

Does a Fee-Sharing Agreement in Violation of a Rule of Professional Conduct Render It Unenforceable?

Rule 1.5(g) of the Pennsylvania Rules of Professional Conduct, based upon the American Bar Association (ABA) Model Rules of Professional Conduct, provides that counsel who intend to enter into a fee-splitting agreement must inform the client of such intention and receive their consent. Those requirements were not new upon the advent of the Pennsylvania Rules of Professional Conduct, nor upon the ABA Model Rules upon which they are based. Those requirements originated with, or at least were pre-existed by, the Pennsylvania Code of Professional Responsibility DR 2-107(a), which was based upon the pre-existing ABA Model Code of Professional Conduct DR 2-107(a). But what if two or more counsel enter into a fee-splitting agreement and both fail to acquire their client's consent, much less even inform their client of its existence? Does that mean that this unethical agreement is not legally enforceable, notwithstanding that it may be the basis for sanction by the Disciplinary Board of the Supreme Court of Pennsylvania, or by a similar body in other jurisdictions? A senior appellate court in another jurisdiction has recently addressed this issue.

In *Marin v. Constitution Realty, LLC*, 28 N.Y.3d 666, 71 N.E.3d 530, 49 N.Y.S.3d 39, 2017 N.Y. Slip Op. 01019 (Ct. of Appeals), the Court of Appeals of New York, plaintiffs' counsel, for a client who was seriously injured in a work-related accident and his wife, had entered into a fee-splitting agreement with another counsel to serve as co-counsel. They agreed in writing that co-counsel would receive 20 percent of the net attorneys' fees in return for providing advice "if the case settled before trial and 25 percent once jury selection commenced." Apparently neither counsel had informed their clients of this agreement, although the co-counsel had believed that plaintiffs' counsel had so informed the clients. Without changing the fee arrangement, that agreement

was later amended, so that the co-counsel agreed that he would continue to provide advice, but that he would not contact the clients, their experts, defendants or the court without the permission of plaintiffs' counsel.

Later, plaintiffs' counsel unilaterally discharged co-counsel and informed him that his fees would be determined pursuant to the principle of quantum meruit and not pursuant to the terms of the fee splitting agreement. Thereafter, plaintiffs' counsel obtained a partial summary judgment with respect to liability, and then engaged a second co-counsel to assist in an upcoming mediation session and for a potential trial on damages. Plaintiffs' counsel would also later dispute that fee agreement as well. However, apparently that fee agreement had been disclosed to and approved by the clients because plaintiffs' counsel challenged the fee claimed by the second co-counsel over a dispute concerning the proper construction of the wording of the agreement and not based upon any claim that it was unenforceable as being unethical.

This case teaches us that an attorney cannot rely upon his or her own unethical conduct to avoid enforcement of a fee agreement.

Plaintiffs' counsel moved for an order setting the first co-counsel's fee based upon quantum meruit instead of 20 percent of net attorneys' fees. She contended that the fee agreement was unenforceable as unethical because its existence had not been disclosed to the clients and, accordingly, the clients had never given their consent. In response, the first co-counsel contended the fee agreement, as modified, was enforceable because plaintiffs' counsel's own unethical conduct in her failure to disclose

its existence to the clients and seek their consent should not preclude his entitlement to 20 percent of net attorneys' fees. The trial court found that the agreement between plaintiffs' counsel and first co-counsel, as modified, "unequivocally and unambiguously entitled [first co-counsel] to 20% of net attorneys' fees." The trial court rejected the contention that, because the agreement with the first co-counsel was unethical, it was rendered unenforceable. The trial court also found the fee agreement with the second co-counsel was enforceable, but based upon a construction argument of the contract language and not because of any premise that it was unenforceable as being unethical.

The Appellate Division, New York's intermediate appellate court, affirmed, unanimously rejecting the argument that the unethical nature of the fee agreement with the first co-counsel rendered it unenforceable. In a split decision, however, the court

also affirmed the trial court with respect to the fee agreement with the second co-counsel, finding that the agreement with the second co-counsel did entitle him to the fee he was claiming.

The Court of Appeals affirmed the Appellate Division in its entirety. With respect to the "unethical" fee agreement involving the first co-counsel, the court notes: "[Plaintiff's counsel's] attempt to use the ethical rules as a sword to render unen-

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forceable, as between the two attorneys, the agreements with [first co-counsel] that [plaintiffs' counsel] herself drafted is unavailing. Her failure to inform her clients of [first co-counsel's] retention, while a serious ethical violation, does not allow her to avoid otherwise enforceable contracts under the circumstances of this case." Quoting from case law, the court notes that "it ill becomes defendants, who are also bound by the Code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits." (citation omitted). "This is particularly true here where [plaintiffs' counsel] and [first co-counsel] both failed to inform the clients about [first co-counsel's] retention, [plaintiffs' counsel] led [first co-counsel] to believe that the clients were so informed, and the clients themselves were not adversely affected by the ethical breach."

Although the Court of Appeals did not say so in so many words, this case teaches that an attorney cannot rely upon his or her own unethical conduct to avoid enforcement of a fee agreement. Instead, the doctrine of unclean hands or in pari delicto, would apply to render a fee agreement unenforceable only where both parties to the agreement must share in the blame.