

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 94-8

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[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to DR 5-103(B), eff. Jun. 14, 1999.]

SYLLABUS: A lawyer may not agree to split a contingency fee with a non-lawyer private investigator as compensation for the non-lawyer's investigative work. There are ethical alternatives that would allow a person of lesser financial means to obtain services such as the retention of a private investigator.

OPINION: This opinion addresses ethical issues surrounding an attorney's representation of a client whose financial resources are insufficient to pay legal fees or costs and expenses of litigation. Two questions are presented.

1. May a lawyer agree to split a contingency fee with a non-lawyer private investigator as compensation for the non-lawyer's investigative work, when the client is unable to pay for the services?
2. If it is not permissible for a lawyer to agree to split a contingency fee with a non-lawyer private investigator, what alternative arrangements would allow a person of lesser financial means to obtain costly services such as the retention of a private investigator?

Question One

The splitting of a legal fee with a non-lawyer is expressly prohibited under Disciplinary Rule 3-102(A) of the Ohio Code of Professional Responsibility: "A lawyer or law firm shall not share legal fees with a non-lawyer." The rule contains narrow exceptions not applicable here.

The policy behind the Disciplinary Rule 3-102(A) prohibition on sharing legal fees with non-lawyers is to protect clients. Fee-splitting encourages non-lawyers to engage in the unauthorized practice of law -- a violation of Disciplinary Rule 3-101(A); enhances the possibility that a non-lawyer will interfere with a lawyer's independent professional judgment -- a violation of Disciplinary Rule 5-101(A); and increases the likelihood that legal fees will be increased excessively -- a violation of Disciplinary Rule 2-106(A). Further, certain fee splitting agreements, such as sharing fees with a private investigator, could be construed as an offer to pay a witness contingent upon the content of his or her testimony or the outcome of the case in violation of Disciplinary Rule 7-109(C) ("[a] lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his [her] testimony or the outcome of the case").

In Ohio, a lawyer was indefinitely suspended for violations that included splitting a fee with a non-lawyer fire loss adjuster. See Bar Ass'n of Greater Cleveland v. Protus, 53 Ohio St. 2d 43 (1978). In New Mexico, a lawyer was indefinitely suspended for multiple violations of their Code including agreeing to split a legal fee with a non-lawyer as compensation for investigative work. See In re Quintana, 104 NM 511, 724 P2d 220 (1986). In New York, an ethics committee advised that a lawyer may not hire an investigator on a contingent fee basis. Ass'n of the Bar of the City of New York, Formal Op. 1993-2 (1993).

It is this Board's view that a lawyer violates Disciplinary Rule 3-102(A) by agreeing to pay a non-lawyer a percentage of a recovery in a case in exchange for the non-lawyer's services in the matter. Depending upon the facts and circumstances, a lawyer may also violate Disciplinary Rules 3-101(A), 5-101(A), 2-106(A), and 7-109(C). Thus, the Board advises that a lawyer may not agree to split a contingency fee with a non-lawyer private investigator as compensation for the non-lawyer's investigative work.

Question Two

As addressed in question one, it is not permissible for a lawyer to agree to split a contingency fee with a non-lawyer private investigator as compensation for the non-lawyer's investigative work. However, in response to question two, there are ethical alternatives that would allow a person of lesser financial means to obtain services such as the retention of a private investigator.

While assisting a client to consider how expenses of litigation may be paid, an attorney's conduct must comport with the Ohio Code of Professional Responsibility. Foremost, the attorney should avoid acquiring an interest in litigation, by complying with Disciplinary Rule 5-103. The rule is set forth below in its entirety.

DR 5-103 (A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he [she] is conducting for a client, except that he [she] may:

- (1) Acquire a lien granted by law to secure his [her] fee or expenses.
- (2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his [her] client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Thus, Disciplinary Rule 5-103(B) provides one option -- a lawyer may advance or guarantee the expenses of a private investigator, provided the client remains liable for the expense. The degree to which a lawyer attempts to seek reimbursement from a client for advanced expenses is a legal or business decision for the individual lawyer to make. See Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 87-001 (1987) and Op. 94-5 (1994). However, it should be noted that an attorney's "no win, no cost" policy would violate this rule, as would any agreement that a client's repayment of expenses would be contingent upon recovery.

Another option is that the client might be able to use an existing credit card to pay for the expense of the investigator. See Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 91-12 (1991) (permitting use of credit cards). If an investigator does not accept credit cards, the client could use the credit card to pay the attorney who could then advance the money to the private investigator since attorneys are permitted to advance expenses of investigation under Disciplinary Rule 5-103(B).

Other options include the client obtaining a loan from a family or friend, or from a financial institution. The caveat to this is that the attorney may assist the client in obtaining a loan, but may not be a co-signer. In signing as co-maker, the attorney would violate DR 5-103(B) by becoming ultimately responsible for the expense along with the client. See State Bar of New Mexico, Op. 1986-2 (undated) (lawyer may not guarantee a client's payment of a bank loan to be repaid from the anticipated recovery of a pending action); South Carolina Bar Op. 90-02 (undated) (lawyer may not stand as a surety or as a guarantor of a client's debt). See also Toledo Bar Ass'n v. McGill, 64 Ohio St. 3d 669 (1992) (public reprimand to two attorneys for signing as co-maker on notes to a trust company for purpose of obtaining and guaranteeing loans of funds to clients who needed the funds to withstand delays in litigation -- clients used the funds for medical expenses, living expenses, and settlements negotiations).

Last, but not least, the lawyer should consider whether or not the client needs pro bono representation. If so, the attorney could either provide or assist the client in obtaining pro bono legal representation.

In conclusion, this Board advises that although it is not permissible for a lawyer to agree to split a contingency fee with a non-lawyer private investigator, there are ethical alternatives that would allow a person of lesser financial means to obtain costly services such as the retention of a private investigator.

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 Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.