The Criminal Defendant's Right to Retain Counsel Pro Hac Vice

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THE CRIMINAL DEFENDANT'S RIGHT TO RETAIN COUNSEL PRO HAC VICE

INTRODUCTION

The American legal profession is balkanized by fifty state bars, each generally limiting the practice of law to locally admitted attorneys. Nevertheless, in litigation lawyers often appear pro hac vice in jurisdictions where they are not permanently admitted. Numerous different rules govern pro hac vice appearances in state and federal courts.

In criminal cases where the defendant seeks to retain a non-local attorney, a conflict may arise between the defendant's right to choose his own counsel and the court's power to control attorney practice. The defendant's choice of counsel is often subordinated to the trial court's rules of admission pro hac vice, or denied in an exercise of the trial judge's discretion.

This Note discusses the criminal defendant's right to retain foreign counsel for his defense, and explores under what circumstances a court's refusal to permit such representation impermissibly interferes with the defendant's constitutional right to counsel of choice. Part I introduces 1. C. Wolfram, Modern Legal Ethics § 15.4.1, at 865 (1986).
2. "For this turn; for this one particular occasion." Black's Law Dictionary 1091 (5th ed. 1979).
3. The roots of pro hac vice practice extend back to seventeenth century England. See Cooper v. Hutchinson, 184 F.2d 119, 122 & n.6 (3d Cir. 1950). In this country, the tradition includes several notable cases. See Flynt v. Leis, 574 F.2d 874, 878-79 (6th Cir. 1978) (listing famous cases and pro hac vice lawyers in American history), rev'd on other grounds, 439 U.S. 438 (1979) (per curiam); see, e.g., United States v. Heast, 638 F.2d 1190 (9th Cir. 1980) (Patricia Heast, defendant; F. Lee Bailey, attorney), cert. denied, 451 U.S. 938 (1981); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972) ("Chicago 7," defendants; William Kunstler, attorney), cert. denied, 410 U.S. 970 (1973); State v. von Bulow, 475 A.2d 995 (R.I. 1984) (Claus von Bulow, defendant; Alan Dershowitz, attorney).
4. Courts generally approve attorneys' requests for admission pro hac vice. See, e.g., Enquire Printing & Publishing Co. v. O'Reilly, 193 Conn. 370, 373-75, 477 A.2d 648, 650-51 (1984) (despite courts' "inherent power to regulate admission to the bar," pro hac vice admission should only be denied "reluctantly"). The exceptional cases where pro hac vice admission is denied are the subject of this Note.
5. The terms "out-of-state attorney," "foreign attorney" and "non-local attorney" are used throughout this text interchangeably to refer to an attorney not licensed to practice before the court.
6. The right to counsel of choice is protected by the right to counsel clause of the sixth amendment, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.
the right to counsel of choice and its recognized qualifications. Part II surveys some common provisions of pro hac vice rules, and discusses rule-based denials of the defendant’s counsel of choice. Part III considers denials of foreign chosen counsel based on the trial judge’s discretion, and whether the right to counsel of choice includes the right to counsel appearing pro hac vice. This Note concludes that, although legitimate governmental interests must be respected, a defendant has a right to select foreign counsel. Foreign counsel should not be denied an appearance to defend his client, absent the same factors that might exclude a local attorney.

I. THE SIXTH AMENDMENT AND THE RIGHT TO COUNSEL OF CHOICE

A criminal defendant’s right to the counsel of his choice, explicitly acknowledged in Powell v. Alabama,7 is one of a cluster of rights identified as incident to the sixth amendment’s right to counsel clause.8

The right to counsel of choice is protected for several reasons. First, the “personal” right to defend9 is critical to due process because “[i]t is the defendant’s interests, and freedom, which are at stake.”10 The sixth amendment grants a defendant autonomy to mount his own defense, rather than “merely [providing] that a defense shall be made for the accused.”11 An important aspect of this autonomy is the defendant’s choice of the counsel whom he believes will best serve his interests.12 Second, despite the attorney-client privilege and the defendant’s interest

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7. 287 U.S. 45, 53 (1932) (“It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.”); accord Crooker v. California, 357 U.S. 433, 439 (1958); see also Chandler v. Fretag, 348 U.S. 3, 9 (1954) (“[r]egardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified”).

The general right to retain counsel has never been questioned. Beginning with Powell, modern right to counsel cases are more concerned with the extent of the government’s obligation to provide appointed counsel to indigent defendants. The defendants’ right to counsel in Powell was based as much on the historical due process concept of a fair hearing, see Powell, 287 U.S. at 67-68, as on the sixth amendment, see id. at 66. This due process aspect of the right to counsel has continued along with its specific basis in the sixth amendment. See Ungar v. Sarafite, 376 U.S. 575, 589 & n.9 (1964); Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978) (identifying four elements of the right to counsel “theme” of the due process clause, including right to counsel of choice).

Besides the right to counsel itself and the right to counsel of choice, the sixth amendment and the due process clauses of the fifth and fourteenth amendments also protect the right to effective assistance of counsel, see McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970), and the right to a reasonable time to consult with counsel before trial, see Chandler v. Fretag, 348 U.S. 3, 10 (1954).

8. See supra note 6.


11. Faretta, 422 U.S. at 819.

12. See id. at 819-21; Wilson v. Mintzes, 761 F.2d 275, 279-80, 279 n.6 (6th Cir. 1985); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979).
in disclosing material facts to his counsel, a defendant in a criminal proceeding often must make sensitive or embarrassing revelations to his lawyer. This disclosure can occur only in a defendant-counsel relationship characterized by trust and confidence, an objective best attained by allowing the defendant freedom to choose his own attorney. Third, counsel is responsible for several crucial decisions during a criminal trial or appeal, including the identification of viable defense strategies. The choice of an attorney is probably the most important decision a defendant makes. Finally, over the long term, allowing a defendant broad latitude in selecting his counsel "promote[s] the fairness and integrity of criminal trials," encourages valuable attorney-client collaboration, and helps to ensure the loyalty and zealous advocacy that the adversarial system requires.

The right to counsel of choice, however, may give way to the systemic interest in the fair, orderly and efficient administration of justice. A clash between the defendant’s qualified constitutional right and the government’s interest often has occurred in cases involving the defendant’s late requests for continuances or for substitution of counsel. A court also may deny a defendant’s choice when a clear risk of unethical conduct or ineffective advocacy exists, or where the chosen attorney faces a conflict of interest. In these cases, the defendant’s more basic constitu-

14. See Laura, 607 F.2d at 56.
19. A defendant’s chosen counsel may not be able to prepare for trial in the time available. The court must then decide between the defendant’s right of choice and its own docket. See Rankin, 779 F.2d at 958-59; Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981); Burton, 584 F.2d at 489-92, 489 n.10.
20. See, e.g., United States v. Torres, 793 F.2d 436, 440-41 (1st Cir.) (denying request to substitute counsel on day of trial), cert. denied, 479 U.S. 889 (1986).
21. See, e.g., United States v. Gorman, 674 F. Supp. 1401, 1403-04 (D. Minn. 1987) (chosen attorney had history of alcohol abuse, misbehavior in court and criminal convictions); In re Lumumba, 526 F. Supp. 163, 165 (S.D.N.Y. 1981) (chosen counsel’s past associations led to conclusion that purpose of appearance was to carry on propaganda campaign).
22. See, e.g., Wheat v. United States, 108 S. Ct. 1692, 1697-98 (1988) (trial court may decline defendant’s proffer of waiver of attorney’s conflict and require separate representation). But see United States v. O’Malley, 786 F.2d 786, 794 (7th Cir. 1986) (declining to adopt per se disqualification rule where defense counsel faced potential conflict). Wheat indicates that, in attorney conflict situations, judicial interests are presumptively more compelling than the right to counsel of choice. The decision may have wider effects on the right to counsel of choice generally, by its statement that the “essential aim” of the sixth amendment is the effective assistance of counsel. See Wheat, 108 S. Ct at 1697. The
tional right to effective assistance of counsel and the systemic interest in avoiding a loss of integrity through trials conducted with conflicted or incompetent attorneys, together, outweigh the right to counsel of choice.23

The common requirement in adjudicating counsel of choice cases has been a balancing of these opposing interests by the court.24 This balancing is important because, on review, a trial court's failure to give adequate deference to the defendant's choice may be considered an arbitrary denial of the defendant's constitutional rights,25 resulting in reversal of a conviction.

Unlike the right to have some counsel and the right to effective assistance of counsel, both constitutional minimums,26 the right to counsel of choice is qualified and may be denied entirely. Yet in another sense, the right to counsel of choice receives greater protection than the right to effective assistance. Courts have frequently ruled that unreasonable or arbitrary denials of the right to counsel of choice are reversible per se,27 whereas alleged deprivations of the right to effective assistance require the defendant to show prejudice to obtain reversal of his conviction.28

The importance of the accused's autonomy over his own defense29 makes the right to counsel of choice "independent of [the] concern for the objective fairness of the proceeding,"30 and its denial is not gauged retrospec-

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23. See supra note 22.
26. See infra note 104 and accompanying text.
27. See Fuller, 868 F.2d at 607-8; Wilson v. Mintzes, 761 F.2d 275, 287 (6th Cir. 1985); Linton, 656 F.2d at 211-12. But cf. United States v. Morrison, 449 U.S. 361, 364-67 (1981) ("Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation.").
29. See supra notes 11-12 and accompanying text.
tively by a trial's outcome. The right to counsel of choice, therefore, is distinct from other identified protections of the sixth amendment's right to counsel clause.

Cases involving a defendant's choice of foreign counsel, however, often receive different treatment from choice of counsel cases generally. This distinction may be explained by the supervening effect given pro hac vice rules in each jurisdiction, and by the application of a different legal standard to foreign attorneys.

II. Pro Hac Vice Rules and the Defendant's Right of Choice

A criminal defendant may want to retain a foreign attorney for several reasons. First, the defendant may feel that the foreign attorney will be a more effective advocate. Second, the alleged crime might be in a specialized area, such as securities offenses or complex enterprise crimes, in which few qualified local attorneys practice. Third, the defendant might have a long-term relationship with the foreign lawyer. Finally, the defendant's perception of pervasive community prejudice against him might lead him to seek counsel from outside the jurisdiction.

A. Nature and Content of Pro Hac Vice Rules

Almost all states and federal districts have rules governing admission to practice pro hac vice. In the federal courts, pro hac vice rules are enacted pursuant to powers granted by Congress in Title 28 and by the Federal Rules of Civil Procedure. State pro hac vice rules are generally contained in state statutes, but also may be promulgated by state high courts or state bar associations.

211-12 (6th Cir. 1981) (arbitrary counsel of choice denials not subject to harmless error analysis).

31. See infra notes 34-42 and accompanying text.

32. See infra notes 100-12 and accompanying text.


34. See Ariens, supra note 4, at 658; Brakel & Loh, supra note 4, at 702; Katz, supra note 4, at 8. Rules for the federal districts may be found in the Federal Local Court Rules binder volumes of the Federal Rules Service.

35. Section 1654 of Title 28 provides in pertinent part: "In all courts of the United States the parties may plead... by counsel as, by the rules of such courts... are permitted to manage and conduct causes therein." 28 U.S.C. § 1654 (1982). Section 2071 of Title 28 provides in pertinent part: "The Supreme Court and all courts established by Act of Congress may... prescribe rules for the conduct of their business... consistent with Acts of Congress and rules... prescribed by the Supreme Court." 28 U.S.C. § 2071 (1982). In addition, Rule 57 of the Federal Rules of Criminal Procedure and Rule 83 of the Federal Rules of Civil Procedure extend broad power to the district courts to enact local rules of practice by a majority vote of the judges in each district. See Fed. R. Crim. P. 57; Fed. R. Civ. P. 83.

36. See D. Keenan, Out-of-State Practice of Law—Multistate and Pro Hac Vice § 2-3, at 13 n.5 (listing state statutes containing pro hac vice rules).

Many pro hac vice rules permit admission on purely discretionary criteria, such as permission of the court, but often they mandate compliance with various objective provisions as well. These requirements might include association with local counsel, submission to the court's disciplinary jurisdiction, and home state reciprocity in allowing pro hac vice appearances.

Formal objective requirements are justified on grounds of the local court's interest in restricting appearances of attorneys unfamiliar with local law, the need for efficient docket control and service of process, the problem of enforcing disciplinary sanctions against foreign attorneys, and the economic protection of the local bar.

Despite these considerations, commentators are almost universally critical of pro hac vice objective requirements, arguing that such provisions are protectionist, insufficiently related to asserted forum interests, and either overbroad or vague. Many of these arguments, however, are directed more to the attorney's right to admission pro hac vice than to the issue of whether the criminal defendant may retain counsel pro hac vice in exercising his right to counsel of choice.

The rights of the client and of the attorney rest on different foundations. The client's right to counsel of choice is grounded in the sixth amendment right to counsel, applied to the states through the fourteenth amendment. The lawyer's right to appear pro hac vice has a weaker constitutional basis. A due process argument for the lawyer's right to
appear was rejected by the Supreme Court in *Leis v. Flynt*. Other arguments, based on the privileges and immunities clause of Article IV, the equal protection clause, and the commerce clause have not yet come before the Court.

### B. Denials of Chosen Counsel Under Pro Hac Vice Threshold Requirements

From the criminal defendant’s standpoint, the issue is whether a trial court may invoke an objective provision of a *pro hac vice* rule to deny admittance to the defendant’s counsel of choice, absent other facts indicating a threat to the efficient administration of justice. Such a denial generally dispenses with any balancing of the accused’s constitutional right against the government’s interests, as is applied in other counsel of choice cases.

In *United States v. Panzardi Alvarez*, the trial court’s failure to apply

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49. In Spanos v. Skouras Theatres Corp., 364 F.2d 161, 169-70 (2d Cir. 1966), the Second Circuit granted a limited right to both the client and the lawyer when the case involved a federal claim or defense. See *id.* at 170. *Leis v. Flynt*, 439 U.S. 438 (1979), however, severely limited the privileges and immunities argument used in *Spanos*. See *id.* at 442, n.4.

50. More recently, the Court has used the privileges and immunities clause to invalidate state residency requirements for permanent bar admission. See *Barnard v. Thorstenn*, 109 S. Ct. 1294, 1299-1302 (1989) (invalidating residency requirements for admission to local bar and upholding right of application of candidates from remote areas of United States); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 288 (1985) (invalidating state bar residency requirements); P. Ross, *The Constitutionality of State Bar Residency Requirements* 14-17 (ABA Monograph Series, 1982).

51. These cases do not, however, show much hope for extending the privileges and immunities argument into the *pro hac vice* context. *Piper* specifically distinguished its holding from the Court’s deferential approach to state *pro hac vice* regulation in *Leis v. Flynt*. See *Piper*, 470 U.S. at 283 n.16.

52. In *Frazier v. Heebe*, 482 U.S. 641 (1987), the Supreme Court struck down a district court residency requirement for admission to the district bar. See *id.* at 646. The Fifth Circuit had upheld the rule, finding the classification of nonresident attorneys rationally related to forum interests. See *Frazier v. Heebe*, 788 F.2d 1049, 1052-53 (5th Cir. 1986), *rev’d*, 482 U.S. at 646-7 (1987). Although the Supreme Court’s reversal did not rest on equal protection grounds, it clearly distinguished admitted nonresident lawyers from lawyers appearing *pro hac vice*. See *Frazier*, 482 U.S. at 646-7. An equal protection argument, therefore, would probably fail in the *pro hac vice* context where the lawyers seeking a right to appear are not admitted in the jurisdiction.

53. In *Panzardi*, the First Circuit struck down a district court *pro hac vice* provision limiting foreign counsel to one appearance annually. The district court had refused to admit the defendant’s chosen counsel because the counsel had already appeared in the jurisdiction that year. See *id.* at 815; see also *Sanders v. Russell*, 401 F.2d 241, 245-46 (5th Cir. 1968) (striking down similar numerical appearance limit and other requirements applied to out-of-state attorneys in civil rights cases); *Lefton v. City of Hattiesburg*, 333 F.2d 280, 285-86 (5th Cir. 1964) (striking down dis-
its discretion by a balancing of interests was held sufficient reason to vacate the conviction. The court asserted that “[t]he sixth amendment . . . does not countenance the mechanistic application of a rule that permits a district court, without articulating any grounds, to deny a defendant the right to counsel of choice.”

In *Ford v. Israel*, however, the application of a Wisconsin *pro hac vice* provision mandating association of local counsel was held non-arbitrary, although the provision effectively denied the defendant his choice of counsel. Upholding the application of the rule, the court concluded that local association advanced the state’s interest in avoiding post-conviction claims of ineffective counsel.

Both *Panzardi* and *Ford* involved purely rule-based denials of the defendant’s counsel of choice. The defendants did not delay the proceedings in either case. Defense counsel were competent and faced no conflicts of interest. Yet the courts’ different assessments of the relation between the rule provisions and forum interests produced opposite outcomes.

Of the two cases, however, the balancing procedure used in *Ford* seems inappropriate. In the accepted balancing procedure applied in counsel of choice cases, a nexus between the particular chosen counsel and the threatened governmental interests must exist. Asserted forum interests are weighed against the defendant’s actual choice, rather than against an entire class of counsel, such as foreign attorneys. Given the weight of

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55. 701 F.2d 689 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983). In *Ford*, the defendant could not afford to retain both his chosen out-of-state attorney and the local associated attorney required by Wisconsin's *pro hac vice* rule. Consequently, the out-of-state attorney withdrew, leaving the defendant with only local appointed counsel. *See id.* at 692.

56. *See id.*

57. *See id.* Apparently the court did not inquire into the qualifications of the foreign lawyer other than to admit that Ford could have “hired a lawyer as good, or almost as good . . . [who was] admitted in Wisconsin.” *Id.* at 693.

58. *Compare* United States v. Panzardi Alvarez, 816 F.2d 813, 817 (1st Cir. 1987) (“Local rules of court designed to regulate attorney conduct cannot unduly handicap the constitutional right of an accused to counsel of his choice.”) *with* Ford v. Israel, 701 F.2d at 692 (local association requirement related to state interest in avoiding claims of ineffective assistance of counsel by defendants seeking to delay proceedings).

59. Courts should balance against an actual choice whether the deprivation of chosen counsel is a result of the balance weighing in favor of forum interests, as in the continuance or late substitution cases, *see*, e.g., *Sampley v. Attorney General*, 786 F.2d 610, 612-13 (4th Cir.) (affirming conviction and denial of counsel of choice in continuance case), *cert. denied*, 478 U.S. 1008 (1986); *Birt v. Montgomery*, 725 F.2d 587, 593 (11th Cir.) (same), *cert. denied*, 469 U.S. 874 (1984), or whether the chosen counsel himself is the irritant to state interests, as in the conflict of interest and unethical behavior cases, *see*, e.g., *Wheat v. United States*, 108 S. Ct. 1692, 1698 (1988) (denying chosen counsel with conflict of interest arising from multiple representation despite defendant’s waiver of right to conflict-free counsel); United States v. Gorman, 674 F. Supp. 1401, 1403-04 (D.
the defendant's constitutional interest, the Ford approach is defensible only if the rule protects a state interest that would be jeopardized in every instance.

The connection of pro hac vice rules to forum interests is problematic in the counsel of choice context. Local association requirements often may promote the defense team's expertise in local law, but cannot be shown to do so in all cases. No jurisdiction specifies what type of local counsel must be associated, allowing the foreign attorney to ally himself with a local attorney who may have no expertise in criminal law at all. Moreover, in those jurisdictions requiring only nominal involvement by the local lawyer, a local association requirement provides no clear benefit to the defendant's or state's interests in avoiding ineffective advocacy. Finally, in cases involving highly complex crimes or offenses under federal law, local counsel's contribution to the defense may be negligible. Local association requirements, therefore, do not necessarily improve the quality of the defense or forestall post-conviction ineffectiveness claims.

Minn. 1987) (denying chosen lawyer's appearance because of past unethical conduct). In either situation, the defendant's choice of a particular counsel is denied.

The Ford approach, however, would permit courts to deny defendants an entire field of available counsel, regardless of whether the selection of any one of them specifically jeopardized forum interests. Indeed, the Ford majority indirectly complimented Ford's chosen out-of-state counsel by admitting that he could have retained an attorney "almost as good" within the state of Wisconsin. Ford v. Israel, 701 F.2d 689, 693 (7th Cir.), cert. denied, 464 U.S. 832 (1983).

Even where specific dangers to forum interests exist, the defendant's choice deserves considerable deference. See United States v. Seale, 461 F.2d 345, 358 (7th Cir. 1972); Magee v. Superior Court, 8 Cal. 3d 949, 953-54, 506 P.2d 1023, 1026, 106 Cal. Rptr. 647, 650 (1973) (en banc).

An example is the almost nonexistent right to appointed counsel of choice, where governmental interests in efficiency and in maintaining a viable system for assigning counsel to indigents are controlling. See United States v. Allen, 789 F.2d 90, 92 (1st Cir.) (no right to appointed counsel of choice but court must inquire into defendant's dissatisfaction with appointed counsel), cert. denied, 479 U.S. 846 (1986); Williams v. Nix, 751 F.2d 956, 959-60 (8th Cir.) (no right to appointed out-of-state lawyer), cert. denied, 471 U.S. 1138 (1985).

See Brakel & Loh, supra note 4, at 705 & n.18.

Some jurisdictions require only that local counsel serve as a maildrop for service of process, or co-sign court papers, without ever having to appear in court to argue the client's case. See Misner, supra note 4, at 362-67 (discussing range of duties required of local associated counsel in federal courts).

Indeed, such arrangements may only increase the risks of malpractice liability for local attorneys. See id. at 367-71. But see Brakel & Loh, supra note 4, at 704-06 (arguing that local association "[may] increase the likelihood that the local counsel will indeed exert control over the foreign attorney to insure the competent and ethical conduct of the latter").

The Supreme Court has encouraged local association in another context. In Barnard v. Thorstenn, 109 S. Ct. 1294 (1989) the Court invalidated a residency requirement for admission to the bar of the Virgin Islands. Yet in responding to the forum's concern for the burden on the court system of accommodating nonresident lawyers' travel schedules, the Court suggested a requirement that nonresident counsel be required to associate local counsel. See id. at 1300.
Other formal pro hac vice requirements appear even less related to the forum's interest in the effective administration of justice. Reciprocity provisions, by which a foreign counsel is only admitted if his home jurisdiction extends the same privilege, protect the local bar rather than the defendant or the system of justice. Limited appearance requirements also seem to benefit only the local bar.66

Logically, therefore, the application of objective requirements to deny a defendant's counsel of choice is more a result of the forum's power to make court rules than an attempt to link specific forum interests threatened by the foreign attorney's appearance. This broad rulemaking power is a principal argument used in state courts to exclude foreign chosen counsel.67

C. State Regulatory Powers and the Right to Counsel of Choice

State courts have consistently upheld pro hac vice rules under the broad power of the states to regulate the practice of law and the conduct of attorneys.69 The Supreme Court, in Goldfarb v. Virginia State Bar,70 acknowledged state power to regulate the professions.71 Among professionals, lawyers require especially exacting regulation because of the risks to the system of justice posed by incompetent or unethical practice.72 The rationale for upholding pro hac vice rules is that foreign attorneys

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67. See United States v. Panzardi Alvarez, 816 F.2d 813, 817 (1st Cir. 1987); Sanders v. Russell, 401 F.2d 241, 246 (5th Cir. 1968). In Sanders, the court identified the "financial or economic interests of the members of the Mississippi bar" as a factor to be considered in its deliberations, but concluded that these interests were not "substantially affected" by the invalidation of the limited appearance provision in the district court's pro hac vice rule. See id.


present special risks. They are unlikely to be as available as local lawyers for scheduling trials and other meetings.\(^3\) Foreign lawyers may lack knowledge of local court procedures and substantive law, which may compromise the efficiency of the court system.\(^4\) Particularly in criminal cases, incompetent lawyering by out-of-state practitioners creates grounds for collateral attacks on convictions and jeopardizes the strong government interest in finality.\(^5\) Unlike in civil cases, a lawyer's errors in criminal cases may not be charged as readily to the client.\(^6\) Finally, disciplinary problems may occur more frequently with foreign counsel than with local counsel.\(^7\)

Apart from ensuring attorney competence, states and state bar associations also have used their regulatory powers to erect protective barriers against foreign lawyers,\(^8\) asserting that a vigorous local bar promotes the availability of counsel, familiarity with local practice, and increased involvement in public service work.\(^9\) The Supreme Court, however, has limited the states' powers to regulate the practice of law when they encroach on constitutional freedoms or on areas traditionally regulated by

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74. See Comment, supra note 46, at 584.
75. See Berger, supra note 22, at 65 & n.289.
78. The Supreme Court has generally invalidated these barriers. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."); see also Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279-83 (1985) (invalidating state residency requirement for admission); Sanders v. Russell, 401 F.2d 241, 246-47 (5th Cir. 1968) (indicating that "the financial or economic interests of the members of the Mississippi bar" are a state interest, but striking down limited appearance pro hac vice provision); Brakel & Loh, supra note 4, at 701-02 ("[e]conomic protectionism is arguably prima facie unconstitutional").
79. The Supreme Court rejected all of these justifications in Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 285 (1985). The Court also held that protectionism was not a "substantial" enough reason to impose a residency requirement for bar admission. See id. at 285 n.18 ("Privileges and Immunities Clause was designed primarily to prevent such economic protectionism.").
In cases involving freedom of association or access to the courts, the Supreme Court has invalidated state regulations that compromise litigants' fundamental rights under the First Amendment. Similarly, although the enactment of rules limiting the practice of out-of-state attorneys is within states' powers, their enforcement should be considered constitutionally suspect when they interfere with the constitutional rights of clients or of the public.

In applying pro hac vice rules in a manner which may exclude a defendant's chosen attorney, state courts effectively subsume the defendant's constitutional right into the circumscribed and discretionary grant of "privilege" to out-of-state lawyers. Analogous to the first amend-

80. See id.; Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977) (state bar ban on lawyer advertising interferes with public's right to receive commercial information and with lawyers' right of commercial free speech); Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975) (county bar association's minimum fee schedule held in violation of Sherman Act); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) (state's qualification requirements for admission to bar invalid unless rationally connected to "applicant's fitness or capacity to practice law").

In the pro hac vice context, the Fifth Circuit invalidated a federal district rule partly on the ground that it could not be applied to interfere with lawsuits authorized by Congress under the Civil Rights Acts. See Lefton v. City of Hattiesburg, 333 F.2d 280, 285 (5th Cir. 1964). Canon Eight of the Model Code of Professional Responsibility provides in part: "Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce." Model Code of Professional Responsibility EC 8-3 (1980).

81. See In re Primus, 436 U.S. 412, 432-33 (1978) (overturning disciplinary reprimand of attorney who had referred prospective civil rights litigant to American Civil Liberties Union in violation of state bar anti-solicitation rule); NAACP v. Button, 371 U.S. 415, 444 (1963) (Virginia anti-solicitation statute interfered with plaintiff's and plaintiff's members' First Amendment rights to associate for purpose of assisting others in civil rights litigation).


83. See Ford v. Israel, 701 F.2d 689, 694 (7th Cir.) (Moran, J., dissenting), cert. denied, 464 U.S. 832 (1983); see also Comment, supra note 46, at 582-84, 582 nn.71-72 (discussing first amendment cases); cf. United States v. Panzardi Alvarez, 816 F.2d 813, 817 (1st Cir. 1987) (striking down federal district court rule as undue handicap on defendant's right to counsel of choice).

84. For a discussion of the different constitutional foundations supporting the rights of the client and of the attorney, see supra notes 47-51 and accompanying text.

The basis for merging clients' rights into lawyers' rights in some state opinions is a pair of federal cases: Thomas v. Cassidy, 249 F.2d 91 (4th Cir. 1957) (per curiam), and People v. Epton, 248 F. Supp. 276 (S.D.N.Y. 1965). Neither of these cases even discusses the defendant's right to counsel of choice.

Thomas involved an appeal by the foreign attorney in a civil case, where the district court refused him admission pro hac vice. See Thomas, 249 F.2d at 92. In Epton, a removal case, the criminal defendant argued that his right to counsel had been violated by the state court's refusal to admit his chosen attorney. The district court denied the removal petition, resting its decision on New York law, which provided that the admission of attorneys was a matter in the discretion of "any court of record." Epton, 248 F. Supp. at 277.

Although both cases avoided discussing the client's right to counsel of choice, several
ment cases, when the application of state pro hac vice rules denies a defendant's constitutional right to choice of counsel, stricter scrutiny of the rule should be required.

In these cases, a presumption should arise in favor of waiving any rule requirement that interferes with the defendant's sixth amendment rights. The presumption could be overcome, denying the foreign counsel's appearance, by a showing that an important state interest would be threatened and that this interest could not be preserved by measures other than enforcing the provision.

Applying this presumption in counsel of choice cases would yield different results depending on the nature of the pro hac vice provision. For example, a requirement that the out-of-state counsel be a licensed attorney could never be waived because the sixth amendment does not give a defendant the right to select a non-lawyer for his defense. Reciprocity provisions and limited appearance restrictions, conversely, could always be waived where they operated to deny a defendant his chosen counsel. Such provisions would not be shown to advance a state interest in any way threatened by the defendant's choice of a particular counsel. Ensuing state opinions directly involving clients' rights cite these cases as principal support. See, e.g., State v. Reed, 174 Conn. 287, 292, 386 A.2d 243, 247 (1978) (citing Thomas); State v. Kavanaugh, 52 N.J. 7, 18, 243 A.2d 225, 231 (citing Thomas and Epton), cert. denied, 393 U.S. 924 (1968); State v. Hunter, 290 N.C. 556, 568, 227 S.E.2d 535, 542-43 (1976) (citing Thomas), cert. denied, 429 U.S. 1093 (1977); State v. Ross, 36 Ohio App. 2d 185, 189-90, 304 N.E.2d 396, 400 (1973) (quoting same passage from State v. Kavanaugh, 52 N.J. at 18, 243 A.2d at 231).

85. See supra note 81 and accompanying text.
88. See Note, Constitutional Right to Engage an Out-of-State Attorney, 19 Stan. L. Rev. 856, 869 (1967) (arguing that "where a requirement of association will be prejudicial to defendant, state courts should be required to waive it"). Because of the operation of the pro hac vice provision, the "prejudice" here is nothing other than the deprivation of the right to counsel of choice. This right is "independent of... the objective fairness of the proceeding," Flanagan v. United States, 465 U.S. 259, 268 (1984), and the defendant should not be required to show additional injury. See supra notes 27-30 and accompanying text.
89. See, e.g., Misner, supra note 4, at 375-76 (arguing that federal district courts should be limited in requiring local association except where foreign counsel proven unreliable); cf. Roe v. Wade, 410 U.S. 113, 155 (1973) (state legislative enactments must be narrowly drawn and can only be justified by compelling state interest where fundamental rights are involved); Boddie v. Connecticut, 401 U.S. 371, 380-82 (1971) (due process analysis requires that state regulation inhibiting exercise of fundamental right be set aside when other alternatives exist); NAACP v. Button, 371 U.S. 415, 438-439 (1963) (holding state anti-solicitation statute overbroad and citing state regulation of bar cases to assert that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights").
91. For a discussion of conventional counsel of choice cases, see supra notes 19-23,
tween these extremes, provisions requiring local associated counsel should also be waived, absent the court's showing that the foreign attorney in question was clearly unfamiliar with local law, or posed a sufficient risk of unreliability or unethical behavior.\textsuperscript{92}

III. DISCRETIONARY DENIALS OF CHOSEN FOREIGN COUNSEL

In most cases, foreign counsel is able to comply with the objective requirements of a jurisdiction's \textit{pro hac vice} rules.\textsuperscript{93} Yet a judge still may deny counsel's motion to appear, invoking a discretion clause in the \textit{pro hac vice} rule,\textsuperscript{94} or accepted common law discretionary powers to supervise the court and the attorneys who practice before it.\textsuperscript{95}

A trial court might deny a foreign lawyer's motion to appear for the same reasons that would apply to a local lawyer, namely conflict of interest\textsuperscript{96} or unethical behavior.\textsuperscript{97} Often, however, courts appear to hold foreign lawyers to a higher standard.\textsuperscript{98} The risk of trial courts abusing their discretion certainly is highest in these factually based denials because ap-

\textsuperscript{92.} Cf. Misner, supra note 4, at 375-76 (discussing desirability of limiting federal district courts' power to require local associated counsel).

\textsuperscript{93.} The attorney has an interest in complying with \textit{pro hac vice} rules if possible. Challenges to the attorney's admission for failure to comply with local or state rules can only weaken the attorney's ability to defend his client. Furthermore, the admission procedure is burdensome enough to undertake even with complete compliance, involving a motion supported by several related documents, a search for local associated counsel and familiarization with the relevant \textit{pro hac vice} rules and substantive law. \textit{See generally} D. Keenan, supra note 36, § 4-1 to 4-4 (discussing procedures and strategy to gain admission from lawyer's standpoint).

\textsuperscript{94.} \textit{See supra} notes 38-41 and accompanying text.


\textsuperscript{97.} \textit{See In re Rappaport}, 558 F.2d 87, 89-90 (2d Cir. 1977); \textit{Dinitz}, 538 F.2d at 1220-23.

The practice here is to exclude foreign lawyers who have been sanctioned in their home jurisdictions if their offenses would result in suspension or disbarment under the standards of the \textit{pro hac vice} jurisdiction. \textit{See Rappaport}, 558 F.2d at 90; \textit{accord} Bundy v. State, 455 So. 2d 330, 347-48 (Fla. 1984), \textit{cert. denied}, 476 U.S. 1109 (1986). \textit{But see In re Evans}, 524 F.2d 1004, 1007-08 (5th Cir. 1975) (admission to a state bar creates presumption of good moral character and denial of \textit{pro hac vice} appearance on grounds of prior unethical behavior requires notice and hearing).

\textsuperscript{98.} Although this is difficult to police or to verify, trial judges may harbor misgivings about foreign attorneys' respect for the integrity of the court. Appellate courts have occasionally grappled with the problem. \textit{See, e.g., Koller v. Richardson-Merrell, Inc.}, 737 F.2d 1038, 1054 (D.C. Cir. 1984) (reversing trial judge who disqualified \textit{pro hac vice} counsel on theory that foreign counsel should be held to stricter standard), \textit{vacated on other grounds}, 472 U.S. 424 (1985); \textit{Cooper v. Hutchinson}, 184 F.2d 119, 123 (3d Cir. 1950) (\textit{pro hac vice} counsel once permitted to appear cannot be removed from case more readily than local counsel).
pellite scrutiny will be at its most deferential.\textsuperscript{99} Despite the risk, however, this problem arises in counsel of choice cases whether or not foreign attorneys are involved.

More important to this analysis are those cases in which the court denies the application of the foreign attorney as a matter of law, asserting that the defendant's right to counsel of choice does not include a right to retain counsel \textit{pro hac vice} because foreign attorneys have no right to practice in the jurisdiction.\textsuperscript{100} Courts asserting this view also maintain that the constitutional right to retain counsel is satisfied as long as competent local counsel is available to represent the defendant.

This position is infirm on several grounds. First, the argument fails to differentiate between the lawyer's right to appear and the client's right to choose; it dispenses with the latter by arguing the limits of the former.\textsuperscript{101} Second, the assertion that the availability of competent local counsel satisfies the sixth amendment improperly "collapses the right to counsel of choice into the right to effective assistance of counsel."\textsuperscript{102} Courts and commentators have viewed the right to counsel of choice as distinct from the right to effective assistance,\textsuperscript{103} the Supreme Court's assertion in \textit{Wheat v. United States}\textsuperscript{104} that the main purpose of the sixth amendment is to guarantee effective assistance\textsuperscript{105} does not eradicate this distinction.


The best way to increase the accuracy of judicial discretion in such instances is to increase its visibility. Trial judges, therefore, should be encouraged to place these determinations on the record even if not required to do so.


\textsuperscript{101} For a complete discussion of the distinction between the two rights, see \textit{supra} notes 47-51 and accompanying text.

\textsuperscript{102} Fuller v. Diesslin, 868 F.2d 604, 610 (3d Cir. 1989).

\textsuperscript{103} See \textit{id.} at 608-09. Effective assistance of counsel is a constitutional minimum that applies in all criminal cases, whether counsel is retained or appointed. Evitts v. Lucey, 469 U.S. 387, 395-96 (1985). Despite its recognized qualifications, however, the right to counsel of choice has broader roots. It is considered an outgrowth of effective assistance, but also of the right of self-representation and the "personal" defense theme. See \textit{Faretta v. California}, 422 U.S. 806, 819-20 (1975); \textit{Fuller}, 868 F.2d at 610-11. The right to choose counsel also may be grounded in the first amendment in certain civil cases. See United Mine Workers v. Illinois State Bar, 389 U.S. 217, 222-24 (1967); NAACP v. Button, 371 U.S. 415, 429-31 (1963). Finally, an unreasonable deprivation of the right to counsel of choice is usually reversible \textit{per se}, see \textit{supra} notes 27-30 and accompanying text, while claims of effective assistance impose a higher burden on the defendant to show both deficient advocacy and an outcome-based prejudice. See \textit{Strickland v. Washington}, 466 U.S. 668 (1984).

\textsuperscript{104} 108 S. Ct. 1692 (1988).

\textsuperscript{105} \textit{Id.} at 1697. The Supreme Court stated that "while the right to select and be
Qualified as it may be, the right to counsel of choice does not exist merely to secure the right to effective assistance of counsel.106

Finally, viewed against practical considerations, an inflexible legal distinction between local and foreign attorneys is anachronistic. The common use of registered mail to deliver court papers would not put any but the most remote foreign attorneys at a disadvantage in receiving process. A court's contempt power may be enforced through long-arm statutes to ensure that foreign counsel can be effectively sanctioned.107 Courts and pro hac vice rules can also require that the foreign counsel submit to local disciplinary jurisdiction without endangering the client's right of choice. Modern realities of rapid travel and communications also argue against a legal standard distinguishing local from foreign counsel.108

The right to counsel of choice, therefore, includes the right to retain counsel pro hac vice.109 Because of the importance of the right to counsel of choice, pro hac vice rules and judges' discretionary evaluations should treat foreign counsel the same as local counsel. Where the appearance of foreign counsel poses difficulties, courts can show adequate deference to the defendant's actual choice only by using the same individualized balancing approach employed in other counsel of choice cases.110

Recognizing that the right to counsel pro hac vice should be analyzed

represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant . . . .” Id. This statement does not necessarily mean that the right to choice is entirely included in the right to effective assistance, although in some cases the facts may compel this conclusion. See Glasser v. United States, 315 U.S. 60, 75 (1942) (reversing denial of defendant's request for separate representation by own counsel). Rather, it means that when the two rights conflict, choice must defer to effective assistance. The Supreme Court resolved this problem in Wheat. See Wheat, 108 S. Ct. at 1698 (holding that defendant may not insist on attorney who has an actual conflict of interest jeopardizing effective assistance).

106. See Fuller v. Diesslin, 868 F.2d 604, 610 (3d Cir. 1989). In Fuller, the Third Circuit stated: “We do not understand the language in Wheat to mean that the right to counsel of choice is important only insofar as it secures the right to effective assistance of counsel. . . . [T]he amendment also comprehends other related rights, such as the 'right to select and be represented by one's preferred attorney.'” Id. (quoting Wheat v. United States, 108 S. Ct. 1692, 1697 (1988)).

107. See Brakel & Loh, supra note 4, at 705-06.

108. See Fuller, 868 F.2d at 607 (arguing that increased mobility will also increase defendants’ choosing of foreign attorneys to represent them); see also Brakel & Loh, supra note 4, at 699-700. Canon Three of the Model Code of Professional Responsibility states in part:

[T]he demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. . . . [T]he legal profession should discourage regulation that unreasonably impose[s] 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.

(Model Code of Professional Responsibility EC 3-9 (1980).)

109. See Fuller, 868 F.2d at 606-07.

110. See supra notes 59-61 and accompanying text.
in the same manner as other counsel of choice problems does not by any means deprive the trial court of the power to exclude a foreign attorney.111 In some cases, the court’s balancing indeed may reveal that the foreign attorney’s admission jeopardizes the fair and efficient administration of justice, permitting the judge to exclude the foreign attorney.

CONCLUSION

A criminal defendant’s right to retain his counsel of choice includes the right to retain counsel appearing pro hac vice. When an objective pro hac vice rule requirement operates to deny a defendant’s chosen counsel, a presumption of waiver of the provision should arise. In evaluating the pro hac vice admission of a defendant’s chosen counsel, the trial court should apply its discretion by the same individualized balancing of interests used in other choice of counsel cases. This procedure will still enable the court to exclude the foreign counsel if the risk to the fair and efficient administration of justice is too great.

Thomas C. Canfield

111. See Fuller, 868 F.2d at 611-12.