

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2002-4

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Withdrawn by Adv. Op. 2022-13

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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 improper under DR 3-101(A) of the Ohio Code of Professional Responsibility for an attorney to delegate the taking of a deposition to a paralegal. An attorney who instructs a paralegal to take a deposition, prepares deposition questions for a paralegal to use, supervises a paralegal in taking a deposition, or instructs a paralegal to represent a deponent at deposition is assisting in the unauthorized practice of law.

An out-of-state attorney may take a deposition in Ohio if the deposition is incidental to a case pending or to be filed in an Ohio court for which the attorney is admitted pro hac vice. An out-of-state attorney may take a deposition in Ohio if the deposition is incidental to a case pending or to be filed in a court outside Ohio in a state in which the attorney is admitted to practice law and if the attorney is permitted to do so by the other state. An out-of-state attorney awaiting admission on examination to the Ohio Bar should not take a deposition in Ohio unless the attorney, as required under Gov. Bar R. I §9(H), has obtained admission pro hac vice. Law school graduates not yet admitted to the practice of law should not take depositions, for they are not authorized to practice law.

An Ohio attorney may take a deposition in a state outside Ohio in which the attorney is not licensed to practice law if permitted by that state.

OPINION: This opinion addresses questions regarding the propriety of paralegals, out-of-state attorneys, and Ohio attorneys taking depositions in Ohio and other states.

1. Is it proper for an attorney to delegate the task of taking a deposition to a paralegal?
2. Is it proper for an out-of-state lawyer not licensed in Ohio to take a deposition in Ohio?
3. Is it proper for an Ohio attorney to take a deposition in a state in which the attorney is not licensed?

Question One

Is it proper for an attorney to delegate the task of taking a deposition to a paralegal?

The Ohio Code of Professional Responsibility prohibits lawyers from aiding a non-lawyer in the unauthorized practice of law.

DR 3-101(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

The Supreme Court of Ohio defines the unauthorized practice of law as follows:

The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice in Ohio under Rule I [Admission to the practice of law] and not granted active status under Rule VI [Registration of attorneys], or certified under Rule II [Limited practice of law by a legal intern], Rule IX [Temporary certification for practice in legal services, public defender, and law school programs], or Rule XI [Limited practice of law by foreign legal consultants] of the Supreme Court Rules for the Government of the Bar of Ohio.

Gov.Bar R. VII §2(A).

The Supreme Court of Ohio defines the practice of law as follows:

The practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.

Land Title & Trust Co. v. Dworken, 129 Ohio St. 23 (1934).

The Ohio Revised Code prohibits the practice of law by persons not admitted to practice. “No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which the person is not a party concerned, either by using or subscribing the person’s own name, or the name of another person, unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules.” Ohio Rev. Code Ann. §4705.01 (West 1998).

A deposition is “1. [a] witness’s out-of-court testimony that is reduced to writing (usu. by a court reporter) for later use in court or for discovery purposes. 2. The session at which such testimony is recorded.” *Black’s Law Dictionary*, 451 (7th ed. 1999). Depositions are taken under oath and may be used as evidence in a court proceeding. See Ohio Civ R. 28 and 32.

Taking a deposition or representing a deponent at a deposition is the rendering of legal services. The Board of Commissioners on the Unauthorized Practice of Law of the Supreme Court of Ohio determined that a non-attorney corporate officer's conduct at a deposition, inter alia, objecting several times to questions made by opposing counsel and instructing the deponent not to answer, constituted the unauthorized practice of law. *Mahoning County Bar Ass'n v. Rector*, 62 Ohio Misc. 2d 564, 569 (Ohio Bd. Unauth. Prac., Sept 10, 1992).

Outside Ohio, the Florida First District Court of Appeal, held that "the taking of a deposition constitutes the practice of law under 454.23, Florida Statutes." *State v. Foster*, 674 So. 2d 747, 749 (Fla. Dist. Ct. App. 1996). The Florida court stated that

[a] deposition is an important, formal, recorded proceeding in which lawyers must observe the Florida rules of court and must rely on their legal training and skills to question witnesses effectively. The activities and services involved in participating in a deposition often implicate ethical questions and strategic considerations of the utmost importance. The effectiveness of the person deposing a witness can have a significant impact on whether objectionable information is identified and addressed or waived, whether a case is made, and how the evidence therefrom is used in any subsequent legal proceeding. Depositions are transcribed by a court reporter for possible use later in court. . . . Without a doubt, the process of directly examining or cross-examining a witness can affect important rights under the law.

State v. Foster, 674 So. 2d 747, 752-53 (Fla. Dist. Ct. App. 1996).

Advisory committees uniformly advise that a lawyer may not delegate to a paralegal the taking of a deposition. See Colorado Bar Ass'n, Op. 79 (1989); Iowa Sup Ct, Bd of Professional Ethics and Conduct, Op. 92-24 (1993); Kentucky Bar Ass'n, Op. 341 (1990); Pennsylvania Bar Ass'n, Op. 91-137 (1991); New York County Lawyer's Ass'n, Op. 666 (1985). Even if a predetermined set of questions is approved by a lawyer, a paralegal may not take a deposition. Pennsylvania Bar Ass'n, Op. 87-127 (1987). Even if supervised by a licensed attorney at a discovery deposition, a paralegal may not take or defend a deposition. See Iowa Sup Ct, Bd of Professional Ethics and Conduct, Op. 96-3 (1996). See also, *State v. Foster*, 674 So. 2d 747, 754, (Fla. Dist. Ct. App. 1996).

In conclusion, the Board advises it is improper under DR 3-101(A) of the Ohio Code of Professional Responsibility for an attorney to delegate the taking of a deposition to a paralegal. An attorney who instructs a paralegal to take a deposition, prepares deposition questions for a paralegal to use, supervises a paralegal in taking a deposition, or instructs a paralegal to represent a deponent at deposition is assisting in the unauthorized practice of law.

Question Two

Is it proper for an out-of-state lawyer not licensed in Ohio to take a deposition in Ohio?

The Supreme Court of Ohio is concerned with the unauthorized practice of law by not only laypersons but also attorneys not admitted in Ohio.

Our rules [Canon 3 of the Ohio Code of Professional Responsibility and its associated Ethical Considerations and Disciplinary Rules] prohibiting the unauthorized practice of law are intended to protect Ohio citizens from the dangers of faulty legal representation rendered by persons not trained in, examined on, or licensed to practice by the laws of our state. *These dangers can arise from the services of out-of-state attorneys unfamiliar with Ohio's legal system as well as from the work of laypersons unschooled in the legal profession.*

Disciplinary Counsel v. Pavlik, 89 Ohio St. 3d 458, 461 (2000). [Emphasis added].

Yet, in regulating the practice of law, the court is cognizant that unreasonable territorial limitations impair the public interest in being able to choose the services of a lawyer.

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he [she] is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his [her] client or upon the opportunity of a client to obtain the services of a lawyer of his [her] choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

The Supreme Court of Ohio has articulated avenues by which out-of-state attorneys may offer their legal expertise in Ohio without engaging in unauthorized practice: 1) admission without examination; 2) registration for corporate status 3) admission pro hac vice; 4) limited practice of law by foreign legal consultants; 5) partnerships among lawyers licensed in different jurisdictions. *See Disciplinary Counsel v. Pavlik*, 89 Ohio St. 3d 458, 462-63 (2000).

When there is litigation pending or to be filed in Ohio, admission pro hac vice provides an authorized method by which an out-of-state attorney may represent a party and take depositions in Ohio. Admission pro hac vice is extended to out-of-state attorneys at the

discretion of each state court or agency. *See, Royal Indemnity Co. v. J.C. Penney Co.*, 27 Ohio St. 3d 31, 33 (1986). For example, under Rule 91.01 of the Local Rules of Practice of the Franklin County Common Pleas Court, General Division an out-of-state attorney is permitted at the trial court's discretion to represent a party or parties *in any litigation pending or to be filed in the county* if certain conditions are met. Under Rule 30(A) of the Ohio Civil Rules of Procedure, a deposition in a civil matter may be taken after the commencement of an action. Under Rule 27(A) of the Ohio Rules of Civil Procedure, upon a petition to a court of common pleas in the county of the residence of any expected adverse party, a deposition may be taken before an action is filed in order to perpetuate testimony. Or, under Rule 27(B), upon motion in the court where the action was tried, a deposition may be taken pending appeal of an action in order to perpetuate testimony.

When litigation is pending or to be filed in a state outside Ohio in which an out-of-state attorney is licensed, the out-of-state lawyer needs guidance as to whether he or she may enter Ohio to take a deposition. An out-of-state attorney must comply with the rules of the state in which licensed, but also must consider how the in-state travel to Ohio is viewed.

The Ohio legislature contemplated that depositions in foreign suits will take place in Ohio. "Depositions may be taken when the testimony is required in an action, cause, or matter pending before any court or authority outside this state." Ohio Rev Code Ann. § 2319.08 (West 1994). The legislature recognized the authority of Ohio courts to compel witnesses to appear and testify at a deposition in Ohio for use in cases pending in states outside Ohio. "Whenever any mandate, writ, or commission is issued out of any court of record in any other state, territory, district, or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceedings as are employed for the purpose of taking testimony in proceedings pending in this state." Ohio Rev Code Ann. § 2319.09 (West 1994).

Taking depositions at a place within a jurisdiction where the lawyer is not admitted is addressed in the Comment to Section 3 of The Restatement (Third) of the Law Governing Lawyers.

A lawyer who is properly admitted to practice in a state with respect to litigation pending there, either generally or pro hac vice, may need to take proceedings and activities ancillary to the litigation in other states, such as counseling clients, dealing with co-counsel or opposing counsel, conducting depositions, examining documents interviewing witnesses, negotiating settlements, and the like. Such activities incidental to permissible practice are appropriate and permissible.

Restatement (Third) of the Law Governing Lawyers § 3 cmt. e (2001).

This Board agrees with the Comment to the Restatement regarding the taking of depositions. Because such depositions by out-of-state attorneys are incidental to

permissible practice it is appropriate and permissible. Further this Board considers the taking of depositions in a matter to be an isolated occurrence not a persistent practice. This view is compatible with past views expressed by the Board. In Opinion 90-12 (1990), the Board stated that limited practice in Ohio by an out-of-state lawyer may be tolerated under certain circumstances. The Board, cited Professor Charles Wolfram's comments that practice by an attorney licensed in another state may be tolerated if the client is a regular client and "either (1) the lawyer's presence is an isolated occurrence and the work is not extensive in duration or (2) the in-state practice is more extensive but is 'incidental' to advising a client on a multi-state problem." Wolfram, Modern Legal Ethics, 867 (1986). According to the Board, "a persistent practice in Ohio would be considered the unauthorized practice of law. Ohio SupCt, Bd Comm'rs on Grievances and Discipline, Op. 90-12 (1990).

There are additional considerations. First, an out-of-state attorney awaiting admission on examination to the Ohio Bar should not take a deposition in Ohio unless the attorney, as required under Gov. Bar R. I §9(H), has obtained admission *pro hac vice*. In Opinion 89-37 (1989), the Board advised that "setting aside the *pro hac vice* situation, a lawyer admitted in another state, awaiting admission to the Ohio bar may not give legal advice directly to Ohio clients, before his [her] admission to the bar." Ohio SupCt, Bd Comm'rs on Grievances and Discipline, Op. 89-37 (1989). Second, law school graduates who reside in Ohio while awaiting admission have no authority to practice law. Law school graduates not yet admitted to the practice of law should not take depositions, for they are not authorized to practice law.

In conclusion, the Board advises as follows. An out-of-state attorney may take a deposition in Ohio if the deposition is incidental to a case pending or to be filed in an Ohio court for which the attorney is admitted *pro hac vice*. An out-of-state attorney may take a deposition in Ohio if the deposition is incidental to a case pending or to be filed in a court outside Ohio in a state in which the attorney is admitted to practice law and if the attorney is permitted to do so by the other state. An out-of-state attorney awaiting admission on examination to the Ohio Bar should not take a deposition in Ohio unless the attorney, as required under Gov. Bar R. I §9(H), has obtained admission *pro hac vice*. Law school graduates not yet admitted to the practice of law should not take depositions, for they are not authorized to practice law.

Question Three

Is it proper for an Ohio attorney to take a deposition in a state in which the attorney is not licensed?

The Ohio Code of Professional Responsibility prohibits Ohio lawyers from engaging in the unauthorized practice of law in other jurisdictions.

DR 3-101(B) 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.

Ohio Rules of Civil Procedure provides authority for an Ohio attorney to take depositions within the state and outside the state.

Civ R. 28 Persons Before Whom Deposition May Be taken

(A) Depositions within the state

Depositions may be taken in this state before: a person authorized to administer any oath by the laws of this state, a person appointed by the court in which the action is pending, or a person agreed upon by written stipulation of all the parties.

(B) Depositions outside the state

Depositions may be taken outside this state before: a person authorized to administer oaths in the place where the deposition is taken, a person appointed by the court in which the action is pending, a person agreed upon by written stipulation of all the parties, or, in any foreign country, by any consular officer of the United States within his consular district.

However, the Board suggests that before taking a deposition in a state in which he or she is not licensed, an Ohio lawyer should consult the rules and laws of that state to determine whether the taking of a deposition in that state by an attorney not licensed therein constitutes the unauthorized practice of law. This is necessary because each state has its own rules and laws governing the practice of law within its borders.

In conclusion, the Board advises that an Ohio attorney may take a deposition in a state outside Ohio in which the attorney is not licensed to practice law if permitted by that state.

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 Take, and the Attorney's Oath of Office.