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Due Process and Pro Hac Vice Appearances by Attorneys: Does Any Protection Remain?

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DUE PROCESS AND PRO HAC VICE APPEARANCES BY ATTORNEYS: DOES ANY PROTECTION REMAIN?

INTRODUCTION

One aspect of a state's power to regulate the practice of law is the restriction on appearances by out-of-state lawyers.[1] Although most states permit attorneys licensed in other jurisdictions to argue individual cases within their courts, these *"pro hac vice"*[2] appearances are often subject to the discretion of state trial courts. Thus, the appearances are not treated uniformly among the states,[3] resulting in the danger of "random arbitrariness and sporadic injustice" when the discretion is unlimited.[4]

The recent Supreme Court decision in *Leis v. Flynt*,[5] limiting the right of attorneys to object to this discretion of a trial court, will have significant impact on the disposition of *pro hac vice* applications. In a summary opinion, the Court refused to compel a state court to grant a hearing to two out-of-state lawyers before

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1. The United States Supreme Court has often recognized this power. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); Sperry v. Florida, 373 U.S. 96 (1963); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); *In re* Summers, 325 U.S. 561 (1945); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

2. *"Pro hac vice"* means literally "[f]or this turn; for this one particular occasion." BLACK'S LAW DICTIONARY 1091 (5th ed. 1979).

3. For a summary of *pro hac vice* practices throughout the United States, see A. KATZ, ADMISSION OF NONRESIDENT ATTORNEYS PRO HAC VICE 9-28 (Research Contributions of the American Bar Foundation No. 5, 1968). *See also* Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 703 nn.12-16 & accompanying text (1975).

4. Flynt v. Leis, 574 F.2d 874, 877 (6th Cir. 1978), *rev'd per curiam*, 439 U.S. 438 (1979). *See also* Silverman v. Browning, 414 F. Supp. 80 (D. Conn.), *summarily aff'd*, 429 U.S. 876 (1976), in which the court called Connecticut's *pro hac vice* policy "an arbitrary 'non-system rule' [which] was likely to violate a litigant's right to equal protection . . . ." 414 F. Supp. at 82. One commentator contends that current *pro hac vice* practice leaves "the way . . . wide open for discriminatory application of the concept. If the *pro hac vice* concept is to be retained, there should be assurances that it will be applied fairly, rationally and consistently." Brakel, *A Look at Multistate Practice Restrictions*, 60 A.B.A.J. 1084, 1085 (1974).

5. 439 U.S. 438 (1979).

denying them *pro hac vice* admission. *Leis* held that attorneys possess no inherent due process right to represent particular clients in states where they have not been admitted to the bar. But the Court did not determine when, if ever, a state's rules or actions regarding *pro hac vice* appearances would require the imposition of procedural due process protection.

A state's power to regulate the practice of law is not without constitutional limitations.[6] Substantive due process, for example, requires a rational connection between any requirement for admission to the bar and an applicant's fitness or capacity to practice law.[7] If a bar applicant's good character is challenged, procedural due process guarantees him a hearing to respond to the charges.[8]

Most *pro hac vice* statutes and rules, including those discussed in *Leis*,[9] fall well within the range of state legislation permitted by substantive due process.[10] Legitimate state interests served by state-imposed restrictions include:

> (1) ensuring that those performing legal services within its borders are in fact qualified to do so; (2) ensuring that those who practice within its borders are familiar with its substantive law, procedural system, and local customs; (3) ensuring the effective administration of its legal system through the availability of attorneys for the call of the docket and emergent matters; (4) ensuring the amenability of attorneys practicing within its borders to disciplinary proceedings for any unethical attorney conduct arising from such practice.[11]

As long as these interests are served by a state's restrictions on appearances by out-of-state lawyers, the restrictions will be valid

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6. "[I]n regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution." Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 6 (1964) (injunction restraining group from recommending specific lawyers to injured workers violated members' first and fourteenth amendment rights of free speech, petition and assembly).

7. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

8. Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963).

9. OHIO REV. CODE ANN. § 4705.01 (Page), OHIO SUP. CT. R. I, § 8(c), 29 Ohio St. 2d xxiv (1972), provided the basis for denial of *pro hac vice* admission to the attorneys in *Leis*. 439 U.S. at 439 n.2.

10. A state statute is valid under the due process clause of the fourteenth amendment if it serves a legitimate state interest. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 485-88 (1955).

11. Note, *Easing Multistate Practice Restrictions—"Good Cause" Based Limited Admission*, 29 RUTGERS L. REV. 1182, 1186 (1976) [hereinafter cited *Easing Restrictions*]. *See also* Comment, *Leis v. Flynt: Retaining a Nonresident Attorney for Litigation*, 79 COLUM. L. REV. 572, 584-88 (1979) [hereinafter cited as *Retaining a Nonresident Attorney*].

on their face.[12] One legitimate means of restricting such appearances is to commit the matter to the discretion of the trial judge.[13] Given this discretion, however, even though the *pro hac vice* rule is valid on its face, individual attorneys might be denied *pro hac vice* admission "for reasons that bear no rational relationship to any legitimate interests of the state in regulating the practice of law."[14]

This Note will consider attorneys' interests in *pro hac vice* representation.[15] It will examine those interests in light of past due process doctrine and the Court's implication in *Leis* that there may be a point in an out-of-state attorney's representation of a client when due process protection attaches.[16] Finally, it will attempt to determine what real protection remains for an attorney seeking admission *pro hac vice* in a state which grants its judges broad discretion over the matter.

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12. *See* Martin v. Walton, 368 U.S. 25 (1961)(per curiam), in which the Court upheld state rules requiring Kansas lawyers, who also practiced outside the state, to associate with local counsel when practicing in Kansas: "[w]e cannot disregard the reasons given by the Kansas Supreme Court for the Rules in question." *Id.* at 26.

13. Norfolk & Western Ry. v. Beatty, 400 F. Supp. 234 (S.D. Ill.), *aff'd mem.*, 423 U.S. 1009 (1975).

14. Silverman v. Browning, 414 F. Supp. 80, 89 (D. Conn.)(Newman, J., dissenting), *summarily aff'd*, 429 U.S. 876 (1976).

15. Although this Note will not address the client's interests in being represented by an out-of-state attorney, those interests are by no means negligible. Indeed, they may well be more significant than those of the attorney, since it is the client whose physical liberty is at stake.

A criminal defendant charged with a felony has an absolute right to the effective assistance of counsel. *See* Powell v. Alabama, 287 U.S. 45 (1932). It has also been held that "a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Id.* at 53. *See also* Chandler v. Fretag, 348 U.S. 3 (1954). "[T]he right to retain counsel of one's own choice, [however], is not absolute" and must sometimes yield to the public's "strong interest in the prompt, effective, and efficient administration of justice . . . ." United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 877 (1979). It follows, therefore, that a defendant's right to choose out-of-state counsel to represent him is not absolute. Faced with the legitimate state objectives served by restrictions on participation by out-of-state lawyers, the defendant's right may be legitimately curtailed. *See* text accompanying note 11 *supra*. For additional discussion of the client's rights in this context, see *Retaining a Nonresident Attorney*, *supra* note 11, at 581-88.

If a state chooses to open its doors to out-of-state attorneys, it cannot do so in a manner that violates due process or equal protection. *See* Griffin v. Illinois, 351 U.S. 12 (1956). Deprivation of these rights may result from either statutory standards or a state's course of conduct. *See* Yick Wo v. Hopkins, 118 U.S. 356, *summarily aff'g*, 429 U.S. 876 (1976).

16. *See* notes 50-54 *infra* & accompanying text.

I. LEIS V. FLYNT

Larry Flynt and Hustler Magazine, Inc., were indicted on February 8, 1977, for disseminating material harmful to children.[17] Herold Price Fahringer and Paul J. Cambria, Jr., partners in a Buffalo, New York, law firm, were named as counsel of record for Flynt and Hustler in the designation of counsel forms filed with the Ohio court. They were not members of the Ohio bar, so they retained a local attorney to act as local counsel for the defendants. Judge Rupert A. Doan, acting as judge for the purpose of designation of counsel, approved the forms on February 23, 1977.[18] On April 8, however, Judge William J. Morrissey, who had been assigned the case for trial, told Flynt: "Mr. Fahringer and Mr. Cambria are not attorneys of record in this case and will not be permitted to try this case."[19] He offered no explanation for his decision. The Ohio Supreme Court dismissed a mandamus action brought by the defendants and their attorneys to require a hearing before denial of the *pro hac vice* appearance.[20]

The defendants and their attorneys then instituted suit in the federal district court for the Southern District of Ohio, claiming that the lawyers' fourteenth amendment procedural due process rights had been violated by the denial of a hearing. The district court enjoined the prosecution of Flynt and Hustler pending a hearing on the rights of Fahringer and Cambria to represent the defendants.[21] The Sixth Circuit Court of Appeals affirmed.[22] On January 15, 1979, the Supreme Court granted certiorari, and, in a per curiam opinion from which three justices dissented, summarily

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17. The defendants had allegedly violated OHIO REV. CODE ANN. § 2907.31(A) (Page), by publishing an article which photographically portrayed "in lurid detail the violent physical torture, dismemberment, destruction or death of a human being." Indictment, cited in Flynt v. Leis, 574 F.2d at 874.

18. Whether this approval of the designation of counsel constituted admission *pro hac vice* was an important issue in the Supreme Court's decision. *See* note 54 *infra* & accompanying text.

19. Flynt v. Leis, 574 F.2d at 874.

20. The Ohio Supreme Court, however, in response to an affidavit of bias and prejudice against Judge Morrissey, reassigned the case to another judge. The court found no evidence of bias or prejudice, but transferred the case to avoid even the appearance of impropriety. Leis v. Flynt, 439 U.S. at 440. *See* ABA CODE OF JUDICIAL CONDUCT, CANONS, (No. 2 (1978)). The judge to whom the case was reassigned refused to reconsider the *pro hac vice* applications. 439 U.S. at 440.

21. Flynt v. Leis, 434 F. Supp. 481 (S.D. Ohio 1977).

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

reversed on the grounds that neither attorney enjoyed a property[23] or a liberty[24] right of constitutional dimension in *pro hac vice* representation.[25]

The Court reasoned that no interests protected by the fourteenth amendment were implicated by the state court's denial of *pro hac vice* admission, and that due process therefore did not require the lawyers to be given notice and an opportunity to be heard.[26]

Two aspects of the Court's decision limit its scope. First, the Court made a factual determination that the naming of Fahringer and Cambria as counsel of record did not constitute admission *pro hac vice*. Consequently Judge Morrissey's action was a denial—not a recission—of such admission.[27] Second, the Court did not con-

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23. By its terms, the fourteenth amendment protects three interests—life, liberty and property. These interests have been broadly construed for due process purposes. Discussing property interests, the Supreme Court explained that

> [t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. . . . Property interests . . . are created and their dimensions are defined by existing rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972). The understanding that creates a property interest must be "mutually explicit" between the state and the individual who claims entitlement; a "subjective expectancy" on the part of the individual is insufficient to create a protected property interest. Perry v. Sindermann, 408 U.S. 593, 601, 603 (1972).

Under current application of the fourteenth amendment, procedural due process must precede any "governmental action [which] deprive[s] the individual of a right previously held under state law . . . ." Paul v. Davis, 424 U.S. 693, 708 (1976). "[H]owever, where government carefully avoided creating *any* expectation of receipt or renewal upon the fulfillment or non-fulfillment of stated conditions," it could still claim that the benefit was only a privilege, since no one had any reasonable expectation of receiving it, and was not subject to due process considerations. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 515 n.4 (1978).

24. The due process notion of "liberty" has been defined as

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

25. Leis v. Flynt, 439 U.S. 438 (1979). Justices Brennan and Marshall joined Justice Stevens in a dissenting opinion. Justice White would have set the case for oral argument.

26. *Id.* at 443-44. The dissenting justices and the lower federal courts, on the other hand, identified several interests which they believed worthy of protection. *See* notes 29-31 *infra* & accompanying text.

27. *See* note 54 *infra* & accompanying text.

sider whether any interests of Flynt and Hustler were sufficient to invoke procedural due process protection.[28] The Court addressed only the narrow issue of whether a lawyer had any protected interest in being admitted *pro hac vice* to represent a client.

II. Due Process and the Lawyer

The lower federal courts in *Leis* premised their application of procedural due process on what they perceived to be a deprivation of the lawyers' property rights.[29] Justice Stevens, in his dissent, discerned two protected interests. Stevens argued that "the profession's interest in discharging its responsibility for the fair administration of justice in our adversary system" is a liberty interest worthy of due process protection.[30] Moreover, "the 'implicit promise' inhering in Ohio custom with respect to [*pro hac vice*] admissions," created a due process property interest.[31] The majority rejected this rationale by not recognizing any interests sufficient to invoke procedural due process.

The liberty and property concepts of the due process clause have been held to encompass two dimensions of an individual's in-

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28. The Court could not consider the interests of the criminal defendants because of the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), which holds that a federal court "should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. Since Flynt and Hustler could assert their alleged sixth amendment right to out-of-state counsel in an appeal of any state court conviction, they could not raise that argument in federal court to enjoin the state prosecution. 439 U.S. at 442 n.4.

29. The District Court ruled that "[t]he right of an attorney to represent a client is a property right" and that this right was "the same whether he seeks initial admission *pro hac vice* or where such admission has been granted and subsequently rescinded." 434 F. Supp. at 486. The right to initial admission, however, sounded more in "liberty," since it was based on the premise that "any arbitrary exclusion of counsel from representation of a party . . . [could deal] an irreparable blow to his professional standing and his future employment prospects." *Id.* at 484. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971). The Circuit Court also concluded that the lawyers' "interests had developed to a point where the court's action in removing them not only deprived them of their expectation of service and remuneration but also adversely reflected upon their competence and integrity." 574 F.2d at 879. The court noted that "[t]he Supreme Court has long held that the Fourteenth Amendment prohibits state imposition of an arbitrary standard or the arbitrary application of an inoffensive standard in order to deny employment opportunities to individuals." *Id.* at 877 n.9.

30. 439 U.S. at 452-53 (Stevens, J., dissenting).

31. *Id.* at 456. *See* note 42 *infra*. Stevens believed that Ohio's "promise" demonstrated its mutual understanding with "out-of-state practitioners that they are welcome in Ohio courts unless there is a valid, articulable reason for excluding them." 439 U.S. at 453. *See* note 23 *supra*.

terest in employment: the constitutional "liberty" to pursue a chosen profession and the proprietary right to hold a specific private job.[32] Pursuit of a legal career is thus a "liberty" protected by due process.[33] In *Schware v. Board of Bar Examiners*,[34] for example, the petitioner, though he had never practiced law in New Mexico, was held to have an interest in not being excluded "from the practice of law . . . in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."[35] The *Schware* Court did not decide whether the petitioner's interest was an inherent "right," since "[r]egardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons."[36] More recently, however, the Court has described the practice of law as a "*right* for one who is qualified by his learning and his moral character."[37] The liberty to pursue a profession, however, invokes due process protection only when governmental action threatens to exclude an individual entirely from pursuing his chosen profession.[38] Assuming an attorney, like Fahringer, possessed an inherent right to practice law, that right would not extend to appearances *pro hac vice* because he would still be free to pursue his legal career in a state in which he was admitted to the bar. To protect his interest in representing a particular client, he would have to demonstrate a property interest in that representation.[39]

Because "Ohio has no specific standards regarding *pro hac*

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32. Greene v. McElroy, 360 U.S. 474, 492 (1959); Allgeyer v. Louisiana, 165 U.S. 578, 589-90 (1897); Dent v. West Virginia, 129 U.S. 114, 121 (1889); Ludtke v. Kuhn, 46 F. Supp. 86, 98 (S.D.N.Y. 1978); Smith v. Fussenich, 440 F. Supp. 1077, 1079 (D. Conn. 1977).

33. Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

34. 353 U.S. 232 (1957).

35. *Id.* at 238-39.

36. *Id.* at 239 n.5.

37. Baird v. State Bar of Ariz., 401 U.S. 1, 8 (1971) (emphasis added).

38. A short-order cook, for example, was found to have no protected right to work in a military munitions plant dining room because she "remained entirely free to obtain employment as a short-order cook or to get any other job . . . . All that was denied her was the opportunity to work at one isolated and specific military installation." Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 896 (1961).

39. Bishop v. Wood, 426 U.S. 341 (1976); Perry v. Sindermann, 408 U.S. 593 (1972); Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

vice admission," the *Leis* court found "no state-law authority" supporting any claim of entitlement by the lawyers,[40] and thus no property right in their representation of Flynt. A claim of entitlement must be based on a mutally explicit understanding in order to invoke due process protection.[41] Since "the rules of the Ohio Supreme Court expressly consign the authority to approve a *pro hac vice* appearance to the discretion of the trial court," and though such rules may have prompted "reasonable expectations of professional service," the Court concluded there was no mutual understanding that any specific *pro hac vice* admission would be permitted.[42]

The issue of entitlement to specific employment normally arises in cases where government seeks to deprive an individual of a job he already possesses.[43] At least one case, however, indicates that a mutually explicit understanding[44] of employment may exist between government and a person who has not begun work at a particular job. In *Goldsmith v. Board of Tax Appeals,*[45] the rules

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40. 439 U.S. at 441.

41. *See* note 23 *supra.*

42. 439 U.S. at 443. Justice Stevens, on the other hand, stated that the Ohio rules contained an "implicit assurance" to "out-of-state practitioners that they are welcome in Ohio's courts unless there is a valid, articulable reason for excluding them." *Id.* at 453 (Stevens, J., dissenting). Justice Stevens noted several indicators of Ohio custom: (1) the rules of the Supreme Court of Ohio, which permit "participation by a nonresident of Ohio in a cause being litigated in this state when such participation is with the leave of the judge hearing such cause." OHIO SUP. CT. R. I; 8(c), (2) Canon 3 of Ohio's Code of Professional Responsibility, which provides:

> [T]he legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice;

and (3) a leading opinion on *pro hac vice* admission in Ohio that required a judge to exercise "sound discretion" in deciding a lawyer's *pro hac vice* application and that identified criteria to aid in the exercise of that discretion. State v. Ross, 36 Ohio App. 2d 185, 304 N.E.2d 396 (1973), *cert. denied,* 415 U.S. 904 (1974).

43. *See* cases cited in note 39 *supra. See also* Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867), in which the Court held:

> The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor . . . . It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

Id. at 379.

44. *See* note 23 *supra.*

45. 270 U.S. 117 (1925).

of the Federal Board of Tax Appeals required the enrollment of attorneys and certified public accountants appearing before the Board. The rules also provided that "the Board may in its discretion deny admission, suspend or disbar any person."[46] The *Goldsmith* court concluded that the rule governing admissions "must be construed to mean discretion . . . exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process."[47] *Leis* may limit *Goldsmith* to its facts and compel the conclusion that no attorney may claim entitlement to admission and therefore, that procedural due process is not required.

Goldsmith, unlike *Leis,* involved a federal agency and not a state court, and thus may constitute little more than an expression of the Supreme Court's opinion on the procedure that should be followed in federal proceedings. Such a distinction, however, is troublesome in light of the subsequent use of *Goldsmith* as an instance of an appropriate application of due process.[48] Despite the absence of the term "mutually explicit understanding" in *Goldsmith,* it is difficult to differentiate *Goldsmith* from *Leis* except by their results. Goldsmith was entitled to a hearing because he fell within a class over which the Board exercised its discretion. Fahringer, although belonging to a similar class (out-of-state attorneys), was not accorded a due process hearing. *Leis* established that where a state statute provides a state judge with discretion over *pro hac vice* applications and offers no standards to guide the exercise of that discretion, the judge is not required to grant a hearing to such applicants before exercising his discretion, nor is he required to justify his reasons for denial.[49]

Since a lawyer seeking admission *pro hac vice* in a state with rules similar to Ohio's cannot claim due process protection before

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46. *Id.* at 123.

47. *Id.*

48. *See* Board of Regents v. Roth, 408 U.S. 564 (1972), in which the Court interpreted *Goldsmith* to mean "that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied." *Id.* at 576 n.15. *See also* Willner v. Committee on Character & Fitness, 373 U.S. 96, 103, 105 (1963).

49. It has been suggested that, unless the judge's discretion is "unfettered," an entitlement can still exist since the attorneys will expect the judge to exercise his discretion in accordance with legal rules and reasonableness. *See Retaining a Nonresident Attorney, supra* note 11, at 578.

being granted admission, the question arises whether such protection will attach to prevent arbitrary termination after admission. Even in the absence of specific *pro hac vice* rules, a state's "policies and practices" may create a "mutually explicit understanding" of continued employment of the attorney.[50] The smooth operation of a state judicial system requires that attorneys neither be removed[51] nor permitted to withdraw[52] from a trial except for compelling reasons. These policies should be sufficient to create a right to continued admission of which an attorney cannot be deprived without procedural due process.[53] The *Leis* majority emphasized that Fahringer and Cambria had not yet been admitted *pro hac vice,*[54] leaving the impression that the result might have been different if they had been. The Court did not determine, however, when a lawyer's admission *pro hac vice* is granted and when, therefore, his protected interest crystallizes.

The Sixth Circuit Court of Appeals, although admitting that it could not "define with certainty the status of the lawyers at the moment they were dismissed," determined that "[t]heir interests had developed to a point where the court's action in removing them" should have been preceded by procedural due process.[55] The Supreme Court, however, determined that the lawyers had no "ground for believing they actually had received leave of the court to appear."[56] The facts do not support this conclusion. The provisions of Ohio laws adequately support reliance on the validity of the *pro hac vice* status. The attorneys were admitted as counsel of record by a judge whose specific responsibility was to approve designation of counsel. Under local court rules, this action precluded

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50. Perry v. Sindermann, 408 U.S. 593, 601-03 (1972)(teacher could not be dismissed from state college without due process where there existed de facto tenure system, even in absence of explicit tenure provisions).

51. *See* Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950).

52. *See* Rule 10(E), Rules of Practice of the Court of Common Pleas, Hamilton County, Ohio, cited in 439 U.S. at 447 n.3 (Stevens, J., dissenting), which permits a designated attorney to withdraw from a case only "upon written motion and for good cause shown."

53. It should be noted that one *pro hac vice* admission would not entitle the same attorney to such admission again. A property interest created by state entitlement is defined by the terms of the entitlement. Board of Regents v. Roth, 408 U.S. 564, 578 (1972). Since *pro hac vice* admission is limited to a particular case, the admission ends with the termination of the case.

54. 439 U.S. at 439.

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

56. 439 U.S. at 440 n.3.

the attorneys from withdrawing from the defense of Flynt and Hustler "except upon written motion and for good cause shown."[57] Despite this limitation and the absence of any additional requisites for *pro hac vice* admissions in that court, the Supreme Court found no indication "that the first judge's endorsement of the entry form, without more, constituted leave for a *pro hac vice* appearance."[58]

The Court's analysis fails to suggest what *would* have constituted such leave. Was it necessary that the endorsing judge be formally apprised of the lawyers' out-of-state status and that he make a formal grant of *pro hac vice* admission, despite the absence of any such requirement in Ohio law? Or could such admission be granted only by "the judge hearing such cause,"[59] in this case Judge Morrissey? Since the answer must be found by reference to state law, it is possible that the correct answer was given by the District Court[60] and Court of Appeals[61]—that the action of the court in this case *was* sufficient to constitute admission *pro hac vice.*[62] A drawback of the Supreme Court's approach is that a state with no rules or whose rules are vague regarding *pro hac vice* appearances theoretically could allow a judge to terminate an out-of-state lawyer's representation of a client well past the point when the lawyer could "reasonably expect" to be terminated, merely by asserting that it shared no "mutually explicit understanding" with the lawyer that his representation of a particular client could continue. Because the Supreme Court now concludes that due process does not protect the right to *initial* admission *pro hac vice,* it should set standards for determining the point at which a *pro hac vice* appearance ripens into a constitutionally protected state entitlement.

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57. Rule 10(E), *supra* note 52.

58. 439 U.S. at 440 n.3. Although there was no procedure for specifically requesting a *pro hac vice* appearance, the plaintiffs suggested in their brief to the Sixth Circuit that the judge who approved their designation of counsel forms was aware of their out-of-state status: "Fahringer and Cambria . . . took great care to insure that [the judge] . . . was aware that they were applying for designation as counsel of record and seeking a specific court order to that effect." Brief for Appellee at 13, Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978).

59. OHIO SUP. CT. R. I, § 8(c).

60. 434 F. Supp. at 483.

61. 574 F.2d at 879.

62. Indeed, the Court has traditionally deferred to the interpretations of state law by lower federal courts when more than one interpretation was reasonable. *See* Bishop v. Wood, 426 U.S. 341, 345 (1976).

Although an attorney cannot demonstrate a sufficient property interest in *pro hac vice* admission, this should not preclude his right to a hearing. If the circumstances surrounding the denial of his application implicate a liberty interest,[63] he is entitled to due process protection.[64] Likewise, a court may not deny admission if it deprives an applicant of equal protection.[65] Because *Leis* permits judges to make *pro hac vice* decisions without divulging their motives, deprivations of liberty and equal protection are more likely to go undetected and therefore unremedied.

The Court, in considering when due process must precede governmental action resulting in an individual's loss of private employment, has said that

> [t]his question cannot be answered by easy assertion that, because [the individual] had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."[66]

Hearings on *pro hac vice* applications are appropriate and needed means for revealing the character of a judge's reasons for

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63. The Court's discussion in *Leis* dealt almost exclusively with the lawyers' property—as opposed to liberty—interests. Justice Stevens spoke vaguely of "the profession's interest" in representing unpopular criminal defendants, an interest that would presumably constitute a "liberty." 439 U.S. at 452-53 (Stevens, J., dissenting). He recognized the absence of a more traditional liberty claim when he noted that the lawyers "in no way rely on the fact that the denial of their applications 'might make them somewhat less attractive' to clients and might otherwise compromise their professional reputations." *Id.* at n.3, citing Bishop v. Wood, 426 U.S. 341 (1976). It was this type of liberty interest that had been suggested by the lower federal courts. *See* note 29 *supra.*

64. *See, e.g.,* Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

65. "Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church." Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). *See also* Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964).

66. Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 894 (1961), quoting Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961). The *Homer* court held:

> In our view lack of a constitutional right to a license or to the positions sought does not solve the problem. The question should be stated as whether [the petitioners]have been deprived of an employment opportunity in private industry by governmental action which does not meet the requirements of the Due Process Clause of the Fifth Amendment.

Id.

denying admission. In *In re Evans*,[67] the trial judge remarked of the out-of-state attorney during a hearing: "I know he is an able fellow but he can't behave himself, he don't have any ethics about him, don't have any respect for counsel or the court or anybody else and that's what I object to."[68] Because the hearing failed to reveal any specific instances of unethical behavior, however, the Fifth Circuit Court of Appeals reversed and admitted the attorney.[69] In hearing the *pro hac vice* application of former Attorney General Ramsey Clark in a California criminal case, the judge denied the application, stating only that he "was not disposed to 'appoint' any co-counsel for [the defendant] . . . who was not chosen *by the court rather than defendant.*"[70] Again, the lower court's hearing revealed inadequate grounds for its decision, and was reversed on appeal.[71] On the other hand, hearings have also provided trial judges with valid reasons for exclusion that can be readily understood by reviewing courts.[72] If a hearing revealed that a judge had denied an application because he disliked the attorney's politics or the type of defendant he usually represented, this would probably be sufficient to constitute a deprivation of the applicant's liberty interests.[73]

Justice Stevens expressed his concern with the possibility that a trial judge would base his decision on personal prejudices:

> The record does suggest, and in any case the Court's broad holding would certainly encompass, one explanation for Judge Morrissey's unusual ruling, but it can hardly be characterized as legitimate. This is an obscenity

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67. 524 F.2d 1004 (5th Cir. 1975).

68. *Id.* at 1006.

69. *Id.* at 1008. The Circuit Court explicitly stated that "[i]f a District Court has evidence of behavior that it believes justifies denying an attorney admission *pro hac vice*, it must set a hearing date and give the attorney notice of all incidents of alleged misbehavior or unethical behavior that will be charged against him." *Id.*

70. Magee v. Superior Ct., 8 Cal. 3d 949, 952, 506 P.2d 1023, 1025, 106 Cal. Rptr. 647, 649 (1973)(emphasis in original).

71. *Id.* at 954, 506 P.2d at 1026, 106 Cal. Rptr. at 650. *See also* Munoz v. United States Dist. Ct., 446 F.2d 434 (9th Cir. 1971).

72. *See, e.g.*, In re Belli, 371 F. Supp. 111 (D.D.C. 1974) (denial of application permissible where attorney admitted, at hearing, making untrue derogatory remarks on national television about judge and court before which he sought admission); State v. Ross, 36 Ohio App. 2d 185, 304 N.E.2d 396 (1973), *cert. denied*, 415 U.S. 904 (1974)(denial of application permissible where attorney, at hearing, refused to cease "unprofessional conduct" outside courtroom).

73. *See, e.g.*, Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964).

> case. Conceivably Judge Morrissey has strong views about the distribution of pornographic materials to minors and about lawyers who specialize in defending such activity. Perhaps these are not the kind of lawyers that he wants practicing in his courtroom. That Judge Morrissey reportedly referred to Fahringer as a "fellow traveler" of pornographers is at least consistent with these speculations.[74]

As Justice Stevens noted, one can only speculate on Judge Morrissey's motivation. But that is the point. If there had been "a meaningful hearing, the application of a reasonably clear legal standard and the statement of a rational basis for exclusion,"[75] Judge Morrissey's true motivation would have been made more clear.[76]

Although hearings are likely to bring into focus the reasons behind a government official's denial of a particular privilege, the Court has previously refused to require them. The Supreme Court rejected, for example, the suggestion of the Seventh Circuit Court of Appeals that "a hearing and a statement of reasons were required . . . 'as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights.' "[77] Likewise, in an earlier case, the Court held due process did not require a hearing before terminating an employee's right to enter a military installation.[78] That decision prompted Justice Brennan to write in dissent:

> [I]f petitioner Brawner's badge had been lifted avowedly on grounds of her race, religion, or political opinions, the Court would concede that some constitutionally protected interest . . . had been injured. But, as the Court says, there has been no such open discrimination here . . . . [The Court] holds that the mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing . . . he may employ "security requirements" [or other valid reasons] as a blind behind which to dismiss at will for the most discriminatory of causes.[79]

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74. 439 U.S. at 447 n.3 (Stevens, J., dissenting).

75. Flynt v. Leis, 574 F.2d at 877.

76. Absent a statutory standard for *pro hac vice* admissions that is discriminatory on its face, or a long course of conduct evincing discriminatory application of a valid standard, a judge's true motives might remain successfully concealed if no hearing is required before denial of the application.

77. Board of Regents v. Roth, 408 U.S. 564 n.14 (1972)(emphasis supplied by Supreme Court), quoting the Circuit Court opinion, 446 F.2d 806, 810 (7th Cir. 1971).

78. Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 896 (1961).

79. *Id.* at 900 (Brennan, J., dissenting).

Given the reluctance of the Court to require a due process hearing to insure that a government official's motivations are legitimate, it is unlikely that its decision will be different where a lawyer's interest in practicing *pro hac vice* is concerned. *Leis* essentially recognized this fact. A decision requiring a due process hearing, however, would go far to alleviate the danger of sporadic injustice, both for lawyers and the clients they represent.[80]

CONCLUSION

Justice Stevens considered it "ironic that this litigation should end as it began—with a judicial ruling on the merits before the parties have been heard on the merits."[81] The few *pro hac vice* cases that have reached the Supreme Court have received similar cursory treatment.[82] A more thorough consideration of the matter by the Court might resolve some of the problems left by *Leis*.

Leis, however, did not leave *pro hac vice* representation totally unprotected by the due process clause. Should a state enact explicit standards for *pro hac vice* admission, those standards could create a "mutually explicit understanding" between attorneys and the state that any lawyer meeting them would be admitted. Procedural due process would then require hearings before admission could be denied.[83] Unfortunately, the possibility that clear *pro hac vice* standards would impose due process hearing requirements where none would otherwise exist, might encourage states to retain vague, broadly discretionary rules. The trend today should be toward more explicit standards so lawyers and clients can know with reasonable certainty whether their professional relationships will remain effective across state boundaries.[84] Explicit standards

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80. *See* note 76 *supra*.

81. 439 U.S. at 457 (Stevens, J., dissenting). Justice Stevens thought the issue of whether to require a hearing in the trial court was important enough to warrant oral argument before the Supreme Court.

82. *Leis* is the most detailed consideration ever given the issue by the Supreme Court. In recent years the Court has twice affirmed without opinion federal district courts rulings, upholding state rules that commit *pro hac vice* decisions to the judges before whom the out-of-state attorneys wish to appear. Silverman v. Browning, 429 U.S. 876 (1976), *summarily aff'g* 414 F. Supp. 80 (D. Conn.); Norfolk & Western Ry. v. Beatty, 423 U.S. 1009 (1975), *summarily aff'g* 400 F. Supp. 234 (S.D. Ill.). A *pro hac vice* controversy has never been set for oral argument before the Court.

83. *See* note 23 *supra*.

84. The policy of the American Bar Association is to discourage unreasonable territorial limitations on an attorney's representation of his clients. ABA CODE OF PROFESSIONAL RE-

would also reduce the likelihood that *pro hac vice* requests will be treated in an arbitrary manner.

Even in states where there is no entitlement to initial *pro hac vice* admission, attorneys should be entitled to continue their representation once admission has been granted.[85] The Court's failure to delineate the point at which a state's treatment of an out-of-state attorney becomes a mutual understanding of continued service creates additional confusion over when a lawyer may claim due process protection.

There is no indication that states are closing their courtroom doors more frequently to out-of-state lawyers since *Leis v. Flynt* was decided. Nor is there any evidence that states with relatively explicit *pro hac vice* rules will make them any less clear. Even without the compulsion of due process, it is possible that states with informal procedures will eventually clarify them. The Supreme Court, however, has missed an excellent opportunity to provide guidance for states in that endeavor.

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SPONSIBILITY CANONS, No. 3. *See* note 42 *supra*. The need to know the status of an attorney-client relationship in a state where the lawyer is not admitted is particulary acute where the lawyer is a specialist, whose expertise is sought by clients in several states, or where the client is involved in legal action spanning many jurisdictions. *See* Brakel, *supra* note 4, at 1084; *Easing Restrictions, supra* note 11, at 1186-91.

85. *See* notes 50-53 *supra* & accompanying text.