

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 97-2

Issued April 11, 1997

WITHDRAWN IN PART BY OPINION 2013-1 ON APRIL 4, 2013

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A retired attorney may serve as “of counsel” to two different law firms formed by the retired attorney’s former partners upon dissolution of their law partnership. An attorney who serves as “of counsel” to more than one firm must maintain a continuing, close, regular, and personal relationship with each firm and avoid conflicts of interest. An attorney who serves as “of counsel” is considered a member of a law firm for purposes of analyzing imputed disqualification questions. When an attorney serves as of counsel to more than one law firm, there is imputed disqualification that extends to all lawyers and firms connected by the “of counsel” relationship.

OPINION: This opinion addresses the propriety of a retired attorney serving as “of counsel” to two different law firms.

Is it proper for a retired attorney to serve as “of counsel” to two different law firms formed by the retired attorney’s former partners upon dissolution of their partnership.

The title “of counsel” is referred to only once in the Ohio Code of Professional Responsibility in DR 2-102(A)(4), a rule regulating letterhead. Under DR 2-102 (A)(4) “[a] lawyer may be designated “Of Counsel” on a letterhead if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate.”

The “of counsel” title is commonly used to describe a retired partner of a firm who does not actively practice law, but remains associated with the firm for consultation. It is also used to describe other types of continuing relationships. *See* ABA Formal Op. 90-357 (1990) describing four patterns of the of counsel relationship: a part-time practitioner; a retired partner; a probationary partner-to-be; a lawyer with a permanent status in between those of partner or associate.

The core characteristic of the “of counsel” relationship is the continuing, close, regular, and personal relationship. The “of counsel” relationship is more than a referral relationship and more than a one-time advisor relationship. An attorney who serves as “of

counsel” to a law firm must maintain a close, regular, and personal relationship with the firm other than partner or associate. *See* ABA, Formal Op. 90-357 (1990), Ohio SupCt, Bd of Comm’rs on Griev & Disc, Ops 91-18 (1991), 90-03 (1990), 88-023 (1988).

The issue of whether an attorney may establish multiple “of counsel” relationships has been addressed by other states, but not Ohio. Some states permit an attorney to be “of counsel” to more than one firm simultaneously. *See* Ass’n of the Bar of the City of New York, Op. 80-22 (undated); Connecticut Bar Ass’n, Op. 88-13 (1988); Bar Ass’n of Nassau County, Op. 88-46 (1988); Philadelphia Bar Ass’n, Op. 86-54 (1986) and 86-143 (1986). One state limits an attorney to serving as “of counsel” to only two firms. *See* State Bar of Texas, Op. 402 (1982). One state does not permit an attorney to serve as “of counsel” to more than one law firm. *See* Iowa State Bar Ass’n, Ops. 87-9 (1987) and 82-19 (1982).

The ABA view is that an attorney may be “of counsel” to more than one firm. In Formal Opinion 90-357 (1990) the ABA committee stated that “[a] lawyer can surely have a close, regular, personal relationship with more than two clients; and the Committee sees no reason why the same cannot be true with more than two law firms.” That advice is a departure from its earlier views in Formal Op. 330 (1972) that an attorney may be “of counsel” to only two firms and Informal Op. 1173 (1971) that an attorney may not be “of counsel” to more than a single firm.

This Board’s view is that an attorney may be “of counsel” to more than one firm if the attorney can maintain the requisite continuing, close, regular, and personal relationship and otherwise comply with the Code of Professional Responsibility. However, as the ABA committee noted, “[t]here is, to be sure, some point at which the number of relationships would be too great for any of them to have the necessary qualities of closeness and regularity, and that number may not be much beyond two, but the controlling criterion is “close and regular” relationships, not a particular number.” *See* ABA, Formal Op. 90-357 (1990).

In expressing this view, the Board is not contradicting, overruling, or withdrawing the advice in Opinion 89-35 that “[a]n attorney at law may not practice with more than one legal professional association or law firm in Ohio at the same time.” That opinion applies to partnership and associate relationships. *See* Ohio SupCt, Bd Comm’rs on Griev & Disc, Op. 89-35 (1989). It does not govern “of counsel” relationships which are unique and distinct from that of partner or associate relationships.

Nevertheless, the attorney who serves as “of counsel” to more than one firm must be vigilant to avoid professional conflicts of interest and misconduct. The “of counsel” attorney must maintain the requisite continuing, close, regular, relationship with each firm he or she serves, which will in effect limit the number of “of counsel” relationships. If the close, regular, and personal relationship does not exist, then use of the title is false or misleading under DR 2-101(A)(1). The “of counsel” attorney must avoid conflicts of interest. This Board agrees with the ABA view, that “there is attribution to the lawyer who is of counsel of all the disqualifications of each firm, and correspondingly, attribution from the of counsel lawyer to each firm of each of those disqualifications.” ABA, Formal Op. 90-357 (1990).

In conclusion, this Board advises that a retired attorney may serve as “of counsel” to two different law firms formed by the retired attorney’s former partners upon dissolution of their law partnership. An attorney who serves as “of counsel” to more than one firm must maintain a continuing, close, regular, and personal relationship with each firm and avoid conflicts of interest. An attorney who serves as “of counsel” is considered a member of a law firm for purposes of analyzing imputed disqualification questions. When an attorney serves as of counsel to more than one law firm, there is imputed disqualification that extends to all lawyers and firms connected by the “of counsel” relationship.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, non-binding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney’s Oath of Office.

