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By Patricia B. Tomasco and Emilio Nicolas

"Let My People Go…to Delaware"

Paupers, Vagabonds and Fugitives from Justice Excepted

Patricia B. Tomasco
Jackson Walker LLP
Austin, Texas

Emilio Nicolas
Jackson Walker LLP
Austin, Texas

Patricia Tomasco is a partner and Emilio Nicolas is an associate at Jackson Walker LLP in Austin, Texas.

Delaware Local Bankruptcy Rule 9010-1 governs bar admissions and limits unfettered practice before its courts to those attorneys "admitted to practice in the District Court and those [attorneys] who may hereafter be admitted in accordance with these Rules."[1] It denies admission *pro hac vice* for those who are "regularly employed in Delaware" or "regularly engaged in business, professional, or other similar activities in Delaware."[2] It also requires attorneys who are admitted *pro hac vice*, but "not admitted to practice by the District Court and the Supreme Court of the State of Delaware," to associate with a Delaware-licensed attorney "who maintains an office in the District of Delaware for the regular transaction of business," unless otherwise ordered by the court.[3]

In turn, the U.S. District Court for the District of Delaware limits full admission to its bar to attorneys who are not members of the Delaware Bar,[4] while Delaware Supreme Court Rule 52 goes on to impose its own restrictive bar admission rules. Rule 52 includes a requirement that the applicant have a "preceptor"—a member of the Delaware Bar for at least 10 years—who can vouch for the applicant and a requirement that the applicant complete a five-month clerkship for a law firm, judge or public attorneys' or legal aid office *within the state of Delaware*.[5]

In addition, 28 U.S.C. § 1408 places permissible venue of title 11 cases in the state where a corporation is domiciled—namely, their state of incorporation. In turn, Fed. R. Bankr. P. 7004(d) provides for nationwide service of process, forcing defendants in related adversary proceedings to travel to distant courts to defend themselves. This expense increases because of Rule 9010-1's aforementioned local counsel requirement for admission *pro hac vice*. This requirement, when coupled with nationwide service of process, leads to potential constitutional infirmities for nonresident attorneys and their defendant-clients, particularly in noncore adversary proceedings based on non-Delaware state law.[6]

For the defendant's nonresident attorney, the constitutional analysis occurs at two levels. First, are the state's bar admission rules discriminatory against nonresidents? Second, are the district court's local rules consistent with established jurisprudence? This analysis becomes more elastic because the profession as a whole is becoming more mobile and more accessible as a result of advances in online communication technologies.[7] Historical concerns about communicating with attorneys, filing papers and attorneys' availability for hearings are lessened with the availability of the Internet, telephonic hearings and ECF.

Nonresident Discrimination Violates Privileges and Immunities Clause

The U.S. Constitution's Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[8] This clause "echoes" the privileges and immunities clause from the Articles of Confederation: "[T]he free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall

1 Del. Bankr. L.R. 9010-1(a).
2 Del. Bankr. L.R. 9010-1(b)(ii)-(iii).
3 Del. Bankr. L.R. 9010-1(c); *see* Del. Bankr. L.R. 9010-1(e)(ii).
4 Del. Bankr. L.R. 83.5(b). This local rule also imposes restrictions on the admission of attorneys *pro hac vice* similar to those imposed by Rule 9010-1. *See* Del. Bankr. L.R. 83.5(c)(2)-(3), (d); *but see* Del. Bankr. L.R. 83.5(f).
5 Del. Sup. Ct. R. 52(a)(2) and (8).
6 Jackie Gardina, "The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code," 16 *ABI Law Review* 37, 41 (2008) (arguing that due-process concerns arising from nationwide service of process are heightened when nature of claim is purely state law and not federally created right).
7 Stephen Gillers, "A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It," 63 *Hastings L. J.* 953, 957 (2012) ("Even a rule that may appear wise at adoption can become unrealistic, inefficient or toothless as the world changes but the rule does not.").
8 U.S. Const. art. IV, § 2.

be entitled to all privileges and immunities of free citizens in the several States."[9] Whether a state regulation violates the Privileges and Immunities Clause depends on whether the restrained activity falls in the protected category. If so, then the analysis turns to whether the regulation has a "substantial" rationale and the discrimination bears a "substantial relationship" to the state's objective.[10]

In *Supreme Court of New Hampshire v. Piper*,[11] the U.S. Supreme Court held that the right of a nonresident attorney to practice law in a state was a "privilege and immunity" subject to protection. In that case, a Vermont resident wanted to practice law in New Hampshire. New Hampshire's rules limited admission to New Hampshire residents. On appeal, the New Hampshire Supreme Court proffered the rationale that nonresident members were less likely to be familiar with the local rules, behave ethically, be available for court proceedings and do *pro bono* work. The Court rejected these justifications, finding that none met the test of "substantiality," and the means chosen did not bear the necessary relationship to the state's objectives.[12] Notably, the Court found that the state's rationale was akin to "economic protectionism," which is the primary target of the Privileges and Immunities Clause.[13] Further, the state's concern with unavailability for hearings set on short notice could be overcome by either designating local counsel or conducting a telephonic hearing.[14]

Other restrictions on out-of-state admissions can implicate the Privileges and Immunities Clause. Recently, a federal district court considered New York's requirement that nonresident attorneys maintain an office or Of Counsel relationships within the state.[15] In *Schoenefeld v. State*,[16] a New York-licensed attorney living and working in New Jersey challenged the requirement. The state argued that the requirement was necessary to facilitate service of process, to allow the state to observe and discipline nonresident attorneys, and to provide assets within the state to effectuate the remedy of attachment.[17] In reviewing the statute's legislative history, the court found that the intent was to effectuate a limited exception to a prior attorney residency requirement, and not to address the stated justifications. Further, the in-state office requirement was not substantially related to the state's interests, and the state's concerns could all be remedied with less restrictive means, such as requiring the attorney to designate an in-state agent for process, carrying malpractice insurance instead of having attachable assets in the state and appearing for emergency hearings by telephone.[18]

Central to this analysis is the fact that the *Schoenefeld* decision did not involve a residency requirement *per se*, but focused on the disparate requirements of resident vs. nonresident attorneys. New York admits nonresidents and has one of the broadest reciprocity admissions in the nation. Does Delaware's five-month in-state clerkship requirement operate as a *de facto* residency requirement? Does the fact that it applies equally to both resident and nonresident attorneys make it nondiscriminatory?

District Local Rules Cannot Require Residency

Regulation of nonresident attorneys under federal district court local rules must also meet rational, nondiscriminatory standards or "principles of right and justice." Although the courts have not specifically imposed a "privileges and immunities" standard on these federal, nonstate actors, they have done so by analogy.

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Early jurisprudence in this area arose out of the civil rights cases of the 1960s where various district courts in the southern states imposed onerous requirements on out-of-state attorneys representing in-state civil rights plaintiffs. In *Sanders v. Russell*,[19] the U.S. Court of Appeals for the Fifth Circuit granted *mandamus* to determine the validity of district court local rules limiting *pro hac vice* appearances to two per year. The Fifth Circuit noted that the authority for a district court's promulgation of local rules is 28 U.S.C. § 1654, adding that "their rules must 'be consistent with Acts of Congress.'"[20] In *Russell*, the district court denied *pro hac vice* admission to two out-of-state attorneys bringing civil rights cases. The Fifth Circuit issued *mandamus* on the grounds that limiting *pro hac vice* admission to a certain number of appearances per year contravened the congressional intent embodied in the Civil Rights Act. It also noted that the "two appearances per year" rule was particularly onerous when admission to the district court was itself conditioned on a lengthy residency requirement.[21]

Like state bar rules invalidated under the Privileges and Immunities Clause, admission to a district court cannot be premised on residency within a state. In *Frazier v. Heebe*, the Supreme Court invalidated local rules of the Eastern District of Louisiana that required attorneys admitted to that court to reside or maintain an office in Louisiana.[22] Although the challenge to the rule was based on the Equal Protection and the Privileges and Immunities Clauses, the Court declined to undertake a constitutional analysis. Instead, it analyzed the local rules under its inherent supervisory power to ensure that the rules were consistent with "the principles of right and justice."[23] Unlike the concerns for litigants advanced in *Russell*, the Court in *Frazier* focused on the relationship of the attorney to the district court. In doing so, the Court relied

9 Brannon P. Denning, *The "Dormant" Commerce Clause: Restrictions on State Regulatory Powers, Bittker on Regulation Interestate & Foreign Commerce* § 6.09 [A] (2012), quoting Art. Confed. art. IV, § 1 (U.S. 1781).
10 *Toomer v. Witsell*, 334 U.S. 386 (1948).
11 470 U.S. 274 (1984); *but see Martin v. Walton*, 368 U.S. 25, 29 (1961) (rejecting Fourteenth Amendment challenge to local counsel requirement on equal protection grounds for out-of-state attorney, finding regulations were not beyond allowable range of state action).
12 *Id.* at 285.
13 *Id.* at 285 n.18.
14 *Id.* at 287.
15 N.Y. Judiciary Law § 470. Notably, the section has not been modified or removed.
16 1:09-CV-00504, 2011 WL 3957292 (E.D.N.Y. Sept. 7, 2011).
17 *Id.* at *9.
18 *Id.* at *12.
19 401 F.2d 241 (5th Cir. 1968).
20 *Id.* at 245 (quoting 28 U.S.C. § 2071).
21 *Id.* at 246.
22 482 U.S. 641 (1987).
23 *Id.* at 645-46.

on *Piper*, which, again, had dismissed a state bar's provincial concerns using the "substantiality" analysis.[24]

The Supreme Court again declined to specifically impose the constitutional overlay to all district court rules in *Barnard v. Thorstenn*.[25] In this case, the District Court of the Virgin Islands promulgated a rule requiring that any applicant to the district court bar reside in the Virgin Islands for one year prior to applying for admission. Rather than exercising its supervisory authority under title 28, the Court decided the case under the Privileges and Immunities Clause because the district court acted as an instrumentality of the Government of the Virgin Islands. Under the *Piper* "substantiality" standard, the Court upheld the nullification of the residency requirement.

Although the Privileges and Immunities Clause applies to state regulations, the Supreme Court applied the rationale from *Piper* in both *Frazier* and *Barnard* to analyze federal district court local rules. Each of those challenges was upheld when it was based on in-state residency. Arguably, the same result would be reached for an in-state office requirement, which was found to be unconstitutional in *Schoenefeld*.

Attorneys do not fare well when the challenged condition in the district court rule is based on admission to the state bar, as opposed to residency. For example, in *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*,[26] California-resident attorneys admitted in other states attempted to gain admission to the federal courts in California even though they had not passed the California bar exam. The district court denied the attorneys' challenge to the district court local rule requiring admission to the California Bar as a condition precedent, noting that the federal government is incapable of violating the Equal Protection or Privileges and Immunities Clauses because both require state, not federal, action.

If Rule 52's in-state clerkship requirement is a *de facto* residency requirement much like the one struck down in *Barnard*, then does Rule 9010-1 operate to exclude nonresident attorneys by requiring that they be admitted to the Delaware State Bar? Certainly, other federal district courts provide for the admission of an attorney who is a member of the bar of any state or the District of Columbia.[27] Those courts should function equally as well.

Limitations of Serial *Pro Hac Vice* Admissions

Many nonresident attorneys practice regularly before the Delaware federal courts. Indeed, the Delaware local rules allow for the courts to dispense with local counsel requirements,[28] and research did not locate any case in a Delaware court that limited the number of *pro hac vice* admissions. Nonetheless, the Delaware local rules limit *pro hac vice* admissions to attorneys who do not regularly engage in professional activities in Delaware, and it still leaves the courts with discretion in deciding whether to dispense with local counsel requirements. This places an unnecessary burden on nonresident attorneys and clients who must answer Delaware bankruptcy proceedings following nationwide service of process where the attorney is barred from full admission to the Delaware State Bar—and consequently, the Delaware federal courts—by the five-month clerkship requirement and must rely on *pro hac vice* admission.

In *Piper*, the Court noted that *pro hac vice* admission was not an equal substitute for full admission because of the local counsel requirement and the district court's discretion in granting admission.[29] Habitual reliance on *pro hac vice* admission may not ensure the ability to practice in any particular bankruptcy court. One recent district court decision, *Mateo v. Empire Gas Co. Inc.*, denied *pro hac vice* admission based on only 12 and 14 appearances in the district and six pending cases, finding that it was "'unreasonable for an attorney to request *pro hac vice* admission repeatedly as a way to avoid admission to the bar of this Court.'"[30]

Given the number of instances where bankruptcy counsel must file claims or defend preference suits in Delaware, it is likely that many have exceeded the 12- and 14-appearance limitation found to be excessive in *Mateo*. In turn, the *Mateo* court justified its ruling on the basis of state bright-line limitations on *pro hac vice* admissions of five per year in Alabama, five per year in the District of Columbia, three per year in Florida and two per year in Montana.[31]

Conclusion

Delaware's clerkship requirement incorporated by reference into the local rules of the district and bankruptcy courts makes it difficult, if not impossible, for nonresident bankruptcy attorneys to gain admission to the Delaware federal district court, and effectively taxes those attorneys and their clients through the cost of local counsel. Reliance on *pro hac vice* admissions may provide a bandage, but they do not provide a real solution for the many clients and attorneys seeking effective participation in cases filed in Delaware. abi

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24 *Id.* at 647-48.
25 489 U.S. 546 (1989).
26 701 F.Supp. 738, 741 (C.D. Cal. 1988), *aff'd*, 915 F.2d 1581 (9th Cir. 1990).
27 *E.g.*, E.D. Mich. R. 83(c)(1).
28 Del. Bankr. L.R. 9010-1(c); Del. Bankr. L.R. 83.5(d); *see Frazier v. American Airlines Inc.*, 434 F.Supp.2d 279, 280 (D. Del. 2006) (plaintiff's counsel was admitted *pro hace vice* without requirement of local counsel).
29 *Piper*, 470 U.S. at 277, n.2.
30 841 F.Supp.2d 574, 576 (D.P.R. 2012).
31 *Id.* at 580, n.11.