



# Ohio Board of Professional Conduct

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## OPINION 2024-04

Issued June 7, 2024

### Fee Mediation or Arbitration Between Departed Lawyer and Former Law Firm

**SYLLABUS:** The mandatory fee mediation or arbitration for lawyer fee disputes set forth in Prof.Cond.R. 1.5(f) applies only to fee disputes arising between lawyers who are not in the same firm at the outset of the representation of a client and who enter into a fee agreement to divide fees pursuant to Prof.Cond.R. 1.5(e). Fee disputes between a lawyer who has departed the firm and the lawyer's former firm are not governed by the mandatory fee arbitration or mediation process in Prof.Cond.R. 1.5(f).

**APPLICABLE RULES:** Prof.Cond.R. 1.5

#### QUESTION PRESENTED:

Whether Prof.Cond.R. 1.5(f) mandates fee arbitration or mediation of a fee dispute between a departed lawyer and that lawyer's former law firm.

#### ANALYSIS:

##### *Application of Rule 1.5(f) to Disputes between Departed Lawyer and Former Firm*

Lawyers who are not in the same firm are permitted to divide reasonable fees based on a proportion of the work performed or upon assuming joint responsibility for the client under Prof.Cond.R. 1.5(e). Fee arrangements under this rule can give rise to fee disputes between the lawyers representing a client. Prof.Cond.R. 1.5(f) mandates that fee disputes between lawyers must be resolved through a mediation or arbitration process managed by a local bar association or the Ohio State Bar Association.

Two comments to Prof.Cond.R. 1.5 clarify application of Prof.Cond.R. 1.5(f) to lawyer fee disputes. Comment [10] provides that lawyers in separate firms who are dividing fees under Prof.Cond.R. 1.5(e) must comply with the procedure established for the resolution of disputes under Prof.Cond.R. 1.5(f). Comment [10] does not reference other types of fee disputes that would require a lawyer's compliance with Prof.Cond.R. 1.5(f). In addition, Comment [8] states that "division (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm" thereby lending support for a conclusion that division (e) is limited to lawyers in separate firms at the outset of the client representation and does not apply to lawyers formerly in the same firm.

Moreover, Prof.Cond.R. 1.5(f) expressly states that it applies to lawyer fee disputes arising under "this rule" [Prof.Cond.R. 1.5]. Since no provision of Prof.Cond.R. 1.5 expressly regulates the division of fees between departed lawyers and their former firm, it reasonably follows that Prof.Cond.R. 1.5(f) is inapplicable to disputes that arise from such a situation. Resolution of fee disputes in these circumstances can be resolved through the doctrine of *quantum meruit* for fees earned by the firm prior to the termination of the firm's representation due to the departure of a firm lawyer. See *Reid v. Lansberry*, 68 Ohio St. 3d 570, 573 (1994) and *Fox & Assoc. Co., LPA v. Purdon*, 44 Ohio St. 3d 69, 71 (1989).

#### *Case Law Consideration of Former DR 2-107(B)*

Neither an Ohio court nor the Board has previously considered the application of Prof.Cond.R. 1.5(f) to the issue raised by the requestor. However, courts have addressed the application of DR 2-107(B), antecedent to Prof.Cond.R. 1.5(f), to fee disputes between lawyers under various circumstances.

In *Shulman v. Wolske & Blue Co., LPA* (1998), 125 Ohio App.3d 365 (10<sup>th</sup> Dist.) the court reviewed a fee sharing arrangement between a lawyer working as an independent contractor and a law firm. During the relationship, the lawyer and firm entered into an agreement for the lawyer to serve as co-counsel in a personal injury case. The case was settled, and a dispute arose between the co-counsel and the firm with regard to the division of fees. The co-counsel filed suit against the firm on a breach of contract claim and was awarded a percentage of the fees collected by the firm. The law firm appealed,

arguing that the fee arbitration process mandated by DR 2-107(B) controlled the dispute and that the trial court did not have jurisdiction over the matter. The appellate court upheld the trial court's decision and noted that DR 2-107(B) is "appropriate in cases of disputes between lawyers arising under DR 2-107(A) [1.5(e)]" but that nothing in the record demonstrated that the parties had complied with former DR 2-107(A) when they agreed to divide fees.

In *Hohmann, Boukis & Curtis Co. v. Brunn*, 138 Ohio App.3d 693 (8th Dist. 2000), the Eighth District Court of Appeals reviewed a fee dispute case where lawyers had departed a law firm and established a new legal practice. The former law firm filed a complaint against the departed lawyers for breach of contract and conversion and sought damages in *quantum meruit* for attorney fees and other remedies originating from the representation of a client when the departed lawyers were still employed by the firm. The trial court ordered the parties to arbitration before the local bar association pursuant to former DR 2-107(B). Citing to the conclusion reached in *Schulman v. Wolske Blue Co. LPA* and the fact that there were other issues in the pending litigation that fell outside the intended scope of former DR 2-107(B), the court reversed the trial court's order of arbitration and remanded the case.

Reviewing the constitutionality of former DR 2-107(B) in *Shimko v. Lobe*, 103 Ohio St.3d 59, 2004-Ohio-4202, the Supreme Court stated that permitting bar associations to arbitrate fee disputes "is precisely what DR 2-107(B) authorizes [them] to do" and that the rule was "the arbitral machinery for determining a fee dispute between attorneys from different firms." *Id.* at ¶63. The fee dispute in *Shimko* stemmed from an oral fee-sharing agreement between two Ohio lawyers who were in separate firms at the outset of the representation. In an earlier proceeding, the appellate court observed that if a fee dispute existed between members of the same firm, the dispute would necessarily involve issues that go beyond the fee agreement and outside the intended scope of DR 2-107(B). The appellate court further noted that when "a fee dispute arises between members of different firms, generally the only existing contractual relationship between the attorneys is the fee agreement itself. These relatively simple disputes are more amenable to arbitration." *Shimko v. Lobe*, 124 Ohio App.3d 336, 345 (10th Dist. 1997). The appellate court ultimately held that for DR 2-107(B) to apply, the dispute must arise under DR 2-107(A)[1.5(e)] regulating the division of fees between lawyers in separate firms. *Id.*

The analysis by courts applying former DR 2-107(B) supports the Board's conclusion that the division of fees and mandatory fee arbitration in Prof. Cond. R. 1.5(f) applies only to those situations where lawyers in different firms agree to divide fees at the outset of the representation of the client. The rule does not apply to fee disputes between lawyers and their former firms unless the firm, the departed lawyers, and the client enter into a new fee agreement governed by Prof. Cond. R. 1.5(e).

The consideration of a mandatory fee arbitration and mediation program for other types of fee disputes is ultimately a policy decision to be made by the Supreme Court. The Board acknowledges that many Ohio bar associations that offer fee arbitration and mediation programs do not handle matters involving lawyers and their former firms. That is not to say that bar associations cannot voluntarily adopt and offer fee mediation and arbitration programs for these types of fee disputes. However, such programs, absent an enforceable rule, would necessitate the voluntary cooperation of the departed lawyers and their former firms.