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Constitutional Law: Attorney Not Entitled to Hearing upon Denial of Admission Pro Hac Vice

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RECENT CASES

CONSTITUTIONAL LAW: ATTORNEY NOT ENTITLED TO HEARING UPON DENIAL OF ADMISSION *PRO HAC VICE*

*Leis v. Flynt*¹

The grand jury of Hamilton County, Ohio, indicted Larry Flynt and *Hustler* magazine, and charged them with violation of an Ohio obscenity statute.² On February 25, 1977, Herald Fahringer and Paul Cambria, attorneys for Flynt and *Hustler* respectively, entered an appearance by local counsel as attorneys of record in the pending criminal action. Fahringer and Cambria were New York based attorneys; they were not admitted to practice in Ohio.³ On March 9, 1977, the judge of the court of common pleas informed local counsel that neither of the out-of-state attorneys would be allowed to represent Flynt or *Hustler*. The judge did not grant a hearing and gave no justification for denial of their *pro hac vice* admissions.⁴ The attorneys brought a mandamus action in the Supreme Court of Ohio seeking to overturn the denial of admission. The Ohio Supreme Court dismissed the action with no explanation, but on motion by plaintiffs the judge who had originally denied the admission was removed from the case.⁵ The attorneys instituted an action in federal district court seeking to enjoin the prosecution of Flynt and *Hustler* until they could be given a hearing on the denial of their admission. The district court held that the attorneys had been denied procedural due process requiring a hearing,

1. 99 S. Ct. 698 (1979).

2. OHIO REV. CODE ANN. § 2907.31 (1965) (prohibits the dissemination of harmful materials to minors).

3. Fahringer and Cambria were admitted to the permanent practice of law in New York, specializing in criminal defense and obscenity law. In 1975 Fahringer received the Outstanding Practitioner of the Year award from the New York Bar Association. Cambria graduated first in his class from the University of Toledo-Ohio Law School. 99 S. Ct. 698, 705 n.14 (Stevens, J., dissenting).

4. The two out-of-state attorneys appeared in person for the first time on April 8, 1979, at which time their requests for admission were summarily denied. The judge of the court of common pleas reportedly was quoted in a newspaper as referring to Fahringer as a "fellow traveler" of pornographers. 99 S. Ct. 698, 703 n.3 (Stevens, J., dissenting).

5. The Ohio Supreme Court found no evidence of bias or prejudice, but stated that trial before a different judge would avoid even the appearance of impropriety. The new judge ruled that the Ohio Supreme Court's dismissal of the mandamus action bound him to deny admission also. 99 S. Ct. at 700.

adequate advance notice, and a specification of alleged misconduct.⁶ The Sixth Circuit affirmed,⁷ and the State of Ohio appealed to the United States Supreme Court. With three justices dissenting,⁸ the Court held that attorneys who were not admitted to the practice of law in Ohio did not possess a property interest under the due process clause of the fourteenth amendment, and therefore were not entitled to a hearing when applying for permission to appear *pro hac vice*.

The holding in *Flynt* severely restricts the multistate practice of law. The former practice of requiring a showing of good cause for denial of *pro hac vice* admissions will no longer be applicable in most situations.⁹ This note will analyze the Court's decision in *Flynt* and will discuss alternative courses of action for an attorney denied *pro hac vice* admission in an arbitrary or capricious manner.

An appearance *pro hac vice* (for this particular occasion) was recognized as early as 1629 by the English Courts of Common Pleas.¹⁰ It was used extensively in the United States as early as 1876.¹¹ Today, an appearance *pro hac vice* involves the application by an out-of-state attorney for admission to try a single lawsuit in a jurisdiction where he is not admitted to the permanent practice of law. Although a majority of the present federal and state rules on *pro hac vice* are couched in language making the power to admit an attorney discretionary,¹² prior to *Flynt* there had been no reported holdings permitting a judge to deny a *pro hac vice* application

6. See *Flynt v. Leis*, 434 F. Supp. 481 (S.D. Ohio 1977).

7. See *Flynt v. Leis*, 574 F.2d 874 (6th Cir. 1978).

8. Justice White did not join the dissent and would have granted certiorari and set the case for oral argument.

9. The Fifth Circuit has held that a federal district court cannot set up *pro hac vice* rules so as to abridge the rights of civil rights litigants to use federal courts. See *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968) (a district court can refuse admission only upon a showing of unethical conduct); *Lefton v. City of Hattiesburg*, 333 F.2d 280, 285 (5th Cir. 1965). See also *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950); Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, 4 HARV. C.R.-C.L. L. REV. 65 (1968).

The Sixth Circuit in *Flynt* noted that an out-of-state attorney could not be refused *pro hac vice* admission on grounds of race, or other constitutionally forbidden reasons. However, it is impossible to know whether a court has denied admission based on forbidden reasons when the court is not required to grant a hearing or give any justification for its decision. 574 F.2d at 878.

10. See *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950); *Thursby v. Warren*, 79 Eng. Rep. 738 (1629); 6 HOLDSWORTH, A HISTORY OF ENGLISH LAW 435-36, 453 (2d ed. 1937); MERRIFIELD, THE LAW OF ATTORNIES 41-44 (1830).

11. See *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950); *In re Mosness*, 39 Wis. 509 (1876); 1 THORNTON, A TREATISE ON ATTORNIES AT LAW § 22 (1914).

12. See A. KATZ, ADMISSION OF NONRESIDENT ATTORNEYS PRO HAC VICE 1 (Research Contributions of the American Bar Association, No. 5, 1968). See also Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 703 (1975); Note, *Easing Multistate Practice Restrictions—"Good Cause" Based Limited Admission*, 29 RUT. L. REV. 1183, 1200 (1976).

arbitrarily. In cases where attorneys had been denied admission, the courts had given the attorneys a hearing followed by a statement of reasons for the denial.¹³

It has long been recognized that states have the power to exercise considerable control over out-of-state attorneys.¹⁴ Three justifications generally have been given. The first is that a state has a duty to ensure that attorneys practicing within its borders are competent.¹⁵ Secondly, limiting appearances of out-of-state attorneys makes easier the administration of justice because local attorneys are more readily subject to service of process and disciplinary proceedings.¹⁶ The third purpose, until recently con-

13. See, e.g., *In re Rappaport*, 558 F.2d 87, 90-91 (2d Cir. 1977) (violation of the Code of Professional Responsibility); *Thomas v. Cassidy*, 249 F.2d 91 (4th Cir. 1957), cert. denied, 355 U.S. 958 (1958) (attorney misconduct); *Bundy v. Rudd*, 581 F.2d 1126 (5th Cir. 1978), cert. denied, 99 S. Ct. 1992 (1979) (attorney misconduct); *United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976), cert. denied, 429 U.S. 1104 (1977) (gross misconduct); *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975) (gross violation of Code of Professional Responsibility required); *Ross v. Reda*, 510 F.2d 1172 (6th Cir.), cert. denied, 423 U.S. 892 (1975) (violation of the Code of Professional Responsibility); *Munoz v. United States District Court*, 446 F.2d 434 (9th Cir. 1971) (arbitrary denial of *pro hac vice* reversed); *Silverman v. Browning*, 414 F. Supp. 80 (D. Conn.), *aff'd mem.*, 429 U.S. 876 (1976); *Silverman v. Browning*, 359 F. Supp. 173 (D. Conn. 1972), *aff'd mem.*, 411 U.S. 941 (1973); *In re Belli*, 371 F. Supp. 111 (D.D.C. 1974) (attorney misconduct); *Norfolk & Western Ry. v. Beatty*, 400 F. Supp. 234 (S.D. Ill.), *aff'd mem.*, 423 U.S. 1009 (1975) (frequency of practice); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969); *Brown v. Wood*, 257 Ark. 252, 258, 516 S.W.2d 98, 101-02 (1974), cert. denied, 421 U.S. 963 (1975) (frequency of practice); *McKenzie v. Burris*, 255 Ark. 330, 334, 500 S.W.2d 357, 366 (1973); *New Jersey v. Kavanaugh*, 52 N.J. 7, 18, 243 A.2d 225, 231, cert. denied, 393 U.S. 924 (1968) (violation of Code of Professional Responsibility); *State v. Ross*, 36 Ohio App. 2d 185, 188, 304 N.E.2d 396, 399 (1973), *appeal dismissed*, 415 U.S. 904 (1974); *Smith v. Brock*, 532 P.2d 843 (Okla. 1975) (attorney misconduct). See also Annot., 33 A.L.R. Fed. 799 (1977).

14. See, e.g., *In re Griffiths*, 413 U.S. 717 (1973); *Sperry v. Florida*, 373 U.S. 379 (1963); *Martin v. Walton*, 368 U.S. 25 (1961); *Koningsberg v. State Bar*, 366 U.S. 36 (1961); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *In re Lockwood*, 154 U.S. 116 (1894); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *Norfolk & Western Ry. v. Beatty*, 400 F. Supp. 234 (S.D. Ill.), *aff'd mem.*, 423 U.S. 1009 (1975); *Brown v. Supreme Court*, 359 F. Supp. 549 (E.D. Va.), *aff'd mem.*, 414 U.S. 1034 (1973); *Ginsberg v. Kovrak*, 392 Pa. 143, 139 A.2d 889, *appeal dismissed*, 358 U.S. 52 (1958). See also Note, *Easing Multistate Practice Restrictions—"Good Cause" Based Limited Admission*, 29 *RUT. L. REV.* 1183 (1976); cases cited note 13 *supra*.

15. See *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

16. See *Brown v. Wood*, 257 Ark. 252, 516 S.W.2d 98 (1974), cert. denied, 421 U.S. 963 (1975); *McKenzie v. Burris*, 255 Ark. 330, 344, 500 S.W.2d 357, 366 (1973) (economic protection of the local bar is a legitimate state interest); Note, *Appearance by Out-of-State Counsel—Connecticut Pro Hac Vice Rule Held Constitutional*, 9 *CONN. L. REV.* 136 (1976); Note, *Easing Multistate Practice Restrictions—"Good Cause" Based Limited Admission*, 29 *RUT. L. REV.* 1183, 1186 (1976).

sidered illegitimate by most courts, is the protection of the economic interests of the local bar.¹⁷ In the *pro hac vice* area the usual practice was that an attorney would be denied admission for gross misconduct,¹⁸ for violation of the Code of Professional Responsibility,¹⁹ or although rarely stated, because the attorney was actually engaging in the regular practice of law in a state where he was not admitted to permanent practice.²⁰ In the latter situation, if the attorney desired to practice law regularly in that state, he would be compelled to apply for permanent admission to the bar.

The district court in *Flynt* recognized that none of the above mentioned grounds for refusal of admission were present. The court noted that both attorneys were competent and qualified, and that no disciplinary action had been taken against either of them by any bar association.²¹ It found a legitimate claim of entitlement to due process because the attorneys initially had been granted *pro hac vice* admission by the trial court judge. Relying upon *Paul v. Davis*²² and *Board of Regents v. Roth*,²³ the district court stated that "when an 'interest' has been initially recognized . . . by state law . . . a deprivation or restriction of that 'interest' which results in an injury to reputation requires procedural safeguards."²⁴ Although the district court utilized this rationale in holding that the attorneys' due process rights had been violated, it went on to state that the right to a hearing was the same whether an attorney was seeking initial admission or whether admission had been granted and subsequently rescinded.²⁵

The Sixth Circuit concurred with the district court. It noted that while they could "not define with certainty the status of the attorneys at the moment they were dismissed,"²⁶ the Ohio court had approved their counsel of record forms at *Flynt's* arraignment. The court posited that after recognition of the attorneys as attorneys of record, the judge could not withdraw permission to appear without a meaningful hearing, the application of a reasonably clear legal standard, and a rational basis for their exclusion.

The Supreme Court disagreed with the lower courts as to the status of the attorneys. The Court believed that the plaintiffs had not been admitted as attorneys of record in the case.²⁷ It held that attorneys applying for

17. See authorities cited note 16 *supra*.

18. See generally cases cited note 13 *supra*.

19. *Id.*

20. *Id.*

21. See note 3 *supra*.

22. 424 U.S. 693, 709 (1976).

23. 408 U.S. 564, 577 (1972).

24. *Flynt v. Leis*, 434 F. Supp. 481, 484 (S.D. Ohio 1977).

25. *Id.* at 486.

26. *Flynt v. Leis*, 574 F.2d 874, 879 (6th Cir. 1978).

27. 99 S. Ct. at 699. The *Flynt* Court ruled that the form used by the plaintiffs in the Ohio court did not constitute an application *pro hac vice*, and did not alert the court that they were not admitted to practice in Ohio. The Court reasoned that because the judge was not aware that they were out-of-state attorneys, he never recognized their *pro hac vice* admissions. However, the attorneys had ap-

admission *pro hac vice* in state or federal courts are not entitled to procedural due process under the fourteenth amendment. Three major issues are raised by implication by the *Flynt* decision, but not definitively resolved by the opinion. First, the Court somewhat summarily dispatched the attorneys' claim to a right of due process. The Court noted that no legitimate claim of entitlement that would afford the attorneys the right to procedural due process could be found under current state or federal law.²⁸ The fact that there were existing customs in other jurisdictions did not create a "mutually explicit [rule or] understanding"²⁹ that the attorneys would be excluded only for permissible reasons by the Ohio courts.³⁰

In *State v. Ross*,³¹ however, an Ohio appellate court held that it was an abuse of discretion to arbitrarily deny admission to out-of-state attorneys. In that case the court did not have to deal with the issue of denial of a hearing because the attorney had been given a hearing. It was thus arguable that Ohio had created an understanding with foreign attorneys that they

peared before the same court in the past, and it was aware that they were not admitted in Ohio. See note 4 *supra*. The Fifth Circuit in *Bundy v. Rudd*, 581 F.2d 1126, 1131 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1992 (1979), agreed with the district court as to the attorneys' status. It also believed that the attorneys in *Flynt* had been admitted *pro hac vice* and were later terminated by the Ohio court with no hearing.

28. The Constitution does not create property interests. They must be derived from an independent source such as state or federal law. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978); *Paul v. Davis*, 424 U.S. 693, 709 (1976); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Goss v. Lopez*, 419 U.S. 565, 572-74 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court has also recognized the existence of an unwritten common law property interest. See *Perry v. Sindermann*, 408 U.S. 593 (1972). Such an interest may be found, although not written in any federal or state statute. The Sixth Circuit alluded to the existence of an unwritten common law interest when it discussed the prevalence and history of *pro hac vice* practice in American courts. However, any such interest was ignored by the court in *Flynt*.

29. 99 S. Ct. at 701. See also *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (where there is a mutual understanding that will support a claim of entitlement, it is sufficient to create procedural due process rights).

30. The *Flynt* Court stated that while some courts may require a showing of good cause for denial of *pro hac vice* admission, others are under no duty to do so. It also stated that it knew of no holding creating a constitutional right by estoppel merely because an expressly discretionary state privilege had been granted generously in the past. 99 S. Ct. at 702 n.5. This reasoning may be inconsistent with the Court's decision in *Perry v. Sindermann*, 408 U.S. 593 (1972). *Perry* holds that the generous granting of a privilege in the past may give rise to a mutual understanding that it will be granted in the future. This mutual understanding would entitle a claimant to the protections of the fourteenth amendment. The Supreme Court also previously held that the practice of law is not a privilege but a right. See *Baird v. Arizona*, 401 U.S. 1 (1971); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

31. 39 Ohio App. 2d 185, 188, 304 N.E.2d 396, 399 (1973), *appeal dismissed*, 415 U.S. 904 (1974).

would not be arbitrarily denied admission.³² Support for this view is evidenced by the dissenting opinion in *Flynt* which noted that “[a] state requirement that a judge’s action in a contested matter be predicated on a permissible reason inevitably gives rise to a procedural requirement that the affected litigants have some opportunity to reason with the judge.”³³

The majority also was not persuaded that the designation of the judge’s power as “discretionary” in rules and statutes limited the power to deny *pro hac vice* appearances, holding in effect that “discretionary” is the equivalent of “arbitrary.” In fact, the term discretionary as used in rules and statutes does not generally signify that discretion can be exercised at the whim or caprice of the individual. In *Goldsmith v. United States Board of Tax Appeals*,³⁴ the Court held that a statute that appeared to be discretionary had to be construed to mean, “discretion to be exercised after fair investigation, . . . notice [and] hearing . . . as would constitute due process.”³⁵ A majority of decisions hold that a statute that employs the term “discretionary” should not be interpreted to mean that the holder of that discretion has unlimited power.³⁶ Ohio law itself refutes the proposition that a rule couched in discretionary language relieves a judge of the duty to justify an arbitrary or capricious exercise of it.³⁷

Finally, the Supreme Court, in support of the holding that a state trial judge arbitrarily can deny an attorney’s *pro hac vice* application, cited only three cases, all of which are inapposite. *Brown v. Supreme Court of Virginia*³⁸ and *Ginsberg v. Kovrak*³⁹ dealt expressly with permanent admission requirements. The third case, *Norfolk & Western Railway v. Beatty*,⁴⁰ upheld the constitutionality of a *pro hac vice* statute but did not involve an arbitrary denial of admission. In *Brown* a federal district court upheld a Virginia statute that made admission requirements for attorneys who passed the Virginia bar exam different from those for attorneys who

32. See *Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

33. 99 S. Ct. at 708. See also *Arnett v. Kennedy*, 416 U.S. 134 (1974).

34. 270 U.S. 117 (1926).

35. *Id.* at 123.

36. See *Atchison, T. & S.F. Ry. v. Jackson*, 235 F.2d 390, 393 (10th Cir. 1956) (the term discretion means sound discretion directed by reason and conscience to a just result).

37. See *State v. Ross*, 36 Ohio App. 2d 185, 188, 304 N.E. 2d 396, 399 (1973), *appeal dismissed*, 415 U.S. 904 (1974); See, e.g., *State v. Ferranto*, 112 Ohio St. 667, 676, 148 N.E. 362, 364 (1925); *Davis v. Shigley*, 88 Ohio App. 423, 425-26, 100 N.E.2d 261, 263 (1950); *Mutual Home Savings Ass’n v. Merion*, 67 Ohio App. 439, 449, 37 N.E.2d 109, 119 (1941); *Fessenden v. Fessenden*, 32 Ohio App. 16, 165 N.E. 746 (1928).

38. 359 F. Supp. 549 (E.D. Va.), *aff’d mem.*, 414 U.S. 1034 (1973), *cited in* 99 S. Ct. at 701.

39. 392 Pa. 143, 139 A.2d 889, *appeal dismissed*, 358 U.S. 52 (1958), *cited in* 99 S. Ct. at 701.

40. 400 F. Supp. 234 (S.D. Ill.), *aff’d mem.*, 423 U.S. 1009 (1975), *cited in*

99 S. Ct. at 701.

sought admission based on comity or reciprocity. The Virginia statute controlling reciprocity vested the Supreme Court of Virginia with the discretion to grant a certificate without examination. In upholding the constitutionality of the statute, the district court noted that discretion cannot be exercised in an arbitrary, unreasonable, or discriminatory manner. Thus, *Brown* is questionable as authority for *Flynt* because it deals only with permanent admission and does not sanction arbitrary exercises of discretionary power. *Ginsberg* involved similar facts and likewise is not pertinent to *Flynt*; it dealt not with an application for a single appearance in association with a local attorney, but rather with a Pennsylvania attorney who contended that because he was admitted to practice in the federal courts, he had the right to practice generally in the courts of Pennsylvania.

More nearly in point but still clearly distinguishable is the third cited authority, *Norfolk & Western Railway v. Beatty*,⁴¹ in which the Illinois *pro hac vice* statute was held constitutional. Missouri attorneys not admitted to permanent practice in Illinois were denied *pro hac vice* admission by an Illinois circuit court judge after it had been shown that they had been representing Norfolk in numerous lawsuits in Illinois courts on a continuing basis. The definition of *pro hac vice*—"for a single cause"⁴²—alone illustrates a major dissimilarity between *Norfolk* and *Flynt*. *Norfolk* is also notably distinguishable from *Flynt* because it did not involve an arbitrary denial of admission and was not disposed of on due process grounds.⁴³

The implication of *Flynt* is that an attorney who is denied *pro hac vice* admission will not be entitled to a hearing to either protest or request reasons for the denial; he will be forced to rely on a claim other than a violation of procedural due process to vindicate his own or his client's rights. Three alternative arguments may be asserted: (1) a violation of the privileges and immunities clause;⁴⁴ (2) denial of substantive due process under the fourteenth amendment;⁴⁵ or (3) a denial of his client's right to counsel under the sixth amendment.⁴⁶

41. *Id.*

42. BLACK'S LAW DICTIONARY 1131 (4th ed. 1951).

43. The attorneys in *Norfolk* relied on a violation of the privileges and immunities clause. They argued that it gave them the right to represent their client in all FELA claims pending in the Illinois courts. 400 F. Supp. at 236.

44. U.S. CONST. amend. XIV, § 1, provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

45. U.S. CONST. amend. XIV § 1, provides in part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

46. U.S. CONST. amend. VI, provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." First amendment rights of a litigant may also be violated when he is denied the attorney of his choice. See *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *Sherman, The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, 4 HARV. C.R.-C.L. L. REV. 65 (1968). See also note 9 *supra*.

*Spanos v. Skouras Theatres Corp.*⁴⁷ was the first case to recognize the existence of a claim under the privileges and immunities clause. Judge Friendly, speaking for the Second Circuit, held that under the privileges and immunities clause no state could prohibit a citizen with a federal claim or defense from engaging an out-of-state attorney. Underlying this holding was the belief that any measure necessary for the assertion of a federal claim or defense could not be restricted by state law. *Spanos* recognized that there is conflict between federal interests in the effective assertion of federal rights and defenses and state interests in regulating those who practice law within a state's borders.⁴⁸ It is not clear to what extent a federal claim or defense under the privileges and immunities clause might reach, or whether the right to an attorney exists only for advice or whether it also includes the right to have a foreign attorney participate fully in a trial.⁴⁹

Although the Court in *Flynt* noted that *Spanos* has been limited if not entirely rejected by *Norfolk*,⁵⁰ the facts in *Flynt* and *Norfolk* are at such variance that a privileges and immunities clause argument should still retain vitality especially where an attorney has been denied admission for arbitrary or discriminatory reasons.

47. 364 F.2d 161 (2d Cir.), cert. denied, 385 U.S. 987 (1966). *Spanos* recently has been affirmed by the Second Circuit. See *Bedrosian v. Mintz*, 518 F.2d 396 (2d Cir. 1975). In *Bedrosian* the complaint before the court did not involve a federal claim or defense. The court explicitly noted that *Spanos* would still be followed, but would be limited to cases involving a federal claim or defense. Therefore, *Spanos* would seem to offer no help to an attorney who is denied *pro hac vice* admission where he cannot characterize the interest as a federal claim or defense. But see 364 F.2d at 170-71, where Judge Friendly stated that what is basically a federal claim or defense may depend in part on an issue or claim which has its source in state law.

48. See Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 COLUM. L. REV. 731 (1967); Note, *Constitutional Right to Engage an Out-of-State Attorney*, 19 STAN. L. REV. 856 (1967). Judge Friendly found support for his position in the growing attorney specialization in many areas of the law, and in the increased mobility of the bar. 364 F.2d at 170.

49. See authorities cited note 48 *supra*. Commentators have interpreted "federal claim or defense" to include such areas as antitrust, income tax, patents, copyrights, trademarks, securities, and labor regulation. In the criminal area the phrase "federal defenses" has been interpreted to include illegal search and seizure, denial of equal protection, due process, deprivation of counsel during pre-arraignment proceedings, and deprivations of freedom of speech, religion, and association. For a discussion of the scope of participation allowed, see Note, *Easing Multistate Practice Restrictions—"Good Cause" Based Limited Admission*, 29 RUT. L. REV. 1183 (1976); Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276 (1967). See also *Norfolk & Western Ry. v. Beatty*, 400 F. Supp. 234 (S.D. Ill.), *aff'd mem.*, 423 U.S. 1009 (1975) (rejected *Spanos* and only allowed attorneys to advise clients). In *Spanos* the court addressed full participation subject only to valid rules of courts as to practice before them. 364 F.2d at 170.

50. 400 F. Supp. 234 (S.D. Ill.), *aff'd mem.*, 423 U.S. 1009 (1975).

The second argument that might succeed under circumstances similar to those in *Flynt* would be under the substantive due process clause of the fourteenth amendment.⁵¹ A successful application of this theory would require an attorney to prove that a discretionary *pro hac vice* statute does not pass the minimum rational basis test and is not related to any legitimate end of government. The only occasion for the Supreme Court to deal specifically with this issue has been *Martin v. Walton*.⁵² In *Martin* the Court held that a Kansas rule requiring Missouri attorneys practicing *pro hac vice* in Kansas to associate with local counsel was not beyond the allowable range of state action under the fourteenth amendment. The *pro hac vice* rule in Kansas would apply equally to all attorneys and could not result in arbitrary denials of admission. Therefore, *Martin* would have little effect on a substantive due process argument based on facts similar to *Flynt*.

The Court has summarily affirmed two recent federal district court cases holding that state *pro hac vice* statutes do not violate substantive due process.⁵³ In the first case, *Silverman v. Browning*,⁵⁴ the plaintiff was a New Jersey attorney who was denied admission *pro hac vice* in Connecticut for no apparent reason. At the time, Connecticut had no rule that clearly set forth the rights of out-of-state attorneys to practice *pro hac vice* in its courts. The federal district court held that "an inconsistent non-system existed,"⁵⁵ and that there was a violation of the fourteenth amendment under this non-rule. However, the court abstained from making any decision until Connecticut framed a proper statute that set forth the rights of foreign attorneys.

One year later the same court again abstained because the new statute had not yet been interpreted by the Connecticut courts. In voting to abstain, Judge Newman stated that the statute clearly violated substantive due process under the fourteenth amendment because it would permit ar-

51. Substantive due process deals with the constitutionality of a rule and not with the fairness of the process by which it is applied. Usually, a rule need only rationally relate to a legitimate end of government. The Court in the past has held that as long as there is some conceivable basis for a finding of a rational relation, a statute will be upheld. See *Ferguson v. Skrupka*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938). See also note 52 *infra*.

52. 368 U.S. 25 (1961). Two justices dissented noting that under *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), a state could not set up rules that have no rational connection to the fitness or capacity to practice law. Arguably an association requirement is related to these interests because it guarantees that the out-of-state attorney will be associated with a local attorney who is familiar with the procedural rules of the state.

53. Generally a summary affirmance by the Court is a disposition on the merits. See *Hicks v. Miranda*, 422 U.S. 332 (1975); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); C. WRIGHT, LAW OF FEDERAL COURTS 551 (3d ed. 1976). See also Note, 52 B. L. REV. 373 (1972).

54. 359 F. Supp. 173 (D. Conn. 1972), *aff'd mem.*, 411 U.S. 941 (1973).

55. *Id.* at 175.

bitrary rulings;⁵⁶ however, he believed that the state courts would resolve the question. This absention was affirmed by the United States Supreme Court.

The same case was litigated four years later in *Silverman v. Browning II*.⁵⁷ With Judge Newman dissenting, the court held that the recently formulated Connecticut statute did not violate substantive due process. The authority relied on by the majority in *Silverman II* had been recently affirmed by the United States Supreme Court in *Norfolk & Western Railway v. Beatty*.⁵⁸ *Norfolk* is questionable authority for the decision in *Silverman II*. It was decided by rejecting not a substantive due process contention, but by rejecting an argument that there had been a violation of the privileges and immunities clause.⁵⁹ Also, the attorneys in *Norfolk* had asked to represent their client on a regular basis in Illinois courts, while in *Silverman II* the attorney had asked only to represent his client in an isolated case in Connecticut.⁶⁰ The effect of the two cases on the vitality of a substantive due process argument is not easily discerned.⁶¹ Neither case holds that *pro hac vice* statutes that are framed in such a way as to allow arbitrary denials of admission do not violate substantive due process. Thus, the Supreme Court has not squarely ruled on a substantive due process argument based on an arbitrary or capricious denial of admission.

The case upon which an attorney asserting a fourteenth amendment claim should rely is *Schware v. Board of Bar Examiners*,⁶² holding that legislation regulating attorneys that contains general conditions of an arbitrary or discriminatory character violates the fourteenth amendment. The decision mandates good moral character and legal proficiency as the only legitimate interests a state may consider in formulating admission statutes for attorneys. The difficulty with *Schware* is that it considered only legislation which bars attorneys from the permanent practice of law. However, there appears to be no authority for the proposition that the

56. *Id.* at 179.

57. *Silverman v. Browning*, 414 F. Supp. 80 (D. Conn.), *aff'd mem.*, 429 U.S. 876 (1976).

58. 400 F. Supp. 234 (S.D. Ill.), *aff'd mem.*, 423 U.S. 1009 (1975).

59. Although a minor contention of the plaintiffs-attorneys in *Norfolk* was that there had been a violation of substantive due process, it is clear from the opinion that the case was disposed of by rejecting a privilege and immunities clause argument. *Id.* at 236.

60. Judge Newman in his dissenting opinion in *Silverman II* noted that it was error to rely on *Norfolk* because the attorneys in *Norfolk* "were asserting the right to be represented by out-of-state counsel in all the FELA cases against them." 414 F. Supp. at 88.

61. It is curious that the court in *Silverman II* relied on *Norfolk* for its decision. It noted that if the attorneys representing the railroad in *Norfolk* had been in Connecticut instead of Illinois, the Connecticut statute would have mandated their admission. This left the Connecticut court in the awkward position of relying on *Norfolk* for its decision, but stating that it would have decided *Norfolk* differently. See *Silverman v. Browning*, 414 F. Supp. 80, 87 (D. Conn.), *aff'd mem.*, 429 U.S. 876 (1976).

62. 353 U.S. 232 (1957).

Supreme Court, if confronted with an argument based on *Schwartz*, would limit the case exclusively to facts involving permanent admission.⁶³

Finally, it could be argued that an arbitrary denial of admission violates a criminal defendant's right to counsel under the sixth amendment.⁶⁴ The *Flynt* Court explicitly noted that the decision did not reach the issue of whether the constitutional rights of *Flynt* and *Hustler* had been violated.⁶⁵ The issue was inappropriate for the federal courts because the *Younger v. Harris*⁶⁶ abstention doctrine does not permit federal interference with state proceedings when the issue can be raised in the state courts. The seminal case of *Powell v. Alabama*⁶⁷ recognized that the right to counsel in criminal cases is guaranteed by the sixth amendment. The holding in *Powell* was incorporated into the fourteenth amendment and applied to the states in *Gideon v. Wainwright*.⁶⁸ In *United States v. Bergamo*⁶⁹ the Third Circuit held that admission of a criminal defendant's out-of-state attorney was mandatory in the federal courts. This holding

63. See generally Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699 (1975); Note, *Retaining Out-of-State Counsel: The Evolution of a Federal Right*, 67 COLUM. L. REV. 731 (1967); Note, *Appearances by Out-of-State Counsel—Connecticut Pro Hac Vice Rule Held Constitutional*, 9 CONN. L. REV. 136 (1976); Note, *Constitutional Law: The Power of the State to Deny an Individual a License to Practice Law*, 25 OKLA. L. REV. 559 (1972); Note, *Easing Multistate Practice Restrictions—"Good Cause" Based Limited Admission*, 29 RUT. L. REV. 1183 (1976); Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276 (1967); Note, 36 GEO. WASH. L. REV. 204 (1967); Note, 40 S. CAL. L. REV. 569 (1967).

64. The sixth amendment guarantees the right to the assistance of counsel for criminal defendants only. A more general right to counsel of one's choice in all cases, civil and criminal, has arisen from *Powell v. Alabama*, 287 U.S. 45, 69 (1932). See note 67 *infra*. The general right to counsel of one's choice has been derived from the sixth and fourteenth amendments. Although recognized by both scholars and case law, its scope is not definite. See authorities cited note 63 *supra*. For a general discussion of the right to the counsel of one's choice, see Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, 4 HARV. C.R.-C.L. L. REV. 65 (1968); Comment, *Interstate and International Practice of Law*, 31 S. CAL. L. REV. 416, 420 (1958); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 1724 n.62 (1967); Note, *Constitutional Right to Engage an Out-of-State Attorney*, 19 STAN. L. REV. 856, 867-69 (1967); Note, 4 HOUS. L. REV. 722 (1967).

65. 99 S. Ct. at 702 n.2. Three justices in the dissenting opinion believed that the sixth amendment right to counsel had been violated.

66. 401 U.S. 37 (1971). See also Comment, "Our Federalism"—*The Limitation of Younger - Samuels and Their Progeny on Federal Intervention in State Court Proceedings*, 42 MO. L. REV. 559 (1977).

67. 287 U.S. 45, 70 (1932) ("If in any case civil or criminal a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.")

68. 372 U.S. 335 (1963). See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

69. 151 F.2d 81 (3d Cir. 1946).

was later limited by *Cooper v. Hutchinson*,⁷⁰ in which the same court held that *Bergamo* exemplified only federal judicial policy of the Third Circuit that need not be followed by the states. Later, in *United States v. Dinitz*,⁷¹ the Fifth Circuit was confronted with a district court exclusion of foreign counsel chosen by a criminal defendant. In upholding the district court decision, the court held that the sixth amendment right to counsel is absolute and unqualified, but went on to note that at some point short of complete freedom of choice a criminal defendant's sixth amendment right to counsel is satisfied. In deciding a sixth amendment claim, the Supreme Court may balance the interests of the defendant against the state's interests served by denying admission of his foreign attorney. To be successful under this approach, an attorney must assert that the interests of a defendant in any criminal case far outweigh any possible state interest.⁷²

Many alternatives have been suggested to solve the myriad of problems caused by the application of *pro hac vice* rules. Attorneys who practice only locally prefer adherence to restrictive *pro hac vice* statutes. Specialists and attorneys engaged in the multistate practice of law advocate modernization of the present system. The existing rules are no longer adequate to fill the needs of the client. It will be in the best interests of all litigants that the present discretionary rules be abandoned. Canon 3 of the Code of Professional Responsibility states: "The legal profession should discourage regulations that unreasonably impose territorial restraints upon the right of a lawyer to handle the affairs of his client."

The long-term solution to problems of appearances by out-of-state attorneys must be addressed by legislative or judicial reevaluation. State and federal *pro hac vice* rules should be adopted which impose a good cause requirement for denial of admission.⁷³ If an attorney has shown good moral character and his legal proficiency is not questioned, he should be allowed to practice *pro hac vice* in any jurisdiction. An appearance should be denied only upon a showing that the foreign attorney is actually engaging in the regular practice of law in the state, committing gross misconduct, or

70. 184 F.2d 119 (3d Cir. 1950).

71. 538 F.2d 1214 (5th Cir. 1976).

72. Practical problems exist with the use of such an argument. If denial of admission *pro hac vice* violates a litigant's right to counsel of his choice, he may be required to prove that he has been prejudiced by the denial. On appeal it may be difficult if not impossible to prove that a litigant has suffered actual harm. See *Silverman v. Browning*, 414 F. Supp. 80, 88 n.1 (D. Conn.), *aff'd mem.*, 429 U.S. 876 (1976). For cases recognizing the right to counsel of one's choice, see *In re Rappaport*, 558 F.2d 87, 90 (2d Cir. 1977); *Bedrosian v. Mintz*, 518 F.2d 396 (2d Cir. 1975); *Bundy v. Rudd*, 581 F.2d 1126 (5th Cir. 1978); *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968); *Lefton v. City of Hattiesburg*, 333 F.2d 280 (5th Cir. 1964); *Ross v. Reda*, 510 F.2d 1172 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975); *United States v. Burton*, 584 F.2d 485 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 837 (1979); *Silverman v. Browning*, 359 F. Supp. 173 (D. Conn.), *aff'd mem.*, 411 U.S. 941 (1973) (dissent).

73. See cases cited note 13 *supra*.