The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 99-7
Issued December 2, 1999

WITHDRAWN IN PART BY OPINION 2013-1 ON APRIL 4, 2013

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: It is proper under Gov. Bar R. III §3 of the Supreme Court Rules for the Government of the Bar of Ohio for an attorney not licensed in Ohio but licensed in another state to be a member, partner or other equity holder in an Ohio legal professional association, corporation, limited liability company, or registered partnership when formed in accord with Ohio law. Whether it is legally proper is a question beyond the advisory authority of this Board.

Whether it is proper for an attorney licensed in another state but not licensed in Ohio to be a member, partner, or other equity holder in two unrelated firms is in part a legal question beyond the advisory authority of this Board.

A law firm does not become a lawyer referral service subject to regulation under DR 2-103 by merely referring a client whose case it cannot competently handle to another law firm. Assuming that a law firm does not advertise or solicit business it does not intend to handle, it would be proper for the law firm to refer a client to another law firm when unable to competently handle a client's matter.

OPINION: This opinion addresses questions regarding the formation of a law firm in Ohio by an attorney licensed in another state but not licensed in Ohio.

1. Is it proper for an attorney licensed in another state but not licensed in Ohio to be a member, partner, or other equity holder in an Ohio law firm?

2. Is it proper for an attorney licensed in another state but not Ohio to be a member, partner, or other equity holder in two unrelated firms, the out of state law firm and the Ohio law firm?

3. Is a law firm required to register as a lawyer referral service if it refers to other law firms the cases it cannot competently handle?

Question One

> Is it proper for an attorney licensed in another state but not licensed in Ohio to be a member, partner, or other equity holder in an Ohio law firm?

Traditionally, lawyers have practiced law through sole proprietorships or partnerships. These forms of practice continue today, but since 1970, lawyers have also been permitted under former Prac. R. XVII B (now Gov. Bar R. III) to practice law in legal professional associations or legal clinics. Beginning November 1, 1995, lawyers have also been permitted under Gov. Bar R. III §1 to practice law through an even wider variety of entities: legal professional associations; corporations, or legal clinics (formed under Chapter 1701 or 1785 or licensed under 1703); limited liability companies (formed or registered under Chapter 1705 of the Revised Code); limited liability partnerships (registered under Chapter 1775. of the Revised Code). *See* Gov. Bar R. III §1.

As to partnerships, the Ohio Code of Professional Responsibility contemplates that attorneys licensed in different jurisdictions may become partners in a law firm. DR 2-102(D), a rule governing professional notices, letterheads, and offices, states that "[a] partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in another permissible listings make clear the jurisdictional limitation on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction." There is a distinction between forming partnerships with attorneys licensed in other states and forming partnerships with non-attorneys. Ohio attorneys may form partnerships with attorneys licensed in other states, but Ohio attorneys may not form partnerships with non-lawyers when any of the activities of the partnership involve the practice of law, for that is prohibited by DR 3-103.

As to legal professional associations, corporations, legal clinics, limited liability companies, or registered partnerships, Gov.Bar R. III §3(B) states that members, partners, or other equity holders may be persons licensed in Ohio or "elsewhere." Presumably, "elsewhere" means outside Ohio.

> **Gov. Bar R. III § 3(B)** An attorney shall not use a legal professional association, corporation, legal clinic, limited liability company, or registered partnership to share legal fees with a **person not authorized to practice law in Ohio or elsewhere**, except as permitted by DR 3-102 of the Code of Professional Responsibility. **An attorney shall not participate in a legal professional association, corporation, legal clinic, limited liability company, or registered partnership in which a member, partner, or other equity holder is a person not authorized to practice law in Ohio or elsewhere**, except as permitted by DR 5-107 of the Code of Professional Responsibility [a fiduciary representative of the estate of a lawyer may hold the stock of the lawyer for a reasonable time during administration]. (Emphasis added).

The licensed "elsewhere" language in Section 3 does not appear in Section 1 of the rule.

> **Gov. Bar R. III § 1** An attorney who is otherwise authorized to practice as an active attorney under Gov. Bar. R. VI may practice law in Ohio, to the same extent as individuals and groups of individuals, through a legal professional association, corporation, or legal clinic, formed under Chapters 1701. or 1785. or licensed under Chapter 1703 of the Revised Code, a limited liability company, formed or registered under Chapter 1705. of the Revised Code, or a partnership having limited liability, registered under Chapter 1775. of the Revised Code.

Section 1 and Section 3 are complementary rules. Section 1 authorizes Ohio attorneys who are licensed under Governing Bar Rule VI to practice law through the entities identified in the rule. Section 3 qualifies who may be members, partners, or equity holders in those entities. Under Section 3, the members, partners, or other equity holders must be persons authorized to practice law in Ohio or "elsewhere." The members, partners, or equity holders of the listed entities may be attorneys licensed in Ohio or in another state, but they may not be persons who are non-attorneys. Two pertinent rules are DR 5-107 and DR 2-102(G). DR 5-107 prohibits attorneys from practicing in a professional corporation or association authorized to practice law for profit if a non-lawyer has an ownership interest therein, is a corporate director or officer thereof, or has the right to direct or control the professional judgment of a lawyer. DR 2-102(G) provides that a "legal clinic cannot be owned by, and profits or losses cannot be shared with, non-lawyers or lawyers who are not actively engaged in the practice of law in the organization."

State corporation law also governs the question raised. While it is beyond the authority of this Board to advise upon state law, the Board does suggest that attorneys give careful consideration to state laws governing legal professional associations, corporations, legal clinics, limited liability companies, or registered partnerships. For example, Section 1785.05 of the Ohio Revised Code restricts the issuance of the capital stock of a professional association "to persons who are duly licensed, certificated, or otherwise legally authorized to render within this state the same professional service as that for which the association was organized." (Baldwin Supp 1999).

In conclusion, it is proper under Gov. Bar R. III §3 of the Supreme Court Rules for the Government of the Bar of Ohio for an attorney not licensed in Ohio but licensed in another state to be a member, partner or other equity holder in an Ohio legal professional association, corporation, limited liability company, or registered partnership when formed in accord with Ohio law. Whether it is legally proper is a question beyond the advisory authority of this Board.

Question Two

> Is it proper for an attorney licensed in another state but not licensed in Ohio to be a member, partner, or other equity holder in two unrelated firms (an out of state law firm and an Ohio law firm)?

The issue of whether it is proper for an attorney licensed in another state but not licensed in Ohio to be a member, partner, or other equity holder in two unrelated firms the Board declines to opine for it is in part a legal question beyond the advisory authority of this Board. *See e.g., Colaluca v. Climaco, Climaco, Seminatore, Lefkowitz & Garafoli Co., L. P. A.* (1995), 72 Ohio St. 3d 229 in which an attorney was permitted to practice with one law firm while retaining one share of stock in a legal professional association. The court held it was not obligatory for a legal professional corporation, to redeem the stock of a shareholder/employee when that person voluntarily separates from the corporation; when the stock in question was issued with no express terms of redemption; when there is no agreement subsequent to issue which has reference to any right of redemption between the corporation and the shareholder; and when the shareholder wishes to continue to practice law in this state. *Id.* at 231. The attorney was not prohibited from practicing law with another firm even though he still held a single share of stock in a legal professional association. According to the court, the attorney did not practice with the legal professional association and therefore no longer was associated with the legal professional association even though he retained a single share of stock. *Id.* at 233.

The issue of whether an attorney is permitted to be a member, partner, or other equity holder in two unrelated firms is distinct from the issue of whether an attorney may practice law with more than one firm. On the latter issue, the Board advised in past Opinion 89-35 that "[a]n attorney may not practice with more than one legal professional association or law firm in Ohio at the same time." At the time Opinion 89-35 was issued (and at the time the *Colaluca* case was decided), former Gov. Bar R. III §3 (D) stated that "[n]o attorney at law shall be associated in any capacity with a legal professional association other than the one with which the attorney is actively and publicly associated." That rule no longer exists. Nevertheless, the Board's advice in Opinion 89-35 was also based upon multiple rules within the Code of Professional Responsibility: DR 2-101 (a lawyer practicing in two firms is potentially misleading and confusing to the public); DR 4-101(B) (there would be a potential for the disclosure of confidential information between various firms and lawyers); Canon 5 (multiple firm membership may increase the number of conflicts of interest); EC 5-1, 5-13, 5-24 (lawyer who maintains two separate law practices may have difficulty exercising his or her professional judgment solely for the benefit of a client and free from outside influences; lawyer must maintain professional independence).

The Board stands by the advice offered within Op. 89-35 that an attorney should not practice with more than one law firm (An "of counsel" relationship with more than one firm is distinguished in Opinion 97-2). The Supreme Court of Ohio published for comment (*Ohio State Bar Association Report*, Vol. 65 No. 22, xlv-xlviii, June 1, 1992) proposed amendments that would have permitted lawyers to practice in multiple firms,

but did not adopt those amendments. This lends support to the Board's view that an attorney may not practice with more than one law firm.

Question Three

> Is a law firm required to register as a lawyer referral service if it refers a client whose case it cannot competently handle to other law firms?

In Ohio, a lawyer or law firm is not permitted to use any form of public communication to seek employment that it does not intend to participate in the representation.

> **DR 2-101(A)** A lawyer shall not, on his or her own behalf or that of a partner, associate, or other lawyer affiliated with the lawyer or the lawyer's firm use or participate in the use of, any form of public communication, including direct mail solicitation, that:
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> > **(2)** Seeks employment in connection with matters in which the lawyer or law firm does not intend to actively participate in the representation, but that the lawyer or law firm intends to refer to other counsel, except that this provision shall not apply to organizations defined in DR 2-103(D)(1).

A law firm does not become a lawyer referral service subject to regulation under DR 2-103 by merely referring a client whose case it cannot competently handle to another law firm. Assuming that a law firm does not advertise or solicit business it does not intend to handle, it would be proper for the law firm to refer a client to another law firm when unable to competently handle a client's matter.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding 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.