

## Alerts

### Eighth Circuit Invalidates Fee-Splitting Agreement Based on Technical Violations of Ethical Rule

September 28, 2010

*Lawyers for the Profession® Alert*

*Eng v. Cummings, McClorey, Davis & Acho PLC*, 611 F.3d 428 (8th Cir. 2010)

#### Brief Summary

The U.S. Court of Appeals for the Eighth Circuit held that a fee-splitting arrangement between law firms was unenforceable because the client did not agree to the arrangement in writing and because the agreement did not indicate that the firms would be jointly responsible for the matter.

#### Complete Summary

A child with a wrongful death claim sought the representation of a Michigan law firm. The Michigan firm referred the case to a Missouri law firm. The two firms ultimately agreed that the Missouri firm would share one-third of its fees with the Michigan firm. The Michigan firm then sent a letter to the client detailing the firms' fee-splitting arrangement.

After the case settled, a dispute over the amount to be shared arose and the Missouri firm sought a declaratory judgment that the fee-splitting agreement was unenforceable. The Michigan firm counterclaimed for bad faith breach of duty, breach of contract, fraud, misrepresentation and unjust enrichment. The district court granted the Missouri firm summary judgment.

The Eighth Circuit affirmed, holding that absent a written agreement between the Michigan firm and the client indicating that the firm would be jointly responsible for the matter, the fee-splitting arrangement was unenforceable. Although the fee-splitting agreement likely would have been valid under Michigan law, the court applied Missouri Rule of Professional Conduct 4-1.5(e), which imposes, *inter alia*, the written agreement and joint responsibility requirements.

The court noted that the Michigan firm's letter to the client did not meet the former requirement because the client never agreed to it in writing. Although current Rule 4-1.5(e) does not require the client's written consent, the court noted that the rule in effect during the relevant time did.

Even if the client had agreed in writing to the arrangement, the court held, the Michigan firm's letter did not indicate that it would share joint responsibility as required by Rule 4-1.5(e). The court further acknowledged that the Michigan

#### Service Areas

Counselors for the Profession

Lawyers for the Profession®



firm had taken some responsibility by occasionally conferring with the client, but held that:

Nothing that [the Michigan lawyer] did rises to this level [of joint responsibility]. He did not file an appearance in the wrongful death action; he did not pay any portion of the court fees; he did not take depositions (although it appears at one point he offered to); and he did not assist [The Missouri firm] in formulating a trial strategy.

Finally, the court held that the unenforceability of the fee-splitting arrangement precluded the Michigan firm's counterclaims. On this point, one judge dissented, stating that the Michigan firm had a triable tort claim for fraudulent inducement, which was independent of the validity of the fee-splitting agreement.

### **Significance of Opinion**

This opinion demonstrates the importance of determining which state's rules of professional conduct govern a fee-splitting arrangement and complying strictly therewith. Notably, although the Eighth Circuit followed settled Missouri law by strictly applying the requirements of Rule 4-1.5(e), other jurisdictions have occasionally upheld fee-splitting agreements despite technical violations of similar rules.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*