



Ohio Board of Professional Conduct

OPINION 2022-13

Issued December 9, 2022

Withdraws Adv. Op. 2002-4

Taking of a Deposition by a Paralegal or Out-of-State Lawyer

SYLLABUS: A lawyer may not delegate the task of taking or defending a deposition to a paralegal. An out-of-state lawyer may take or defend a deposition in Ohio so long as he or she meets one of the exceptions contained in Prof.Cond.R. 5.5. An Ohio lawyer may take or defend a deposition in a state outside Ohio in which the lawyer is not licensed to practice law if permitted by that state

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Ohio Board of Professional Conduct

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QUESTIONS PRESENTED:

- 1) May a lawyer delegate the task of taking a deposition to a paralegal?
- 2) May an out-of-state lawyer not licensed in Ohio take a deposition in Ohio?
- 3) May an Ohio lawyer take a deposition in a state in which the lawyer is not licensed?

APPLICABLE RULES: Prof.Cond.R. 5.5

OPINION:

Question 1: Deposition by a Paralegal

The Rules of Professional Conduct prohibit lawyers from aiding a non-lawyer in the unauthorized practice of law. Prof.Cond.R. 5.5(a). The Rules for the Government of the Bar define the unauthorized practice of law as “the rendering of legal services for another by any person not admitted to practice in Ohio under Rule I of the Supreme Court

Rules of the Government of the Bar * * * .” The rule then lists multiple exceptions for individuals not admitted to the bar in a traditional capacity, none of which has application to a paralegal. Gov.Bar R. VII §31(J)(1)(a). In conducting a deposition, counsel must determine what questions to ask based on sound application of the law. The necessity of asking appropriate follow-up questions may rely on legal analysis of a deponent’s answer. A person defending a deposition must identify if opposing counsel is attempting to elicit inappropriate information and make appropriate objections. *State v. Foster*, 674 So.2d 747 (Fla.App. 1996). “Without a doubt, the process of directly examining or cross-examining a witness can affect important rights under the law.” *Id.* at 753. One advisory committee has described conduct at depositions as “uniquely lawyer functions that a nonlawyer assistant cannot perform.” Pa. Bar Ass’n Op. 98-75.

Several cases provide guidance as to whether a lawyer may delegate the task of taking a deposition to a paralegal. The Supreme Court has specifically indicated that a paralegal engages in the unauthorized practice of law when he or she provides clients legal advice without a lawyer’s supervision. *Columbus Bar Assn. v. Thomas*, 109 Ohio St.3d 89, 2006-Ohio-1930. At least two cases have addressed the deposition conduct of individuals who are not admitted to the practice of law in Ohio. In *Mahoning Cty. Bar Assn v. Rector*, 62 Ohio Misc.2d 564, 608 N.E.2d 866 (1992), the Court found that a non-attorney corporate officer engaged in the unauthorized practice of law during a deposition when he objected to questions asked of deponents by opposing counsel and instructed a deponent not to answer a question. In *Disciplinary Counsel v. Brown*, 99 Ohio St.3d 114, 2003-Ohio-2568, the Court found that a disbarred attorney engaged in the unauthorized practice of law when he participated in pretrial conferences and depositions on another’s behalf. During two depositions he entered objections on the record and made legal arguments on the behalf of deponents. *Id.* at ¶4.

The Board advises that a lawyer may not delegate the responsibility of taking or defending a deposition to a paralegal. A lawyer 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 a deposition is assisting in the unauthorized practice of law.

Question 2: Deposition by an Out-of-State Lawyer¹

An out-of-state lawyer who is admitted in another jurisdiction, is in good standing, and regularly practices law may provide legal services in Ohio, on a temporary basis, in certain circumstances. Prof.Cond.R. 5.5(c). These exceptions recognize that there are circumstances where an out-of-state lawyer providing legal services in Ohio does not create an unreasonable risk to the interests of clients, the public, or the courts. *Id.*, cmt. [5].

First, an out-of-state lawyer may associate with a lawyer admitted in Ohio who agrees to take responsibility for a matter and actively participates in the matter. *Id.* at (c)(1). In that instance, the out-of-state lawyer may conduct a deposition in Ohio regarding that matter. The degree of required participation by the lawyer admitted in Ohio is a frequent question received by the Board. The participation of the Ohio lawyer must be meaningful and not simply nominal. Mich. Ethics. Op. RI-382 (2021). The Board believes the best practice is for the out-of-state lawyer and Ohio lawyer to have regular contact. This contact should entail discussing any matters pertinent to Ohio law, any procedural or substantive questions, and review of documents to be filed with the court. Both lawyers should keep one another updated with any information regarding the status of the matter. The Board believes that it is not necessary for the lawyer admitted in Ohio to attend a deposition conducted by the out-of-state lawyer in order to actively participate in the matter. In the event the out-of-state lawyer must take a deposition in Ohio and the Ohio admitted lawyer is unable to attend, the Ohio lawyer should make every effort to be available remotely to provide any necessary assistance to the out-of-state lawyer.

Second, an out-of-state lawyer may also provide services in Ohio that are reasonably related to a pending or potential proceeding in a tribunal, either in Ohio or another jurisdiction, if the lawyer is authorized to appear in such proceeding, or reasonably expects to be so authorized. Prof.Cond.R. 5.5(c)(2). This conduct includes activities in anticipation of a proceeding. *Id.* cmt. [10]. Taking or defending a deposition

¹ The out-of-state lawyer referenced in this section is one who is not admitted by any of the provisions for admission or registration available pursuant to Gov. Bar.R. I, Gov. Bar R. VI, Gov. Bar R. XI, or Gov. Bar R. XII.

of a party or potential witness in Ohio is a permissible activity under this division. Thus, if an out-of-state lawyer has already obtained *pro hac vice* admission or even reasonably expects to be admitted *pro hac vice* for litigation in Ohio, he or she may take depositions in Ohio related to that pending or potential proceeding. The rule also permits lawyers associated with the out-of-state lawyer, but who do not expect to appear before the tribunal, to assist in the matter. *Id.* cmt. [11]. Thus, subordinate lawyers associated with the out-of-state lawyer may take a deposition in Ohio related to a pending or potential proceeding. If an out-of-state lawyer is involved in litigation in his or her home jurisdiction and must enter Ohio to conduct legal services, such as depositions, he or she or associated subordinate lawyers may do so.

Finally, when an out-of-state lawyer is providing services that arise out of or are reasonably related to the lawyer's practice in his or her home jurisdiction, he or she may conduct or defend a deposition in Ohio in two additional circumstances. Under Prof.Cond.R. 5.5(c)(3) it is permissible for an out-of-state lawyer to conduct or defend a deposition that is related to an arbitration, mediation, or other alternative dispute resolution process, for which *pro hac vice* admission is not required. Prof.Cond.R. 5.5(c)(4) allows out-of-state lawyers to engage in investigation, negotiation, and non-litigation activities in Ohio. Thus, if the taking or defending of a deposition related to any of these services becomes necessary, an out-of-state lawyer may do so in Ohio pursuant to these two exceptions.²

Question 3: Deposition by an Ohio Lawyer in Another State

The Ohio Rules of Professional Conduct prohibit Ohio lawyers from engaging in the unauthorized practice of law in other jurisdictions. Prof.Cond.R. 5.5(a). All states have adopted some version of Model Rule 5.5 addressing the multi-jurisdictional practice of law. American Bar Association, Variations of the ABA Model Rules of Professional Conduct - Rule 5.5, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibil

² Adv. Op. 2002-4 addressed related considerations of whether out-of-state attorneys awaiting admission on examination or law school graduates may take depositions in Ohio. Because the requestor did not inquire as to those related groups, the Board will not address those considerations. However, the Board notes that Gov.Bar R. I §19 now provides for a process to practice pending admission and refers readers to that rule and section.

[ity/mrpc-5-5.pdf](#) (accessed Nov. 8, 2022). Before taking or defending 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, and the appropriate regulatory authority, to determine whether the taking of a deposition by a lawyer not licensed therein constitutes the unauthorized practice of law. An Ohio lawyer may take or defend a deposition in a state outside Ohio in which the lawyer is not licensed to practice law if permitted by that state.