The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
(614) 387-9370 (888) 664-8345 FAX: (614) 387-9379
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2004-11

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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 Ohio attorney who practices law in an Ohio law firm may become "of counsel" to a lawyer or law firm in another state, provided the "of counsel" relationship does not violate the disciplinary rules or laws of the other state.

An out-of-state attorney, not licensed in Ohio but licensed in another state, may become "of counsel" to a lawyer or law firm in Ohio, provided the "of counsel" relationship complies with the disciplinary rules and laws of Ohio.

OPINION: This opinion addresses "of counsel" relationships of Ohio attorneys with lawyers or law firms in other states.

> Is it proper for an Ohio attorney who practices law in an Ohio law firm to become "of counsel" to a lawyer or law firm in another state?

For purposes of this opinion, " 'firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." ABA, Model Rules of Professional Conduct, Terminology, Rule 1.0 (c). (The Ohio Code of Professional Responsibility defines "law firm" but the definition does not expressly include or exclude sole proprietorships. Law firm is defined, as including "a legal professional association, corporation, legal clinic, limited liability company, registered partnership, or any other organization under which a lawyer may engage in the practice of law pursuant to the Supreme Court Rules for the Government of the Bar of Ohio." Ohio Code of Professional Responsibility, Definitions.)

"Of Counsel" relationship

The "of counsel" relationship is not well defined. The only reference to "of counsel" in the Ohio Code of Professional Responsibility, is in DR 2-102(A)(4), a rule addressing letterhead. DR 2-102(A)(4) states: "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." There is no direct reference to the "of counsel" relationship in the ABA Model Rules.

The "of counsel" relationship receives definition, in part, by what it is not. The term "of counsel" does not describe a partner or associate or its equivalent in a professional association, an attorney who is a mere forwarder or receiver of clients, an attorney who provides an occasional collaboration, or an outside consultant. See ABA, Formal Op. 90-357 (1990).

The core characteristic of an "of counsel" relationship is a "close, regular, personal relationship." See ABA, Formal Opinion 90-357 (1990). Four principal patterns of the "of counsel" relationship are described.

> 1. "[A] part-time practitioner who practices law in association with a firm, but on a basis different from that of the mainstream lawyers in the firm."
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> 2. "[A] retired partner of the firm who, although not actively practicing law, nonetheless remains associates with the firm and available for occasional consultation."
>
> 3. "[A] lawyer who is, in effect, a probationary partner-to-be: usually a lawyer brought into the firm laterally with the expectation of becoming partner after a relatively short period of time."
>
> 4. "[A] permanent status in between those of partner and associate . . . but having the quality of tenure, or something close to it, and lacking that of an expectation of likely promotion to full partner status." [Footnote omitted.]

Id.

Another pattern of the "of counsel relationship" that exists in Ohio is that of an attorney who practices law either as a sole practitioner or in a multi-lawyer firm, but who has a continuing relationship with another lawyer or law firm and who is available to provide assistance when needed.

Thus, generally, the "of counsel" relationship describes a link between a lawyer and another lawyer or law firm. The link is a continuing one arising from a close, regular, and personal relationship. The link does not describe a relationship of partner or associate or its equivalent in a professional association or other multi-lawyer firm, an attorney who is merely a forwarder or receiver of clients, or an attorney who provides an occasional consultation.

"Of counsel" to another lawyer or law firm

The Ohio Code of Professional Responsibility places no restrictions on who may serve as "of counsel" to a lawyer or law firm. In the absence of restrictions, the

Board's view is as follows: A member, associate, partner, shareholder, or an attorney employee of a multi-lawyer law firm may serve as "of counsel" to another lawyer or law firm. A sole practitioner may serve as "of counsel" to another lawyer or law firm. Office sharing attorneys may serve as "of counsel" to the lawyers or law firm with whom the office space is shared. But, regardless of whether the "of counsel" attorney practices law as sole practitioner, as an office sharing attorney, or as member, associate, partner, shareholder, attorney employee of a multi-lawyer law practice, there must be a "continuing relationship" that is "close, regular, and personal."

The Board's view, that a sole practitioner, office sharing attorney, member, associate, partner, shareholder, or an attorney employee of a multi-lawyer law practice may serve as "of counsel" to another lawyer or law firm, is different from the view offered by the state bar association in Op. 02-04. The state bar ethics committee advised that an attorney "may not be 'of counsel' to one firm while being a partner or associate in another." Ohio State Bar Assn., Op. 02-04 (2002). The Board disagrees.

The state bar opinion, in part, relies upon the Board's Opinion 89-35. In the Board's view, Opinion 89-35 does not support the bar association's view. In Op. 89-35, the Board advised 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." Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 89-35 (1989).

An "of counsel" attorney does not function or practice as a member of the law firm to which he serves as "of counsel." An "of counsel" relationship is sui generis. An "of counsel" attorney is unique from a member in a law firm. [An exception is that an "of counsel" attorney is considered a member of a law firm for purposes of analyzing disputed disqualification questions arising as to conflicts of interest. Imputation of disqualification protects a client from representation by an attorney whose independent professional judgment might be compromised by a conflict of interest. See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 97-2 (1997) ("An attorney who serves as 'of counsel' is considered a member of a law firm for purposes of analyzing imputed disqualification questions.") See, also, ABA, Formal Op. 90-357 (1990) ("[T]he of counsel lawyer is 'affiliated' with the firm and its individual lawyers for purposes of the general attribution of disqualifications under DR 5-105(D) of the Model Code.")

"Of Counsel" to more than one firm

The question of whether an attorney may be "of counsel" to more than one firm has been addressed by this Board. "Of counsel" relationships with more than one firm are permitted, but when an attorney serves as "of counsel" to more than one law firm, disqualification is imputed to all lawyers and firms connected by the "of counsel" relationship. See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 97-2 (1997). See, also, ABA, Formal Op. 90-357 (1990).

"Of counsel" to a lawyer or law firm in another state

The question of whether an Ohio attorney may be "of counsel" to a lawyer or law firm in another state is before this Board for the first time.

The prevailing view in other states is that a lawyer in one state may be "of counsel" to a lawyer in another state. See, e.g., Missouri Sup.Ct, Legal Ethics Counsel, Informal Op. 20010080 (2001); Maryland State Bar Assn., Op. 97-2 (1997); Connecticut Bar Assn., Op. 94-27 (1994); Philadelphia Bar Assn., Op. 93-17 (1993); District of Columbia Bar, Op. 197 (1989); Virginia State Bar, Op. 1282 (1989); State Bar of California, Op. 1986-88 (undated).

It is this Board's view that an Ohio attorney or Ohio law firm may be "of counsel" to a lawyer or law firm in another state. The basis for the Board's view is that the Ohio Code of Professional Responsibility does not prohibit such conduct, directly or indirectly.

While Ohio's Code does not prohibit an Ohio attorney or Ohio law firm from being "of counsel" to a lawyer or law firm in another state, several disciplinary rules are applicable to the conduct of an Ohio attorney who becomes "of counsel" to a lawyer or law firm in another state.

Unauthorized practice of law

An "of counsel" attorney must not engage in the unauthorized practice of law.

> DR 3-101(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of the regulations of the profession in that jurisdiction.

Before becoming "of counsel" to a lawyer or law firm in another state, an Ohio lawyer must learn whether such relationship is permitted in that state and what constitutes the unauthorized practice of law in that state.

What constitutes the unauthorized practice of law in another state is determined by that state. EC 3-9 reminds attorneys, "[r]egulation of the practice of law is accomplished principally by the respective states."

As to an out-of-state attorney becoming "of counsel" to an Ohio lawyer or law firm, this Board's view is that it is permitted. For example, an Ohio law firm may have a multi-state client and need a close, regular, relationship with an out-of-state lawyer as to the laws of that state.

Nevertheless, Ohio attorneys must not assist in the unauthorized practice of law.

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

What constitutes unauthorized practice of law within Ohio is a question of law. Advisory authority as to what constitutes unauthorized practice of law by an out-

of-state attorney lies with the Board of Commissioners on the Unauthorized Practice of Law of the Supreme Court of Ohio.

Misleading communication

Ohio's DR 2-102(A)(4) states, "[a] lawyer may be designated as "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." Ohio's DR 2-101(A)(1) requires that any form of public communication shall not contain "any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement."

Whether another state requires the jurisdictional limitations of an Ohio attorney who is "of counsel" to be listed on the law firm letterhead is a question for that state. As to Ohio, it is the Board's view that the jurisdictional limitation should be included when listing an out-of-state attorney as "Of Counsel" on an Ohio law firm's letterhead. See, also, ABA, Formal Op. 90-357 advising that "[a]n additional ethical consequence of the relationship implied by the term 'of counsel' is that in any listing, on a letterhead, shingle, bar listing or professional card, which shows the of counsel lawyer's name, any pertinent jurisdictional limitations on the lawyer's entitlement to practice must be indicated."

Division of fees

Before becoming "of counsel" to a lawyer or law firm in another state, an Ohio attorney must determine whether that state's jurisdiction permits such relationship and if so how the Ohio attorney may be compensated for his or her services.

Across the nation, there is not a uniform view as to whether an "of counsel" attorney is *in the same firm* or *not in the same firm* for purposes of fee division.

Some states have expressed the view that restrictions on fee division with attorneys not in the same firm do not apply to "of counsel" attorneys. See, e.g., Maine Bd. Overseers of Bar, Op. 175 (2001), Assn. Bar City New York, Op. 1996-8 (1996), Texas State Bar, Op. 450 (1987), Virginia State Bar, Op. 442 (1983), Alabama State Bar, Op. 81-536 (undated).

Other states have expressed the view that restrictions on fee division with attorneys not in the same firm do apply to "of counsel" attorneys. See, e.g., State Bar of California, Op. 1986-88 (1986), State Bar of South Dakota, Op. 90-9 (1990).

The *Restatement* view is that the rule regarding fee splitting between lawyers not in the same firm "does not prevent a law firm, of whatever form, from dividing income among its lawyers (including lawyers who are of counsel and temporarily employed) in any lawful way provided in the firm agreement or by an ad hoc arrangement." *Restatement (Third) of the Law Governing Lawyers* § 47 Comment (g) (2000).

This Board has never addressed whether an "of counsel" attorney is in the same firm, or not in the same firm for purposes of fee division. DR 2-107(A) permits division of fees among lawyers not in the same firm, but requires disclosure, client consent, and other requirements as set forth in the rule.

The Board has advised that for purposes of DR 2-107(A), lawyers sharing office space and lawyers maintaining separate law practices within the same building are *not in the same firm*. Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 2003-3 (2003). However, Opinion 2003-3 does not specifically address office sharing attorneys serving as "of counsel" to a lawyer or law firm.

As to "of counsel" attorneys, the Board's view is as follows: The restrictions in DR 2-107(A), as to division of fees with attorneys not in the same firm, do not apply to attorneys properly designated as "of counsel" to a lawyer or law firm. The "of counsel" designation indicates to the public that the attorney has a special relationship with the law firm. Thus, to clarify Opinion 2003-3, the restrictions of DR 2-107(A) do not apply to office sharing attorneys who are properly designated as "of counsel" to a lawyer or law firm.

Thus, the Board's view is that the Ohio Code's provision, DR 2-107(A) restricting the division of fees with another lawyer who is not a partner or associate is inapplicable to attorneys who are properly designated as "of counsel" to a lawyer or law firm. Fee agreements with "of counsel" attorneys must meet the general requirements of DR 2-106 that a lawyer may not collect an illegal fee or a clearly excessive fee. See DR 2-106.

Conclusion

An Ohio attorney who practices law in an Ohio law firm may become "of counsel" to a lawyer or law firm in another state, provided the "of counsel" relationship does not violate the disciplinary rules or laws of the other state.

An out-of-state attorney, not licensed in Ohio but licensed in another state, may become "of counsel" to a lawyer or law firm in Ohio, provided the "of counsel" relationship complies with the disciplinary rules and laws of Ohio.

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.