the citizen's access to the national courts is impaired. He is free to select the expert help he desires, and his access to the courts surely is not diminished by the fact that those courts reserve the right to prescribe standards of conduct and practice to which the expert must adhere. Indeed, the Supreme Court has upheld the right of lower courts to control the practice of attorneys appearing before them.[41]

The use of the privileges and immunities clause in the principal case also raises other serious questions with which the court failed to deal. First, it has long been held that a corporation is not a citizen within the meaning of the privileges and immunities clause and therefore is not entitled to its protection.[42] The court in the principal case, although not explicitly overruling this precedent, has implicitly held that a corporation is a citizen since the defendant, whose right to hire an attorney was said to be protected by the privileges and immunities clause in the principal case, was in fact a corporation. It is not necessarily illogical to assert that a corporation should be protected by the privileges and immunities clause; certainly a corporation has no less interest in asserting its rights under federal law with the aid of competent attorneys than does an individual. How-

38. Brents v. Stone, 60 F. Supp. 82, 84 (E.D. Ill. 1945).

39. 73 U.S. (6 Wall.) 35 (1868).

40. Brief for the Association of the Bar of the City of New York as Amicus Curiae, p. 10.

41. See note 1 *supra*.

42. Grosjean v. American Press Co., 297 U.S. 233 (1936); Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1899).

ever, a circuit court of appeals decision which stands contrary to a long line of Supreme Court precedent, and which does so without explicitly recognizing that fact, is a decision to be seriously questioned. A second problem raised by the decision in the principal case is that since the privileges and immunities of national citizenship are limited to citizens,[43] the right to engage expert out-of-state legal aid is limited to citizens. However, the alien who possesses a federal claim or defense is surely as much in need of expert legal advice as is the citizen.

Given the doubtful validity of the court's use of the privileges and immunities clause and the problems which are raised even if the court has correctly invoked the clause, one must seek another answer to the problem posed by the interstate practice of law[44]—a problem that will become more acute in this age of increased specialization and high mobility of the bar. In the absence of applicable federal rules or statutes, the simplest solution would be to abandon the privileges and immunities theory and rely upon an orthodox contract theory, as was done in *Gray v. Joseph S. Brunetti Construction Co.*[45] In *Gray*, the client, a resident of New Jersey, was involved in a dispute with the Federal Housing Authority. He retained an out-of-state attorney to work "behind the scenes" with his local attorneys. The court found that most of the attorney's work was performed in New Jersey. Since he had not been admitted to practice before either the New Jersey state courts or the federal district court, the district court lacked the independent jurisdiction to exercise the autonomous control over his conduct which it would have over members of its own bar. Nonetheless, the Third Circuit Court of Appeals allowed recovery of the attorney's fees solely on the basis of New Jersey contract law. Thus, since the district court had found that the contract was fairly made, the appellate court held that the attorney was entitled to the entire fee.[46]

In any situation involving the hiring of out-of-state attorneys, the ultimate concern is assuring that effective control is exercised over the activities of such lawyers. Neither the contract analysis of *Gray*

43. Trimble, *The Privileges and Immunities of Citizens of the United States*, 10 U. KAN. CITY L. REV. 77, 82 (1942); Weihofen, *supra* note 33, at 84.

44. One answer—admittedly more a stated truth than helpful analysis—is simply that not all states are as strict as New York on the subject of the practice of law by nonresident lawyers within their borders. The New Jersey Supreme Court, for example, in Appell v. Reiner, 43 N.J. 313, 204 A.2d 146 (1964), acknowledged as the general rule the proposition that legal services to New Jersey residents concerning New Jersey matters should be rendered by New Jersey counsel. The court recognized, however, that given the many multi-state transactions arising in modern times, strict adherence to the general rule may not always be in the public interest. If this were the attitude of the New York courts, Judge Friendly might never have had to reach his constitutional theory.

45. 266 F.2d 809 (3d Cir. 1959).

46. *Id.* at 818.

v. Brunetti nor the privileges and immunities rationale of the court in the principal case meets this basic issue of control. Moreover, the narrow scope of the privileges and immunities clause, which would not protect a corporation or an alien, makes it an unsatisfactory answer to the issues raised by the principal case. It is submitted that the answers to the problems inherent in the interstate practice of law lie with Congress. Congress must either adopt laws regulating the multistate practice of law or it must direct the Supreme Court to lay down applicable rules. It would appear preferable that Congress itself legislate with respect to the situation, for the Supreme Court can only adopt rules affecting the federal courts and the problem is as acute at the state level as it is at the federal level.