

Practicing Law in the “Gig Economy”

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Akron Bar Association

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The “Gig Economy” is here for legal Jobs, like it or not

LAW STUDENTS

Less than half of recent law grads had 'good jobs' waiting after graduation, report says

BY STEPHANIE FRANCIS WARD

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What Is the Gig Economy?

In a gig economy, temporary, flexible jobs are commonplace and companies tend toward hiring [independent contractors](#) and [freelancers](#) instead of full-time employees. A gig economy undermines the traditional economy of full-time workers who rarely change positions and instead focus on a lifetime career.

Investopedia

What legal professionals are affected?

- Contract Attorneys employed by large firms
- Smaller firms or firms in smaller communities looking for “depth”
- Solo lawyers, retired lawyers
- Support Staff
- “On Demand” legal services providers

For a longer analysis see Law Crossing’s article

The Gig Economy for Lawyers and Legal Staff: How the Gig Economy Effects Lawyers and Legal Staff

<https://www.lawcrossing.com/employers/article/900048996/The-Gig-Economy-What-It-Is-and-How-Can-It-Affect-the-Legal-Industry/>

MWT

Advocacy & Advice

A typical scenario

- New attorney or attorney in solo practice
 - Perhaps has some client base but looking to grow
 - Has time and expertise/talent to offer
 - Or, no full-time job available
- Smaller firm or firm in smaller community needs help
 - Specialized expertise
 - Bench depth
 - Part-time work
- Can the attorney maintain his/her own firm and also work for the other firm?
- Can the attorney affiliate with multiple firms?

Option: contract work

- Performing research or writing on a contract basis to other attorneys
 - Not considered “practice of law”
 - Advisory Opinion 2005-1
 - So not a basis to actually practice law and develop a career
 - And (usually) not a long-term solution for employment
- So what other options are there?

Can a lawyer work for more than one firm?

- Previously, the answer was a hard “NO”
- See Advisory Opinions 89-35; 97-2; and 99-7

A lawyer “may not practice with more than one legal professional association or law firm in Ohio at the same time.” (Advisory Opinion 89-35, syllabus.)

So can a lawyer work for more than one firm?

- But now the answer is “YES – BUT BE CAREFUL”
- [Advisory Opinion 2008-01](#)
- https://ohioadvop.org/wp-content/uploads/2017/04/Op_08-001.pdf
- Permitting lawyer to be “of counsel” to more than one firm
- [Advisory Opinion 2013-01](#)
- https://ohioadvop.org/wp-content/uploads/2017/04/Op_13-001.pdf
- Permitting association with multiple firms

Advisory Opinion 2008-01: Of Counsel designation - I

- A lawyer in a law firm may be “of counsel” to another law firm if the requisite continuing relationship exists
- The “of counsel” relationship is
 - Continuing,
 - Close,
 - Regular, and
 - Personal.

Advisory Opinion 2008-01: Of Counsel designation - II

- Types of “of counsel” relationships
 - Part-time practitioner in association with a firm but on a different basis with the firm
 - Retired partner associated for consultation but not actively practicing
 - Probationary partner-to-be (generally short-term position for lateral hire)
 - Permanent status between partner and associate (like tenure without expectation of promotion to partner)

Advisory Opinion 2008-01: Of Counsel designation - III

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Advisory Opinion 2008-01: Of Counsel designation - IV

- Ethical Considerations
 - Active registration status – must maintain
 - Name on letterhead – OK if former name partner; otherwise potentially misleading
 - Division of fees – considered “lawyer in same firm” so Rule 1.5(e) division of fees doesn’t apply

Advisory Opinion 2008-01: Of Counsel designation - V

- Ethical Considerations, cont.
 - Conflicts of interest – conflicts of interest attributed across firms
 - Multiple relationships – OK so long as “continuing, close, regular and personal relationship” maintained
 - Out of state firm? – OK so long as disciplinary rules not violated

Law Firm as “Of Counsel”

- A law firm may serve as “of counsel” for another law firm.
 - Advisory [Opinion 2014-4](#) extends the rationale of 2008-1
 - https://ohioadvop.org/wp-content/uploads/2017/04/Op_14-004.pdf
 - Same general rules apply as for lawyer serving as of counsel:
 - Fees, letterhead, inter-state affiliation
 - Conflicts issue is magnified since all lawyers in a firm that is of counsel to another firm may be disqualified due to the relationship: conflicts are imputed to all lawyers and/or firms.
 - So permissible, but must be extra careful.

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“Of Counsel” relationships

- Who does this work for?
 - Firms or lawyers in the 4 categories above
 - Continuous relationship with another firm
 - Fairly common in practice
- But not flexible enough for the “Gig Economy”

Other forms of association with multiple firms

- Part-time practice in multiple environments
- Working for legal aid, public defender, or legal services organization while also engaging in private practice of law
- Actual membership or employment with multiple firms – more than just “of counsel”

Advisory Opinion 2013-01: Simultaneous Practice in Multiple Firms - I

- Until recently, the only avenues for a lawyer to practice with more than one firm were as a contract attorney (not practice of law) or in an of counsel capacity (limited opportunity).
- The Board of Commissioners repeatedly restricted association with multiple firms: Advisory Opinions 89-35, 97-2 and 99-7
- But the landscape has changed, and the Board changed its mind.

Advisory Opinion 2013-01: Simultaneous Practice in Multiple Firms - II

- “Rarely does the Board advocate its position on a single issue in three separate advisory opinions. That is the case here [Ops. 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.”

Six reasons for the change - I

1. 1995 repeal of Gov.Bar. 3 III(3)(D) language prohibiting involvement with multiple legal associations
2. 2007 rules of Professional Conduct – do not prohibit practice in multiple firms
3. Advisory Opinion 2008-1: “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.”

Six reasons for the change - II

4. Prevailing view in other jurisdictions is practice in multiple firms is permissible if it otherwise complies with ethical rules.
5. Otherwise, lawyer in a firm could not work with legal services organizations, legal aid, or as a public defender.
6. “[T]he 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.”

What is “association”

- Firm is defined by Prof.Cond.R. 1.0(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.

What's the difference between “association” and “of counsel”

- Association:
 - “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. (Prof.Cond.R. 1.0(c))
- Of Counsel:
 - Part time/different basis; retired; probationary partner-to-be; status between partner and associate

Ethical considerations - general

- A lawyer may practice in more than one firm at the same time if the practice otherwise complies with the Rules of Professional Conduct.
- Sounds pretty basic but requires careful reading of the Rules and the relevant Advisory Opinions
- Where more than one state is involved, must comply with rules of each state.

Ethical considerations – conflicts and confidentiality

- A lawyer who engages in simultaneous practice in multiple firms must recognize the potential ethical issues connected with such practice. **The lawyer 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.**
- These might be the trickiest to implement
 - Need to ensure comprehensive conflicts check, while maintaining confidentiality
 - Imputation of conflicts between firms

Conflicts of interest

- Conflicts checks must span all firms
- Conflicts of a lawyer who practices in multiple firms will be imputed across all firms.
- If prohibited from representing a client in one firm, can't use another firm to represent that client.
- Ethical screen is probably NOT sufficient to avoid imputation of conflict.
- Prof.Cond. Rs. 1.7, 1.8, 1.9, 1.10.

Confidentiality and disclosure

- Must maintain client confidentiality across all associated firms. (Prof.Cond. R. 1.6)
- Lawyer must inform clients of all multiple practice associations. (Prof.Cond. Rs. 1.4, 7.1)
- Fiduciary issues might also arise.

Ethical considerations - IV

- 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.**
 - In initial meeting/consultation
 - In written fee agreement
 - Fee arrangement must also be disclosed

Ethical considerations – fee arrangements

- Disclosure should include fee arrangement
- Multiple Associations, Rule 1.5(e) regarding fee-splitting applies.
- Must disclose nature of arrangement to clients.
- Distinct from lawyers who practice “in association with each other but not in a partnership, of counsel, or other permissible legal arrangement are not considered lawyers in the ‘same firm’ for purposes of the division of fees under Prof.Cond.R. 1.5(e). Advisory Opinion 2016-11

Ethical considerations, fee arrangements – II

- Must evaluate nature of employment relationship – does employment with multiple firms constitute a “permissible legal arrangement”?
 - Probably, but this will be fact-specific
 - 2016-11 is tailored to group of attorneys who collectively operate an office, with separate letterhead, but are not otherwise associated.
 - Rule 1.5(e) requires: division of fees in proportion to work; client consent; closing statement; and total reasonable fee.
 - May be best practice to follow a similar arrangement.

Ethical considerations – When to decline 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.
- Decline additional firm associations if obligations to any one of the firms would interfere with professional independence and judgment. (Prof.Cond. Rs. 2.1, 5.4)

Practical considerations –conflicts checks

- Ensure all conflict-check forms are complete and accurate
 - Ethical issue: how do you present clients and adversaries from matters with firm A to firm B for conflicts purposes?
 - Obtain client or potential client's consent to circulate enough information to other firms to perform the required check
- If you use practice management software, consider integration or automatic checking
- Database of clients and adverse parties that can be accessed by both firms

Practical considerations – disclosure

- Advise all clients of associations
 - Initial meeting/discussion
 - Engagement Agreement
 - Website/advertising: open question of how much disclosure is necessary on website. But cannot be misleading.
 - At least a disclaimer is probably necessary.

Practical steps for the firm hiring attorneys with multiple relationships

- Attorney must disclose all other firm relationships
- Develop protocol for attorney to clear potential conflicts with other firm(s)
- This must be done to share enough information but preserve client confidences

Practical steps for the firm hiring attorneys with multiple relationships

- Put Compensation Arrangements in Writing
 - Fee may be divided in proportion to services performed, or if joint responsibility is assumed by each lawyer (Rule 1.5(e).)
 - Clients must agree to the arrangement
 - Fee splitting rules do not apply to “of counsel” (Advisory Opinion 2008-1)

Sample fee/engagement agreement language - I

As a client of our Firm, you may receive legal services from attorneys who also have associations with other firms in addition to Our Firm. This multiple association is permitted by under Ohio's ethical rules and allows Our Firm to provide services to our clients that might not otherwise be possible.

Sample fee/engagement agreement language - II

As a client of our Firm, ROE LAW FIRM, you may receive legal services from attorneys who also have associations with other firms in addition to Our Firm. In this matter, you are represented by ATTORNEY JONES, who also practices through her own firm, JONES LAW. All services performed by Ms. JONES in connection with your matter will be performed through ROE LAW FIRM, and you are at all times a client of the Firm.

Sample fee/engagement agreement language - III

Our Firm and the attorney(s) have taken extensive steps to ensure that no conflicts of interest have arise in connection with representing you, and to ensure that all information related to our representation remains confidential. Lawyers associated with, but not employed by, ROE LAW FIRM receive compensation proportionate to the services performed during the representation.

But wait, there's more to worry about!

Ethical opinions address the 30,000-foot concerns and considerations (conflicts, disclosure, compensation), but there are many operational and practical considerations too.

Insurance

- Depending on the relationship, different insurance may be necessary.
 - Firm hiring an associated lawyer generally must maintain coverage for services the lawyer provides for the Firm – but excludes other work by the lawyer.
 - Associating Lawyer must carry their own coverage for work not done for Firm, with additional exclusions
 - Consult with your carrier. OBLIC has experience with this, but other carriers probably do too.
- Disciplinary issues – the Advisory Opinions don't discuss this but obviously disciplinary issues must be disclosed across firms.

Court log-ins and registration

- Clerks of Courts are NOT equipped to handle multiple representations
- This means that however you registered with the Court for one matter (associating lawyer, or lawyer in firm) will probably extend to all other filings.
 - Electronic and paper
- Must ensure proper notice of court action arrives with the right lawyer
- Can lead to client confusion

Email considerations

- Email addresses
 - Best to have separate addresses for each firm – keep the relationship separate
 - Clients know who they are dealing with
- Cell phones/text messages
 - Must take care to minimize client confusion
- Must be able to ensure confidentiality (Prof.Cond. R. 5)

Remote access

- Remote access to client files
 - Secure passwords
 - Must take steps to ensure confidential information is not stored in other Firm's records
 - Policies to address extent to which an affiliating attorney can access/retrieve/store work
 - Be careful of metadata issues, too!

Vendors and service providers

- Research and software subscriptions
 - Who can use the firm's research platform?
 - Restrictions on availability may depend on provider, but can be negotiated between attorney and firm. There are no ethical rules here.
- Ensure Vendors can set up separate billing if you do work through more than one association.

Internet presence and marketing

- Recall that “of counsel” aren’t always allowed to be on letterhead
- But affiliated lawyers can be
 - No definitive guidance on when multiple associations must be disclosed
 - If attorney is employed by firm, appears to be permissible to list the attorney – but clients must receive disclosure.
 - Don’t rely on this observation as legal advice – the issue remains unaddressed.
- Online search optimization and SEO
 - Have to be careful if multiple firms are using attorney’s info for marketing.
 - Especially if affiliating attorney also has their own firm

Is it worth all this?

- There are many additional layers of complexity in a multiple-association scenario.
- Everyone has to work well together
- Disclosure and transparency are paramount
- But in my opinion, these complexities aren't much greater than the ethical and practical concerns facing all practitioners
- Allows for flexibility and strategic relationships

About the Presenter



I advocate for and advise parents, their children, and their business and employment issues, through trust and estate planning, education law, and litigation.

While I primarily provide legal services and representation through my own law firm, I am proud to be Of Counsel for The Lefton Group, assisting on litigation matters, and to provide legal services in Tuscarawas County in association with The McCleery Law Firm, LLC.

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