

REPORT OF THE NYSBA WORKING GROUP ON JUDICIARY LAW §470

Background

Judiciary Law §470 provides:

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.

In 2009, Ekaterina Schoenefeld, an attorney licensed to practice in New York, but residing in New Jersey and having an office only in New Jersey, commenced an action in federal court in the Northern District of New York to challenge Judiciary Law §470 under the United States Constitution. In 2011, the District Court found §470 unconstitutional under the Privileges and Immunities Clause.¹ The Attorney General appealed the decision to the Second Circuit, and the Second Circuit certified the question of what constituted an office within the state to the New York Court of Appeals.²

The Court of Appeals accepted the certification³ and, interpreting the statute for the first time, held that §470 “requires nonresident attorneys to maintain a physical office in New York.”⁴ In its opinion, the Court of Appeals recognized that the State “does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here.” However, the Court acknowledged that currently “there would appear to be adequate measures in place relating to service on nonresident attorneys” under the CPLR and its own Court rules and that the Legislature could take additional action if necessary.

On June 30, 2015, while the appeal was pending before the Second Circuit, then NYSBA President David Miranda appointed the Working Group to address the issue of the requirements on non-resident attorneys to practice in New York and to make a recommendation once the Second Circuit determined the issue of the statute’s constitutionality.

On April 22, 2016, the Second Circuit upheld §470, holding that the statute did not violate the Privileges and Immunities Clause.⁵ Ms. Schoenefeld filed a petition for certiorari before the Supreme Court of the United States, but on April 17, 2017, the Supreme Court denied the petition.⁶ The Working Group then met to discuss whether to recommend that §470 be

¹ *Schoenefeld v. New York*, 907 F. Supp.2d 252 (N.D.N.Y. 2011). The action asserted claims under the Privileges and Immunities Clause, the Commerce Clause and the Equal Protection Clause. The court found a violation of the Privileges and Immunities Clause but dismissed the claims under the Commerce and Equal Protection Clauses. Plaintiff never appealed the dismissal of those claims, so they were never further adjudicated.

² *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014).

³ *Schoenefeld v. State*, 23 N.Y.3d 941 (2014).

⁴ *Schoenefeld v. State*, 25 N.Y.3d 22 (2015).

⁵ *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016).

⁶ *Schoenefeld v. Schneiderman*, ___ U.S. ___, 137 S.Ct. 1580 (2017).

changed and, if so, whether any such change should be effected by amending § 470 or instead by repealing it entirely.

Analysis and Recommendation

Judiciary Law §470 is outdated and is no longer needed to serve the purpose for which it was originally enacted. Section 470 was initially enacted in 1909.⁷ At that time, residency within the State of New York was required in order to practice law.

In 1979, the New York Court of Appeals struck down the residency requirement on ground that it violated the Privileges and Immunities Clause,⁸ but the New York Legislature did not amend the language of § 470. The statute thus applies to all non-resident lawyers licensed to practice in New York regardless of where they live.⁹ If non-resident lawyers do not maintain a physical office for the practice of law in New York, then they are violating § 470 by practicing here.

The most frequent consequence of § 470 has been dismissal of actions brought by non-resident attorneys who do not maintain a physical office within New York.¹⁰ The Second Circuit determined that the purpose of §470 when enacted was entirely related to the question of whether an attorney could be served with process. The Legislature in 1909 believed that a non-resident attorney with an office in New York could be served at his or her office.¹¹ The implication was that a non-resident attorney who did not have an office in New York might not be amenable to service of process.

The Working Group has concluded that §470 is no longer necessary to ensure that a non-resident attorney who is a member of the New York bar may be served with process. Moreover, the requirement of a physical office is often onerous to non-resident attorneys, but there is no nondiscriminatory basis for imposing that burden.

The Working Group is also satisfied that non-resident attorneys are subject to disciplinary proceedings within New York State, because service could be made on the clerk of the Appellate Division based on the designation required at the time of admission and biennial registration.

The Working Group did discuss, however, whether any amendment might be necessary to the CPLR (or to § 470) with respect to the service on a non-resident attorney without a physical office within the state. Currently, CPLR 2103(b) authorizes interlocutory service, and CPLR 313 permits service outside the state where there is a jurisdictional basis under CPLR 301 (which permits a New York court to “exercise such jurisdiction over persons ... as might have been exercised heretofore) or under CPLR 302 (which provides for “long arm jurisdiction” over persons outside New York).

⁷ A predecessor section in substantially the same form was enacted in 1877 in the Code of Civil Procedure.

⁸ *In re Gordon*, 48 N.Y.2d 266 (1979).

⁹ *White River Paper Co., Ltd. V. Ashmont Tissue, Inc.*, 110 Misc.2d 373 (Civ.Ct. Bronx Co. 1981)

¹⁰ *E.g., Kinder Morgan Energy Partners, LP v. Ace American Ins. Co.*, 51 A.D.3d 580 (1st Dept. 2008).

¹¹ *Schoenefeld v. Schneiderman*, 821 F.3d 273, 282 (2d Cir. 2016).

The issues raised regarding service and jurisdiction were referred to the Association’s CPLR Committee. That committee concluded that: CPLR 2103(b) already contemplates service on an attorney at his or her office outside the state; that attorneys resident outside the state, but within the United States, may use first class mail for interlocutory service;¹² and that attorneys resident outside the United States may use other methods of service, such as overnight delivery under CPLR 2103(b)(6) or electronic means under CPLR 2103(b)(7). The CPLR Committee further concluded, with respect to jurisdiction over an attorney defendant, that a non-resident attorney who practices law or transacts business in New York, or contracts anywhere to provide services in New York, is “supplying goods and services within the state” within the meaning of CPLR 302(a)(1), thus allowing service on the attorney outside the state. (The Working Group notes that §470 does not purport to restrict New York lawyers from practicing outside the state.) A memorandum from the CPLR Committee addressing these issues is attached.

For these reasons, the Working Group recommends an outright repeal of Judiciary Law §470, and does not recommend replacing § 470 with any new or amended language in the Judiciary Law, the CPLR, or elsewhere in New York’s statutes.

Working Group on Judiciary Law §470

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¹² CPLR 2103(f)(1) defines “mailing” as depositing a paper in a first class wrapper “in a post office or official depository under the exclusive care and custody of the United States Postal Service within the United States.”

**NYSBA CIVIL PRACTICE LAW AND RULES COMMITTEE
SUB-COMMITTEE MEMORANDUM REPORT**

From: Domenick Napoletano, Esq. Sub-Committee Chair and Co-Chair of the NYSBA CPLR Committee.

To: Michael Miller, NYSBA President.

Date: September 17, 2018.

SUB-COMMITTEE MEMBERS: Souren A. Israelyan, Esq. Co-Chair; Domenick Napoletano, Esq. Co-Chair and Sub-Committee Chair; Sharon Stern Gerstman, Esq.; James Edward Pelzer, Esq. and Thomas F. Gleason, Esq.

MEMBERS PRESENT: Souren A. Israelyan, Esq. Co-Chair; Domenick Napoletano, Esq. Co-Chair and Sub-Committee Chair; Sharon Stern Gerstman, Esq.; James Edward Pelzer, Esq. (Thomas F. Gleason, Esq. was excused).

Subject of Sub-Committee's inquiry; "How to assure that jurisdiction is obtained over out of state attorneys, and any other procedural issues, if any".

Judiciary Law § 470 provides that: "A person, regularly admitted to practice as an attorney and counselor, 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 counselor, although he resides in an adjoining state".

The majority of the CPLR committee that examined the issue of jurisdiction over non-resident attorneys, believes that CPLR 302 (a) (1), which permits exercise of personal jurisdiction over a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state," provides sufficient basis to obtain jurisdiction over a non-resident attorney who practices law or transacts business in New York, or contracts anywhere to provide services in New York.

The sub-committee likewise examined the service provisions of CPLR § 2103 (b) and its interplay in obtaining jurisdiction over non-resident attorneys as said attorneys are defined by Judiciary Law § 470.

After much discussion the committee resolved that Judiciary Law § 470 need not be amended so as to incorporate jurisdiction service provisions given the service of process provisions contained in CPLR § 2103 (b) which provide for service upon an attorney: "Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney". Thereby defining service upon an attorney as adequate when made under CPLR § 2103 (b)(2) "by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state and six days if the mailing is made from outside the state but within the geographic boundaries of the United States", mailing being defined as meaning "the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the United States"¹.

Respectfully Submitted,

DOMENICK NAPOLETANO, ESQ.

Cc: Souren A. Israelyan, Esq

¹ See CPLR § 2103 (f)