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An Update on the Use of Virtual Law Offices

By Anthony E. Davis
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In this article we return to the vexing problem in New York of whether—and which—lawyers may practice remotely, using the tools of the digital age, without having a physical office. This column first addressed the subject three years ago, in "**In-State Office Requirement: Gap Between Theory and Reality**," N.Y.L.J. (May 9, 2016). In that article, which considered the decision of the U.S. Court of Appeals for the Second Circuit 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. We commented there that the Second Circuit's decision was out of step with the reality of law practice in the 21st century. We returned to the subject a year later, in the column "**Tales of Woe: An Update on Two Disturbing Issues**," N.Y.L.J. (May 3, 2017)), after the U.S. Supreme Court's denial of certiorari, leaving the Second Circuit's unfortunate decision in place. We return to the subject again because the Association of the Bar of the City of New York Committee on Professional Ethics (the Committee) recently issued Formal Opinion 2019-2 "Use of a Virtual Law Office by New York Attorneys" (the Opinion), which replaces Opinion 2014-2 (2014).

As we will see, the Opinion bravely seeks to plot a path which New York lawyers may follow to comply with the law and rules on this subject. However, it does so by the use of curious logic and by ignoring the fact that ethics opinions can't actually change the law even when the law is, as Dickens would have it, "a ass." At the end of the day, although the clear implication of the Opinion is that Schoenefeld and other similarly situated New York lawyers who reside outside the state may practice remotely if they use a Virtual Law Office (VLO), it is not certain whether it provides a secure route under applicable law for them to do so.

Let us start with Schoenefeld's conundrum, as we summarized it in the May 2017 article:

> Ekaterina Schoenefeld, a New York admitted lawyer who resides in New Jersey, sought a judicial declaration that the office requirement imposed by §470 of New York's Judiciary Law on nonresident members of the New York bar, in contrast to the absence of any office requirement for New York lawyers residing in the state, 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. The state appealed to the Second Circuit, which reversed the District Court's decision, finding the statute constitutional. The U.S. Supreme Court denied her petition for certiorari on April 16.

We commented in that article that "the outcome is regrettable and makes no rational sense in 2017, when lawyers (like everyone else) work remotely away from their physical offices (if they have one). Apart from anything else, the outcome reduces client choice. Removal of New York's barrier to practice based on a lawyer's decision to reside outside the state would necessarily enlarge access to legal services—an objective often strongly endorsed both by bar leaders and the courts."

While the new Opinion references the *Schoenefeld* case, it does not (as it could not) attempt to legislate it away. Instead, it takes a much broader approach. First, the Opinion defines as its topic "Identifying a virtual law office in attorney advertising and on business cards, letterheads and websites." And in the Digest of the Opinion it answers the question thus posed as follows: "A New York lawyer may use the street address of a virtual law office ("VLO") located in New York as the lawyer's "principal law office address" for the purposes of Rule 7.1(h) of the New York Rules of Professional Conduct (the "New York Rules" or the "Rules"), provided the VLO qualifies as an office for the transaction of law business under New York's Judiciary Law. In addition, a New York lawyer may use the address of a VLO as the lawyer's office address on business cards, letterhead and law firm website. A New York lawyer who uses a VLO must also comply with other New York Rules, including Rules 1.4, 1.6, 5.1, 5.3, 8.4(a) and 8.4(c)."

Before we dissect how the Committee reaches this conclusion, this author wants to go on record as unequivocally endorsing the outcome as what the law the ethics rules *ought* to provide. It is how it gets there that is troubling—at least for out-of-state resident lawyers like Schoenefeld.

The problem resides entirely in the definitions. At the beginning of the text of the Opinion the Committee defines a "VLO … [as] a facility that offers business services and meeting and work spaces to lawyers on an "as needed" basis. Although arrangements may vary, VLO's typically provide private or semi-private work spaces, conference rooms, telephones, fax, printers, photocopy machines, and mail-drop services in exchange for a monthly fee." But then, in footnote 2, the Opinion states that "A VLO as it is used in this opinion should be distinguished from a "Virtual Law Practice," which typically has no physical address and operates primarily over the Internet. Virtual Law Practice is also known by terms such as "Digital Law, Online Law, [and] eLawyering." See, e.g., Cal. Op 2012-184 at 2. Although a Virtual Law Practice might make use of the facilities of a VLO to conduct business, this opinion does not address the ethical issues associated with operating a Virtual Law Practice."

Are you confused by this? Under this definition, a VLO is a physical facility, but the reason lawyers need the facility in the first place is in order lawfully to engage in a method of practice that is common, at least to some extent, for every single practicing lawyer in the 21st century—namely remote practice using digital technology, i.e., "Virtual Law Practice." Surely, the problem that confronts lawyers using digital technology remotely is precisely whether that mode of practice is permitted under the law as well as the ethics rules governing the profession.

So why does the Committee resort to this back-to-front approach to the problem? Because the *Schoenefeld* case decided that Judiciary Law §470 requires nonresident lawyers admitted in New York to maintain a physical office for the transaction of a law business within New York state, even though in-state resident lawyers are under no such statutory obligation. Thus, the Opinion actually addresses the underlying problem by seeking to equate a VLO with a physical office. Its route to this result is convoluted. First, the Committee notes the requirement of New York Rule of Professional Conduct (RPC) 7.1(h) that "All advertisements shall include the … principal law office address … of the lawyer or law firm whose services are being offered." Comment [17] to Rule 7.1 adds: "A law firm that has no office it considers its principal office may comply with paragraph (h) by listing one or more offices where a substantial amount of the law firm's work is performed." And then it (almost) makes the leap that the definition of "principal law office" for purposes of RPC 7.1(h) and of "physical law office" for purposes of compliance by out-of-state resident New York Lawyers with §470, are coterminous. The committee is careful to "express no opinion on whether the VLO described in this Opinion meets the minimum standards for a 'law office' in New York. That is a question of law beyond our jurisdiction and must be interpreted in accordance with the growing body of case law on the topic." Nevertheless, what the Opinion actually goes on to say is as follows: "We note, however, that a VLO as described in this Opinion includes a physical facility at which a lawyer may meet with clients and receive service of process. As discussed below, *assuming the VLO qualifies under §470*, it may be identified as a lawyer's "principal law office" under Rule 7.1(h)" (emphasis added). Thus, while acknowledging that ethics opinions are not supposed to decide questions of law (such as the meaning of §470), that is exactly what the Opinion implicitly does.

The balance of the opinion is dedicated to explaining why the use of VLOs complies with the ethical requirements of identifying an office in New York for advertising purposes, and is "consistent with the evolution of modern law practice." In other words, the use of VLOs is implicitly consistent with "Virtual Law Practice." And thus is the square peg firmly jammed into the round hole.

Notably, and no doubt helpfully, in the Opinion's very first footnote the Committee "note[s] that the New York City Bar Association offers its members a VLO service meeting this general description. See **https://www.nycbar.org/member-and-career-services/small-law-firm-overview/virtual-law-office**."

If the Opinion does in fact provide a safe harbor for non-resident New York lawyers if they use a VLO located within the state, presumably at a lower cost than renting a discrete "physical office," it will serve to avoid, at least in part, the inherent unfairness of the *Schoenefeld* decision without the need to persuade the legislature to amend §470, which would be the only certain way to achieve that result. Hopefully, the Grievance Committees in the state will accept that outcome.

Anthony E. Davis *is a partner of Hinshaw & Culbertson and a past president of the Association of Professional Responsibility Lawyers.*