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The $1 Million Message: Lawyers Risk Fees and More When Representing Out-of-State Clients

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I. INTRODUCTION

Have you ever represented an out-of-state client? Perhaps the matter involved litigation in another state. Or maybe you negotiated an employment contract for the client under the laws of the foreign state. Still further, you may have drafted a will for a client living in a neighboring state. Were you licensed to practice law in the foreign jurisdiction? If not, the recent California Supreme Court decision in Birbrower, Montalbano, Condon & Frank v. Superior Court (Birbrower)\(^1\) serves as a compelling reminder of the legal and ethical issues lawyers face when representing out-of-state clients.

In Birbrower,\(^2\) the California Supreme Court held that a New York law firm engaged in the unauthorized practice of law in California by giving legal advice and otherwise assisting their California client in resolving a contract dispute in California.\(^3\) This ruling barred the firm's recovery of more than $1 million in fees.\(^4\)

As Birbrower demonstrates, the unauthorized practice of law may result in serious adverse consequences for a practitioner. For one, the unauthorized practice of law violates


2. \textit{Id.}
3. \textit{Id.} at 7.
state law regulating the practice of law. These statutory violations are punishable as criminal offenses or as contempt of court. The unauthorized practice of law also violates the rules of professional conduct. Thus, a lawyer may also face disciplinary sanctions. Finally, as in Birbrower, a finding of unauthorized practice may preclude recovery of the lawyer’s fee.

Birbrower is the most comprehensive decision from a state’s highest court addressing the unauthorized practice of law by out-of-state lawyers. Despite the attention Birbrower has generated, the court’s holding is unremarkable. The “practice of law” definition adopted in Birbrower is not unique, and the factual record convincingly supports the court’s decision. Additionally, barring recovery of fees generated by the unauthorized practice of law is an established sanction.


6. See, e.g., 705 ILL. COMP. STAT. 205/1 (1995) (stating that a person practicing law in Illinois without a license “is guilty of contempt of court and shall be punished accordingly”).


9. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 10 (Cal.), cert. denied, 119 S. Ct. 291 (1998) (“It is a general rule that an attorney is barred from recovering compensation for services rendered in another state where the attorney was not admitted to the bar.”) (citation omitted); see also Ranta v. McCarney, 391 N.W.2d 161 (N.D. 1986); Lozoff v. Shore Heights, Ltd., 362 N.E.2d 1047 (Ill. 1977); Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965); 7 AM. JUR. 2D Attorneys at Law § 259 (1997); Annot., Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar, 11 A.L.R. 3d 907, 908 (1967). This rule is codified in many states. See, e.g., 705 ILL. COMP. STAT. § 205/1 (1995) (“No person shall receive any compensation directly or indirectly for any legal services other than a regularly licensed attorney.”).


11. See Sutton, supra note 8, at 1033.
While the Birbrower holding breaks no new ground, the court’s dicta is significant. In dicta, the court indicates that an out-of-state practitioner may violate a state’s unauthorized practice rules even where the practitioner never physically enters the foreign state. This notion represents a departure from traditional unauthorized practice concepts and raises significant concerns for lawyers serving out-of-state clients.

This article analyzes Birbrower and its interpretation of California’s unauthorized practice statute. This article also examines the exceptions traditionally available to out-of-state practitioners and concludes that these exceptions afford only limited protection from unauthorized practice claims. Finally, this article discusses Birbrower’s impact on non-California lawyers and suggests measures an out-of-state lawyer may implement to guard against an unauthorized practice claim.

II. NON-CALIFORNIA LAWYERS AND THE UNAUTHORIZED PRACTICE OF LAW

A. The Birbrower Opinion.

In 1992, ESQ Business Services, Inc. (ESQ), a California corporation, engaged the New York law firm Birbrower, Montalbano, Condon & Frank, P.C. (Birbrower) to investigate and prosecute a claim against Tandem Computers Incorporated (Tandem) arising from a software development contract between ESQ and Tandem. The ESQ-Tandem contract provided that California law would govern the contract and that all disputes would be resolved by arbitration in accordance with American Arbitration Association rules.

In the course of representing ESQ, Birbrower performed some legal services from its New York office. In addition,
Birbrower lawyers traveled to California and engaged in activities on behalf of ESQ in California on several occasions. Specifically, in 1992, Birbrower lawyers met with ESQ and its accountants in California to discuss a strategy for resolving the dispute. The Birbrower lawyers "made recommendations and gave advice." Birbrower lawyers also met with representatives from Tandem on behalf of ESQ. At this meeting, one Birbrower lawyer gave his opinion that damages would exceed $15 million if the case proceeded to litigation. Another Birbrower lawyer made a settlement demand on ESQ's behalf. Also in California, Birbrower filed an arbitration demand on ESQ's behalf with the American Arbitration Association.

The Birbrower lawyers again traveled to California in 1993. The lawyers interviewed potential arbitrators and again met with ESQ and its accountants. Later that year, Birbrower lawyers returned to California to assist in settling the dispute with Tandem. During this trip, a Birbrower lawyer discussed a proposed settlement with ESQ and its accountants. Birbrower gave ESQ legal advice during this visit, including a recommendation to reject the proposed settlement. ESQ and Tandem thereafter settled their dispute, and the matter never proceeded to arbitration. No Birbrower lawyer was licensed to practice law in California during the course of the representation.

In 1994, ESQ sued Birbrower for legal malpractice. Birbrower counterclaimed to recover its fees for both its Cali-
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California and New York services. ESQ responded that Birbrower’s representation of ESQ constituted the unauthorized practice of law in California and precluded Birbrower from recovering fees for these services. The California Supreme Court agreed, concluding that Birbrower’s activities in California on behalf of ESQ constituted the unauthorized practice of law in violation of California law.

B. Did the Birbrower Lawyers “Practice Law”?

The Birbrower court held that the Birbrower lawyers violated section 6125 of the California Business and Professions Code. Section 6125 provides: “[n]o person shall practice law in California unless the person is an active member of the State Bar.” Although section 6125 clearly proscribes the unauthorized practice of law, the statute does not define the term “practice law.” Thus, deciding the ultimate issue of whether the Birbrower lawyers violated section 6125 first requires a determination of whether Birbrower’s services constituted the practice of law.

Relying on California precedent, the Birbrower majority defined the practice of law as “the doing and performing services in a court of justice,” as well as “legal advice” and “legal instrument and contract preparation.” The underlying dispute between ESQ and Tandem in Birbrower was settled without litigation. The Birbrower lawyers, therefore, did not “[perform] services in a court of justice.” However, the Birbrower lawyers did render legal advice in California.

36. Id. at 13.
38. Id.
39. The “practice of law” defies clear or consistent definition. See Annotated MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (“[T]here is no single definition of the practice of law in the United States; the definition varies from one jurisdiction to another.”); ROTUNDA, supra note 7, at 118 (“The state law definitions of unauthorized practice are varied and often confused.”) (citation omitted).
40. Birbrower, 949 P.2d at 5.
41. Id. at 3.
42. Id. at 5.
43. Id. at 3 (“[Birbrower] made recommendations and gave advice... [Birbrower] gave ESQ advice during this trip...”).
The Birbrower lawyers arguably engaged in "legal instrument and contract preparation" in California by virtue of their participation in the drafting of the ESQ-Tandem settlement agreement between ESQ and Tandem and preparing ESQ's arbitration demand. Based on these findings, the court concluded that Birbrower's services constituted the practice of law.

The dissenting justice in Birbrower criticized the majority's "practice law" definition as "overbroad." The dissent proposed a more narrow definition, contending that the practice of law means the representation of another in litigation, or performing "an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind." Thus, excluding litigation, only complex legal services necessitating a "trained legal mind" would constitute the practice of law. According to the dissent, the Birbrower lawyers simply assisted in resolving the contract dispute between ESQ and Tandem through negotiation and/or arbitration. In the dissent's view, these services did not require application of "that degree of legal knowledge and technique possessed only by a trained legal mind."

The dissent's "trained legal mind" standard complicates the "practice law" analysis. Application of the dissent's standard would require courts to distinguish between legal services requiring a degree of legal knowledge and technique "possessed only by a trained legal mind," and those legal services requiring some degree of "legal knowledge and technique," but not that degree of knowledge and technique possessed only by a trained legal mind. A definition requiring such amorphous distinctions would create additional ambiguities and yield unpredictable results. By contrast, the majority's definition is well grounded in established case law.

44. Id. at 7.
45. Id.
47. Id. at 15.
48. Id. at 13-14.
49. Id. at 17 ("[R]epresentation of another in an arbitration proceeding, including the activities necessary to prepare for the arbitration hearing, does not necessarily require a trained legal mind.").
50. The majority adopted its definition from a 56-year-old California Supreme Court opinion. See People ex rel. Lawyers' Institute of San Diego v.
and is utilized by courts throughout the country.\textsuperscript{51} Perhaps more significantly, the majority's definition offers a more concrete standard for assessing whether a particular legal service constitutes the practice of law. This practice of law definition adopted in \textit{Birbrower} includes "the doing and performing in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure" as well as "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation."

A close analysis reveals that any disagreement between the majority and dissent as to the appropriate "practice law" definition is immaterial because the majority's conclusion that Birbrower practiced law is sound under either definition.\textsuperscript{52} Indeed, when properly viewed in light of the trial court's findings, the Birbrower lawyers practiced law even under the dissent's more narrow "practice law" definition.\textsuperscript{53} The dissent's summary characterization\textsuperscript{54} of Birbrower's services ignores the trial court's extensive factual findings, which convincingly show that Birbrower engaged in numerous activities requiring a trained legal mind.\textsuperscript{55} These activities included analyzing California law, applying that law to the dispute between ESQ and Tandem, formulating a damage estimate based on an analysis of the applicable law, and evaluating the adequacy of the proposed settlement in light of the applicable law.\textsuperscript{56} Although the Birbrower lawyers ul-
timately performed a dispute resolution function, they necessarily utilized the legal knowledge and technique of a trained legal mind to competently perform this service. The dissent’s contrary conclusion fails to appreciate the legal analysis and skilled judgment necessary to effectively perform even routine legal services. Following the majority’s definition, therefore, Birbrower practiced law because they gave legal advice and drafted legal instruments. However, even under the dissent’s definition, Birbrower practiced law by engaging in numerous activities that require a trained legal mind.

C. The Unauthorized Practice of Law Must Occur “in California”

The unauthorized practice of law prohibited by section 6125 must occur “in California.” Without question, section 6125 prohibits the unauthorized practice of law within the geographic confines of the State of California. Birbrower’s significance derives from its suggestion that an out-of-state lawyer may practice law “in California” without physically entering the State of California. Although controversial, this extension of section 6125 is justifiable in view of the statute’s avowed purpose.

Section 6125 seeks to protect California citizens from the practice of law by persons not trained or examined on California law. A lawyer not licensed to practice California law could enter the State of California and thereby subject California citizens to the risks of unauthorized practice. Furthermore, an out-of-state lawyer could represent a California citizen and thereby subject a California citizen to the risks of unauthorized practice, without entering the State of California. To address this latter circumstance, Birbrower’s “in California” test requires an assessment of the out-of-state lawyer’s contacts with the California client, irrespective of

57. *Id.* at 5.
58. *Id.* at 5-6. (“For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.”).
60. See *id.* at 5, 8. See also Condon, 76 Cal. Rptr. 2d at 927 (noting that section 6125 seeks to “protect California citizens from incompetent attorneys”).
the geographic location of the lawyer or client.\textsuperscript{61} The court announced, "[i]n our view, the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal services a clear legal representation.\textsuperscript{62}

The Birbrower lawyers engaged in extensive activities constituting the practice of law without a California license while physically present in the State of California over a two-year period.\textsuperscript{63} On these facts, the Court had little difficulty concluding that Birbrower practiced law "in California"—they practiced law while physically present in the state.\textsuperscript{64} However, the Birbrower lawyers may have violated section 6125 even absent their physical presence in California. Birbrower indicates that an out-of-state practitioner who never physically enters the State of California may maintain sufficient contacts with a California client so as to practice law "in California."\textsuperscript{65}

First, an out-of-state practitioner could maintain "sufficient contact" with a California client through "virtual" contacts with the California client.\textsuperscript{66} "For example, one may practice law in the state in violation of section 6125 without being physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means."\textsuperscript{67} While declining to specify what amount of virtual contacts the court would deem "sufficient contact," the court did reject the possibility that a single virtual contact with a California client would automatically constitute sufficient contact.\textsuperscript{68}

In addition to virtual contacts with a California client, a lawyer could also maintain "sufficient contact" with a Cali-

\textsuperscript{61} See Birbrower, 949 P.2d at 5-6.
\textsuperscript{62} Id. at 5 (emphasis added).
\textsuperscript{63} See Birbrower, 949 P.2d at 3, 7.
\textsuperscript{64} Id.
\textsuperscript{65} Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 5 (Cal.) ("Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state."), cert. denied, 119 S. Ct. 291 (1998).
\textsuperscript{66} See id. at 5-6.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 6 ("[W]e do reject the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite.").
fornia client without physically entering California by regularly advising a California client on California law outside the state. For example, an Illinois lawyer who regularly advises a California client on California law during the client's monthly visit to Illinois is practicing law "in California" within the meaning of section 6125. In this scenario, the Illinois lawyer has "created a continuing relationship with a California client."

On the other hand, section 6125 does not prohibit an out-of-state lawyer from practicing California law for a non-California client outside the state. For example, an Arizona lawyer could advise an Arizona client on California law outside the State of California without offending section 6125. Although the Arizona lawyer is practicing California law, the lawyer is not practicing law "in California" within the meaning of section 6125. That is, rendering legal advice to an Arizona client on California law does not implicate the concerns underlying section 6125—the protection of California citizens.

69. See id. at 5 ("The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.") (emphasis added).

70. Indeed, the client's state of residence is a critical factor in assessing whether the lawyer has engaged in the unauthorized practice of law. See Condon v. McHenry, 76 Cal. Rptr. 2d. 922, 928 (1998).

71. See Condon, 76 Cal. Rptr. 2d at 924 n.2. In fact, Condon, 76 Cal. Rptr. 2d. at n.2, indicates that the court even permitted the Colorado lawyer to recover fees for some work performed while physically present within the State of California. Id. Thus, Condon suggests that a non-California lawyer could practice California law for a non-California client, to some degree, whether physically present in the State or outside the State.

72. Unauthorized practice rules are enforced less strictly where the out-of-state lawyer is representing an out-of-state client. In Condon, the California Court of Appeals held that a Colorado lawyer could recover his fees for legal services rendered to a Colorado resident who was serving as an executor for a California estate. Condon v. McHenry, 76 Cal. Rptr. 2d 922 (1998). As Condon demonstrates, California would be less vigilant in enforcing its unauthorized practice rules where an out-of-state lawyer enters California on an isolated occasion to represent a non-California client. Id. Although the out-of-state lawyer is practicing law "in California" by virtue of his physical presence in the State of California, the State's interest in policing this conduct is lessened because a California citizen is not at risk. See Illinois Bar Journal Advisory Opinion No. 94-5 (1995) ("For example, a New York lawyer may be retained by a New York client to negotiate a transaction with an Illinois party in Illinois. Given that the purpose of the Illinois statute prohibiting the practice of law by
Both the virtual contact test and the continuing relationship test permit a finding of unauthorized practice absent a physical presence in California. This interpretation of the "in California" element is consistent with section 6125's purpose of protecting California citizens from the risks of unauthorized practice. This interpretation also represents an effort to adapt California's unauthorized practice rules to the modern practice of law in which technology permits lawyers to communicate with clients, and maintain a relationship with clients, without entering the foreign state and without personal client contact. Although unprecedented, Birbrower's extension of the rules governing unauthorized practice furthers the statute's avowed purpose.

D. Is Birbrower Internally Inconsistent?

The Birbrower holding barred recovery of those fees attributable to Birbrower's illegal practice—Birbrower's practice of law in California. However, the court remanded the case to allow Birbrower to pursue recovery of those fees attributable to its services rendered exclusively from its New York office. The court identified these New York services as

unlicensed persons is to protect the public (presumably the people of Illinois) from representation by untrained and unexamined people, the Committee does not believe it necessary for Illinois to protect a New York client in a multi-state transaction from representation by a New York lawyer.

73. These tests bears a striking similarity to the "purposeful availment" analysis used to determine whether an exercise of personal jurisdiction comports with due process. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) ("[W]here the defendant 'deliberately' has engaged in significant activities within a State ... or has created 'continuing obligations' between himself and residents of the forum ... he manifestly has availed himself of the privilege of conducting business there ... [j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State.") (citations omitted).

74. See supra text accompanying notes 60-62.

75. See supra text accompanying notes 60-62.


78. The Court determined that the illegal portion of the fee contract (the
"fee contract negotiations and corporate case research."^79

Permitting Birbrower to seek recovery of fees generated from its New York office is inconsistent with the court's "virtual contact" and "continuing relationship" concepts. Even those services Birbrower performed from its New York office would involve virtual contacts with a California client (ESQ), presumably by telephone, fax, and e-mail.^80 The fee contract negotiations in New York likely included transmitting drafts of the proposed fee agreement to ESQ in California by facsimile. At the very least, rendering these "New York services" required telephone calls to ESQ in California. These telephone calls and facsimile transmissions would satisfy the virtual contacts test.^81 Alternatively, assuming insufficient virtual contacts, Birbrower nonetheless rendered these New York services in the course of "a continuing relationship with [a] California client." In either case, the "in California" element of section 6125 would be satisfied.^82 Thus, allowing Birbrower to recover its New York fees conflicts with the Court's dicta interpreting the "in California" element to include "virtual contacts" with a California client or the maintenance of a "continuing relationship" with a California client. Applying the court's "virtual contacts" and "continuing relationship" tests, Birbrower should also be precluded from recovering its New York fees.

III. ARE THERE EXCEPTIONS?

Birbrower outlines several exceptions to section 6125. The two principal exceptions are 1) the so-called "federal California services) could be severed from the remainder of the fee contract. Birbrower, 949 P.2d at 13. Birbrower also sought to recover its California fees under a quantum meruit theory. That claim was not adjudicated at the trial court level and thus the quantum meruit claim for Birbrower's California fees remained a viable theory on remand, along with Birbrower's claim for its New York fees under a contract theory. See id. at 10 n.5. Some courts conclude that a finding of unauthorized practice will preclude recovery of fees under both theories. See, e.g., Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 911 F. Supp. 560, 576 (N.D.N.Y. 1995); Martin v. Martin, 541 So.2d 1, 1 (Ala. 1989); Taft v. Amsel, 180 A.2d 756, 757 (Conn. Super. Ct. 1962).

79. See Birbrower, 949 P.2d at 11.
80. See id. at 5-6.
81. See id.
82. See id. (finding that even absent physical presence, an out-of-state lawyer may violate section 6125 through virtual contacts with the California client or by creating a continuing relationship with a California client).
court” exception, and 2) admission pro hac vice, neither of which applied in Birbrower. Although these are viable exceptions, Birbrower illustrates that they afford only limited protection from unauthorized practice claims.

A. The Federal Court Exception Is Really the Federal Claim Exception

As a general rule, a lawyer may practice in a federal court of a foreign state even though the lawyer is not licensed to practice in that state. This rule is based on principles of federal preemption. That is, each federal court prescribes its own rules governing the admission of attorneys to practice before that court. To the extent a federal rule permitting the lawyer’s appearance conflicts with a state rule prohibiting the lawyer’s appearance, the supremacy clause preempts the contrary state rule.

While recognizing the validity of the federal court exception, the Birbrower court found the exception inapplicable, stating that “none of Birbrower’s activities related to federal court practice.” As discussed below, even if the dispute between ESQ and Tandum involved federal court proceedings,

83. Another exception exists for foreign legal consultants who obtain a registration certificate from the California State Bar. Id. at 6-7. These consultants may advise on the law of the foreign jurisdiction in which they are admitted. Id. Finally, international commercial disputes resolved under California arbitration rules are also exempt from section 6125. Id.


86. See id. at 13.

87. See id.

88. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 10 (Cal.), cert. denied, 119 S. Ct. 291 (1998). In proceedings before the California Court of Appeal, Birbrower contended that the federal court exception applied because the ESQ-Tandum contract required arbitration before the American Arbitration Association. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 56 Cal. Rptr. 2d 857, 862 (Cal. Ct. App. 1996), review granted, 930 P.2d 399 (1997), aff’d in part, rev’d in part, 949 P.2d 1 (1998). Birbrower argued that proceedings before the American Arbitration Association were analogous to practice before a federal court. Id. The Court of Appeal rejected this argument concluding that the supremacy issues underlying the federal court exception were not applicable where the parties select their own forum to resolve a dispute. Id.
the federal court exception would not protect the Birbrower firm.

The leading case of *Spanos v. Skouras Theatres Corp.* addresses a lawyer's claim for fees based on the federal court exception. There, a California attorney (Spanos) sued a New York client seeking to recover his fees. The New York client retained Spanos to assist in the preparation and litigation of an antitrust suit in federal district court in New York. Spanos was not a member of the New York state bar.

The client argued that Spanos was not licensed to practice in New York and, therefore, New York's unauthorized practice statute barred recovery of Spanos' fees. The Second Circuit Court of Appeals disagreed. Sitting *en banc*, the court held that New York law could not prevent an out-of-state lawyer from recovering fees for work performed on a federal claim in federal court. While permitting Spanos to recover his fees attributable to the federal antitrust claim, the court noted that a federal claim could "depend in part on an issue or claim which has its source in state law." Recognizing that a federal claim could involve state law issues, the court additionally required that out-of-state counsel associate with local counsel in the foreign state. The court emphasized that its holding was narrow, stating that whether the federal court exception would apply "if the client in such case dispensed with the local attorney or if the matter were one in which federal jurisdiction rested on diverse citizenship, are questions better left to another day."

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91. *Id.*
92. *Id.* at 164.
94. *Spanos*, 364 F.2d at 171.
95. *Id.*
97. *Id.* "We thus limit our holding to the situation here presented, where a citizen has invited a duly licensed out-of-state lawyer to work in association with a local lawyer on a federal claim or defense." *Id.*
98. *Id.*
Under *Spanos*, the federal court exception probably would not apply where federal jurisdiction is based solely on diversity of citizenship. In most diversity cases, state law will govern the dispute.99 *Spanos* counsels that an out-of-state lawyer could not litigate a diversity suit in federal court, notwithstanding his or her admission to the federal bar and the association of local counsel. *Spanos* limits the federal court exception to the litigation of federal claims premised on federal question jurisdiction.100 Applying *Spanos*, the federal court exception would not apply to the Birbrower firm even if the dispute between ESQ and Tandem was litigated in federal court because it was a state law claim, not a federal claim.101

This construction of the federal court exception furthers the avowed purpose of section 6125,102 by prohibiting the practice of law in a foreign state by persons not educated and examined on that state's laws. Nonetheless, strict application of the *Spanos* rule becomes unworkable. A case may be brought in federal court premised on federal question jurisdiction with state law claims joined as supplemental claims.103 Following *Spanos*, the out-of-state lawyer could litigate the federal claim, but not the supplemental state law claims. Similarly, because "[s]tate law issues are inevitably and inextricably intertwined with bankruptcy law issues,"104 a lawyer would not be permitted to practice in a bankruptcy court in another state even if the lawyer was admitted to the federal bar.105

Notwithstanding these difficulties in practical application, *Spanos* remains the leading case on the federal court exception. *Spanos* indicates that the federal court exception extends only to federal claims premised on federal question

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100. See *Spanos*, 364 F.2d at 171.
101. See id.
102. See supra text accompanying note 60.
105. Although this conclusion is an arguable extension of *Spanos*, at least one court has allowed an out-of-state lawyer to recover fees for bankruptcy court proceedings based on the federal court exception. See *Cowen v. Calabrese*, 41 Cal. Rptr. 441 (1964).
jurisdiction and, therefore, confers the out-of-state practitioner with only limited protection from unauthorized practice claims. At a minimum, Spanos suggests that the contours of the federal court exception remain undefined.

B. Pro Hac Vice Does Not Mean Carte Blanche

The other principal exception to section 6125 is pro hac vice admission. Pro hac vice admission permits an out-of-state lawyer to perform litigation services in a foreign jurisdiction. Birbrower recognizes pro hac vice admission as an exception to section 6125, so long as the out-of-state lawyer associates with California counsel. At the same time, Birbrower illustrates the limitations of pro hac vice admission.

As an initial matter, pro hac vice admission applies only to litigation matters. The dispute between ESQ and Tandem did not involve litigation. Thus, the Birbrower lawyers could not avail themselves of this exception. Secondly, admission pro hac vice is a privilege, not a right. A court may deny a motion for admission pro hac vice in its discretion. Furthermore, a court may revoke or suspend a lawyer’s pro hac vice privileges. Finally, a court’s rules may limit the number of times an attorney may appear pro hac vice.

More significantly, an out-of-state lawyer can obtain ad-
mission *pro hac vice* only after a lawsuit is filed.\(^{115}\) Unless and until an action is commenced, the out-of-state lawyer is unable to obtain admission *pro hac vice*.\(^{116}\) Unfortunately, the out-of-state lawyer may already have engaged in unauthorized practice during this pre-filing period.

The filing of a complaint at a minimum involves the drafting of a legal document; this constitutes the practice of law.\(^{117}\) The out-of-state lawyer may also render substantial services constituting the practice of law still earlier. Even before a complaint is drafted, the lawyer will likely give preliminary advice concerning the client’s rights under the foreign law and the client’s prospects for success should the matter proceed to litigation. A strategy for resolving the dispute may also be discussed. The out-of-state lawyer may also set forth the client’s position in correspondence with the opposing party and cite supporting legal authority. These preliminary activities could lead to settlement discussions where the lawyer would make recommendations concerning a proposed settlement. These pre-filing activities may involve several trips to the foreign jurisdiction and may occur over a period of weeks, months, or, as in *Birbrower*, a period of years. All of these services constitute the practice of law and all of these services will have been performed by the out-of-state lawyer before any opportunity to seek admission *pro hac vice*.

Perhaps a court will deem the lawyer’s subsequent admission *pro hac vice* retroactive and thereby validate the lawyer’s prior activities. But what if the matter is resolved prior to litigation? That is, what if a lawsuit is never filed? In those circumstances, the out-of-state lawyer could never obtain *pro hac vice* admission. *Birbrower* illustrates this predicament, albeit in an arbitration setting. The Birbrower lawyers never engaged in formal arbitration proceedings.\(^{118}\) In fact, the Birbrower lawyers made several trips to California and engaged in numerous activities constituting the prac-


\(^{116}\) See id.


\(^{118}\) *Birbrower*, 949 P.2d at 9.
tice of law all before an arbitration demand was even filed.\textsuperscript{119} The case ultimately settled without arbitration.\textsuperscript{120} Although \textit{Birbrower} arose in an arbitration context rather than a litigation context, \textit{Birbrower} illustrates that an out-of-state lawyer may be unable to validate his or her pre-filing activities where a case settles prior to litigation.

Even where the lawyer obtains \textit{pro hac vice} admission immediately after being retained, the scope of the lawyer’s services may be limited to in-court services.\textsuperscript{121} For instance, Illinois’ \textit{pro hac vice} rule provides that an out-of-state lawyer may “be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he or she is employed.”\textsuperscript{122} This limiting language suggests that \textit{pro hac vice} admission permits only in-court practice. Similarly, while acknowledging the \textit{pro hac vice} exception, the \textit{Birbrower} court noted that the California \textit{pro hac vice} rule provides that “out-of-state counsel may appear before a court as counsel pro hac vice.”\textsuperscript{123} Neither the Illinois rule nor the California formulation of the \textit{pro hac vice} exception confers an out-of-state lawyer with general authority to perform legal services related to the pending litigation, but instead limit a lawyer’s services to in-court appearances.\textsuperscript{124}

A narrow \textit{pro hac vice} rule may not pose significant difficulties where the client is a citizen of the lawyer’s home state and all material witnesses are also located in the lawyer’s home state. In those circumstances, the lawyer may reasonably limit his or her contacts with the foreign state to in-court appearances. The attorney can perform all other serv-

\textsuperscript{119} Id. at 3, 7.
\textsuperscript{120} Id. at 3.
\textsuperscript{121} See Kalish, \textit{supra} note 106, at 372-73. “The foreign attorney will be engaged in the unauthorized practice of law for legal work done in the state without, prior to, or which is outside the scope of \textit{pro hac vice} admission.” \textit{Id}.
\textsuperscript{122} Ill. S. Ct. R. 707 (emphasis added).
\textsuperscript{123} Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 6 (Cal.) (citing CAL. RULES OF COURT, R. 983) (emphasis added), cert. denied, 119 S. Ct. 291 (1998).
\textsuperscript{124} Other states have similarly narrow \textit{pro hac vice} rules. \textit{See}, e.g., S.C. App. Ct. R. 404 (out-of-state lawyer may be permitted “to participate in the trial or argument of any case”); MICH. ST. BAR. R. 15 (out-of-state lawyer “may be permitted to engage in the trial of a specific case”); WASH. ADM. FRAC. R. 8 (out-of-state lawyer “may appear as a lawyer in the trial of any action or proceeding”); COL. R. CIV. P. 221 (out-of-state lawyer may “be permitted to participate before such Court in the trial or argument of any particular cause”).
ices incident to the representation in his or her home state. This clear division of services may not be practical where the client is a citizen of the foreign state where the litigation is pending. In such circumstances, the lawyer must enter the foreign jurisdiction to discuss strategy with the client, advise the client, and perform other services incident to the representation. The representation of an institutional client in complex litigation illustrates these limitations. Representing an institutional client would likely require discussing strategy with, advising, and perhaps drafting affidavits for a large number of persons employed by the client. If the state’s *pro hac vice* rule limits the out-of-state lawyer’s activities to court appearances, the lawyer’s services in the foreign jurisdiction would constitute the unauthorized practice of law. Nor could the out-of-state lawyer avoid unauthorized practice by conducting these services in the lawyer’s home state. Under *Birbrower*, these services will have been performed in the course of a continuing relationship with an out-of-state client, or necessitate virtual contacts with the client, and thus constitute practicing law in the foreign state.

While primarily addressing the federal court exception, *Spanos* also contains dicta addressing the *pro hac vice* exception. Contrary to the narrow interpretation of *pro hac vice* admission discussed above, *Spanos* indicates that *pro hac vice* admission would permit an out-of-state lawyer to engage in “any legal services reasonably incident” to the litigation of a matter before the court. This more expansive interpretation of the *pro hac vice* rule would presumably authorize out-of-court services in addition to in-court appearances. A narrow *pro hac vice* rule adopted by a particular state would obviously trump this dicta. Therefore, to avoid an unauthor-


126. Some states adopt this more expansive interpretation. *See, e.g.*, FL. ST. BAR R. 1-3.2 (out-of-state lawyer “who has professional business in a court of record of this state may . . . be permitted to practice for the purpose of such business”); OK. ST. BAR RULES art. II, § 5 (out-of-state lawyer may be admitted for the purpose of conducting an action or a proceeding in which he has been employed”); PA. BAR ADM. R. 301 (out-of-state lawyer may be admitted “for purposes limited to a particular matter”). *See also* Note, supra note 110, at 1200 (*pro hac vice* admission permits “court appearances and out-of-court functions directly connected with pending litigation”) (footnote omitted).
ized practice claim, practitioners representing out-of-state clients should consult the foreign state's pro hac vice rule immediately upon being retained.

*Birbrower* illustrates how limitations on the process of obtaining pro hac vice admission render an out-of-state attorney vulnerable to an unauthorized practice claim. Even where the out-of-state lawyer obtains admission pro hac vice, a narrow pro hac vice rule may limit the scope of a lawyer's services and thus afford only limited protection from unauthorized practice claims.

IV. IN THE WAKE OF BIRBROWER

A. How Does Birbrower Affect the Out-of-State Lawyer?

*Birbrower* is a California decision and, therefore, only affects non-California lawyers to the extent they practice law "in California." No other state has interpreted its unauthorized practice rules as broadly.127 Assuming no exception applies,128 may a non-California lawyer ever represent a California client on a matter involving California law? Although *Birbrower* provides little guidance, the court noted that not all practice by an out-of-state lawyer on a California legal matter would violate section 6125.129 The Court stated that "[m]ere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.'"130

This allowance for fortuitous or attenuated contacts would presumably permit an out-of-state lawyer to enter California on behalf of a non-California client to consummate an isolated transaction incident to the lawyer's representation of the client in another state.131 In these circumstances,

127. See generally, Mary F. Andreoni, 10 Ethics Questions From Young Lawyers, CBA RECORD, Feb.-Mar. 1998, at 46, 48 (Administrative Counsel to the Illinois Attorney Registration and Disciplinary Commission concludes that an Illinois lawyer who does not physically enter the State of Wisconsin does not engage in the unauthorized practice of law by rendering legal advice on Wisconsin law to a Wisconsin client).
128. See supra Part III.
130. See *Birbrower*, 949 P.2d at 5 (emphasis added).
131. See *Birbrower*, 949 P.2d at 3; see also *Spivak* v. Sachs, 211 N.E.2d 329
the lawyer's contacts with the State of California are arguably incidental, the matter involves a non-California client and the lawyer's physical presence in the state is limited to an isolated occasion.

By contrast, the allowance for "fortuitous or attenuated" contacts probably would not apply where a non-California lawyer represents a California client under similar circumstances. Even assuming the out-of-state lawyer's physical presence in California was limited to an isolated occasion and, therefore, was "fortuitous or attenuated," the lawyer's contacts with the California client are not "fortuitous or attenuated." The representation of a client necessarily involves more than incidental contacts between the lawyer and client whether by telephone, e-mail, facsimile, or other means. These "virtual contacts" may satisfy the "in California" test.132

Alternatively, even assuming a lawyer could represent a California client with only "fortuitous or attenuated" contacts, the lawyer's presence in the state on behalf of the California client nonetheless occurs in the course of a continuing relationship with the California client.133 This "continuing relationship" may also satisfy the "in California" test.134 Thus, the allowance for "fortuitous and attenuated" contacts would likely not apply where the out-of-state lawyer represents a California client.135

Does Birbrower's continuing relationship test136 effectively preclude an out-of-state lawyer from ever representing a California client in a matter governed by California law assuming no exception applies? Although a definite answer awaits further clarification from the California courts, Birbrower suggests that the California courts would condition such representation on several requirements.

Given that section 6125 seeks to protect California citi-

(N.Y. 1965) (holding that a California lawyer was engaged in the unauthorized practice of law in New York, thereby precluding recovery of his fees). However, the court also noted "we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York." Spivak, 211 N.E.2d at 331.

132. See Birbrower, 949 P.2d at 5-6. See also supra Part II.B-C.
133. See supra note 69.
134. See Birbrower, 949 P.2d at 5. See also supra Part II.B-C.
135. See supra Part II.D.
136. See supra Part II.C-D.
zens from persons not educated and examined on California law, the out-of-state lawyer would be required to associate with local California counsel. *Birbrower* makes clear, however, that simply retaining local counsel is not sufficient. Rather, California counsel must be actively and meaningfully engaged in the representation. This suggests that any issues requiring the interpretation or application of California law should be delegated to California counsel. Similarly, California counsel should participate in all strategy sessions and client conferences where issues involving California law are discussed. These measures should afford the California citizen adequate protection from the risks of unauthorized practice by a non-California lawyer. If section 6125 seeks only to protect California citizens from the risks of unauthorized practice, these measures should permit an out-of-state lawyer to represent a California client on a matter of California law.

V. AVOIDING UNAUTHORIZED PRACTICE IN THE

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138. The trial court in *Birbrower* supported its conclusion that Birbrower violated section 6125 by noting that Birbrower did not associate with California counsel. *Birbrower*, 949 P.2d at 4. To correct any misimpression cast by the trial court, the California Supreme Court expressly rejected any suggestion that simply retaining local counsel would exempt an out-of-state lawyer from section 6125. See *id.* at 4 n.3 (“Contrary to the trial court’s implied assumption, no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.”).

139. See *id.*

140. See *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 171 (2d Cir.) (en banc) (conditioning the federal court exception on the association of local counsel because a federal claim may have its basis in state law), cert. denied, 385 U.S. 987 (1966).

141. See *Birbrower*, 949 P.2d at 5.

142. *Birbrower*’s continuing relationship test is not limited to engagements dealing with California law. Under *Birbrower*’s “in California” analysis, an out-of-state lawyer practices law “in California” by maintaining a continuing relationship with a California client. The Court did not limit this rule to relationships with California clients on matters of California law. Thus, for example, *Birbrower* arguably prohibits a Florida lawyer from representing a California client on a matter of Florida law pending in a Florida court. This extension of section 6125 would not serve to protect California citizens from the risks of unauthorized practice. Rather, such a rule would serve only to protect the economic interests of California lawyers.
INTERJURISDICTIONAL CONTEXT.

An out-of-state lawyer can take several steps to guard against an unauthorized practice claim. At the outset, out-of-state counsel should send the foreign client an engagement letter advising the client of those jurisdictions where counsel is admitted to practice and alerting the client to potential restrictions on counsel's services. Next, counsel should consult the foreign state's unauthorized practice statute, and case law interpreting the statute, for guidance in determining what activities constitute the practice of law in that state.

After being retained, the out-of-state lawyer should retain local counsel in the foreign state. In addition to rendering general assistance, local counsel should assume primary responsibility for any issues requiring the interpretation or application of the foreign law. As a defensive measure, the out-of-state lawyer and local counsel should ensure that their billing entries and written correspondence reflect this division of responsibility. Local counsel should participate in the preparation of all pleadings and other documents of significance and cosign these papers, thereby documenting the involvement of local counsel. To the extent a member of the out-of-state lawyer's firm is admitted in the foreign jurisdiction, that lawyer should be assigned to the matter regardless of the lawyer's area of expertise.

Where the out-of-state lawyer's services involve litigation, counsel should seek admission pro hac vice at the earliest possible time. Additionally, counsel should carefully review the state's pro hac vice rule to determine the scope of services authorized by the state's pro hac vice rule. Counsel should also consult the state's unauthorized practice statute. Even where a state adopts a narrow pro hac vice rule, the state's unauthorized practice statute may categorize certain activities as outside the definition of the practice of law. Thus, although a state's pro hac vice rule may limit a lawyer's services to in-court appearances, the out-of-state lawyer

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143. Where the client is advised that the lawyer is not licensed to practice in a given jurisdiction, an argument exists that the client waives any unauthorized practice claim by subsequently engaging the lawyer. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 11 (Cal.) (citations omitted), cert. denied, 119 S. Ct. 291 (1998).

144. See supra Part III.B.
may nonetheless perform those out-of-court services that do not constitute the practice of law. 145

In the event an adverse party is also represented by an out-of-state lawyer, counsel should inquire whether opposing counsel has also taken steps to guard against unauthorized practice. If opposing counsel has failed to take appropriate measures, counsel may be assisting opposing counsel in the unauthorized practice of law. 146 Birbrower illustrates this point. If Tandem's lawyers knew that counsel for ESQ (the Birbrower lawyers) were not licensed in California, but Tandem's lawyers nonetheless continued to deal with the Birbrower lawyers in California, Tandem's lawyers arguably aided Birbrower in the unauthorized practice of law in violation of Model Rule 5.5(b). 147 Additionally, Tandem's lawyers could also be sanctioned for assisting another in the violation of the Rules of Professional Conduct 148 or for failing to report a known violation of the Rules. 149

VI. CONCLUSION

The Birbrower holding announces no new rule. The Birbrower lawyers were not licensed to practice law in California. They nonetheless discussed legal strategy, rendered legal advice, filed an arbitration demand, and ultimately negotiated a settlement of a dispute governed by California law for a California client while physically present in California. No exception applied. These lawyers plainly engaged in the unauthorized practice of law in California.

145. See Condon v. McHenry, 76 Cal. Rptr. 2d 922, 925 n.4. (1998) (noting that out-of-state lawyers can recover fees for services performed "in California" if those services do not constitute the practice of law).

146. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(b) ("A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.").


148. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, [or] knowingly assist or induce another to do so. . . ."").

149. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").
Birbrower's significance lies in the court's unprecedented suggestion that a lawyer who never physically enters a foreign state may nonetheless violate that state's unauthorized practice rules through "virtual contacts" with the client or by maintaining a "continuing relationship" with the client. Birbrower also illustrates that the traditional exceptions to unauthorized practice afford only limited protection from unauthorized practice claims.

Perhaps Birbrower is simply further testament to California's reluctance to accommodate out-of-state lawyers. On the other hand, Birbrower may signal a trend toward tighter enforcement of unauthorized practice rules in the interjurisdictional context. At the very least, Birbrower increases awareness of the risks and consequences of unauthorized practice by out-of-state lawyers.

150. See Charles W. Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice By Transactional Lawyers, 36 S. TEX. L. REV. 665, 681 (1995) (noting that certain states, "led by California," have enacted "obstructive regulation" making it difficult for out-of-state lawyers to practice in the foreign state); ALAS Loss Prevention Journal, supra note 10, at 26 ("Some states, like California, have developed a reputation for being less permissive than other states about sporadic work by out-of-state lawyers.").