

## **Strike 2 in *Zelinsky*: New York's Convenience Rule Survives**

**by Timothy P. Noonan and Open Weaver Banks**

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## Strike 2 in Zelinsky: New York's Convenience Rule Survives

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Timothy P. Noonan



Open Weaver Banks

Timothy P. Noonan is a partner in the Buffalo and New York City offices of Hodgson Russ LLP, and Open Weaver Banks is a partner in the firm's Hackensack and New York City offices.

In this installment of Noonan's Notes, Noonan and Banks argue that while professor Edward Zelinsky has suffered two setbacks in his New York convenience of the employer rule litigation regarding his remote work in 2019 and 2020, precedent indicates that he has a solid chance of winning at the appellate level.

For around 40 years, taxpayers, practitioners, auditors, and courts have grappled with the scope of New York's convenience of the employer rule, which has also taken up its share of space in this column and in this publication.<sup>1</sup> It's also been

<sup>1</sup> See Timothy P. Noonan and Emma M. Savino, "New York's Convenience Rule: Under the COVID Microscope," *Tax Notes State*, May 31, 2021, p. 893; see also Joshua M. Sivin and Jason Turner, "The Convenience of the Employer Rule: A Taxing Issue for Remote Workers — Part I," *Tax Notes State*, Oct. 30, 2024, p. 319; Walter Hellerstein, "Nonresident NY Employees Are Not Currently Working at Home for Their 'Convenience,'" *Tax Notes State*, Apr. 6, 2020, p. 83; Noonan, "The Ins and Outs of New York Nonresident Allocation Issues," *Tax Notes State*, Feb. 8, 2010, p. 439.

covered extensively in the general press, especially as remote work expanded during the COVID-19 pandemic,<sup>2</sup> and has even found its way into the podcast circuit.<sup>3</sup> A central character in this saga has been Connecticut resident Edward Zelinsky, a tax law professor at the Benjamin N. Cardozo School of Law of Yeshiva University in Manhattan (Cardozo).

In a case that reached the state's highest court 20 years ago (*Zelinsky I*),<sup>4</sup> Zelinsky took on the New York State Department of Taxation and Finance and its convenience rule and lost. But during the pandemic, it occurred to him that not only had the nature of remote work changed dramatically over the past 20 years, but also that the mandatory work-at-home arrangements forced upon him by New York and his employer made the idea that he worked from home for convenience ridiculous. So the good professor, undeterred by his prior defeat, stepped into the fray again, and *Zelinsky II* was born.<sup>5</sup>

In 2023 an administrative law judge in the New York State Division of Tax Appeals rejected Zelinsky's appeal for the 2019 and 2020 tax years, holding that the convenience of the employer rule was properly applied to Zelinsky in those two years, and — as applied — did not violate any

<sup>2</sup> Alexis Leondis, "Remote Work and Taxes: Start Preparing for Next Year Now," *Bloomberg*, Feb. 26, 2021; Sam McQuillan, "Telecommuting Boom Puts Employers at Risk for Millions in Taxes," *Bloomberg Tax*, Feb. 23, 2021; Jeanne Sahadi, "Living in One State and Working Remotely From Another? You Could Owe Income Taxes in Both," *CNN Business*, Mar. 30, 2021.

<sup>3</sup> See Joseph F. Tantillo, "Happy Minute 1 — The Convenience Rule," *State Tax Talks with Joe Tantillo*, Jan. 31, 2023; see also Edward K. Zollars, "Second Challenge to Convenience of the Employer Rule," *Current Federal Tax Developments*, May 26, 2025.

<sup>4</sup> *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85 (N.Y. 2003), cert. denied, 541 U.S. 1009 (2004).

<sup>5</sup> Noonan and Savino, "The Convenience Rule: Another Bite at the Big Apple," *Tax Notes State*, June 26, 2023, p. 1083.

protections afforded nonresidents of New York by the U.S. Constitution.<sup>6</sup> That was strike one. And just recently, the New York Tax Appeals Tribunal upheld the ALJ's determination on mostly the same grounds.<sup>7</sup> So now we have strike two. In this article, we'll review the tribunal's decision and analyze what's in store for Zelinsky's next at-bat in the New York courts.

### Background

Nonresidents of New York are taxed on their compensation based on the percentage of days worked in New York during the tax year. All states essentially use the same approach, but New York diverges from the general rule by treating days worked out of state by the employee for her convenience — as opposed to employer necessity — as days worked in New York.<sup>8</sup> Rather than loosen this rule during COVID-19, when many nonresidents were forced to work at home for a year or more, New York doubled down. In July 2020 the tax department issued guidance stating that the convenience rule still applied to those telecommuting because of the pandemic.<sup>9</sup> According to department policy, this meant that nonresidents who historically worked in New York but were working out of state thanks to stay-at-home orders would continue to pay New York state tax on their wages.

So if there was ever an opportunity to take another bite at the apple, the pandemic appeared to present the perfect set of circumstances for Zelinsky, since Cardozo — like so many New York businesses — closed its doors and required him to work remotely. For good measure, Zelinsky also threw in a refund claim for his 2019 year and stipulated to the fact that his work situation was the same in 2019 as it was in *Zelinsky I*, when he worked in New York at Cardozo teaching law school classes three days a week and

conducted his scholarly and administrative activities from Connecticut the other two days.

### The Tribunal's Constitutional Analysis

Interestingly, while the questions around the application of the convenience rule to mandatory work-at-home arrangements were really the most important and controversial aspects of Zelinsky's case, most of the tribunal's analysis in its May 15 decision is devoted to whether applying the rule to Zelinsky violated either the commerce clause or the due process clause of the 14th Amendment of the U.S. Constitution.<sup>10</sup> So we'll start the discussion there.

### Due Process

Although the tribunal stated that the due process analysis should turn on whether Zelinsky's income attributed to New York was out of appropriate proportion to his activities in the state or otherwise led to a grossly distorted result, the tribunal's finding of no due process violation apparently did not consider either factor. This is significant in 2020, when Zelinsky reported that he worked from Connecticut for over 90 percent of his workdays that year.

If attributing 100 percent of income to New York when 90 percent of the income-earning activities were conducted outside the state doesn't strike the tribunal as a grossly distorted result, then clearly no level of work performed out of state would satisfy the tribunal. That is because the tribunal's reasoning emphasizes that Zelinsky's minimal physical presence in New York (less than 10 percent of total working days), coupled with availing himself of the state's economic market through his employment with a New York-based employer, was sufficient for due process.

<sup>6</sup> *Matter of Zelinsky*, ALJ Determination, Nov. 30, 2023.

<sup>7</sup> *Matter of Zelinsky*, Tax Appeals Tribunal, May 15, 2025.

<sup>8</sup> N.Y. Comp. Codes R. & Regs. tit. 20, section 132.18(a).

<sup>9</sup> New York State Department of Taxation and Finance, "Frequently Asked Questions About Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax" (updated Oct. 19, 2020).

<sup>10</sup> The tribunal's jurisdiction over constitutional claims is limited to as-applied challenges and does not extend to the question of whether a statute is unconstitutional on its face. *Matter of Eisenstein*, Tax Appeals Tribunal, Mar. 27, 2003.

## Commerce Clause

The tribunal also considered whether the convenience rule violated the dormant commerce clause's fair apportionment prong by applying both the internal and external consistency tests developed by the U.S. Supreme Court.<sup>11</sup>

The tribunal determined that internal consistency is satisfied in the hypothetical situation in which every state adopted the same tax regime as New York, which applies the convenience rule to nonresidents and gives residents a credit for taxes paid on income sourced to and taxed by another state. New York and New Jersey are a real example of this situation, in which each applies the convenience rule to residents of the other state and gives its own residents a credit for taxes sourced to and taxed by the other state.<sup>12</sup> New York's tax regime is internally consistent because double taxation is avoided, and individuals are not discouraged from crossing state lines to work. It is hard to find fault with that analysis.

However, the tribunal's external consistency analysis fell short. First, although the tribunal emphasized that its review of the constitutional arguments was limited to as-applied challenges, this looks an awful lot like a facial analysis. According to the tribunal's circular analysis, since a state tax is externally consistent if it reaches only that portion of the revenue that reasonably reflects the in-state component of the activity being taxed, it follows that external consistency is satisfied since New York's tax laws only tax nonresidents for income derived from New York sources. The problem with this analysis is that it did not consider the activity actually being taxed, and the fact that over 90 percent of Zelinsky's activity was conducted outside New York in 2020.

As with the due process analysis, the tribunal's external consistency analysis assumed away the key question of how much of Zelinsky's income was actually from his activities in New York. The only finding that mattered to the tribunal was that the source of the compensation at issue was a New York-based employer.

<sup>11</sup> *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983).

<sup>12</sup> In 2023 New Jersey adopted its own "retaliatory" convenience rule that applies only to nonresidents of states such as New York that apply the convenience rule to New Jersey residents working in New York. N.J. Stat. Ann. section 54A:5-8(e).

## The Convenience Rule and Mandatory Remote Work

While the shortcomings of the tribunal's constitutional analysis will ideally give the Appellate Division something to think about on appeal, the tribunal's application of the convenience rule to 2020 is where we think this decision really misses the mark and is what we think will be subject to extremely close scrutiny (and quite possibly a reversal) by New York's courts on appeal.

This analysis starts with how the tribunal framed the issue, finding that "Cardozo's *allowing* its employees to work from home, wherever that may have been, does not constitute its own necessity to have those job functions performed in those places" (emphasis added). This turn of phrase is important. Did Cardozo really "allow" Zelinsky to work from home, as if the school had some kind of "Fun Friday" policy allowing students and teachers to Zoom into classes one day a week? As those who experienced COVID-19 in New York know, none of us were "allowed" to work from home in March 2020; rather, we were *required* to work at home, either because the governor mandated it or because employers wouldn't let us in the building. Generally, it's this framing of the issue that is likely to tie the tax department up in knots on appeal. And it's this framing that affects all aspects of the tribunal's legal justification for upholding the convenience rule.

### Misapplication of *Colleary*

The main convenience rule decision that the tribunal relied on was *Colleary*,<sup>13</sup> which is interesting because it has never been discussed in significant detail — largely because the taxpayer's position didn't make much sense. In that case, the employee worked for a New York City company as the head writer for the *Captain Kangaroo* television show. The employee's job entailed both writing and supervisory work, and he performed his supervisory duties at the employer's New York office two days a week. He spent the other three days of the week writing from a New Jersey office. While

<sup>13</sup> *Matter of Colleary*, 69 A.D.2d 922 (3d Dept. 1979).

acknowledging that the employer maintained no office in New York for his writing duties, the court in *Colleary* upheld application of the convenience rule because the employee failed to show that facilities for his writing activities could not have been provided at his employer's office.

According to the tribunal, Zelinsky's situation wasn't much different than the facts in *Colleary*. And to be sure, at the most basic level, we tend to agree that the *Colleary* facts are similar to Zelinsky's 2019 facts and to many hybrid work arrangements that employers put in place after the COVID-19 pandemic ended. But 2020 is a different story: Cardozo closed its doors in March and did not reopen for the rest of the year. Had the tribunal correctly applied the same reasoning that the court applied in *Colleary*, we think it should have concluded that Zelinsky met his burden of proving that no facilities were available for him to perform his work activities at Cardozo's New York location beginning in March 2020.

*Colleary* also happens to be one of a handful of cases in which the tribunal or New York courts have aligned around the idea that although there was some aspect of the working conditions that made it difficult or inconvenient for employees to get their work done, the employer could have made accommodations to meet the employees' needs with "a minimum of ingenuity and effort."<sup>14</sup> However, in all the cases the tribunal cited, the employer maintained an office that was open and available for employees. Zelinsky's case, involving a closed office, is the first of its kind, so it should have been easy for the tribunal to find an exception to the convenience rule for the 2020 office closure.

<sup>14</sup>*Wheeler v. State Tax Commission*, 72 A.D.2d 878 (3d Dept. 1979). See also *Kitman v. State Tax Commission*, 92 A.D.2d 1018 (3d Dept. 1983); and *Matter of Tuohy*, Tax Appeals Tribunal, Feb. 13, 2003.

## Weaponization of *Fass*

In the long history of convenience rule decisions, the one glimmer of hope for remote workers is *Fass*,<sup>15</sup> in which the employee's job involved testing and analyzing certain products and items: sports cars, motorcycles, firearms, home improvement, and dogs and horses — all of which required that he use specialized equipment and facilities at his New Jersey home that were not present at his employer's office in New York.

In *Fass*, the department held that since the specialized facilities could have been set up somewhere else in New York, the New Jersey situs was chosen merely for the taxpayer's convenience. But the court held that the right to allocate income away from New York is denied under the convenience rule only when the taxpayer could have done the work at the employer's New York office:

The cases in this area do not stand for the proposition that out-of-state services are not for an employer's necessity where they could have been performed *somewhere* in New York State. Rather, they hold that an employee's out-of-state services are not performed for an employer's necessity where the services could have been performed at his employer's office.<sup>16</sup>

So while cases like *Colleary* hold that the employee must prove that facilities for his services could not have been provided at the employer's office, *Fass* recognizes that the employee does not have to prove that the necessary facilities could not have been provided somewhere else in New York. The focus remains solely on the availability of workspace at the employer's New York office.

The employee in *Fass* was able to make a compelling argument that he could not test firearms or sports cars at his employer's New York office location. But we think that the pandemic-related office closures of 2020 also make for a unique set of facts and a compelling argument. As

<sup>15</sup>*Matter of Fass*, 68 A.D.2d 977 (3d Dept. 1979), *aff'd*, 50 N.Y.2d 932 (1980).

<sup>16</sup>*Id.* at 977-978 (emphasis added).

was the case in *Fass*, Zelinsky could not perform his services at Cardozo's New York location.

Instead of applying *Fass* to reject the application of the convenience rule, what the ALJ opinion and the tribunal's opinion have done is weaponize *Fass* against taxpayers, so that only an employee who can prove that they need specialized facilities can avoid application of the convenience rule. But the rule is called the convenience rule, not the specialized facility rule. By focusing on the result in *Fass*, the tribunal has lost sight of the primary question in convenience rule cases, which is to determine whether the employer obligated the employee to perform work outside New York. And in Zelinsky's case, in which his employer closed its New York office, it is illogical to attribute his decision to work at home to anything other than employer necessity. His employer clearly obligated him to perform his services at his home outside New York.

### All About Nexus?

Lastly, the tribunal justified the application of the convenience rule to Zelinsky on nexus grounds, basically on the theory that the professor's work in Connecticut wouldn't have been sufficient to establish nexus in Connecticut for Cardozo:

For us, the nature of the employment relationship is paramount in considering whether the days on which a taxpayer claims to have performed personal services outside New York are subject to application of the convenience rule. *In other words, the question boils down to whether the employer established a nexus in another jurisdiction by directing its employee to perform personal services in that out-of-state location for its own necessity. . . .* Absent a showing of such a fact, a nonresident taxpayer's personal services performed for a New York employer will be subject to the convenience rule if the taxpayer performs those personal services both within and without New York.<sup>17</sup>

<sup>17</sup> *Zelinsky*, Tax Appeals Tribunal at 26 (emphasis added).

So according to the tribunal, the question boils down to nexus, and whether Cardozo had nexus in Connecticut because one of its employees worked there remotely. But if that's true, then shouldn't it be sufficient for nexus purposes that Cardozo directed Zelinsky to work from his home in Connecticut? Cardozo knew Zelinsky lived in Connecticut, and it didn't offer him the ability to work anywhere else in New York. Where else would the school think he would have worked?

And more importantly, almost every state would hold that the presence of a remote employee is enough to create nexus for her employer. That issue was tackled in the 2012 *Telebright* case, in which the New Jersey Superior Court determined that the presence of one remote employee in the state satisfied the constitutional minimum connection requirement and gave the corporate taxpayer nexus in New Jersey.<sup>18</sup> Absent special rules — many of which were briefly put in place during the pandemic — most states would follow the same rule, even New York.<sup>19</sup>

But whether Cardozo had nexus in Connecticut or not, Zelinsky wasn't working in Connecticut for his own convenience. He was working there because his employer told him to, and because he had no other place to work during the pandemic. So while the tribunal held that Zelinsky "has not shown that Cardozo required him to perform the functions of his job at his home in Connecticut," the opposite is true.<sup>20</sup> Cardozo absolutely required him to perform the functions of his job at home in Connecticut because it gave him no other place to work. The whole convenience rule issue in these COVID-19 cases really boils down to that, which is why there is a good possibility that New York's courts will side with Zelinsky on appeal.

<sup>18</sup> *Telebright Corp. Inc. v. Director, New Jersey Division of Taxation*, 38 A.3d 604 (N.J. Super. Ct. App. Div. 2012).

<sup>19</sup> TSB-A-05(7)C (suggesting a single in-state employee working from home will create nexus unless P.L. 86-272 applies); see also Bloomberg Tax, "Executive Summary: 2019 Survey of State Tax Departments," p. 14 (2019) ("Having a minimal number of telecommuting employees who conduct non-solicitation activities is enough to create nexus in 41 states. A similar number of states also responded that a single telecommuting employee would create nexus if they are performing back-office functions (38 states) or participating in product development functions (39 states).").

<sup>20</sup> *Zelinsky*, Tax Appeals Tribunal at 26.

### What's Next?

Under New York's tax appeal system, the next step for Zelinsky is to appeal the tribunal's adverse decision to the state appellate court in the Appellate Division, Third Department. That court is charged with reviewing the tribunal's decision to determine whether it was grounded in an error of law or not supported by substantial evidence. From there, the case could proceed back to where *Zelinsky I* ended, for what will likely be the professor's final shot, in the New York State Court of Appeals. ■

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