EMPLOYMENT LAW — LEGAL PROFESSION — SECOND CIRCUIT HOLDS THAT DOCUMENT REVIEW IS NOT PER SE PRACTICE OF LAW UNDER THE FLSA. — *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, No. 14-3845-cv, 2015 WL 4476828 (2d Cir. July 23, 2015).

Legal professionals share a distinct interest in the precise — and preferably eloquent — use of language. One might thus expect judges and lawyers to have an easy time articulating what exactly it means to "practice the law." But recent litigation involving contract attorney compensation suggests otherwise. Last summer, in *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*,[1] the Second Circuit held that document review was not per se within North Carolina's definition of "practicing law."[2] This holding reversed the Southern District of New York, which had reached the opposite result when interpreting the same state statute and guidance document.[3] In overturning the district court, the court of appeals determined that the practice of law in North Carolina necessarily includes exercising "at least a modicum of independent legal judgment."[4]

Regardless of the practical consequences,[5] the Second Circuit's interpretation of the relevant regulation raises several concerns. First, the court's borrowing of state law to flesh out a federal *regulation*, rather than a statute, carries the same effect as an impermissible agency subdelegation. Second, the court applied the state definition out of context, which squares poorly with the articulated legal standard and precedent. Third, the resulting interpretation frustrates the Department of Labor's (DOL's) regulatory scheme because it arguably renders the interpreted regulation superfluous. But the court does not own all of the blame. Indeed, this puzzling interpretation follows an equally puzzling promulgation. Taken together, these issues evince a need for clarification or revision from the DOL.

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[1] No. 14-3845-cv, 2015 WL 4476828 (2d Cir. July 23, 2015).

[2] *Id.* at *6.

[3] *Id.* at *4–6.

[4] *Id.* at *6.

[5] Some legal staffing firms already pay overtime, but they reduce the regular rate to make up the cost. Chris D. Birkel, *The Growth and Importance of Outsourced E-Discovery: Implications for Big Law and Legal Education*, 38 J. LEGAL PROF. 231, 270–71 (2014). At conference in the district court, Judge Sullivan mused that "[t]here might be full-fledged associates at Skadden who are hoping that document review, when it's 90 percent of what you do, is enough to get you covered by the Fair Labor Standards Act, because they get time and a half on a salary that's 160 a year, right?" Transcript of Conference Held on Oct. 31, 2013 at 14, Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, No. 13-cv-5008, 2014 WL 4626228 (S.D.N.Y. Sept. 16, 2014) [hereinafter Conference Transcript]. A separate Fair Labor Standards Act exemption for highly compensated employees makes this specific scenario unlikely. *See* 29 C.F.R. § 541.601 (2015). But junior attorneys working in smaller markets could conceivably have valid claims under this holding.

The Fair Labor Standards Act[6] (FLSA) guarantees employees compensation of at least one and a half times their regular hourly rate for every hour worked in excess of forty per week.[7] But the FLSA also makes available a mélange of exemptions to the wage and hour requirements.[8] Importantly, the FLSA does not guarantee overtime pay to those "employed in a bona fide . . . professional capacity."[9] Instead of defining that term itself, Congress explicitly delegated the job to the Secretary of Labor.[10] According to the Secretary's rules, "[a]ny employee who is the holder of a valid license or certificate permitting the practice of law . . . and is actually engaged in the practice thereof" qualifies as an exempt professional.[11]

During the fifteen months at issue in this case, David Lola "reviewed documents for Skadden[, Arps, Slate, Meagher & Flom LLP (Skadden)] in connection with a multi-district litigation pending in the United States District Court for the Northern District of Ohio."[12] Lola had a California Bar license, but was working for Tower Legal Staffing, Inc. (Tower) in North Carolina.[13] He described his work as "extremely routine [in] nature," consisting only of "(a) looking at documents to see what search terms, if any, appeared in [them], (b) marking those documents into . . . categories predetermined by [Tower and Skadden], and (c) . . . drawing black boxes to redact portions of certain documents based on specific protocols."[14] He "routinely worked 45–55 hours per week" for "$25 per hour."[15] Thinking himself covered by the FLSA and hoping to get his overtime wages, Lola brought a collective action against Skadden and Tower.[16] In light of the regulation mentioned above, Lola's claim depended on the defendants' inability to prove that Lola was "actually engaged in the practice" of law.[17]

Skadden moved to dismiss the case for failure to state a claim.[18] Judge Sullivan of the Southern District of New York granted the mo-

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6 29 U.S.C. §§ 201–219 (2012).

7 *See id.* § 207(a)(1).

8 *See id.* § 213, *amended by* Pub. L. No. 113-277, 128 Stat. 2995 (2014).

9 *Id.* § 213(a)(1).

10 *See id.*

11 29 C.F.R. § 541.304(a)(1) (2015).

12 Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, No. 13-cv-5008, 2014 WL 4626228, at *1 (S.D.N.Y. Sept. 16, 2014).

13 *Id.* at *1 & n.2.

14 First Amended Complaint at 5, *Lola*, 2014 WL 4626228 (No. 13-cv-5008).

15 *Id.* at 6.

16 *See Lola*, 2014 WL 4626228, at *1–2.

17 29 C.F.R. § 541.304(a)(1) (2015). Courts treat the 29 U.S.C. § 213 exemptions as affirmative defenses, *see, e.g.*, *In re* Novartis Wage & Hour Litig., 611 F.3d 141, 150 (2d Cir. 2010), *abrogated on other grounds by* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012), thus placing the burden of proof on Skadden and Tower in this case.

18 *Lola*, 2014 WL 4626288, at *1.

tion.[19] He first reasoned that state law definitions, rather than a judge-made federal standard, must elucidate the term "practice of law."[20] He then held that, among the various options, North Carolina's law governed because that is where Lola worked.[21] Finally, Judge Sullivan found that document review was one of several "legal support services," the provision of which constitutes practicing law in North Carolina.[22] This finding meant that Lola's labor was per se exempt, and he therefore had not stated a valid claim for relief.[23]

The Second Circuit reversed.[24] Writing for a unanimous panel, Judge Pooler[25] explained why the facts as alleged supported a valid claim for relief under the FLSA. First, the court of appeals agreed with the lower court that looking to a state definition of "practice of law" was preferable to articulating a federal common law standard.[26] In so doing, the court relied on the Supreme Court's guidance in *Kamen v. Kemper Financial Services, Inc.*[27] According to *Kamen*, "a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand."[28] The court should default to state law unless doing so "would frustrate specific objectives of the federal program[]."[29] This preference for state law is especially important "in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards."[30] The Second Circuit reasoned that "there is no federal law governing lawyers" because "[r]egulating the 'practice of law' is traditionally a state endeavor."[31] The court also pointed to a 1949 DOL report that evinced the agency's understanding that states govern the legal profession.[32] Thus, the case for state law seemed clear and persuasive.

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19 *Id.*

20 *Id.* at *4–5.

21 *Id.* at *7–10. The court considered four possibilities: "North Carolina (where Lola worked), Ohio (where the MDL Litigation was pending), California (where Lola apparently was licensed), or New York (where Defendants reside)." *Id.* at *7.

22 *Id.* at *12; *see also id.* at *10–14.

23 *Id.* at *14.

24 *See Lola*, 2015 WL 4476828, at *6.

25 Judge Pooler was joined by Judges Lohier and Droney.

26 *See Lola*, 2015 WL 4476828, at *2.

27 500 U.S. 90 (1991).

28 *Id.* at 98.

29 *Id.*

30 *Id.*

31 *Lola*, 2015 WL 4476828, at *3.

32 *See id.*

The Second Circuit then affirmed the district court's choice of North Carolina law as the most appropriate among the state options. Looking for the "jurisdiction [with] the greatest interest in the litigation,"[33] the court noted Lola's resident status and the state's "strong interest in making sure Lola is fairly paid" as points favoring North Carolina.[34] This approach comported with the *Restatement (Second) of Conflict of Laws*, which favors the jurisdiction in which services are rendered as delimiting rights under a contract for services.[35]

But the Second Circuit disagreed with Judge Sullivan's interpretation of the North Carolina definition. As the court noted,[36] North Carolina essentially defines the term "practic[ing] law" as "performing any legal service,"[37] and likewise prohibits the unlicensed tendering of "legal services."[38] The court turned to a formal opinion issued by the North Carolina State Bar Ethics Committee for further elucidation.[39] Where Judge Sullivan had read the very same ethics opinion to include document review as a per se legal service within the meaning of the statute, the Second Circuit interpreted the ethics opinion to "strongly suggest[] that inherent in the definition of 'practice of law' in North Carolina is the exercise of at least a modicum of independent legal judgment."[40] The court found further support in two North Carolina cases concerning the unauthorized practice of law, as well as opinions from courts in Nevada, Colorado, Oregon, Illinois, and New York suggesting that "the exercise of some legal judgment [is] an essential element of the practice of law."[41] Noting that "[t]he parties themselves agreed . . . that an individual who . . . undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law," the court held that the facts as pleaded stated a valid claim.[42] It vacated and remanded the case.[43]

The Second Circuit's application and subsequent interpretation of the North Carolina definition of "practic[ing] law" raises several concerns. First, if the DOL actually intended to link 29 C.F.R. § 541.304 with preexisting state regulations, it would likely have committed an impermissible subdelegation. But the court overstated the connection

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[33] *Id.* at *4 (quoting *In re* Koreag, Controle et Revision S.A., 961 F.2d 341, 350 (2d Cir. 1992)).

[34] *Id.*

[35] *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 (AM. LAW INST. 1971)).

[36] *See id.* at *4–5.

[37] N.C. GEN. STAT. § 84-2.1 (2013).

[38] *Id.* § 84-4.

[39] *See Lola*, 2015 WL 4476828, at *5.

[40] *Id.* at *6. Certifying the question to the North Carolina courts was not an option. *See id.* n.2.

[41] *See id.* at *6.

[42] *Id.*

[43] *See id.* at *7.

between the regulation's requirement that an employee be licensed to practice law and the requirement that he or she "is actually engaged" in that practice.[44] The link is implicit at best and may not exist at all. Furthermore, the court's importation of North Carolina's definition does not square neatly with prevailing federal common law jurisprudence because it takes the definition out of context and creates inconsistencies within § 541. These issues, in addition to the DOL's own peculiar promulgation, evince a need for agency clarification or revision.

The FLSA commits the power to define an "employee employed in a bona fide . . . professional capacity" to the Secretary of Labor.[45] Nevertheless, the Second Circuit concluded that it should incorporate the regulatory regimes of the states absent guidance from the DOL.[46] This is indeed a well-settled interpretive rule of federal common law.[47] But the court did not consider the implications of applying this presumption to a federal *regulation* rather than a *statute*. Applying state law in this instance creates a problem because had the DOL deliberately incorporated the state definitions, it likely would have committed an impermissible subdelegation of agency authority. In *United States Telecom Ass'n v. FCC*,[48] the D.C. Circuit described the relevant case law as "strongly suggest[ing] that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization."[49] Indeed, the Second Circuit has recently "agree[d] with the D.C. Circuit that, absent statutory authorization, such delegation [to an outside entity] is impermissible."[50] States and state agencies, including state bar committees, clearly count as "outside entities."[51] The courts have often contended that borrowing state law to fill a gap in federal statutes is justifiable because Congress legislates against the backdrop of state law.[52] But where, as here, a delegation would be permissible for Congress but impermissible for a federal agency, this practice of borrowing state law is quite suspect.

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[44] 29 C.F.R. § 541.304(a)(1) (2015).

[45] 29 U.S.C. § 213(a)(1) (2012), *amended by* Pub. L. No. 113-277, 128 Stat. 2995 (2014).

[46] *See Lola*, 2015 WL 4476828, at *3–4. The district court went so far as to say that "the DOL rule itself explicitly links the term 'practice of law' with state licensing requirements." Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, No. 13-cv-5008, 2014 WL 4626228, at *5 (S.D.N.Y. Sept. 16, 2014).

[47] *See Lola*, 2015 WL 4476828, at *3.

[48] 359 F.3d 554 (D.C. Cir. 2004).

[49] *Id.* at 565.

[50] *See* Fund for Animals v. Kempthorne, 538 F.3d 124, 132 (2d Cir. 2008).

[51] In fact, *U.S. Telecom* dealt specifically with a subdelegation to state agencies. *See* 359 F.3d at 564.

[52] *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98–99 (1991); United States v. Standard Oil Co., 332 U.S. 301, 308–09 (1947); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 662–63, 665, 748–50 (7th ed. 2015).

The subdelegation issue aside, the Second Circuit somewhat overstated the textual connection between the two requirements of the DOL's regulation: licensing and actual engagement in the practice of law. The licensure requirement obviously recognizes the fact that the states issue law licenses. But though the language of "actual engage[ment]" appears in the same sentence as the license requirement, "actual engage[ment]" refers back to the activity and not the state-supplied credential.[53] Had the DOL wanted to link the two requirements, it could have easily adopted a more straightforward and familiar articulation. Perhaps most naturally, the DOL could have repeated the format of the other professional employee exemptions[54] and defined an exempt employee as one whose primary duty is the performance of work requiring a law license. Combined with the prospect of an impermissible subdelegation, this tenuous connection between the two requirements undermines the seemingly clear choice to use state law to elucidate the meaning of "practice of law."

In addition, the state definitions do not cleanly apply to the FLSA rules in the manner that the Supreme Court's federal common law jurisprudence envisions. The district court correctly observed that state regulation of the legal profession extends to setting eligibility criteria for future lawyers, promoting professional ethics, and defining and punishing law practice by nonlawyers.[55] In short, the state regulations set minimum *quality* standards for legal *services*. The FLSA, on the other hand, sets minimum *compensation* standards for *labor*.[56] Thus, when the DOL refers to one "actually engaged in the practice" of law, it most naturally invokes an attorney's labor, rather than his work product. Even if much of the attorney's labor goes into fashioning work product, the labor and the work product are not coextensive, and the definition of one does not neatly apply to the context of the other.[57]

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53 The court of appeals may not have seen an explicit link, but it clearly thought that state licensing informed both elements. *See Lola*, 2015 WL 4476828, at *6.

54 *See* 29 C.F.R. §§ 541.300(a)(2), 541.301(a), 541.302(a), 541.303(a) (2015).

55 Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, No. 13-cv-5008, 2014 WL 4626228, at *4 (S.D.N.Y. Sept. 16, 2014).

56 *See* 29 U.S.C. § 202 (2012) (finding "that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" causes various social and economic ills).

57 Indeed, the parties at conference in the district court discussed how photocopying is part of attorney labor. *See* Conference Transcript, *supra* note 5, at 8 ("Lawyers photocopy all the time."). This distinction between labor and work product is why many attorneys must record and justify their billable hours as a subset of their work time. *See generally* Julius J. Suarez, *The Billable Hour Exception: The Law Firm's Affirmative Defense to Employment Liability*, 12 RUTGERS BUS. L. REV. 97, 100–08 (2015) (discussing the history and basic features of the billable hour model). Pressures on the cost of billable time have also contributed to the advent of legal support staff in the past half century. *See* Susan Mae McCabe, *A Brief History of the Paralegal Profession*, MICH. B.J., July 2007, at 18, 18. Judge Sullivan noted as much. *See Lola*, 2014 WL 4626228, at *13–14.

This situation sharply contrasts with the example the Supreme Court set in *De Sylva v. Ballentine*,[58] which the Second Circuit discussed at length. In *De Sylva*, the Supreme Court considered whether the term "children" as it appears in the Copyright Act should have one national definition or should take on local meaning.[59] When the Court opted for the latter, it did so only after deliberately looking for the *appropriate* definition within the state statutes: the definition from probate law.[60] The Court recognized that the state defined the parent-child relationship in this context for the very same purpose that the Copyright Act did: to establish property rights.[61] Other leading precedents in federal common law jurisprudence share this characteristic.[62] Thus, the *Lola* court strained to conclude that it was importing an *appropriate* definition from state law, rather than simply an available definition.

The Second Circuit's interpretation also seems at odds with the regulatory scheme. As the court pointed out, *Kamen* calls for a state standard "unless application of the particular state law in question would frustrate specific objectives of the federal program[]."[63] Here, the DOL defined "bona fide" professional employees through five separate regulations. Four of those regulations require a factual inquiry into the "primary dut[ies]" of the employee.[64] The special regulation for doctors and lawyers omits and explicitly waives this requirement.[65] Likewise, the exemption for learned professionals specifically requires "consistent exercise of discretion and judgment,"[66] whereas the regulation for doctors and lawyers does not.[67] The court's determination that practicing law requires exercising "at least a modicum of independent legal judgment"[68] necessitates a fact-intensive inquiry aimed at finding work of a particular intellectual character.[69] But § 541.304 does not clearly require such an inquiry. Indeed, if this is the true meaning of § 541.304, it is unclear why it exists at all.[70] Under the

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[58] 351 U.S. 570 (1956).

[59] *See id.* at 580–81.

[60] *See id.* at 581–82.

[61] *See id.*

[62] *See* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991) (corporate governance); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (priority of creditor interest); Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946) (real property).

[63] *Lola*, 2015 WL 4476828, at *3 (quoting *Kamen*, 500 U.S. at 98).

[64] *See* 29 C.F.R. §§ 541.300(a)(2), 541.301(a), 541.302(a), 541.303(a) (2015).

[65] *See id.* § 541.304(d).

[66] *Id.* § 541.301(b).

[67] *See id.* § 541.304.

[68] *Lola*, 2015 WL 4476828, at *6.

[69] The inquiry demands discovery, hence the Second Circuit's denial of the motion to dismiss.

[70] Again, Judge Sullivan recognized this issue in his opinion. *See* Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, No. 13-cv-5008, 2014 WL 4626228, at *13 (S.D.N.Y. Sept. 16, 2014).

court's articulation, little — if anything — sets § 541.304 apart from the learned professionals exemption, which is also available to lawyers.[71] It seems strange that an interpretation of a regulation that renders it superfluous could be found not to "frustrate specific objectives of the federal program[]."[72]

If the need for § 541.304 is unclear under the court's interpretation, the story of its genesis emphatically supports the case for agency interpretation or revision. The language of § 541.304 first appeared in the second promulgation of Part 541, which issued in 1940. At that time, the DOL added the language of what is now § 541.304 to the singular "professional employees" regulation, but only to waive minimum salary requirements for doctors and lawyers.[73] There the language stayed for sixty-four years, withstanding numerous statutory and regulatory alterations to the overtime exemptions. Then, in a 2003 notice of proposed rulemaking, the DOL announced its intention to consolidate and move "[p]rovisions of the current regulations in §§ 541.3 and 541.314 that provide an exception to the salary or fee requirements for physicians and lawyers . . . to proposed § 541.304."[74] According to the DOL, it did "not intend any substantive changes."[75] The next year the DOL noted that it had "received few comments on [the new § 541.304] and [did] not believe any substantive changes to this section [were] necessary."[76] But the final regulations made the longstanding proviso its own full-fledged definition of a "professional." Why this occurred remains a mystery, but it doubtless contributes to the novelty of Lola's claims and the court's interpretive woes.

Thus, *Lola* presents a troubling reading of an already troublesome regulation. Taken together, the above points toward a need for the DOL to clarify or otherwise revise § 541.304 in the near future.

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[71] *See* 29 C.F.R. § 541.301(d) ("[T]he learned professional exemption is available to the occasional lawyer who has not gone to law school . . . ."). Importantly, the Second Circuit's interpretation of North Carolina law would apply to most, if not all, state statutes in this area. *See* 7 AM. JUR. 2D *Attorneys at Law* § 1 (2007) (compiling state cases that similarly define "practice of law"). Indeed, as noted earlier, the Second Circuit also relied on states other than North Carolina in making its interpretation.

[72] Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)).

[73] *See* Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman," 5 Fed. Reg. 4077, 4077–78 (Oct. 15, 1940) (codified at 29 C.F.R. § 541 (Supp. 1940)).

[74] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15,560, 15,568 (proposed Mar. 31, 2003) (codified as amended at 29 C.F.R. § 541 (2015)).

[75] *Id.*

[76] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,158 (Apr. 23, 2004) (codified as amended at 29 C.F.R. § 541).