

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

## **OPINION 2003-3**

Issued June 6, 2003

**[Withdrawn- by Opinion 2016-11 on December 9, 2016]**

*[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]*

**SYLLABUS:** When lawyers not in the same law firm agree to a division of legal fees under DR 2-107(A), based upon assuming responsibility for the representation rather than the proportion of services performed, each lawyer must assume responsibility for the representation through a written agreement signed by the client and each lawyer. Regardless of whether the division of fees is to be in proportion to the services performed or based upon assuming responsibility, each lawyer and client must sign a written disclosure of the terms of the division and the identity of all lawyers sharing in the fee. In addition, the total fee must be reasonable. Since heretofore, Ohio lawyers have not had guidance on whether DR 2-107(A) requires a *signed* written agreement, this advice applies prospectively to future division of fee agreements among lawyers not in the same firm.

When lawyers not in the same firm agree to a division of legal fees, each lawyer is responsible for providing the required written notice to a client under DR 1-104 regarding his or her own lack of professional liability insurance. Signatures of the lawyer and the client are required on the written notice.

This opinion does not address division of fees among lawyers not in the same firm in cases involving class actions and complex cases involving aggregation of multiple plaintiffs. This opinion does not address legal issues regarding enforceability of fee agreements involving a division of fees by lawyers not in the same firm.

**OPINION:** This opinion addresses questions regarding the requirements of notice, disclosure and written agreement when there is a division of fees by lawyers not in the same firm. This opinion does not address division of fees among lawyers not in the same firm in cases involving class actions and complex cases involving aggregation of multiple plaintiffs. This opinion does not address legal issues regarding enforceability of fee agreements involving a division of fees by lawyers not in the same firm.

1. When lawyers not in the same firm agree to a division of legal fees based upon assumption of responsibility rather than upon the proportion of services performed, is each lawyer required to sign a written agreement with the client?

2. When lawyers not in the same firm agree to a division of legal fees, is each lawyer responsible for providing written notice to the client of the required information as to the lack of professional liability insurance, when applicable?

*Question One*

When lawyers not in the same firm agree to a division of legal fees based upon assumption of responsibility rather than upon the proportion of services performed, is each lawyer required to sign a written agreement with the client?

Lawyers who are not in the same law firm may share legal fees, but must comply with DR 2-107 of the Ohio Code of Professional Responsibility.

DR 2-107 DIVISION OF FEES AMONG LAWYERS.

(A) Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply:

- (1) The division is in proportion to the services performed by each lawyer or, if by written agreement with the client, all lawyers assume responsibility for the representation;
- (2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client;
- (3) The total fee is reasonable.

(B) [Omitted].

(C) [Omitted].

For purposes of DR 2-107(A), *lawyers not in the same firm* includes lawyers sharing office space and lawyers maintaining separate law practices within the same building. *See* Ohio SupCt, Bd Comm'rs on Griev & Disc, Op. 91-9 (1991) and Op. 91-5 (1991).

Under DR 2-107(A), lawyers not in the same firm may divide legal fees in one of two ways. The division may be either in proportion to the services each lawyer performs, or by assumption of responsibility unrelated to the proportion of services performed. In either circumstance, there must be prior consent of the client and written disclosure to the client of the terms of the division and the identity of the lawyers sharing in the fee. When the division of fee is unrelated to the proportion of services each lawyer performs, there is an additional requirement that each lawyer assume responsibility for the representation by written agreement with the client.

It is implicit in the rule that the written disclosure of the terms of the division and the identity of the fee-sharing lawyers and the agreement to assume responsibility be signed by all the parties to the agreement—each fee-sharing lawyer and each client. However, it

is not necessary that the parties to the agreement sign in the presence of each other; for example, a client may wish to take the agreement home to review, consider, and sign. However, to avoid misunderstanding, each lawyer and each client should retain a copy of the completed document signed by all the parties.

The ethical requirement that the division of fee agreement be a written agreement signed by each lawyer and each client complements the statutory requirement that a lawyer and a client sign a written contingent fee contract.

R.C. § 4705.15 (B) If an attorney and a client contract for the provision of legal services in connection with a claim that is or may become the basis of a tort action and if the contract includes a contingent fee agreement, that agreement shall be reduced to writing and signed by the attorney and the client. The attorney shall provide a copy of the signed writing to the client.

Ohio Rev. Code Ann. § 4705.15 (West 1998).

Because “assume responsibility” under DR 2-107(A) is undefined in the Ohio Code of Professional Responsibility, the Board takes the opportunity to address the meaning in this opinion. In advising upon the meaning of “responsibility” under the ABA Model Rule 1.5(e), the Standing Committee on Ethics and Professional Responsibility of the American Bar Association expressed the view that “responsibility” has the same meaning in the Code as in the Model Rules.

The [ABA] Committee is of the opinion that assumption of responsibility does not require substantial services to be performed by the lawyer since assumption of responsibility is the alternative to a division of fees in proportion to services performed. The Committee is also of the opinion that assumption of “joint responsibility for the representation” includes assumption of responsibility comparable to that of a partner in a law firm under similar circumstances, including financial responsibility, ethical responsibility to the extent a partner would have ethical responsibility for the actions of other partners in a law firm in accordance with Rule 5.1 [Responsibilities of Partners, Managers, and Supervisory Lawyers], and the same responsibility to assure adequacy of representation and adequate client communication that a partner would have for a matter handled by another partner in the firm under similar circumstances.

ABA, Informal Op. 85-1514 (1985).

This Board agrees that “assume responsibility” under DR 2-107(A) includes financial responsibility as well as ethical responsibility to assure adequate representation and adequate client communication. A lawyer who assumes responsibility should be available to both the client and the other fee-sharing lawyer as needed throughout the representation and should remain knowledgeable about the progress of the legal matter. “It is the ongoing protection of the client’s interests by the referring lawyer that justifies the referring lawyer receiving a fee that is beyond the proportion of the services actually provided by that lawyer.” Wisconsin Bar, Formal Op. E-00-01.

In conclusion, the Board advises as follows. When lawyers not in the same law firm agree to a division of legal fees under DR 2-107(A), based upon assuming responsibility for the representation rather than the proportion of services performed, each lawyer must assume responsibility for the representation through a written agreement signed by the client and each lawyer. Regardless of whether the division of fees is to be in proportion to the services performed or based upon assuming responsibility, each lawyer and client must sign a written disclosure of the terms of the division and the identity of all lawyers sharing in the fee. In addition, the total fee must be reasonable. Since heretofore, Ohio lawyers have not had guidance on whether DR 2-107(A) requires a *signed* written agreement, this advice applies prospectively to future division of fee agreements among lawyers not in the same firm.

*Question Two*

When lawyers not in the same firm agree to a division of legal fees, is each lawyer responsible for providing written notice to the client of the required information as to the lack of professional liability insurance, when applicable?

Ohio lawyers who do not maintain a required level of professional liability insurance must disclose this information and provide written notice to the client pursuant to DR 1-104 of the Ohio Code of Professional Responsibility, adopted effective July 1, 2001. The only exceptions from this disclosure requirement are for governmental lawyers and in-house counsel.

DR 1-104. DISCLOSURE OF INFORMATION TO THE CLIENT.

- (A) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.
- (B) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.
- (C) The notice required by division (A) of this rule shall not apply to a lawyer who is engaged in either of the following:
  - (1) Rendering legal services to a governmental entity that employs the lawyer;
  - (2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

Required by DR 1-104  
Ohio Code of Professional Responsibility

Pursuant to DR 1-104 of the Ohio Code of Professional Responsibility, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

\_\_\_\_\_  
Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by DR 1-104 of the Ohio Code of Professional Responsibility that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

\_\_\_\_\_  
Client's Signature

\_\_\_\_\_  
Date

Lawyers not in the same firm who agree to divide legal fees are subject to the disclosure requirement of DR 1-104. Each lawyer is responsible for providing this notice to a client regarding his or her own lack of professional liability insurance. Even if a lawyer assumes responsibility for a legal representation in a fee-sharing agreement, rather than performing most of the legal services, that lawyer is still subject to the disclosure requirement.

In conclusion, the Board advises as follows. When lawyers not in the same firm agree to a division of legal fees, each lawyer is responsible for providing the required written notice to a client under DR 1-104 regarding his or her own lack of professional liability insurance. Signatures of the lawyer and the client are required on the written notice.

**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.**