The Supreme Court of Ohio

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OPINION 2013-1
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Simultaneous Practice in Multiple Firms

SYLLABUS: A lawyer may practice in more than one firm at the same time if the practice otherwise complies with the Rules of Professional Conduct. A lawyer who engages in simultaneous practice in multiple firms must recognize the potential ethical issues connected with such practice. The lawyer has to be diligent in avoiding conflicts of interest, and imputation of conflicts will apply across all associated "firms." The lawyer is also required to scrupulously maintain client confidentiality and professional independence. As part of the lawyer's duty to refrain from false, misleading, or nonverifiable communications about the lawyer or the lawyer's services, the lawyer must inform his or her clients of all multiple firm associations.

Advisory Opinion 89-35 is withdrawn, and Advisory Opinions 97-2 and 99-7 are withdrawn in part.

QUESTION PRESENTED: May a lawyer practice simultaneously in more than one firm?

APPLICABLE RULES: Rule III of the Rules for the Government of the Bar of Ohio and Rules 1.0, 1.4, 1.6, 1.7, 1.8, 1.9, 1.10, 1.18, 2.1, 5.4, and 7.1 of the Ohio Rules of Professional Conduct

OPINION:

The Board's Position on Practice in Multiple Firms under the Former Code

An Ohio lawyer has asked for the Board's current view on simultaneous practice in multiple firms. The Board first addressed this issue in Advisory

Opinion 89-35. The syllabus of that opinion states that a lawyer "may not practice with more than one legal professional association or law firm in Ohio at the same time." Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 89-35 (Dec. 15, 1989). The Board's conclusion was based primarily on Gov.Bar R. III(3)(D), which then indicated that "[n]o attorney shall be associated in any capacity with a legal professional association other than the one with which the attorney is actively and publicly associated." In Opinion 89-35, the Board also identified several potential ethical issues with practice in multiple firms. The Board concluded that practice in more than one firm could be misleading and confusing to the public, create the possible disclosure of confidential lawyer-client information, increase the number of conflicts of interest, and threaten the lawyer's professional independence. At the time of Opinion 89-35, the former Code of Professional Responsibility (Code) defined a "law firm" as including "a professional legal association or a legal clinic." Code, Definitions, at (2) (amended effective June 11, 1979). Given this definition of "law firm," it appears that the Board's position in 1989 was that a lawyer could not engage in part-time practice in both a traditional law firm and a legal clinic.

In *Colaluca v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.*, 72 Ohio St.3d 229, 648 N.E.2d 1341 (1995), the Supreme Court of Ohio (Court) interpreted the Gov.Bar R. III language relied upon by the Board in Advisory Opinion 89-35. *Colaluca* was an action brought by a lawyer against his former law firm to compel redemption of the share the lawyer held in the firm. The lawyer argued that Gov.Bar R. III(3)(D) required redemption of the share because otherwise the lawyer could not practice in another firm. The Court held that "the intent of Gov.Bar R. III(3)(D) is to prohibit an attorney from practicing with more than one firm, including a legal professional association, in Ohio at the same time." *Id.* at 233, 648 N.E.2d at 1344. Because the lawyer was practicing in a new firm and was no longer associated with the former firm, the Court determined that the lawyer was not in violation of Gov.Bar R. III and the former firm was not required to redeem the lawyer's share.

Colaluca was decided on May 24, 1995. On September 26, 1995, the Court adopted amendments to Gov.Bar R. III, effective November 1, 1995. The impetus for the 1995 amendments was legislation in 1994 that permitted lawyers and other professionals to form limited liability companies, corporations, and partnerships. *See* Proposed Amendments to Rules for the Government of the Bar of Ohio, 72 Ohio St.3d xxix-xxxiii (1995). As a result of the Court's 1995 amendments, the language of Gov.Bar R. III that banned practice in multiple

legal professional associations was eliminated. The replacement language was virtually identical to the current version of Gov.Bar R. III(3)(D), which states, "[a] legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership in which an attorney is an officer, director, agent, employee, manager, member, partner, or equity holder shall be considered the attorney's firm for purposes of the Ohio Rules of Professional Conduct and these rules." *See* Amendments to the Rules for the Government of the Bar of Ohio, 74 Ohio St.3d CXXVI-CXXVIII (1995).

In 1997, the Board considered a question related to practice in multiple firms, that is, whether a retired lawyer may be "of counsel" to two different law firms. The Board concluded that a retired lawyer was permitted to be "of counsel" to more than one firm, but made clear that it was "not contradicting, overruling, or withdrawing the advice in Opinion 89-35 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. of Comm'rs on Grievances and Discipline, Op. 97-2 (April 11, 1997), at 2. At that time, the Board deemed "of counsel" relationships as "unique and distinct from that of partner or associate relationships" in explaining the Board's continued adherence to the advice provided in Advisory Opinion 89-35. *Id.*

Four years after the Court's rewrite of Gov.Bar R. III, the Board again addressed simultaneous practice in multiple firms. In Advisory Opinion 99-7, the Board was asked to determine whether a lawyer not admitted in Ohio could be a member, partner, or other equity holder in both an out-of-state firm and an Ohio firm. *See* Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 99-7 (Dec. 2, 1999). The Board declined to answer this specific question, but reaffirmed its view that a lawyer should not practice in more than one law firm. *Id.* at 4-5. Although the Board recognized that the Court had repealed the former Gov.Bar R. III(3)(D) language, the Board concluded that the potential ethical issues mentioned in Opinion 89-35 still justified a prohibition on practice in multiple firms. As further support for its stance against practice in multiple firms, the Board noted that in 1992 the Court chose not to adopt an amendment to Gov.Bar R. III that would have explicitly allowed practice in multiple firms. *Id.* This rule proposal predated the 1994 legislation on professional associations and the Court's complete rewrite of Gov.Bar R. III in 1995, however.

The Board's View on Multiple "Of Counsel" Relationships under the Current Rules

The Court repealed the Code and adopted the Rules of Professional Conduct (Rules) effective February 1, 2007. The Board has not revisited the question of simultaneous practice in multiple firms since the adoption of the Rules, although it provided additional guidance on "of counsel" relationships in Advisory Opinion 2008-1. *See* Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2008-1 (Feb. 8, 2008). In that opinion, the Board analyzed whether the Rules permit a lawyer to serve as "of counsel" to more than one law firm, and was unable to identify a Rule of Professional Conduct that prohibits multiple "of counsel" relationships. The Board concluded that so long as a lawyer maintains the requisite "continuing, close, regular, and personal relationship with each firm" and avoids conflicts of interest, the lawyer may serve as "of counsel" to more than one firm. *Id.* at 7. Opinion 2008-1 references Opinion 97-2, in which the Board allowed multiple "of counsel" relationships under the Code, but also disallowed practice in multiple firms. Nonetheless, Opinion 2008-1 fails to take a position on practice in multiple firms under the Rules.

The Approach in Other Jurisdictions

In Advisory Opinion 89-35, the Board cited a Maryland advisory opinion as authority for its conclusion that practice in multiple firms raises too many potential ethical issues for it to be permissible. Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 89-35 (Dec. 15, 1989) at 1, citing Md. State Bar Assn. Commt. on Ethics, Op. 88-45 (Jan. 13, 1988). However, the American Bar Association (ABA) and a number of other jurisdictions take the position that practice in multiple firms is permissible if it can be accomplished without violation of the applicable ethics rules. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1253 ("the Code of Professional Responsibility does not prohibit a lawyer from being associated with more than one law firm"); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 83-1499 ("[a] lawyer may be a partner in two law firms in different states"); D.C. Bar Op. 338 (Oct. 2006) ("a lawyer may practice in more than one firm," noting that "the prevailing view among the various jurisdictions that have considered these issues is that a lawyer is not prohibited from being a partner in more than one firm if the firms are treated as one for imputation of conflicts"); Fla. State Bar Assn., Commt. on Prof'l Ethics, Op. 93-6 (May 15, 1994) ("[a]s a general rule, an attorney is not ethically precluded from practicing simultaneously in two bona fide law firms");

Ga. Sup. Ct., State Bar of Ga., Op. 97-2 (Feb. 13, 1997) ("[a]n attorney may practice in more than one firm so long as those firms represent different ownership, the public and individual clients are clearly informed, and each firm adheres to all requirements…governing conflicts of interest and client confidences and secrets"); N.Y. State Bar Assn., Commt. on Prof'l. Ethics, Op. 944 (Nov. 8, 2012) (adopting Florida view that a lawyer is not "ethically precluded from practicing simultaneously in two bona fide law firms"); Phila. Bar Assn., Prof'l. Guidance Commt., Op. 2001-5 (April 2001) ("there is nothing unethical in the Rules per se about an attorney practicing as a partner or member in more than one firm at the same time," finding conclusion comparable to multiple "of counsel" relationships); S.C. Bar, Ethics Adv. Commt., Op. 95-15 (July 1995) ("[i]t is permissible for an attorney to practice as a sole practitioner in City A and simultaneously practice law in a partnership in City B," but the attorney must ensure "that no conflicts of interest exist between the lawyer and the client").[1]

The Board's Current Position on Practice in Multiple Firms

Rarely does the Board advocate its position on a single issue in three separate advisory opinions. That is the case here, as the Board disapproved of simultaneous practice in multiple firms in Advisory Opinions 89-35, 97-2, and 99-7. The Board carefully considers any reversal of course and generally defers to its prior advice, but in this instance the Board finds substantial justification for a new perspective on practice in multiple firms.

Reviewing the association with multiple firms in the context of current rules and modern practice, the Board has identified at least six reasons for a withdrawal of its long-standing position. First, in 1995 the Court repealed the language of Gov.Bar R. III(3)(D) that prohibited a lawyer's involvement with multiple legal professional associations. The Board issued Advisory Opinions 97-2 and 99-7 after this rule amendment, but the former Gov.Bar R. III(3)(D) language was the only outright prohibition against practice in multiple firms in place at the time of the Board's original opinion in 1989. The remainder of Advisory Opinion 89-35 bases the Board's ban on practice in multiple firms on the potential problems that could result, not any absolute restriction contained in the former Code.

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[1] *See also*, Mason & Mesulam, *Legal Polygamy: Ethical Considerations Attendant to Multiple Law Firm Affiliations*, 29 Law. Man. Prof. Conduct 75 (2013).

Second, the Court adopted the Rules in 2007, and the Board has not considered practice in multiple firms since that time. No Rule of Professional Conduct or Rule for the Government of the Bar prohibits practice in multiple firms, and the Board last addressed the issue 14 years ago.

Third, after the Court adopted the Rules, the Board issued Advisory Opinion 2008-1, which allows lawyers to maintain multiple "of counsel" relationships with different firms. As stated in Opinion 2008-1, lawyers who are "of counsel" are considered members of the firm for purposes of conflicts and division of fees. If lawyers may be members of multiple firms for "of counsel" purposes, it seems contradictory to prohibit actual membership or employment with multiple firms. Opinion 2008-1 makes no mention of the Board's prior advice on practice in multiple firms.

Fourth, as demonstrated by the opinions from other jurisdictions cited previously, the prevailing view is that practice in multiple firms is permissible if it otherwise complies with the applicable rules of ethics. Fifth, the definition of "firm" and "law firm" in Prof.Cond.R. 1.0(c) is expansive:

> (c) "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.

Under the Board's former opinions on practice in multiple firms, a lawyer could not work for a legal aid, public defender, or legal services organization while also engaging in the private practice of law. This practice restriction contravenes a lawyer's responsibility to "seek improvement of the law, ensure access to the legal system, [and] advance the administration of justice." Rules, Preamble, at ¶ [6].

Finally, on a related point, the financial reality of the current practice of law, especially in small communities, is that lawyers may have to create full-time employment through part-time positions in different practice environments. The Board does not believe it is appropriate to impede a lawyer's ability to generate full-time work if it may be accomplished in compliance with the Rules. For all of

these reasons, the Board withdraws Advisory Opinion 89-35 in full and Opinions 97-2 and 99-7 in part and concludes that lawyers may engage in simultaneous practice in multiple firms, with "firm" defined as in Prof.Cond.R. 1.0(c).[2]

Ethical Issues for Lawyers Practicing in Multiple Firms

Notwithstanding its modern view of practice in multiple firms, the Board still believes, as it stated in Opinions 89-35, 97-2, and 99-7, that there are significant ethical issues for lawyers to consider if they practice in more than one firm. The primary concern for these lawyers is dealing with conflicts of interest as addressed in Prof.Cond.R. 1.7, 1.8, 1.9, and 1.10. A lawyer practicing in multiple firms must conduct conflict checks that span all of the lawyer's firms, rather than confining the checks to individual firms. In addition, the conflicts of a lawyer who practices in multiple firms will be imputed across all of the firms. Under Prof.Cond.R. 1.10 conflicts of lawyers "associated in a firm" are imputed to all of the lawyers in the "firm." Accordingly, all of the firms in which a lawyer practices will be treated as one firm for purposes of imputation, unless the conflict may be ameliorated in compliance with Prof.Cond.R. 1.10. A lawyer may not violate the duty of client loyalty by representing clients in an additional firm that the lawyer is already prohibited from representing due to a conflict. This conclusion is consistent with the Board's position on imputation in "of counsel" associations. *See* Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2008-1 (Feb. 8, 2008).[3] *See also* Phila. Bar Assn., Prof'l. Guidance Commt., Op. 2001-5 (April 2001). The specific conflict situations described in Prof.Cond.R. 1.8, such as business transactions with clients, the use of information to the disadvantage of a client, the solicitation of gifts from clients, and providing financial assistance to clients, will also be imputed to all of the lawyers associated with the lawyer's multiple firms. *See* Prof.Cond.R. 1.8(k). Lawyers should further be aware of the conflicts involving prospective clients that may arise under Prof.Cond.R. 1.18 and the potential for imputation. *See* Prof.Cond.R. 1.18(c). Due to the complex conflict concerns for lawyers who practice simultaneously in multiple firms, such lawyers must notify all of the applicable firms of the lawyer's other firm associations.

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[2] Government agencies are not "firms" for purposes of Prof.Cond.R. 1.0(c). *See* Prof.Cond.R. 1.0, Comment [4A].

[3] Advisory Opinion 2008-1 also addresses the division of fees when a lawyer is designated as "of counsel." Prof.Cond.R. 1.5(e) governs the division of fees between lawyers who are not in the same firm.

Additional considerations for lawyers who practice in multiple firms fall into the general categories of confidentiality, communication, advertising, professional independence, and fiduciary responsibilities. Prof.Cond.R. 1.6 states that in general "[a] lawyer shall not reveal information relating to the representation of a client," and lawyers practicing in multiple firms have to take scrupulous care to maintain client confidences across all associated firms. Reading a lawyer's duty to communicate under Prof.Cond.R. 1.4 with a lawyer's duty to refrain from false or misleading communications about the lawyer or his or her services under Prof.Cond.R. 7.1, a lawyer must inform his or her clients of all multiple practice associations. Both clients and prospective clients may require this information to make informed decisions about the representation. Prof.Cond.R. 2.1 obligates lawyers to exercise independent judgment, and lawyers must be mindful of this responsibility when selecting multiple firms for practice. A lawyer should decline any additional firm associations if the lawyer's obligations to any one of the firms would interfere with professional independence and judgment. *See also* Prof.Cond.R. 5.4. Further, a lawyer's fiduciary responsibilities to a firm's members may prevent association with additional firms. *See* Phila. Bar Assn., Prof'l. Guidance Commt., Op. 2001-5 (April 2001), at 2; Mason & Mesulam, *supra* note 1, at 75. This issue falls outside the Rules of Professional Conduct and the Board's advisory authority, but the Board recommends that lawyers carefully research any fiduciary issues before embarking on practice in multiple firms.

CONCLUSION:

The Board no longer believes that a lawyer may not practice with more than one firm in Ohio at the same time, and withdraws the Board's previous position on this issue as stated in Advisory Opinions 89-35, 97-2, and 99-7. The Board has changed its view for the following reasons:

- The Supreme Court repealed former Gov.Bar R. III(3)(D)'s prohibition against multiple professional associations in 1995;
- Neither the Rules for the Government of the Bar nor the Rules of Professional Conduct currently prohibit simultaneous practice in multiple firms;
- In Opinion 2008-1, the Board sanctioned multiple "of counsel" relationships with multiple firms;

- The prevailing view from other jurisdictions is that practice in multiple firms is permissible;
- Due to the expansive definition of "firm" in Prof.Cond.R. 1.0(c), which includes legal aid, public defender, and legal services organizations, a ban on practice in multiple firms would prohibit a lawyer with a private practice from also choosing to promote access to the legal system through work in such organizations; and
- For financial reasons, and especially in smaller communities, lawyers may have to maintain more than one part-time position to create the equivalent of full-time employment.

The Board's current position is that a lawyer may practice in more than one firm at the same time if the practice otherwise complies with the Rules of Professional Conduct. For purposes of this Opinion, a "firm" is defined as stated in Prof.Cond.R. 1.0(c).

A lawyer who engages in simultaneous practice in multiple firms must recognize the potential ethical issues associated with such practice. The lawyer has to be diligent in avoiding conflicts of interest, and imputation of conflicts will apply across all "firms" of practice. Practice in more than one firm may not be used to eschew the duty of client loyalty, and the lawyer is advised to notify all firms of any multiple associations. Client confidences must be scrupulously maintained in regard to all associated firms. As part of the lawyer's duty to refrain from false, misleading, or nonverifiable communications about the lawyer or the lawyer's services, the lawyer shall inform his or her clients of all multiple firm associations. A lawyer should decline any additional firm associations if the lawyer's obligations to any one of the firms would interfere with professional independence and judgment.

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.