The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES & DISCIPLINE
65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
Telephone: 614.387.9370 Fax: 614.387.9379
www.supremecourt.ohio.gov

OPINION 2014-4
Issued December 12, 2014

Law Firm In "Of Counsel" Relationship With Another Law Firm

SYLLABUS: It is proper for a law firm to enter an "of counsel" relationship with another law firm, provided both firms comply with the Ohio Rules of Professional Conduct.

QUESTION PRESENTED: May a law firm, rather than an individual lawyer, be designated "of counsel" with another law firm?

OPINION:

A lawyer seeks the Board's guidance on whether a law firm may enter into an "of counsel" relationship with another law firm. In past advisory opinions, the Board has addressed the "of counsel" relationship between individual lawyers and law firms, as well as the issue of lawyers practicing simultaneously in multiple law firms.

In a 2004 opinion, the Board determined that a lawyer may serve "of counsel" to another lawyer or to a law firm in another state, so long as the disciplinary laws of Ohio and the other state are not violated. Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2004-11(October 8, 2004). That opinion also stated that an out-of-state lawyer, not licensed in Ohio, may be "of counsel" to a lawyer or a law firm in Ohio provided that the relationship complies with all laws and disciplinary rules in Ohio.

Later, in a 2008 opinion, the Board extensively analyzed the "of counsel" relationship and determined that lawyers may maintain multiple "of counsel" relationships with different law firms, provided each of those relationships is "close, regular, and personal," and not simply an "occasional collaboration." Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2008-1 (February 8, 2008). The Board's opinion reflects the opinion of the ABA and a majority of other jurisdictions. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 357 (1990).

Most recently in 2013, the Board determined that a lawyer may simultaneously practice in more than one law firm if the practice otherwise complies with the Rules of Professional Conduct. Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2013-1 (April 4, 2013). This is the prevailing view of the ABA and other jurisdictions. In rendering that opinion, the Board stated a number of reasons to allow a lawyer to practice in multiple law firms, including that no Rule of Professional Conduct or Rule for the Government of the Bar prohibits such practice; lawyers are permitted to maintain multiple "of counsel" relationships with different firms; the prevailing view in other jurisdictions is to permit practice in multiple firms; the definition of "firm" and "law firm" under Prof.Cond.R. 1.0(c) is expansive; and to not allow multi-firm practice could impede a lawyer's ability to generate full-time work.

Based on the Board's prior opinions which allow for multiple "of counsel" relationships and for lawyers to simultaneously practice in multiple law firms, permitting a law firm to become "of counsel" with another law firm is logical.

The ABA and other jurisdictions have concluded that a law firm may be "of counsel" with another law firm. ABA Formal Op. 357; Md. State Bar Assn. Commt. on Ethics, 88-45 (Jan. 13, 1988); Assn. of the Bar of the City of New York, Op. 1995-8 (May 31, 1995); State Bar of Arizona, Op. 87-24 (November 17, 1987); Phila. Bar Assn., Prof'l. Guidance Commt., Op. 2001-5 (April, 2001); D.C. Bar Op. 338 (February, 2007). In reversing its prior opinion, the ABA stated that it did not perceive "any reason of policy why a firm should not be of counsel to another firm." ABA Formal Op. 90-357. However, at least one state summarily dismissed a plan to designate one firm "of counsel" to another firm to cross-refer business, because it determined it was a marketing scheme. Illinois State Bar Assn. 840 (January 4,1984).

The ABA has recognized certain limitations of firm-to-firm "of counsel" relationships. ABA Formal Op. 90-357. The ABA found that the "[e]ffect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualification." ABA Formal Op. 90-357; *see also* D.C. Bar Op. 338; Assn. of the Bar of the City of New York, 1995-8; Phila. Bar Assn., Prof'l. Guidance Commt., Op. 2001-5. As a result, all conflicts between and among firms are imputed to each of the firms. Additionally, the "of counsel" designation cannot be used to designate a relationship that arises "by the mere referral of business between firms or an occasional consulting relationship." Assn. of the Bar of the City of New York, Op. 1995-8.

When law firms become "of counsel" with other law firms, the ethical issues are multiplied. There are a number of ethical limitations that must be recognized in firm-to-firm "of counsel" relationships, including fiduciary duties, conflicts of interest, and fee sharing. Although most of the issues are similar to those found in the more basic "of counsel" relationships, caution should be exercised.

Conflict of interest analysis is of primary concern because all of the lawyers in a firm that is "of counsel" with another firm may be disqualified due to the "of counsel" relationship. For conflict analysis, the firms are treated as one unit, and conflicts are imputed to all "of counsel" lawyers and/or firms. *See* Prof.Cond.R. 1.8(c); 1.10. Therefore, any conflicts applicable individually to either firm or lawyer apply to all. As a result, firms in "of counsel" relationships with other firms must conduct comprehensive conflict checks. In at least one jurisdiction, implementation of a "screen" is not sufficient to avoid the imputation of conflicts when one firm is "of counsel" with another firm. N.Y. State Bar Assn., Commt. on Prof'l. Ethics, Op. 793 (March 17, 2006).

When conducting conflict checks, law firms in "of counsel" relationships should consider obtaining client or potential client informed consent to disclose sufficient information to the other firm to perform a complete conflict check. Client confidences must always be protected. Issues may arise when clients, especially those with trade secrets or other highly confidential information, may not be willing to allow for such disclosures. As a result, law firms in "of counsel" relationships should have a detailed and comprehensive method for conflict analysis and protecting client or potential client confidentiality.

Law firms also must be cognizant that in order to maintain an "of counsel" relationship, the firms must maintain the requisite "close, regular, and personal" relationship. Depending on the size of the two "of counsel" firms, this relationship may not be feasible. The "of counsel" relationship should not be a loose alliance for marketing and advertising purposes.

Division of fees is another ethical consideration. In Ohio, "of counsel" lawyers are considered to be in the same firm for purposes of the division of fees, so the restrictions regarding the division of fees under Prof.Cond.R. 1.5(e) do not apply. Unlike Ohio, some jurisdictions do not recognize "of counsel" lawyers to be members of the same firm, and require the division of fees with the firm as if they are not all in the same firm. *See* Nancy Kaufman, *The Of Counsel Relationship*, http://www.mass.gov/obcbbo/ofcounsel.htm (last visited December 9, 2014).

Additional considerations for law firms entering into "of counsel" relationships with other law firms, include ensuring that lawyers maintain "active" Ohio registration status; not including an "of counsel" lawyer in the firm name who is not already a named partner; and including the jurisdictional limitations of the "of counsel" lawyers and firms on the letterhead. Finally, firms should also disclose the "of counsel" relationship to clients in an engagement letter.

Although not directly addressed in Ohio's Rules of Professional Conduct, lawyers' fiduciary duties must be considered when one firm becomes "of counsel" with another firm. The firms should have a consistent approach regarding clients and other business opportunities, including which firm receives the engagement.

CONCLUSION: Although there are multiple ethical considerations involved, law firms may choose to enter "of counsel" relationships with other law firms for a number of reasons. First, the prevailing view of the ABA and other jurisdictions is that law firms may be "of counsel" to other law firms, so long as no ethical rules are violated. Second, no Rule of Professional Conduct or Rule Governing the Bar of Ohio prohibits firm-to-firm "of counsel" relationships. In fact, the Board's prior opinions allow for multiple "of counsel" relationships with different firms and for lawyers to simultaneously practice in multiple firms. Therefore, a law firm may be "of counsel"

with another law firm, so long as both firms comply with the Rules of Professional Conduct and do not violate any ethical rules.

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.