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In-State Office Requirement: Gap Between Theory and Reality

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When Thomas Jefferson became President in 1801, the fastest means of communication on land was on horseback. If the U.S. Court of Appeals for the Second Circuit is to be believed, nothing whatsoever has changed in the intervening centuries. In this column we consider the court's decision in *Schoenefeld v. Schneiderman*, 11-4283-cv, decided April 22, 2016, and the advisory opinion from the New York Court of Appeals (in *Schoenefeld v. State of New York*, 25 N.Y.3d 22 (2015)), which the Second Circuit had requested—and we contrast the outcome with the reality of law practice in the 21st century.

The facts and background of the case are described by the circuit court as follows:

> Plaintiff Ekaterina Schoenefeld, a citizen and resident of New Jersey, is licensed to practice law in New Jersey, New York, and California. She maintains an office in New Jersey, but not in New York. She asserts that she has declined occasional requests to represent clients in New York state courts to avoid violating N.Y. Judiciary Law §470, which states as follows:
>
> A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state. N.Y. Judiciary Law §470 (McKinney 2016).
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> Schoenefeld seeks a judicial declaration that the office requirement imposed by §470 on nonresident members of the New York bar violates the Constitution's Privileges and Immunities Clause by infringing on nonresidents' right to practice law in New York. The district court agreed and, on the parties' cross-motions for summary judgment, declared §470 unconstitutional.

Put in more straightforward language, the real question for the court was whether, a requirement to have a physical office in any given location continues to make sense in the era when lawyers—be they solo practitioners like the plaintiff here, or lawyers in giant law firms—connect to their offices, their clients and adversaries, and the rest of the world, remotely, from wherever they may be physically located at any moment in time. The U.S. District Court for the Northern District of New York gave the plaintiff the declaration that she sought, finding that the requirement was indeed unconstitutional, having in mind the realities of law practice in 2016.

Before the Second Circuit decided the appeal, the court certified, and the New York Court of Appeals accepted the following question: "Under New York Judiciary Law §470, which mandates that a nonresident attorney maintain an 'office for the transaction of law business' within the state of New York, what are the minimum requirements necessary to satisfy that mandate?"

Court of Appeals Opinion

The Court of Appeals began its opinion, written by Chief Judge Jonathan Lippman, by noting that the U.S. District Court had "rejected the state interests proffered by defendants as insubstantial and found that, in any event, the statute did not bear a substantial relationship to the interests asserted as there were less restrictive means of accomplishing those interests." However, the Court of Appeals was evidently constrained by the very narrow language of the certified question, and accordingly very quickly concluded that "we interpret the statute as requiring nonresident attorneys to maintain a physical law office within the State."

What is interesting about the opinion, however, is that while it could have ended right there, it did not. Instead, the opinion next took an interesting direction. It noted that New York State had argued that in order to withstand the constitutional attack the statute should be read narrowly so as "merely to require nonresident attorneys to have some type of physical presence for the receipt of service—either an address or the appointment of an agent within the State. [The state] maintain[s] that interpreting the statute in this way

would generally fulfill the legislative purpose and would ultimately withstand constitutional scrutiny."

The court then reviewed the history of N.Y. Judiciary Law §470, from its original incarnation in 1862 to the present. The opinion pointedly noted that, along the way, in *Matter of Gordon* (48 NY2d 266 [1979]) the Court of Appeals had invalidated the residency requirement for New York lawyers. However, the opinion could not avoid pointing out that the service of process provision was not addressed when the statute was amended to conform to the Gordon decision. Most interesting, however, and most pointed, was the language with which the opinion closed:

> The State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here. However, it is clear that service on an out-of-state individual presented many more logistical difficulties in 1862, when the provision was originally enacted. The CPLR currently authorizes several means of service upon a nonresident attorney, including mail, overnight delivery, fax and (where permitted) email…Under our own Court rules, the admission of attorneys who neither reside nor have full-time employment in the State is conditioned upon designating the clerk of the Appellate Division in their department of admission as their agent for the service of process for actions or proceedings brought against them relating to legal services offered or rendered (see Rules of Ct of Appeals [22 NYCRR] §520.13 [a]). Therefore, there would appear to be adequate measures in place relating to service upon nonresident attorneys and, of course, the legislature always remains free to take any additional action deemed necessary.

Given the constraints of its limited role in the matter, it is hard to imagine a clearer plea from the Court of Appeals to the Second Circuit to uphold the decision of the U.S. District Court, notwithstanding the Court of Appeals' recognition that its necessarily narrow answer to the certified question might lead to a different outcome. But apparently this message, and the limitations on its role, was lost on a majority of the circuit court, which concluded its review of the advisory opinion by determining that "Because the Court of Appeals' response to our certified question does not moot Schoenefeld's constitutional challenge to §470, we proceed to address her claim and conclude that it fails on the merits."

The majority decision, after an extensive review of the case law on the privileges and immunities clause, concluded that even though "[i]n some circumstances, a facial classification is enough, by itself, to manifest a proscribed intent…not every facial distinction between state residents and nonresidents will admit an inference of protectionist purpose. Indeed, in *McBurney* [*v. Young*, 133 S. Ct. 1709] the Supreme Court did not find [a] facial distinction between residents and nonresidents sufficient to admit an inference of protectionist purpose…"

Here the majority held that "the in-state office requirement was not enacted for the protectionist purpose of burdening nonresident attorneys in practicing law in New York. Rather, it was enacted to ensure that every licensed New York lawyer, whether a state resident or not, could practice in the state by providing a means for the nonresident attorney to establish a physical presence in the state (and therefore place for service) akin to that of a resident attorney."

The closest that the Second Circuit came to addressing the realities of how law is practiced in the 21st century was to find that the plaintiff "fails to show that the burden on a nonresident of maintaining an office in New York is greater than the burden on a resident of maintaining a home (and frequently a home and office) in New York. In any event, the Privileges and Immunities Clause 'does not promise nonresidents that it will be as easy for [them] as for residents to comply with a state's law (citation omitted).'"

In a spirited, but carefully reasoned dissent, Circuit Judge Peter Hall criticized the majority for "inject[ing] an entirely novel proposition into our Privileges and Immunities Clause jurisprudence" that to prevail the nonresident must "[make] out a prima facie case of discriminatory intent." Instead he recognized that the plaintiff "has established that the New York statute has protectionist aims, and the State's proffered justifications for the discrimination fail to survive scrutiny."

After an exhaustive discussion of why the majority's position was not supported by the cases on which it relied, he pointedly noted that "the Supreme Court has rejected the argument that an in-state office requirement is necessary to ensure the availability of attorneys for court proceedings as 'unnecessary and irrational.' *Frazier v. Heebe,* 482 U.S. 641, 649 (1987)." Here, and at several other places in his dissent, Judge Hall also noted that in the earlier proceedings before the circuit court, which had led it to request the advisory opinion from the New York Court of Appeals, the circuit court had itself reached the opposite conclusion to that set out in the majority's decision. Also notable, in the closest reference to the way in which many lawyers customarily practice today—that is, remotely—Hall referred to the fact that the majority in part had reached its decision because the plaintiff had not actually demonstrated as a fact that a "nonresident's burden of maintaining an office in New York is greater than a resident's burden of maintaining a home in New York. As a factual matter, the majority's conclusion that the law poses no undue burden on nonresident attorneys directly conflicts with our findings earlier in this case."

Finally, he concluded, "The State of New York has chosen to discriminate against nonresident attorneys with regard to their right to pursue a common calling,

and it has failed to provide a substantial justification for that discrimination."

Changing Times

At root, the problem with this decision is not just that it places an undue burden on New York lawyers who choose to live out-of-state, but rather that the decision—and even to some degree, the dissent—are rooted in a failure to recognize the ways in which technology has changed how lawyers today actually practice law. Forgetting the intervening inventions of the railway and the airplane, the advent of the Internet has made regulation of lawyers based on the assumption that the fastest means of communication is still on the back of a horse nothing less than ridiculous.

The New York Court of Appeals opinion made oblique reference to the fact that the New York Legislature could cure the problem—which was probably created inadvertently when Section 470 was most recently revised. In our era of political gridlock, obtaining relief from that quarter may be a wish easier to express than to accomplish. Nevertheless, given the circuit court's unwillingness to recognize how law practice has changed since 1801, unless cert. is sought from and granted by the U.S. Supreme Court, the legislative process, as dysfunctional as it is, appears to be the only quarter from which relief might be had.

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