Reprinted with permission from New York State Bar Association Journal, Vol. 91, No. 6 | August 2019

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

DEAR FORUM:

My partner and I have a two-person firm that we have operated out of a small shared office for many years. With the advances in technology over the last two decades, such as e-filing, video conferencing, file transfer programs, high speed internet, and email, we decided that we don't really need our office space as much as we did only 20 years ago. And it isn't just our office technology that has reduced the need for our office space. Our clients prefer to conduct most of their communications with us electronically and they aren't interested in spending time traveling to our office if they can avoid it. We meet with clients periodically in the office for certain matters, like the signing of wills and deposition preparation, but when we don't have client meetings scheduled, we usually just work from home to avoid our commutes. Our office lease is about to expire and we are seriously considering alternatives to our traditional office space.

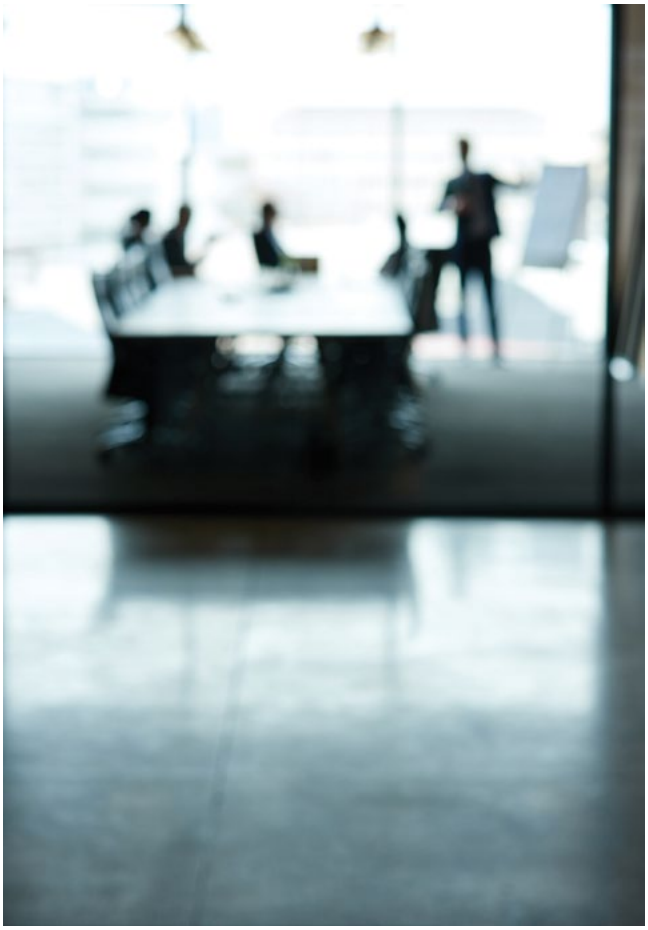
One option I have read about is a "virtual office." As I understand the virtual office business model, we could pay a fee to have access to a meeting space as we need it. My preliminary research suggests that it would be a significant reduction of our overhead costs and I don't think it will impact our business significantly as long as we have a reliable location where we can meet with clients when we need to schedule a face-to-face meeting.

I know that there are restrictions on how attorneys maintain their offices and I don't want to run afoul of my ethical obligations. I think it will also be beneficial to our clients since many of the virtual offices are centrally located and it will be easier for many of our clients to travel to our "virtual" office space when we do meet in person. What issues do I need to consider if we decide to transfer to a virtual office? For instance, what address can we put on our letterhead and our website?

Sincerely,
Neo

DEAR NEO:

While your question is relatively straightforward, the answer is rather complicated and requires that we chart a course through rapidly evolving areas of both law and technology. Many lawyers do not want to maintain large (and expensive) physical offices when work is often done remotely and communication with clients frequently happens by phone, videoconference, email, or text message. The days of having to meet one's client in a physical office are about as frequent as communicating with adversaries solely by facsimile or, perhaps worse, snail



mail. The legal office space landscape has changed (as it has for many industries). The problem, as some have observed, is that the rules governing attorney practice have not kept pace with the practicalities of the legal profession in 2019.

A "virtual law office" (VLO) can be defined as "a facility that offers business services and meeting and work spaces to lawyers on an 'as needed' basis." *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-2 (2019). Often these workspaces do not provide a lawyer with a dedicated office space and the lawyer shares the amenities with other subscribers. *Id.* The New York Rules of Professional Conduct (RPC) do not specifically address the use of VLOs, but they do prohibit attorneys from advertising or engaging in conduct that is deceptive or misleading. *See* RPC 7.1(a)(1), 8.4(c). Our discussion should begin with an advertising requirement under RPC 7.1(h).

RPC 7.1(h) tells us that all attorney advertisements "shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered." Attorney advertising is an issue that we have discussed in several prior Forums. *See* Vincent J. Syracuse, Jamie B.W. Stecher & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., September 2013, Vol. 85, No. 7; Vincent J. Syracuse, Carl F. Regelmann, Richard W. Trotter & Amanda M. Leone, Attorney Professionalism Forum, N.Y. St. B.J., February 2018, Vol. 90, No. 2. The reference to "principal law office address" in RPC 7.1(h) means the advertising firm's "main office in New York State." *See Roy Simon, Simon's New York Rules of Professional Conduct Annotated*, at 1698 (2016 ed.). Professor Simon has commented that the requirement that the law firm include the firm's principal office on the advertisement is designed to prevent law firms from advertising offices that are sparsely staffed or unstaffed. *Id.* at 1699. If a lawyer creates an advertisement that lists an office where attorneys cannot actually meet with clients for an appointment, then listing that office would likely be considered deceptive and misleading to potential clients. *Id.* While law firms are certainly permitted to list their branch offices where lawyers see clients by appointment only, the advertisement should specify that meetings at that location only occur by appointment. *Id.* If a law firm does not maintain a "principal office," a law firm may list one or more of their offices "where a substantial amount of the law firm's work is performed." *See* RPC 7.1(h) Comment [17].

Various ethics opinions have also identified several purposes for RPC 7.1(h)'s "principal law office" requirement, including: (1) to assist a client's ability to make an intelligent selection of a lawyer; (2) a physical office location allows a client to meet with a lawyer, contact a lawyer by mail and effectuate service of process; and (3) the absence of a physical office could be misleading as to the physical proximity of the lawyer to the client or the ability of the lawyer to work in a jurisdiction which the firm or lawyer is not qualified to practice. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-2 (2019) *citing* NYSBA Comm. on Prof'l Ethics, Op. 756 (2002).

The issue whether RPC 7.1(h) applies to a VLO was first addressed by the New York City Bar Association (NYCBA) Committee on Professional Ethics five years ago. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2014-2 (2014). The Committee opined that a lawyer may comply with RPC 7.1(h) by listing the street address of the VLO on law firm advertising. *Id.* This opinion, however, was recently withdrawn by the Committee and replaced with NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-2 (2019) which we discuss below. Another 2014 ethics opinion by the New York State Bar Association (NYSBA) Committee on Professional Ethics went even further and concluded that a VLO with no street address may use its website address *alone* to comply with RPC 7.1(h) if the lawyer's office otherwise complied with Judiciary Law § 470. *See* NYSBA Comm. on Prof'l Ethics, Op. 1025 (2014). NYSBA Opinion 1025 modified prior NYSBA Committee on Professional Ethics opinions 756 and 964 where the committee opined that a New York lawyer was required to maintain a physical office space. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1699 (2016 ed.). The inquiring attorney involved in Opinion 1025 advised that she could securely communicate with clients and would appoint an agent to accept deliveries and service of process. *Id.* at 1700. *See also* NYSBA Comm. on Prof'l Ethics, Op. 1025 (2014). The committee found these factors persuasive in determining that a physical office space was not required. *Id.*

The landscape has changed since the issuance of Opinion 1025 due to various decisions interpreting Judiciary Law § 470 which provides that "[a] person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transition of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." After the United States Court of Appeals for the Second Circuit certified a question to the New York Court of Appeals seeking clarification of the minimum requirements necessary to satisfy Judiciary Law § 470, the New York Court of Appeals held that Judiciary Law § 470 indeed requires that lawyers admitted in New York, but who reside in another state, maintain a *physical* law office in New York. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-2 (2019) citing *Schoenefeld v. New York,* 25 N.Y.3d 22 (2015) and *Schoenefeld v. New*

York, 821 F.3d 273 (2d Cir. 2016). The Second Circuit upheld the constitutionality of that interpretation. *Id.*

In light of the *Schoenefeld* decisions from the New York Court of Appeals and the Second Circuit, the NYCBA Committee on Professional Ethics formally withdrew its prior opinion 2014-2 concerning RPC 7.1(h) and issued Opinion 2019-2. *Id.* Prior to the *Schoenefeld* opinions, it was unclear whether a non-resident attorney was required to maintain a *physical* office in New York; many lawyers were taken by surprise by the courts' decisions. *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-2 (2019). While the committee noted that RPC 7.1(h) and Judiciary Law § 470 indeed govern different attorney behaviors (RPC 7.1(h) regulates *advertising* of all New York-admitted attorneys, while Judiciary Law § 470 applies to the *practice of law* by those New York admitted attorneys *residing outside* the State of New York), the committee declined to interpret the term "law office" as used in Rule 7.1(h) differently from how the courts interpret the term "office for the transaction of law business" in Judiciary Law § 470. *Id.* The committee reasoned that the required offices serve a similar function and the same state judiciary that interpreted Judiciary Law § 470 also adopted the RPC. *Id.* Therefore, the committee said that in light of the *Schoenefeld* decisions, any "law office" listed on attorney advertising as contemplated by RPC 7.1(h) must also comply with Judiciary Law § 470. *Id.* Ultimately, the committee opined that a "lawyer may use the VLO address on business cards, letterhead and law firm website" and "[a] New York lawyer may designate the street address of a VLO as the 'principal law office address' for the purposes of Rule 7.1(h) *provided the VLO qualifies as an office for the transaction of law business under the Judiciary Law*." *Id.* (emphasis added). Notably, in Opinion 2019-2, the committee declined to comment on whether the VLO described by the inquirer met the minimum standards for a law office in New York pursuant to Judiciary Law § 470. *Id.* The committee also opined that "[e]ven when business cards and letterhead are not used for advertising purposes, however, they must not be deceptive or misleading" pursuant to RPC 8.4(c). *Id.*

Since the committee's opinion is largely dependent on whether a VLO satisfies the law office requirements of Judiciary Law § 470, it is important to look at the case law. The few New York State courts tackling the issue have held that VLOs *do not* comply with the requirements of Judiciary Law § 470. *See Law Office of Angela*

Barker, LLC v. Broxton, 60 Misc. 3d 6 (App Term, 1st Dep't 2018) citing *Schoenefeld,* 25 N.Y.3d 22 (2015) and *Schoenefeld,* 821 F.3d 273 (2d Cir. 2016) ("The term 'office' as contained in section 470 'implies more than just an address or an agent appointed to receive process … [a]nd the statutory language that modifies 'office' – 'for the transaction of law business' – may further narrow the scope of permissible constructions.'"). In a 2018 New York State Supreme Court decision, the court rejected an attorney's argument that his membership at a VLO associated with the NYCBA qualified as a law office under Judiciary Law § 470. *See Marina Dist. Dev. Co., LLC v. Toledano,* 60 Misc. 3d 1203(A) (N.Y. Sup. Ct. 2018). The court noted at the outset that a VLO cannot comply with Judiciary Law § 470 because, put plainly, by basic definition, a VLO is *not* an actual office. *Id.* The court went on to consider numerous fact specific circumstances highlighted in the papers filed by the attorney arguing that his VLO complied with the requirements of Judiciary Law § 470. *Id.* The VLO at issue would take telephone messages, forward mail, and make meeting rooms available to the attorney, but the attorney admitted that he did not want mail sent to the City Bar address and directed all of his correspondence to his office outside the state. *Id.* The attorney did not list the VLO telephone number on the papers submitted to the court and the attorney did not advise the court that he had ever actually used the facilities offered by the VLO for any purpose. *Id.* The court found that all of the factors militated in favor of finding that the VLO did not comply with Judiciary Law § 470. *Id.*

This is undoubtedly a grey area and there is simply not enough jurisprudence on VLOs to give you absolute guidance. Based upon the courts' recent interpretations of Judiciary Law § 470 as it relates to VLOs, it is unclear whether use of a VLO as your exclusive office will comply with the requirements of RPC 7.1(h) and Judiciary Law § 470. Further, depending on the circumstances of how you describe your VLO, you could run afoul of RPC 8.4(c) if your descriptions could be considered a misrepresentation or deceitful. Should you proceed with your VLO plan, you should accurately describe how your VLO operates to your clients and consider including a VLO disclaimer on documents if you are concerned that the VLO address alone could be misleading.

Judiciary Law § 470 has been the subject of significant criticism by many attorneys who see it as an anachronistic relic that restricts a client's ability to choose counsel and makes hiring a lawyer more expensive. NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2019-2 (2019). Significantly, on January 18, 2019, the New York State Bar Association's House of Delegates passed a resolution calling for the repeal of Judiciary Law § 470. *Id.* Only time will tell where this all ends and we will have to look to the courts (and perhaps eventually an amendment to the RPC) for guidance on this issue as VLOs continue to face challenges. We should all be on the lookout for the inevitable changes that we expect will occur as this area of the law continues to evolve and hopefully responds to our profession's modern day needs and the New York legal community's interest in providing competent legal representation and access to justice for all.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Alexandra Kamenetsky Shea
(shea@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am an attorney practicing civil and criminal law here in New York. I have been approached by my millennial client who is employed by a large bank. She suspects, but is not sure, that her employer, in conjunction with government authorities, is conducting an investigation of her and others in her division for potential violations of banking laws. In an effort to prepare for the defense of my client who may be facing both civil and criminal exposure, I have asked her to try and obtain information regarding the full scope of the investigation. Naturally, I have advised her to avoid creating any "paper trail" of her efforts and so have instructed her to stick to just spoken conversations with her various professional colleagues in an effort to "see what they know and have heard."

My client suggested that she could also communicate using a message app that would auto self-delete the text as soon as it is read by the recipient. I never heard of such a thing but my client showed me one of these apps and it worked great. I am concerned that one might say that using such an app intentionally is a way to destroy evidence. However, it would seem to me that such an app is just like spoken communication, unless it's recorded, leaving no record other than the parties' recollections. Please give me some guidance.

Sincerely,
Teki Challenged