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Lawyer Admitted in New Jersey and New York Challenges New York Office Rule

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Author's Note: Section 478 of the Judiciary Law is the source of the prohibition against practice in New York by nonresident lawyers:

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this State… [or] in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this State, and without having taken the constitutional oath.

Section 478 was not mentioned in the opinion of Judge Lawrence E. Kahn in *Schoenefeld v. State of New York*, 1:09-CV-0504 (U.S. District Court, Northern District, February 8, 2010). However, it is relevant to our understanding of the relationship between the practice of law and the maintenance of an office for the practice of law.

My discussion of the *Schoenefeld* case follows:

Ekatarina Schoenefeld, a lawyer admitted in New York, New Jersey and California, with an office for the practice of law in Princeton but none in New York, learned at a New York CLE program in 2007 that her lack of an office in New York prevented her from practicing law in New York. Referring to New York's Judiciary Law, she found that §470 provides as follows:

> 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.

Though inartfully worded, §470 has been in effect since 1909.

In 2008, Ms. Schoenefeld instituted an action for equitable relief under 42 U.S.C. §1983 in the Southern District of New York. In 2009, the action was removed to the Northern District. Ms. Schoenefeld directed her action at thirty-seven Defendants, including the State of New York, one of the Appellate Divisions, the Committee on Professional Standards, Attorney General Cuomo, eleven Appellate Division justices, and twenty-one members of the Committee on Professional Standards. The individual Defendants were sued in their official capacity only.

In support of her complaint, Ms. Schoenefeld alleged that she had been asked to represent clients in New York but that she had "refrained from accepting cases" because of the scope and impact of §470 and her "respect for the law."

Plaintiff's Arguments:

1. §470 violates Article IV, §2 of the U.S. Constitution – the privileges and immunities clause – by imposing "a residency requirement on non-resident attorneys," i.e., by insisting that they "maintain a fulltime office in the State in order to practice law there," and by not requiring the same of lawyers residing in New York.

2. §470 violates a lawyer's Fourteenth Amendment equal protection rights by imposing different requirements for resident lawyers and non-resident lawyers.

3. §470 imposes burdens on interstate commerce in violation of Article I, §8 of the U.S. Constitution – i.e., the Commerce Clause.

Ms. Schoenefeld asked the Court to enjoin the Defendants from enforcing §470 against her and to declare the provision unconstitutional. The Defendants responded by moving to dismiss the complaint in its entirety.

Defendants' Argument:

1. Under FRCP 12(b)(1), the Court lacks subject matter jurisdiction because the case is not ripe.

2. Defendants State of New York, the Appellate Division and the Committee on Professional Standards do not qualify as "persons" under 42 U.S.C. §1983.

3. Plaintiff has failed to plead sufficient facts to link the Defendants to the constitutional violations cited by Plaintiff.

The Court's Analysis

The case was assigned to Judge Lawrence E. Kahn, who conducted a detailed inquiry into the issues raised by the parties. Judge Kahn considered first what his standard of review should be. He concluded that the issue before him was "not whether a plaintiff is likely to "'prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.'" Quoting from *Ashcroft v. Iqbal*, __U.S.___, 129 S. Ct. 1937, 1949 (2009) and Bell *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) Judge Kahn wrote:

> A court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Next, if plaintiff provides well-pleaded factual allegations, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

Applying this reasoning, Judge Kahn proceeded to resolve all the issues presented by the parties.

Plaintiff's Claim Is Ripe. Because Defendants have moved for dismissal of the complaint under Rules 12(b)(1) and 12(b)(6), the Court must first consider whether there is in fact a litigable subject matter. If a

cause of action is not ripe, a federal court must deny jurisdiction. *Fed. Election Comm'n. v. Cent. Long Island Tax Reform Immediately Comm*., 616 F.2d 45, 51 (2d Cir. 1980). Also, "a case must be ripe before a federal court has jurisdiction to grant either injunctive or declaratory relief." *Williamson v. Village of Margaterville*, 1993 WL 133719 at *1 (N.D.N.Y. April 23, 1993). Ripeness exists where the controversy is "definite and concrete, touching the legal relations of parties having adverse interests." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937).

Defendants argued that Ms. Schoenefeld had not shown that she intended to practice law in New York, or that she had been prevented from doing so by any of them. Therefore, there was no dispute or controversy between the parties that would permit or require "specific relief through a decree of conclusive character."

Plaintiff replied that a party is not required to violate a statute, or be prosecuted for violating it, before challenging its constitutionality. *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). She pointed out that she had been asked to take cases by people in New York but had refused them because she did not maintain an office there and did not wish to violate Judiciary Law §470.

Judge Kahn found that Plaintiff had alleged sufficient facts to establish that a "substantial controversy admitting of specific relief" existed, and he rejected Defendants' claim that the case was not ripe.

Impact of Section 1983 on Amenability to Suit. U.S.C.
§1983 applies to "every person" who uses the law of a state to deprive "any citizen of the United States" of any "rights, privileges or immunities secured by the Constitution and laws." The Section provides that any such person "shall be liable to the party injured." Section 1983 is an extension of the principles of Article IV of the U.S. Constitution, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities in the several states." The clause forbids a State from unjustly depriving citizens from other states of any rights derived from state citizenship solely on the basis of nonresidence.

Defendants argued that those Defendants which were agencies of the State – the State itself and the Appellate Division – were not "persons" as required by Section 1983. Plaintiff herself acknowledged that this was so, but Judge Kahn disposed of the issue anyway:

> It is well settled that "neither a State nor its officials acting in their individual capacities are 'persons' under §1983." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). The prohibition against suit applies "to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." Id. At 70.

The State itself and the Appellate Division are unquestionably agents of the State. As for the Committee on Professional Standards, Judge Kahn found that the courts had determined that it, too, was an agency of the State, especially because the State's Attorney General is empowered to enforce laws and rules interpreted by the Committee. *Aretakis v. Comm. on Prof'l Standards,* 2009 WL 2229578 (S.D.N.Y. July 27, 2009).

Accordingly, Judge Kahn dismissed the Plaintiff's complaint against the State, the Appellate Division, and the Committee. But he refused to dismiss it as to the individual Defendants
– the Appellate Division judges and the members of the Committee.

The basic principle separating agencies as such from their individual officials is that the officials and their staffs are "tasked with an express or general duty to enforce" a particular statute. When the statute is alleged to be unconstitutional, the official "is sufficiently connected to that statute to make him a proper party to a suit for injunctive relief." The Attorney General is charged with enforcing laws prohibiting the unlawful practice of law; and the justices of the Appellate Division and the members of the Committee on Professional Standards have the duty and the power to investigate and punish violations of professional misconduct. Because "all these individual Defendants, when sued in their official capacity, have some connection to the alleged violation," they are all proper parties in an action to restrain them from performing their duties.

Impact of the Privileges and Immunities Clause. Judge Kahn recognized that the courts have universally endorsed the right of each state to regulate the practice of law. However, these rights are not absolute. Several states have attempted to impose conditions on practice only to see them nullified by the courts. In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Court struck down a rule which excluded nonresidents from the state's bar. In *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988), the Court struck down a rule permitting lawyers to be admitted on motion, but only if they qualified as permanent residents of the State.

A non-resident lawyer who has passed the State bar exam and who has satisfied all the other requirements for admission, has an interest in the practice which is protected by the privileges and immunities clause. Ms. Schoenefeld has alleged sufficient facts to qualify her for protection of that interest. It is enough, as she has argued, that the State has discriminated against her by requiring her to maintain an office in New York under §470, without imposing that same requirement on resident lawyers.

But Judge Kahn imposed several additional conditions for protection of non-residents under the constitutional clause: 1) is there a substantial reason for the difference in treatment of residents and nonresidents? 2) does the discrimination against nonresidents bear a substantial relationship to the State's objectives? and 3) are other less restrictive means available to the State?

In *Frazier v. Heebe*, 482 U.S. 641 (1987), the Court was faced with a local rule requiring a lawyer to be a resident of, or to maintain an office in, Louisiana. The Court refused to consider the constitutional implications of the rule, but it did invalidate it anyway "in an exercise of its inherent supervisory power to ensure that district courts only adopt rules that 'are consistent with the principles of right and justice'."

As Judge Kahn pointed out, the impact of Section 470 is not limited to the admission of out-of-state lawyers on motion, nor is it only a local rule adopted by a particular court. On the contrary, it is a State rule which applies to all nonresident lawyers "including those who have confirmed their commitment to practice by passing the State's bar exam and attending CLE courses".

Judge Kahn found that Ms. Schoenefeld had alleged sufficient facts to indicate a protected interest to practice in New York. In view of the different treatment of out-of-state lawyers and resident lawyers, and because the Defendants had shown no substantial reason for the different treatment, "nor any substantial relationship between the differential treatment and State objectives," and because case law does not compel dismissal of her complaint as a matter of law, "the Court denies Defendants' Motion to dismiss

Plaintiff's claim…" Judge Kahn did not hold that Section 470 was unconstitutional – only that Plaintiff was entitled to proceed with her action against the individual Defendants.

Impact of the Equal Protection Clause. Under the cases, Ms. Schoenefeld has not asserted a claim for relief under the Fourteenth Amendment, which provides, in pertinent part, "No State shall make or enforce any law which shall abridge the privileges ***or*** immunities of citizens of the United States…" (Author: note the difference between "privileges ***and*** immunities" in Article IV and "privileges or immunities" in the Fourteenth Amendment.)

Plaintiff is not a member of a suspect class nor is she invoking a fundamental right. "Plaintiff's equal protection argument is not based on her having an immutable characteristic, nor on her being a member of a group traditionally subjected to mistreatment. Accordingly, neither heightened nor intermediate scrutiny applies." (citing *Frazier*, supra.)

The Court's duty is to determine whether the restrictions in Section 407 are rationally related to a legitimate governmental purpose. The constitutionally of the Section has never been addressed by this Circuit, but other circuits have found that office requirements have a rational basis. Thus, in *Lichtenstein v. Emerson*, 674 N.Y.S.2d 298 (1998), the court found that the office requirement makes lawyers amenable to service and available for contact by clients and other parties. Other courts have found as rational bases for requiring an office in the nonresident state: 1) amenability to service; 2) facilitating contact with clients. other lawyers, witnesses and the courts; 3) elimination of tax liability disparities between resident and nonresident lawyers.

In *Friedman*, supra, the Supreme Court "indicated that an office requirement, at least as applied to certain classes of nonresident attorney was not irrational or arbitrary." In view of the many rational bases for requiring a nonresident attorney to maintain an office in the nonresident state, "Plaintiff's claim under the Equal Protection Clause [of the Fourteenth Amendment] does not plausibly give rise to an entitlement of relief."

Impact of the Commerce Clause. The courts will invoke the Commerce Clause when a state statute imposes a burden on [interstate] commerce which is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church*, 397 U.S. 137 (1970). Plaintiff has put forth no theory under which New York's requirement of an in-state office for nonresident lawyers can be said to be "clearly excessive to the substantial interest New York has in ensuring that nonresident attorneys are familiar with New York law and maintain a stake in their New York license…"

Further, Plaintiff has advanced no theory which would make the office requirement "clearly excessive" to the State's interest in ensuring that nonresident lawyers are accessible to "clients, courts, and other interested parties."

Judge Kahn denied Plaintiff's commerce clause claims.

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