11-4283-cv

United States Court of Appeals
For the Second Circuit

EKATERINA SCHOENEFELD,

Plaintiff-Appellee,

v.

STATE OF NEW YORK, ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK, NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, ALL JUSTICES OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, MICHAEL J. NOVACK, IN HIS OFFICIAL CAPACITY AS CLERK OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, COMMITTEE ON PROFESSIONAL STANDARDS OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENTS AND ITS MEMBERS JOHN STEVEN, CHAIRMAN OF THE COMMITTEE ON PROFESSIONAL STANDARDS "COPS" OTHER THOMAS C. EMERSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE THE NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF PLAINTIFF AND AFFIRMANCE OF THE DISTRICT COURT JUDGMENT

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Statement and Interest of Amicus Curiae

Amicus Curiae, the New Jersey State Bar Association ("the NJSBA") is the primary advocate for the members of the New Jersey bar.[1] The NJSBA serves, protects, fosters and promotes the personal and professional interests of over 17,500 members, and functions as the voice of New Jersey attorneys to other organizations, governmental entities and the public with regard to the law, legal profession and legal system.

The NJSBA has played an active role in the development of New Jersey's "*bona fide* office" rule, codified in New Jersey Court Rule 1:21-1(a),[2] offering comments on proposed amendments

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[1] The NJSBA has no parent corporation, nor does any publicly held corporation own 10% or more of its stock. No party's counsel has authored this brief, in whole or in part, nor has any party, any party's counsel or any person other than the NJSBA, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

[2] The full text of Rule 1:21-1(a) is as follows:

> Qualifications. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the Rule 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and, except as provided in paragraph (d) of this Rule, maintains a *bona fide* office for the practice of law. For the purpose of this section, a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

and appearing as *amicus curiae* in related litigation. See In re Sackman, 90 N.J. 521, 448 A. 2d 1014 (1982); Tolchin v. Supreme Court of the State of New Jersey, 111 F.3d 1099 (3d Cir. 1997), cert. denied, 522 U.S. 977 (1997). The NJSBA also counts among

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> For the purpose of this section, a *bona fide* office may be located in this or any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter "a United States jurisdiction"). An attorney who practices law in this state and fails to maintain a *bona fide* office shall be deemed to be in violation of RPC 5.5(a). An attorney who is not domiciled in this State and does not have a *bona fide* office in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.
>
> A person not qualifying to practice pursuant to the first paragraph of this rule shall nonetheless be permitted to appear and prosecute or defend an action in any court of this State if the person (1) is a real party in interest to this action or the guardian of the party; or (2) has been admitted to speak *pro hac vice* pursuant to R. 1:21-2; (3) is a law student or law graduate practicing within the limits of R. 1:21-3; or (4) is an in-house counsel licensed and practicing within the limitations of R. 1:27-2.
>
> Attorneys admitted to the practice of law in another United States jurisdiction may practice law in this state in accordance with RPC 5.5(b) and (c) as long as they maintain a *bona fide* office.
>
> No attorney authorized to practice in this State shall permit another person to practice in this State in the attorney's name or as the attorney's partner, employee or associate unless such other person satisfies the requirements of this rule.

its members many New Jersey-resident attorneys who are admitted to practice in New York, and have a vital interest in the outcome of this matter. Because the Third Circuit's decision in Tolchin was a reference point for the parties' arguments in this case, the NJSBA seeks to inform the Court of New Jersey's experience with the rule since Tolchin, as there have been important developments that directly bear on the Privileges and Immunities analysis here.

For many years, the NJSBA strongly supported the requirement of a law office in New Jersey, and resisted any changes that would have permitted attorneys to avoid maintaining an ongoing presence in our state. That position was grounded in the belief that a fixed, physical location for the practice of law was necessary to assure accessibility by, and accountability to, courts, adversaries, regulatory authorities and the public.

The NJSBA's historical position on the matter reflected how law was practiced in New Jersey at that time, but the NJSBA's stance on the matter has evolved in light of developments in law firm practice technology, and clients' needs and expectations. For the reasons presented below, the NJSBA submits that the underlying goals of the *bona fide* office rule now can be served effectively through less burdensome means, and supports affirmance of the district court's judgment.

Pursuant to FRAP 29(a), the undersigned counsel represents that all parties have consented to the filing of this brief.

Argument[3]

The judgment of the district court should be affirmed because Section 470 violates the Privileges and Immunities Clause.

The district court found that New York Judiciary Law Section 470 (McKinney 2010)("Section 470") violates Article IV section two of the United States Constitution ("Privileges and Immunities Clause") because it impermissibly discriminates against nonresident attorneys by requiring them to maintain offices in-state. In reaching that conclusion, the court found that the state interests asserted in support of the statute were not substantial. Even if they were, the court held, there was an insufficient relationship between Section 470 and the interests that defendants claim it advances.

The crux of the district court's opinion was not so much the absence of legitimate state interests to support Section 470, as the availability of less restrictive means to serve them. Recent developments in New Jersey reflect our own state's growing realization that, with the advent of readily-accessible communication technology and internet access, the physical

[3] Portions of this argument are adapted from an article co-authored by the undersigned counsel scheduled for publication shortly. See David Dugan, Craig Aronow, David Rubin, "The Bona Fide Office Rule: Will Virtual Offices Be Allowed?," forthcoming, New Jersey Lawyer, The New Jersey State Bar Association (June 2012).

trappings of the traditional "bricks-and-mortar" law office are no longer necessary to achieve the goals of accessibility and responsiveness.

By way of background, until 1969 New Jersey-admitted attorneys were required to reside in-state. Sackman, 448 A. 2d at 1017; see Pressler, Current New Jersey Court Rules, Comment R. 1:21-1 (1969). That year, the Supreme Court of New Jersey implemented the recommendation of a Court-appointed committee to expand eligibility to include nonresident attorneys who maintained their principal office in New Jersey. Sackman, 448 A. 2d at 1017. In 1978, the rule was amended again to require resident attorneys to maintain a "*bona fide* office" in New Jersey, while still requiring nonresident attorneys to maintain their principal office in the state. Id.

The term "*bona fide* office" was not defined, which prompted another amendment in 1981 to include the following definition:

> For the purpose of this section, a *bona fide* office is a place where the attorney or a responsible person acting on his behalf can be reached in person and by telephone during normal business hours. A *bona fide* office is more than a maildrop, a summer home which is unattended during a substantial portion of the year, or an answering service unrelated to a place where business is conducted. [R. 1:21-1(a)].

The rule was amended again, in 1982, in Sackman, 448 A. 2d at 1017, to require *all* New Jersey-admitted attorneys to maintain a *bona fide* office there, regardless of their residence.

With some nonsubstantive changes not relevant here, that was the version of the rule in effect in 1997, when the Third Circuit rejected a constitutional challenge on Privileges and Immunities and other grounds in Tolchin, 111 F.3d 1099. The court held that "a rational relationship exists between the benefit of attorney accessibility and the *bona fide* office requirement," id. at 1109, and was satisfied that the rule was a reasonable means of advancing New Jersey's interest of "ensuring that attorneys licensed in New Jersey are available to New Jersey courts, practitioners and clients." Id. at 1113. The NJSBA fully supported the court's decision, at the time, and appeared as *amicus curiae* to oppose the grant of *certiorari* by the U.S. Supreme Court.

As we now have come to realize, the Third Circuit, in Tolchin, was addressing the practice of law at the dawn of the digital age, at least for smaller firms and solo practitioners who were most impacted by the *bona fide* office requirement. According to a survey by the American Bar Association Legal Technology Resource Center, as of 1996 only 32% of individual lawyers had portable computers, and only 37.6% had internet access. Technology and Law Practice Guide, "What's Hot:

Technology Trends for Smaller Law Firms," http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/tsp97yevics2.html. The first known use of a smartphone was not until 1997, when Tolchin was decided. Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/smartphone. The Tolchin court, sensing change in the air, presciently noted toward the close of its opinion the possibility that "some of the recent rapid advances in communication and transportation technology may render the *bona fide* office requirement's intended benefit of attorney accessibility less significant in the future." Id. at 1115.

Indeed, much has changed in New Jersey since Tolchin. In 2004, the Supreme Court of New Jersey once again amended Rule 1:20-1(a) to permit the *bona fide* office to be located in "in this or any other state, territory of the United States, Puerto Rico, or the District of Columbia[.]" The revision incorporated the recommendations of two study commissions that had been requested to review the *bona fide* office rule, following an administrative hearing on a proposal by the Philadelphia Bar Association to permit its New Jersey-admitted members to share an office in New Jersey.

One of the committees offered the following rationale:

> 1. The requirement that a lawyer maintain a *bona fide* office in New Jersey does not recognize that technology, when used

effectively, can substitute for proximity, and that a lawyer's office in Delaware, Pennsylvania or New York may be just as accessible by such means as an office in New Jersey. Additionally, the existing rule does not recognize the proximity of New York City and Philadelphia to many New Jersey courts and clients, or reconcile the differential in treatment between attorneys with offices located in those cities and attorneys whose New Jersey offices are located at a considerable distance from their clients and from courts in which litigation is pending.

2. New Jersey has exhibited a gradual relaxation of residency and office requirements, the history of which is set forth in Tolchin v. Supreme Ct. of the State of N.J., 111 F. 3d 1099, 1103-04 (3d Cir. 1997). Nonetheless, the Tolchin court upheld the present *bona fide* office rule against constitutional challenge only because it found a rational relationship to exist between the benefit of attorney accessibility and the *bona fide* office requirement. Id. at 1108. The observations in the preceding paragraph render even this justification constitutionally suspect and suggest that a further rule relaxation may now be warranted.

3. The research . . . discloses that the rule as currently written does not fall within the mainstream of other states' supervisory schemes. In fact, it is practically unique.

4. The proposal of the Philadelphia Bar Association that has been designed as a means of compliance with the present *bona fide* office rule envisions the creation of an artificial, shared satellite office. That proposal was not adopted by the Court; but was instead referred to this Committee and the Pollock Commission for further study. If our recommendation is approved, the PBA proposal should become moot.

See http://www.judiciary.state.nj.us/notices/reports/finalreport.pdf. Under the version of the rule proposed by that committee, a *bona fide* office would still be required, but could be located in any American jurisdiction.

The NJSBA once again supported the existing version of the rule, believing it to be in the best interests of the public at that time, see http://www.njsba.com/about/njsba-reports/reports-and-comments/pollock-wallace.html#TheBonaFideOfficeRule, but the proposal was adopted by the Court. Since 2004, however, the NJSBA has reexamined its position on the *bona fide* office rule, mindful of Justice Holmes' sage observation that the life of the law has not been logic but experience. See O. Holmes, The Common Law 1 (1881). A three-year review of our experience with the liberalized standard by the Supreme Court of New Jersey Professional Responsibility Rules Committee in 2007, http://www.judiciary.state.nj.us/notices/2007/n070308a.pdf, found "no known problems with respect to deletion of the in-state requirement for a *bona fide* office, and that "[d]ebate about removing the in-state *bona fide* office requirement has all but disappeared since the amendment went into effect."

As reliance upon e-mail, teleconferencing, social media and other sophisticated forms of digital communication became

standard throughout the business community, the bar and the public at large, the NJSBA, in 2010, accepted the recommendation of a joint subcommittee of its Solo and Small Firm Section and Professional Responsibility and Unlawful Practice Committee to support elimination of the *bona fide* office requirement altogether. The subcommittee was appointed to study the existing rule, and to recommend any changes that it deemed appropriate in view of advancements in technology and law firm practice management.

Shortly after the subcommittee was formed, the New Jersey Supreme Court's Advisory Committee on Professional Ethics and its Committee on Attorney Advertising issued a joint opinion, ACPE Opinion 718/CAA Opinion 41 (2010), http://www.judiciary.state.nj.us/notices/2010/n100326a.pdf, holding that so-called "virtual offices," i.e., time-share arrangements with no ongoing presence by an attorney or full-time dedicated staff, do not satisfy the *bona fide* office requirement. The joint opinion correctly applied the rule as it stood, but shone an even brighter spotlight on the growing disconnect between the "bricks-and-mortar" office mandate and the needs of lawyers and their clients.

The subcommittee began its task by identifying the underlying policy objectives that the *bona fide* office rule was intended to advance, then addressing the most effective way to

accomplish those objectives to honor the reasonable expectations of clients in the digital environment in which business typically is conducted today. The rule's apparent purpose was to assure that attorneys are promptly accessible and responsive to clients, judicial tribunals, government agencies and bar regulatory authorities. One problem with the current rule was that it appeared to assume that most attorneys are litigators who spend their days in court, then return to the office to meet with clients. This practice model may have been prevalent in the days of Perry Mason, but hardly reflects the professional lifestyle of most litigators today.

Another problem was that the rule seemed oblivious to transactional attorneys and other non-litigators, who may spend no time "at the office" because they have no need for one, at least not the traditional version contemplated by the rule. After considerable discussion, the subcommittee unanimously found that a fixed, physical office location, regularly staffed during normal business hours, was not the only reliable way to achieve the accessibility and responsiveness necessary to fulfill an attorney's professional obligations.

Yet another problem was that the rule had been liberalized over the years, to the point where it now permits a licensed New Jersey attorney to reside in Puerto Rico and maintain a *bona fide* office in Guam. The subcommittee concluded that if the

rule ever did serve a useful purpose, it no longer does, at least not in its current form. There also was a concern about too much undesired accessibility for the many attorneys practicing from their homes, who have legitimate concerns about privacy and safety.

In a report to the NJSBA's trustees, the subcommittee emphasized that the "traditional" law office is by no means a relic of a bygone era. It remains a viable choice for attorneys and firms who believe that this practice model best reflects their professional style and identity, and most effectively meets the needs of their clientele. But for many attorneys and their clients, smartphones, e-mail and video conferencing offer opportunities for communication and information-gathering far more suited to their needs than a physical office location that the attorney does not require to perform most of the daily tasks of lawyering, and that busy, far-flung clients may have no interest in visiting.

The subcommittee agreed that attorneys may need to designate physical locations for specific purposes, such as attorney regulatory audits and service of process. For the day-to-day servicing of clients, however, it could discern no persuasive policy basis for continuing the requirement of a "*bona fide* office," as presently defined. The subcommittee noted in passing that the current rule undoubtedly increases the

cost of legal services to the public. That would not be reason in itself to dispense with the rule if it were necessary to protect clients' interests, but the subcommittee believed that, if that ever were the case, it no longer is.

The subcommittee proposed that Rule 1:21-1(a) be amended to read as follows:

> 1:21-1. Who May Practice; Appearance in Court
>
> (a) Qualifications. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the Rule 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and complies with the following requirements:
>
> (i) An attorney need not maintain a fixed, physical office location, but must structure his or her practice in such manner as to assure prompt and reliable communication with, and accessibility by clients, other counsel, and judicial or administrative tribunals before which the attorney may practice; provided, that an attorney must designate one or more fixed, physical locations where client files, and business and financial records, may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served upon the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court.
>
> (ii) An attorney who is not domiciled in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as

> agent upon whom service of process may be made for the purposes set forth in the preceding subsection. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.
>
> (iii) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(i).
>
> (iv) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.
>
> * * *

The subcommittee's proposed revision to the rule placed front and center, more so than the current rule, the goals of attorney accessibility and responsiveness that remain valid as ever, while offering attorneys flexibility in how those objectives may be achieved. It established a functional test that the subcommittee was confident could be understood by attorneys, and enforced by the judiciary. The proposal was promptly endorsed by the NJSBA's trustees, and forwarded to the Supreme Court of New Jersey for consideration.

On January 9, 2012, the Supreme Court of New Jersey's Professional Responsibility Rules Committee issued its 2010-2012 Rules Cycle Report,

http://www.judiciary.state.nj.us/reports2012/PRRC2010-12RPT.pdf, "largely agreeing" with the NJSBA subcommittee's proposal, and recommending that the Court accept it with several modifications, including a requirement that the site of the designated "fixed, physical location" for file inspection, hand-deliveries, and process service be located in New Jersey.[4] Mindful of the present litigation, the Committee observed,

> This will increase the burden on non-resident attorneys who presently satisfy Rule 1:21-1(a) by maintaining their offices outside of New Jersey because, if adopted, the proposed amendments would require them to "designate" a *New Jersey* location for service, deliveries, and file inspection. Nonetheless, the members distinguished such a burden from the one at issue in Schoenefeld v. New York, 1:09-CV-00504 (N.D.N.Y. Sept. 7, 2011), available at 2011 U.S. Dist. LEXIS 100576 (holding that New York rule requiring non-resident attorneys to maintain in-state offices while resident attorneys can operate offices out of their basements violates Privileges and Immunities Clause of U.S. Constitution). The Committee is of the view that there is a distinction between a requirement to "maintain" a fixed physical office for practice and having to "designate" space for purposes of bringing files for inspection by authorities on short notice and for receiving hand-delivered mail and service of process. [Report at 8-9]

During the public comment period on the proposed rule change, which closed on April 2, 2012, the NJSBA stood by the version of the rule proposed by its subcommittee, and opposed

[4] A copy of the NJSBA subcommittee's recommendations is included as an appendix to that report.

the requirement that a location be designated in New Jersey, which is more onerous than the current rule. The proposal is now under consideration by the Court, with some disposition expected by September 2012 during its annual rule-revision process.

We will not burden this Court with a lengthy discussion of the merits of the constitutional issue before it, which already have been briefed by the parties, but offer the following in support of plaintiff's position. As the district court noted, "[i]n deciding whether a statute bears a close or substantial relationship to a substantial state interest, a court must consider the availability of less restrictive means to pursue the state interest in order to minimize the burden on the affected party." (slip op. at 20) (citing Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985)) Some examples mentioned by the court were appointing an agent for service of process within the state, see Matter of Gordon, 48 N.Y. 2d 267, 274,[5] requiring a lawyer who resides a great distance from a

[5] New Jersey's current *bona fide* office rule does just that:

> An attorney who is not domiciled in this State and does not have a *bona fide* office in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot

particular state to retain local counsel to be available on short notice for any appearances, see Piper, 470 U.S. at 287, and using "modern communication systems, including conference telephone arrangements." Frazier v. Heebe, 482 U.S. 641, 642 (1987).

Defendants attempt to side-step the district court's findings by suggesting that the term "office" in Section 470 does not necessarily entail a fixed location where the attorney practices law, but may mean no more than an address at which the nonresident may receive service. Defendants' Brief at 23. Minimizing the burden of the rule to the point of oblivion hardly supports defendants' position but, in our view, only serves to bolster the district court's conclusion that the in-state office requirement is nothing more than a solution in search of a problem.

As New Jersey's documented experience has shown, there is no evidence that relieving attorneys of the burden of maintaining an in-state office has negatively impacted any of the important values cited by defendants in this case, and our state may well be on the verge of dispensing with the "bricks-and-mortar" office requirement altogether. Given the proximity

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otherwise be effectuated pursuant to the appropriate Rules of Court. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court. [R. 1:21-1(a)]

of New Jersey to New York, and the similarities in the day-to-day practice of law in these two jurisdictions, the less restrictive means proven to work in New Jersey are sufficient proof that New York's in-state office requirement is an unnecessary burden, and can no longer withstand scrutiny under the Privileges and Immunities Clause.

Conclusion

For the reasons presented above, *amicus curiae,* the NJSBA, submits that the district court's judgment should be affirmed.

Respectfully submitted,

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Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

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The undersigned attorney, David B. Rubin, hereby certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7). According to the word processing system used by this office, this brief, exclusive of the title page, table of contents, table of citations, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 4,186 words.

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