NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1223 (05/12/2021)

Topic: Dual practice; Rental of office space

Digest: Renting law office space for lawful purposes is a permitted nonlegal business for a lawyer. Where a lawyer who owns a nonlegal services business is providing nonlegal services to persons who are not clients, Rule 5.7(a)(3) provides that the nonlegal services entity will be subject to the Rules by virtue of Rule 5.7 only if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

Rules: 5.7(a)(3) and (4), 7.1(h)

FACTS

1. The inquirer plans to establish a Professional Limited Liability Company ("PLLC") or a Professional Corporation ("PC") to operate a "Virtual Office Suite" in the first floor of his home. The business would have a reception desk; ten or more independent workstations with stand-alone, non-networked computers for each user; high speed internet access; separate, secure paper filing systems for each user; and one or more shared conference rooms. The inquirer also states that the business would comply with all aspects of Section 470 of the New York Judiciary Law, which provides an exception to the requirement that lawyers who practice New York law must be resident in New York, if the lawyers reside in contiguous states and keep "an office for the transaction of law business" in this State.

QUESTION

2. May a New York lawyer rent space to other lawyers as a nonlegal business, and provide them with facilities and equipment to operate their separate law practices?

OPINION

3. We assume for this opinion that the persons who might rent space from the inquirer are lawyers who are not also legal clients of the inquirer.

4. The jurisdiction of this Committee is limited to questions of legal ethics. We do not give opinions on matters of law. Thus, we cannot opine on whether it would be legally permissible to run a nonlegal business in a PLLC. We note, however, that Limited Liability Company Law § 1203(a) authorizes one or more professionals to form a Professional Limited Liability Company "for the purpose of rendering the professional service or services as such professionals are authorized to practice," which would not appear to be the case here. Similarly, we cannot interpret Judiciary Law §470.

5. Although the inquirer refers to his business as rental of "virtual law offices," we are not adopting this terminology. We do not believe there is a generally accepted definition of a "virtual law office." In N.Y. State 1025 (2015), this Committee defined a "virtual law office" as meaning solely an online presence. *Compare* N.Y. City 2019-2 (which defines a virtual law office, for purposes of that opinion, as a facility that offers business services and meeting and work spaces to lawyers on an "as needed" basis and where the lawyers do not have a dedicated office space, but rather share all space and amenities with other subscribers). The question of what constitutes a physical office for purposes of Judiciary Law §470, as opposed to a mail drop or internet office, is a question of law. In this opinion, we will therefore describe the inquirer's proposal as renting office space and amenities.

Lawyers Operating a Nonlegal Business

6. The rental of office space and amenities – even space to be used by lawyers for the practice of law – is a nonlegal business. The responsibilities of lawyers who provide nonlegal services is governed by Rule 5.7 of the New York Rules of Professional Conduct (the "Rules"). We have issued several recent opinions on lawyers who also engage in a nonlegal business. *See, e.g.,* N.Y. State 1157 (2018) (engineering), N.Y. State 1155 (2018) (financial planning), N.Y. State 1101 (2016) (real estate brokerage), N.Y. State 915 (2012) (nonlegal consulting). The issue under Rule 5.7 is whether the nonlegal services are not distinct from legal services and thus should be subject to the Rules. Where a lawyer who owns a nonlegal services business is providing nonlegal services to persons who are not clients, Rule 5.7(a)(3) provides that the nonlegal services entity will be subject to the Rules as a result of Rule 5.7 only "if the person receiving the services could *reasonably* believe that the nonlegal services are the subject of a client-lawyer relationship." (Emphasis supplied.) Rule 5.7(a)(4) creates a presumption that the recipient has such a belief, unless the lawyer has advised the person receiving the nonlegal services in writing that the services are not legal services and that the protection of the client-lawyer relationship does not exist with respect to the nonlegal services. However, in N.Y. State 1222 (2021), we said that presumption does not go into effect until, after weighing all relevant factors under Rule 5.7(a)(3), a person receiving the nonlegal services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship. In this case we think it unlikely that lawyers renting office space in accordance with the arrangement described by the inquirer could reasonably believe that the rental of office space creates a client-lawyer relationship with the inquirer. Consequently, we do not believe that the Rule 5.7(a)(4) disclaimer is necessary on the facts here.

Office Sharing Arrangements

7. We will not opine here on the conduct of lawyers who might rent space from the inquirer. We have, however, previously opined on the ethical responsibilities of lawyers who share office space, including their responsibility for maintaining confidentiality. *See* N.Y. State 1102 (2016). In addition, Comment [2] to Rule 1.0 (the definition of firm) notes that "a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists . . . ."

New York-Resident Lawyers and Judiciary Law § 470

8. A New York resident lawyer may have a nonpermanent office without implicating Judiciary Law § 470. For example, a New York lawyer may work out of his or her residence in New York, but not want to meet clients there or use a home address for business. A New York resident lawyer who spends most of his or her time in court may not need an office other than to meet clients from time to time. A New York resident lawyer may have an office in one New York town but want to explore setting up a location in another New York town. In each of these circumstances, an office that the lawyer does not occupy full-time enables the lawyer, at relatively

small expense, to meet both client needs and the lawyer's own law practice management goals.

Section 470 and New York-Admitted Lawyers Not Resident Here

9. The principal issue facing New York-admitted lawyers who are not resident in New York but want to practice here is Section 470 of the Judiciary Law. Section 470, which was adopted at a time when the law provided that only a New York resident could practice law in New York, provides that a person admitted to practice in New York whose *office for the transaction of law business* is in New York may practice as an attorney even though he or she lives in an adjoining state. In 1979, the New York Court of Appeals struck down the residency requirement of Section 470 on the grounds that it violated the Constitutional Privileges and Immunities Clause. *In re Gordon*, 48 N.Y.2d 266 (1979). The New York legislature, however, did not amend the statute to fix the problem. New York courts therefore have interpreted Section 470 to apply to all non-resident members of the New York bar. See *Lichtenstein v. Emerson,* 251 A.D.2d 64 (lst Dep't 1998).

10. In 2015, as part of a federal case challenging the Constitutionality of Judiciary Law § 470, the New York Court of Appeals was asked by the Second Circuit Court of Appeals what constituted an office for the transaction of law business in New York for purposes of the statute. The Court of Appeals opined that the statute required nonresident attorneys to maintain a physical office in New York. *See Schoenefeld v. State*, 25 N.Y.3d 22 (2015). Although the Court was urged to read Section 470 as requiring only some type of physical presence for the receipt of service, such as an address or the appointment of an agent within the State, the Court of Appeals explained that the phrase "for the transaction of law business" makes this interpretation of the law much less plausible. Nevertheless, the Second Circuit held that Section 470 did not violate the Privileges and Immunities Clause. *See Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016).

11. The Second Circuit's conclusion has directed new attention to the purpose of Judiciary Law § 470. *See Report of the NYSBA Working Group on Judiciary Law § 470* (October 8, 2018). (The report notes that the Legislature adopted Section 470 because it believed a New York office was necessary so that the non-resident lawyer could be served with process. But the Working Group concluded 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 in biennial registrations. The Association's CPLR Committee also determined that a non-resident attorney who practices in New York and who is a defendant in a New York legal matter may be served outside New York.) In January 2019, the New York State Bar Association adopted a resolution calling for the repeal of Section 470. The President of the Bar Association stated: "In a digital era where attorneys across the street and around the world are just a click away on their computer or smart phone, an antiquated rule from over a century ago requiring a physical office in the state no longer serves any purpose." Although bills have been introduced in both houses of the New York legislature that would repeal Judiciary Law § 470, *see* N.Y. Assembly Bill A5895 (Weprin 2021), N.Y. Senate Bill S700 (Hoylman 2021), no action has been taken on them. Thus, Section 470, as interpreted by the courts, is still the law of New York.[1]

Effect of New York Ethical Rules

12. In N.Y. State 1025 (2014), *i.e*. before the Second Circuit's *Schoenefeld* decision, we considered the requirement of Rule 7.1(h) that an attorney's advertisement must include the

[1] Committee Note dated May 19, 2021: On May 12, 2021, the same day that this opinion was released, the New York State Senate adopted S700. The bill has been referred to the Assembly Judiciary and Rules Committees.

attorney's "principal law office address." In an earlier opinion, we had interpreted this requirement as precluding a "mail drop" as the attorney's sole address, but instead said it must be a physical office at which the attorney is located. *See* N.Y. State 964 (2013). However, in N.Y. State 1025, we concluded that it was incorrect to interpret the attorney advertising rule as an independent mandate for attorneys who advertise to maintain a physical office address. Accordingly, we held that a lawyer could use a virtual law office address for Rule 7.1(h) purposes, as long as the lawyer complies with all applicable laws and Rules.

13. In 2019, *i.e.*, after the Second Circuit's opinion in *Schoenefeld*, the New York City Bar's Ethics Committee issued Formal Opinion 2019-2. In it, the Committee concluded that any law office listed on attorney advertising under Rule 7.1(h) must qualify as a law office under Judiciary Law § 470 because the purpose of the two requirements is the same – to disclose an office where the lawyer is present and available for contact, and where personal service or delivery of legal papers could be effected. The opinion concluded that a lawyer may use the street address of a virtual law office as the lawyer's principal office address for the purposes of Rule 7.1(h) as long as the virtual law office qualifies as an office for the transaction of law business under Section 470. It also concluded that a lawyer could use a virtual law office address on letterhead, business cards and the lawyer's website, as long as such use is not misleading under the circumstances. The Committee noted that it could not express an opinion on compliance with Section 470, which is a question of law. But it also noted that the virtual law office in that opinion, like the proposed virtual law office here, included a physical facility at which a lawyer could meet with clients and receive service of process.

14. In light of the continued validity of Judiciary Law § 470, we confirm our opinion in N.Y. State 1025: A non-resident attorney who is admitted to practice in New York and who practices New York law must have an office in New York that meets the minimum requirements of Section 470, but we express no opinion as to what Section 470 requires.

CONCLUSION

15. Renting law office space for lawful purposes is a permitted nonlegal business for a New York lawyer. Where a lawyer who owns a nonlegal services business is providing nonlegal services to persons who are not clients, Rule 5.7(a)(3) provides that the nonlegal services entity will be subject to the Rules by virtue of Rule 5.7 only if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship. In N.Y. State 1025, we allowed a lawyer legally practicing in New York to use a virtual law office address for Rule 7.1(h) purposes. But the principal issue facing New York-admitted lawyers who are not resident in New York is compliance with Judiciary Law § 470. That is a legal issue on which we do not opine.

(10-21)