

**Report of the Commercial and Federal Litigation Section
In Support of Repeal of Judiciary Law Section 470**

October 3, 2017

Last year, the Second Circuit upheld the constitutionality of N.Y. Judiciary Law Sec. 470, which requires nonresident members of the New York bar who wish to practice in the state to maintain an office in New York in *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016), *cert den.* 2017 U.S. LEXIS 2468; 137 S. Ct. 1580; 197 L. Ed. 2d 705; WL 1366736 (2017). The Court concluded that New York enacted Sec. 470 to afford nonresident New York attorneys a way to establish a physical presence in New York akin to resident attorneys, eliminating any service-of-process concerns. Before the Second Circuit decided *Schoenefeld*, it had certified a question to the New York Court of Appeals asking it to set forth the minimum requirements necessary to satisfy Sec. 470. In answering the certified question, the New York Court of Appeals held that Sec. 470 requires “nonresident attorneys practicing in New York to maintain a physical law office here.” The New York Court of Appeals also noted that, while ensuring the possibility of service on out-of-state attorneys may have played a role in driving the enactment of the statute in 1862, today there appear to be adequate measures in place outside Sec. 470 to ensure potential claimants’ ability to effect service upon nonresident attorneys, and the New York Legislature could make any necessary changes to Sec. 470 it deemed necessary. *See Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221 (2015).

The Section has considered how the Second Circuit’s decision affects New York resident and non-resident attorneys, including in particular the way it impinges on multijurisdictional practice and how the decision could affect in-house counsel and New York’s status as a leader in the law and the forum of choice in business disputes. It has reviewed similar statutes in other states and discussed how some states have eliminated or significantly limited the

physical presence requirement for their nonresident attorneys without any noticeable adverse impact on the local bar. *See* Pa. Bar. Assn. Op. 2010-200; *N.J. Ct. R.* 1:21-1; N.C. St. Bar 2005 Op. 10.

The Section recommends that the New York State Legislature repeal Judiciary Law Sec. 470. Aside from service-of-process interests, which the Court of Appeals noted the law no longer serves, the Court did not identify any other policy goals advanced by the law. Other concerns traditionally thought to be addressed by the local office requirement – availability of the attorney and records, lawyers’ familiarity with local rules, and court supervision of out-of-state counsel – are either obsolete in the age of videoconferencing and file-sharing or, like service of process, are now amply addressed by other regulations and ethics rules. Furthermore, the Court left undefined both the concept of “practicing in New York” and the exact parameters of what a “physical law office” constitutes, virtually guaranteeing future litigation over these issues.

Any identifiable concerns that a repeal of Sec. 470 may open a regulatory void can be addressed separately by regulations that New York can adopt at the appropriate time. No regulatory voids were readily apparent to the Section.

This Report was prepared by the Legislative and Judicial Initiatives Committee of the Commercial and Federal Litigation Section of the New York State Bar Association and was adopted at a meeting of the Section’s Executive Committee on October 3, 2017. Opinions expressed in this report are those of the Section and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association’s House of Delegates or Executive Committee.

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