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ATTORNEY — CLIENT FEE LITIGATION IN FEDERAL COURT: THE PENUMBRA OF SPANOS V. SKOURAS

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INTRODUCTION

The Traditional State Interest in Supervising Attorneys

Attorney-client fee litigation is seldom resolved by resort to ordinary contract principles. Rather, a number of rules peculiar to the attorney-client relationship can be invoked in such disputes. These rules determine issues such as the reasonableness of contingent fees, recovery after wrongful discharge by the client, illegality of the contract predicated upon solicitation, and the attorney's lien. Although there is considerable attorney fee litigation in federal court,[1] there is a dearth of authoritative analysis or resolution of the choice of law issue in the cases. Until recently the easy answer was that state law should govern in all cases. Most of the rules in question are grounded in general equitable principles based on the fiduciary relationship of attorney and client[2] or supervision of attorneys as officers of the court.[3] As to the former, the *Erie* doctrine reinforces the case for state law in the post-*Erie* decisions. As to the latter ground, state regulation of the legal profession is predicated upon strong state interests and a long tradition. The state is concerned with competent representation of residents, the entire administration of justice to which lawyers so greatly contribute, the effectiveness of disciplinary authority in order to insure high professional ethics, and the economic and professional status of the state bar. Moreover, Congress has not seen fit to enact comprehensive regulation of practice before the federal courts although such authority is generally conceded and legislation has been proposed.[4] Consequently, admission to federal practice

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1. *See* MODERN FEDERAL PRACTICE DIGEST, *Attorney & Client* (1960).

2. More than a century ago the Supreme Court stated in Stockton v. Ford, 52 U.S. 232, 247 (1850):

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably or faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

3. *See* Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959), *cert. denied*, 361 U.S. 374 (1960).

4. *See* Note, 67 COLUM. L. REV. 731, 738 n.49 (1967).

generally follows state standards.[5]

The Independent Federal Interest in Supervision of Attorneys

The above circumstances support the facile assumption that state interests should dominate the attorney-client relationship. Several recent developments, however, suggest further analysis and re-examination of that assumption. A series of Supreme Court decisions have found state policies directed at champerty and maintenance violative of the First Amendment freedom to associate and the right to petition for redress of grievances.[6] Similarly, in *Sperry v. Florida,*[7] the state's unauthorized practice law was held incompatible with Congressional policy in favor of non-lawyer patent practitioners. These decisions can be viewed as an emerging body of law concerning situations in which a civil liberty interest is asserted in a particularized context or where there is an articulated Congressional policy. The present discussion is concerned with the more frequently recurring, conventional contexts, such as judicial scrutiny of contingent fee contracts, wherein the federal interest is rather vague or subtle and consequently ill-defined.[8]

As indicated above, admission to federal practice has generally followed state standards. Nonetheless, in an opinion of recent date, the Supreme Court stated without dissent, "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers among whom, in the present context, lawyers are included."[9] Therefore, federal disbarment does not automatically follow state disbarment, even though "a lawyer is admitted into a federal court by way of a state court."[10] The federal courts, then, have an independent interest in supervising the conduct of attorneys practicing before them—an interest rooted in disciplinary authority and concern for the administration of justice in federal courts, neither of which is wholly identical with analagous state interests.

Further analytical difficulties are posed because the choice of law issue can arise in several distinct contexts—distinguishable as to the basis of jurisdiction invoked by the plaintiff or the nature and source of the right sued upon. These contexts may include: 1) a suit invoking

5. *See* Comment, 19 STAN. L. REV. 856, 863 n.41 (1967).

6. United Mineworkers of America, Dist. 12 v. Illinois State Bar Ass'n., 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 377 U.S. 415 (1963). *See* Zimroth, *Group Legal Services and the Constitution,* 76 YALE L.J. 966 (1966).

7. 373 U.S. 379 (1963).

8. Completely outside the present discussion are matters of due process in bar admission procedures and right of counsel in criminal cases.

9. *See, e.g.,* Theard v. United States, 354 U.S. 278 (1957).

10. *Id.* at 281.

diversity jurisdiction where the legal services were previously rendered in a state court proceeding; 2) a suit invoking diversity jurisdiction after a prior federal court proceeding; 3) a petition in the original federal court proceeding predicated upon ancillary jurisdiction.[11] As a source of potential conflict between state and federal interests it is evident that the federal interest is less appreciable in the first situation above and stronger when the client's original claim is a federal one.

The Federal-State Conflict Posed

At this point one may hypothesize a problem of accommodating or reconciling federal-state interests because a state rule impedes some federal interest or because of some supposed demand for national uniformity. This putative federal-state conflict turns, then, upon whether the federal courts should develop a "federal common law" for attorney fee litigation, at least in the strongest context: legal services rendered in connection with a federal claim cognizable only in federal court.[12] Seventeen years ago, Judge Wyzanski put the question thus:

> But does it do violence to Article III of the United States Consititution and to the Supremacy Clause of Article VI of the United States Constitution for a state legislature to regulate the substantive relationship between a litigant in the federal courts and his counsel? It might be argued that (1) it is the United States Court acting under Article III and statutes and rules pursuant thereto that admits the attorney to practice before it, (2) his conduct and his rights in connection with litigation in United States Courts are, therefore, the *exclusive* concern of the United States and (3) because of the Supremacy Clause of Article VI . . . no state can govern the relationship of the attorney and of the client in the United States Courts.[13]

Judge Wyzanski left the question unanswered as to legal services rendered in connection with federal claims. The question before him involved an attorney's claim for the value of his services and for a lien pursuant to the Massachusetts statute. The original suit was a personal injury action filed in federal court on the basis of diversity jurisdiction. In such a case it was felt that the *Erie* doctrine controlled and that the

11. Woodbury v. Andrew Jergens Co., 69 F.2d 49 (2d Cir. 1934) is the foundation case for this basis of jurisdiction. There are many other variations, *e.g.*, lawsuit not commenced and legal services before a state or federal administrative agency.

12. *See generally* Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Hill, *The Law-Making Power of the Federal Courts: Constitutional Pre-emption*, 67 COLUM. L. REV. 1024 (1967).

13. *In re* Hoy's Claim, 93 F. Supp. 265, 267 (D. Mass. 1950). Judge Wyzanski so held ten years later.

state statute would be applicable if the claim were pressed in federal court on the basis of ancillary jurisdiction.

The Spanos Case: A Constitutional Right to Engage an Out-of-State Attorney

The issue posed by Judge Wyzanski, as a possible rule of primary, rather than interstitial, applicability remained dormant until the recent decision in *Spanos v. Skouras Theatres Corp.*[14] In that decision, the Second Circuit, in a very narrow holding, resolved a conflict between a state statute and the federal interest served by the client's freedom of choice in retaining a non-resident expert in connection with a federal claim in federal court. Plaintiff-attorney Spanos had established himself as an expert in anti-trust law. He was retained by Skouras to work on a contemplated and later pending anti-trust suit in the Southern District of New York. Spanos, at that time a non-resident, was retained to work in association with local attorneys. He was not admitted to practice in New York state courts or in the Southern District, nor did he apply for admission *pro hac vice*. After the anti-trust suit was settled, Spanos was discharged; he then brought the instant action, based on diversity jurisdiction, for the value of his legal services. The defendant raised the defense of illegality, relying on a New York penal statute directed at unauthorized practice of law within the state and New York decisions precluding recovery of fees under such circumstances. The three-judge panel sustained the defense, Judge Friendly dissenting. On reconsideration *en banc*, the court, in an opinion by Judge Friendly, affirmed the district court judgment in favor of Spanos. The majority opinion initially approached the matter as a basic contract question and found an estoppel basis in the discharge of Spanos and, perhaps, in failure of the New York attorneys to secure admission *pro hac vice* for their colleague. But the court was not content with that rationale. It went on to hold that "under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state."[15] Consequently, the constitutional guarantee must include what is necessary and appropriate for its assertion: that the state law yield. Not only the risk of criminal prosecution but also the rule precluding recovery of fees presented constitutional obstacles. In deference to the state interest in the premises, however, the court expressly limited its holding to the situation before it.

14. 364 F.2d 161, *rev'd on rehearing en banc*, 364 F.2d 168 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966).
15. *Id.* at 170.

Attorney Regulation as a Restriction upon Assertion of Federal Claims

The *Spanos* case and other recent developments have important implications for the conventional attorney-client questions under consideration here. As to *Spanos* itself, much will turn upon whether it is narrowly interpreted or whether a broader interpretation will spawn progeny in related areas and thus move the law in the direction suggested by Judge Wyzanski's dictum. Because the client's constitutional right filtered down to the attorney's claim for his fee, an inquiry is suggested into other areas of attorney compensation and state restrictions thereon.[16] In this regard, the entire court was in agreement that admission *pro hac vice* would have insulated Spanos from the force of the New York statute.[17] Indeed, this point was the thrust of the dissenting opinion—Spanos could have obtained such admission but did not.

Focus on this aspect of the case and a broad interpretation yield the following exegesis. The New York statute does not effect an absolute prohibition against choice of out-of-state counsel or recovery of his fee. Admission *pro hac vice* accommodates the federal interest as well as the state interest by insuring that persons practicing within the state are screened at an appropriate level. Consequently, the finding of a constitutional right relates as much to the *ease* with which Spanos can recover his fee as to whether he can recover it at all. On this theory, any state rule governing the contractual relations of attorney and client would have to be measured against its restrictive effect upon assertion of a federal claim in federal court.[18]

Other developments include related Supreme Court holdings in the civil liberties context[19] as well as the decision in *Sperry v. United States*[20] and *Theard v. United States*.[21] Moreover, the layman today is arguably more knowledgeable, sophisticated and litigious in his relations with practi-

16. In *Spanos*, plaintiff argued that an attorney's compensation for services in federal court should be governed by federal law. Brief for Petitioner on Rehearing. More recently the Supreme Court was asked to resolve this question. Shiya v. National Committee of Gibran, 381 F.2d 602 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968) (contingent fee proceeding ancillary to copyright litigation). It should be noted that the contract-estoppel theory employed in *Spanos* was not supported by New York decisions and is subject to criticism.

17. The district judge's attitude seemed to be that such admission was a mere formality under the circumstances. Spanos v. Skouras, 235 F. Supp. 1, 11 (S.D.N.Y. 1964).

18. *See* discussion of the "balancing" approach in United Mineworkers of America, Dist. 12 v. Illinois State Bar Ass'n., 389 U.S. 217, 227-28 (Harlan J., dissenting). *See also* Cheatham, *The Reach of Federal Action Over the Profession of Law*, 18 STAN L. REV. 1288, 1293 (1966).

19. Stockton v. Ford, 52 U.S. 232 (1850); *see* note 2 *supra*.

20. 373 U.S. 379 (1963).

21. 354 U.S. 278 (1957).

tioners in the learned professions.[22] Lawsuits between attorneys and their former clients are apt to be contested bitterly, with either party pressing for some favorable variation or nuance of meaning in the available rules of decision.

Federal opinions of the past dealing with what are herein described as the conventional questions fall into three categories. Many cite and apply state law;[23] others cite both federal and state authorities;[24] still others discuss general principles without any citation of authority.[25] The purpose here is to consider general principles controlling choice of law in this area and then to re-examine some specific problems, especially scrutiny of the contingent fee contract, in light of the recent developments indicated above. Ultimately, the objective is to determine whether there is a future for Judge Wyzanski's dictum.

General Principles

At the outset, some basic assumptions and limitations are in order. First, it is assumed that the rules governing the attorney's contractual relations with his client are "substantive" insofar as the *Erie* doctrine might be applicable; thus, if state law is displaced in such a case it will be attributed to some over-riding federal policy.[26] Second, the discussion above fairly indicates that the proper reference for rules of decision cannot be found in the usually reliable, mechanical approach—focusing only on the basis of jurisdiction invoked;[27] the nature of the claim or source of the right will often be determinative. Finally, the present discussion assumes the case in which the client's original claim is a federal one. If the action would have to be brought in federal court solely on the basis of diversity jurisdiction, the arguments for state law and the *Erie* doctrine are usually compelling. The state interests are very strong in such a case and the federal interest correspondingly reduced. Further, it is difficult to imagine a more odious form of forum

22. In the present cascade of printed material, it is not insignificant that best-seller lists include a book dealing, basically, with how to avoid lawyers, and which engaged the attention of bar associations as well as book clubs. *See* New York County Lawyers' Ass'n v. Dacey, 28 App. Div. 2d 161, 283 N.Y.S.2d 984 (1st Dep't 1967). *See also* Blaustein, *What Do Laymen Think of Lawyers? Polls Show the Need for Better Public Relations*, 38 A.B.A.J. 39 (1952).

23. *E.g.*, United States v. Transocean Airlines, Inc., 356 F.2d 702 (5th Cir. 1966); Pitcher Construction Co. v. United States, 322 F.2d 843 (9th Cir. 1963); Carter v. Spanos, 250 F.2d 814 (8th Cir. 1958); Sharor v. Pollia, 191 F.2d 116 (10th Cir. 1951).

24. *E.g.*, Gray v. Joseph J. Brunetti Constr. Co., 266 F.2d 809 (3d Cir.), *cert. denied*, 361 U.S. 826 (1959); Falcone v. Hall, 235 F.2d 860 (D.C. Cir. 1956).

25. *E.g.*, Shiya v. National Committee of Gibran, 381 F.2d 602 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968); *In re* Kuflik, 342 F.2d 421 (2d Cir. 1965).

26. *Cf.* Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958).

27. 1 A. Moore, Federal Practice § 305 (3), § 324 (1965).

shopping than that designed to secure for the attorney an advantage over his client.[28]

The Supremacy Clause and Specific Congressional Policy

Sperry v. Florida is the Supreme Court opinion closest to the present inquiry.[29] The Florida Bar instituted a proceeding in a state court to enjoin a non-lawyer from acting as a patent practitioner in the state of Florida. The Court held that under the supremacy clause state law must yield. The applicable federal statute authorized non-lawyer patent practice as did the administrative regulations. Moreover, the Court was able to cite a long and impressive history in support of a congressional determination that non-lawyers be admitted to practice before the Patent Office. The Court stated:

> Nor do we doubt that Florida has a substantial interest in regulating the practice of law within the State and that, in the absence of federal legislation, it could validly prohibit non-lawyers from engaging in this circumscribed form of patent practice. . . . But the law of the State, though enacted in the exercise of powers not controverted, must yield when incompatible with federal legislation.[30]

Sperry in no way supports a wholesale displacement of state law with respect to the relation of attorney and litigant in federal court. In *Sperry* there was a very specific congressional policy and sharp conflict between that policy and state law. In marked contrast is the general delegation to the district courts of authority to make rules governing admission to practice in those courts. Moreover, the patent law area is especially inviting for assertion of the supremacy clause, not only because of the esoteric nature of the subject, but primarily because of the strong national interest in its relation to our competitive enterprise and anti-trust policy.[31] In a different context, but also involving patents, the Supreme Court has said:

> But the doctrine of (*Erie R. Co. v. Tompkins*) is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by

28. *See* Espaillat v. A.H. Bull S.S. Co., 152 F. Supp. 264 (S.D.N.Y. 1957) (reliance on New York percentage schedule).
29. 373 U.S. 379 (1963).
30. *Id.* at 383.
31. *Cf.* Sears, Roebuck and Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

federal law having its source in those statutes, rather than by local law.[32]

The Post-Erie Remnants of a Federal Common Law

Other recent cases shed light on the Court's attitude when congressional policy is not clearly articulated or when the conflict with state law or the need for national uniformity is less evident than in the above situation.

Wallis v. Pan American Petroleum Corp.[33] involved the validity of assignments of a lease of public lands. The lease application had been filed with the Secretary of the Interior pursuant to federal acts governing "acquired lands" and "public domain lands." The district court held the oral assignment ineffective under Louisiana law, the situs of the property. The Court of Appeals for the Fifth Circuit reversed and remanded for a new trial governed by federal law. On certiorari, the Supreme Court reversed and held that Louisiana law should apply. Justice Harlan's opinion for eight members of the Court stated:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that "Congress acts . . . against the background of the total corpus juris of the states. . . ." Because we find no significant threat to any identifiable federal policy or interest, we do not press on to consider other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern . . . the feasibility of creating a judicial substitute. . . and other similar factors.[34]

The case is instructive in that the federal act comprehensively regulated various aspects of the leasing process and included a section providing

32. Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176 (1942).
33. 384 U.S. 63 (1966).
34. *Id.* at 68-69.

that oil and gas leases shall be assignable.[35] Moreover, there was an intimation in the court of appeals that federal law might yield a different result.[36] Nonetheless, the Court rejected the argument for federal law as having "no force in this instance because Louisiana concedely provides a quite feasible route for transferring any mineral lease."[37] As to any federal interest in the premises, the Court stated, "Apart from the highly abstract nature of this interest, there was no showing that state law is not adequate to achieve it."[38]

International Union v. Hoosier Cardinal Corp.[39] presented the question of the proper statute of limitations applicable, in federal court, to actions for violation of a collective bargaining agreement under section 301 of the Labor Management Relations Act. Section 301 was silent on the issue. Notwithstanding the resultant lack of uniformity, the majority held that state statutes should apply. The Court considered the situation inappropriate for "judicial inventiveness" in fashioning a judicial substitute. *United States v. Yazell*[40] involved the applicability of the Texas law of coverture to a wife's liability on a disaster loan from the Small Business Administration. Again the majority held that Texas law was applicable.[41]

These very recent decisions confirm an attitude expressed in an earlier case: "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days ante-dating *Erie R. Co. v. Tompkins*. The instances where we have created federal common law are few and restricted."[42] Together, these cases admonish against displacement of state law merely because *some* federal interest has been located. Instead, a plethora of factors must be evaluated: the strength of the state interest; an identifiable, concrete federal policy and a significant threat thereto; a high degree of specificity in federal legislation that may be relevant; a demand rather than mere opportunity to achieve national uniformity; the feasibility of judicial substitutes for state law and, in that regard, the drain of judicial energy as compared with the convenience and certainty of

35. *Id.* at 69.
36. *Id.* at 67 n.5.
37. *Id.* at 70.
38. *Id.* at 71.
39. 383 U.S. 696 (1966).
40. 382 U.S. 341 (1966).
41. Although the holding is narrow in that the Court emphasized that the loan was a "custom-made, hand-tailored, specifically negotiated contract," the context of United States as a party is strong. 382 U.S. at 348 (1966). *See The Law-Making Power of the Federal Courts: Constitutional Pre-emption, supra* note 12.
42. Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

an already developed body of state law;[43] whether state law is adequate to achieve the federal interest; and, the degree of difficulty in determining which state rule to apply.[44]

The *Wallis* case, especially as supported by the rationale in *Sperry*,[45] suggests that even uniform rules for admission to practice before the federal courts would be significant only with respect to the precise matter to which such rules might be addressed. It is against this backdrop that a few representative problems will now be considered. In many cases these factors will militate in favor of state law even though there is some federal interest in the premises.

Some Typical Issues

Judicial Scrutiny of Contingent Fee Contracts

The contingent fee contract now enjoys a traditional status although its pros and cons are still debated.[46] Where the balance lies, in evaluating its social utility, cannot be established empirically; to abolish it altogether would seem a "noble experiment" of sorts. What is clear, however, is that the contingent fee generates more antagonism and litigation between attorney and client than any other issue. The successful plaintiff will scrutinize, with hindsight, the efforts of his attorney. He is not impressed by the fact that part of his bill is justified by other instances in which a less fortunate plaintiff, along with the attorney, realized no recovery at all.

All jurisdictions agree that at some point a contingent fee contract will be set aside under judicial scrutiny and the attorney relegated to a *quantum meruit* recovery.[47] That point, polarized as to the intensity of the adjectival phrases, may be when it is "unreasonable" or when it amounts to "perpetration of a fraud." Other expressions include "unconscionable," "over-reaching," "in a clear case," etc. For present purposes the question is whether there is anything of substance in these variations. Much of the literature suggests that there is.

It is evident that the amount of the fee is not to be measured

43. *See* Sears v. Austin, 292 F.2d 690, 695 (9th Cir. 1961).

44. United States v. Yazell, 382 U.S. 341, 357 n.34 (1966). Generally, with respect to attorney fee contracts, the place where the services are to be rendered can be ascertained and should be controlling. Peresipka v. Elgin J. & E.R. Co., 231 F. 2d 268 (7th Cir. 1956); Lehigh & N.E.R. Co. v. Finnerty, 61 F.2d 289 (3d Cir. 1932); *Cf.* Hoxsey v. Hoffpauir, 180 F.2d 84 (5th Cir.), *cert. denied*, 339 U.S. 953 (1950).

45. 373 U.S. 379 (1963).

46. *See* Radin, *Contingent Fees in California*, 28 Calif. L. Rev. 587 (1940); Youngwood, *The Contingent Fee—A Reasonable Alternative?*, 28 Modern L. Rev. 330 (1965); Note, 54 Ky. L.J. 155 (1965).

47. *See* 7 C.J.S. *Attorney & Client* & 186(b) (1937); 7 Am. Jur. 2d *Attorneys at Law* § 215 (1963).

exclusivley against the reasonable value of the services. Authorities agree that the risk and uncertainty of compensation is a relevant, evidentiary consideration.[48] Moreover, it is patently unsound to equate an *unreasonable* fee with that which is greater than the reasonable value of the services. It would make the contingent fee contract illusory from the viewpoint of the attorney, thereby frustrating the very purpose it was designed to serve, and fomenting potentially endless litigation of a sort that would embarrass the entire judicial process. Likewise, equity precedents dealing with inadequacy of consideration are not a reliable guide because of the risk and uncertainty of compensation.

The opinions in *Gair v. Peck*[49] contain extensive discussion of the contingent fee contract. The suit was for a declaratory judgment as to the validity of court rules providing a percentage schedule for contingent fees in personal injury and death actions. In sustaining the rules against several attacks, the court stated:

> Contingent fees may be disallowed as between attorney and client in spite of contingent fee retainer agreements where the amount becomes large enough to be out of all proportion to the value of the services rendered. It matters little whether under such circumstances the "formula be that the size of the fee becomes 'unconscionable' or 'unreasonable.' " *Each word means the same thing in this context.*[50]

Elsewhere in the majority opinion the court used or quoted approvingly the following expressions: "exorbitant," "unfair advantage," "legal fraud perpetrated," "unfair," "oppressive and overreaching."[51] The decision goes far in laying these variations to rest as semantic.

Perhaps the standard employed in this area cannot be refined beyond the various verbal formulae and relevant evidentiary factors. Nonetheless it is believed that all jurisdictions adhere to the same basic standard with the ordinary allowance for different factual conclusions by different triers of fact. The same conclusion is offered with respect to other verbalizations that can be put in juxtaposition for their apparent con-

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48. *See* 7 AM. JUR. 2d *Attorneys at Law* § 250 (1963). Canon 13 of the American Bar Association provides:

> A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

New Jersey law is now in harmony with the general rule. *In re* Quinn, 25 N.J. 284, 135 A.2d 869 (1957).

49. Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 49 (1959).

50. *Id.* at 106, 160 N.E.2d at 48, 188 N.Y.S.2d at 497. (emphasis added).

51. *Id.* at 106-07, 160 N.E.2d at 48-49, 188 N.Y.S.2d at 497-98.

flict. For example, it is stated that a contingent fee contract will be enforced according to its terms as any other contract[52] and, on the other hand, that such a contract will be strictly construed in favor of the client.[53] As noted above, no dissent has been found from the proposition that at some point the contract will be set aside. Further, so-called rules of strict construction have been characterized as secondary rules of interpretation to be employed when other standards fail.[54] An analysis of the cases indicates that the courts resolve problems of interpretation according to the usual standards if the amount of the fee is not unconscionable.[55] Strict construction is resorted to here, as in other areas, as a make-weight when the attorney presses for an unreasonable interpretation,[56] when there is overreaching and abuse of confidence[57] or when the contract is hopelessly ambiguous.[58]

It is submitted, then, that in this very important and sensitive area, the law is substantially uniform and well-established; variations in the verbal formulae encountered are "non-substantial or trivial,"[59] and the strong state interest in the premises protect the federal interest. Within the framework of general principles outlined above, there should be little temptation to displace state law. Even in the case of an out-of-state attorney, the *Spanos* context, the right of the client can hardly require a departure from general principles embraced in all jurisdictions in substantially the same form, and, consequently, a limitation on the attorney's freedom of contract everywhere. In this posture of the law, it

52. *See, e.g.*, Carter v. Spanos, 250 F.2d 814, 816 (8th Cir. 1958); Bryant v. Hand, 404 P.2d 521 (Colo. 1965).

53. *See, e.g.*, Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246 (5th Cir. 1934); Ridge v. Healy, 251 F. 798, 804 (8th Cir. 1918).

54. RESTATEMENT OF CONTRACTS § 236 (1932); 4 WILLISTON, CONTRACTS §§ 602A, 618-26 (3d ed. 1961).

55. Shiya v. National Committee of Gibran, 381 F.2d 602 (2d Cir. 1967); Gray v. Joseph J. Brunetti Constr. Co., 266 F.2d 809 (3d Cir.), *cert. denied*, 361 U.S. 826 (1959); Unterberg v. Therm-air Mfg. Co., Inc., 14 N.Y.2d 859, 200 N.E.2d 776, 252 N.Y.S.2d 92 (1964), *rev'g* 20 App. Div. 2d 260, 246 N.Y.S.2d 907; Seligson, Morris & Neuberger v. Fairbanks Whitney Corp., 22 App. Div. 2d 625, 257 N.Y.S.2d 706 (1965); McAvoy v. Schramme, 219 App. Div. 604, 220 N.Y. S.423, *aff'd mem.*, 245 N.Y. 575, 157 N.E. 863 (1927).

56. Agnew v. Fort Myers Drainage Dist., 69 F.2d 244 (5th Cir. 1934); Lane v. Wilkins, 229 Cal. App. 2d 315, 40 Cal. Rep. 309 (1964) (percentage formula); Hawke v. Dorf, 148 App. Div. 326, 133 N.Y. S.23 (1911); Samuels v. Simpson, 144 App. Div. 466, 129 N.Y. S.534 (1911).

57. Ridge v. Healy, 251 F. 798 (8th Cir. 1918); Race v. Harris, 246 App. Div. 367, 286 N.Y. S.168 (1936); *In re* Smith's Will, 11 Misc. 2d 170, 170 N.Y.S.2d 27 (1958); *In re* Vaupel's Estate, 37 N.Y.S.2d 853, *aff'd*, 266 App. Div. 723, 40 N.Y.S. 2d 956 (1942).

58. Samuels v. Simpson, 144 App. Div. 466, 129 N.Y. S.534 (1911).

59. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965). Non-substantial variations reduce problems of forum-shopping and unequal protection of laws; but they also reduce the need for national uniformity and over-refinement of issues. *Cf.* Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 n.5 (1966).

is understandable that federal opinions do not belabor the appropriate reference for rules of decision.[60]

Wrongful Discharge, the Attorney's Lien, Champertous Contracts

Three other issues will be discussed briefly. Together with the contingent fee, they constitute the great bulk of attorney-client litigation. The questions involve: 1) wrongful discharge; 2) the attorney's lien; and, 3) contracts attacked as champertous because of a provision that the attorney will pay expenses.

In cases of wrongful discharge, there is disagreement as to the proper measure of recovery by the attorney. The majority allow recovery of the full stipulated fee while other jurisdictions restrict the attorney to a *quantum meruit* recovery.[61] The latter obviously find a stronger policy in favor of the client's choice of attorney. Federal decisions in this area cite and apply state law.[62]

The second question is the attorney's lien. Many states have statutes providing for such liens and there are variations with respect to the extent of the lien, when it attaches, and whether a common law lien exists apart from statute.[63] A large number of federal decisions apply the state statutes.[64] In absence of any state protection, the decisions do not enforce an independently created "federal" lien.[65]

The third question involves the contract defense of illegality because of the champertous nature of the contract. Here also, variations are encountered as to whether certain contracts are unenforceable and, if unenforceable, whether the attorney can recover on a *quantum meruit*

60. One possibly errant decision is Gray v. Joseph J. Brunetti Constr. Co., 266 F.2d 809 (3d Cir. 1959). The legal services were rendered before a federal agency. Suit was brought in New Jersey by plaintiff-attorney who was not admitted to practice in New Jersey courts or in the district court. Because he was not an "officer" of either court, it was held that the contingent fee contracted for could not be reduced. This is a rather narrow view of the court's supervisory role as well as the fiduciary relationship. In any event, the court further indicated that the contract met New Jersey standards of fairness.

61. *See* ANNOT., 54 A.L.R.2d 604 (1957). The statement in the text is oversimplified. There are further refinements depending on whether the contract is for a fixed fee, contingent or mixed.

62. Dombey v. Detroit T. & I.R. Co., 351 F.2d 121, 127 (6th Cir. 1965); Batter v. Williams, 316 F.2d 540 (5th Cir. 1963); Gangwere v. Bernstein, 199 F. Supp. 38 (S.D.N.Y. 1961); Schartz v. Broadcast Music, 130 F. Supp. 956, 958 n.1 (S.D.N.Y. 1961); Casebolt v. Mid-Continent Airlines, Inc., 85 F. Supp. 915 (D. Minn. 1949).

63. *See* 7 C.J.S. *Attorney & Client* §§ 207-38 (1937); 7 AM. JUR. 2d §§ 272-308 (1963).

64. *See* MODERN FEDERAL PRACTICE DIGEST, *Attorney & Client*, Key Nos. 171-74 (1960).

65. Pitcher Constr. Co. v. United States, 322 F.2d 843 (9th Cir. 1963); Donaldson v. Gaudio, 260 F.2d 333 (10th Cir. 1958).

basis.[66] Again, federal decisions[67] look to state law for guidance except to the extent that Supreme Court holdings[68] displace the state law of champerty and maintenance.

Divergent State Rules as a Source of Potential Conflict

In these above three areas, unlike scrutiny of contingent fee contracts discussed previously, there are divergent rules in the various jurisdictions. The argument for federal law would be predicated upon some significant federal interest impeded by one or another of these rules. That argument could be developed in either of two opposite directions—either the state rule represents a laxity inconsistent with the proper standards of ethics for federal court, or the state restrictions upon the attorney unduly impede the *client* in his choice of counsel for prosecution of a federal claim. The former is rejected out of hand. It is difficult to see any identifiable over-riding federal policy requiring a determination, for example, that a discharged attorney recover only the reasonable value of his services rather than the stipulated fee.

The latter requires further analysis and the *Spanos* case is the appropriate point of reference. In that regard, the present discussion assumes either a resident or non-resident attorney. It might be argued, as an extension of *Spanos*, that state limitations on the measure of the attorney's recovery, or his security, unduly impede the right of the client. This conclusion is also rejected.

Initially, *Spanos* is pregnant with analytical difficulties—in finding protection for a corporation in the privileges and immunities clause and in allowing the attorney to raise the constitutional right of another.[69] Further, the majority refused to let the matter turn on admission *pro hac vice*, as the dissenters would have. It is suggested that this represents neither a cavalier disregard for New York policy nor an attitude that admission *pro hac vice* is purely formal; but rather a concern for situations in which no action is pending and the attorney's advice is sought in an extra-litigation context. A further observation on the narrow holding in *Spanos* lies in its important implications in the civil rights field, presumably alluded to in the Court's mention of the need for a non-resident attorney in connection with locally unpopular causes.[70]

66. *See* ANNOTS., 8 A.L.R.3d 1155 (1966), 100 A.L.R.2d 1378 (1965).
67. Kenrich Corp. v. Miller, 377 F.2d 312 (3d Cir. 1967); Dombey v. Detroit T. & I.R. Co., 351 F.2d 121, 128-30 (6th Cir. 1965); Van Bergh v. Simons, 286 F.2d 325 (2d Cir. 1961); *Application of* Kamerman, 278 F.2d 411 (2d Cir. 1960).
68. *See* note 6 *supra* and accompanying text.
69. *See* Comment, 19 STAN. L. REV. 856, 858-61 (1967).
70. *See* Note, 67 COLUM. L. REV. 731, 734-35 (1967).

The common sense of the situation is that the *Spanos* decision is directed at state policy that withdraws a large number of attorneys from the client's available choices. Analytically, then, *Spanos* should be interpreted as a case in which state rules effectively precluded the attorney-client relationship altogether. State policy that permits the contractual relationship, but regulates it in varying degrees, should stand on a different footing. Such a position is consistent with the general principles gleaned from Supreme Court opinions and discussed above in part two. This conclusion, especially with reference to the issue of champerty, calls for brief comment on *NAACP v. Button*,[71] *Brotherhood of R.R. Trainmen v. Virginia ex rel Virginia State Bar*[72] and *United Mineworkers of America, Dist. 12 v. Illinois State Bar Ass'n.*[73] Narrow readings of *Button* and *Brotherhood* would produce a strict rule: political expression and federal claim, respectively, are no longer possible and, in fact, were explicitly rejected in *United Mineworkers*. Nonetheless, the discussion above assumes that these cases will not be extended to the ordinary form of solicitation for profit, at least where there is no right of association involved. In all three cases the Court acknowledged the strong state interest in regulating the legal profession and noted that the supposed substantive evils did not materialize in the cooperative programs under review.[74]

In *Greenberg v. Panama Transportation Co.*,[75] Judge Wyzanski held that solicitation in connection with a federal claim presented in federal court should be determined by a uniform national rule. This proposition is not supported by the conclusions reached herein. As a broad formulation, applicable to all federal claims, it is rejected on the theory that 1) the First Amendment, as stated above, does not reach so far and 2) one should not infer a congressional policy incompatible with the traditional body of state law. As to the Jones Act—the situation in the *Greenberg* case—certainly there is a policy in favor of assertion of

71. 377 U.S. 415 (1963). This case is discussed earlier in the article. *See* note 6 *supra* and accompanying text.

72. 377 U.S. 1 (1964). This case is discussed earlier in the article. *See* note 6 *supra* and accompanying text.

73. 389 U.S. 217 (1967). This case is discussed earlier in the article. *See* note 6 *supra* and accompanying text.

74. *See* Hackin v. Arizona, 389 U.S. 143 (1967) dismissing an appeal from an unauthorized practice conviction attacked on constitutional grounds. Justice Douglas, dissenting, spoke of "charitable efforts" of non-lawyers offered for "no personal profit." A present grave concern is the matter of accommodating legal services under the Poverty Program with local policy. *Application of* Community Action for Legal Services, 26 App. Div. 2d 354, 274 N.Y.S.2d 779 (1966). *See* Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROB. 211, 214 n.25.

75. 185 F. Supp. 320, 324 (D. Mass. 1960), *rev'd on other grounds*, 290 F.2d 125, *cert. denied*, 368 U.S. 891 (1961).

employee claims. It is doubted, however, that this policy should be found so encouraging as to sanction champertous practices, especially when there is concurrent jurisdiction in the state courts. "It must be remembered that 'Congress acts . . . against the background of the total corpus juris of the states. . . .' "[76]

Rules that Primarily Affect the Conduct of Litigation

To conclude this discussion of illustrative problems, two federal decisions will be noted in which the courts pursued an independent path. In a conflict of interest case, an attorney was disqualified from representing the plaintiff against a defendant formerly represented by the attorney in the same transaction; the court expressly rejected the *Erie* doctrine.[77] In connection with an order substituting attorneys and conditioned on posting security, the Second Circuit has likewise found *Erie* inapplicable.[78] The primary interest promoted by principles governing substitution of attorneys and conflict of interest is the efficient administration of justice in the particular lawsuit. When that lawsuit involves a federal claim, the state interest is considerably weakened. But quite apart from the strength of the state interest, rules that vitally affect the conduct of particular litigation before the court are properly an independent federal concern. The conflict of interest issue is especially significant, affecting, as it does, discovery procedures under the Federal Rules.[79] The strong federal interest here should distinguish this type of case and over-ride state law whether the suit involves a federal claim or solely diverse citizenship.

Conclusion

The proposition that an attorney's relationship with a litigant in federal court is the exclusive concern of the United States cannot be maintained. State law is applicable with respect to many problems. This is entirely consistent with Supreme Court pronouncements as well as the practice in many federal district courts. The state interest in the premises is very strong and frequently achieves, or at least does not threaten, the federal interest. To pursue a policy that emphasizes differences with state rules would fragmentize the law of professional

76. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966). Judge Wyzanski's opinion in *Greenberg* is not explicit as to what state rules were rejected. Perhaps the unique Massachusetts attitude toward contingent fees contributed to his disposition of the case. *See* Hughes, *The Contingent Fee Contract in Massachusetts*, 43 B.U.L. Rev. 1 (1963).

77. Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964).

78. National Equipment Rental, Ltd. v. Mercury Typesetting Co., 323 F.2d 784, 786 n.1 (2d Cir. 1963).

79. *Cf.* Hanna v. Plumer, 380 U.S. 460 (1965).

conduct in a fashion reminiscent of the era prior to the *Erie* case. Federal policy, however, will displace state law in certain areas which are still emerging. The following listing of those areas is neither categorical nor is it necessarily exclusive: 1) cases involving a matter of constitutional right, including the *Spanos* rationale for out-of-state attorneys; 2) areas affected by specifically articulated congressional policy or dominated by the sweep of federal legislation, especially when there is no common law antecedent or state analogue; 3) disciplinary matters concerning which an independent federal determination must be made; 4) a broad area, presently ill-defined, in which the rules of decision vitally affect the conduct of particular litigation before the court.

In the wake of *Spanos* and other recent developments the argument for federal law will be pressed more frequently and vigorously. In time, these categories of federal law, especially the fourth, will crystallize into substantive federal law.