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Admission? Yes; Practice? No: New York's Inconsistent Treatment of Nonresident Attorneys

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SURVEY OF PROFESSIONAL RESPONSIBILITY

INTRODUCTION

The *Journal of Legal Commentary* is pleased to present the fourth annual *Survey of Professional Responsibility*. The *Survey* discusses current issues relating to ethical conduct in the legal community.

The spring 1991 *Survey* contains two articles. The first article examines the constitutionality of residency requirements placed on the practice of law. It specifically addresses section 470 of New York's Judiciary Law which applies to nonresident attorneys. The second article explores the permissible scope of ex parte communications between an attorney and parties represented by counsel. In particular, the article reviews the proper standard to be applied in determining the permissible extent of ex parte interviews with employees of a business enterprise.

It is the hope of the Editors that these articles will assist and provide guidance to both students and practitioners in their legal endeavors.

ADMISSION? YES; PRACTICE? NO: NEW YORK'S INCONSISTENT TREATMENT OF NONRESIDENT ATTORNEYS

The privileges and immunities clause¹ of the United States Constitution protects individual citizens² from discriminatory barriers

¹ U.S. CONST. art. IV, § 2, cl. 1. The section provides in relevant part that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." *Id.*

² See *Blake v. McClung*, 172 U.S. 239, (1898) (corporation not citizen for purposes of privileges and immunities clause). See also *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975) (under privileges and immunities clause, terms "citizen" and "resident" are essentially interchangeable); *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (individual has right to seek services available in another state); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 563 (1920) (individual right to equal treatment in courts).

erected by states in pursuit of their own parochial interests.³ The right to engage in one's profession, including the practice of law, falls within the ambit of the clause.⁴

In *Supreme Court of New Hampshire v. Piper*,⁵ the Supreme Court of the United States declared that a New Hampshire requirement that attorneys must reside within the state in order to qualify for admission to the bar was an unconstitutional violation of the privileges and immunities clause.⁶ Since *Piper*, several states, including New York, have sought to restrict a nonresident bar member's ability to practice within a state by requiring their members to reside or maintain an office within the state.⁷ Recently, however,

³ See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280 (1985) (clause intended to create national economic union); *Baldwin v. Montana Fish & Game Commn.*, 436 U.S. 371, 386 (1978) (same); *Hicklin v. Orbeck*, 437 U.S. 518 (1977) (rejecting hiring preferences for residents); *Sonsa v. Iowa*, 419 U.S. 393, 406 (1975) (administrative convenience alone not sufficient legitimate state interest); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (clause meant "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy"); *Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1870) (struck down tax imposed on out-of-state vendors); *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 180 (1869) (purpose of privilege and immunity clause is to eliminate protectionist burdens). Cf. *Gordon v. Committee on Character & Fitness*, 48 N.Y.2d 266, 273-75, 397 N.E.2d 1309, 1313-14, 422 N.Y.S.2d 641, 645-46 (1979) (invalidating New York's six month residency requirement for admission to bar). *But cf. Piper*, 470 U.S. at 284 (clause does not preclude discrimination against nonresidents where: (i) there is substantial reason for difference in treatment; and (ii) discrimination practiced against nonresidents bears substantial relationship to State's objective); *United Bldg. & Constr. Trades v. Mayor of Camden*, 465 U.S. 208, 222 (1984); *Baldwin*, 436 U.S. at 383 (clause does not implicate "those privileges and immunities bearing upon the vitality of the Nation as a single entity"); See generally NOWAK & ROTUNDA, CONSTITUTIONAL LAW, § 9.6 (4th ed. 1991) (in Article IV cases, Supreme Court looks to whether activity restricted effects whole nation in determining whether activity is protected by privileges and immunities clause) (citing *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984)); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 6-35 (2d ed. 1988).

⁴ See *Hicklin*, 437 U.S. at 524-25 (rejected hiring preference for state residents). See also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371-72 (1976) (state can regulate, but not prohibit, attorney advertising); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780 (1974) (price fixing activities of state and local bar not state action); *In re Griffiths*, 413 U.S. 717, 724 (1973) (practice of law does not encompass power to affect matters of state policy so as to justify state residency requirement). Cf. *Wilson v. Wilson*, 416 F. Supp. 984, 988 (D. Or. 1976) (Oregon Supreme Court's rule requiring residency for admission to bar found not violative of due process), *aff'd mem.*, 430 U.S. 925 (1977)).

⁵ 470 U.S. 274 (1985). Kathryn Piper lived 400 yards outside the New Hampshire Border and was denied admission to its bar pursuant to New Hampshire Supreme Court Rule 42, because she neither resided nor filed a statement of intent to reside in New Hampshire. *Id.* at 275-76.

⁶ *Id.* at 288. See *infra* notes 8-18 and accompanying text (discussion of *Piper*).

⁷ See N.Y. JUD. LAW § 470 (McKinney 1983) (requires admitted nonresident who appears "in the courts of record of [the] state" to maintain New York office); *infra* notes 46-69

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the New York City Civil Court for the County of Bronx, in *Warner Corp. v. Vittorio*,⁸ repudiated New York's residency requirement, section 470 of the Judiciary Law, as outdated due to the decision in *Piper* and subsequent cases, and permitted a non-resident bar member without a New York office, to appear as counsel.⁹

This Survey will analyze the Supreme Court's decision in *Piper* and the development of subsequent federal case law. It will examine the rationale underlying restrictions relating to the practice of law and demonstrate that certain of these restrictions, particularly section 470 of New York's Judiciary Law, do not substantially relate to the aims sought to be redressed. The Survey will then suggest less restrictive means for states to regulate the practice of law.

I. FEDERAL TREATMENT OF RESIDENCY REQUIREMENTS

In *Piper*, a Vermont resident was denied admission to the New Hampshire bar because she failed to meet the state's residency requirement.¹⁰ The State of New Hampshire contended that the privileges and immunities clause was inapplicable because the State was exercising its judicial power over an officer of the court.¹¹ The New Hampshire Supreme Court justified its residency requirement, stating that it was less likely that nonresident members would become familiar with local law, behave ethically, be available for court proceedings, and render pro bono or volunteer services within the state.¹²

On appeal, the Supreme Court of the United States found that an attorney was not an officer within the ordinary meaning of the word,¹³ and concluded that the right to practice law is protected

(discussing state restrictive statutes).

⁸ *Warner Corp. v. Vittorio, Puleo, Doe, & Bagel Nosh Wholesale Bakery, Inc.*, No. 89-21964 (N.Y.C. Civ. Ct. Bronx County April 16, 1990).

⁹ *Id.*

¹⁰ *See Piper*, 470 U.S. at 275-76.

¹¹ *Id.* at 282. The Court noted that the activities of a lawyer are "bound up" with the administration of judicial power and justice. *Id.*

¹² *Id.* at 285.

¹³ *Id.* at 282-83. (citing *In re Griffiths* 413 U.S. 717, 728 (1973)). The Court affirmed its previous position, holding that a lawyer "makes his own decisions, follows his own best judgment, collects his own fees and runs his own business." *Id.* at 283 (quoting *In re Grif-*

by the privileges and immunities clause.¹⁴

Writing for the majority, Justice Powell maintained that those who sought admission and incurred the financial obligation to maintain local bar membership would not fail to familiarize themselves with local law,¹⁵ suggesting that mandatory practical skills seminars would be a less restrictive means of ensuring competence.¹⁶ Moreover, the majority acknowledged that the State has the ability to regulate nonresident attorneys because it is empowered to discipline any attorney practicing within its borders.¹⁷ Justice Powell dismissed the State's contention that nonresident attorneys would behave less ethically than residents, reasoning that reputation is equally important to nonresidents as it is to resident attorneys.¹⁸

The Court conceded that nonresidents might be inclined to shirk their fair share of pro bono work¹⁹ or be unavailable for court proceedings on short notice,²⁰ but it offered less restrictive alternatives,²¹ concluding that these problems did not justify the total exclusion of nonresidents. The majority reasoned that nonresidents who took the New Hampshire Bar and paid the annual fees would likely live in places reasonably convenient to the state,

fiths, 413 U.S. at 717)).

¹⁴ *Id.* at 288. The majority concluded that the Supreme Court of New Hampshire "neither advance[d] a 'substantial reason' for . . . discrimination against nonresidents . . . nor demonstrated that the discrimination practiced [bore] a close relationship to its proffered objectives." *Id.* at 286. See *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 222 (1984) (privileges and immunities clause does not preclude discrimination against nonresidents where substantial reason exists for difference in treatment and discrimination bears substantial relationship to state's objective).

¹⁵ *Piper*, 470 U.S. at 285.

¹⁶ *Id.* at 285 n.19.

¹⁷ *Id.* at 286 n.20. The majority noted that the state court had the authority, pursuant to New Hampshire Supreme Court Rule 37, to discipline all bar members regardless of where they resided. *Id.*

¹⁸ *Id.* at 285-86.

¹⁹ *Id.* at 287. The Court, however, felt that "most lawyers who become members of a state bar will endeavor to perform their share of these services." *Id.*

²⁰ *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 286-87 (1985).

²¹ *Id.* The majority noted the feasibility of a rule requiring distant attorneys to retain a local agent for unscheduled meetings and hearings. *Id.* at 286 n. 21. See also Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 735 (1975) (alternate schemes less restrictive than total exclusion available); Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1481-89 (1979) (residency requirement not closely tailored to state interest in regulating admission to bar).

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and suggested that a trial court, in its discretion, could require attorneys who live a great distance from the state to retain local counsel for unscheduled hearings.²²

The Supreme Court addressed the issue again in *Frazier v. Heebe*,²³ where a Louisiana bar admission rule requiring nonresidents to maintain an in-state office was challenged. The State asserted that nonresident attorneys were less competent and less available to the court than resident attorneys, and therefore, the rule was justified because it facilitated efficient administration of justice.²⁴

Exercising its supervisory power,²⁵ the Court held that the rule was "unnecessary and irrational."²⁶ The Court stated that the competence of nonresident attorneys in local and federal law has been tested and demonstrated to the same extent as that of Louisiana lawyers, and that both members are equally qualified.²⁷ The Court was unwilling to concede that a nonresident attorney would disserve his clients by not acquainting himself with the local rules.²⁸ Furthermore, the Court reasoned that as a matter of convenience, many nonresident attorneys would try to reside in an area close to the out of state court, and that modern communications would help minimize the availability problem.²⁹

²² *Piper*, 470 U.S. at 287. See N.Y. COMP. CODES R. & REGS. tit. 22B, § 520.11(a) (1988) (every applicant for admission to New York state bar must designate Clerk of Appellate Division admitting him or her as agent for service of process based on any action arising out of legal services offered or rendered). See generally Brennan, *Repeal Judiciary Law § 470*, 62 N.Y.S.B.J. 20 (Jan. 1990) (discussing service of process on attorneys).

²³ 482 U.S. 641 (1986).

²⁴ *Id.* at 646.

²⁵ *Id.* at 645-46. Although the Court dispensed with the case by exercising its supervisory powers, its reasoning was based on the rationale previously employed in *Piper*. *Id.* See 28 U.S.C. § 2072 (1988). According to section 2072 "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure of the district courts and courts of appeals of the United States in civil actions. . . ." *Id.* See also Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation or Information*, 14 LOY. L.A. L. REV. 213, 216-18 (1981) (exercise of local rule criticized as usurpation of powers belonging to Supreme Court and Congress).

²⁶ *Frazier*, 482 U.S. at 649.

²⁷ *Id.* at 647-49.

²⁸ *Id.*

²⁹ *Id.* But cf. *Martin v. Davis*, 187 Kan. 473, 473, 357 P.2d 782, 782 (1960) (no denial of due process in requiring Kansas attorney who has substantial practice in another state to associate with local counsel).

Similarly, in *Barnard v. Thorstenn*,³⁰ the Supreme Court struck down a protective residency-based statute in the Virgin Islands.³¹ This statute required a bar applicant to be a resident of the island and demonstrate an intent to remain.³² The petitioner asserted that the Virgin Islands' geographic isolation limited a nonresident's availability to appear in court on short notice.³³ Moreover, petitioner claimed that any efforts by the courts to accommodate the attorney's schedule would further congest the court's docket,³⁴ and that delays in publication of local court decisions meant nonresident attorneys were unable to maintain up-to-date knowledge of local laws and rules.³⁵ The Virgin Islands' Bar stated that it lacked the resources necessary to provide adequate supervision and policing of a national bar,³⁶ and that nonresidents would be unavailable for pro bono work.³⁷

³⁰ 489 U.S. 546 (1989).

³¹ See *id.* at 549-50. In *Barnard*, two attorneys who were members of the New York and New Jersey bars applied to take the Virgin Islands bar examination in 1985. *Id.* They were categorically denied because they were not residents of the Virgin Islands as required by state law, i.e., V.I. CODE ANN. tit. 5, App. V., § 56(b) (1982). *Id.* The attorneys subsequently filed suit seeking to enjoin enforcement of the rule as violative of the privileges and immunities clause of the Constitution. *Id.*

³² *Id.* at 549. See V.I. CODE ANN. tit. 5, App. V., § 56(b)(4), (5) (1982). The rule provides that before an otherwise competent attorney is admitted to the Virgin Islands bar, he must prove to the Committee of Bar Examiners that he has resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the bar, and if admitted, that he intends to continue to reside in and to practice law in the Virgin Islands. *Id.*

³³ See *Barnard*, 489 U.S. at 553 (petitioners asserted that irregular airline/telephone services made it difficult for nonresidents to appear in court and communicate with parties involved in dispute).

³⁴ *Id.*

³⁵ *Id.* See generally Brackel & Loh, *supra* note 21, at 708 (residence requirements are relevant concerns; theoretically, they assure legal competence with local rules and customs).

³⁶ *Id.* See generally Note, *supra* note 21, at 1482 (residency rule is not tailored to state legitimate concerns). *But cf.* Brackel & Loh, *supra* note 21, at 709 (nonresident's reputation in home state may be more reliable than observation for short time by local bar service).

³⁷ *Barnard*, 489 U.S. at 554-59. Petitioners contend that section 56(b) is necessary in order to administer District Court Rule 16 effectively and fairly. *Id.* See V.I. CODE ANN. tit. 5, App. V., § 16(B)(j) (1982). Under section 16(B), each active member of the Virgin Islands' bar must remain available to accept appointments to represent indigent defendants. *Id.* The attorney must be in contact with the client within five days from the date the court clerk mails the notice. *Id.* at § 16(B)(f). The respondents argued that because the defendant has a constitutional right to a speedy trial, it is of utmost importance that the attorney be available immediately to meet with the client and provide adequate representation. *Barnard*, 489 U.S. at 546. It is virtually impossible to rely on nonresident attorneys to meet with the client within the five day limit. *Id.* Moreover, it is difficult to expect the attorney to be available as needed for defense preparation and trial. *Id.*

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Relying on *Piper*, the *Thorstenn* Court found that justifications in support of the statute were outweighed by its discriminatory effect on qualified nonresident attorneys, thereby violating the privileges and immunities clause.³⁸ Justice Kennedy, writing for the majority, pointed out that *Piper* precluded the assertion of unavailability on short notice as a justification for discriminating against nonresident attorneys,³⁹ and suggested that any scheduling problems could be easily resolved by appointing a resident attorney to appear.⁴⁰ As in *Piper*, the Court found no evidence that nonresident attorneys would not familiarize themselves with local law after taking the local bar examination and paying the necessary fees.⁴¹ Moreover, the Court stated that delays in publications affected residents and nonresidents equally.⁴² The Court acknowledged that the State had a legitimate objective in delegating pro bono work fairly and evenly, but suggested that all attorneys be

Although the statute does not preclude an attorney from assigning the case to another attorney, the district court in *Barnard* has interpreted the rule so that only the attorney so notified may represent the appointee. *Id.*

³⁸ See *id.* at 554-59. The Court stated that the problem of congested dockets was not unique to the Virgin Islands. *Id.* at 554-55. As Justice Kennedy wrote, "A court in New Jersey may be inconvenienced to some extent by a request to accommodate the conflicting court appearance of a nonresident attorney in New York. But that does not justify closing the New Jersey Bar to New York residents." *Id.* at 555. Justice Kennedy noted that each attorney paid an initial fee of \$200 to take the bar examination and paid \$600 annually in dues and fees and that this money should be able to cover any administrative costs. *Id.* at 556. He also pointed out that the Bar Association can and does rely on the National Conference of Bar Examiners for character information. *Id.* The dissent agreed that requiring an applicant to have lived in the Virgin Islands for one year in order to be admitted was unconstitutional, but "because of the unique circumstances of legal practice in the Virgin Islands, as compared to the mainland states," the dissent would have upheld the residency requirement which allowed only residents to practice on the island. *Id.* at 559-60. (Rehnquist, C.J., dissenting).

³⁹ *Id.* at 554.

⁴⁰ *Id.*

⁴¹ *Id.* at 555. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1985). The Court was not willing to assume that "a nonresident lawyer—any more than a resident would deserve his clients by failing to familiarize himself with the [local] rules." *Id.* See also Note, *supra* note 21, at 1486. "A lawyer licensed in two or more jurisdictions could well specialize in appearances, . . . while the resident attorney who was only occasionally called to court would find that his mere residency had not enabled him to absorb a working knowledge of local procedure." *Id.* See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1980). "A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation." *Id.*

⁴² See *Barnard*, 489 U.S. at 556 (nonresidents can find adequate means to review unpublished slip opinions when occasional need arises).

held responsible for assigned pro bono work and, if unavailable to arrange for a resident attorney to handle it.⁴³

II. STATE RESIDENCY RULES: SECTION 470 OF NEW YORK'S JUDICIARY LAW

In light of the Court's holding in *Piper* and its progeny, all states have eliminated residency-based bar admission requirements.⁴⁴ Nevertheless, several states, including New York, have placed similar restrictions on a nonresident's ability to practice law in the state after admission.⁴⁵ These restrictions appear in various forms, including requirements that a nonresident maintain an office in the state,⁴⁶ affiliate with a local attorney,⁴⁷ denote a local agent for service of process,⁴⁸ or pledge that in the future, the nonresident will reside or maintain an office within the state.⁴⁹

⁴³ *Id.* at 557. The Court acknowledged that a state can require its members to represent indigent clients as a requirement to practice before the bar. *Id.* The Court pointed out however, that requiring an attorney, who has no experience in criminal defense work to represent an indigent criminal defendant is not necessarily serving the better interests of justice. *Id.* at 558. It would be more beneficial to allow an attorney to appoint an experienced colleague to attend to the matter. *Id.* Therefore, a nonresident could also appoint a resident colleague to appear in a particular matter. *Id.*

⁴⁴ See Hitchcock, *Residence Requirement Decisions Reflect Realities of Law Practice*, Nat'l L.J., Nov. 7, 1988 at 20. (Supreme Court has removed some barriers hindering bar's ability to serve on national level).

⁴⁵ See *infra* notes 46-49 and accompanying text (discussing several state restrictive statutes).

⁴⁶ See, e.g., MO. SUP. CT. R. 9.02 (1980) (mandates nonresident member of Missouri bar practicing within state to maintain in-state office except if state where nonresident lives allows Missouri residents to practice there without office); *supra* note 7 (New York's office requirement). *But see* Bastian v. Watkins, 230 Md. 325, 331-32, 187 A.2d 304, 307-08 (1963) (county court's rule requiring attorney to have "bona fide" office in Maryland invalid); Archer v. Odgen, 600 P.2d 1223, 1223-24 (Okla. 1979) (high court struck office requirement as infringement on power to regulate and control practice of law); *Annual Survey of Oklahoma Law: Legal Profession*, 6 OKLA. CITY U.L. REV. 225, 236 (1981) (residency not required for active bar members to practice law in Oklahoma).

⁴⁷ See Dorador v. State, 573 P.2d 839, 841 (Wyo. 1978) (although not facially apparent in WYO. STAT. § 33-5-111 (1977), out-of state counsel admitted for particular case must associate with local member of bar who will actively participate in case); S.D. CODIFIED LAWS ANN. § 16-18-2 (1989) (requires nonresident attorney to employ resident member to associate and participate with him in local trial or hearing). See generally Annotation, *Attorney's Right to Appear Pro Hac Vice in State Court*, 20 A.L.R.4th 855 (1983) (discussing cases requiring nonresident to employ/associate with resident attorneys).

⁴⁸ See KAN. STAT. ANN. § 7-104 (1989) (service on required local affiliate deems foreign attorney served within state and amenable to disciplinary action).

⁴⁹ See KAN. STAT. ANN. § 7-126, R.705 (1981) (allows temporary license for foreign attorney intending to become Kansas resident).

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A. *New York's Judiciary Law*

In New York, section 470 of the Judiciary Law provides that a nonresident attorney, duly admitted⁵⁰ to practice "in the courts of record of this state," must maintain an office within the state.⁵¹ Prior to 1979, this rule worked in conjunction with section 9406(2) of the New York Civil Practice Law and Rules which required an applicant to reside in the state for six months prior to the filing of an admission application.⁵²

The New York Court of Appeals, in *Matter of Gordon*,⁵³ however, struck down section 9406(2) as violative of the privileges and immunities clause.⁵⁴ The court noted that the State's obligation to

⁵⁰ See *18 International Ltd. v. Interstate Express, Inc.*, 116 Misc. 2d 66, 68, 455 N.Y.S.2d 224, 226 (Sup. Ct. New York County 1982) (New York does not require out-of-state counsel, admitted pro hac vice, to become associated with local attorney); 22 N.Y. COMP. CODES R. & REGS. tit 22, § 602.2(a) (1986) (persons admitted pro hac vice not subject to rule). See generally BLACK'S LAW DICTIONARY 1212 (6th ed. 1990) (pro hac vice status means that an out of state lawyer may be admitted to practice in jurisdiction for particular case only).

⁵¹ N.Y. JUD. LAW § 470 (McKinney 1983). Section 470 provides, "a person regularly admitted to practice as an attorney and counsellor, 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 counsellor, although he resides in an adjoining state." *Id.*

An earlier version of section 470 created a residency exemption for practicing resident attorneys who later moved to an adjoining state. See Brennan, *supra* note 22, at 21 (section 470's forerunner, section 60 of the New York Code of Civil Procedure, excepted from residency requirement resident bar members who subsequently moved to an adjoining state, provided they maintained office and practiced solely in New York).

Prior to enactment of section 60 of the New York Code of Civil Procedure, nonresidence suspended a New York bar member's right to practice. See *Richardson v. Brooklyn City & Newton R.R. Co.*, 22 How. Pr. 368 (1862) (attorney who removed himself from New York remained attorney but right to practice ceased during period of nonresidence). In another early case the court distinguished between New York bar members in adjoining and distant states. See *Hommedieu v. Stowell*, 18 Abb. Pr. 366 (1865) (New York bar member residing in Wisconsin prohibited from representing client to enforce judgment).

⁵² See N.Y. CIV. PRAC. L. & R. § 9406(2) (McKinney 1985). The rule provided that a person may not be admitted as a member of the bar unless he proved "that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice." *Id.*

⁵³ 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

⁵⁴ See *id.* at 274-75, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646. See generally Herzog, *Conflict of Laws*, 31 SYRACUSE L. REV. 119 (1980) (predicting *Gordon* decision would completely revise state provisions governing attorneys); Schwartz, *The Reorganization of the Legal Profession*, 53 TEX. L. REV. 1269 (1980) (calling for national bar to eliminate residency requirement, and citing *Gordon* favorably as precursor to national bar system). But see *Canfield v. Wisconsin Bd. of Attorneys' Professional Competence*, 490 F. Supp. 1286, 1290 (W.D. Wis. 1980) (taking exception to *Gordon's* implication that any residency requirement violated privileges and immunities clause).

ensure the competency of its attorneys could not be fulfilled at the expense of a nonresident's protected right to practice law.⁵⁵ The court offered less restrictive means for controlling nonresident bar members, including appointment of an in-state agent for service of process⁵⁶ and application of local disciplinary proceedings to miscreant nonresident attorneys.⁵⁷ Since *Gordon*, it is clear that presence in the state is not a requirement for bar admission.⁵⁸ Nevertheless, a nonresident attorney's right to continue to practice law remains restricted by section 470 of the Judiciary Law.⁵⁹

The validity of section 470 has been addressed by the New York courts on several occasions. In *Rosenberg v. Johns-Manville Salés Corp.*,⁶⁰ the New York County Special Term read section 470 as an absolute requirement that bar members residing in adjoining states maintain an office in New York.⁶¹ In *White River Paper Co., Ltd. v. Ashmont Paper*,⁶² the Bronx Special Term further broadened the application of section 470, holding that it imposed an office requirement on all nonresident bar members, not just

⁵⁵ *Gordon*, 48 N.Y.2d at 275, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646. See also *Troyer v. Town of Babylon*, 483 F. Supp. 1135, 1140 (E.D.N.Y. 1980) (*Gordon* similar to ordinance forbidding nonresident from distributing religious literature; both constitute invidious discrimination against nonresidents), *aff'd per curiam*, 628 F.2d 1346 (2d Cir. 1980), *aff'd mem.*, 449 U.S. 988 (1980).

⁵⁶ *Id.* at 274, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646 (citing *Hess v. Pawloski*, 274 U.S. 352 (1927)). But see *Amsterdam v. Goldstick*, 131 Misc. 2d 131, 134, 499 N.Y.S.2d 568, 572 (N.Y.C. Civ. Ct. New York County 1986) (requirement that real estate managing agent reside in city, or regularly attend office maintained therein, did not violate privileges and immunities clause; limited discrimination outweighed by state's objective to supervise agents and hold them accountable to tenants), *aff'd per curiam*, 136 Misc. 2d 946, 947, 501 N.Y.S.2d 203, 204 (Sup. Ct. New York County 1987).

⁵⁷ *Gordon*, 48 N.Y.2d at 274, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646.

⁵⁸ See, e.g., *Strauss v. Alabama State Bar*, 520 F. Supp. 173, 175 (N.D. Ala. 1980) (residency requirement for admission to bar struck down as violative of privileges and immunities clause); *Shelley v. Alaska Bar Ass'n*, 620 P.2d 640, 645 (Alaska 1980) (30 day residency requirement for admission to bar held unconstitutional); *Sargus v. West Virginia Bd. of Law Examiners*, 170 W. Va. 453, 458, 294 S.E.2d 440, 444 (1982) (same). But see *Canfield*, 490 F. Supp. at 1290 (upheld residency requirement at time of admission to state bar for non-resident attorneys); *Wilson v. Wilson*, 416 F. Supp. 984 (D. Or. 1976) (same), *aff'd mem.*, 430 U.S. 925 (1977).

⁵⁹ See *supra* note 52 (discussing text of CPLR § 9406.); *supra* note 47 (discussion of § 470 office requirement and text of statute, respectively).

⁶⁰ 99 Misc. 2d 554, 416 N.Y.S.2d 708 (Sup. Ct. New York County 1979).

⁶¹ *Id.* at 557, 416 N.Y.S.2d at 710 (citing *Park Lane Commercial Corp v. Travelers Ind. Co.*, 50 Misc. 2d 231, 270 N.Y.S.2d 155 (Sup. Ct. New York County 1966)).

⁶² 110 Misc. 2d 373, 441 N.Y.S.2d 960 (N.Y.C. Civ. Ct. Bronx County 1981).

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those in adjoining states.⁶³ In *White River*, Judge Lehner asserted that nonresident attorneys would reap favorable tax benefits if they were allowed to compete against resident attorneys without establishing an office in the state.⁶⁴ He maintained that local presence would facilitate settlement before trial through the ease of local meetings and less expensive telephone communications.⁶⁵

B. Problems in Construction

Section 470 requires a nonresident member of the New York bar to maintain an "office" within the state.⁶⁶ Since the term "office" is not defined by the statute or legislative history, courts have interpreted its meaning on a case-by-case basis.⁶⁷ The minimum requirement for an office facility was addressed in *Estate of Neufeld*,⁶⁸ in which New Jersey residents claimed that the rental of a room and telephone in a farm house constituted an "office" within the meaning of the statute.⁶⁹ The surrogate court stated

⁶³ *Id.* at 376, 441 N.Y.S.2d at 963.

⁶⁴ *See id.* at 377, 441 N.Y.S.2d at 963 (discriminatory effect created by allowing nonresident to practice in New York while avoiding local taxes). *Cf.* *Amsterdam v. Goldstick*, 131 Misc. 2d 131, 499 N.Y.S.2d 568, 572 (N.Y.C. Civ. Ct. New York County 1986) (residency requirement for managing agents upheld to avoid preferential tax treatment).

⁶⁵ *See White River*, 110 Misc. 2d at 377, 441 N.Y.S.2d at 963 (meetings and telephone calls are less expensive and more convenient between local attorneys than distant ones). *But see* *Frazier v. Heebe*, 482 U.S. 641, 649 (1987) (Justice Brennan cited minimizing effect "modern communications" have on attorney's unavailability); Supreme Court of New Hampshire v. Piper 470 U.S. 274, 286 n.21 (1985) (unscheduled hearings often only minimal problem in light of conference telephone calls); Note, *supra* note 21, at 1487-88 n.153 (available communication and transportation negates premise on which rule is based and casts doubts on its constitutionality).

⁶⁶ *See supra* note 51 (text of New York's Judiciary Law § 470).

⁶⁷ *See Austria v. Shaw*, 143 Misc. 2d. 970, 971, 542 N.Y.S.2d. 505, 505 (Sup. Ct. New York County 1989) (nothing in statute states size or type of office required). *See also* *Application of Tang*, 39 A.D.2d 357, 359, 333 N.Y.S.2d 964, 967 (1st Dept. 1972) (rental of hotel room in New York by New Jersey applicant to New York bar did not satisfy New York's residency requirement). *But see* *Application of Pirie*, 64 A.D.2d 110, 111, 408 N.Y.S.2d 511, 512 (1st Dept. 1978) (rental of hotel room for 135-186 days per year satisfied New York's residency requirement); *infra* notes 68-72 and accompanying text (demonstrating courts analysis for parameters of definition of "office").

⁶⁸ 196 N.Y.L.J. 117, Dec. 18, 1986, at 15, col.3 (Sur. Ct.).

⁶⁹ *See id.* Petitioners maintained an office in a family farmhouse. *Id.* at 15. The room in the farmhouse was fully equipped, and a sister was hired to keep books and oversee the office. *Id.* The phone line was shared with the family members who resided in the farmhouse. *Id.* The law partnership paid \$100 rent per month for the use of the phone line and the office. *Id.* at 16., col. 1 One partner also asserted that she spent 75-100 days a year in the office. *Id.*

that although the arrangement was "less than a classic operating law office," it seemed to comply with the statute's minimal requirements,⁷⁰ which were vague and "worthy of clarification."⁷¹ More recently, courts have followed this interpretation, and have held that as long as the telephone is answered, the attorney receives messages, and the mail is forwarded to the attorney, the requirements of the statute are satisfied.⁷² In each of these decisions, however, the court was able to dispose of the case without reaching the issue of the statute's constitutionality raised by the litigants.⁷³ Additionally, it is unclear whether section 470 restricts only those attorneys appearing as counsel in litigation matters before the courts or whether it applies to all attorneys who desire to practice in New York.⁷⁴ It is submitted that both case law and the rationale supporting the statute support the proposition that section 470 does not apply to every nonresident attorney practicing in New York, but only to those who appear before New York

⁷⁰ *Id.* at 15.

⁷¹ *Id.* at 16.

⁷² *See, e.g.,* Austria v. Shaw, 143 Misc. 2d 970, 972, 542 N.Y.S.2d 505, 506 (Sup. Ct. New York County 1989). Ira B. Marshall was a resident of New Jersey and an attorney admitted to practice in New York and New Jersey. *Id.* at 971, 542 N.Y.S.2d at 506. When his lease expired, he contracted with and paid a fee to Sheldon Feldstein, Esq. for the use of his secretarial staff and desk space in Feldstein's office. *Id.* Marshall's name was listed on the door and on Feldstein's letterhead as "of counsel." *Id.* "Neither the desk nor the telephone need be exclusively that of the attorney." *Id.* at 972., 542 N.Y.S.2d at 506.

⁷³ *See, e.g.,* Estate of Neufeld, 196 N.Y.L.J. 117, Dec. 18, 1986, at 15 col. 3 (Sur. Ct.) (unnecessary and inappropriate for court to reach constitutional infirmity of statute; eligibility to practice law more appropriately left to regulating agencies); *Cf. In re Arthur*, 415 N.W.2d 168, 171-72, (Iowa 1987). In *Arthur*, an Iowa court reached the constitutional question and held that the Iowa rule requiring non-inhabitants of Iowa to demonstrate a bona fide intent to establish an office for the practice of law in the state did not violate the privileges and immunities clause. *Id.* The court found that the statute was rationally related to maintain Iowa's position as a national leader in handling disciplinary matters and maintaining high standards. *Id.*

⁷⁴ *See* Cheshire Academy v. Eileen Lee, 112 Misc. 2d. 1076, 1077, 448 N.Y.S.2d 112, 113 (N.Y.C. Civ. Ct. Bronx County 1982) (nonresident attorney may not represent party in contract litigation); Rosenberg v. Johns-Mansville, 99 Misc. 2d 554, 557, 416 N.Y.S.2d 708, 710 (Sup. Ct. New York County 1979) (out of state attorneys have no capacity to represent client in New York litigation); Parklane Corp. v. Travelers, 50 Misc. 2d 231, 232, 270 N.Y.S.2d 155, 155 (Sup. Ct. New York County 1966) (attorney whose office is in New Jersey can not represent party in New York action); *In re Fordan's Estate*, 5 Misc. 2d 372, 375, 158 N.Y.S.2d 228, 230-31 (Sur. Ct. New York County 1956) (New York attorney residing in West Germany not entitled to counsel fees for representing client in Surrogate Court). *See also* Brennan, *supra* note 18, at 21. (unclear whether statute applies only to litigators or to all practicing attorneys).

courts.⁷⁶

C. *Unequal Treatment of Attorneys Under Section 470*

New York courts that have adopted *White River* may permit a nonresident attorney who rents local desk space to appear as an attorney of record in a local litigation.⁷⁶ However, New York courts which have not adopted that decision may actually allow a New York bar member residing in a non-adjointing state to practice law without maintaining an in-state office, thereby causing a disparity of treatment between residents of adjoining and nonadjoining states.⁷⁷

Moreover, section 470 may cause unequal treatment between admitted members and non members of the bar who are permitted to appear before the courts on a pro hac vice motion.⁷⁸ In *United States Ice Cream v. Carvel*,⁷⁹ for example, former New Jersey Governor Brendan Byrne, a nonresident bar member, was disqualified from the case because he failed to maintain a New York office.⁸⁰ His pro hac vice motion was also denied because he was a member of the New York bar.⁸¹ *Carvel* illustrates an additional weakness of section 470: under certain circumstances the section affords greater rights to attorneys who are not admitted to practice in New York than to members who have been admitted, paid

⁷⁶ See *White River Paper Co. v. Ashmont*, 110 Misc. 2d 373, 376, 441 N.Y.S.2d 960, 962 (N.Y.C. Civ. Ct. Bronx County 1981) (§ 470 applies to nonresident attorney who wishes to act as attorney of record); *supra* note 71 (demonstrating that § 470 applies mostly in cases dealing with litigation). *But cf.* Brennan, *supra* note 22, at 23 (neither courts nor legislature has addressed issue of what form of legal practice nonresident member of New York State bar might engage in without running afoul of office requirement).

⁷⁷ See, e.g., *White River*, 110 Misc. 2d at 376, 441 N.Y.S.2d at 962 (local office required for all non resident lawyers appearing as the attorney of record in New York).

⁷⁸ See *supra* note 63 (holding of *White River*). Although *White River* is a Supreme Court for the County of the Bronx case, and not binding on other New York jurisdictions, it is submitted that if the matter comes before courts in other jurisdictions, they may not extend § 470 to all nonresidents, thereby yielding a disparity of treatment between residents of adjoining and non-adjointing states. See *generally* note 51 (discussing historical distinction between New York bar members residing in adjoining and non-adjointing states).

⁷⁹ See *supra* note 50 (discussing inapplicability of § 470 to pro hac vice).

⁸⁰ See Brennan, *supra* note 22, at 23 (refers to *United States Ice Cream v. Carvel*, an unpublished decision from Supreme Court for the County of Westchester).

⁸¹ *Id.*

⁸² *Id.*

membership fees, and intended to practice in New York.⁸²

It is further submitted that the office requirement in section 470 is not substantially related to the state's interest in assuring that counsel will be available on short notice for unscheduled proceedings, since a nonresident attorney's "office," specifically, the recent expansion of the term to include the renting of desk space within the state, does not guarantee short-notice availability.⁸³ In addition, nonresident unavailability is easily minimized by modern communication systems, indeed, nonresidents may often have less difficulty ensuring prompt attendance than a resident attorney.⁸⁴

States' imposition of practice restrictions on admitted nonresidents is similar to the admission restrictions which the Supreme Court has found violative of the privileges and immunities clause.⁸⁵ The clause applies not only when nonresidents are denied a license but also when a state unduly burdens nonresidents in favor of residents.⁸⁶ It is in this regard that section 470 must be addressed.

Recently, the Bronx New York Civil Court in *Warner Corp. v. Vittorio*, dismissed a claim under section 470 based on the ration-

⁸² See *id.* (attorneys admitted pro hac vice may represent client in New York litigation without paying any admission fees). See generally *supra* note 50 (discussing § 470's inapplicability to pro hac vice motions).

⁸³ See *Barnard v. Thorstenn*, 89 U.S. 546, 554 (1989). The Court stated that "[t]he exclusion of non-residents is not substantially related to the District Court's interest in assuring that counsel will be available on short notice for unscheduled proceedings." *Id.* The Court suggested that a less restrictive alternative would be to allow the courts to make appropriate orders for prompt appearances and speedy trials. *Id.* at 555.

⁸⁴ *Frazier v. Heebe*, 482 U.S. 641, 649 (1986). The Court maintained that such modern conveniences as conference telephone arrangements may easily enable a nonresident member of the bar to maintain contact with local courts. *Id.*

⁸⁵ In striking down the admission restrictions at issue in *Barnard v. Thorstenn*, 489 U.S. 546 (1989), *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988), *Frazier v. Heebe*, 482 U.S. 641 (1986), and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Supreme Court found all arguments advanced in support of the restrictions less than compelling. Those arguments included: the bar's inability to police nonresident members of the bar; a nonresidents lack of current and sufficient knowledge of local law; the local bar's prohibitive financial burden in maintaining a national bar membership; a nonresident's inability to appear on short notice; and the lack of jurisdiction over nonresidents.

⁸⁶ See *Barnard*, 489 U.S. at 558 (denial of nonresident bar application based on residence unduly burdensome); *Piper*, 470 U.S. at 283 (same); *Hicklin*, 437 U.S. at 527 (protective hiring regulation unduly burdens qualified nonresidents); *Austin v. New Hampshire*, 420 U.S. 656 (1975) (New Hampshire commuter income tax which applies only to nonresidents violates privileges and immunities clause).

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ale in *Piper* and its progeny.⁸⁷ Writing for the court, Judge Greene permitted a nonresident member of the New York bar who did not maintain an office in-state to appear as counsel,⁸⁸ stating that in light of recent New York and federal caselaw, section 470 is "no longer viable."⁸⁹

III. INSUBSTANTIAL STATE INTEREST AND LESS RESTRICTIVE MEANS

It is respectfully submitted that Judge Greene's rationale in *Warner Corp.* is the better view, since the office requirement of section 470, as interpreted by the courts, does not serve any substantial state interest and violates the privileges and immunities clause. Alternatively, it is proposed that even if the State's interests are found to be substantial, less restrictive means are available. The bar could, for example, require a nonresident attorney to reside within a 100 mile radius of the court in which she is to appear in order to allay fears that she will not be available on short notice. Additionally, it is suggested that the provision could be waived by the trial court if satisfied that such a problem would not arise. Another alternative would be to require a distant attorney to retain local counsel who would be available for hearings and proceedings held on short-notice.⁹⁰ Finally, the court could order a prompt and speedy trial and sanction any attorney who did not comply with such direction.⁹¹

To ensure nonresident pro bono performance, states could follow the Supreme Court recommendation that mandatory pro bono work be for all admitted attorneys.⁹² Another generally

⁸⁷ *Warner Corp. v. Vittorio, Puleo, Doe, & Bagel Nosh Wholesale Bakery, Inc.*, No. 21964-89 (N.Y.C. Civ. Ct. Bronx County April 16, 1990).

⁸⁸ *See id.* (New York bar member who resided in New Jersey and failed to maintain New York office was permitted to represent party in civil litigation despite timely § 470 objection).

⁸⁹ *Id.*

⁹⁰ *See Reske, Last Chapter for Bar Residency Rules?*, 74 A.B.A. J. 68, 70 (March 1988) (barriers no longer important due to ease of getting from one place to another); *supra* notes 80-81 and accompanying text (same).

⁹¹ *See Frazier v. Heebe*, 482 U.S. 641, 648 (1986) (Court discusses alternatives to residency requirement of imposing sanctions when attorneys fail to appear in court). *See also Piper*, 470 U.S. at 287 (New Hampshire bar had authority to police all members).

⁹² *See Barnard v. Thorstenn*, 489 U.S. 546, 557 (1989) (state may enforce mandatory

cited interest, the need to ensure that attorneys are familiar with local laws and rules,⁹³ could be fulfilled by bar associations who have the authority to require continuing legal education for all attorneys.⁹⁴ Finally, service on such attorneys may be accomplished by attorney consent to service by mail⁹⁵ or appointment of an in-state agent to accept service of process.⁹⁶

CONCLUSION

It is submitted that state statutes which prohibit nonresident members of the bar from practicing law within their borders unless they maintain an office in the state violate the privileges and immunities clause, and therefore, are unconstitutional. The Supreme Court has struck down each of the arguments used to support such statutes as insubstantial. Moreover, there are less restrictive means available to the states to satisfy the legitimate goals they seek to protect. It is submitted that such restrictive statutes should be repealed, or in the alternative, struck down by the

pro bono requirement); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (attorneys bound to serve when appointed). *See also* Committee to Improve the Availability of Legal Services, Final Report, April 27, 1990. (New York proposal suggesting implementation of mandatory pro bono). *See generally* Survey of Professional Responsibility, "... And Justice For All"? — *The Bar, the Indigent and Mandatory Pro Bono*, 5 ST. JOHN'S J. LEGAL COMMENT. 387, 389-90 (1990) (discussing proposal requiring lawyers practicing in New York to contribute 40 hours every two years to pro bono services). *But see In re* Emergency Delivery of Legal Services to the Poor, 432 So. 2d 39, 41 (Fla. 1983) (analogy drawn between mandatory pro bono and involuntary servitude); Caroll, *Current Professional Issues: Addressing Obligations and Exploring Opportunities*, N.Y.S.B.J. 10 (Feb.1990) (several local New York bar associations oppose mandatory pro bono); D'Alemberte, *The Role of the Courts in Providing Legal Services: A Proposal To Provide Legal Access for the Poor*, 17 FLA. ST. U.L. REV. 107, 114 (1989) (mandatory pro bono objectionable because of problems defining where service will be recognized).

⁹³ *See, e.g.*, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 70 (1988) (nonresident attorney lived close enough to be aware of Maryland law). *See generally* *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1985) (attorney who brings case in federal district court also must be familiar with state law, however, residency requirement applies only to attorneys bringing case in state court).

⁹⁴ *See Friedman*, 487 U.S. at 69 (states may require mandatory attendance at continuing legal education courses); *see also* Drinan, *Moral Architects or Selfish Schemers*, 79 GEO. L.J. 389, 396 (1990) (Book Review) (continuing legal education mandatory in number of states). *See generally* Carlson, *Competency and Professionalism In Modern Litigation: The Role Of the Law Schools*, 23 GA. L. REV. 689, 699 (1989) (society entitled to high standards of competence, and informed lawyers are vital).

⁹⁵ N.Y. CIV. PRAC. L. & R. § 312-a (McKinney 1990).

⁹⁶ *See id.* §§ 308(3), 318; *supra* note 19 and accompanying text (discussing appointment of agent to receive process).

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courts as unconstitutional.

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EX PARTE COMMUNICATIONS WITH EMPLOYEES OF A BUSINESS ENTERPRISE: THE NEED FOR A BRIGHT LINE TEST

INTRODUCTION: THE EXISTING PROBLEM

X.X.X., Inc. is a hypothetical company incorporated and legally doing business in State A. X.X.X., Inc. has a typical corporate structure, consisting of directors, senior and junior executives, managers, workers and an office support staff, with a normal turnover of personnel occurring in all positions. In its course of business X.X.X., Inc. becomes embroiled in a legal dispute with P. Litigation commences and the discovery process begins. P's attorney plans to contact present and former employees of X.X.X., Inc. to conduct informal ex parte¹ communications. Counsel for

¹ See BLACK'S LAW DICTIONARY 576 (6th ed. 1990). Ex parte is defined as "[o]n one side only." *Id.* Communication is defined as "the sharing of knowledge by one with another." *Id.* at 279. The term ex parte communication/contact is used to describe contacts made between one counsel and witness/parties for the opposing side without the opposing counsel's knowledge and/or presence. See generally *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (use of "ex parte communication" consistent with above description and sets minimum standard which must be followed when dealing with employees of business enterprise); *Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv. Ltd.*, 745 F. Supp. 1037, 1039 (D.N.J. 1990) (ruling upon motion to prohibit ex parte communication with former employees); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 628 (S.D.N.Y. 1990) (no ethical bar against ex parte communications with former employees); *Niesig v. Team I*, 76 N.Y.2d 363, 368, 558 N.E.2d 1030, 1031-32, 559 N.Y.S.2d 493, 494 (1990) (denying employer's ability to prevent ex parte communications with low-level and former employees); *Stahl, Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 WASH. & LEE L. REV. 1181, 1182 (1987) (analyzing theories on protecting employees from ex parte interviews).