Why Law Firms Shoul Agreements for Depar *Vance v. Griggs*

BY MICHAEL DOWNEY[1]

Vance v. Griggs[2] interprets Missouri Supreme Court Rule 4-1.5 to allow a lawyer to claim a share in fees earned after the lawyer leaves a law firm. Law firms should therefore consider using separation agreements to ensure departing lawyers cannot make a claim for a share of fees received after the lawyer departs.

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As a lawyer who advises law firms on ethics and risk management issues, I find that law firms frequently fail to document the most fundamental and important transactions. For example, many law firms lack partnership agreements and engagement agreements with some of their most important clients.

This failure to document often becomes more serious when a law firm fails to document the terms on which a partner or other lawyer should leave the firm. Having worked at three firms, ranging from 10 to approximately 500 lawyers, I have never been asked to sign an employment, separation or similar agreement.

Perhaps law firms fail to use employment or separation agreements because they believe that the risks surrounding the departure of lawyers

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are comparatively small. This is false. Experience with law firm separations proves a departing lawyer may cost a former firm a substantial amount in damage to reputation, lost business, and legal fees litigating issues arising from the separation.

Perhaps, instead, law firms believe they cannot do much to encourage good conduct or discourage bad conduct. After all, Missouri Supreme Court Rule 4-5.6 largely prohibits law firms from entering post-employment non-competition agreements with their lawyers. Yet a careful reading of Rule 4-5.6 reveals that, although it prohibits non-compete agreements, it still allows firms to use separation agreements to guide many aspects of a lawyer's departure.

Moreover, the case of *Vance v. Griggs* should serve as a warning to law firms that if the law firm does not document terms for a lawyer's departure, a departed lawyer may have a claim for legal fees received after the lawyer leaves the firm. *Vance v. Griggs* suggests that a 2008 amendment to Missouri Supreme Court Rule 4-1.5 permits a departing lawyer to claim a share of attorney fees for work the lawyer performed while at a firm but received after the lawyer left that firm.

The remainder of this article discusses the law on fee sharing for lawyers, including those who leave a firm, both before and (according to *Vance v. Griggs*) after the 2008 amendment to Rule 4-1.5.

Background on Sharing Fees Among Lawyers

Like the ABA Model Rules of Professional Conduct[3] and the law of most jurisdictions, the Missouri Rules of Professional Conduct – both before and after 2008 – distinguish between fee sharing (a) by lawyers who are all associated in a firm and (b) by lawyers who are not associated in a firm.

Sharing by Lawyers at the Same Firm

When the lawyers who will share in a fee are associated in a single firm, the Missouri Rules of Professional Conduct allow those lawyers to divide and share fees in any manner they want. As long as the total fee the lawyers collectively receive is not "unreasonable," a requirement imposed by Rule 4-1.5(a), lawyers in a law firm may divide fees for legal services without limitation under the Missouri Rules of Professional Conduct.

If two lawyers are associated in the same firm, therefore, they can agree that one lawyer will receive the entire fee, without regard for whether that lawyer does any work for the client. Imagine, for example, that partner Smith and associate Jones work at Smith Law Firm, LLP. They could agree that, if associate Jones originates a matter and performs all legal services on that matter, all fees generated on the matter still go to the Smith Law Firm, LLP and thus to its sole partner Smith. Jones might be paid a fixed hourly wage without regard for whatever fees he originates or earns.

Sharing by Lawyers Not at the Same Firm

When the lawyers are not working in the same firm, fee-sharing arrangements are heavily regulated under Rule 4-1.5(e). Rule 4-1.5(e), as amended January 1, 2008, allows lawyers (or law firms) not associated in a single law firm to share fees only when either (a) the lawyers divide the fees on a proportionate basis, with each lawyer receiving a share that reflects the share of services the lawyer performed on the matter; or (b) each lawyer assumes joint responsibility for the entire matter.

The second requirement, joint responsibility, allows lawyers to agree to a fee split that does not reflect the share of work they will or have done. A referring lawyer can receive a share of the fee, for example, while providing no legal services on the matter. To do so, however, each lawyer sharing in the fee must assume full joint responsibility for the entire matter. This normally includes responsibility and liability both for malpractice and for any ethical issues that may arise in the representation.

The major change that the 2008 amendment to Rule 4-1.5(e) effected is that, regardless of whether lawyers share based upon proportion of work or shared responsibility, the lawyers now

must gain client approval of the fee-sharing confirmed in writing. Missouri Rule 4-1.5(e) requires client approval only of a fee-sharing "association." This differs from the ABA Model Rule, which requires client approval of the "arrangement, including the share each lawyer will receive, and the agreement [must be] confirmed in writing."[4]

Failure to obtain written client approval of a fee-sharing association will cause the fee-sharing arrangement to fail and be unenforceable. Then one lawyer may be able to keep the entire fee, regardless of what the lawyers had previously agreed. In *Eng v. Cummings, McClorey, Davis & Acho, PLC*,[5] for example, the 8th Circuit held that, even when a referring lawyer and lawyer receiving a referral had documented their agreement to share fees, the referring lawyer had no right to a share of fees where the lawyers lacked written confirmation of the client's agreement to the fee-sharing.

When lawyers do not comply with Rule 4-1.5(e), Missouri courts frequently reject lawyers' civil claims to share fees.[6]

Fee Sharing Among Separating Lawyers

Pre-2010 Guidance – Missouri Informal Opinion 2002003

As described above, Rule 4-1.5 has long distinguished fee-sharing among lawyers at a single firm from fee-sharing among lawyers at different firms. Prior to 2008, however, Rule 4-1.5 did not offer any guidance on fee-sharing among lawyers who started at a single firm but then, while a matter was pending, separated into different firms.

Missouri Informal Advisory Opinion 20020003[7] offered the best Missouri guidance, suggesting that fee-sharing could occur when lawyers had been associated at firm but then separated only if the lawyers had satisfied Rule 4-1.5(e). Thus, a lawyer who separated from a firm could only share a fee if the sharing was based upon proportion of work performed or joint responsibility, and adequate client consent was obtained. (Prior to the 2008 amendment, Rule 4-1.5(e) did not require written confirmation of client consent to a proportionate fee-sharing arrangement.)

Informal Advisory Opinion 20020003, the question presented was whether a law firm's partnership agreement could provide that, in the event a partner left the firm and took a contingency fee case with him, "the firm and the departing attorney would each be responsible for fifty percent of the expenses of the litigation until conclusion, and in the event of a recovery, the firm and departing attorney would share the contingent fee on a 50/50 basis."

Informal Advisory Opinion 20020003 opined that the firm and departing lawyer needed to comply with Rule 4-1.5(e). This meant that, under the pre-2008 version of Rule 4-1.5(e) then in effect, the fee-sharing could occur only if (a) the lawyers were to receive shares proportionate to the legal services provided or (b) the lawyers each assumed joint responsibility and the client consented to the fee sharing. (Again, the pre-2008 version of Rule 4-1.5(e) did not require client consent to a proportionate fee-sharing arrangement.)

Current Law – and *Vance v. Griggs*

While making some substantive changes, the 2008 amendments did not add any specific language in the rule about lawyers who separate from a firm. Thus, it seemed fair to presume that Informal Advisory Opinion 20020003 still governed fee-sharing among separating lawyers and required full compliance with Rule 4-1.5(e) for fee-sharing to occur after lawyers separated from a firm.

Vance v. Griggs, however, proved this presumption false by concluding a 2008 addition to the Comment to Rule 4-1.5 demonstrated Informal Advisory Opinion 20020003 was wrongly decided. Contradicting that opinion, *Vance v. Griggs* holds Rule 4-1.5(e) *does not* govern fee-sharing among lawyers who were associated in a firm but then separated.

In *Vance v. Griggs*, three lawyers – Valerie Vance, LeRea Annette Griggs, and David McCollum – were partners in the firm of McCollum, Griggs & Vance, LLC ("MGV"). When forming the new firm, the three lawyers "agreed that they would contribute all works in progress to the new firm and share equally in all expenses and revenues."[8]

Six months later, McCollum and Griggs announced that they were withdrawing from the firm, thus ending their association with Vance. Vance then brought suit against her former partners, *inter alia,* to obtain "her proportionate share of MGV revenues."[9]

McCollum and Griggs sought to dismiss Vance's claims, arguing that, because they were no longer associated, Vance had no right to share in such revenues because she could not aver compliance with Rule 4-1.5(e). The trial court granted the motion to dismiss, apparently because Vance could not and did not plead that the clients had in writing authorized the fee-sharing, a pre-requisite for the non-proportionate, equal sharing that Vance sought. Vance then appealed.

The pre-2008 version of Rule 4-1.5(e) governed the dispute between Vance and her former partners McCollum and Griggs. Thus, we might presume that McCollum and Griggs were right, and that Vance could not share fees because she could not plead compliance with Rule 4-1.5(e).

The Missouri Court of Appeals, however, found it compelling that a 2008 amendment to the Comment for Rule 4-1.5 proved Missouri Informal Opinion 20020003 was wrong, and that separating lawyers did not need to comply with Rule 4-1.5(e).

Included in the 2008 amendments to Rule 4-1.5 was the addition of Comment paragraph [8], which states, "Rule 4-1.5(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." This language was inserted after the fee-sharing agreement at issue in *Vance v. Griggs* was established. But the Western District Court of Appeals found this change applied to both pre-2008 and post-2008 fee-sharing arrangements, and thus the partnership agreement at issue in *Vance v. Griggs*. The Western District explained:

> Because the change to Rule 4-1.5(e) itself was minor, we presume that the comment was added merely to clarify the proper application of the rule and was not intended as a substantive change in the rule. Therefore, the comment may aid our assessment of petitions filed before the rule change took effect, as well as those filed afterward.[10]

Having been so aided, the *Vance v. Griggs* court concluded that Vance did not need to allege compliance with Rule 4-1.5(e) to seek a share of fees based upon the 2008 fee-sharing arrangement. Thus, the *Vance v. Griggs* court reversed and reinstated Vance's claims.

In so doing, the *Vance v. Griggs* court recognized there was no clear authority on how the firm and separated lawyer should divide the fee subject to sharing. Rather, the court notes a presumption that division will be "in proportion to the work performed on each case while [the departing a]ttorney[s were] member[s] of the firm."[11]

In ruling for Vance, the *Vance v. Griggs* court also distinguished *Law Offices of Gary Green, P.C. v. Morrissey*.[12] *Law Offices of Gary Green v. Morrissey* had found a post-separation fee-sharing arrangement that lacked client consent was unenforceable.[13] The *Vance v. Griggs* opinion noted that the fee-sharing agreement had been made after the lawyers had ended their association, and thus was not addressed by Rule 4-1.5 Comment [8].[14]

B. The Lesson of Vance v. Griggs – and Need for Separation Agreements

Vance v. Griggs offers interesting guidance on how modifications to the Comments of the Rules of Professional Conduct may influence the propriety of conduct that occurred prior to such modifications.

Yet, such an insight is minor compared to the warning it should provide to law firms about fee-sharing among lawyers where the work is done while the lawyers are associated, but the fee is received after the lawyers separate. For cases arising after 2008, *Vance v. Griggs* explains the effect of Comment [8] as follows: "[I]t is clear that any attorney's fees and costs which could properly be attributed to *work* that a departing attorney had *done prior to the separation* would not be subject to the requirements of Rule 4-1.5(e)."[15] In other words, if a lawyer has done work on a matter before he or she leaves a firm, and the firm then receives a fee

after the lawyer has left the firm, the lawyer may have a claim to share in such fees *based upon the work done while at the firm.*

Vance v. Griggs does not analyze when a lawyer would and would not have such a claim. Experience with law firm operations, however, suggests the scenarios will fall into the following grid, based upon (a) whether the firm typically paid the now-separated lawyer a share of fees received on cases the lawyer handles and (b) whether the law firm and separating lawyer had an agreement regarding post-separation fee sharing.

Table 1 – Should separating lawyer have valid claim to post-separation fee-sharing?

	History of sharing fees	No history of sharing fees
Agreement to share	Yes	Yes
No agreement	Unclear but likely	Unclear but less likely
Agreement not to share	No	No

As Table 1 indicates, the only way a firm can be certain of the outcome for a claim for post-separation fee-sharing is to have in place an agreement that governs such fee-sharing. The agreement might be included in a partnership agreement or in a free-standing employment agreement entered into when the lawyer joins or is working at the firm.

Alternatively, the firm and a departing lawyer may employ a separation agreement to govern terms of separation.

Failure to enter an agreement governing post-separation fee sharing – and to make such an agreement effective, for example by failing to provide consideration (such as severance benefits) – may allow a departed lawyer to haunt his or her former firm for a share of fees.

Conclusion

Carefully documenting relationships is often an effective way to regulate risks. *Vance v. Griggs* should provide law firms a potent reminder that they should consider documenting separation terms for lawyers who are leaving or may leave the firm, and who may leave behind work for which they can claim a portion of fees the firm may later receive.

Endnotes

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2 324 S.W.3d 471 (Mo. App. W.D. 2010).

3 *Client-Lawyer Relationship,* Rule 1.5 Fees, Model Rules of Professional Conduct (American Bar Association 2010) .

4 ABA Model Rule 1.5(e)(2).

5 611 F.3d 428 (8th Cir. 2010).

6 *See, e.g.*, *Neilson v. McCloskey*, 186 S.W.3d 285 (Mo. App. E.D. 2005).

7 *Available at* http://www.mobar.org/mobarforms/opinionResult.aspx?rule=1.5.

8 324 S.W.3d at 473.

9 *Id.*

10 324 S.W.3d at 477 n.4.

11 325 S.W.3d at 476 (citing Missouri Informal Advisory Opinion 20000219).

12 210 S.W.3d 421 (Mo. App. S.D. 2006).

13 *Id.* at 425.

14 *Vance*, 324 S.W.3d at 475.

15 324 S.W.3d at 475 (emphasis in original).