

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 88-26

Issued December 16, 1988

[Withdrawn by Board on Dec. 5, 1997 due to amended DR 2-107, eff. Aug. 1, 1990]

SYLLABUS: Under DR 2-107(A)(2), a division of fees among lawyers shall be made in proportion to the services performed and responsibilities assumed by each. Assuming responsibility under the rule signifies that a lawyer must actually be involved in the case. A lawyer who uses his or her legal judgment, expertise or experience on behalf of the client would be “assuming responsibility” under the Rule.

OPINION: We have before us your request for an informal advisory opinion regarding DR 2-107(A)(2). Specifically, you inquire whether advancing or guaranteeing the costs of litigation would constitute “responsibility assumed” under the Rule. You also ask whether entering an appearance as co-counsel or “of counsel” would entitle that lawyer to part of the legal fees. In addition, you ask whether entering an appearance and advancing or guaranteeing expenses would be considered assuming responsibility as contemplated by the Rule. Finally your last questions are whether, entering an appearance and monitoring the litigation would be assuming responsibility and whether monitoring and advancing litigation expenses is assuming responsibility.

The text of DR 2-107(A)(2) is as follows:

[a] lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office unless, ...[t]he division is made in proportion to the services performed and responsibility assumed by each.

Because of the countless number of cases involving fee sharing, we do not herein specifically define what constitutes “responsibility assumed.” Instead, each fee sharing decision should be made on a case-by-case basis. ABA Committee on Ethics and Professional Responsibility, Informal Op. 848 (1965).

In regard to your specific questions, we are not going to address each one by stating which constitutes “responsibility assumed.” Again, each situation must be determined individually, taking into account the totality of the circumstances surrounding the division of fees. However, any determination of what constitutes “responsibility assumed” under DR 2-107(A)(2) should depend upon whether the lawyer actually participated in the case by using his or her legal skills and independent judgment. See, e.g., Palmer v. Breyfogle, 217 Kan. 128, 535 P.2d 955, 967 (1975). Therefore, a lawyer who actually participates in the case would be entitled to a division of the fees in proportion to the services performed and responsibility assumed.

In conclusion, it is our opinion and you are so advised that a division of fees between lawyers must be based upon the services performed and responsibility assumed by each. To be entitled to part of the fee, each lawyer must participate in the case by using his or her own judgment, expertise or experience on behalf of the client.

This is an informal non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.