CTQ-2014-00005 **CORRECTED COPY**

STATE OF NEW YORK
COURT OF APPEALS

EKATARINA SCHOENEFELD,

Respondent,

-against-

STATE OF NEW YORK; NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT; COMMITTEE ON PROFESSIONAL STANDARDS OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT AND ITS MEMBERS,

Defendants,

ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK; ALL JUSTICES OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT; ROBERT D. MAYBERGER, IN HIS OFFICIAL CAPACITY AS CLERK OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT; MONICA DUFFY, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS" OTHER THOMAS C. EMERSON,

Defendants-Appellants.

AMICUS CURIAE BRIEF
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Date Completed:
January 5, 2015

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PRELIMINARY STATEMENT

Judiciary Law §470 is unconstitutionally vague. In over 150 years since New York State required lawyers residing in adjacent states to maintain an "office for the transaction of law business" within New York State no court ever attempted to define that term in a manner that would give non-resident lawyers clear notice of what arrangements they are required to make to comply with the statute.

There is no need, nor any justification, for this Court to continue the futile exercise of exegesis of the lower courts by arbitrarily legislating a definition of "office for the transaction of law business" to artificially breathe life into an indisputably facially unconstitutional statute. Nor is it necessary to remand the question of whether some interpretation of §470 might be consistent with the Privileges and Immunities Clause to the Second Circuit.

Rather the Court should use the occasion of the Second Circuit's certified question to recognize that neither the language nor legislative history of §470 can be stretched to provide a functional definition of what is required to maintain an office for the transaction of law business in 2015. Revolutionary developments in communications and transportation technology have changed the manner in which a law business operates in ways that could not have been anticipated by the legislators who added §470 to the Judiciary Law in 1909.

In the federal system most service, filings and correspondence are transmitted electronically. New York State has

declared its intention to follow suit. See *Statement of Chief Judge Jonathan Lippman on Judiciary Budget Issues*, (Press Release, March 2, 2011) C-45.

The question of what, if any, special requirements should be imposed on non-resident attorneys practicing in New York in the 21st century should be determined by the legislature and the Court through its rule making authority after due deliberation following comment and input from all interested parties. A lawsuit and an outdated statute are poor tools from which to fashion a 21st century rule governing state practice by non resident attorneys.

CERTIFIED 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?

The opinion of the Second Circuit certifying the question noted: "The New York Court of Appeals may, of course, expand, alter, or reformulate this question as it deems appropriate." [Citation omitted] A14.

PROPOSED REFORMULATED CERTIFIED QUESTION

> Is the term "office for the transaction of law business" as used in Judiciary Law §470 unconstitutionally vague?

JUDICIARY LAW §470

Judiciary Law §470 states:

> 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.

The procedural history of the statute is set forth in Appellants' Brief ("App. Brf.") at 3-10. The statute's predecessor was originally enacted in 1862 when New York State required practicing attorneys to be state residents. App. Brf. at 5. The statute was a limited exception to the state residency requirement that permitted attorneys admitted in New York who subsequently moved to an adjacent state to continue practicing in New York provided their only office for the practice of law was in New York. Id. In 1866 the statute was amended to remove the requirement that the New York office be an attorney's "only" law office. In 1909 the statute was split in two with the present in-state law office requirement enacted as Judiciary Law §470 and language in the statute relating to service enacted as §60 of the State Code of Civil Procedure. Id. Except for non substantive amendments, §470 has remained unchanged since. Id.

Over 35 years ago this Court declared that a companion statute requiring state residency for bar applicants violated the Privileges and Immunities Clause. Matter of Gordon v. Committee on Character and Fitness, 48 N.Y. 266, 269 (1979). Appellants,

and Respondent agree that following Gordon the plain language of §470, which on its face discriminates between residents of the five states adjacent to New York and persons residing elsewhere, violates the Privileges and Immunities Clause. See Respondent's Brief ("Res. Brf.") at 24 ("[a]pplying the rationale and reasoning of this Court in Matter of Gordon, it logically follows that, if residency as a prerequisite to admission to the bar violated the Privileges and Immunities Clause and was unconstitutional, then Section 470 - which was created as an exception to that residency requirement - should also become a nullity as an antiquated relic that no longer serves any valid purpose"); App. Brf. at 4 ("[o]n its face, the provision appears simply to provide authority for residents of adjoining states with an office in New York to practice in New York courts, but the provision no longer serves this limited purpose").

ARGUMENT

I.

JUDICIARY LAW §470 BECAME FACIALLY UNCONSTITUTIONAL WHEN THIS COURT DECIDED MATTER OF GORDON IN 1979.

Judiciary Law § 470 should have been declared a nullity after this Court's ruling in Gordon held that the preexisting statutory scheme that encompassed §470 and its companion statutes violated the Privileges and Immunity Clause.

Instead, shortly after Gordon was decided an unfortunate decision by the Bronx County Civil Court rewrote §470

contrary to its plain meaning to permit, rather than prohibit, the practice of law by non-residents in state courts provided they maintained a New York State "office for the transaction of law business," a term that remains undefined and, as will be argued below, cannot be defined in the 21st century based on the language and legislative history of the statute. White River Paper Co. v. Ashmont Tissue, 110 Misc 2d 373, 376, 441 N.Y.S.2d 960, 962 (N.Y. City. Civ. Ct., Bronx Cty. 1981).

The White River court correctly recognized that "[a]s a result of Gordon, it is clear that the restriction on section 470 of the Judiciary Law limiting the nonresidents who can practice here to those who reside in adjourning States is unconstitutional." Id. The question of whether the state should impose any special office requirements for non-residents practicing as attorneys in New York courts following Gordon should have been referred to the state legislature. Instead, the White River court elected to ignore the words "an adjourning" in the statute and instead replace them with "another", thereby reconstructing the statute to permit, rather than prohibit, practice by residents of non-adjacent states and territories. Rather than saving the statute, the White River decision constructed a completely different statute that directly contravened the manifest intent of the legislators who enacted §470 to prohibit non-residents from practicing in New York State with only a limited exception for lawyers who formerly resided in New York but subsequently moved to one of the five bordering

states provided they maintained a law office in New York.

II.

THE AD HOC APPROACH TAKEN BY MOST NEW YORK COURTS INTERPRETING THE LAW OFFICE REQUIREMENT OF JUDICIARY LAW §470 FAILED TO PRODUCE CONSISTENT OR COHERENT RESULTS.

Unfortunately, the radical reconstruction of Judiciary Law §470 by White River has been implicitly adopted by most courts that have since construed §470 as imposing a general (but undefined) state office requirement on all non-resident attorneys as a condition for practicing in New York. See, e.g., Lichtenstein v. Emerson, 251 A.D.2d 64, 65 (1st Dep't 1998). In Lichtenstein the First Department ignored a plaintiff's attempt to challenge the judicial amendment of §470 and incongruously stated "[w]e need not reach plaintiff's additional contention that the statute impermissibly discriminates between non-resident attorneys from States adjacent to and not adjacent to New York since plaintiff's failure to satisfy the statute's constitutionally permissible threshold of a New York office renders such distinction inconsequential in his case." Id. Yet by applying §470's state office requirement to the plaintiff, a resident of Washington D.C., the First Department implicitly and necessarily adopted the revised statute as judicially amended in White River.

Since White River reconstructed Judiciary Law §470 in 1981 a number of courts adopted an ad hoc approach to construing the law office requirement for out of state residents. These

decisions have often been inconsistent or unclear and no court to date has attempted to articulate a general standard informing lawyers residing out of state which factors are necessary or sufficient to fulfill the requirement of maintaining a New York State law office within the meaning of §470. For example, in finding an attorney was not in compliance in Lichtenstein v. Emerson, 171 Misc.2d 933, 934, 656 N.Y.S.2d 180, 181-182 (N.Y. Cty. sup. Ct. 1997) aff'd 251 A.D.2d 64 (1st Dep't 1998) the court noted that the room claimed as an office was in the basement of a bar that could only be reached by going down a flight of stairs, the room was only 10 by 12 feet, the room contained three desks, none of which was claimed by the plaintiff, the law literature consisted of a single volume of the Federal Rules of Civil Procedure, the plaintiff's name was not listed in any New York telephone directory, the plaintiff reported no New York income for 5 years, the bartender had never been told that he was authorized to accept service and the liquor license indicated that no other business was to be conducted at the location. The court did not indicate which of these factors were necessary or sufficient to establish non-compliance. Cf. Austria v Shaw, 143 Misc 2d 970, 971-972 (N.Y. Cty. Sup. Ct. 1989)("[n]othing in the statute states the size or type of office required to be maintained. Specifically, a rental of desk space, with a telephone which is answered, as here, suffices. Neither the telephone nor the desk need be exclusively that of the attorney. Here, the Judicial Hearing Officer found that telephone

messages or calls to the attorney were answered and forwarded to the attorney. Mail was apparently forwarded to the attorney. This suffices to meet the requirements of the statute."]; Rosenshein v. Ernstoff, 176 A.D.2d 686 (1st Dep't 1991), (in state law office requirement of §470 could be satisified satisfied by attorney's use of residential apartment addresses in Manhattan where the attorney was not listed in residential building directory or in the NYNEX phone directory); In Re Estate of Scarsella, 195 A.D.2d 513, 515-516 (2d Dep't 1993) (attorney satisfied §470 by renting a desk in a real estate office where he had an unlisted phone number).

"Due process requires that a statute be 'sufficiently definite so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms.'"Matter of Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235, 256 (2010); quoting, Foss v. City of Rochester, 65 N.Y.2d 247, 253 (1985).

The ad hoc approach taken by New York courts to interpreting the law office requirement of §470 since 1981 has failed to produce predictable or consistent results adequate to inform non-resident attorneys of what they need to do to fulfill the statute's requirement that they must maintain an "office for the transaction of law business" in New York State.

III.

REVOLUTIONARY DEVELOPMENTS IN COMMUNICATIONS AND TRANSPORTATION TECHNOLOGY ARE REDEFINING THE MEANING OF A "LAW OFFICE" IN WAYS THAT CANNOT BE ADDRESSED BY ANY CONSTRUCTION OF THE LANGUAGE OF JUDICIARY LAW §470.

The only point of consensus among the various courts that have construed the law office requirement of §470 is recognition that a lawyer should be readily available for service of process within New York State. But does that mean that a law office must be open to accept service by hand from 9 to 5 during the week? May a law office be open 10 to 4? 11 to 3? Or would 12 to 2 three days a week suffice?

May a law office close for religious observances on Friday afternoons? Must someone remain in the office to accept service during business hours if a sole practitioner goes to court, to lunch or on vacation? The way we live and work has changed since §470 was enacted and the statute cannot answer these questions.

Whatever the legislature understood to be an office for the transaction of legal business in 1862 when the requirement was first enacted, or in 1909 when the statute was included in the Judiciary Law, has little relevance to a functional definition of a law office in 2015. In 1862 there were no bridges across the Hudson or the East Rivers and the pony express was delivering mail over the overland trail. In 1909 telephone was an emergent technology. Revolutionary changes in communication and transportation technology have changed the business of law.

Advances in technology led to an unprecedented expansion of interstate commerce that in turn led to an expansion of interstate jurisdiction. International Shoe v. Washington, 326 U.S. 310 (1945) resulted in the enactment of state long arm statutes like CPLR §302 in 1962. A century ago it made sense to limit the practice of law to residents of New York or nearby states and to require that they maintain a physical presence in New York where they could be served or contacted. Today that is no longer the case, but the old language of §470 rests on outdated assumptions from a bygone era.

The meaning of a law office has radically changed with the use of fax machines, voice and video teleconferencing, email, electronic court filings, cell phones, voice mail, commercial air transport, nationwide overnight delivery services, virtual office services and cloud storage. Neither the language of Section 470 nor its legislative history provide any guidance into what are the minimum requirements for a contemporary "office for the transaction of law business" which might have been self-evident in 1909.

Does a law office in 2015 require a telephone? A land line? A cell phone? A computer? Internet access? A fax machine? A typewriter? A teletype machine? A paper library? Must a law office have a space for an attorney to physically meet clients or may meetings be held by telephone or skype or a conference room rented on a hourly basis? What equipment needs to be physically present in the office and what work can the lawyer do on mobile

or cloud devices? No amount of exegesis can twist the language of §470 to provide meaningful answers to these questions.

IV.

THE COURT SHOULD NOT RELY ON AN OUTMODED STATUTE TO FASHION A MODERN PRACTICE REQUIREMENT FOR NON-RESIDENT ATTORNEYS.

Appellants now invoke the rule of constitutional avoidance to urge the Court to continue the activist approach begun by White River by continuing to preserve the constitutionality of this obsolete statute by arbitrarily, and in contravention to its history, construing an "office for the transaction of law business" to be nothing more than "an address sufficient for the personal service of legal papers." App. Brf. at 20.

Respondent is correct in observing that such a tortured construction of §470 would be "contrary to the plain language of Section 470 and the Legislature's intent when it enacted and reenacted the statute . . . . 'courts are not at liberty to save a statute by, in effect, rewriting it in a manner that contravenes its plain wording as well as its unambiguously articulated legislative purpose.'" Res. Brf. at 11. Citing Matter of Wood v. Irving, 85 N.Y.2d 238, 245 (1995).

Ironically, Appellants' proposed "narrow reading" of the statute does not "place non resident attorneys on an equal footing with resident attorneys who may be personally served at their New York residence and avoids raising a serious question as

to the statute’s constitutionality." App. Brf. at 20-21.

CPLR 2103[4] permits service at an attorney’s New York state residence at any time the attorney cannot be served at her office. To place attorneys residing out of state on an equal footing with New York resident attorneys who can be served 24-7 at their residences if their offices are closed would require out of state attorneys to make very costly arrangements for round the clock receipt of service and would place a considerable burden on out of state residents that would violate the Privileges and Immunities Clause.

Res. Brf. at 11-20 argues that §470 should be read to require nothing less than a conventional law office. But this construction cannot be derived from a fair reading of the inconsistent case law where some courts have upheld very minimal arrangements as satisfying the statute. See, e.g., Scarsella, supra; Rosenshein, supra; Austria v. Shaw, supra.

As a question of policy, the undersigned agrees with the observation in Res. Brf. at 53-54 that the courts and the legal profession are inevitably and rapidly transitioning to the point where most business and communication in the legal profession, including service, will be conducted electronically. In the long run, the practice requirements for lawyers should be revised for all practitioners to permit service on lawyers by email without prior consent and to provide that all attorneys be required to provide a publicly available email address for that purpose.

However, I respectfully disagree with the Respondent's suggestion that the Court could or should resuscitate a facially invalid statute enacted over a century ago when telephonic communication was an emergent technology, for the purpose of creating a modern practice requirement embracing electronic service.

The better way forward to the digital age in the practice of law would be to amend CPLR 2103[7] to provide for electronic service upon an attorney's designated email address without prior consent and to delete the word "optional" from Rule 118.1[e][11] that would then require registering attorneys to provide an email address where they could be served.

This approach would permit interested members of the bar and the public to have an opportunity to comment and provide input into new practice requirements appropriate to contemporary technologies and business realities.

As for Judiciary Law §470, there is no need to continue the confusing and futile exegesis begun by White River in an unfortunate attempt to avoid concluding that a statute enacted to achieve an unconstitutional purpose could not be judicially reconstructed into something that its creators never intended. The law office requirement in the statute is unconstitutionally vague.

CONCLUSION

It is respectfully suggested that the Court of Appeals conclude that the term "office for the transaction of law

business" as used in Judiciary Law §470 is unconstitutionally vague and that the statute is therefore a nullity.

Dated: New York, New York
January 5, 2015
Corrected: January 19, 2015

Respectfully Submitted,

/s/
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