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THE RIGHT TO REPRESENTATION BY OUT-OF-STATE ATTORNEYS IN CIVIL RIGHTS CASES

Edward F. Sherman

I. INTRODUCTION

One result of the civil rights movement of the 1960's was to make legal services available to a substantial number of southern Negroes to whom they had never before been available. Due to the hostility of southern lawyers to the civil rights movement, out-of-state attorneys were largely responsible for this accomplishment. Southern lawyers, supported by local and state bar associations, refused to provide legal assistance in civil rights cases, and so southern courts, under pressure from the activist Fifth Circuit and the media, permitted out-of-state attorneys to act as defense counsel for Negroes and civil rights workers. However after the large demonstrations and mass arrests subsided and civil rights law practice in the South shifted from defense to affirmative suits, the lenient attitude of southern courts towards out-of-state attorneys began to change.


2 See Note, Judicial Performance in the Fifth Circuit, 73 Yale L. J. 90 (1963); Wright, The Overloaded Fifth Circuit: A Crisis in Judicial Administration, 42 Texas L. Rev. 949 (1964); S. Fingerhood, The Fifth Circuit Court of Appeals, in Southern Justice 214 (L. Friedman, ed. 1965).

3 A review, made by the author, of the annual Docket and Case Report of the Lawyers' Constitutional Defense Committee for pending Mississippi cases as of September, 1965, shows 65 defensive actions (involving over 1000 individuals, most of them arrested in mass demonstrations) and 26 affirmative actions. The same docket as of March 1, 1968 shows only 12 defensive actions and 22 affirmative actions (most of them involving challenges to government laws, practices, and agencies).
Southern bar associations withdrew from agreements with civil rights legal organizations, courts promulgated restrictive rules to bar practice by out-of-state attorneys, and criminal prosecutions were filed against out-of-state attorneys for the unauthorized practice of law. This summer two cases involving attempts to bar out-of-state attorneys from civil rights practice in the South were decided by federal courts, establishing for the first time, that out-of-state attorneys could legally serve as counsel in civil rights cases. In Sobol v. Perez, a three-judge court in the Eastern District of Louisiana ruled that a northern lawyer working for a civil rights organization in Louisiana who represented Negro clients in association with local counsel in non-fee civil rights cases could not be prosecuted under the Louisiana unauthorized practice of law statute. In Sanders v. Russell and Anderson v. Cox, the Fifth Circuit Court of Appeals granted a writ of mandamus against two federal judges in the Southern District of Mississippi and held invalid their rule which severely restricted the right of out-of-state attorneys to appear before the court when applied to non-fee civil rights cases. These decisions, although limited in their holdings, represent the first judicial recognition of a constitutional right to be represented by an out-of-state attorney in non-fee civil rights cases. Whether this right will be applied to the wide variety of civil rights cases in which out-of-state lawyers are now involved in the South or in non-civil rights situations, such as poverty law cases, where there is also doubt that the client can obtain sympathetic representation by a local lawyer is still to be decided. A consideration of the case law governing admission to practice and the unauthorized practice of law in light of the Sobol and Sanders cases is needed to predict the future scope of the newly recognized right to representation by an out-of-state attorney.


6 "The limitation to non-fee generating cases does not preclude petitioners from seeking attorney fees in appropriate cases. The award of attorney's fees pursuant to Titles II and VII of the 1964 Civil Rights Act, 42 U.S.C.A. §§ 2000 a-3(b), 2000 e-5(d); Newman v. Piggie Park Amusement Co., 36 U.S. L.W. 42, 43 (U.S. March 18, 1968) is not in conflict with a policy of refusing to accept fees from clients," Sanders v. Russell, No. 25815 (5th Cir., Sept. 18, 1968) at 6 n. 5.
A. General Admission to Practice before State and Federal Courts

The power to regulate the practice of law within a state is divided between the state legislature and the highest court of a state, with some conflict among authorities as to the extent of the power in each. It is generally considered that a state legislature, in the exercise of its police powers, may prescribe standards for bar admission and the practice of law. On the other hand, the power to regulate the practice of law has been held to be an inherent power of the judiciary allowing the highest court of a state to establish rules of its own for admission to the bar.

The conflict of authority does not often arise because the courts have generally been willing to follow statutory standards, either by adopting them as their own or by not questioning the authority of the legislature to make them. However, a statute which established different standards for admissibility than the rule of the state supreme court has been held invalid, and supreme courts have imposed stricter standards than those called for by statutes. Thus, the Mississippi Supreme Court has stated that although the statute does not consider free out-of-court advice to be the practice of law, the court is not bound by the statutory definition and may impose stricter restrictions on civil rights volunteers.

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7 E.g., La. Rev. Stat. Ann. § 37, ch. 4, Reporter's Notes (1964): "... [I]n the exercise of its police power, the Legislature may prescribe minimum standards for admission to the bar and may aid the court in its exercise of its power to disbar..."


10 Darby v. Board of Bar Admissions, 185 So. 2d 684 (Miss. 1966) (dictum).
The rules governing admission to the practice of law, whether statutory or court-promulgated, usually create an administrative Board of Bar Admissions to administer examinations, determine qualifications of candidates, and decide which candidates will be granted admission. This board is usually appointed by the highest court of the state or the governor or both, and the state bar association often plays a role in the selection process, such as preparing a list of nominees for the board.\(^{11}\) The board is delegated certain powers either by statute or rule of the highest court and is usually subject to the direction of the highest court. However, like many regulatory agencies of the executive department, it usually acts according to rules, regulations and procedures of its own with relative independence from the highest court.

There are usually three basic eligibility requirements for admission to the practice of law in a state, residency in the state for a certain period, passing of a bar examination and certification of good moral character and fitness. The Board of Bar Examiners generally makes determinations in respect to these qualifications which are accepted by the highest court without review. An aggrieved applicant who objects to denial on the grounds of violation of statutory or constitutional standards can obtain judicial review under customary administrative law standards.\(^{12}\)

Once an attorney has been admitted to the practice of law in a state, he is entitled to practice before all of the courts of

\(^{11}\) E.g., *La. Rev. Stat. Ann.*, Articles of Incorporation of the Louisiana State Bar Association, art. XII, § 1 (1964); *Ala. Code* tit. 46, §§ 21, 22 (1958) (Board of Commissioners elected by the members of the state bar).

Admission to practice before the appellate courts of the state often requires some additional, but relatively simple, application procedure. The attorney also has the right to conduct an office practice within the state and to perform all acts constituting "the practice of law." In states which have integrated bar associations, a lawyer must be a member in good standing in the state bar in order to practice law. However, bar admission is ordinarily coincident to admission to practice by the highest court of the state, and the payment of dues is the only requirement to maintain membership in the bar.

Although admission to the state bar is usually a permanent status entitling the attorney to practice in the state at any time whether or not he continues to reside there, some states require compliance with additional standards for the continuance of the privilege of practicing within that state. The classic example is the Kansas rule, promulgated by statute and state supreme court rule, that an attorney admitted to practice in Kansas may not practice in the state if he regularly practices outside the state and is a member of the bar of the place of his regular practice. In Martin v. Walton, the Supreme Court upheld Kansas' right to apply this rule against an attorney who lived in Mission, Kansas, had law offices in both Mission and Kansas City, Missouri, and was a member of the bar of both states. Justice Douglas' dissent indicates possible constitutional problems, which will be discussed in a later section of this article, but the decision supports the authority of the state to condition the right to practice law under its police power. However, this type of limitation, obviously designed to prevent competition from lawyers specializing in interstate practice, has not been exercised by other states.

Admission to practice before federal courts is determined by rules prescribed by the Supreme Court and the lesser federal

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14 There are 26 states with integrated bars. Countryman, The Scope of the Lawyer's Professional Responsibility, 26 Ohio St. L. J. 66, 88 (1965).


courts. This power derives from the Supreme Court's "judicial power" granted in Article III, Section 1 of the Constitution and from express recognition of such power by the Congress. 28 U.S.C. § 2071 (1964) provides:

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

The requirement in the last sentence that "such rules shall be consistent with Acts of Congress" would seem to provide a possible source of conflict with the Supreme Court's Article III "judicial power," but Congress has not attempted to invade the broad rule-making power of the courts and the federal courts have acknowledged the need for their rules to be "consistent with Acts of Congress." Each federal court establishes its own standards for admission to that particular court.

Since federal courts do not administer their own bar examinations, they must rely upon passage of a state bar examination to determine the competency of a lawyer. Most federal courts do not attempt to determine the moral character and fitness of applicants, but must rely upon state bar determinations.

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17 See Lefton v. City of Hattiesburg, 333 F.2d 280, 284 (5th Cir. 1964); accord, Brown v. City of Meridian, 356 F.2d 602, 605 (5th Cir. 1966); Sanders v. Russell, No. 25815 (5th Cir., Sept. 18, 1968) at 8.


19 However, state disbarment is not binding on federal courts. 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 disbarment in the federal court upon disbarment from practice in the Colorado state courts).

20 E.g., S.D. Cal. R. 1(c) ("good moral character"); N.D. Ill. R. 6(a)(i), (ii) (affidavits concerning applicants character). See generally Crotty, Requirements for Admission to Practice in Federal Courts.
Therefore, it is not surprising that most federal district courts require only admission to the highest court of the state in which the federal court is located as a prerequisite for general admission to the federal court. Some federal district courts have additional requirements such as membership in the state bar for a certain period residency within the district or the state for a certain period (in addition to the state bar residency requirements) or, for non-residents, maintenance of an office in the district or the state.

An important aspect of rules governing admission to federal courts is that although membership in the state bar usually provides automatic admission to the federal court, out-of-state attorneys may also be granted general admission. The federal circuit courts of appeal, which serve a number of states and obviously cannot limit admission only to attorneys who are members of the bar in the state in which they sit, not only grant admission to attorneys who are members of the bar of states under their jurisdiction, but also to attorneys admitted to


22 See Note, The Practice of Law by Out-of-State Attorneys, 20 Vand. L. Rev. 1276, 1294-95 n. 89 (1967) for analysis of ten "representative" district courts' admission rules. Two of the ten require some length of state bar membership, 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).

23 Two of the ten district courts restrict admission to residents, D. Mass. R. 2 (residents of state district); E. D. Mo. R. II(1) (Mo. residents must reside within district, non-Mo. residents within county adjacent to district, but must associate a resident member for appearances).

24 Two of the ten district courts require residency or maintenance of an office within the district, S. D. Cal. R. 1(c)(1); D. Colo. R. 4(b). Three require no local office but condition appearances upon presence before the court of a member with a local office, 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 requires the non-resident applicant to have an office within the judicial district, E. D. Mo. R. II(1). Three have office requirements for all applicants, S. D. Cal. R. 1(c)(1); D. Colo. R. 4(b); E. D. Pa. R. 5(a).
practice before any federal district court. Thus, most of the
New York staff members of the civil rights legal organizations
involved in southern civil rights practice have been generally
admitted to practice before the Fifth Circuit Court of Appeals
and can practice before that court in any case at any time.26

Federal district courts also offer general admission to
out-of-state attorneys. Some will grant general admission to
an out-of-state attorney who is a member of the bar of a state
in which the federal district courts extend a corresponding privi-
lege to their attorneys.27 Some will admit an out-of-state
attorney who comes from a neighboring or bordering state and
is a member of a federal district court there.28 These "recri-
pocity" and "neighboring state" rules were adopted at the urg-
ing of local lawyers who desired to obtain a similar favor from
district courts in other states.

Over one-third of the federal district courts offer general
admission to attorneys who are not members of the state bar.29
Their only requirements are that the attorney be admitted to
another federal district court and that he provide evidence of
this fact. A number of out-of-state civil rights attorneys have
been admitted to practice in the Northern District of Mississippi,
the Eastern District of Louisiana, and the Southern District of

Rules (1964), as amended (Supp. 1966). E.g., First Cir. R.
7(1) (admission to any attorney admitted to practice in the U.S.
Supreme Court, another court of appeals, any U.S. district
court, or the highest appellate court of any state upon oral
motion of a member of the bar of the First Circuit).

26 Brief for Petitioners at 4, Anderson v. Cox, No.
July 22, 1968) at 5.

27 E.g., S. D. N. Y. R. 3(a) (admits members of N. Y. bar
and members of state and district court bars in Vt., Conn., and
N. J. whose district courts extend a corresponding privilege to
attorneys of S. D. N. Y.,).

28 E.g., N. D. Ill. R. 6(a) (admits members of bars of
Wis. and Ind.).

29 Brief for Petitioners at 15, Anderson v. Cox, No.
25815 (5th Cir. 1968).
The trend has been toward general admission of any lawyer admitted to another federal district court on the theory that his qualifications to practice before a federal court would not vary from state to state.

B. Pro Hac Vice Admission to Practice before State and Federal Courts

*Pro hac vice,* literally "for this turn," is a limited admission to practice before a court for one particular lawsuit. Pro hac vice admission only applies to litigation before a court and, therefore, only provides permission to do those acts incidental to the prosecution of the particular case. It would not, for example, provide permission to have an office practice, write a will, draft documents, or advise clients in a non-litigation setting.

The requirements for pro hac vice admission to state courts are established either by statute or court rule. Whether court rules will be written varies from court to court. Since the judge administers the rule, he has a great deal of discretion, even when there are express statutory standards. The usual procedure is for an out-of-state attorney to be introduced, either by a local attorney or by letter, to the judge of the court as a member in good standing of the bar of another state and to request that he be granted admission pro hac vice for all matters pertaining to the case at hand.

A common requirement for pro hac vice admission is that an out-of-state attorney associate a local attorney with him. In most states, the local attorney need only be a member of the state bar, although some states require that he be a resident of the court or of the judicial district where the

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30 Id. at 15 n. 19.
33 E.g., La. Rev. Stat. Ann. § 37:214 (1964) (out-of-state attorney "temporarily present" in the state forbidden to practice unless he acts in association with some attorney duly licensed to practice law by the Supreme Court of this state.).
The state interest in such a rule would appear to be to insure that a local attorney is associated in the case who is familiar with local law and procedure, who can be served with process and papers, and who can be held responsible for any violations of professional ethics or court rules. Another important purpose of this requirement is to prevent out-of-state lawyers from taking away fees from local lawyers.

In some states, there is no requirement that a local lawyer be associated when the out-of-state lawyer comes from a state which gives similar "reciprocity" to its lawyers. The Louisiana statute, for example, permits an out-of-state lawyer to practice in the state without associating a local lawyer if he comes from a:35

... state which, either by statute or by some rule of practice accorded specific recognition by the highest court of that state, has adopted a rule of reciprocity that permits an attorney duly licensed and qualified to practice law in this state to appear alone as an attorney in all courts of record in the other state, without being required to be admitted to practice in such other state, and without being required to associate with himself some attorney admitted to practice in the other state.

"Reciprocity" and "comity" privileges are the products of an earlier period of less interstate commerce when states were still able to establish barriers against outsiders and when bar associations felt it necessary to lobby for such statutes to insure that their attorneys received privileges elsewhere. It is doubtful that there are still valid policy reasons for their continuance. Apart from the administrative problems created by requiring a court to take notice of another state's laws and court rules on admission of lawyers to practice, these privileges are unhealthy for both the administration of justice and the efficient practice of law.


36 See note 27 supra.
Even apart from the special consideration given to lawyers who come under the "reciprocity" rule, pro hac vice admissions are usually granted freely by state court judges. Despite local lawyers' displeasure at the usurpation of their clients by out-of-state specialists, strong professional tradition dictates that out-of-state attorneys be treated with courtesy, and judges have not usually used unreasonably their discretion to deny pro hac vice admission. However, civil rights attorneys have had an increasingly difficult time in obtaining pro hac vice admissions in southern courts. They are, of course, somewhat different from the usual out-of-state lawyers who are granted admission so easily. Since civil rights lawyers are not private attorneys working for a fee, they are often not easily accepted as members of the legal fraternity. They are usually young lawyers. The fact that they appear in the role of social reformer does not endear them to southern judges and local bars. Since the judge's discretion is broad, these characteristics of out-of-state civil rights lawyers make pro hac vice admission more difficult for them than for other out-of-state lawyers.

Pro hac vice admission in federal courts is determined by rules of the particular court. In federal circuit courts of appeal and over one-third of the federal district courts which readily grant general admission to out-of-state attorneys, there is no need for pro hac vice rules. All other district courts, except two, grant pro hac vice freely to out-of-state attorneys, some requiring that the attorney be admitted to another federal district court, some requiring presentation by a local attorney, and some requiring association with a local attorney. The two exceptions are the United States District Court for the District of New Jersey which limits pro hac vice appearances of any attorney to three per calendar year, and the United States District Court for the District of New Jersey which limits pro hac vice appearances of any attorney to three per calendar year.

37 See Brief for Petitioners at 15 n. 19, Anderson v. Cox, No. 25815 (5th Cir. 1968) for description of rules of the 76 district courts with published rules.

38 Id. at 20 n. 20.

39 Id.

40 D. N. J. R. 4(C). "The Clerk of the District of New Jersey informed counsel for petitioners that the Rule was designed to prevent New York and Philadelphia lawyers from monopolizing lucrative commercial cases, especially FELA cases, and was waivable in the kind of case for which there was little competition among New Jersey lawyers." Id. at 20 n. 21.
District Court for the Southern District of Mississippi, whose restrictive pro hac vice rule was struck down in the Sanders decision.\(^{41}\)

III. SOUTHERN COURTS BEGIN TO ENFORCE UNAUTHORIZED PRACTICE STATUTES AND RESTRICTIVE COURT RULES AGAINST OUT-OF-STATES CIVIL RIGHTS ATTORNEYS

Out-of-state volunteer lawyers went into the South in sizeable numbers for the first time in the summer of 1963, and their numbers increased substantially in 1964 and 1965. At first, most out-of-state attorneys were short-term volunteers, many of whom spent only several weeks of vacation in the South. They were usually sponsored by one of the civil rights legal organizations and worked out of temporary civil rights legal offices or offices of Negro attorneys licensed to practice in the state. Whenever possible they associated and were accompanied by a member of the local bar in each case. However, because of the small number of Negro attorneys in certain southern states (there were only four in Mississippi at the start of the civil rights movement\(^{42}\) and only 12 out of 2200 lawyers today\(^{43}\) and the refusal of virtually all white lawyers to assist in civil rights cases,\(^{44}\) it was not always possible for them to associate

\(^{41}\)Rule as to Nonresident Attorneys, United States District Court for the Southern District of Mississippi, promulgated Sept. 26, 1967; Amendment to Rule, promulgated Nov. 10, 1967.

\(^{42}\)United States Commission on Civil Rights, Hearings 321 (1965).

\(^{43}\)Sanders v. Russell, No. 25815 (5th Cir., Sept. 18, 1968) at 7.

\(^{44}\)37 Miss. L. J. (May, 1966) was devoted to a "Symposium on Southern Justice" with replies from the members of the Mississippi bar to the criticisms contained in Southern Justice (L. Friedman ed. 1965). The replies indicated little change in attitude towards accepting representation in civil rights cases. E.g., "The Southern bar has refused, and I think rightfully so, to become free counsel for a band of professional self-styled protesters, crusaders, and demonstrators," Attorney General Patterson at 37 Miss. L. J. 404-05. Luckett, "Clarksdale Customs," id. at 423, states that civil rights workers do not want an attorney but "a propagandist who would use [the] case as a platform from which to launch an attack against our social
with a member of the local bar. In such cases it was customary for the out-of-state attorney to participate in the case without a formal request for pro hac vice admission and for the judge and prosecutor not to raise any question concerning his lack of admission to the local bar.

All but one of the civil rights legal organizations which brought volunteer lawyers to the south were created after the beginning of the large demonstrations. Since they were developed to cope with the legal problems of a mass movement, they displayed from the very beginning a dissimilarity from the traditional forms of American legal practice. The first substantial hurdles for the civil rights legal organizations were the canons of ethics of the organized bars. The American Bar Association's Canons of Professional Ethics expressly forbid group legal services (Canon 35), solicitation (Canon 27), and stirring up litigation (Canon 28). However, in 1963 in *NAACP v. Button*, the Supreme Court held that a plan by which the NAACP recommended lawyers to Negroes and paid their fees was protected by the first and fourteenth amendment rights of speech, assembly and petition. In 1964 (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*) and 1967 (*United Mine Workers of America v. Illinois State Bar Association*), the Court held group legal services were constitutionally order. No lawyer worthy of the name would lend himself to any such project; certainly not if he was not himself at war with our social order and bent on its destruction." In the hearings before the Three-Judge Court in *Sobol v. Perez*, No. 67-243 (E. D. La., July 22, 1968), a Louisiana attorney who had testified that he would not hesitate to take a civil rights case was asked on cross-examination: "Q. So that if three Negroes from Chicago came down and picketed the courthouse in Pointe a la Hache because they had white and colored drinking fountains, and were arrested, you would not represent them? A. I would not; I am a white man first and foremost." Record, vol. 6, at 188.

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45 *NAACP Legal Defense and Education Fund, Inc.*


49 389 U. S. 143 (1967).
protected against bar association attack. Thus, by the time that the civil rights legal organizations began to function in the summer of 1964, there was strong judicial support for the organizational form of civil rights law practice. Only the limitations imposed on the right to practice by out-of-state attorneys posed a serious problem.

Three major civil rights legal organizations have sponsored most out-of-state lawyers practicing in civil rights cases in the South since 1964: The NAACP Legal Defense and Education Fund, Inc. (usually referred to as "The Legal Defense Fund" or "The Inc. Fund"), the Lawyers' Committee for Civil Rights Under Law (originally called "The President's Committee" and now called "The Lawyers' Committee"), and the Lawyers' Constitutional Defense Committee (usually referred to as LCDC). Although the first major program to provide volunteer out-of-state attorneys for the South was the National Lawyers' Guild's "Project Mississippi" in the early summer of 1964, the other three organizations entered with sizeable numbers of lawyers in the same summer and rapidly became the primary agencies for civil rights practice in the South.

The NAACP Legal Defense and Education Fund, Inc. was established by the NAACP in 1939 but has since become independent of the NAACP. It served for years as the only legal assistance group for the struggling civil rights movement in the South. Its organizational structure has always been less calculated to result in conflict with local practice laws than the two newer civil rights organizations because it has relied upon "cooperating attorneys," most of whom are Negros licensed to practice law in their states. There are now some 250 "cooperating attorneys" in the southern states.

The "Inc. Fund" has long been the prime force in school desegregation cases. It represented the plaintiffs in Brown v. Board of Education and even now handles most of the school

50 One of the organizations, LCDC, applied and received an opinion from the Standing Committee on Professional Ethics of the ABA which found its program "clearly within the standards and practices of the ABA." Opinion 78, Dec. 24, 1964.


cases being brought. Because of heavy workloads and lack of expertise, most of its participating lawyers cannot do the legal research, prepare the pleadings and briefs, nor perform the appellate arguments required in "test-cases." It therefore has a permanent staff working in its New York City office who fly to the South when necessary to handle various "test-cases." In the past the permanent staff members in Mississippi have not been members of the local bar, but the two staff members presently in Mississippi are members of the Mississippi bar.

The Lawyers' Committee for Civil Rights under Law was established in June, 1963, at the request of President John F. Kennedy, by concerned northern lawyers representing a number of prestigious law firms and the American Bar Association. It began in the summer of 1964, sending only volunteer lawyers into Mississippi. Like the Legal Defense Fund, it associated local Negro attorneys with its volunteer attorneys whenever possible in cases requiring formal pleadings before a court, but large numbers of its volunteers were able to serve as defense counsel without association in criminal cases involving civil rights workers. A field office was established in Jackson in June, 1965, and was operated by out-of-state volunteers until September, 1966, when a member of the Mississippi Bar was hired as staff attorney. The staff attorney is now assisted by

54 Brief for Petitioners at 13, Anderson v. Cox, No. 25815 (5th Cir. 1968).
55 Brief for Petitioners at 4, Anderson v. Cox, No. 25815 (5th Cir. 1968).
56 President Kennedy invited 250 lawyers to the White House on June 21, 1963, and urged them to help activate the Bar to provide legal assistance in defense of civil rights. "The Lawyers' Committee then was formed and through the vigorous leadership (and some prodding) by Co-Chairmen Harrison Tweed of New York and Bernard G. Segal of Philadelphia, the Committee's members came to include an impressive roster of leaders of the Bar: the President-Elect and eight past presidents of the American Bar Association; the president or a past president of more than half of the state bar associations." Honnold, The Bourgeois Bar and the Mississippi Movement, 52 A. B. A. J. 228, 229 (1966).
57 See Brief for Petitioners at 8, Sanders v. Russell, No. 25797 (5th Cir., Sept. 18, 1968).
five other attorneys, none of them members of the Mississippi bar, but two of whom have now taken and passed the Mississippi bar exam.

The Lawyers' Constitutional Defense Committee was incorporated as a non-profit charitable corporation in the State of New York on May 22, 1964, for the purpose of "providing without cost and assisting in the obtaining of legal counsel to persons engaged in activities aimed at achieving the equal protection of law and other rights guaranteed by the Constitution of the United States and who are unable to obtain such counsel without assistance." It was formed by legal representatives of a number of social action groups in anticipation of the need for an independent lawyers' committee, unconnected with any other civil rights group, which could provide northern volunteer lawyers to protect and defend civil rights workers and Negroes in the summer of 1964.

In the summer of 1964, LCDC had no staff counsel, but relied entirely on some 150 volunteers who served for three- or four-week periods in the offices of Southern Negro lawyers. It scattered its lawyers throughout the communities of five states, Alabama, Georgia, Florida, Louisiana, and Mississippi. The volunteer lawyers, usually unaccompanied by members of the state bar, were permitted to serve as defense counsel in state

58 Id. at 9.

59 Certificate of Incorporation, quoted in Post-Trial Brief for Plaintiffs at 6, Sobol v. Perez, No. 67-243 (E. D. La., July 22, 1968).

60 President: Leo Pfeffer, General Counsel, American Jewish Congress; Vice-President: John M. Pratt, Counsel, Commission on Religion and Race, National Council of Churches; and Carl Rachlin, General Counsel, Congress of Racial Equality; Secretary: Melvin L. Wulf, Legal Director, American Civil Liberties Union, Treasurer: Edwin J. Lukas, National Affairs Director, American Jewish Committee; Directors: Robert L. Carter, General Counsel, N. A. A. C. P.; Rev. Robert F. Drinan, Dean, Boston College Law School; Jack Greenberg, Director-Counsel, N. A. A. C. P. Legal Defense Fund; Clarence B. Jones, Counsel to Dr. Martin Luther King, Jr.; and Howard Moore, Jr., Counsel, Student Nonviolent Coordinating Committee. Brief for Plaintiffs at 6, Sobol v. Perez, No. 67-243 (E. D. La., July 22, 1968).
and federal courts without objection. LCDC found, however, that volunteer attorneys were in the South for too short a period to be effective and that spreading its attorneys over a large area was inefficient. In early 1965, Alvin J. Bronstein, a New York lawyer, became director, with two main offices in Jackson, Mississippi and New Orleans. A third office in Selma, Alabama, was opened in early 1966 but was closed about a year later.

LCDC has an Executive Secretary, Henry Schwartzschild, at its national office in New York City, but he maintains no legal staff there. The New Orleans office is directed by Richard Sobol (who replaced Alvin Bronstein when he took a leave of absence to become a Fellow at the Institute of Politics, John F. Kennedy School of Government, Harvard University), who is not a member of the local bar, and two Louisiana-licensed staff attorneys. The Jackson office is directed by two staff attorneys, one a member of the Mississippi bar and one not. LCDC has taken fewer short-term volunteers each year, with the bulk of the legal work now done by its staff attorneys.

All three legal organizations achieved a modicum of acceptance during the 1964-65 period of mass arrests. In some localities judges became familiar with civil rights attorneys and dealt with them as though they were members of the bar.

In Mississippi, where all three organizations established offices, the state bar went so far as to enter a formal agreement with the most moderate of the three civil rights organizations, The Lawyers' Committee, whereby The Lawyers' Committee was "to temporarily locate an office in this State and take over the defense of said parties [those who are charged with violations of law in connection with the enforcement of civil rights] and work with the Bar." The Board of Bar Examiners was to extend its "cooperation" to the Lawyers' Committee which apparently meant that it would not question the right of out-of-state lawyers to represent civil rights clients and to perform activities incident to the running of an office in Mississippi. Although the other two civil rights legal organizations were not included in the resolution, the Mississippi bar also acquiesced in their establishment of offices in the state and in the practice

61 Id. at 6-17.
62 Id. at 13-18.
63 Quoted in 38 Miss. L.J. 532-33 (Oct. 1967).
As the mass demonstrations and arrests began to subside after the summer of 1965, the increasing attacks by southern lawyers and politicians on out-of-state civil rights lawyers indicated the end of the uneasy truce which had permitted them to practice. At approximately the same time, bar officials and judges in three states—Alabama, Louisiana, and Mississippi—acted to forbid practice by out-of-state civil rights attorneys. The first action came on November 16, 1966, when Donald A. Jelinek, a New York lawyer who was staff counsel for LCDC's Montgomery, Alabama office, was arrested in Demopolis, Alabama, and charged with practicing law without an Alabama license.  He was arguing two appeals from lower court convictions of a white civil rights worker at the Marengo County Circuit Court. After arguing the first appeal in the morning without objection from the judge or prosecution, he was ordered by the judge, during the trial of the second appeal, to take the stand. He was questioned concerning his practice of law without a license and, apparently by prearrangement, was then arrested and taken to the County Jail. This procedure was a strange way for the court to protect itself from unauthorized practice, as the customary method would have been for the court to have refused Jelinek admission, and then, if he refused to abide by the court's ruling, to use its contempt powers. The manner in which the arrest was made, with the court first permitting him to practice before it and then suddenly acting as the investigatory arm of the law, was irregular and would have raised substantial questions, both constitutional and otherwise, as to how a refusal of pro hac vice admission can be made and how the unauthorized practice of law statutes can be applied. However, these issues were never litigated as Jelinek agreed to leave the state (for personal reasons involving a change of jobs) and the charges against him (which had been joined by the Alabama Bar Commissioners) were dropped. 

The next episode in the tightening of admissibility requirements came in Louisiana when, on February 26, 1967, Richard B. Sobol, a staff member of the LCDC New Orleans office and a Washington lawyer who had originally taken leave from the firm of Arnold, Fortas, and Porter, was arrested in Plaquemines Parish, Louisiana, for "practicing law without a license." Sobol

64 N. Y. Times, Nov. 17, 1966 at 7, col. 1.

was arrested while presenting a post-trial motion to the judge of the Twenty-Fifth Judicial Court in a criminal case involving civil rights issues which he had tried without objection a month before. He was associated in the case with a Negro law firm, Collins, Douglas, and Elie, but had tried the case alone.

Sobol's arrest had an immediate effect upon the willingness of Louisiana courts to permit civil rights lawyers to practice before them. Two days after the arrest, Leander Perez, Jr., District Attorney of the Twenty-Fifth Judicial District, wrote letters to a number of district attorneys around the state warning them that Sobol was not licensed to practice in the state. As a result, Sobol received warnings from a number of district attorneys and courts not to attempt to practice. He made no state court appearances after February 21, 1967. Other civil rights attorneys in Louisiana began to experience similar problems. Parishes which had previously permitted them to practice without question, now began to refuse them admission.

The new hard line displayed by the arrest of Richard Sobol in Louisiana was adopted in Mississippi at about the same time. First, the state bar association established an Unauthorized Practice of Law Committee to investigate the practice of law by out-of-state civil rights attorneys. Bar leaders who had entered into an agreement with the Lawyers' Committee "to

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66 The defendant, a Negro, was accused of a battery on a white boy when he attempted to assist two Negro boys who had integrated an all-white school under court order and were being threatened by a group of white boys. He was convicted, but the conviction was reversed in a landmark Supreme Court decision which established a constitutional right to a jury trial in misdemeanor cases involving serious penalties. Duncan v. Louisiana, 88 S. Ct. 1444 (1968).


69 Id. at 115-16.

70 Id. at 121-24.

71 See 38 Miss. L. J. 533 (1967).
take over the defense" in civil rights cases only two years before now expressed surprise and indignation that "certain out-of-state lawyers [are] apparently practicing law in our state without a proper Mississippi license."\textsuperscript{72} On April 7, 1967, the Bar Commissioners rescinded the 1965 agreement to cooperate with the Lawyers' Committee on the grounds that "the decline in the activities for the problem specified in the original resolution indicates that problem no longer exists.\textsuperscript{73}

Then on September 26, 1967, the United States District Court for the Southern District of Mississippi promulgated a rule, called the "comity rule," governing pro hac vice admissions which stated that attorneys who reside in Mississippi but who are not members of the bar may not appear in that court and that out-of-state attorneys who do not reside in Mississippi would only be admitted to practice before that court:\textsuperscript{74}

1) in "one case in any calendar year, or within the space of twelve months,"

2) if "such attorney has been admitted to practice for at least five years before the court of the state from which he or she comes, unless it be shown to this Court that the federal court of such state from which the attorney comes admits attorneys from Mississippi to practice by comity under a more favorable or relaxed rule,"

3) on a motion to admit "presented to the Court for an order not later than at the motion day for the session of Court at which the particular case is set for trial" and accompanied by an affidavit providing certain information,

4) if the motion or affidavit "does not show on the face of the affidavit that the nonresident attorney is entitled to

\textsuperscript{72}N. W. Overstreet, Jr., President of the Mississippi State Bar, in "The President's Corner," 14 Miss. Lawyer 2 (Sept. 1967).

\textsuperscript{73}14 Miss. Lawyer 2 (May-June, 1967). \textit{See} 38 Miss. L.J. 534 (1967).

\textsuperscript{74}Rule as to Nonresident Attorneys, U.S. District Court for the Southern District of Mississippi, promulgated Sept. 26, 1967.
the relief requested" a committee appointed by the judge will be required to "consider, hear, and recommend" proper action.

The rule was clearly aimed at the civil rights legal organizations. The one-case-a-year rule for non-resident out-of-state lawyers could effectively prevent staff attorneys from New York and Washington from coming to Mississippi to assist with and argue cases before the court. The rule barring resident out-of-state attorneys in all cases would prevent any staff attorney who lived in Mississippi from practice before the court. To make sure that the rule could not be avoided by using members of the Mississippi bar for court appearances, it was also provided that attorneys not admitted to the court may not "participate in any manner or to any extent in any discovery proceeding for or as an attorney (or present any matter to the Court for an order); or affix his name or permit his name to be affixed to any motion or pleading in any case before this Court as attorney for any litigant."75 An Attorneys' Committee made up of a former President of the Mississippi Bar Association and four other Mississippi lawyers was empowered to receive all applications for admission by nonresident attorneys and to make a "hearing and report and recommendation to the Court as to its proper action thereon."76

The new pro hac vice rule had an immediate effect upon civil rights cases in the Southern District of Mississippi. Legal Defense Fund attorneys who were not members of the Mississippi bar were serving as counsel in seven pending desegregation suits77 and Lawyers' Committee attorneys were serving as counsel in two pending civil rights cases.78 Marian Wright, a Negro member of the Mississippi bar, was associated in the

75Id. at 1-2.

76Amendment to Rule as to Nonresident Attorneys, U.S. District Court for the Southern District of Mississippi, promulgated Nov. 10, 1967.

77See Brief for Petitioners at 1, Anderson v. Cox, No. 25815 (5th Cir. 1968).


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Legal Defense Fund cases, and Lackey Rowe, Jr., a white member of the Mississippi bar was associated in the Lawyers' Committee cases, but it was obvious from the number of cases in which they were involved that they could not carry the cases through by themselves. On October 17, 1967, Marian Wright filed applications requesting leave to associate two Legal Defense Fund attorneys who were then residing in Mississippi (Paul and Iris Brest) and two who resided in New York (Jack Greenberg and Melvyn Zarr). After four months' investigation by the Attorneys' Committee, Judge Cox substantially denied the applications. Lackey Rowe, Jr. filed similar applications to associate two Lawyers' Committee attorneys (Jonathan Shapiro and Lawrence Aschenbrenner) which applications were also substantially denied by Judge Russell. On February 20, 1968 the Lawyers' Committee filed a Petition for Mandamus to declare the court's pro hac vice rule void and to order Judge Russell to grant pro hac vice admission in the future to out-of-state counsel in nonfee civil rights cases. On February 27, the Inc. Fund filed a similar mandamus action against Judge Cox. Thus, by the spring of 1968, the lines had been drawn on the issue of the right of out-of-state attorneys to practice in civil rights cases. The application of unauthorized practice prosecutions, as in the Sobol case, and of exclusionary court rules, as in the Sanders and Anderson cases, promised to bring an end to participation by out-of-state lawyers in civil rights practice in the South.

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79 Application of Marian E. Wright, No. 4207 (S. D. Miss.). Applications were also filed in each of the seven school desegregation cases, Mason v. Biloxi Municipal Separate School Dist., No. 2696(S) (S. D. Miss. 1968) and Gladney v. Moss Point Municipal Separate School Dist., No. 3004(S) (S. D. Miss. 1968).

80 The two attorneys not living in Mississippi (Zarr and Greenberg) were permitted to continue in 5 and 7 cases, respectively, in which they were listed as original counsel but were denied admission in all other cases. The two attorneys living in Mississippi (Paul and Iris Brest) were found not to be "non-residents" and denied admission in all 7 cases and, by implication, all other cases. Petition for Writ of Mandamus at 14-15, Anderson v. Cox, No. 25815 (5th Cir. 1968).

81 Aschenbrenner was granted admission in Sanders as he had not appeared in the district within the preceding 12 months, but was denied admission in Shaffer as he had now used up his one case. Shapiro was granted admission in Shaffer, but not in Sanders. Petition for Writ of Mandamus at 4-5, Sanders v. Russell, No. 25797 (5th Cir. Sept. 18, 1968).
IV. THE DECISIONS IN SOBOL v. PEREZ AND SANDERS v. RUSSELL

The day after his arrest, Richard Sobol filed a complaint in the United States District Court for the Eastern District of Louisiana, New Orleans Division, for himself, the defendant whom he was representing as defense counsel at the time of his arrest, and all other persons similarly situated, asking that the Louisiana unauthorized practice statutes be declared unconstitutional and that the Louisiana officials be enjoined from prosecuting him thereunder. The United States intervened on behalf of the plaintiffs and certain individual Southern lawyers, the Criminal Courts Bar Association, the State of Louisiana, and the Louisiana State Bar Association intervened on behalf of the defendants.82

Sobol sought from the court, as stated in his brief: 83

(8) A declaratory judgment that Mr. Sobol's representa-
tion of clients in non-paying civil rights cases in Louisiana, in association with Collins, Douglas and Elie, is not unlawful under L. S. A. - R. S. 37: 213, 214; and that it is constitutionally protected . . . .

and urged that the court's holding be broad enough to establish a constitutional right for out-of-state lawyers to practice in any state in non-fee civil rights cases in which a member of the state bar had been associated. The United States took the position that Sobol's prosecution violated the Equal Protection Clause of the Fourteenth Amendment, on two alternative theories: 84

(1) that the arrest and prosecution of Sobol was a form of harassment, undertaken without basis in law or fact, for the purpose of deterring him and other lawyers similarly situated from helping to provide legal representation in civil rights cases; or (2) that, without regard to the pur-
pose of the arrest and prosecution, it represents an unconstitutional application and construction of section 214 of Title 37 of the Louisiana Revised Statutes, because such an application and construction of the state statute

82 Sobol v. Perez, at 3-4.
deprives persons of a much needed source of representation in civil rights cases without serving any legitimate state purposes.

Because Sobol was seeking to enjoin a state court prosecution, he and the United States as intervenor raised the Dombrowski v. Pfister\textsuperscript{85} grounds that his prosecution was undertaken as a form of harassment, without basis in law or fact, and in bad faith and that unless enjoined it would have a "chilling effect" upon first amendment rights. The United States argued that the court should not decide the case on the nonconstitutional ground (see (1) above) but should reach the claim of the unconstitutionality of the Louisiana statute (stated in (2) above) so that possible "chilling effect" of the statute would be curtailed in the future.\textsuperscript{86} Thus it asked for a decision:\textsuperscript{87}

(1) delineating the constitutional limits for the application of section 214;

(2) imposing a criminal intent requirement on the application of the criminal sanction of section 214;

(3) retaining continuing jurisdiction of the case so that interested persons can apply to this court to construe the meaning of the decree and the permissible constitutional limits of a state criminal action under section 214.

Sobol and the United States did not obtain the broad holding based on constitutional grounds for which they had hoped. The three judge court, composed of Circuit Judge Ainsworth and District Judges Heebe and Cassibry, filed a per curiam opinion on July 22, 1968 which granted the injunction against Sobol’s prosecution but which expressly relied on nonconstitutional grounds. The court reviewed Sobol’s representation of Duncan, for which he was arrested, and determined that under the Louisiana unauthorized practice statute this was not the unauthorized practice of law.\textsuperscript{88}

\textsuperscript{85} 380 U.S. 479 (1965).

\textsuperscript{86} Sobol v. Perez, No. 67-243 (E. D. La., July 22, 1968) at 4.

\textsuperscript{87} Id. at 4-5.

\textsuperscript{88} Id. at 17-18.
Sobol's representation of Duncan was not unauthorized practice of law under LSA-R.S. 37: 213-214. Essentially section 213 provides that no natural person, who has not first been duly and regularly licensed and admitted to practice law by the Supreme Court of Louisiana, shall practice law in the state. Section 214 qualifies this in one way, among others, by providing that no person licensed or qualified to practice law in another state and temporarily present in Louisiana shall practice law in Louisiana unless he acts in association with some attorney duly licensed to practice law by the Supreme Court of the state. Sobol was temporarily present in the state. He did not then, and does not now, have any intention of remaining in the state permanently. He was in association with local counsel when Collins of Collins, Douglas and Elie went with him to the Plaquemines court and introduced him as a lawyer from Washington, D.C., associated with him in the case.

Although the court took pains to indicate the narrowness of its holding, it is to be noted that its finding that Sobol was not covered by the Louisiana statute required a liberal reading of the statutory exception. Sobol had been living in New Orleans with his family since August, 1966, and, although he had always claimed an intent not to establish a residence there and to return to the North, he was still residing in Louisiana at the time of the decision. Thus, the court's decision permits a rather broad definition of the phrase "temporarily present in Louisiana," apparently making the intent of the attorney himself the controlling factor. The court has also given a liberal meaning to the phrase "acts in association with some attorney duly licensed to practice," indicating that such associated member of the bar need not be present at hearings and trial and that in the absence of an express requirement by the judge written motions for association are not required.

It is conceivable that the Louisiana legislature could now delete the exception from its unauthorized practice statute and thus create the question whether after Sobol a civil rights attorney in similar circumstances can be prosecuted for the unauthorized practice of law. Although the Sobol decision emphasizes compliance with the statutory exception, there is language in the decision which indicates that, absent the exception, Sobol might still be protected from prosecution. In determining whether Sobol was entitled to injunctive relief, the court states:89

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89 Id. at 16-17.
We have concluded, under the circumstances of this case, that this was an unlawful prosecution which was undertaken for purposes of such harassment [referring to plaintiffs' charge of "unconstitutional harassment"], which served no legitimate interest of the State, for which no adequate remedy at law exists in the state courts, and which causes irreparable injury to Gary Duncan and other Negroes in need of representation in civil rights cases.

Later in the opinion the court states:

The circumstances surrounding the arrest and charge against Sobol, and the course of the Duncan case, convince us that Sobol was prosecuted only because he was a civil rights lawyer forcefully representing a Negro in a case growing out of the desegregation of the Plaquemines Parish School system.

and again:

This prosecution was meant to show Sobol that civil rights lawyers were not welcome in the parish, and that their defense of Negroes involved in cases growing out of civil rights efforts would not be tolerated. It was meant also as a warning to other civil rights lawyers and to Negroes in the parish who might consider retaining civil rights lawyers to advance their rights to equal opportunity and equal treatment under the Equal Protection Clause of the Fourteenth Amendment.

The court was forced to consider constitutional issues in determining whether Dombrowski-type injunctive relief should be granted, and the language quoted above is specifically related to that question. However, the language indicates that, although the court intentionally rested its decision on nonconstitutional grounds, there are constitutional rights involved in the Sobol case which could justify a broader holding. For example, the court's recognition that a prosecution undertaken for purposes of harassment "served no legitimate interest of the State" would appear to present a constitutional challenge to such

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90 Id. at 18-19.
91 Id. at 21.
92 Id. at 16.
prosecutions even if there were no compliance with a statutory exception. The court's recognition that such prosecutions might chill the exercise by civil rights lawyers and Negroes of "rights to equal opportunity and equal treatment under the Equal Protection Clause of the Fourteenth Amendment," would appear to provide a constitutional defense to such prosecutions apart from a statutory exception. The Sobol decision has left many questions unanswered but, despite its insistence on a nonconstitutional holding, it appears to offer support for a constitutional argument in a case not blessed with a statutory exception.

The decision of the Fifth Circuit in Sanders v. Russell provides stronger support for the conclusion that there is a constitutional right to representation by an out-of-state attorney in non-fee civil rights cases, although its holding is also rather narrowly circumscribed. The Fifth Circuit, in a decision filed on September 18, 1968 by Circuit Judge Dyer and joined by Chief Judge Brown and District Judge Garza, issued the Writs of Mandamus and invalidated the rule of the district court. The petitioners had urged that:

The Rule as to Nonresident attorneys, on its face and as applied to petitioners, unduly restricts pro hac vice admissions in the United States District Court for the Southern District of Mississippi, and is plainly inconsistent with the Constitution of the United States, with federal statutes and with proper principles of federal court practice, and specifically alleged violation of the privileges and immunities clause, the first and fourteenth amendments, the mandate of 42 U.S.C. § 1988 (1964) and 28 U.S.C.

93 Id. at 21.
94 Petition for Writ of Mandamus at 17, Anderson v. Cox, No. 25815 (5th Cir. 1968).
95 "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and
§ 2071. The Fifth Circuit took a more narrow view of the rule's invalidity. It found that although federal district courts have broad discretion in prescribing requirements for admission to practice before them, a rule which operated "in such a way as to abridge the right of civil rights litigants to use the federal court"\(^9\) contravenes the express direction by Congress to "the federal courts to use that combination of federal law, common law, and state law as will be best adapted to the object of the civil rights laws,"\(^8\) and so violates the requirement in 28 U.S.C. § 2071 that rules "be consistent with Acts of Congress." The Fifth Circuit reviewed the possible interests which the district court and the Mississippi bar might have in such a rule to preserve decorum and dignity, maintain high levels of professional ethics, protect the financial or economic interests of the members of the Mississippi bar, and assure a high quality of representation. It found that these interests were not threatened by admission of out-of-state attorneys in non-fee civil rights cases.\(^9\) Thus, since the rule served no valid regulatory interest of either the District Court or the Mississippi Bar, and since it had an adverse effect upon the exercise of litigants' rights to retain counsel of their own choice, the Court of Appeals invalidated the rule under its supervisory power over district courts. The court stated the scope of its decision in specific terms:\(^10\)

The petitioners' position is simply that they have a federal right to retain counsel of their choice who are changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

\(^{96}\) See text following note 16.

\(^{97}\) Sanders v. Russell, No. 25815 (5th Cir., Sept. 18, 1968) at 8.

\(^{98}\) Id. at 8, quoting from Lefton v. City of Hattiesburg, 333 F.2d 280, 284 (5th Cir. 1964).

\(^{99}\) Id. at 9-12.

\(^{100}\) Id. at 6-7.
attorneys in good standing at their respective bars and are associated with locally-admitted counsel in non-fee generating school desegregation and civil rights cases in federal court. This case does not involve the right of non lawyers to practice law. This case does not involve the right to practice in state courts. This case does not involve the right to general admission to a federal district court. This case does not involve the right of attorneys to be admitted pro hac vice without association with locally admitted counsel. This case does not involve fee-generating cases.

It is to be noted that the Fifth Circuit does not use the constitutional language which was pressed upon it by the petitioners and that even when it speaks of "rights" of litigants it does so not in terms of a constitutional right but in terms of a "federal right" either to use the federal court or to retain counsel of one's own choice. It appears to have viewed the Congressional mandate that the federal courts use the law to facilitate the vindication of civil rights as an important factor and to regard the "federal right" to use the courts as arising as much out of the proper administration of the federal judiciary as out of the Constitution. However, notions of equal protection, due process, and privileges and immunities have obviously influenced the court's recognition of such a federal right, and despite the lack of constitutional language it would seem that the decision rests upon a constitutional footing.

One important aspect of the Sanders decision, as it affects the future of civil rights practice in the South, is the Fifth Circuit's discussion of the limitations which the decision imposes upon future rules of the district courts. The court in an apparent attempt to set out some guidelines observes that "only reasonable limits can be placed on a federal litigant's choice of counsel." It would be reasonable to establish requirements "to insure that the same counsel will continue in the case until it is concluded" or to "refuse to admit a lawyer, otherwise qualified, on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." Such conditions should cause no problems for

101 Id. at 13.
102 Id. at 14.
103 Id.
civil rights legal organizations as they have all shifted from using short-term volunteer lawyers to using staff lawyers, and the ethical standards of out-of-state civil rights lawyers have never been questioned. As if to emphasize its intention to insure that district court rules comply with its standards, the Fifth Circuit added a footnote at the end of the opinion stating that another rule promulgated by the District Court for the Southern District of Mississippi while this case was being argued which required that "every lawyer who signs or permits his name to be listed as counsel . . . shall appear in person . . ." is overly broad and thus invalid as applied to non-fee generating civil rights cases." 104

While Sobol and Sanders were pending, it was anticipated that at last there would be a determination as to the scope of the right of out-of-state lawyers to practice in non-fee civil rights cases. But they have been decided on narrow grounds, and at best the uncertainty has only been slightly diminished. Sobol clearly absolves civil rights lawyers from the charge of unauthorized practice in Louisiana (and states having a similar exception for attorneys "temporarily in the state" who have associated a local attorney) and extends this exception to a lawyer who has lived in the state for several years without intent to become a resident, and who is not actually assisted in the proceeding by the associated lawyer. Sanders clearly forbids a federal district court from denying pro hac vice admission to an out-of-state lawyer in non-fee civil rights cases where there is an "inadequate reservoir" of attorneys willing to take such cases. These narrow holdings still leave some uncertainty as to the right to civil rights practice by out-of-state lawyers. There is still no clear protection from unauthorized practice prosecution where there is no Louisiana-type statutory exception and no clear right to practice in non-fee civil rights cases in state courts. It is necessary, therefore, to consider both the common law and constitutional limitations on a state's power to regulate the practice of law through admissions requirements and unauthorized practice prosecutions to determine what scope should now be given after Sobol and Sanders to the right of out-of-state attorneys to practice.

104 Id. at 15 n. 10.
105 Id. at 7.
Unauthorized practice of law statutes are a principal mechanism for enabling states to regulate the practice of law. The usual state statute makes the unauthorized practice of law a misdemeanor with a maximum punishment of $500 to $1000 and/or a jail sentence of 6 months to 2 years. These statutes are ordinarily found not in the state Penal Code, but among the statutes concerning "Attorneys at Law," so the crime is closely related to statutes governing admissibility to the bar and conduct of the legal profession.

What is considered "unauthorized practice of law" is usually dependent upon a statutory definition of the "practice of law," plus any judicial or administrative gloss. The statutes vary a good deal in defining the practice of law, some providing only a general definition and many enumerating specific activities, such as representing litigants in court and preparing any papers incident thereto, preparation of a legal instrument, and rendering opinions regarding real estate. Many use broad, all-inclusive language, such as the Georgia statute which includes "any action taken for others in any matter connected with the law" and the Alabama and Louisiana statutes which include "any act in a representative capacity in behalf of another tending to obtain or secure for such other person the prevention or the redress of a wrong or the enforcement or establishment of a right." 

106 E.g., Ala. Code, tit. 46, § 31 (1958) (fine not to exceed $500, imprisonment not to exceed 6 months or both); Fla. Stat. Ann., § 454.23 (1965) (fine of $1000, imprisonment for 12 months); N. C. Gen. Stat. § 84-8 (1953) (a misdemeanor punishable by fine, imprisonment, or both "in the discretion of the court"); S. C. Code Ann. § 56-141 (1962) (fine of $500 for every cause he represents or solicits).


109 Id.

There are a number of exceptions to the unauthorized practice statutes, either by common law development or by express statutory exception, such as the exception for lawyers "temporarily in the state" which was involved in Sobol. Some of these exceptions appear to have constitutional overtones, but most of them were developed in a period of limited extension of the Constitution, and so they generally rest on nonconstitutional grounds. Certain of the exceptions may apply to out-of-state civil rights lawyers, and, if the constitutional right to practice is limited, resort to such exceptions may, as in Sobol, provide a modicum of protection for civil rights practice.

A. Exceptions for Certain Businesses and One's Own Business

A number of statutes single out activities of certain non-lawyer businesses as not constituting the practice of law. For example, abstract and title companies are authorized to make abstracts of title and provide opinions as to title (but not to draft deeds, conveyances, mortgages and other legal documents) in Alabama, and banks may give advice to customers relating to legal matters and draw up their own legal documents in Georgia. Some statutes also exclude from the practice of law an individual's doing his own legal business. For example, a citizen is not prohibited from caring for his "own business, claims or demands," in Alabama.

Most of these statutes and other non-statutory rules permitting certain groups to perform legal services have resulted from compromises between the legal and related non-legal professions. They represent the power of certain groups, such as the banks, abstract companies, and accountants, to insure that their right to perform certain acts is protected. Although these exceptions were clearly not designed for the civil rights situation, there may be room in some states to argue for a statutory construction which permits a Negro to be assisted by an out-of-state attorney on the grounds that he is merely caring for his "own business, claims or demands." If a businessman is permitted to write his own leases and contracts, often with the assistance of his non-lawyer employees, might not a Negro be assisted by an out-of-state attorney in preparing and filing a complaint charging discrimination by a public housing authority?

or bringing a Title II suit against a discriminating place of public accommodation? The presence of these statutory exceptions for special interest groups raises a constitutional argument based on the equal protection clause of the fourteenth amendment (which will be discussed more fully in a later section). The state's alleged interest in insuring that all legal work is done by local attorneys appears already to have been compromised, and the fact that bankers and businessmen are excepted while out-of-state civil rights attorneys, who offer the only legal service available in civil rights cases, are not raises a substantial constitutional question.

B. "For Consideration" Rule

A number of statutes, including the provisions of the Alabama and Louisiana statutes quoted above, distinguish between activities in connection with litigation before a court or administrative body and legal advice in a non-litigation setting, with the provision that legal services performed in the latter case do not constitute the practice of law if not done "for a consideration." This could be an important exception in civil rights and poverty law cases where there is usually no fee. An advisory opinion of the Massachusetts Supreme Judicial Court recognizes this in stating that "[t]he gratuitous furnishing of legal aid to the poor and unfortunate without means in the pursuit of any civil remedy, as a matter of charity, [does] not constitute the practice of law." The fact that the statutes of Alabama, Louisiana, and Mississippi have this exception probably accounts for the form which the attacks upon out-of-state lawyers took in the Jelinek and Sobol cases. The states were forced to find a litigation setting in which to bring unauthorized practice charges.

It is conceivable that this statutory exception could be removed or that charges could be brought against civil rights lawyers for performance of "office practice" functions on the grounds that civil rights lawyers who are receiving a salary from a civil rights organization are performing services "for a consideration." Thus, although this exception provides at the moment a substantial loophole for civil rights law office practice, it is not a very satisfactory long-range safeguard. The loophole is also of limited value today since the bulk of the legal work being done by civil rights lawyers involves litigation and affirmative suits.

C. "Mere Investigation" Rule

A few courts, including the Supreme Court of Louisiana, have held that activities which involve only investigation of the law and the facts, as opposed to providing legal services in connection with a case, do not constitute the practice of law. Thus, investigation by a civil rights lawyer of a claim of discrimination which only involved looking into the case for the client, talking to potential witnesses, and determining whether there were grounds for a suit would be immune. Whether this exception can also be extended to investigations after the case has been taken is more in doubt. However, it could be argued that investigation of facts or law at any time is not practicing law. If a lawyer can hire a layman private detective to investigate facts or use non-lawyers to research the law in his office, why should an out-of-state lawyer not be able to perform the same functions?

There have been cases where southern sheriffs and police refused to permit out-of-state lawyers to perform preliminary acts of investigation, such as interviewing clients in the jail, viewing official records, and finding out information. Some of these incidents were part of the general harassment tactics which southern law enforcement officials developed in response to the 1963-65 demonstrations, but such tactics have continued in some areas. Certain courts have also used this tactic to limit the effectiveness of out-of-state lawyers, such as an order given by Judge Cox that his clerks would not accept any pleadings or legal papers from someone who is not a member of the state.


120 See Southern Justice (L. Friedman, ed. 1965).
Despite the fact that it is common practice for lawyers to use secretaries and other non-lawyers to file papers at court for them. However, even though only Louisiana has judicially recognized the "mere investigation" rule, it is likely that most courts would honor the exception.

D. Right to Appear Pro Se

Most states provide either by statute or by judicial recognition of a right in common law that a citizen may represent himself in any court action in which he is a party. This doctrine has not been extended, however, to permit a party to be represented by a layman who is willing to assist him free of charge. In Hackin v. Arizona, the Supreme Court refused to grant certiorari to review the conviction of a law school graduate who was not a member of a bar for unauthorized practice of law in representing free of charge an indigent defendant who had not been able to obtain a lawyer in an extradition hearing. Justice Douglas, dissenting, based his objections not on the right to appear pro se but on the indigent's first amendment rights of advocacy and petition of redress and of equal justice. There is no precedent for extending the right to appear pro se, and the constitutional arguments for permitting non-members of the bar to represent an indigent appear to provide stronger grounds, but it may be that some state courts could be persuaded to expand the doctrine. The right of an individual to defend himself, even without any knowledge of the law, court procedures, and the ethical requirements of the bar is in itself in conflict with the state's purpose in permitting only authorized lawyers to practice. Such defense seems to be permitted because the common law placed great importance on the right of the individual free man to act for himself. Even in today's more complex society, which requires more specialized legal representation,

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121 Petition for Writ of Mandamus at 8 n.12, Anderson v. Cox, No. 25815 (5th Cir. 1968). See Judge Cox's reply in Response and Certificate of United States District Judge at 6, Anderson v. Cox, id.


124 389 U.S. 143 (1967).

125 Id. at 152.
there would still seem to be a valid policy reason for the individual to be able to present his own case. If an indigent Negro cannot obtain an authorized attorney and our courts do not require that he be provided counsel in misdemeanor criminal cases and all civil cases an essential extension of the right to appear pro se may be to permit non-lawyer representation. The arguments are more persuasive when made in a constitutional context, but there may be room for an argument based on the modern day application of the common law right which would permit indigents to be represented in both civil and criminal suits by non-bar members standing in the place of the individual under his right to appear pro se.

E. "Solitary Incident" and "Practicality of One Lawyer" Rule

A number of courts have evolved a rule to temper the harshness of unauthorized-practice statutes which permit an out-of-state attorney to practice within the state in one particular case. The New York courts adopted the original "solitary incident" doctrine whereby non-lawyers were held not to be engaged in the practice of law by performing legal services as a "single isolated incident" despite the fact that a fee was charged. In Bennett v. Goldsmith a layman who specialized in assisting clients to obtain visas to Canada was held not to have practiced law by charging a small fee for the drawing of a single legal document, and in People v. Title Guaranty and Trust Company, a layman who drew a single legal document for a fee was held not to have engaged in the practice of law. However, in People v. Alfani, a layman who made a regular business of drawing up legal documents was held to be engaged in the unauthorized practice of law.

The "solitary incident" rule by itself has limited value to civil rights practice. It may be of some service in the occasional situation in which an out-of-state attorney, such as a law professor or attorney who is an expert in constitutional law, is brought into a state to assist with a particular case. Affirmative suits do sometimes require such expert assistance, and if

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127 280 N. Y. 529, 19 N. E. 2d 927 (1939).
128 227 N. Y. 366, 125 N. E. 666 (1919).
129 227 N. Y. 334, 125 N. E. 671 (1919).
It is feared that this will constitute unauthorized practice, the "solitary incident" rule might be used as additional justification.

The "solitary incident" rule is of more value in those states where it has developed into a broader doctrine permitting an out-of-state attorney to perform substantial legal services. Such an expansion usually requires that the services arise out of legitimate representation of his client in the state in which he practiced and be deemed necessary for the proper, efficient, and economical representation of that client. The 1964 New Jersey Supreme Court decision of Appell v. Reiner\(^\text{130}\) broke the ground for the new extension of the doctrine. There a New York attorney not admitted to the New Jersey bar was representing two New Jersey residents in the contest of a will in New York. The will contest became dependent upon the settling of certain claims against his clients by New Jersey creditors, and the attorney assisted in obtaining extension of credit and compromising the debts with the New Jersey creditors. In a suit to recover his fee his clients raised the defense that he had violated the New Jersey unauthorized-practice-of-law statute.

The court found that the clients' New Jersey financial problems "constituted an inseparable unit" with the New York will contest and held that due to the "inseparability" and "inter-state nature" of the transactions his performance of legal services in New Jersey was not against public policy and so not illegal.\(^\text{131}\) This doctrine, as so stated, holds little promise for civil rights practice which rarely involves this type of interstate transaction. However, the reasoning of the court indicates that the doctrine may have a broader application. The court was impressed by the fact that if the clients had been forced to retain a separate New Jersey lawyer, the aggregate fees would have exceeded the reasonable compensation for one attorney and the involvement of two attorneys from different states would have been "grossly impractical and inefficient."\(^\text{132}\) These problems are particularly present in civil rights cases. If a client should not be required to hire a second lawyer to handle New Jersey legal matters which are related to a New York action because of the expense, inefficiency, and impracticality involved, a Negro resident of Mississippi with a civil rights problem has similar interests at stake. It is likely that the civil rights legal

\(^{130}\) 43 N. J. 313, 204 A. 2d 146 (1964).

\(^{131}\) \text{Id.} at 314, 204 A. 2d at 148.

\(^{132}\) \text{Id.} at 317, 204 A. 2d at 148.
organizations offer the only legal representation he will be able
to obtain. The few attorneys who are licensed to practice in the
state and who will take civil rights cases are so overburdened
with non-fee civil rights cases and often lack the expertise to
handle the constitutional issues adequately that if the Negro is
forced to accept such representation, his case will suffer. If
there are valid policy reasons for not applying a state's
unauthorized practice laws because they will cause too much
expense and inefficiency in the handling of a client's case, then
there would seem to be equally compelling policy reasons for not
applying such laws where a Negro might thereby be denied effec-
tive representation.

It must be admitted that this analysis goes beyond both
the holding and dicta of the Appell case. Appell relates to the
particular problem of clients whose legal problems have multi-
state contacts while the typical civil rights case relates to only
one state. Also the legal services provided in Appell did not
involve participation in court proceedings, and the court specifi-
cally limited its holding to legal advice not related to court pro-
ceedings. But despite the factual differences, it is suggested
that the policies involved have some common ground. The
Appell court was concerned with seeing that its citizens obtain
adequate legal services without undue expense or inefficiency.
If state unauthorized practice laws got in the way, it was willing
to waive them. The court recognized that a state's interests in
protecting its citizens from unauthorized practice of law may be
outweighed by the interest shared not only by the client, but also
the legal profession and the courts, in insuring that citizens
obtain adequate legal representation. There appears to be no
policy reason why a citizen with legal problems relating to two
states should be entitled to avoid unauthorized-practice laws to
obtain economical and efficient specialized legal representation
while a citizen with only an intrastate legal problem is not. The
Appell court, it is true, was particularly concerned with the
inefficiency caused in multi-state legal problems, but its ration-
ale indicates a concern for providing adequate legal representa-
tion for its citizens.

The Appell approach is relatively novel, but the ever-
increasing amount of multi-state legal problems indicates that
other jurisdictions may be attracted by it. The New York Court
of Appeals, in its 1965 Spivak v. Sachs133 decision, chose not
to expand its "solitary incident" rule to include substantial legal
services and held that legal advice given over a two-week period

by a California lawyer in New York constituted the unauthorized practice of law. However, in dicta the court expressed its agreement with Appell that recognition must be given to the problems caused by multi-state transactions and stated that "we cannot penalize every instance in which an attorney. . . comes into our state for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."134

Justification for the right to hire an out-of-state attorney in non-fee civil rights cases in order to obtain adequate legal representation may be better accomplished under a constitutional analysis than by expanding the exceptions to unauthorized-practice statutes. However, in light of the limited holdings in Sobol and Sanders there may be a need to rely upon more narrow statutory construction arguments. Since in civil rights cases the federal courts have been specifically directed by Congress "to use that combination of federal law, common law, and state law as will be 'best adapted to the object' of civil rights law,"135 the expansion of state doctrines regarding practice of law may have an important role in accomplishing that result.

VI. CONSTITUTIONAL LIMITATIONS ON STATE POWER TO REGULATE THE PRACTICE OF LAW

Apart from common law, statutory and judicial limitations upon the state's power to regulate the practice of law there are federal constitutional limitations which affect the power of state legislatures and courts over the practice of law. These restrictions may forbid state regulatory action altogether in certain areas or merely limit unreasonable restrictions.

A. Supremacy Clause and Federal Preemption of Admission Standards

Congress possesses the power to create standards for the practice of law before federal agencies and to preempt the right of a state to establish conflicting standards. The Supreme Court held in 1963 in Sperry v. Florida136 that although a state has a substantial interest in regulating the practice of law, Florida could not deny the right of a layman who had been

134 Id. at 168, 211 N.E. 2d at 331.
135 Lefton v. City of Hattiesburg, 333 F. 2d 280, 284 (5th Cir. 1964).
admitted to practice before the U.S. Patent Office to perform legal functions relating to the preparation and prosecution of patent applications. The court relied upon the fact that Congress expressly gave the Commissioner of Patents authority to make regulations governing patent practice, and that under the supremacy clause of Art. VI, Cl. 2 of the Constitution a state could not pass a law in conflict with such regulations. The court also determined that such exclusive jurisdiction of practice standards did not violate the tenth amendment. States still possess, however, the right to regulate the practice of law; the decision did "not authorize the general practice of law" but only those functions necessary to practice before the Patent Office.

A number of other federal administrative agencies, created by Congress and authorized to establish regulations governing practice before them, have been held not to be subject to state practice of law rules. The preemptive doctrine has been applied to the NLRB, the ICC, the Immigration Department, the U.S. Land Office, Customs courts, and the U.S. Tax Court. The doctrine has not been extended to authorize the general practice of law, even though relating to the law of the particular federal agency. Thus, the New York Court of Appeals in *In re Bercu* held that a certified public

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140 DePass v. B. Harris Wool Co., 346 Mo. 1038, 144 S.W. 2d 146 (1940).
143 Brooks v. Mandel-Witte Co., 54 F.2d 992 (2d Cir. 1932), cert. denied, 286 U.S. 559 (1932).
144 Petition of Kearney, 63 So. 2d 630 (Fla. 1953).
accountant was not entitled to give legal advice concerning federal
tax matters and that in so doing he had violated the state's
unauthorized practice of law statute.

The essential element in the application of the preemptive doctrine appears to be that Congress or a federal agency acting under congressional authorization has established definite standards for admission to practice. Classic examples are the U.S. Patent Office which admits laymen as patent attorneys and the U.S. Customs Court which admits laymen as customs brokers. A number of federal agencies do not establish express standards for admission to practice before them, but, like the ICC and the NLRB, permit a party or a layman representative to appear before them. Finally, a number of federal agencies do not specifically provide for appearances before them, but a federal act provides that certain complaints will be received by the agency and that certain actions will be taken by the agency in regard to the complaints. The question then arises as to whether such federal legislation is preemptive of state unauthorized-practice statutes which would forbid a person who is not a member of the local bar from engaging in such practice.

This question is particularly applicable to civil rights practice which frequently involves dealings with federal agencies which do not have express standards for practice before them. The Civil Rights Act of 1964 empowers federal agencies and commissions to make various kinds of legal determinations upon complaint. Title II of the Act provides that civil actions for discrimination in public accommodations may be referred by the court for 60 days to a newly created agency called the Community Relations Service which has investigatory powers and that injunctive and civil actions may be brought by the Attorney General if he deems it necessary upon the basis of complaints received. Title IV provides for a survey and establishment of guidelines for grants by the Commissioner of Education and for suits (upon receipt of a written complaint) by the Attorney General to accomplish desegregation of public education. Title V gives

146 See notes 139 and 140 supra.
investigatory powers to the Commission on Civil Rights in cases involving deprivation of the right to vote.\textsuperscript{150} Title VI provides for determinations of charges of discrimination in federally assisted programs, from a hearing examiner to final determination by the Commissioner of Welfare.\textsuperscript{151} Title VII empowers the Equal Employment Opportunity Commission to investigate and bring charges in the federal courts on complaints of discriminatory employment practices.\textsuperscript{152} It should be obvious that a layman is usually incapable of pursuing his various rights under this act without some form of assistance in dealing with the governmental agencies and authorities involved. The fact that no express provision is made in the Act as to the type of person who can represent an aggrieved party in dealings with the government authorities would, under a strict application of the preemption doctrine, permit a state to forbid the giving of legal assistance by one not admitted to the state bar.

The reason usually given for applying the preemption doctrine to legal practice before federal agencies is that such agencies must not be hampered in the prosecution of their functions (and thus the purpose of the federal legislation frustrated) by undue state regulation. With this interest in mind, there appears to be no valid reason for a distinction permitting practice in violation of state unauthorized-practice laws before the FCC and NLRB because they expressly permit one to appear through a "representative" and forbidding similar legal services in filing a complaint under the Civil Rights Act. Both situations involve practice before a particular federal agency, based upon a specialized body of federal law, and in both the scope of the legal services to be performed can be easily limited beforehand.

If the preemption doctrine were extended to prevent state unauthorized-practice rules from applying to all legal services incident to federal administrative practice, a good portion of civil rights practice would thereby be protected. Obviously federal administrative practice should not be opened up to anyone without any requirement of admission standards. However, there seems to be no reason why the state laws could not be held to be preempted in those cases in which a practitioner possesses professional qualifications, such as membership in the bar of another state (whether non-lawyers who possess expertise in a

\textsuperscript{150} 42 U.S.C. § 1975(a).
\textsuperscript{151} 42 U.S.C. § 2000d-1.
particular administrative field should be permitted to practice before federal agencies in non-fee civil rights cases is beyond the scope of this article) and in those cases in which there is a showing that no fee is being charged and the client was unable to obtain adequate representation by a member of the local bar. This approach would protect the federal interest of insuring that the objectives of its legislation are carried out and that its citizens have access to its administrative tribunals without interfering with the state in protecting its citizens from unqualified and unethical law practitioners.

B. State Interests in the Regulation of Admission to Practice

The Supreme Court stated in Schware v. Board of Bar Examiners:153

A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards or when their action is invidiously discriminatory.

State admission-to-practice rules, therefore, must have some reasonable relation to the protection of valid state interests. The state interest in regulating the practice of law is based upon its desire to insure that its citizens, courts, and institutions will be served by attorneys who:

1) Possess adequate knowledge of the state and federal law and the procedures applicable in its courts to be able to provide competent legal advice and representation,

2) Possess qualities of good moral character necessary for professional men and officers of the court,

3) Are easily available and amenable to process incident to any case in which they represent a party and can

be held accountable for any mistake, malfeasance or breach of conduct resulting from their legal practice.

The first of these interests is met by the requirement that before a person is eligible to take the state bar examination he must be a graduate of an accredited law school, have taken a certain number of legal courses, or have completed a satisfactory course of study with a lawyer and the requirement that he must satisfactorily pass the state bar examination. The second is met by the requirement that an applicant for bar admission must submit character references, possibly be examined by a committee of the bar, and be determined to meet certain character requirements. The third is met by requirements that an attorney must be a resident of the state and, in some states, that he be a resident of the local community and that he be subject to the rules of ethics promulgated by the state bar on pain of disbarment for failure to comply.

When these state interests are applied to out-of-state civil rights lawyers, the case for state regulation is not overwhelming. It is difficult to make a strong argument that out-of-state civil rights attorneys threaten either of the first two state interests. They all have graduated from accredited law schools (and a high proportion of them come from respected law schools and were graduated high in their class) and have

154 For discussion of the requirements of the various states as to the numbers of years of law school or law study required for eligibility to take the bar exam see Countryman, The Lawyer in Modern Society, Parts IV, VII-2 to-7 (1965).


156 E.g., Ala. Code tit. 46, § 25(c) (1958) (investigation requirements).


158 For example, a large proportion of the twenty-eight Inc. Fund staff attorneys graduated from Harvard, Yale, and Columbia Law Schools. Interview with Melvin Zarr, Legal Defense Fund, Inc. Staff Attorney, New York City, N. Y.

159 See, e.g., Petition for Writ of Mandamus at 6, Anderson v. Cox, No. 25815 (5th Cir. 1968): "Paul Brest is a
passed a bar examination in their state. Some of the civil rights lawyers have been national experts in their field, like Anthony Amsterdam and the late Mark De Wolfe Howe, and some are acknowledged experts with substantial practical experience in civil rights work, like Alvin Bronstein and Richard Sobol of the LCDC. Many are relatively young, recent law school graduates, but very few, these days, are without practical experience and specialized training in civil rights and federal law. All three of the civil rights legal organizations operating in the South provide workshops for both their volunteers and their staff attorneys. 160 The knowledge of federal law and procedures of all civil rights attorneys is generally in excess of that of the average local southern lawyer. The record of the hearings before the three-judge court in the Sobol case shows instances when Sobol, on cross-examination by the southern lawyers on the other side, displayed a more thorough knowledge of both federal and Louisiana law than did his cross-examiners. 161

The interest of the state in insuring that attorneys possess good moral character also provides little support for the exclusion of out-of-state civil rights lawyers. These lawyers have passed the character examinations required by their states, and there has never been any contention that character requirements are more rigorous or exacting in southern states than elsewhere. In order for the state to substantiate its interest,

graduate magna cum laude of Harvard Law School and has served as a law clerk to a United States Circuit Judge;" and Brief for Plaintiffs at 32-33, Sobol v. Perez, No. 67-243 (E. D. La., July 22, 1968): "Mr. Sobol is an honor graduate of the Columbia Law School in New York City. As an officer of the Columbia Law Review, he did considerable specialized study in the fields of constitutional and criminal law; and, while a student, he was a research assistant to Professor Herbert Wechsler in the Professor's work as Reporter for the Model Penal Code. Upon graduation, he worked briefly for a New York law firm and then served as a law clerk to a United States Circuit Judge of the Court of Appeals for the Second Circuit. He thereafter moved to Washington, D.C., where he was Special Assistant to a F. T. C. Commissioner before joining the Washington law firm of Arnold and Porter."


it would have to attack the generally accepted notion of "comity" which all southern states have adopted in some form. That is, if a southern state is willing to grant pro hac vice admission to any out-of-state attorney who comes from a state which will extend the same privilege to its attorneys, it appears that it is not particularly concerned with checking the intellectual credentials and character of all out-of-state attorneys. In fact, even the strongest advocates of excluding out-of-state civil rights attorneys, like Judge Cox and Judge Leon of Pacquemines Parish (in the Sobol case), have not pressed the argument that they could not trust the bar examination and character determinations of other states. The published standards of the American Bar Association have tended to bring all state admission requirements up to minimum standards (the southern states, particularly Alabama, Georgia, Mississippi, and Louisiana, have always been the problem states with lower standards than those of other states). The general attitude of most bar associations, including the southern ones, favoring extending professional courtesies to members of other bars and the possible effect of the "full faith and credit clause" on attacks by one state upon the sufficiency of determinations of qualifications to practice have tended to make southerners avoid the argument

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162 ABA Section of Legal Education and Admission to the Bar.

163 The southern states are among the least demanding states as regards required period of prelegal education (Mississippi--2 years college or 4 years high school; Georgia--high school or equivalent), required period of law study (Georgia--2 years) and alternatives to law school study (Georgia and Mississippi--2 years law office study; Louisiana--combination office and school study equivalent to 3 years full-time law school study; North Carolina, South Carolina, Texas and Virginia--3 years law office study or 3 years in office and school). Countryman, The Lawyer in Modern Society, supra note 154, at VII-3 to -6, compiled from ABA Section of Legal Education and Admission to the Bar, 1960 Review of Legal Education, 23-28 (1960).

164 The full faith and credit clause, U.S. Const. art. IV, § 1, has not been applied to the right of an out-of-state attorney to practice. Licensing may be a special public act not within full faith and credit clause protection, and the right to practice a profession in one state has been held not to extend such right in another state. See Rhode Island v. Rosenkrans, 30 R.I. 374, 75 A. 491 (1910), aff'd, 225 U.S. 698 (1912) (dentistry). A further full faith and credit argument has been suggested: "A second
that they cannot trust the bar examinations and character determinations of other states.

An argument which is more frequently made is that out-of-state civil rights attorneys are not familiar with the local rules and procedures. In some cases that has only meant that they questioned segregated court rooms, raised objections to all-white juries which are never raised by local attorneys, and objected to the constitutionality of practices which have always been accepted. However, there is some justification

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, "Note, The Practice of Law by Out-of-State Attorneys, supra note 57, at 1291.

165 See Schulman, "Clarksdale Customs," in Southern Justice 111 (L. Friedman ed. 1965), "The Supreme Court decided not long ago that the Constitution requires integration of all courtrooms--state and Federal--and the conviction of a Negro in a segregated court must be reversed. Yet when a Mississippi judge, a woman, ordered her courtroom segregated and was told what the Supreme Court had decided, she smiled benignly and said: yes, she knew of that decision 'but we have our customs down here,'" The courtroom remained segregated."

166 Carruthers v. Reed, 102 F. 2d 933 (8th Cir. 1939) (failure of attorney for Negro to object to exclusion of Negroes from jury because he believed it would lead to an increase of race prejudice in the community held not violative of due process and equal protection); Smith v. Balkcom, 205 Ga. 408, 54 S.E. 2d 272 (1949) (failure of attorney to object to exclusion of Negroes from jury panel held not denial of adequate counsel as attorney had been member of the bar for 25 years); McNeil v. North Carolina, 248 F. Supp. 867 (E. D. N. C. 1965) (failure of attorney to challenge all white jury panel held chargeable to defendant).

167 Lucear v. Georgia, 221 Ga. 572, 146 S.E. 2d 316 (1965) (reference to defense witnesses as "niggers" by prosecutor held not grounds for reversing murder conviction); Swain v. Alabama, 380 U.S. 202 (1965) (participation by defense attorneys with prosecutor in striking Negroes under "struck
for the complaint that out-of-state attorneys are not familiar with lawful local practices, and to some extent, this has probably caused some delay and inconvenience in legal matters in which out-of-state civil rights attorneys have been involved. However, there is the same problem with out-of-state attorneys who are admitted pro hac vice on "comity" rules; this is one of the drawbacks of all law cases involving interstate matters. One of the interesting aspects of the Cox and Russell rule is that while it has been applied to prevent civil rights lawyers from obtaining admission to the court, the time-consuming and harassing tactics of the Attorneys' Committee have not been applied to lawyers from neighboring states. Judge Cox testified at the hearing on the Petition for Mandamus concerning the admission, after the rule was promulgated, of attorneys from neighboring states:

"I admit them all the time on the Coast. They come over here in droves from Alabama and New Orleans on the other side and I haven't referred those matters to the Committee even because they just as a matter of course are admitted if they are in good standing and have been practicing for five years."

This kind of double standard raises doubts about the arguments for state interest in this type of exclusion of attorneys. 169

The third state interest, that of insuring that an attorney

jury" system); Bowen v. U. S., 192 F. 2d 515 (5th Cir. 1951) (Failure to object to pretrial statement); Jones v. Huff, 80 App. D. C. 254, 152 F. 2d 14 (1945) (failure to raise constitutional issues).

168 Brief for Petitioners at 6, Anderson v. Cox, No. 25815 (5th Cir. 1968).

169 Judge Cox's rule, of course, constitutes action by a federal court, rather than a state, but the interest of a federal court in preventing out-of-state attorneys from practice is similar to the interests of states in enforcing unauthorized practice laws. Lefton v. City of Hattiesburg, 333 F. 2d 280, 285 (5th Cir. 1964), said of Judge Cox's refusal to accept removal petitions signed by out-of-state attorneys: "This principle [that a state's power to regulate the practice of law cannot infringe upon the right to representation] applies with special force where it is a federal court and not a state, whose regulations may interfere with lawsuits authorized by Congress."
is amenable to process, is not threatened in the civil rights context. All three of the civil rights legal organizations are non-profit corporations and have complied with the requirements for doing business in the southern states in which they operate. All three have permanent offices there, and all pleadings can be served on their attorneys at that office. They also have a national office with full-time staff. There has never been any complaint that mail has not been answered promptly. There have been a few complaints by southern courts that civil rights attorneys missed scheduled appointments and dropped suits, but this has been rare, particularly since the organizations have begun to rely almost entirely upon staff attorneys rather than volunteers.

Judge Cox actually has not maintained that civil rights attorneys have been unamenable to process. In his brief he gives the following reason for his rule:

The comity rule became important and necessary by reason of the large number of transient attorneys from other states who moved to Jackson and boldly practiced law in damage suits and labor relations cases without qualifying to practice law in this state or before the trial.

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170 One of the reasons given by the State of Kansas for not permitting Kansas attorneys who lived and practiced outside the state to practice in Kansas was that there had been problems in getting such lawyers to attend dockets, answer their phone and be available for service. The Supreme Court apparently found this persuasive in upholding the state regulation. Martin v. Walton, 368 U.S. 25 (1961).

171 See Response and Certificate of United States District Judge at 8, Anderson v. Cox, No. 25815 (5th Cir. 1968): "An accumulation of brazen acts of people from other states claiming to be lawyers and actually practicing law in a case in this Court against International Paper Company and several labor unions precipitated the adoption of this comity rule. Those persons [including Mrs. Brest] were taking depositions in the Southern Division of this district and abruptly abandoned a noticed hearing with their clients, resulting in a hearing before this Court resulting in the imposition of sanctions against their clients under the Federal Rules of Civil Procedure."

172 Response and Certificate of United States District Judge at 6, Anderson v. Cox, No. 25815 (5th Cir. 1968).
court. Many of these persons were mere law students on
vacation at the time. Some of these students even improp-
erly and erroneously advised people charged with crimes
in the trial court.

It is obvious that the state (and in the Cox situation, a particular
federal court) has a genuine interest in insuring that fly-by-night
attorneys do not create expectations in clients and those dealing
with them and then leave the state free from accountability for
unethical practices. However, this is not the case with the
civil rights attorneys. The resident staff attorneys have for the
most part spent at least one year or more in the state, and the
non-resident staff attorneys and volunteer attorneys who come
in from out-of-state are screened beforehand by the organiza-
tions, with the organizations standing behind any legal actions
undertaken by them. The requirement for association of a local
attorney has been the primary method of insuring that an out-
of-state lawyer will have an office to work out of while in the
state where process can be served. The permanent civil rights
organization office in the state serves this purpose for civil
rights attorneys.

VII. FEDERAL INTERESTS IN PROTECTION
OF CONSTITUTIONAL RIGHTS

The federal interest in the regulation of the right to prac-
tice law extends not only to its administrative agencies, as dis-
cussed previously, but also to the responsibility of the federal
courts to protect the constitutional rights of citizens.

A. Right to Representation by Counsel of Own Choice

The Constitution guarantees a right to appointed counsel
to indigents in a variety of situations. Gideon v. Wainwright173
held that the sixth amendment right to counsel as applied to the
states by the fourteenth amendment due process clause requires
that an indigent be provided legal counsel in the trial of a felony
case. That right has been extended by the Fifth Circuit Court
of Appeals174 and certain jurisdictions175 to include serious
misdemeanor cases. The right of an indigent to appointed

174 Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965);
McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965).
175 E.g., State v. Borst, 154 N.W.2d 888 (Minn. 1967).
counsel was extended in *Douglas v. California* to include the appeal, and in a number of other cases to include pre-trial pro-
ceedings. *Griffin v. Illinois*, established the proposition that when certain procedural rights which are not constitutionally
required, are made available by a state, those rights cannot be
denied an indigent. *Griffin* may provide support for the conten-
tion that an indigent cannot be denied free counsel when others
with funds are permitted to have counsel.

The right of an indigent to free counsel has not been
extended to civil cases. However, there is sentiment among
what appears to be a minority of the Supreme Court Justices for
review of the civil counsel situation. Justice Fortas stated in a
national television broadcast on October 27, 1967 that:

*Gideon* established that persons who commit felonies are
entitled to lawyers if they cannot afford to hire one them-
selves. The next question and the great question before
the country now in connection with the urban problem is
whether the state will provide lawyers at state expense
to poor people who cannot afford to hire lawyers when
such poor people are involved in some civil litigation
... . The only way to provide equal justice is to pro-
vide counsel for persons who have legal problems and
the only way that can be done adequately is through state
support.

Justice Douglas has maintained in *Williams v. Shaffer* and
*Hackin v. Arizona* that the fourteenth amendment ensures
equal justice for the poor in both criminal and civil actions. In
*Williams v. Shaffer*, an action involving eviction of a poor tenant

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177 See *Pointer v. Texas*, 380 U.S. 400 (1965) (right to
confrontation); *White v. Maryland*, 373 U.S. 59 (1963) (prelimi-

nary hearing); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraign-
ment).


179 Quoted from transcript of "Justice for All," National

180 385 U.S. 1037 (1967).

We have recognized that the promise of equal justice for all would be an empty phrase for the poor if the ability to obtain judicial relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an indigent the right to appeal (Burns v. Ohio, 360 U.S. 252, 79 S. Ct. 1164, 3 L. Ed. 2d 1209), the right to file a habeas corpus petition (Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39), or the right to obtain a transcript necessary for appeal (Griffin v. People of State of Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891).

The right of an indigent to free counsel is important in the civil rights and poverty law areas, because the lawyers provided by these organizations are frequently the only lawyers available to Negroes and the poor for legal assistance. There is, therefore, a constitutional cast to the activities of such law practice which is derivative from the right of the individual himself to free counsel. However, since the criminal portion of civil rights practice has been steadily decreasing and most poverty law programs do not take criminal cases, and since the right to counsel has not been extended to civil cases, the indigent's right to counsel cannot be relied upon.

In addition to the right of indigents to free counsel, there is a general right of a citizen to be represented in any case by counsel of his choice. The Supreme Court stated in Powell v. Alabama:

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

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This principle has been upheld in both state and federal court contexts by subsequent cases. 184

This right has been found to override both state unauthorized-practice-of-law statutes and restrictive pro hac vice admissions. In Spanos v. Skouras Theatres Corporation, 185 a case involving legal services by an out-of-state anti-trust specialist, the Second Circuit affirmed that there is a right to obtain specialized legal services and that a citizen with a federal claim or defense cannot be prevented by state unauthorized-practice-of-law statutes from engaging an out-of-state lawyer so long as a local lawyer is associated. Spanos specifically involved a citizen with a federal claim or defense, and because its holding was based upon the privileges and immunities clause of the fourteenth amendment (as will be discussed shortly), it does not stand for the proposition that state unauthorized-practice rules cannot prevent a citizen with a state law problem from obtaining out-of-state counsel. However, the general right of a citizen to counsel of his choice is well established, and although the federal nature of a suit adds an additional constitutional dimension in support of overriding state restrictive rules, the right to counsel is equally at stake in a purely state law matter. The need for representation by counsel having both specialized knowledge and vigorous interest in the case can be just as great in a case involving state law as one involving federal law. The civil rights claimant, however, will usually have a claim based on federal law.

The courts have also upheld the right to be represented by an out-of-state counsel in the face of restrictive pro hac vice rules. In United States v. Bergamo, 186 a federal district judge in the Middle District of Pennsylvania refused to admit a New Jersey lawyer pro hac vice to defend a criminal case despite the fact that he was a member in good standing in a New Jersey federal court and had associated a local attorney. The Third Circuit stated that "[t]o hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by

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186 154 F.2d 31 (3d Cir. 1946).
them is to vitiate the guarantee of the Sixth Amendment.\textsuperscript{187}

The court reserved the question whether this right applied to

civil cases, but it is suggested that the relatively new approach

represented by the Spanos case would provide an equally com-
mpelling argument for overriding pro hac vice refusals of an out-
of-state attorney in a civil case. There has not been complete

agreement with the Bergamo result. A more recent federal
district court decision, People of the State of New York v.

Epton,\textsuperscript{188} rejected a removal petition which alleged that the

state judge had refused to permit representation by an attorney

who was not a member of the New York bar and approved the

judge's statement that "counsel of his own choosing means
counsel recognized by the Courts of this State."\textsuperscript{189} This deci-
sion, however, may be distinguished on its facts, as there was

no showing that a local attorney was associated or that the out-
of-state attorney was necessary to provide specialized or

sympathetic representation which was unavailable by a local

New York City attorney.

In a number of ways, civil rights cases present a stronger

case for permitting representation by an out-of-state counsel

than does a case in which the client or defendant can afford and

obtain an acceptable local attorney. Civil rights lawyers are

often the only counsel the client can obtain. The Legal Defense

Fund, in its brief in Anderson v. Cox, argued that its lawyers

provided by local attorneys in filling a need for:\textsuperscript{190}

1) Specialized legal service - With the increasing com-
plexity of the legal profession, federal, and particu-
larly civil rights law, has become a specialized prac-
tice. Petitioners' attorneys are among the few

specialists in this field. Indeed, in the highly special-
ized area of school desegregation litigation in Missis-
sippi, petitioners' attorneys are the only nongovern-
mental attorneys operating in the field.

2) Free legal service - This service is not a commer-
cialization of the legal profession which might

\textsuperscript{187} Id. at 35.

\textsuperscript{188} 248 F. Supp. 276 (S. D. N. Y. 1965).

\textsuperscript{189} Id. at 277.

\textsuperscript{190} Brief for Petitioners at 13-14, Anderson v. Cox, No.

25815 (5th Cir. 1968).
threaten the moral and ethical fabric of the administration of justice. It is not "ambulance chasing."

3) **Courageous legal service** - It is not overstatement that in Mississippi, and in the South generally, Negroes with civil rights claims or defenses have often found securing representation difficult . . . . The occasion when a locally admitted attorney not associated with the LDF, LCCRUL or the LCDC undertakes a civil rights case in Mississippi is a remarkable event indeed.

Lefton v. City of Hattiesburg[^191] is a seminal case in establishing a right in a civil rights context to representation by an out-of-state lawyer in the face of a restrictive court rule, although its holding is limited by its favorable fact situation. It involved the arrest of forty civil rights demonstrators in the summer of 1964 under recently enacted statutes forbidding picketing and demonstrations in the environs of public buildings. When they attempted to remove their cases to the U.S. District Court for the Southern District of Mississippi, the Clerk, acting under local court rules promulgated by Judge Cox, refused to accept the petitions for filing on the grounds that: 1) they were in behalf of more than one individual, 2) were not accompanied by a filing fee of $15 per individual, 3) were not accompanied by a removal bond of $500 per individual, and 4) were not signed by a member of the bar of the U.S. District Court for the Southern District of Mississippi.

The Fifth Circuit held that the first three requirements would unduly restrict the federal objective of protecting civil rights. It found the fourth requirement to be violative of the rights to free expression and association by engaging in litigation (which will be discussed in the next section) and to counsel. The court recognized that a federal district court has broad discretion over admission but stated:[^192]

> [I]f no local counsel are available, a court rule requiring local counsel should be waived. Moreover, where local counsel are associated in the case to comply with court rules, non-local counsel chosen by the parties may nevertheless take the lead in the direction and argument of the case. . . .

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[^191]: 333 F. 2d 280 (5th Cir. 1964).

[^192]: Id. at 285, 286.
[W]aiver of local rules or admission to the bar pro hac vice, should be allowed when, as herein alleged, the non-local counsel "was unable to find counsel admitted [locally] who would sign the pleadings with him."

Thus, _Lefton_ would hold state and court restrictive admission rules to be inapplicable to out-of-state attorneys "if no local counsel are available." A threshold determination as to whether local counsel is available must be made. _Lefton_ involved a situation in which time was of the essence and refusals of representation by some members of the bar and general hostility by the rest of the bar left little doubt that local counsel could not be obtained. It may be more difficult, however, to prove that local counsel is not available to defend Negroes in a civil-rights-related case like the one involved in Sobol's arrest or in the school desegregation suits filed by the out-of-state attorneys in Judge Cox's court. There have been cases where every lawyer in the locality was asked and refused to take a civil rights case. Should however, an individual be expected to call every member of the state bar and obtain a refusal before he can be represented by an out-of-state civil rights lawyer? If not, should evidence indicating that some local lawyers were asked and that they represent a cross-section of the bar be required? In either case, the requirement would constitute an onerous burden on the defendant.

The right to counsel, when viewed apart from its relationship to first amendment rights, may be of limited value in today's civil rights practice, because of the need to prove unavailability of local counsel. However, it may not be straining the rationale of the _Lefton_ decision to say that what is required is that no local counsel be available for "adequate representation." It would then sometimes appear that a civil rights litigant cannot obtain "adequate representation" from either the few Negro or civil rights attorneys who are admitted to the bar or from the entire white bar. The fact that the few Negro and civil rights attorneys admitted to the local bar are unable to handle all civil rights cases (and particularly complicated affirmative suits) and that white members of the bar have

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194 C. B. King, a Negro attorney practicing in southwest Georgia, was representing civil rights clients in more than
demonstrated a lack of sympathy for civil rights suits\(^{195}\) and an unwillingness to raise constitutional issues and defenses in behalf of Negro clients\(^{196}\) should be sufficient proof that adequate representation is not available from local counsel.

As time goes on, the argument can be expected to be made more often by southern lawyers that they will accept "genuine" cases involving civil rights which are not just "propaganda" and will provide adequate representation.\(^{197}\) This argument

2,000 pending cases in 1964, most of the cases not involving a fee. Pollitt, "Timid Lawyers and Neglected Clients," Harper's, Aug., 1964, 81 at 83. For statistics on the number of Negro lawyers in southern states, see Carlin and Howard, Legal Representation and Class Justice, 12 U. C. L. A. L. Rev. 381, 394 n. 41; The Negro Lawyer in Virginia: A Survey, 51 Va. L. Rev. 545, 553 n. 8. The Report of the Advisory Committee for the Minority Groups Study, Association of American Law Schools Proceedings, 1967 Annual Meeting, 160, reported: "The finding is that the current output of Negro law graduates is painfully inadequate; it is hardly more than miniscule. Negroes make up one-tenth of the population, yet less than 200 are currently graduating from American law schools as contrasted with some 10,000 white graduates."

\(^{195}\) See note 44 supra.

\(^{196}\) See notes 166 and 167 supra.

\(^{197}\) See Judge Cox's statement: "Of course, all your cases involve federal rights but I don't think it's an accurate statement to intimate in this record that there are not local Counsel that are available to handle any kind of civil rights cases on either side. I have had that suggested and I pointed out a law firm here some years ago in a case where that very contention was made and they went to that law firm and hired them immediately. And only two or three months ago, I had a case that involved civil rights of the very worst kind. Matter of fact, it was a federal case against three colored boys for I believe about one of the most inflammatory charges that could be made against them, involved some white girls and I appointed this very competent lawyer and he went right to bat for them and I think he sought some legal assistance from maybe your crowd [Legal Defense Fund] or Mr. Bronstein's crowd [Lawyers' Constitutional Defense Committee] and I saw his brief and he wrote a real able brief. It's in the Fifth Circuit now. People were tried before a mixed jury I think it had three colored
tends to obscure the real issue in these cases which is that persons being deprived of their constitutional rights are entitled not merely to adequate assistance, but to vigorous and effective legal assistance in protecting those rights and that such protection extends beyond the limits of the constitutional right to counsel.

B. Rights of Free Speech and Association by Engaging in Litigation

Civil rights legal organizations, their attorneys, and potential Negro litigants all share in the interest insured by the first amendment in using litigation as a form of political expression directed at vindicating civil rights. The first amendment is a broader and more potent limitation upon restrictive admission rules than the right to counsel which is tied to criminal cases and requires proof of inadequacy and unavailability of local counsel. The Supreme Court recognized, in *NAACP v. Button*, that civil rights litigation is a "form of political expression":

... [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion, ... In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment for all government, federal, state, and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of the New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

people and nine white people on there and they were convicted but this fellow had no hesitancy and he didn't even wince at all at my asking him to handle the defense." Brief for Petitioners at 14, *Anderson v. Cox*, No. 25815 (5th Cir. 1968).

The right to litigate necessarily includes a right to counsel, and this right to counsel, when viewed in the litigation context, would appear to be broader than the sixth amendment right to counsel. The generally accepted rule for determining whether the legal assistance provided met constitutional standards of the sixth amendment and due process is whether it was so deficient as "to shock the conscience of the court and make the proceedings a farce and a mockery of justice." Courts have taken the attitude that one who accepts a lawyer is estopped from denying that he had proper representation. Thus, even those, like Justice Douglas, who have urged the recognition of a right to counsel in certain kinds of civil cases, have not attempted to define what qualities are essential to the requirement of "effective counsel." Most of the cases dealing with the issue arise out of later complaints that there was inadequate representation. The courts' narrow definition of what is required reflect the fear that there will be no end to litigation if parties can later object to the quality of their legal representation. A few cases have considered the problem in a different context. Spanos v. Skouras Theatres Corporation relying on the privileges and immunities clause, found a right to be represented by an out-of-state attorney with particular expertise in a specialized area of federal law, and Appell v. Reiner mentioned considerations of practicality, efficiency, and cost in weighing the effectiveness of local counsel against out-of-state counsel. These cases are relevant in analyzing the first amendment right to litigate by showing that, even in a civil context not involved with first amendment rights, there are certain minimal qualities inherent in the notion of "effective counsel."

"Effectiveness" is an important element of the first

200 Smith v. United States, 324 F.2d 436, 440 (D.C. Cir. 1963); United States v. Miller, 254 F.2d 523, 524 (2d Cir. 1958).
203 43 N.J. 313, 204 A.2d 146 (1964).
amendment. The fact that the Supreme Court gives special consideration to the need for immediacy and efficacy in preserving the right to free speech and has stated that first amendment rights are preferred rights would indicate that a counsel who is ineffective in using litigation to redress the deprivation of a client's constitutional rights would not meet the requirements for a right to litigate. Lukewarm legal representation is a disservice to a client in any case, but it is particularly so in a first amendment case. A counsel who lacks the sympathy or determination to raise the first amendment issues and litigate them properly undermines the whole purpose of bringing the suit. First amendment cases often involve greater discretion and call for more intricate strategy than other kinds of cases, with the result that a counsel who fails to utilize affirmative suits or raise the issues as the case progresses can himself insure that redress of the client's first amendment rights will fail. Thus, "effectiveness" of representation becomes an important element in the right to litigate, requiring specialized and courageous legal services as necessary elements of the constitutional right itself.

The right to litigate in order to protect one's first amendment rights is, like all constitutional rights, not an absolute. There must be, however, a compelling state interest if it is to be restricted. The Supreme Court stated NAACP v. Button:

Thus it is no answer to the constitutional claims . . . today . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights . . . . "In the domain of these indispensable liberties, whether of speech, press or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."

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A balancing of the state's interests in regulating law practice against the individual's first amendment rights is not always easy, but the preferred nature of first amendment rights and the increasingly questionable efficacy of outlawing out-of-state civil rights attorneys tends to tip the scales in favor of overriding the state interest. Lefton v. City of Hattiesburg provides a good example of a balancing of interests which resulted in a determination that the court rule refusing to permit removal petitions to be signed by an out-of-state civil rights attorney was an undue restriction upon first amendment rights. The fact that this legal action arose out of the attempts of Negroes in association to participate in free speech activities and that the civil rights lawyer was providing his services without charge were found persuasive.\(^{207}\)

In this context where the litigation is not brought for private gain, any regulation of the practice of law must show sufficient "substantial regulatory interest"... to justify the potential and actual inhibitory effects of the regulation on the constitutionally protected right to litigate.

The court determined that no such "substantial regulatory interest" was sufficient to overrule the need for protection.

C. Right to Engage Out-of-State Attorney under Privileges and Immunities Clause

The admission to practice cases have developed a relatively recent federal right, based on the privileges and immunities clause of the fourteenth amendment, to hire an out-of-state attorney of one's own choice. The privileges and immunities clause, however, was so severely limited by Supreme Court decisions years ago that it appeared that it could never be revived. In the 1873 Slaughterhouse Cases the Supreme Court narrowed the clause to those rights inherent in national citizenship such as the right to come to the seat of the government, free access to seaports, protection of the government while on the high seas, right to peaceably assemble and petition for redress of grievances, right to a writ of habeas corpus, and right to use navigable waters of the United States.\(^{208}\) The privileges and immunities clause has never quite recovered from this

\(^{207}\) 333 F. 2d 280, 286 (5th Cir. 1964).

limiting interpretation, although Justice Douglas has urged a broadening interpretation in such opinions as *Bell v. Maryland*. 209

It has generally been held that the practice of law in state courts was not a privilege and immunity. 210 However, in 1966, the Second Circuit in *Spanos v. Skouras Theatres Corporation* held that under the privileges and immunities clause "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." 211 The *Spanos* resuscitation of the privileges and immunities clause as grounds for refusing to apply the state's unauthorized practice laws has been criticized: 212

Since the need to retain out-of-state counsel was tied to a federal claim or defense rather than to the right of access to the federal courts, it could well be maintained that the court intended its ruling to apply to state court proceedings as well. So applied, the court's decision could be utilized to invalidate any state rule of practice, the enforcement of which might hinder or prevent the vindication of a federally created right. With no narrower criterion than the "necessary and appropriate" standard of *Spanos*, statutes of limitations, local pleading and discovery rules, or requirements of security for costs, could fall whenever a federal cause of action is asserted.

These critics argue that the *Spanos* result would more properly have been reached by use of the supremacy clause, as in *Sperry v. Florida*, 213 than with the privileges and immunities clause. But it is not clear that there would be any firmer standards under a supremacy clause analysis than under the privileges

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210 See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872); *Starr v. State Board of Law Examiners*, 159 F. 2d 305 (7th Cir. 1947).

211 364 F. 2d 161, 170 (2d Cir. 1966).


and immunities clause. The supremacy clause analysis which speaks in terms of preemption of state authority to regulate certain areas of federal law is no easier to apply than the Spanos doctrine that when out-of-state counsel are "necessary and appropriate" for the assertion of a federal right, the right to such counsel is a privilege and immunity which cannot be vitiated by state regulation or court rule. Both analyses require a balancing of federal concerns (whether denominated rights or interests) against state interests in the particular case. If, in a particular case, state rules governing local pleading do, in fact, infringe upon federal concerns, then those rules, like Judge Cox's rules concerning the acceptance of removal petitions in Lefton v. City of Hattiesburg, will have to give way to the federal right or interest. The constitutional tag which is used is less important than the result achieved, and it appears that many general state rules governing not only admission to law practice but also the running of courts may be subject to preemption by federal standards.

The Spanos court specifically limited its holding to non-litigation legal services and stated that "we in no way sanction a practice whereby a lawyer not admitted to practice by a state maintains an office there and holds himself out to give advice to all comers on federal matters." However, Spanos, unlike civil rights cases, involved a private attorney charging a fee for specialized legal services which, no doubt, could have been provided by a local New York attorney. In such a commercial setting, the court had to set some limits to avoid creating, in effect, a right to the general practice of law in any state in federal law matters. The court apparently recognized that its narrow holding may not be necessary in a non-fee situation by citing Lefton with approval and noting that "in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication." Spanos also viewed the right to hire an out-of-state counsel as including the remedies necessary for its protection. The court stated that "where a right has been conferred on citizens by federal law, the constitutional guarantee against its

\[215\] Id. at 171.
\[216\] Id. at 170.
abridgement must be read to include what is necessary and appropriate for its assertion. 217 What is "necessary and appropriate for its assertion" will vary from situation to situation. The fact that a civil rights lawyer, like Sobol, lives in the state would not appear to be a crucial factor to prevent him from being entitled to practice. If the federal right exists, the individual litigant should be entitled to representation by any counsel who is needed to provide specialized representation, as provided by the California attorney in Spanos, or free and courageous representation, as offered by civil rights attorneys. The fact that the federal right is based upon civil rights, rather than federal anti-trust laws as in Spanos, gives a broader scope to the use of necessary and appropriate remedies. The Fifth Circuit said in Lefton: 218


The concern in Spanos for protecting a federal right and insuring that a citizen has the same opportunity as the citizen of another state to obtain specialized legal representation to preserve that right is magnified in civil rights cases. The preferred nature of civil rights and first amendment rights gives special urgency to actions to insure their protection. The Spanos privilege and immunity doctrine intended as it was to meet the problems posed by federal economic regulations requiring legal specialization holds considerable promise for the non-fee civil rights practice, and its enlargement to cover out-of-state lawyers in non-fee cases appears appropriate.

D. Right to Engage Out-of-State Counsel under Equal Protection of the Laws

The emphasis in Spanos upon insuring that a New York resident has the same opportunity to obtain the legal services

217 Id.
218 333 F. 2d 280, 284 (5th Cir. 1964).
of a California federal antitrust expert as does a California resident sounds a bit like another constitutional provision, the equal protection clause of the fourteenth amendment. It appears to be properly expressed in terms of the privileges and immunities clause because the difference in opportunity is clearly based upon state residency. However, when the rights to particular out-of-state counsel is viewed in the civil rights context, an analysis in terms of equal protection of the law may be more appropriate. The Sobol complaint raised the issue in these terms:219

By long-established custom and usage, the State of Louisiana, and particularly Plaquemines Parish, denies plaintiffs Duncan and Reynolds and the class plaintiffs the equal protection of the laws guaranteed by the 14th Amendment by depriving them of opportunities for legal representation, and for access to the courts, and for legal advocacy in support of their rights, equal to the opportunities which Louisiana and Plaquemines Parish give persons not Negroes or civil rights workers; and the State of Louisiana and Plaquemines Parish further deny plaintiffs Duncan and Reynolds and the class plaintiffs the same right to sue, be parties, give evidence and to the full and equal benefit of laws and proceedings for the security of person and property as are enjoyed by white citizens, by depriving them of the same opportunities for legal representation that are available at the Louisiana bar to whites.

This argument recognizes that the practical effect of enforcing the Louisiana unauthorized-practice statutes against out-of-state civil rights workers is to close the doors of the courts to many Negroes. The doctrine that state laws, although within the state's police power and impartially enforced, still may not be permitted to result in de facto discrimination against the poor has been enunciated by the Supreme Court in Griffin v. Illinois220 and Douglas v. California.221 The denial of equal protection is easier to see in Griffin where the state conditioned appellate review on the presence of a stenographic transcript for which an indigent would be unable to pay than in the case of

a Negro who is unable to obtain a local attorney. There is clearly state action in the Griffin situation, while it is more difficult to find state action where private members of the bar simply refuse to represent Negroes. An argument might be made that lawyers are quasi-public officials and that due to the monopoly they enjoy over the practice of law fostered by the delegation of public functions over the regulation of law practice to bar associations their refusal to represent Negroes constitutes state action. An argument might also be made, under an analysis similar to that advanced by the Solicitor General in the government's brief to the Supreme Court in Bell v. Maryland, that deprivation of opportunity for counsel for Negroes is a residue from the state-enforced system of segregation which required separate court facilities, bar associations, etc., and therefore may be considered state action. Obviously, state action is not easily found, and as more civil rights lawyers become members of southern bars and more young southern law graduates indicate willingness to take civil rights cases, the argument that private refusal of Negro cases by lawyers constitutes state action will be even more difficult to make.

VII. CONCLUSION

Although the Sobol and Sanders decisions failed to enunciate a broad constitutional right for out-of-state attorneys to practice in civil rights cases, there are a number of hopeful signs that legal protection will be extended to such practice. Sobol and Sanders have severely limited the use of unauthorized practice prosecutions and restrictive federal court rules to bar out-of-state attorneys from civil rights practice, thus removing the most effective weapons for barring out-of-state lawyers from practice. In a non-civil rights context there are promising developments. The Spanos decision recognized a federal interest in permitting an out-of-state attorney to practice in

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222 See Black, The Supreme Court 1966 Term: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 70-71 (1967): "I take the fourteenth amendment's 'equal protection' clause to mean that members of a race are to be shielded in the most ample way from any incidence of governmental power that works their disadvantaging by virtue of their race, with all the distinguishing implications in this ampleness and in this application to race as a subject of special solicitude." See also Bell v. Maryland, 378 U.S. 226, 242 (1964) (separate opinion by Douglas, J.).

cases requiring specialized services to vindicate a federal right, and the *Appell* decision acknowledged a similar federal interest in cases with multi-state contacts.

Continued pressure to extend the boundaries of permissible practice by out-of-state attorneys can be expected in both civil rights and non-civil rights areas. One likely area for future evolution is poverty law. Poverty law programs have likewise experienced problems with restrictive bar admission rules. Like civil rights legal organizations, poverty law offices require a particular type of lawyer who cannot always be found among members of the state bar. It has been felt that an effective poverty law program requires lawyers with an interest and an expertise in problems of the poor, a commitment to the use of law to bring about changes in the condition of the poor, and a willingness to accept a lower salary than is offered in private practice. 224 Some poverty law programs have attracted the hostility of local bar associations by activist programs (such as the California Rural Legal Assistance, Inc., which was sued by the local bar association in 1967 to prevent it from opening a neighborhood law office in Stanislaus County, California) 225, and poverty law programs have hired only members of the state bar despite the severe limitations it sometimes places on their

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225 See Stanislaus County Bar Assoc. v. California Rural Legal Assistance, Inc., No. 93302 (Dept. No. 4, Stanislaus County Superior Court 1966) discussed in 7 Welfare Law Bulletin 3 (1967). The complaint alleged that CRLA proposed to hire persons to act as solicitors "under the guise of social workers" in violation of the rules and laws governing the practice of law in California. A temporary restraining order was issued but was not renewed when it expired, and the office was opened. Amicus curiae briefs were filed by the United States Department of Justice and the National Legal Aid and Defender Association on behalf of defendants. No decision was entered, apparently for want of prosecution or for mootness. Letter from Don B. Kates, Jr., Director of Legal Research, CRLA, to author, April 10, 1968.
Another aspect of the poverty program which could result in conflict with bar admission rules is the use of non-lawyers in performing certain quasi-legal functions. For example, if practice of law rules are interpreted strictly, the preparation of a public housing complaint or counseling about welfare laws by a social worker might be considered the practice of law. Justice Douglas and a recent American Bar Association committee study have taken the position that the use of trained laymen to represent the poor in certain legal matters is necessary and advisable.

Pressures arising out of civil rights and poverty law situations will, no doubt, continue to cause conflict with the tangled body of rules promulgated by a myriad of courts, legislatures and administrative bodies, which now limit the right to practice law. There have been some broad proposals for reform of the structure, such as the creation of a National Board of Bar Examiners, the creation of a "federal bar," and the application of conflicts of law doctrines and legislative guidelines to establish more definite provinces for state and federal regulation of the practice of law. One can only speculate on...

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226 Letters from the legal offices of five regional offices of OEO (Mid-Atlantic, Great Lakes, North-Central, Southeast, and Southwest) in the spring of 1968 to author indicated that although there was interest in hiring lawyers who were not members of the local bar, no attempt was being made to do so.


231 Id. at 1311-12.
the possibilities for success of such broad reforms, but it seems clear that agitation will continue for freer access to legal and judicial remedies through the assistance of specialized and sympathetic out-of-state lawyers. In the civil rights area, the most restrictive limitations on practice by out-of-state lawyers have now been overcome, and it appears that there are adequate precedents to establish a broad legal protection for practice by out-of-state attorneys in non-fee cases.