

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 2008-1** Issued February 8, 2008

*[Note the erratum on page 7, line 5, where Comment [2] to Rule 1.5 should be Comment [2] to Rule 1.0.]*

**SYLLABUS:** A lawyer in a law firm may be “of counsel” to another law firm if the requisite continuing relationship exists between the lawyer and the law firm. The requisite continuing relationship is other than as a partner or associate or its equivalent and is more than a mere forwarder or receiver of legal business, more than a one-time advisor/consultant relationship, and more than a one-case relationship. The “of counsel” relationship is continuing, close, regular, and personal.

A lawyer who enters an “of counsel” relationship must be aware of the accompanying ethical implications. A lawyer who serves as “of counsel” must have an active license to practice law. A law firm may continue to include in the firm name the name of a lawyer who was already a name partner or name shareholder but who becomes “of counsel” to the law firm. A law firm may not include in the firm name the name of an “of counsel” lawyer who was not already a name partner or name shareholder of the law firm. The listing of an out-of-state lawyer as “of counsel” to an Ohio law firm must include the jurisdictional limitation of the “of counsel” lawyer on the letterhead. An “of counsel” lawyer is considered a lawyer in the same firm for purposes of division of fees under Rule 1.5(e); therefore, the restrictions on division of fees with a lawyer not in the same firm do not apply to a lawyer who is properly designated as “of counsel.” A lawyer may serve as “of counsel” to more than one law firm. Conflicts of interest are attributed in an “of counsel” relationship. “Of counsel” relationships may be entered into between Ohio lawyers and law firms and out-of-state lawyers and law firms.

**OPINION:** This opinion addresses a question regarding the “of counsel” relationship and advises as to the ethical implications of the “of counsel” relationship.

May a lawyer in a law firm be “of counsel” to another law firm?

For purposes of this opinion, a law firm is defined as it is in Rule 1.0(c) of the Ohio Rules of Professional Conduct. “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 private or

public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization.”

### Characteristics of an “of counsel” relationship

“Of counsel” is a professional designation used by a lawyer to denote a continuing relationship with a lawyer or law firm other than as a partner or associate or the equivalent of a partner or associate.

A lawyer’s use of the professional designation “of counsel” is governed by the Ohio Rules of Professional Conduct. A direct reference to “of counsel” appears in Rule 1.8(c). Direct references also appear in Comment [3] to Rule 7.5 and Comment [2] to Rule 1.0. Other rules, such as Rule 7.1 and Rule 1.5(e), contain no direct reference to “of counsel” but are applicable to its proper use.

The references to “of counsel” in both the former Ohio Code of Professional Responsibility and the current Rules are sparse at best. For this reason, Ohio lawyers have sought and still seek the Board’s guidance as to the meaning and use of the title “of counsel.” Over the last twenty years, the Board issued eight opinions addressing various “of counsel” issues. See Ohio Sup.Ct, Bd Comm’rs on Grievances & Discipline, CPR Op. 2006-2 (2006), CPR Op. 2004-11 (2004), CPR Op. 97-2 (1997), CPR Op. 91-18 (1991), CPR Op. 90-13 (1990), CPR Op. 90-3 (1990), Withdrawn Op. 88-26 (1988), CPR Op. 88-023 (1988).

As with the use of any professional designation, the use of “of counsel” must not be false or misleading. Rule 7.1 requires that “[a] lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer’s services.” Rule 7.5, requires, in pertinent part, that “[a] lawyer shall not use a *firm* name, letterhead, or other professional designation that violates Rule 7.1.”

As explained in Comment [3] to Rule 7.5 “[a] lawyer may be designated ‘Of Counsel’ if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate.”

The requirement that an “of counsel” relationship be a continuing relationship carried over into Ohio Rules of Professional Conduct upon Ohio’s February 1, 2007 transition from the Ohio Code of Professional Responsibility. In the section on Comparison (of Rule 7.5) to former Ohio Code of Professional Responsibility, the drafters of the Rules explain that “Comment [3] [to Rule 7.5] is substantially the same as the Ohio [Code] provision on the ‘of counsel’ designation.” The former Ohio Code provision, DR 2-102(A)(4), stated “[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.”

Proper use of the professional designation “of counsel” requires a continuing relationship of a lawyer with a lawyer or a law firm, other than as a partner or associate or the equivalent of a partner or associate. Absent the requisite continuing relationship with a lawyer or law firm, a lawyer’s use of the title “of counsel” is false or misleading.

The requisite continuing “of counsel” relationship has as its core characteristic a close, regular, and personal relationship other than as a partner or associate or the equivalent of a partner or associate, that is more than a mere forwarder or receiver of legal business, more than a one-time advisor/consultant relationship, and more than a one-case relationship.

See, for example, CPR Op. 2004-11 similarly describing the core characteristic as a “close, regular, personal relationship” and stating that “[t]he ‘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 also, for example, CPR Op. 97-2 describing the core characteristic of an “of counsel” relationship as a continuing, close, regular, and personal relationship that is more than a referral relationship, more than a one-time advisor relationship, and different from a partner or associate relationship.

In summary, the “of counsel” designation describes a link between a lawyer and a law firm. The link is a continuing one arising from a close, regular, and personal relationship. The “of counsel” requisite continuing relationship is other than as a partner or associate or its equivalent and is more than a mere forwarder or receiver of legal business, more than a one-time advisor/consultant relationship, and more than a one-case relationship.

### Types of “of counsel” relationships

Different types of “of counsel” relationships may link a lawyer to a law firm.

An American Bar Association Standing Committee on Ethics and Professional Responsibility described four principal patterns of the “of counsel” relationship in ABA Formal Op. 90-357 (1990).

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.”
2. “[A] retired partner of the firm who, although not actively practicing law, nonetheless remains associated 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—akin to the category just described, 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.]

In CPR Op. 2004-11, the Board agreed with the ABA committee and still agrees that the use of the designation “of counsel” is appropriate to describe these four patterns—a lawyer who has a close, regular, and personal relationship with a law firm as a part-time practitioner; a retired partner; a probationary partner-to-be; or as permanent non-partner/non-associate.

Further, in CPR Op. 2004-11, the Board expressed the view that use of the title “Of Counsel” is also appropriate to describe a lawyer 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. The Board advised: “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.’” This remains the Board’s view.

Accordingly, the Board’s advice as to the question raised is as follows. A lawyer in a law firm may be “of counsel” to another law firm if the requisite continuing relationship exists between the lawyer and the law firm.

#### Ethical implications of an “of counsel” relationship

A lawyer who enters an “of counsel” relationship must be aware of the accompanying ethical implications.

Comment [2] to Rule 1.0 states: “Whether two or more lawyers constitute a firm within division (c) [of Rule 1.0] can depend on the specific facts. For example, a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm. On the other hand, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm for purposes of fee division in Rule 1.5(e). The terms of any

agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.”

Areas in which questions arise as to ethical implications of an “of counsel” relationship include registration status; firm names and letterhead; division of fees; conflicts of interest; multiple “of counsel” relationships; and “of counsel” relationships with out-of-state lawyers or law firms.

### Registration status

Because an “of counsel” lawyer remains available to provide legal assistance to a law firm through the continuing close, regular, and personal relationship, the “of counsel” lawyer must maintain active registration status.

“Of counsel” is not an appropriate designation for a lawyer with inactive registration status. See Gov.Bar R. VI(2)(C) stating “[a]n inactive attorney shall not be listed as “of counsel” or otherwise be represented as being able to engage in the practice of law.”

“Of counsel” is not an appropriate designation for a lawyer whose application for retirement or resignation from the practice of law has been granted. See, for example, Gov.Bar R. VI(6)(D) stating “[a] retired attorney shall not be listed as “of counsel” or otherwise be represented as able to engage in the practice of law in Ohio.”

“Of counsel” is not an appropriate designation for an individual who is disbarred or suspended from the practice of law.

### Firm names and letterhead

A common question as to firm names is whether an “of counsel” lawyer’s name may be included in the firm name. Firm names are governed by Rule 7.5. Rule 7.5(a) states in pertinent part that “[i]f otherwise lawful, a *firm* may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.”

It is the Board’s view that pursuant to Rule 7.5(a), there is no ethical impediment to a law firm continuing to include in the firm name, the name of a lawyer who was already a name partner or name shareholder but who becomes “of counsel” to the law firm. As already stated, a lawyer who wishes to be designated as “of counsel” must maintain an active license to practice law and must maintain the requisite continuing relationship.

This view is consistent with the Board's advice in CPR Op. 91-18 that "[a] law firm may continue to include in its firm name, the name of a retiring partner of the firm who becomes 'of counsel' to the firm." The underpinning of that advice was that it was not misleading to continue the name in the firm name.

In contrast, it is the Board's view that pursuant to Rule 7.1 and Rule 7.5(d) there are ethical impediments to a law firm including the name of an "Of Counsel" lawyer in the firm name when the "of counsel" lawyer is not a lawyer who was already a name partner or name shareholder of the law firm. Rule 7.1 prohibits false or misleading communication. Further, Rule 7.5(d) requires that a "lawyer may state or imply that they practice in a partnership or other organization only when that is the fact." If an "of counsel" lawyer is not a lawyer who was already a name partner or name shareholder, the inclusion of that "of counsel" lawyer's name in the firm name is misleading and implies a partnership or ownership of the firm which does not and never did exist.

With regard to letterhead, an issue is whether the listing of an out-of-state lawyer as "of counsel" to an Ohio law firm must include the jurisdictional limitation of the "of counsel" lawyer on the letterhead. Rule 7.1 prohibits misleading communication. Thus, the Board's view is that the jurisdictional limitation of an "of counsel" lawyer should be included on an Ohio law firm's letterhead when listing an out-of-state lawyer as "of counsel." This view is consistent with the Board's view in CPR Op. 2004-11, advising "that the jurisdictional limitation should be included when listing an out-of-state attorney as "Of Counsel" on an Ohio law firm's letterhead." Predecessor DR 2-101(A)(1), like Rule 7.1, prohibited misleading communication.

### Division of fees

With regard to division of fees, an issue is whether an "of counsel" lawyer is considered a lawyer in the same firm for purposes of Rule 1.5(e). Rule 1.5(e) requires that lawyers who are not in the same firm comply with strict requirements set forth as to division of fees.

Comment [2] to Rule 1.0 in pertinent part states that "a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm. On the other hand, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm for purpose of fee division in Rule 1.5(e)."

Accordingly, the Board's view is that an "of counsel" lawyer is considered a lawyer in the same firm for purposes of division of fees; therefore, the restrictions in Rule 1.5(e) on division of fees with lawyers not in the same firm do not apply to a lawyer who is properly designated as "of counsel." This view is consistent with

the Board's advice in CPR 2004-11 which was based upon application of DR 2-107(A) which is substantively similar to Rule 1.5(e).

### Conflicts of interest

An issue is whether conflicts of interest are attributed in an "of counsel" relationship. Comment [2] to Rule 1.5 states that "a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm." Accordingly, the Board's view is that conflicts of interest are attributed.

In CPR Op. 97-2, the Board agreed with the view expressed by the American Bar Association ethics committee in ABA Formal Op. 90-357(1990) that "there is attribution to the lawyer who is of counsel of all the disqualification of each firm, and correspondingly, attribution from the of counsel lawyer to each firm of each of those disqualifications." See CPR Op. 97-2. The Board still agrees.

One conflict of interest rule specifically attributes a conflict of interest to an "of counsel" lawyer. Rule 1.8(c) prohibits a lawyer from preparing "on behalf of a client an instrument giving the lawyer, the lawyer's *partner*, associate, paralegal, law clerk, or other employee of the lawyer's *firm*, a lawyer acting 'of counsel' in the lawyer's *firm*, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client." The general rule governing imputation of conflicts of interest is Rule 1.10.

### Multiple "of counsel" relationships

An issue is whether a lawyer may serve as "of counsel" to more than one law firm. The Board's view is that a lawyer may serve as "of counsel" to more than one law firm. No rule prohibits more than one "of counsel" relationship. Nevertheless, the requirement of maintaining the requisite continuing relationship and the attribution of conflicts of interest place practical limitations upon the number of "of counsel" relationships a lawyer should enter into.

See CPR Op. 97-2 expressing the view 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."

There is nothing in the transition to the Ohio Rules of Professional Conduct from the Ohio Code of Professional Responsibility that would change the Board's view. A lawyer who serves as "of counsel" to more than one firm must maintain a continuing, close, regular, and personal relationship with each firm and avoid conflict of interest.

### “Of counsel” relationship with an out-of-state lawyer or law firm

“Of counsel” relationships may be entered into between Ohio lawyers and law firms and out-of-state lawyers or law firms. See CPR OP. 2004-11 advising that “[a]n 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.”

### Conclusion

In conclusion, the Board advises as follows. A lawyer in a law firm may be “of counsel” to another law firm if the requisite continuing relationship exists between the lawyer and the law firm. The requisite continuing relationship is other than as a partner or associate or its equivalent and is more than a mere forwarder or receiver of legal business, more than a one-time advisor/consultant relationship, and more than a one-case relationship. The “of counsel” relationship is continuing, close, regular, and personal.

A lawyer who enters an “of counsel” relationship must be aware of the accompanying ethical implications. A lawyer who serves as “of counsel” must have an active license to practice law. A law firm may continue to include in the firm name the name of a lawyer who was already a name partner or name shareholder but who becomes “of counsel” to the law firm. A law firm may not include in the firm name the name of an “of counsel” lawyer who was not already a name partner or name shareholder of the law firm. The listing of an out-of-state lawyer as “of counsel” to an Ohio law firm must include the jurisdictional limitation of the “of counsel” lawyer on the letterhead. An “of counsel” lawyer is considered a lawyer in the same firm for purposes of division of fees under Rule 1.5(e); therefore, the restrictions on division of fees with a lawyer not in the same firm do not apply to a lawyer who is properly designated as “of counsel.” A lawyer may serve as “of counsel” to more than one law firm. Conflicts of interest are attributed in an “of counsel” relationship. “Of counsel” relationships may be entered into between Ohio lawyers and law firms and out-of-state lawyers and law firms.

**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 Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney’s Oath of Office.**