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COURT OF APPEALS

STATE OF NEW YORK

EKATERINA SCHOENEFELD,

Respondent,

-against-

No. 39

STATE OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York 12207
February 17, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 39, Schoenefeld v. State of New York.

3 Counsel?

4 MS. ETLINGER: May it please the court, I
5 would like to reserve three minutes for rebuttal.

6 CHIEF JUDGE LIPPMAN: Three minutes. Go
7 ahead. You're on.

8 MS. ETLINGER: The issue before the court
9 is whether Judiciary Law Section 470 can, and
10 therefore should, be interpreted narrowly to avoid
11 raising a serious Constitutional question.

12 CHIEF JUDGE LIPPMAN: How narrowly would
13 you like us to interpret it?

14 MS. ETLINGER: We - - - the - - - the
15 statute can reasonably be interpreted narrowly to
16 require only that an att - - - a nonresident attorney
17 maintain an address or a location in the state at
18 which the attorney - - -

19 CHIEF JUDGE LIPPMAN: Show us the language
20 in - - - in the - - - in the Judiciary Law that
21 allows you to make that interpretation.

22 MS. ETLINGER: Well, the language in the
23 Judiciary Law is, "office for the transaction of law
24 business." And - - -

25 CHIEF JUDGE LIPPMAN: What does that mean?

1 MS. ETLINGER: And an office for the
2 transaction of law business can be construed to mean
3 an office that facilitates the transaction of law,
4 with a limited construction here specifically to
5 allow personal service on the attorney.

6 JUDGE ABDUS-SALAAM: So you're talking
7 about a brick and - - - bricks and mortar location,
8 counsel, or something else?

9 MS. ETLINGER: Well, it has to be more than
10 a - - - a P.O. Box. It has to be an - - - an office
11 in the sense of an address location where somebody is
12 there to accept personal service.

13 CHIEF JUDGE LIPPMAN: What - - - what leads
14 you, in the history of this statute, to interpret it
15 that way? It - - - it seems contrary to everything
16 we know about - - - about the statute over the years.
17 You know, the prior decisions, Gordon. What - - -
18 why - - - why - - -

19 MS. ETLINGER: Well - - -

20 CHIEF JUDGE LIPPMAN: - - - all of a sudden
21 do we now say that you don't need a - - - a - - -

22 MS. ETLINGER: Well, one of the - - -

23 CHIEF JUDGE LIPPMAN: - - - a physical
24 presence?

25 MS. ETLINGER: One of the original purposes

1 of the instate office requirement was to facilitate
2 personal service on the nonresident attorney. That
3 was one of the reasons this - - - the legislature
4 included the in-state office - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but we don't -
6 - - we don't write the statute, you know. This is a
7 history. And if you look at it and if you look at
8 Gordon and the interpretations, there seems to be
9 this - - - this dichotomy between whether you
10 actually need a physical address. And now, at this
11 late point in time, we are going to rewrite the
12 statute?

13 MS. ETLINGER: Well - - -

14 CHIEF JUDGE LIPPMAN: Is that what you're
15 asking us to do?

16 MS. ETLINGER: I don't think we're asking
17 you to rewrite the statute. But there is a rule of
18 statutory construction that says when a - - - a
19 statute can be interpreted is at least susceptible to
20 interpretation.

21 JUDGE READ: But this - - - but this is a
22 certified question. I mean, we understand that
23 principle. But this is a certified question from the
24 Second Circuit. Do we even have the freedom to do
25 that or - - -

1 MS. ETLINGER: I think absolutely. I think
2 that's - - -

3 JUDGE READ: You don't think they're just
4 asking us what the statute means and then they'll
5 make the determination whether or not it's
6 Constitutional?

7 MS. ETLINGER: Well, I think it's two
8 different questions. I think the question ultimately
9 whether the statute violates the princ - - - the
10 Privileges and Immunities Clause is the question in
11 the Second Circuit litigation.

12 JUDGE READ: Right.

13 MS. ETLINGER: But they have - - - we have
14 proposed a very narrow interpretation to this - - -
15 to the Second Circuit. And we said the Court of
16 Appeals - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but why do you
18 think they came to us?

19 MS. ETLINGER: I think they came to you to
20 see if you would interpret it narrowly applying the
21 rule of Constitutional avoidance, as we've suggested.
22 And that it - - - and that it can be interpreted that
23 way because it's - - - it - - - the question under
24 the rule of Constitutional avoidance is does it raise
25 a serious question? Is there grave doubts about the

1 statute? And if there are and there's another
2 interpretation that avoids those clashes - - -

3 CHIEF JUDGE LIPPMAN: What's - - - what's
4 the harm in - - - in not doing what you say? Why - -
5 - why don't we say what it appears was meant and - -
6 - and is still meant? What - - - what's going to be
7 the great calamity that will - - -

8 MS. ETLINGER: Well - - -

9 CHIEF JUDGE LIPPMAN: - - - befall us if we
10 - - - if we say that it means a physical presence in
11 the state?

12 MS. ETLINGER: Well, there's two things.
13 One is this court, under the rule of Constitutional
14 avoidance, strives to retain statutes
15 Constitutionally when it can. When - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but sometimes
17 they're hopeless, right?

18 MS. ETLINGER: Sometimes they're hopeless.

19 CHIEF JUDGE LIPPMAN: We can't retain them.

20 MS. ETLINGER: We don't think this one is.
21 But - - - but there is a goal to sustain a statute if
22 you can.

23 CHIEF JUDGE LIPPMAN: What's - - - what's
24 the - - -

25 MS. ETLINGER: And - - -

1 CHIEF JUDGE LIPPMAN: But what's the - - -

2 MS. ETLINGER: Yes, I - - -

3 CHIEF JUDGE LIPPMAN: I'm talking, what's
4 the practical benefit?

5 MS. ETLINGER: Practical. The practical
6 benefit of having an in-state location where a
7 nonresident attorney can be served is that it
8 preserves to the litigant, who happens to be
9 litigating against someone who has a nonresident
10 attorney, the ability to use all of the methods of
11 service available under CPLR 2103 at their choice in
12 a practical, reasonable means. So that if I have a
13 need or choose to serve papers personally, because I
14 want a soon - - - a soon - - - a quicker return date,
15 I have voluminous papers, I want to bring them to
16 someone's attention immediately, it's practical for
17 me to do that within the state.

18 JUDGE FAHEY: So - - - so that - - - so
19 that a designated agent would suffice to meet your
20 argument.

21 MS. ETLINGER: And - - -

22 JUDGE FAHEY: As opposed to a - - - a place
23 where the attorney actually had to be present
24 occasionally?

25 MS. ETLINGER: Absolutely. The attorney

1 does not have to be present. There has to be
2 somebody there who could accept - - -

3 JUDGE RIVERA: But - - -

4 MS. ETLINGER: - - - service on behalf of
5 the attorney.

6 JUDGE RIVERA: Counsel, after this court's
7 declared unconstitutional the residency requirement,
8 the legislature did, in fact, amend the CPLR, but
9 they didn't at all - - -

10 MS. ETLINGER: Exactly.

11 JUDGE RIVERA: - - - amend the Judiciary
12 Law. Doesn't that seem to suggest that "office"
13 means more than what you're suggesting is the
14 appropriate narrowed reading?

15 MS. ETLINGER: Well, they didn't amend
16 Judiciary Law 470 at all, even when they had an
17 opportunity to do so. So I think the question is
18 what did they mean by leaving this intact? And - - -

19 JUDGE FAHEY: This is a really unusual
20 rule, isn't it, really, at this point? In - - - in
21 the history of the law in the United States, it seems
22 if you look at other states - - - I did a little bit
23 of research and looked at some of the other ones. I
24 looked at Illinois, Florida, Texas, California, and
25 Missouri. Missouri had reciprocity-based

1 restrictions, but the rest of them really didn't.
2 And - - - and it seems that at this point in - - - in
3 the history of the litigation that - - - or this - -
4 - this idea that things have really changed a lot.
5 And - - - and the only way this could survive is in a
6 very narrow reading.

7 The interesting thing is to compare it to
8 New Jersey. New Jersey has something almost as - - -
9 actually a little less narrow than what you're
10 proposing right now, and that's where the litigant, I
11 think, is from, New Jersey originally, so - - -

12 MS. ETLINGER: Yes. And - - - and there
13 are - - - it - - - it is not a prevalent rule in the
14 United States anymore. There are some states that
15 still require an office for different purposes.
16 Delaware requires all attorneys who practice in the
17 Delaware Supreme Court to maintain an office in
18 Delaware.

19 JUDGE PIGOTT: Is that - - - when - - -
20 when you - - - when you prepared to oppose this, did
21 you make the determination that you - - - that - - -
22 that rather than argue that it bears a substantial
23 relationship to the State's objective, you wanted to
24 argue narrowness? In other words, have you already
25 decided that 470, in your view, does not bear a

1 substantial relationship to the State's objectives?

2 MS. ETLINGER: No. We're not conceding
3 that it would - - - that it's unconstitutional. But
4 we think the Second Circuit has certainly raised a
5 serious question about that in their opinion
6 certifying - - -

7 JUDGE PIGOTT: But couldn't you argue, if
8 you look at 497 of the Judiciary Law, which says that
9 - - - I think it says that you've got to have banks
10 in the State of New York; if you look at our
11 requirements under the - - - under the Canons of
12 Professional Responsibility which says that your - -
13 - your financial records have to be subject to
14 subpoena; if you look at the fact that in your IOLA
15 account, it has to be in a New York bank, that there
16 may be substantial relationships here that require an
17 office in the State of New York. Did you - - - did
18 you consider that argument and reject it, or am I
19 misunderstanding your view?

20 MS. ETLINGER: We - - - we took the simpler
21 tact that be - - - because the question before the
22 Second Circuit was, if there was any reading under
23 which it could be Constitutional, as a facial
24 challenge, it would survive. So we didn't
25 necessarily concede that it's not - - - there are not

1 substantial reasons that could sustain an office
2 requirement.

3 JUDGE PIGOTT: When you - - - when you made
4 your arguments, too, did you consider the fact that
5 we're talking about New Jersey here. But would this
6 apply to an attorney who lives in Florida who - - -

7 MS. ETLINGER: The - - - it would apply to
8 an attorney who - - -

9 JUDGE FAHEY: I was almost done.

10 MS. ETLINGER: Oh, I'm sorry.

11 JUDGE PIGOTT: Who decides that he's
12 sitting or she's sitting in Florida and wants to do
13 real estate closings or family law and can make an
14 appearance and - - - and in, some fashion, I guess,
15 appear in our courts, but may not be available for a
16 litigant or for the - - - pursuant to an order of the
17 court from that distance?

18 MS. ETLINGER: Yes, it would apply to
19 Florida, and it would apply to an attorney in
20 California, and it would apply to a - - - an attorney
21 in Paris, France.

22 JUDGE PIGOTT: Does that - - - does that -
23 - - I - - - I didn't see that in anybody's briefs or
24 papers. That's why I was curious. I - - - I - - - I
25 didn't know if - - - yeah.

1 MS. ETLINGER: Yes, since - - - and after
2 this court - - - the - - - the statute originally
3 talked about adjoining states. But after this court
4 struck down the residency requirement in 1979 in the
5 Gordon case, the lower courts have, pretty uniformly,
6 int - - - interpreted the statute to apply to all
7 nonresident attorneys, so all nonresident attorneys
8 are subject to an office requirement under 470.

9 CHIEF JUDGE LIPPMAN: Counselor, what is
10 the statute's relationship to modern technology?
11 That - - - that, you know, when you talk about a
12 physical presence, there's lots of different ways
13 that people can have a presence in the state. Can
14 you have a virtual office - - -

15 MS. ETLINGER: You - - -

16 CHIEF JUDGE LIPPMAN: - - - under this
17 statute?

18 MS. ETLINGER: You can have a virtual
19 office if you still allow - - - if you still have
20 some means of being personally served. That's our
21 proposed meaning to the statute.

22 JUDGE READ: Not electronic service?

23 MS. ETLINGER: I'm sorry?

24 JUDGE READ: Not electronic service?

25 MS. ETLINGER: Not electronic service.

1 JUDGE READ: Why not?

2 MS. ETLINGER: Because electronic service
3 is not uniform within the state yet. Right now,
4 electronic service is permitted under the rules in
5 the electronic filing system. And that's allowed
6 only in specified courts and specified types of
7 cases. We're not at that point yet.

8 JUDGE READ: Well, we're close, if you
9 heard the State of the Judiciary.

10 MS. ETLINGER: Yes. Yes. But we're not
11 there yet. And right now personal service still is
12 one of the available means to litigants in - - -

13 JUDGE PIGOTT: Right. Let - - - let me
14 follow up again. I - - - I appreciate your point on
15 service of process and particularly bulk documents
16 and things like that. 493 (sic) talks about IOLA
17 accounts and it says that you must have - - - you
18 have funds in a banking institution which means a
19 bank, trust company, savings bank, savings and loan
20 association, on and on, in this state. Its principal
21 banking business is in this state. Does that fall?

22 MS. ETLINGER: Under the Privileges and
23 Immunities Clause?

24 JUDGE PIGOTT: Yeah, because you're only
25 arguing you need a - - - you need a website. That

1 you need a - - - would we then have to change 497 to
2 say that your IOLA account can be in a bank, you
3 know, in - - - in Florida, Texas?

4 MS. ETLINGER: No. I - - - I - - - I - - -
5 I think they're two different - - -

6 JUDGE PIGOTT: So you're saying the IOLA
7 account has to be in - - - in New York State?

8 MS. ETLINGER: Well, that's what the law
9 says now.

10 JUDGE PIGOTT: I understand that.

11 MS. ETLINGER: Yeah.

12 JUDGE PIGOTT: I'm asking you that. I - -
13 - you're - - - you're - - - you're trying to protect
14 470 but you're trying to - - - it seems to me, arg -
15 - - protect it in a very narrow sense.

16 MS. ETLINGER: Um-hum.

17 JUDGE PIGOTT: And you're saying you can
18 have somebody - - - you can have an agent for
19 service.

20 MS. ETLINGER: Um-hum.

21 JUDGE PIGOTT: All right, which - - - well,
22 your time is running out. And I don't want to - - -
23 you can finish up.

24 MS. ETLINGER: Well, but there could be - -
25 - I - - - I guess I'm just hesitating because there

1 could be - - - I haven't thought through the reasons
2 why an IOLA account might need to be in New York.
3 There could be other reasons that satisfy that that
4 have absolutely nothing to do with service of
5 process.

6 JUDGE RIVERA: I want to go back to this
7 question of the narrowness of just focusing on
8 service. And I understand the - - - your historical
9 argument, but, again, the fact that the legislature
10 amended the CPLR and didn't amend this could be
11 interpreted, right, to suggest that an office for the
12 transaction of law business means something other
13 than service, because you've taken care of the
14 service with the CPLR. Why - - - why can't it be
15 interpreted to mean more than what you suggest, which
16 is just focusing on service?

17 MS. ETLINGER: It could be interpreted more
18 broadly. But the Second Circuit has indicated that
19 if it's interpreted as broadly to mean a fully
20 operational office with attendant costs of staffing
21 and equipment, that that would likely violate the
22 Privileges and the Immunities Clause. So applying -
23 - -

24 JUDGE RIVERA: Well, then the - - - then
25 you're getting back to Judge Read's question whether

1 there's - - - what is the exercise that's been put
2 before us? Is it merely to interpret the statute and
3 say this is what we believe it means, not how it
4 should be interpreted for purposes of its
5 Constitutionality?

6 MS. ETLINGER: But the canon of
7 Constitutional avoidance is a tool in - - - in
8 statutory construction, not a tool in determining
9 whether a statute is Constitutional or not.

10 JUDGE RIVERA: But even under that
11 construction, does it have to be as narrow as you
12 suggest, right? You suggest it could be just a P.O.
13 Box or, in fact, nothing. It could be - - -

14 MS. ETLINGER: No.

15 JUDGE RIVERA: - - - just I identify
16 someone to accept service.

17 MS. ETLINGER: Yes.

18 JUDGE RIVERA: How is that about the
19 transaction of law, business law? Business is not
20 solely about service.

21 MS. ETLINGER: No, but it's one of - - -
22 it's a limiting construction, because service is one
23 of the attributes of the transacting service. And
24 the critical one and the one specifically provided
25 for an office under 2103 sub - - - subdivision - - -

1 CHIEF JUDGE LIPPMAN: Okay, counsel.
2 You'll have your - - - you'll have your rebuttal.

3 MS. ETLINGER: Okay.

4 CHIEF JUDGE LIPPMAN: Let's - - - let's
5 hear from your adversary.

6 MS. SCHOENEFELD: May it please the court;
7 my name is Ekaterina Schoenefeld, and I'm appearing
8 here pro se as - - -

9 CHIEF JUDGE LIPPMAN: But you are in the
10 plaintiff in this case?

11 MS. SCHOENEFELD: Yes.

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MS. SCHOENEFELD: I would - - -

14 CHIEF JUDGE LIPPMAN: What do you hope to
15 achieve as a result of this? You want to practice in
16 New York?

17 MS. SCHOENEFELD: Yes. Yes, Your Honor.
18 And I would like to go back to your question - - - to
19 Your Honor's question about IOLTA accounts, I do not
20 believe it would affect, in any way, Section 493,
21 because, for instance, New Jersey did away with the
22 bona fide office requirement several years ago, but
23 it still requires IOLTA accounts for New Jersey
24 practice to be located in New Jersey. So nonresident
25 New York attorneys could still - - - if the statute

1 declared unconstitutional, then New York-licensed
2 attorneys could still practice in New York courts
3 while being out of state, but they would have to
4 maintain client - - - client funds in New York State
5 - - - or in New York State.

6 JUDGE PIGOTT: So you would have two I - -
7 - I know it's IOLTA there, IOLA here. But you have
8 spirit - - - and the point of IOLA is that you have
9 all of this money that doesn't necessarily belong to
10 you but is of such an insignificant amount that it's
11 not worth setting up a separate account for. And so
12 that money goes into this - - - this account that
13 each lawyer keeps, the interest of which goes in - -
14 - goes to the state on the - - - on the interest on
15 lawyers' accounts for - - - for other purposes. So
16 you're saying that if you're in New Jersey, you're
17 going to hold a New - - - well, I guess, what,
18 clients that have cases in New Jersey in one account
19 and then clients that you have in New York, you'd
20 have a separate IOLA account over here in a New York
21 bank?

22 MS. SCHOENEFELD: Yes, Your Honor. That's
23 the current setup right now for New Jersey. For
24 example, if - - - if there is a New York-based New
25 York attorney who's also licensed in New Jersey and

1 he practices in both states, he has to maintain two -
2 - - two IOLTA accounts, one in New Jersey, one New
3 York.

4 JUDGE ABDUS-SALAAM: Counsel, why wouldn't
5 a designated agent for service satisfy the statutory
6 construction issue that we're faced with? Why
7 wouldn't that save the statute?

8 MS. SCHOENEFELD: Your Honor, I don't
9 believe it would save the statute because there's no
10 such thing just merely designating a service - - - an
11 agent for service of papers, because the purpose is
12 to get these papers to the attorney soon - - - as
13 quickly as possible in the case as - - - such in
14 order to show cause or injunctive relief or emergent
15 relief. So if you just designate a service - - - an
16 agent for service of papers without accompanying
17 office space where that agent would scan the papers,
18 forward e-mail, or fax to the attorney out-of-state
19 location - - -

20 CHIEF JUDGE LIPPMAN: So what - - - what do
21 you want the law to be with - - - if - - - if you're
22 - - - if you're admitted and you're a New Jersey
23 resident, and if we - - - if it turns out that it's
24 unconstitutional to - - - unconstitutional to require a
25 physical office. And you're saying that service - -

1 - designating an agent is not sufficient. So what
2 would happen if you win? What would - - - what would
3 happen in New York if you're representing a client
4 here, you have no office. How does the other side
5 proceed if they want to serve you?

6 MS. SCHOENEFELD: They would have an option
7 of personal service to - - - out of state.

8 CHIEF JUDGE LIPPMAN: To go - - - go to New
9 Jersey and serve you?

10 MS. SCHOENEFELD: Yeah, they could serve me
11 in New Jersey.

12 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

13 MS. SCHOENEFELD: For instance, for
14 example, commercial process servers like Guaranteed
15 Subpoena, you can fax documents or e-mail documents
16 to them and they would print and serve anywhere in
17 the country, any fifty states. You would have still
18 mail, because the mail these days, first-class mail -
19 - - mail goes as fast from New York, Manhattan to New
20 Jersey as fast as to Buffalo.

21 CHIEF JUDGE LIPPMAN: It wouldn't be better
22 if you had an agent for service of process in New
23 York?

24 MS. SCHOENEFELD: It would cause delays.
25 As one - - -

1 CHIEF JUDGE LIPPMAN: It would cause delays
2 to have the agent?

3 MS. SCHOENEFELD: It would - - -

4 CHIEF JUDGE LIPPMAN: Rather than to just
5 serve you personally in New Jersey?

6 MS. SCHOENEFELD: Yes. Yes, Your Honor.

7 JUDGE FAHEY: Well, New Jersey has a
8 fallback position, though. I believe that - - - if
9 you - - - if someone hasn't designated a physical
10 space, they can - - - or a phy - - - or an actual
11 agent, the clerk of the New Jersey Supreme Court can
12 be designated as the fallback agent. Isn't that how
13 it works in New Jersey?

14 MS. SCHOENEFELD: Yes, Your Honor. But
15 that's - - - as I understand it, it's in case if the
16 attorney's being sued in his personal capacity, like
17 from a practice or if I breached a lease or something
18 like that. Not in my representative capacity in the
19 course of representation of clients.

20 JUDGE FAHEY: But the point is is there's a
21 fallback location within the state for service to
22 take place. I guess that's - - - that's what I'm
23 wondering. And - - - and under your proposal, there
24 would not be one in New York.

25 MS. SCHOENEFELD: There is one already. As

1 part of the admission to New York Bar, I had to sign
2 and execute a document that says that the Secretary
3 of the State is designated, as you mention.

4 JUDGE FAHEY: I - - - I understand that.
5 It's a poor question on my part. What - - - what I
6 meant is is that under the New - - - New Jersey
7 statute there's a fallback within the state. But
8 under your proposal, there wouldn't be a fallback
9 within New York.

10 MS. SCHOENEFELD: There would be no need
11 for that because - - -

12 JUDGE FAHEY: I see.

13 MS. SCHOENEFELD: - - - an attorney out of
14 state could be served by personal service, could be
15 served by mail, could be served electronically.

16 JUDGE FAHEY: What's the third one?

17 MS. SCHOENEFELD: Electronically, by e-
18 mail. For example, some states, like Florida,
19 already implemented mandatory service by e-mail,
20 which is - - -

21 JUDGE PIGOTT: What do you do - - - in - -
22 - in our Code of Professional Responsibility we talk
23 about availability of bookkeeping records. And we
24 say, the financial records required by this Rule
25 shall be located, or made available, at the principal

1 New York State office of the lawyers subject hereto
2 and any such records shall be produced in response to
3 a notice of subpoena duces tecum issued in connection
4 with a complaint before any investigation by the
5 appropriate grievances department or committee.

6 MS. SCHOENEFELD: Well, one - - -

7 JUDGE PIGOTT: Does that - - - does that
8 rule stand or fall?

9 MS. SCHOENEFELD: It could still stand.

10 JUDGE PIGOTT: All right. So you'd have to
11 keep your financial records here in New York?

12 MS. SCHOENEFELD: I could keep my financial
13 records only in New York, or it could be done the
14 same way as it - - - it is done in New Jersey where I
15 have to designate - - - if, for example, out-of-state
16 attorney practicing in New Jersey has to designate a
17 fixed location where the records and bookkeeping
18 financial documents would be produced on short
19 notice.

20 JUDGE PIGOTT: Can we call that an office?

21 MS. SCHOENEFELD: It's not an office, Your
22 Honor, because that would not be permanent location
23 of my book records.

24 JUDGE PIGOTT: Well, we need them. In
25 other words, not you, but you've got some lawyer from

1 Alaska who's practicing in the State of New York.
2 And the - - - and the - - - and the - - - a resident
3 in the state of New York calls up the grievance
4 committee and says I haven't heard from my lawyer in
5 six months. He was supposed to close this deal. I
6 gave him 25,000 dollars to do it, and I haven't seen
7 hide nor hair of him. I want to file a complaint.
8 So you filed a complaint with the Appellate Division.
9 They immediately subpoena the Alaska attorney's
10 records. Where do they go with a subpoena?

11 MS. SCHOENEFELD: They could serve that
12 attorney upon Secretary of State. They could serve
13 at his Alaska location and - - -

14 JUDGE PIGOTT: You honestly think you can
15 serve the Secretary of State with a subpoena on a
16 grievance matter requesting financial records?

17 MS. SCHOENEFELD: And the attorney could
18 produce financial records, even hard copy or - - -

19 JUDGE PIGOTT: I'm sorry, and what?

20 MS. SCHOENEFELD: That attorney could
21 produce financial records, either in a hard copy,
22 bring the paper documents to New York - - -

23 JUDGE PIGOTT: In a what?

24 MS. SCHOENEFELD: Paper copy.

25 JUDGE PIGOTT: Hard copy, I got you.

1 MS. SCHOENEFELD: Yeah.

2 JUDGE PIGOTT: I'm sorry.

3 MS. SCHOENEFELD: Or people can - - -

4 JUDGE PIGOTT: But suppose he doesn't
5 respond, is my point. I mean, you got to subp - - -
6 you got to subpoena him somehow. And so serving the
7 - - - the Secretary of State, I doubt, is going to
8 make him respond - - - or her respond. You need the
9 records. You need - - - you know, trying to get the
10 money. Otherwise your IOLA account goes - - -
11 finances go crazy.

12 MS. SCHOENEFELD: Yes, Your Honor. But I
13 would believe that - - - I believe that that attorney
14 would be still subject to New York courts' powers
15 because he's admitted in New York and he's under
16 their Third Judicial Department jurisdiction. He
17 would have to produce records.

18 JUDGE PIGOTT: Well, that's another
19 question. Why would you say the Third Department?
20 In other words, what Department would you be subject
21 to if you were to practice here?

22 MS. SCHOENEFELD: Third Jud - - - Third
23 Judicial Department because I was a out-of-state
24 attorney when I was admitted.

25 JUDGE PIGOTT: So all out-of-state

1 attorneys are subject to discipline in the Third
2 Department?

3 MS. SCHOENEFELD: Yes.

4 JUDGE PIGOTT: Including the ones in Texas?

5 MS. SCHOENEFELD: Yes.

6 JUDGE PIGOTT: So if - - - if the ones in
7 Texas who decide that they are the - - - the - - -
8 the attorneys to see in terms of asbestos litigation,
9 they no longer would have to get lawyers in New York,
10 right, to represent them? They would - - - they
11 could now say call us directly here in Houston, and
12 we will represent you on your asbestos claims in New
13 York. And we don't need a lawyer in New York to be
14 our counsel there, right?

15 MS. SCHOENEFELD: Yes, if they're admitted,
16 you mean.

17 JUDGE PIGOTT: Assuming - - - assuming
18 somebody's admitted in that firm.

19 MS. SCHOENEFELD: Yes.

20 JUDGE PIGOTT: You think that's a
21 substantial change in the way we handle that type of
22 litigation?

23 MS. SCHOENEFELD: I don't believe, Your
24 Honor, because New Jersey had a similar concern. At
25 one time, they required a bona fide office in this -

1 - - in New Jersey and for a - - - initially they did
2 away for a couple of years. And they did not
3 experience any influx of Pennsylvania and New York
4 attorneys. Nothing has changed. That's when it
5 became permanent that none of - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but I think
7 what the Judge is saying it's a very significant
8 change in the way we do our business. Is that a good
9 thing or a bad thing?

10 MS. SCHOENEFELD: I think it is a good
11 thing, because - - -

12 CHIEF JUDGE LIPPMAN: Why? Why is it a
13 good thing?

14 MS. SCHOENEFELD: Because it would ensure
15 that more lawyers are available for clients, to
16 litigants, that they could have a wide - - - wider
17 variety of choice where to go to.

18 CHIEF JUDGE LIPPMAN: So - - - so basically
19 you could live anywhere in the country. You could
20 represent a client here. And if you have a case, you
21 come in and you go to the courtroom and - - - and
22 that's what our law provides. And - - - and in your
23 mind, is it the - - - the mobility is a good thing, I
24 guess?

25 MS. SCHOENEFELD: Yes, Your Honor.

1 JUDGE ABDUS-SALAAM: Counsel, are you
2 suggesting when you - - - in answer to Judge Pigott's
3 question about how service of process could be made
4 that we could save this statute by requiring
5 electronic service?

6 MS. SCHOENEFELD: Yes, Your Honor.

7 JUDGE ABDUS-SALAAM: And would that be
8 good?

9 MS. SCHOENEFELD: I believe so. Yes.

10 JUDGE ABDUS-SALAAM: We could save the
11 statute by requiring that office means electronic
12 service?

13 MS. SCHOENEFELD: Yes, Your Honor. I
14 believe in that case it would not be imposing
15 substantial burden and it would be very fast and
16 efficient way of serving.

17 CHIEF JUDGE LIPPMAN: Is it our place to be
18 saying that? In other words, do we have the
19 authority to say you can just serve electronically,
20 that's the way it is from now on?

21 MS. SCHOENEFELD: Well, that's a good
22 question, Your Honor. Because as this court has
23 held, the courts cannot rewrite the statute in order
24 to save it. And that would be rewriting the statute.

25 JUDGE ABDUS-SALAAM: So that would be a

1 reasonable interpretation of what is currently
2 existing in the statute?

3 MS. SCHOENEFELD: The statute speaks in
4 terms of office for the transaction of law business,
5 and service is only one aspect of that law practice.

6 JUDGE PIGOTT: Are you agreeing - - -

7 JUDGE RIVERA: Yeah. I wanted to follow up
8 on that. I thought your position - - - because I
9 take the State's position is that the statute is
10 about service, and she's very careful about how she
11 suggested that should be narrowly interpreted to
12 focus on service and how - - - how we could do that
13 and - - - and ensure that the statute survives
14 Constitutional scrutiny. But I took your position to
15 be that you cannot, despite the historical approach
16 that the - - - the State proposes, that the statute
17 doesn't mean - - - is - - - is not only referring to
18 service.

19 MS. SCHOENEFELD: Yes, Your Honor. That's
20 correct.

21 JUDGE RIVERA: Okay. So what else is it
22 referring to other than service, and how does that -
23 - - that interpretation fit within the historical
24 background of this statute?

25 MS. SCHOENEFELD: Well, Your Honor, the

1 statute talks an office for the purpose of
2 transacting law business. Law business entails more
3 than just service of process. It's also meeting with
4 clients, working on the documents, doing legal
5 research, conducting closing to positions, et cetera.
6 So practice of law, that's all these things. That
7 was true 100 years ago and today.

8 Now, office is a place where all these
9 activities were traditionally conducted. Now the
10 practice of law has changed. Now you can do
11 everything remotely and all you need, really, to
12 practice law is a computer and Internet and a cell
13 phone.

14 JUDGE RIVERA: You don't need a space to
15 meet clients?

16 MS. SCHOENEFELD: That can be reserved like
17 a conference room in the library private space. You
18 could reserve in the - - - somebody else's like - - -

19 JUDGE RIVERA: You mean you don't need a
20 fixed permanent space that's - - - that you always go
21 back to?

22 MS. SCHOENEFELD: Yes.

23 JUDGE RIVERA: Okay.

24 MS. SCHOENEFELD: Yes, Your Honor. You can
25 practice from anywhere in the world. You can file

1 documents electronically. You can serve documents
2 electronically. Even if the e-filing system is not
3 yet statewide in New York courts, you can still have
4 e-serve - - - e-mail service for subpoenas, doc - - -

5 CHIEF JUDGE LIPPMAN: Do you think,
6 counsel, that - - - that if - - - if we were to find
7 in your favor and if the Second Circuit were to say
8 it's unconstitutional, do you think we'd need
9 additional legislation in New York to frame how we do
10 our business given that now you don't have to have a
11 physical office? Or do you think it would just all
12 go smoothly from there that, as you say, you could be
13 in Houston or Alaska or whatever and you just
14 practice here and - - - and, you know, we'd work it
15 out that - - - that - - - um - - - or do you think,
16 maybe there'd have to be additional legislation to
17 sort of frame some of these issues like electronic
18 service that you're talking about?

19 MS. SCHOENEFELD: That's - - -

20 JUDGE RIVERA: Or - - - or would it saying
21 that the legislature just required that New York-
22 resident lawyers have an office? Then everybody's
23 treated the same. Does that resolve the
24 Constitutional problem?

25 MS. SCHOENEFELD: Well, that would not be a

1 Constitutional problem for nonresidents, but I don't
2 see why - - -

3 JUDGE RIVERA: I know. But I thought that
4 was the nature of your claim. Perhaps I
5 misunderstood your claim.

6 MS. SCHOENEFELD: I'm - - -

7 JUDGE PIGOTT: It sounds like you're
8 agreeing that, you know, the Attorney General is
9 saying, you know, as long as there's a - - - a place
10 for service of process, you know, it's fine, and
11 you're saying the same thing. Only you're saying
12 that means 470's unconstitutional and she's saying
13 that means 470's Constitutional.

14 MS. SCHOENEFELD: Your Honor, I believe
15 that where we disagree, that it's where that space
16 should be located whether it's New Jer - - - or out
17 of state or in state.

18 JUDGE PIGOTT: No, no. She's saying if you
19 have a place to serve for process here. And you were
20 saying, you know, you can get served electronically
21 or you can get served - - - you know, you can have a
22 designated person for service. And that satisfies
23 the statute.

24 MS. SCHOENEFELD: Um-hum.

25 JUDGE PIGOTT: At least that's what I

1 thought your answer to Judge Abdus-Salaam's question.

2 MS. SCHOENEFELD: Designating an agent for
3 service, it's not - - - it's not the only activity
4 that would be performed as an office, so it would not
5 exactly satisfy the statute. But it would be still
6 burdensome, because it would require a space for that
7 agent to be in and equipment and utilities in order
8 to - - -

9 JUDGE PIGOTT: I - - - I - - - I disagree
10 with you on that. You're - - - you yourself are
11 saying that everything is done elec - - -
12 electronically. So if - - - if you've got somebody
13 that - - - that can be served personally in the event
14 of an emergency or in the event that a judge says I
15 want her here tomorrow, that somebody can communicate
16 with your office.

17 MS. SCHOENEFELD: Electronically.

18 JUDGE PIGOTT: Hmm?

19 MS. SCHOENEFELD: Yes, Your Honor.
20 Electronically would be the fastest way to do that,
21 because serving it on the agent within the State of
22 New York would not get the communication from the
23 court that they'd have to be in court right away
24 tomorrow.

25 JUDGE PIGOTT: No, but at least you know -

1 - - at least you know you - - - that there was
2 service. I see your time's expired. I'm sorry.

3 CHIEF JUDGE LIPPMAN: Okay. Thank you,
4 counsel.

5 MS. SCHOENEFELD: Thank you, Your Honor.

6 CHIEF JUDGE LIPPMAN: I won't call you
7 counselor in New York yet. We'll see what happens
8 with the case. Okay.

9 MS. SCHOENEFELD: Thank you, Your Honor.

10 JUDGE RIVERA: She's admitted.

11 JUDGE ABDUS-SALAAM: She's admitted.

12 JUDGE RIVERA: Admitted.

13 CHIEF JUDGE LIPPMAN: No, admitted, but
14 she's appearing pro se in this case.

15 JUDGE RIVERA: Right.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.

17 MS. ETLINGER: I would - - - I would just
18 like to explain again why - - -

19 CHIEF JUDGE LIPPMAN: What's the
20 difference? As Judge Pigott was just honing in on,
21 what's the difference between the two of your
22 positions? Are you both saying the same thing and
23 just one requiring us to declare it unconstitutional
24 and the other one not? Or is there a substantive
25 difference between your - - - your two positions?

1 MS. ETLINGER: No. I think there's a
2 substantive difference.

3 CHIEF JUDGE LIPPMAN: What's the
4 difference?

5 MS. ETLINGER: The difference is we're
6 saying what you need - - - what - - - the way the
7 statute can be read to read it Constitution - - - to
8 - - - so that it is clearly Constitutional - - -

9 CHIEF JUDGE LIPPMAN: So you need an agent
10 for service.

11 MS. ETLINGER: You're still obligated - - -

12 CHIEF JUDGE LIPPMAN: And your adversary's
13 saying yeah, you have to be able to be served, but
14 you don't necessarily need an agent for service here.

15 MS. ETLINGER: Well, we think - - - we're
16 saying an agent for service here is the reasonable
17 way to read the statute for two reasons. One - - -

18 JUDGE READ: Or an address. I thought you
19 had the two alternatives. Or an address, you said
20 the - - -

21 MS. ETLINGER: An - - - an address, right.
22 It could be an address where you could be personally
23 served where - - -

24 JUDGE READ: Or a designated agent.

25 MS. ETLINGER: Or a designated agent. And

1 the designated agent could be at the address.

2 CHIEF JUDGE LIPPMAN: The only difference
3 is your adversary is saying you could serve me, but
4 not necessarily by requiring that you have an agent
5 for service here. She's saying there are lots of
6 ways you could serve.

7 MS. ETLINGER: There's other ways. We're
8 focusing on personal service in the sense of hand
9 delivery of papers for two reasons. One, because
10 that's one of the historical purposes of the in-state
11 office. So we think there's a connection to the
12 original statute, and that gives - - -

13 CHIEF JUDGE LIPPMAN: What - - - what - - -

14 MS. ETLINGER: - - - the court a way to say
15 that it's reasonable.

16 CHIEF JUDGE LIPPMAN: What if we disagree
17 with you and she wins? What happens in New York?

18 MS. ETLINGER: There would not be a place
19 to personally ser - - - there would not have to be a
20 place to personally serve - - -

21 CHIEF JUDGE LIPPMAN: So what would happen
22 in those situations?

23 MS. ETLINGER: If you - - - you would - - -
24 the burden would then be on the non - - - the
25 attorney who happens to be litigating against someone

1 who's a nonresident to - - - if they needed to
2 personally serve, to do that wherever the attorney is
3 located, in Florida, California, or Paris.

4 CHIEF JUDGE LIPPMAN: Could you serve them
5 in Houston? Is that a great problem?

6 MS. ETLINGER: Well, it's not as - - - as
7 easily done. If - - - if I - - - it's expected if
8 you're in the state that you might have contacts for
9 personal service within the state. It's not readily
10 - - -

11 CHIEF JUDGE LIPPMAN: So what's the - - - I
12 guess what I'm driving at - - -

13 MS. ETLINGER: Um-hum.

14 CHIEF JUDGE LIPPMAN: - - - so what's the
15 State interest, and is what you're proposing
16 significantly related to that interest? What's the
17 State interest?

18 MS. ETLINGER: The - - -

19 CHIEF JUDGE LIPPMAN: Is there a State
20 interest in - - - in avoiding what your adversary
21 suggests, which is that, well, you need to serve me
22 in Houston, you serve me in Houston. The - - -
23 what's the State in - - - what's the problem with
24 that?

25 MS. ETLINGER: The State interest is

1 preserving to the litigant all of the available
2 methods of service in a reasonable fashion that are
3 available under CPLR 2103 and not placing a burden on
4 the litigant in New York who happens to be litigating
5 against someone - - -

6 CHIEF JUDGE LIPPMAN: So the State interest
7 is ease of service in - - -

8 MS. ETLINGER: Yes. And - - -

9 CHIEF JUDGE LIPPMAN: - - - in your view?

10 JUDGE PIGOTT: I'm surprised that - - -
11 that no one's arguing money here. I - - - I hate to
12 be mercenary about this. There's been too much money
13 gone south with lawyers. There's too many times when
14 - - - when - - - when lawyers don't respond promptly
15 to what's going on, particularly in family court or
16 in - - - in some of these high-volume courts. And no
17 one seems to be worried about the fact that - - -
18 that we - - - we don't know what the - - - what the
19 requirements are in terms of insurance. We don't
20 know where the - - - where the escrow accounts are
21 going to be. We don't know where the IOLA accounts
22 are going to be. And we don't care.

23 MS. ETLINGER: Well, the other - - - I - - -
24 - the other reason we focus on service is because
25 it's a way to clearly avoid implicating the

1 Privileges and Immunities Clause, because it places
2 residents and nonresidents on equal footing because
3 residents already have a place to be personally
4 served on New - - - in New York. So - - -

5 JUDGE FAHEY: But the financial issues - -
6 - the financial issues really speak to the regulation
7 on the profession itself. And it - - - your - - - if
8 I understand your argument correctly you be - - - we
9 - - - we will be undermining the regulation of the
10 profession itself by taking away this tool and this
11 contact?

12 MS. ETLINGER: I'm sorry. I didn't quite -
13 - -

14 JUDGE FAHEY: That's all right.

15 CHIEF JUDGE LIPPMAN: Okay.

16 JUDGE RIVERA: May I just follow up because
17 - - -

18 CHIEF JUDGE LIPPMAN: Oh, I'm sorry, Judge
19 Rivera.

20 JUDGE RIVERA: - - - this - - - this is
21 sort of the point I was trying to get to to your
22 opponent. So the - - - as you just said, you're
23 focusing on service because then they're both
24 similarly situated.

25 MS. ETLINGER: Exactly.

1 JUDGE RIVERA: The - - - so then the Second
2 Circuit's concern in its opinion certifying the
3 question - - -

4 MS. ETLINGER: Right.

5 JUDGE RIVERA: - - - is about office - - -

6 MS. ETLINGER: Right.

7 JUDGE RIVERA: The requirement of an office
8 for a New York resident attorney is irrelevant as
9 long as you're focusing on service, because they
10 always have a residence.

11 MS. ETLINGER: Yes, exactly. And so it
12 simply avoids raising any question under the
13 Privileges and Immunities Clause.

14 CHIEF JUDGE LIPPMAN: Okay.

15 JUDGE RIVERA: Thank you.

16 CHIEF JUDGE LIPPMAN: Thank you both.
17 Appreciate it.

18 (Court is adjourned)

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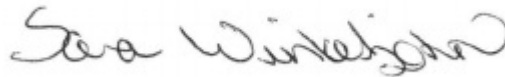
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Ekaterina Schoenefeld v. State of New York, No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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