The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-6
Issued April 12, 1991
[Withdrawn- by Opinion 2016-9 on December 9, 2016]

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: An attorney not admitted in Ohio who sets up an office within the state for the practice of federal law is engaged in the unauthorized practice of law in violation of DR 3-101 (B). This opinion is not to be interpreted as prohibiting the attorney's appearance before a federal court to which he/she has been admitted. The Board acknowledges that what constitutes the unauthorized practice of law is ultimately a legal question to be decided by the courts.

The letterhead of an attorney not licensed to practice law in Ohio, who resides in Ohio and appears in federal court, should identify the federal courts to which the attorney is admitted, make a disclaimer regarding admission in Ohio, and otherwise comply with DR 2-101, DR 2-102, and DR 2-105.

OPINION: We have before us a request for an advisory opinion on questions regarding whether a practice of federal law within Ohio by an attorney not licensed by Ohio is an unauthorized practice of law within the state. The questions are as follows:

1. Whether an attorney who resides in Ohio but who is not admitted to the Bar of Ohio or any other state court is engaged in the unauthorized practice of law in Ohio if the attorney advises clients on federal claims, appears in federal courts in Ohio and limits his practice to the federal courts to which he is admitted;

2. Whether an attorney who resides in Ohio but is not admitted to the Bar of Ohio or any other state court is engaged in the unauthorized practice of law in Ohio if the attorney uses "Attorney at Law" letterhead with his Ohio address in connection with his practice in the federal court to which he is admitted and in good standing?

The attorney's admission to the federal bar was based upon his admission to a state bar from which he has since resigned for reasons not related to discipline.

DR 3-101 (B) of the Code of Professional Responsibility provides "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." In Ohio, no person is permitted to practice as an attorney unless he/she has been admitted to the bar by order of the Supreme Court of Ohio. OHIO REV. CODE ANN. §4705.01 (Baldwin 1990). The question before the Board is whether an attorney can avoid the proscriptions of DR 3-101 (B) and section 4705.01 by limiting his/her practice to federal courts. This question requires an analysis of the tension between a state's right to regulate the practice of law within its borders and the federal court system's right to regulate practice in the federal courts.

The Supreme Court of Ohio has constitutional authority to prescribe rules governing practice and procedure in all courts of the state and to make rules governing admission to the practice of law and the discipline of those admitted. OH Const. art. IV, § 5. The Supreme Court of Ohio has the inherent power to regulate, control and define the practice of law in Ohio. Melling v. Stralka, 12 Ohio St. 3d 105, 106-07, 465 N.E.2d 857, 859-60 (1984); In re Unauthorized Practice of Law in Cuyahoga County, 175 Ohio St. 149, 192 N.E.2d 54 (1963), cert. denied, Brown v. Unauthorized Practice of Law Committee of Cuyahoga County Ohio, 376 U.S. 970 (1964). reh'g denied, 377 U.S. 940 (1964); Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 85, 12 N.E.2d 288, 290 (1937). The supreme court's jurisdiction over the discipline of attorneys is exclusive and absolute. Smith v. Kates, 46 Ohio St. 2d 263, 266, 348 N.E. 2d 320, 322 (1976).

Although the state supreme court has the express power to develop rules regarding practice and procedure within the state, the federal courts have the power to develop rules for the practice within federal courts. 28 U.S.C. §§ 1654, 2072. Clearly, federal courts have control over attorneys admitted to the federal bar. See Theard v. United States, 354 U.S. 278 (1957) and Selling v. Radford, 243 U.S. 46 (1917).

Admission to practice before a federal court generally derives from membership in a state bar. See, e.g., Federal Rules of Appellate Procedure Rule 46 (a); U.S. District Court Rules E.D.& W.D. Kentucky Rule 3 (a), N.D. Ohio Rule 2.02. Compare S.D. Ohio Rule 2.5.2 (Eligibility for admission to the bar of the Southern District of Ohio derives only from membership in the Ohio bar.) However, disbarment from a state bar does not automatically lead to disbarment from a federal bar. Theard v. United States, 354 U.S. 278, 282 (1957); Selling v. Radford, 243 U.S. 46, 49 (1917); Thus, theoretically, an attorney can remain a member of a federal bar even though the attorney is no longer a member of a state bar. Such is the case in the hypothetical question we are addressing.

Under the Supremacy Clause of the U.S. Constitution (Art. VI), a state may not deny to those failing to meet its own qualifications, the right to perform functions within the scope of federal authority. Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379, 385 (1963). Thus, in Sperry, Florida could not prohibit a nonlawyer, never admitted to the bar of any state, from appearing before the United States Patent office, because his practice was authorized by federal statute.

The United States Court of Appeals for the District of Columbia Circuit ruled that the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law did not act beyond its authority in investigating New York attorneys who maintained an office in the District of Columbia without being members of the local bar. Simons v. Bellinger, 643 F.2d 774, 786 (D.C. Cir. 1980). The court rejected the attorneys' assertion that the exclusively federal nature of their legal practice in the District of Columbia placed the attorneys beyond the authority of any local bar committee. Id. at 785-86.

Courts considering disciplinary charges arising out of the unauthorized practice of law recognize the federal/state tension created when the alleged unauthorized practice is federal. See e.g., Kennedy v. Bar Ass'n of Montgomery County, 316 Md. 646, 561 A.2d 200 (1989); In re Perrello, 270 Ind. 390, 386 N.E.2d 174 (1979); Ginsburg v. Kovrak, 392 Pa. 143, 139 A.2d 889 (1958), appeal dism'd, 358 U.S. 52 (1958); Petition of Kearney, 63 So.2d 630 (Fla. 1953) (en banc); In re Page, 257 S.W.2d 679 (Mo. 1953) (en banc). Nevertheless, these courts have rejected federal practice exceptions to rules and regulations prohibiting the unlicensed practice of law within a state. Id.

These courts reason that the "practice" of law necessarily involves more than advising clients on federal law, preparing federal court documents and appearing before federal courts. For example, screening clients and representing only those whose matters require suit or defense in a federal court, requires interview, research, analysis, and explanation of legal rights which would constitute the practice of state law. Kennedy at 209-10. Further, "conducting of the business management of a law practice" -- the handling of clients' money, the requirements of IOLTA, and other management matters -- are part of the total process of practicing law and are subject to the state's control over the profession. Perrello 386 N.E.2d at 179.

In response to question one, this Board is of the opinion that an attorney not admitted in Ohio who sets up an office within the state for the practice of federal law is engaged in the unauthorized practice of law in violation of DR 3-101 (B). The Board cautions that this opinion is not to be interpreted as prohibiting the attorney's appearance before a federal court to which he/she has been admitted. The Board also acknowledges that what constitutes the unauthorized practice of state law is a legal question to ultimately be decided by the courts.

In response to the second question, an attorney's letterhead must not be false or misleading. Code of Professional Responsibility DR 2-101, DR 2-102. In the past the Board has expressed the opinion that under certain circumstances, jurisdictional limitations should be indicated on the letterhead. An attorney admitted in another state and awaiting admission in Ohio may be listed on Ohio law firm's letterhead provided the jurisdictional limitations are indicated. Ohio SupCt, Op. 89-37 (1989). A multistate firm name can contain the name of an attorney not licensed to practice within the state provided that the jurisdictional limitations are enumerated on the letterhead and in other permissible listings. Ohio SupCt, Op. 91-4 (1991).

The ethics committee of the Cleveland Bar Association has expressed the opinion that an attorney admitted to practice before the United States District Court, Northern District of Ohio and not admitted to practice in the state courts of Ohio, may state on his letterhead and office door "Attorney-Not Admitted to Practice Before the Courts of the State of Ohio. Cleveland Bar Ass'n, Op. 127 (1976). The committee stated it would be inappropriate to indicate on letterhead or otherwise that the attorney's practice is limited to a federal district court because it would imply a level of expertise or specialization in violation of DR 2-105.

This Board's opinion is that the letterhead of an attorney not licensed to practice law in Ohio, who resides in Ohio and appears in federal court, should identify the federal courts to which the attorney is admitted, make a disclaimer regarding admission in Ohio, and otherwise comply with DR 2-101, DR 2-102, and DR 2-105.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility and the Supreme Court Rules for the Government of the Bar of Ohio.