

## The *Bona Fide* Office Rule

# Will Virtual Offices Be Allowed?

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A substantial number of attorneys practicing in New Jersey are solo practitioners. In 2010, there were 35,867 lawyers engaged in the private practice of law, 21,511 of whom practice full time.<sup>1</sup> Of the 35,867, a total of 11,373 were solos and 3,454 were members of two-person firms.<sup>2</sup> Few court rules have as significant an impact on the solo and small firm's ability to practice as the *bona fide* office rule. The rule has been around, in some form or other, for over 30 years, and it has always brought with it controversy.

In the 1995 *In re Kasson* decision, the state Supreme Court discussed the versions of the rule up to that time, and the trend toward relaxing the rule's requirements through each subsequent amendment.<sup>3</sup> For example, several early versions of the rule required all practicing attorneys to be domiciliaries of the state, and to maintain a principal office as a condition of practicing.<sup>4</sup> When *Kasson* was issued, the Court spoke about amendments to the prior versions of the rule, which "removed the distinction between domiciliaries and non-domiciliaries," in order to allow "interstate movement [of attorneys] while at the same time assuring a sufficient degree of competence, accessibility and accountability."<sup>5</sup> The more recent versions of the rule have continued this trend, but still impose what the authors see as unnecessary restrictions on the manner in which attorneys may set up their practices.

The effects of the rule have come to the forefront of the solo's world, in particular, due to the current state of the economy. At a time when new lawyers cannot find employment

and have no option but to open their own shop, when big firms are laying off experienced associates and partners, and when mothers are looking to go back to work to help their households, the authors view the *bona fide* office rule as an unnecessary and antiquated impediment to operating a cost-effective practice while meeting clients' needs.

While once viewed as a rule to protect the New Jersey attorney from having their practice swallowed up by New Yorkers and Philadelphians,<sup>6</sup> the rule now may hamper the New Jersey solo's ability to practice law within the state due to cost. There may, however, be light at the end of the proverbial tunnel, by way of the New Jersey Supreme Court's Professional Responsibility Rules Committee's (PRRC) recent report adopting a rule change proposal from the New Jersey State Bar Association.

This article examines the current rule and its interpretation, the pending proposed rule change, and the implications for practitioners under both the current rule and the proposed change.

### The Current Rule and ACPE Opinion 718/CAA Opinion 41

The rule is found at New Jersey Court Rule 1.21-1(a), and states that every attorney who currently practices law in New Jersey must have a *bona fide* office, which is defined as:

...a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time...." [Emphasis added]

This rule, which in varying forms has been part of New Jersey law for over 30 years, can be troublesome. Taken literally, its *place* and *person* requirements can be financially burdensome for solo and small-firm lawyers, and possibly prohibitive for lawyers who prefer to practice only part time. Moreover, if the purpose of the place and person requirements is to ensure that attorneys are available and can be found by clients, courts and adversaries,<sup>7</sup> then the rule is out of step with modern technology, which can render lawyers readily accessible at any time or place.

In 2010, two advisory committees of the New Jersey Supreme Court, the Advisory Committee on Professional Ethics (ACPE) and the Committee on Attorney Advertising (CAA), issued a joint opinion, ACPE Opinion 718/CAA Opinion 41 (2010), in response to an inquiry about whether a home office or a “virtual office” can qualify as a *bona fide* office.<sup>8</sup>

The committees took a literal approach to the rule. Regarding the place requirement, they determined that a home office is acceptable if confidentiality is preserved, but that a virtual office, serving as the lawyer’s only office, is unacceptable. The type of virtual office they had in mind in their opinion was a time-share arrangement, whereby a lawyer reserves space in an office building as needed, in order to meet with clients, but generally conducts business from outside the office.

Regarding the person requirement, the committees determined that a lawyer could occasionally leave the office unattended, provided he or she was accessible by cell phone or other hand-held device. However, if the lawyer were regularly out of the office during normal business hours, there must be a back-up person physically present; the lawyer’s remote accessibility would not be sufficient to satisfy the rule.

Kevin Michels, New Jersey’s leading ethics scholar, supports the joint opinion’s position on the rule’s place requirement. However, he strongly disagrees with the opinion’s approach to person:

The opinion creates difficulty for part-time practitioners who do not have a full-time person ‘present at the office’ during business hours. In the electronic age, which allows practitioners to be reached from nearly every location both by voice and email, it seems extraordinary that the Committee would require a practitioner to shoulder the expense of a full-time support person to maintain a physical presence throughout the day. For part-time practitioners, the economics of such an arrangement may prove prohibitive. Lawyers need to be available and responsive, but their physical presence is required only for specific undertakings and not throughout the day. The requirement of a *bona fide* office, whether at home or elsewhere, remains valid. The insistence on the physical presence of an attorney or support person at the office throughout the business day (other than occasionally) is an indirect and unnecessarily burdensome means to ensure accessibility. The Court should demand accessibility, eliminate the requirement of a physical presence, and insist that attorneys be reachable by electronic or other means within a reasonable (or prescribed) period of time during regular business hours.<sup>9</sup>

George Conk, a member of one of the advisory committees that produced the 2010 joint opinion, believes virtual lawyering is a widespread reality, with lawyers increasingly operating in a computer ‘cloud.’<sup>10</sup> This worries Conk, who maintains that for the public to have confidence in lawyers, they must maintain a physical presence.<sup>11</sup>

In 2003, when the Supreme Court was considering issues relating to the *bona fide* office rule, the New Jersey State Bar Association chose to support the rule’s place and person requirements. Since then, however, the state bar’s position has shifted, reflecting major advances in office technology, as well as the financial hardship the current rule imposes upon lawyers with modest or marginal practices. In June 2010, the board of trustees of the New Jersey State Bar Association submitted to the Supreme Court a proposed amendment to Rule 1:21-1(a), which would give lawyers flexibility in satisfying the objectives of lawyer accessibility and responsiveness.

### The NJSBA’s Proposal

In the wake of ACPE Opinion 718/CAA Opinion 41 (2010), the New Jersey State Bar Association formed a subcommittee of its Solo and Small-Firm Section and Professional Responsibility and Unlawful Practice Committee to study the *bona fide* office requirement of Rule 1:21-1(a), and to recommend any changes that it deemed appropriate in light of recent developments in technology and law firm practice management. The subcommittee began its task by identifying the underlying policy objectives the *bona fide* office rule was intended to advance, then addressing the most effective way to accomplish those objectives to honor the reasonable expectations of clients in the digital age.

The rule’s obvious purpose was to assure that attorneys are promptly accessible and responsive to clients, judicial tribunals, government agencies and bar regulatory authorities. One problem with the current rule was it appeared to assume most attorneys are litigators who spend their days in court, then return to the office to meet with clients. This practice model may have been prevalent in the days of Perry Mason, but hardly reflects the profes-

sional lifestyle of most litigators today.

Another problem was that the rule seemed oblivious to transactional attorneys and other non-litigators, who may spend no time 'at the office' because they have no need for one, at least not the traditional version contemplated by the rule.

After considerable discussion, the subcommittee unanimously found that a fixed, physical office location, regularly staffed during normal business hours, was not the only reliable way to achieve the accessibility and responsiveness necessary to fulfill an attorney's professional obligations.

Yet another problem was that the rule had been liberalized over the years to stay ahead of one constitutional challenge after another, to the point where it now permits a licensed New Jersey attorney to reside in Puerto Rico and maintain a *bona fide* office in Guam. The subcommittee concluded that if the rule ever did serve a useful purpose, it no longer does, at least not in its current form. There also was a concern about too much undesired accessibility for attorneys practicing from their homes, who have legitimate concerns about privacy and safety.

In a written report to the state bar's trustees, the subcommittee emphasized that the 'traditional' law office was by no means a relic of a bygone era. It remains a viable choice for attorneys and firms who believe this practice model best reflects their professional style and identity, and most effectively meets the needs of their clientele. But for many attorneys and their clients, smartphones, email and video conferencing offer opportunities for communication and information-gathering far more suited to their needs than a physical office location the attorney does not require to perform most of the daily tasks of lawyering, and that busy, far-flung clients may have no interest in visiting.

The subcommittee agreed that attorneys may need to designate physical locations for specific purposes, such as Office of Attorney Ethics audits and service of process. For the day-to-day servicing of clients, however, it could discern no persuasive policy basis for continuing the requirement of a *bona fide* office, as presently defined. The subcommittee noted in passing that the current rule undoubtedly increases the cost of legal services to the public. That would not be reason in itself to dispense with the rule if it were necessary to protect clients' interests, but the subcommittee believed that, if that ever were the case, it no longer is.

The subcommittee proposed that Rule 1:21-1(a) be amended to read as follows:

**1:21-1. WHO MAY PRACTICE;**

**APPEARANCE IN COURT**

(a) Qualifications. Except as provided below, no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State, has complied with the Rule 1:26 skills and methods course requirement in effect on the date of the attorney's admission, is in good standing, and complies with the following requirements:

(i) An attorney need not maintain a fixed, physical office location, but must structure his or her practice in such manner as to assure prompt and reliable communication with, and accessibility by clients, other counsel, and judicial or administrative tribunals before which the attorney may practice; provided, that an attorney must designate one or more fixed, physical locations where client files, and business and financial records, may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served upon the attorney for all actions,

including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event that service cannot otherwise be effectuated pursuant to the appropriate Rules of Court.

(ii) An attorney who is not domiciled in this State, but who meets all the qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent upon whom service of process may be made for the purposes set forth in the preceding subsection. The designation of the Clerk as agent shall be made on a form approved by the Supreme Court.

(iii) The system of prompt and reliable communication required by this rule may be achieved through maintenance of telephone service staffed by individuals with whom the attorney is in regular contact during normal business hours, through promptly returned voicemail or electronic mail service, or through any other means demonstrably likely to meet the standard enunciated in subsection (a)(i).

(iv) An attorney shall be reasonably available for in-person consultations requested by clients at mutually convenient times and places.

The subcommittee's proposed revision to the rule placed front and center, more so than even the current rule, the goals of attorney accessibility and responsiveness that remain as valid as ever, while offering attorneys flexibility in how those objectives may be achieved. It established a functional test the subcommittee was confident could be understood by attorneys, and enforced by the Judiciary.

The proposal was promptly endorsed by the state bar's board of trustees, and forwarded to the Supreme Court for consideration. On Jan. 9, 2012, the Supreme Court's Professional Responsibility Rules Committee issued its 2010-

2012 Rules Cycle Report, “largely agreeing” with the state bar subcommittee’s proposal, and recommending that the Court accept it with several modifications, including a requirement that the site of the designated “fixed, physical location” for file inspection, hand-deliveries, and process service be located in New Jersey. The Court invited public comment by April 2, 2012, and formal action on the proposal is expected later this year.

In its Jan. 2012 Rules Cycle Report, the New Jersey Supreme Court’s Professional Responsibility Rules Committee proposed the following new rule, designated as Rule 1:21-1(a)(i):

An attorney need not maintain a fixed, physical location, but must structure his or her practice in such a manner as to assure prompt and reliable communication as set forth in RPC 1.4 with, and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice; provided, that an attorney must designate one or more fixed, physical locations in New Jersey where client files, and business and financial records, may be inspected on short notice by duly authorized regulatory authorities, where mail or hand-deliveries may be made and promptly received, and where process may be served upon the attorney for all actions, including disciplinary actions, that may arise out of the practice of law and activities related thereto, in the event service cannot be effectuated pursuant to the appropriate Rule of Court.

### **Where We Are and Where We May Be Going**

For now, New Jersey attorneys are still operating under the current rule, and there are, of course, no guarantees the *bona fide* office rule will change. While the joint opinion is explicit, following are several points to guide prac-

tioners under the current rule.

The heart of the current rule is accessibility at the physical location. For an attorney to be in compliance with the rule, he or she, or someone on his or her behalf, *must* be at the physical location and accessible “during normal business hours,” with only “occasional” absences.<sup>12</sup> The joint opinion specifically states that a receptionist in an office-sharing arrangement does not satisfy the rule’s criteria, as such a person “would not be privy to legal matters being handled by the attorney and would be unable to ‘act on the attorney’s behalf’ in any matter.”<sup>13</sup>

In the joint opinion, the ACPE goes so far as to state that “in general, an attorney should not permit the receptionist of a ‘virtual office’ to field telephone calls to the attorney.”<sup>14</sup> The primary concern is that a client might assume the receptionist is an employee of the attorney, and disclose confidential information.

The rule is clear: An attorney must either be available at his or her physical location or must have someone available at that location on his or her behalf, and not simply serving as an answering service or routing phone calls to voicemail.

There, of course, is gray area in the rule. What does “occasional” mean? How many solo attorneys can one receptionist/staff member work for before they are considered akin to an “answering service”? There are no clear answers to these questions; they are the areas solos will need to explore when determining what office arrangement to choose and how best to comply with the rule. With respect to the latter, the key appears to be preserving confidentiality and the receptionist/staff member working on clients’ cases having knowledge sufficient to assist clients if the attorney is not available.

The authors view these as the most cost-prohibitive portions of the rule and

the joint opinion, citing that solos, part-time attorneys and some small firms do not have the means to pay for the type of arrangement the rule requires. Believing that these requirements do not further the intent of the rule, the authors argue that the proposed rule changes should be made.

The joint opinion also provides that an attorney’s advertising material must not be misleading regarding the nature of the physical office location. This essentially means that if an attorney is not accessible during regular business hours, all advertising material must note that the office is “by appointment only.” This emphasizes the committees’ interpretation that a “virtual office” or “shared office” is not sufficient to be in compliance with the rule, and that attorneys are not permitted to advertise as if they are in compliance with the rule.

Under the proposed rules, much of the constricting requirements would be removed. The intent of the rule would be accomplished without the need for staffing a physical location throughout the normal business day. An attorney would be in compliance if he or she has a physical location where client files can be inspected, business and financial records can be maintained, and service can be accomplished.

The proposed rule requires that attorneys provide means for prompt and reliable communication, as required under the Rules of Professional Conduct. Cell phone and email accessibility would easily satisfy these requirements. Mobile communication devices and a fixed office in New Jersey, shared or otherwise, would ensure compliance under the proposed rule. It would enable attorneys with struggling practices or new practices to get up and running, and enable attorneys to provide legal services to clients in a more cost-effective manner.

### **Penalties**

When an attorney is not in compli-

ance with the *bona fide* office rule, and that is the sole violation, an admonition is the common discipline.<sup>15</sup> However, if an attorney fails to maintain a *bona fide* office there may be other violations as well, such as failing to maintain a required trust account in a New Jersey bank.<sup>16</sup> In such a case, a reprimand is more common.<sup>17</sup> Another significant ethical breach that could accompany a *bona fide* office rule violation is breach of confidentiality.

## Conclusion

In the authors' view, the *bona fide* office rule, as it now stands, disproportionately affects solo and small-firm practitioners in the state. Technology may be changing the manner in which the Supreme Court chooses to achieve the requirements of attorney accessibility and accountability. The proposed rule would retain these requirements while allowing virtual offices. ♪

## Endnotes

1. Office of Attorney Ethics, State of the Attorney Disciplinary System Report, pp.66-67 (2010).
2. *Id.*
3. *In re Kasson*, 141 N.J. 83 (1995).
4. 141 N.J. at 86 (*citing In re Sackman*, 90 N.J. 521, 526 (1982)).
5. *See Id.* (*quoting* 90 N.J. at 533).
6. Jill Capuzzo, *Balancing Life and Practice: Bars Battle Back the Bona Fide Office Rule*, *New York Times*, 2002 at <http://www.lexisone.com/balancing/articles/n092002d.html>.
7. Committee on Attorney Advertising Opinion 19 (1994).
8. ACPE Opinion 718/CAA Opinion 41 (2010).
9. Kevin Michels, *New Jersey Attorney Ethics*, section 4:5, pp.48-49 (Gann Law Books, 2012 Edition).
10. George Conk, *We're All Virtual Lawyers Now*, *New Jersey Lawyer*, December 2011, pp.19-23. For an

aggressive critique of New Jersey's *bona fide* office rule by an advocate of virtual lawyering, *see* Stephanie Kimbro, *Practicing Law Without an Office Address: How the Bona Fide Office Requirement Affects Virtual Law Practice*, 36 *Dayton L. Rev.* 27 (2010).

11. Cloud computing refers to computer users sharing resources over a network instead of purchasing traditional hardware and installing it at their physical location. For example, instead of having a large-capacity server at their office, a user can store their data over a network at an off-site location.
12. ACPE Opinion 718/CAA Opinion 41, pp.2-3 (2010).
13. *Id.*
14. *Id.* at p.4.
15. *In re Witherspoon*, 203 N.J. 343, 359 (2010); *Matter of Young*, 144 N.J. 165 (1996); *Matter of Beck*, 143 N.J. 308 (1996).
16. *See* RPC 1.15; 1:21-6.
17. *See Matter of Gajewski*, 139 N.J. 389 (1995). *See* Section 4:5, Michels, *New Jersey Attorney Ethics* (Gann Law Books, Newark, 2000).

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