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In this article, Sykes argues that local federal district court rules that require attorneys to be members of the bar of the state in which the court is located contravene the Constitution and established Supreme Court case law, and create difficulties for federal tax dispute lawyers and their clients.

Sykes recently filed a brief in the Ninth Circuit making such a challenge to the rules of the U.S. District Court for the Western District of Washington.

I. A Local Rule Ripe for a Constitutional Challenge

Most federal district courts have a local rule that for attorneys to be eligible for a regular admission the attorney must be a member of the bar of the state in which the federal district court is located.[1] To date, no federal court seems to have considered whether this type of local rule (hereinafter, "local restriction admission rule") runs afoul of the Constitution's Article III, the Sixth Amendment right to counsel, the Seventh Amendment right to a jury trial, and the provisions of the Judiciary Act of 1789 that established the power of the federal courts to create local rules for civil and criminal cases.

I believe this type of local rule contravenes the Constitution. Further, for a lawyer who is indisputably fit for admission in terms of competence and character, this type of local rule should not survive scrutiny under the standards for local rules set out in *Frazier v. Heebe*.[2]

Local restriction admission rules create special difficulties for federal tax dispute lawyers and their clients. Those lawyers are authorized to conduct an administrative nationwide practice before the IRS and are typically admitted to practice before the U.S. Tax Court and Court of Federal Claims, both based in Washington, D.C., from anywhere in the United States. Further, lawyers are eligible for admission to the bars of any of the 13 federal courts of appeals if they are "of good moral and professional character and . . . admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court."[3]

By impeding a federal tax lawyer's path from unsuccessful administrative proceedings before the IRS through a federal trial court and on to a federal court of appeals, a local restriction admission rule severely disrupts a taxpayer's choice of counsel and judicial forum, their enjoyment of constitutional rights, and their statutory right to a jury trial under title 28. The disruption of a taxpayer's preferred representation may also occur after the Justice Department's Tax Division brings suit against the taxpayer in a federal district court.

Caseload statistics published by the Federal Judicial Center bear out the importance of having

[1] Gerald A. Kafka and Rita A. Cavanaugh, *Litigation of Federal Civil Tax Controversies*, Vol. 1 at para. 15.07[1] (2024) (stating that this type of local rule generally prevails).

[2] *Frazier v. Heebe*, 482 U.S. 641 (1987).

[3] Federal Rule of Appellate Procedure 46(a)(1).

proper local rules governing attorney admissions.[4] In the one-year period ending June 30, 2024, 54,951 criminal cases[5] and 340,683 civil cases were commenced in federal district courts.[6] In the civil cases in which the federal government was not a party, 143,801 were federal question cases and 151,739 were diversity of citizenship cases.[7] Of the civil cases filed, 531 were tax suits: 275 suits filed by the United States and 253 suits filed by federal taxpayers.[8]

It is not an answer to say that federal district courts may allow federal tax lawyers to appear under *pro hac vice* permissions. Those rules typically require the lawyer to manage the case with assistance from a second lawyer who has a regular admission to that particular district court's bar. This requirement drives up taxpayer costs and potentially deprives them of their tax litigator of choice. *Frazier v. Heebe*[9] held that a *pro hac vice* permission is not a reasonable alternative to a regular admission. Further, some local rules — for example, Local Civil Rule 83.1(d) and Local Criminal Rule 62.1(d) for the U.S. District Court for the Western District of Washington — allow *pro hac vice* permission only for lawyers who both reside and have offices at a location outside that judicial district.

The authorization for a lawyer to conduct a federal tax practice in states in which the lawyer is not admitted to the state bar is found in three places:

1. Treasury regulations and the rules of the IRS, as implemented by *Sperry v. Florida*,[10] which established the supremacy of federal law in matters involving a right to practice law (even by a nonlawyer) before federal agencies;
2. membership in the bars of the Tax Court, the Court of Federal Claims, and the federal courts of appeals; and
3. state statutes and rules that explicitly recognize the supremacy of federal law for the right to practice law before federal agencies and tribunals, without that federal practice being viewed by the state as the unauthorized practice of law.

Concerning the third point, the American Bar Association's Model Rule of Professional Conduct 5.5(d)(2), is designed to provide a safe harbor from a charge of unauthorized practice of law:

> (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
>
> *****
>
> (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

Most state judiciaries, such as those in Washington, Illinois, and Wisconsin, have adopted this provision verbatim or nearly so. A chart on the ABA's website describes the status of Model Rule 5.5(d)(2) in the various states and Washington, D.C.[11] States that have not adopted this rule, such as Florida, sometimes express their alternatives to Model Rule 5.5(d)(2) in terms that correspond to *Sperry v. Florida*, with its practice authorization that is potentially broader than expressed in Model Rule 5.5(d)(2).

[4] *See* United States Courts, "Federal Judicial Caseload Statistics" (viewed Jan. 10, 2025).

[5] *Id.* Table D.

[6] *Id.* Table C-2.

[7] *Id.* Notable numbers of the civil case filings against the government included 13,847 Social Security cases and 11,652 immigration cases. Among the federal question cases, 14,566 focused on intellectual property rights.

[8] *Id.* Three involved local taxation.

[9] *Frazier v. Heebe*, 482 U.S. at 650-651 and nn.12-13.

[10] *Sperry v. Florida*, 373 U.S. 379 (1963).

[11] *See* American Bar Association Center for Professional Responsibility Policy Implementation Committee, "Variations of the ABA Model Rules of Professional Conduct" (Mar. 15, 2024).

II. An Unconstitutional Delegation

A. *Northern Pipeline*'s Application of Article III

Local restriction admission rules require a federal lawyer to navigate state admissions through a process that applies state substantive and procedural standards. That admissions process confers upon the state judiciary the right to make an unappealable, final adjudication on an issue that is exclusively within the inherent power of an Article III federal court.[12]

This delegation of a final, adjudicative power over a federal court admission — a preemptive veto power — is impermissible under 28 U.S.C. section 1654.[13] A state judiciary's admissions apparatus is not part of an Article III court under the Constitution, so the delegation is impermissible under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[14] *In re Sheridan*[15] vacated a sanction order by the non-Article III bankruptcy appellate panel, holding that the order must be presented by that in-house tribunal as a report and recommendation subject to a final, plenary review by an Article III district court.[16] The delegation made by a local restriction admissions rule — to a state judiciary applying state legal standards and processes — is a far more serious affront to Article III than Congress's creation of in-house Article I bankruptcy courts for administering the Bankruptcy Code (enacted by Congress).

Section 1654 allows a party to appear by "counsel" under rules "to manage and conduct causes." The statute was originally enacted contemporaneously with the ratification of the Constitution occurring on June 21, 1788.[17] This seminal statute cannot properly be construed in a way that contravenes Article III as explained by *Northern Pipeline*.

B. Article III and the Judiciary Act of 1789

Admissions rules delegating an Article III court's final adjudicative powers to the state judiciary of the state in which the federal court sits are not somehow a special case. Instead, provisions of the Judiciary Act of 1789, as well as the Sixth Amendment's right to counsel, make clear that a delegation of that type was imprudent and disapproved by the Constitution's framers.

Observe the framers' efforts to form a unified nation out of the 13 states after the Articles of Confederation failed to do so.[18] The Judiciary Act of 1789 implemented Article III and promoted that unification by, *inter alia*, providing for removal, to federal court from state court, "a suit . . . commenced in any state court . . . by a citizen of the state in which the suit is brought against a citizen of another state," if the amount in dispute exceeded $500. The act also provided original diversity jurisdiction over cases with that citizenship pattern.[19]

In their drive to knit the states together into a functioning nation, the framers never intended to allow a federal court rule to insist that a nonresident defendant in an original or removed diversity suit could be represented only by a lawyer admitted to practice in the state in which the federal court sits. In *The Federalist Papers*, Alexander Hamilton says:

> The power of determining causes between two States, between one State and the citizens of another, and between citizens of different States, is perhaps not less

[12] *See In re Poole*, 222 F.3d 618, 620 (9th Cir. 2000) ("Admission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges."); *Pappas v. Philip Morris Inc.*, 915 F.3d 889, 895 (2d Cir. 2019) ("The ability of federal courts to regulate those who appear before them cannot be controlled by state law.").

[13] *Frazier v. Heebe*, 482 U.S. at 654 (identifying section 1654, enacted by section 35 of the Judiciary Act of 1789, as the original and still operative statutory source for local rules and admissions); *Pappas v. Philip Morris Inc.*, 915 F.3d at 894-897 (same); *Brown v. McGarr*, 774 F.2d 777, 781 (7th Cir. 1985) (same).

[14] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding that Congress could not confer Article III functions on Article I bankruptcy courts).

[15] *In re Sheridan*, 362 F.3d 96, at 110-112 (1st Cir. 2004)

[16] *See Stern v. Marshall*, 564 U.S. 462, 494-495 (2011) (holding that *Northern Pipeline* invalidates an amended statute purporting to delegate Article III powers); *Gomez v. United States*, 490 U.S. 858, 864 (1989) (in a case involving jury selection, construing the Federal Magistrates Act in a way that avoids an issue under Article III).

[17] Ch. 20, 1 Stat. 73, 92. *Brown v. McGarr*, 774 F.2d at 781. A transcript of the Federal Judiciary Act may be seen on the website of the National Archives, "Federal Judiciary Act (1789)" (2022).

[18] John A. Garraty and Mark C. Carnes, Vol. 1, *The American Nation*, at 137, 141-142, 147 (2005); *The Federalist* No. 78, at 519 (Alexander Hamilton).

[19] *Cf. Pappas v. Philip Morris Inc.*, 915 F.3d at 894-895 (focusing on the ancient section 1654 and holding that a pro se litigant was not barred by a Connecticut statute from representing her husband's estate in a diversity case in a district court sitting in Connecticut).

> essential to the peace of the Union than [disputes with foreign citizens or disputes that involve national questions].[20]

It is inconceivable that the framers, having allowed (by statute) a nonresident defendant sued in state court to remove the case from state court to federal court, meant to bestow on the state's judiciary the power to veto the federal admission of the lawyer chosen by that defendant to manage the defense of their federal case.[21] Proper rules of admission were of critical importance to the framers' efforts to unify the new nation, as Hamilton made clear.

The Sixth Amendment provides that in a criminal case, the defendant has the right "to have the assistance of counsel for his defense." The framers enacting section 1654 (applicable to criminal as well as civil rules) never would have imagined that a criminal defendant with so much at stake could be denied, by a mere local rule, the power to select an out-of-state counsel who lacked membership in the bar of the state in which the federal court sits. Indeed, federal courts have interpreted the Sixth Amendment right to counsel to allow criminal defendants to select their own lawyer.[22] Also, and rather obviously, federal courts should not block lawyers with expertise in federal law from practicing before them, especially in a criminal case.[23]

Section 1654 cannot properly be viewed as somehow in tension with Article III, for its 1789 statutory predecessor was designed to implement Article III. Discussing the provisions of the Constitution, *The Federalist* No. 78 at 524 (Hamilton) says:

> The prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

Further, as *Stern v. Marshall* said, "it goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution'" (citation omitted).[24]

C. The Framers' Term 'Counsel'

The framers' rejection of state-court jurisdiction is consistent with the framers' use of "counsel" in the predecessor to section 1654 and in the Sixth Amendment. Under those provisions, a bar membership in one (unspecified) jurisdiction or another is necessary for one to properly be viewed as counsel or a lawyer. That membership is part of the definition of what it takes to be counted as counsel. It is not, however, necessary to be a member of a particular state's bar to be viewed as counsel within the ordinary meaning of that constitutional term.

The traditionally authoritative *Webster's Second* defines counsel for purposes of law as "one who gives advice, esp. in legal matters; one professionally engaged in the trial or management of a cause in court."[25] For example, a lawyer practicing federal tax law while possessing various state and federal bar memberships is indisputably counsel when advising on federal tax law even if they are not a member of the bar in the state where the practice takes place. The bar memberships possessed suffice to bring the lawyer within the ordinary meaning of counsel. The same considerations in the 1780s would have required John Adams of Massachusetts to be regarded as counsel if he were retained to manage a matter in, say, Virginia. "The enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said."[26]

[20] *The Federalist* No. 80, at 534.

[21] *Pro hac vice* admissions would not become a general feature of the legal landscape for another 87 years. *Cooper v. Hutchinson*, 184 F.2d 119, 122, and n.7 (3d Cir. 1950).

[22] *United States v. Bergamo*, 134 F.2d 31, 35 (3d Cir. 1946) ("To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment.").

[23] *See Spanos v. Skounas Theatres Corp.*, 364 F.2d 161, 166 (2d Cir. 1966).

[24] *Stern v. Marshall*, 564 U.S. at 501.

[25] Webster's *New International Dictionary* at 606 (2d ed. 1957).

[26] *Gibbons v. Ogden*, 22 U.S. 1, at 71 (1824).

The ancient and seminal section 1654, still effective today, surely permits a federal district court to require by rule that a lawyer, to obtain a regular admission, be a member in good standing of some (that is, any) state or federal bar. That applicant could rely on a federal admission and not be required to submit to a final adjudication by a state judiciary. The federal judiciary created in 1789 would not have had a stable of federally admitted counsel from which to draw; and the framers knew that most litigation in the new nation would be conducted in state courts. But the framers' overriding goal, after the failure of the Articles of Confederation, was to unite the 13 states into one nation. In line with the removal and diversity provisions of the Judiciary Act of 1789 and Hamilton's warning in *The Federalist* No. 80, it is a very different and entirely inadmissible notion that the framers meant for the predecessor to section 1654 to authorize a local rule allowing the state judiciary in the state where the federal court sits to veto a federal civil or criminal litigant's choice of counsel.

III. Impingement on Choice of Counsel and Forum, and Comity

A local restriction admissions rule can be detrimental for taxpayers interested in using a single lawyer to efficiently and economically manage their federal tax disputes. A *pro hac vice* permission typically requires a litigant to pay two lawyers, assuming that *pro hac vice* permission is not barred by a geographic stipulation.[27]

A local restriction admissions rule also disrupts a federal taxpayer's path from administrative proceedings before the IRS or the Justice Department (in criminal investigations), to the federal district court, and then on appeal to a circuit court. This is inconsistent with the statutory scheme established by Congress to give taxpayers a choice of forum among the Tax Court, a federal district court, and the Court of Federal Claims.[28]

Further, taxpayers sometimes do not have the option to go to the Tax Court or the Court of Federal Claims, such as when the Justice Department files against them a civil or criminal case in a federal district court. A local restriction admission rule blocks even an expert lawyer with a federal practice conducted state-wide with the permission of the state judiciary from continuing a fully authorized administrative representation.

Here is a vivid example of how disruptive and unfair a local restriction admission rule can be to the federal taxpayer. If a taxpayer has failed to administratively resolve a collection dispute with the IRS and the agency wants to seize a taxpayer's primary residence, that seizure can be accomplished only with permission from a federal district court.[29] A well-qualified tax lawyer who represented the taxpayer at the administrative level should not have to hurriedly plead for the court to override the irrational and unnecessary text of its regular admission and *pro hac vice* rules to secure the right to continue with the representation, which could scarcely be more critical to a beleaguered taxpayer. It is impossible to imagine that the Congress that enacted section 6334(e)(1) intended to permit a federal district court to prevent a lawyer who was fit for admission from continuing to represent a taxpayer on the verge of losing their home — or that an impecunious taxpayer should be required to foot the bill for two attorneys under the *pro hac vice* provisions (assuming that the taxpayer's existing counsel would not be barred by a geographic requirement of the *pro hac vice* rule).

Taxpayers dealing with civil litigation or criminal charges in federal district court and facing expert tax litigators at the Justice Department's Tax Division or the U.S. attorney's office are fully justified in seeking and securing representation from a highly qualified federal tax lawyer. The imagined risks are not fanciful. The IRC and Treasury regulations together amount to about 80,000 pages. The practice of federal tax law is a complex specialty.

As the court in *Spanos v. Skouras Theatres* said, "The rules of federal courts concerning admission have long recognized that experts in federal law should be permitted, when appropriate, to conduct litigation in the federal courts regardless

[27] Kafka and Cavanaugh, *supra* note 1, at 15.07[1].

[28] *See generally* Kafka and Cavanaugh, *supra* note 1, at chapters 1 and 15; *see* Kafka and Cavanaugh, *Litigation of Federal Civil Tax Controversies*, Vol. 2, at chapter 20.

[29] Section 6334(e)(1).

of whether they have been admitted to practice in the state in which the court sits."[30] A state bar membership in the state in which the federal court sits is properly regarded by stressed federal taxpayers facing an experience in the federal district court as completely irrelevant to their selection of counsel.

Only a district court affords a right to jury trials in civil tax refund cases.[31] The Seventh Amendment right to a jury trial may be in jeopardy as well. The 2024 case *SEC v. Jarkesy*,[32] which allowed a jury trial in a penalty matter commenced by the government before the SEC, may have the effect of requiring jury trials in additional matters in which the IRS is pursuing a penalty. In a criminal tax case, a local restriction admissions rule impermissibly impinges on the taxpayer's choice of counsel under the Sixth Amendment.[33]

In short, a local restriction admissions rule is inconsistent with several statutory and constitutional rights — something that never could have been intended by the framers or modern Congresses. In situations in which the state judiciary has a rule authorizing the lawyer to conduct a federal practice in the state, that rule is properly viewed as eschewing a state bar application from the lawyer. For a federal court to insist, nonetheless, that a state bar application be filed, evaluated, and approved is to intrude on federal-state judicial comity.[34]

It is not an answer to say that local rules of this type may be waived by the district court; the process of getting a waiver from the federal court, even if obtained, requires the costly filing of a motion and triggers undue delay during a critical period in which time, controlled by court deadlines, is likely of the essence. This delay and expense, coupled with the unjustified disruption of Congress's tri-forum scheme, surely runs afoul of Rule 1 of the Federal Rules of Civil Procedure and its counterpart in local rules, for example, Rule 1 of the Local Rules of the Western District of Washington.

IV. Invalidity Under *Frazier v. Heebe*

A local restriction admissions rule, if applied to exclude from admission a manifestly fit lawyer, also runs afoul of a long-standing test for the validity of a federal district court's local rules of admission. *Frazier v. Heebe* held that a district court's admission rule must not be "unnecessary and irrational" or contrary to "right and justice." That this standard is not met by a local restriction admissions rule should be fairly obvious when a lawyer is permitted by the state judiciary to conduct a federal practice statewide under a rule resembling Model Rule 5.5(d)(2). The ABA Model Rules of Professional Conduct are viewed by most, if not all, district courts as authoritative; they are even specifically embraced by local rules.[35] Note that Model Rule 5.5(d)(2)'s safe harbor has an internal standard that makes its practice authorization narrower than the Supreme Court's authorization in *Sperry v. Florida*: It requires that the lawyer be "not disbarred or suspended from practice in any jurisdiction."

The irrationality of a local restriction admissions rule is also suggested by the admissions rules of the Tax Court (Rule 200), the Court of Federal Claims (Rule 83.1(b)), the 13 federal appellate courts (Federal Rules of Appellate Procedure 46(a)(1)), and the Supreme Court (Rule 5), none of which give a state judiciary veto power over a federal admission.

One justification for a local restriction admissions rule that has been typically offered, particularly in cases involving the federal district courts in California (where reciprocal admissions are not allowed), is that the state judiciary's admissions and disciplinary apparatus is needed by the federal district court to assist in carrying out its proper screening and disciplinary functions.[36]

To begin with, as noted in *Stern v. Marshall*, "it goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in

[30] *Spanos v. Skouras Theatres Corp.*, 364 F.2d at 166.

[31] *See* 28 U.S.C. sections 1346(a)(1) and 2402.

[32] *SEC v. Jarkesy*, 603 U.S. 109 (2024).

[33] *See, e.g.*, Criminal Rule 62.1(b). *United States v. Bergamo*, 154 F.2d at 35.

[34] *See Surrick v. Killion*, 449 F.3d 520, 520 (3d Cir. 2006) (stating that "the dictates of comity must never be ignored").

[35] *See, e.g.*, LCR 83.3(a)(2).

[36] *See, e.g., Giannini v. Real*, 911 F.2d 354, 360 (9th Cir. 1990) (challenge to local restriction admission rules in the federal district courts for the Central, Southern, and Eastern districts of California).

facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution'" (citation omitted).[37] Further, *In re Poole* held that "admission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges."[38]

The premise of this proffered justification is wholly unpersuasive if the federal district court has in its local rules provisions that allow for disciplinary referrals to other tribunals (for example, to a state bar association or a federal administrative agency) and for the imposition of reciprocal discipline based on discipline imposed by other tribunals. Moreover, state bars allowing reciprocal admissions do not examine whether an applicant possesses knowledge of the state's laws; and state bar examinations are unlikely to be concerned with an applicant's knowledge of federal law.[39]

A lawyer contemplating a challenge to a local restriction admissions rule under *Frazier v. Heebe* should become familiar with the provisions of (1) the district court's local rules regarding admission, discipline, and reciprocal discipline, and (2) the pertinent state judiciary's provisions governing admissions by examination, reciprocal admissions, lawyer discipline, and whether sharing of information about its admissions and disciplinary investigations with the federal district court would be permissible.

Cases decided decades ago regarding the relationship between California state admissions and discipline, and admissions and discipline of federal courts sitting in California, were based on standards and processes that are likely irrelevant to other states and other federal district courts. The decided cases did not involve a lawyer who was authorized to practice federal law in California under a counterpart to Model Rule 5.5(d)(2) or *Sperry v. Florida*.[40] Comment 19 to ABA Model Rule 5.5(d)(2) provides that a lawyer practicing under that rule is subject to the state's disciplinary authority; and so does, for example, comment 19 to Washington Rule of Professional Conduct 5.5(d)(2).

It is easier to establish the invalidity of a local restriction admissions rule under *Frazier v. Heebe* if the attorney is indisputably fit for admission in terms of character and competence. An applicant with many bar admissions, a long history of successful practice in federal district court, and an unblemished ethics record should easily suffice. Conversely, a lawyer with only one recent bar admission or an imperfect ethics record would likely have some difficulty establishing that the standards of *Frazier v. Heebe* require the invalidation of a local restriction admissions rule as applied. Interestingly, a local restriction admission rule would block admission of the former applicant but not the latter, assuming that the latter applicant remained in good standing with the state bar.

It would be helpful to an applicant's argument if *pro hac vice* permission is barred, as in the Western District of Washington, by a geographic barrier. In that situation, the effect of the regular admission and *pro hac vice* permission rules taken together prevent an attorney fully authorized by the state judiciary to conduct a statewide practice of federal law from practicing in federal court — an obviously irrational result, impermissible under *Frazier v. Heebe*.[41]

Even in states where an applicant is not blocked from obtaining *pro hac vice* permission, the Supreme Court in *Frazier v. Heebe* held, in authorizing a regular admission and rejecting the Louisiana bar's argument that *pro hac vice* permission was available to an attorney who had been denied a regular admission, that *pro hac vice* permission was not a "reasonable alternative" to a regular admission.[42]

V. Two Pending Matters Worth Watching

Now pending in the Ninth Circuit is an appeal I filed on October 18, 2024, challenging a local restriction admissions rule that requires good

[37] *Stern v. Marshall*, 564 U.S. at 501.

[38] *In re Poole*, 222 F.3d at 620.

[39] *See* National Conference of Bar Examiners, "Prepare Now With BarNow Online Study Aids" (last viewed Nov. 22, 2024) (addressing the Uniform Bar Examination); Barbri, "Washington Bar Exam (UBE) Details" (last viewed Nov. 22, 2024) (Washington state bar examination).

[40] *Sperry v. Florida*, 373 U.S. 379.

[41] *See, e.g.*, Local Civil Rule 83.1(d) and Criminal Rule 62.1(d) (requiring a *pro hac vice* applicant not to reside or have an office in the Western District of Washington).

[42] *Frazier v. Heebe*, 482 U.S. at 650-651 and nn.12-13.

standing as a member of the Washington State Bar Association to be eligible for a regular admission to the bar of the U.S. District Court for the Western District of Washington.[43] In an order entered 107 days after my petition for admission was filed, the district court had determined that I was ineligible for admission solely because I was not a member in good standing of the Washington State Bar Association.[44] The court's nine-page order did not disagree that I indisputably possessed, as a factual matter, the competence and character required for a regular admission. The court neither requested supplementation of my petition nor held an evidentiary hearing.

The court rejected my argument that my undisputed authorization, under the Washington judiciary's Rule of Professional Conduct 5.5(d)(2), to conduct a statewide federal tax practice in Washington was a species of, or the equivalent of, a good-standing membership in the Washington State Bar Association that was sufficient to satisfy the textual requirement of Local Civil Rule 83.1(b). The court refused to waive the textual eligibility requirement under the provisions of the introduction to the Local Civil Rules allowing a waiver. The court rejected the argument that giving the state bar admissions apparatus a preemptive veto power over my admission was an improper delegation of the court's inherent and quintessential powers over lawyer admissions. The court rejected the argument that Local Civil Rule 83.1(b), if read rigidly, was unnecessary and irrational and thus invalid under the standards set out in *Frazier v. Heebe*.

In a 14-page declaration made under penalty of perjury, accompanied by a 25-page legal memorandum, I emphasized that my 19 good-standing federal and state bar admissions and my 44 years spent litigating 200 or more federal tax cases controlling in the aggregate billions of dollars, without sustaining any ethical blemish on my record, obviously made me fit for a regular admission — especially given that I was indisputably authorized by the Washington judiciary to conduct a federal tax practice statewide in Washington. I also noted that my bar admissions included the Tax Court, the Court of Federal Claims, the Ninth Circuit, and the Supreme Court — and that a denial of admission would therefore disrupt a taxpayer's path forward from unsuccessful administrative proceedings. I emphasized also that under Local Civil Rule 83.1(d) a *pro hac vice* permission is unavailable because I reside and have an office in the Western District of Washington, not outside as required by the *pro hac vice* rule. The court was unmoved, viewing Local Civil Rule 83.1(b)'s eligibility requirement rigidly and as conclusive.

The opening brief in my pending appeal to the Ninth Circuit was filed on November 29, 2024. Setting out the arguments described above, it requests that the court reverse and remand with instructions to grant a regular admission. The opening brief asserts that the issues under Article III and the Sixth Amendment are issues of first impression, as are issues concerning my undisputed authorization from the Washington judiciary to practice federal tax law state-wide in Washington. The brief also suggests that the Ninth Circuit should consider, in the exercise of its supervisory authority, directing a repair of the multiple flaws in Local Civil Rule 83.1's provisions governing both regular admissions and *pro hac vice* permissions.

The time within which an answering brief was to have been filed closed on January 2, 2025, without any filing or letter explaining that a brief would not be filed. The Justice Department, which presumably might have been authorized to present a defense of Local Civil Rule 83.1, has not entered a notice of appearance, despite both the U.S. attorney for the Western District of Washington and the U.S. attorney general having been served with a copy of my opening brief on November 29, 2024. This failure to file an answering brief was unexpected and curious, especially given my arguments of first impression concerning Article III, the Sixth Amendment, and a practice authorization under the Washington counterpart to ABA Model Rule 5.5(d)(2) and *Sperry v. Florida* — not to mention that the district court (rigidly) declined to waive the Washington State Bar membership requirement.

Also worth watching are ongoing proceedings before the U.S. Courts' Judicial Conference Committee on Rules and Practice and Procedure.

[43] *In re: Sykes*, No. 24-6477 (9th Cir. 2024).

[44] *In re: Sykes*, No. 2:24-mc-00041-DGE (W.D. Wash. 2024) (unpublished order filed Sept. 30, 2024).

The committee is examining, *inter alia*, whether local restriction admissions rules are authorized or prudent.[45] In the wake of the committee's January 7 meeting, I submitted my Ninth Circuit opening brief as a comment, which has been posted.[46] The committee appears focused on whether the Rules Enabling Act of 1934 permits intervention by the committee; no mention is made of the constitutional arguments emphasized in my opening brief or the Supreme Court's 1987 invalidation of a Louisiana district court's admissions rule in *Frazier v. Heebe* (relying in part on 28 U.S.C. section 1654). My cover letter to the committee, viewable online, asserted that the Rules Enabling Act should have no effect on the demands of the Constitution, particularly as implemented by the contemporaneously enacted 28 U.S.C. section 1654. The committee is scheduled to meet again on June 10 in Washington, D.C.

VI. Considerations in Mounting a Challenge

A lawyer considering a challenge to a local restriction admissions rule should consider the following points in drafting papers supporting a petition for a regular admission:

- File the petition as a stand-alone item, not as part of a pending case. Doing so will make it easier to avoid difficulties establishing that an adverse order is a final, appealable order under 28 U.S.C. section 1291. Otherwise, an appeal may face an argument that an adverse admissions decision can be considered only if it is treated by the court of appeals as a petition for a writ of mandamus under 28 U.S.C. section 1651.
- In support of the petition, submit a well-developed declaration under penalty of perjury[47] that establishes both elements that have traditionally been viewed as bearing on fitness for admission: character and competence.
- Allege in the declaration, if possible, reasons why your petition is neither unripe nor moot.
- In support of the petition, submit a well-developed legal memorandum. Among other things, the memorandum should emphasize any admissions-on-motion that are offered by the pertinent state bar; any privacy protections for an applicant for a state-bar admission; and the federal district court's own rules authorizing it to ascertain misconduct and impose discipline, including discipline based on discipline imposed by other tribunals or jurisdictions.
- In the memorandum, give the court a technical, analytical pathway for the court to rule in favor of admission without its conceding that the local restriction admissions rule is unconstitutional or invalid. If local rules provide that they can be waived, argue for that. With that pathway presented, if admission is denied the argument on appeal squarely presents the questions as to unconstitutionality and invalidity, as well as reasons for the court of appeals to exercise supervisory authority over a defective local admissions rule.
- Refer in the supporting papers to your own website if it sets out detailed biographical information.

VII. Conclusion

Local restriction admission rules in federal district courts appear to have infirmities under Article III, the Sixth Amendment, the Seventh Amendment, and 28 U.S.C. section 1654. Especially for tax lawyers who manifestly possess the competence and character that makes them fit for admission and who practice federal law under a rule of the state judiciary, these rules also appear to run afoul of:

- the standards for the validity of local rules set out in *Frazier v. Heebe*;
- the congressional scheme providing three judicial forums for resolving federal tax disputes; and
- well-established considerations of state-federal judicial comity.

[45] *See* Avalon Zoppo, "Judiciary Panel Questions Authority to Make Attorney Admissions Rule for US Trial Courts," *Nat'l L. J.* (Jan. 7, 2025); National Law Journal, X post, Jan. 7, 2025. *See also* Zoppo, "Judiciary Rules Panel Weighs Unified Bar Admissions Proposal for U.S. District Courts," *Nat'l L. J.* (Jan. 4, 2024).

[46] United States Courts, Records of the Rules Committee, Rules Suggestions, "Thomas Sykes (25-CV-B)" (Jan. 22, 2025).

[47] *See* 28 U.S.C. section 1746 and Federal Rule of Civil Procedure 56 (c)(1).

The observed infirmities of local restriction admission rules have real-world significance for federal taxpayers facing an experience in federal court and for any lawyer (tax or nontax) with a federal practice that crosses state lines. It is especially important for federal tax litigators to appreciate these possible infirmities as they and their clients: (1) chart a course through and among the three available judicial forums potentially available in the wake of unsuccessful administrative proceedings before the IRS; and (2) respond to a civil or criminal suit commenced in federal district court by the Justice Department's Tax Division.

I hope that this article's insights and arguments help taxpayers litigate their federal tax disputes more efficiently and economically using expert tax counsel of their choice, unencumbered by local rules that purport to require that their counsel, authorized to practice federal tax law nationally and otherwise manifestly fit for admission, be an enrolled member of the bar of the state in which the federal district court sits. ■