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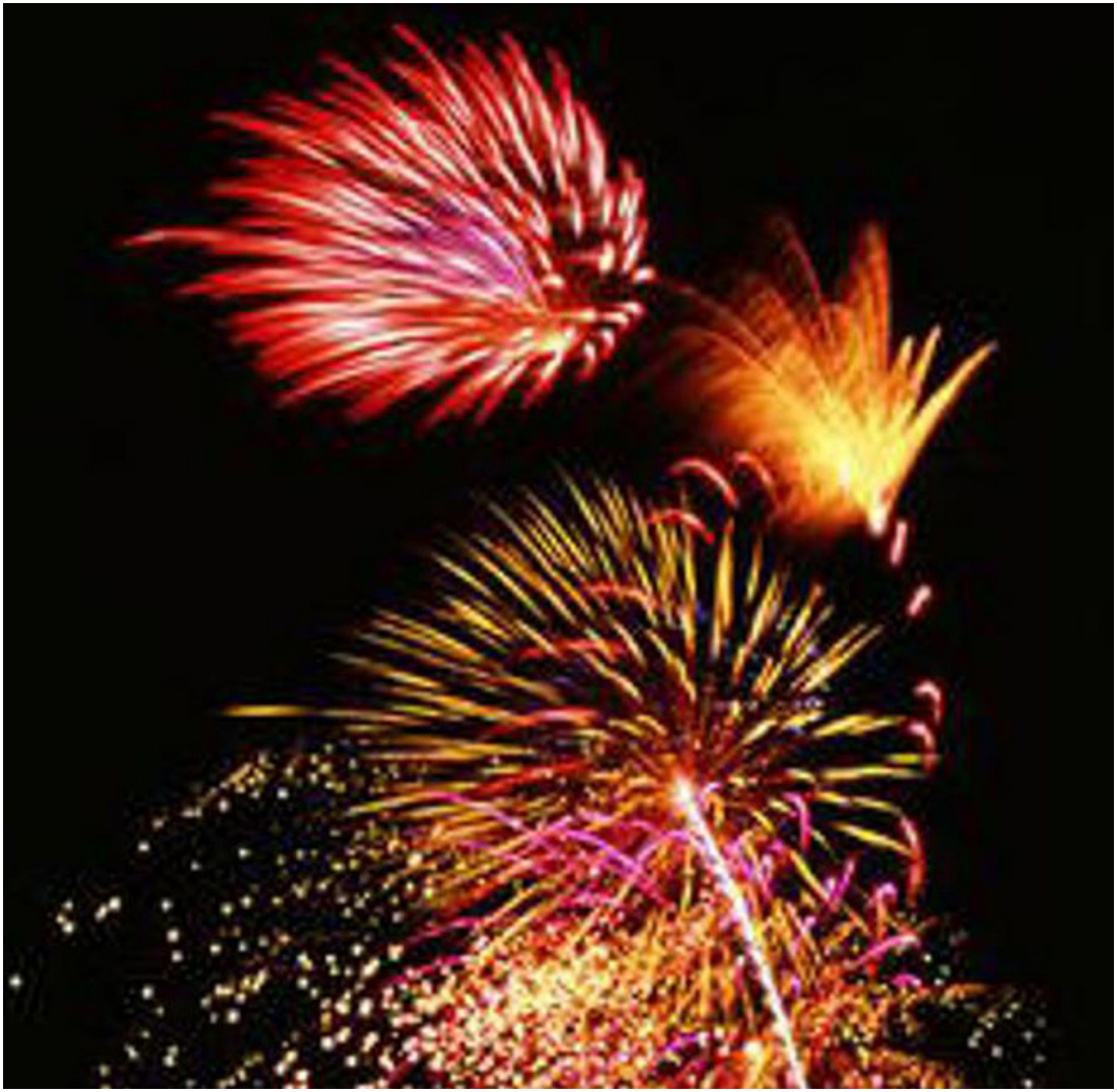


APPEALS COURT AFFIRMS A LAWYER'S LICENSE TO STEAL!

(SPLITTING FEES REQUIRES WRITTEN CONSENT, SOMETIMES)

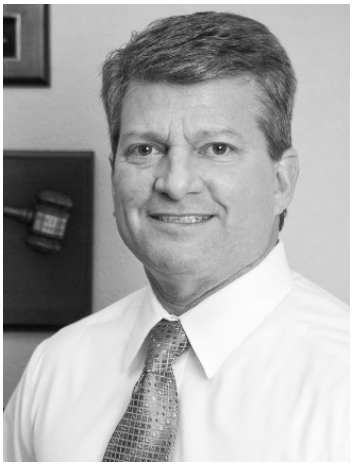
By Russell Kohn, Esq.

One great aspect of having a license to practice law is the ability to profit from referral fees. Attorney fees can only be split between attorneys! (Well, there is an exception for Lawyer Referral Services, which will be discussed later.) In particular, personal injury cases can yield huge referral fees.

Being a personal injury attorney, I am fortunate to routinely be referred injury cases from other attorneys who do not handle injury cases. I always have the client promptly sign a written consent to the fee split with the referring attorney. Most often, I refer to it in my written retainer agreement, so there can be no doubt it was agreed to by the client. California Rules of Professional Conduct, rule 1.5.1, which became operative on November 1, 2018, requires that fee split agreements between lawyers be in writing and that clients consent to the division after full disclosure at or near the time the lawyers enter the fee split agreement. 1 A fee-sharing agreement between attorneys is unenforceable as against public policy if the client did not give this informed, written consent to the fee-sharing agreement. (*Chambers v. Kay* (2002) 29 Cal.4th 142, 147-161.) An unscrupulous lawyer might purposely fail to get the client's written consent and then later claim lack of compliance with the rule to weasel out of the obligation to the referring attorney. That would be stealing, you say!

Well, in March such stealing was sanctioned by the California Third District Court of Appeals. In *Reeve v. Meleyco*, (2020) 46 Cal.App.5th 1092, the Court of Appeal reversed a judgment in favor of an attorney for breach of a written referral fee agreement pertaining to a large personal injury case. The appellate court concluded that the client's written acknowledgement that he received and understood a letter explaining that the referral fee would not come from the client's percentage of any settlement did not constitute written consent to the referral fee agreement under former California Rules of Professional Conduct, rule 2-200. That's right - the bad lawyer won and got to keep the entire personal injury contingency fee!

The underlying case involved a tragic traffic accident in which James Luoma's wife died and his daughter was seriously injured. Luoma contacted his attorney friend Robert Reeve. Attorney Reeve then brought his friend's case to a more seasoned personal injury attorney Kenneth Meleyco, who agreed to pay Reeve a referral fee of 25% of the eventual attorney contingency fee. Such fee split arrangements were common in Meleyco's law practice. In fact, Meleco boasts on his website that "Over the past 30 years, the Meleyco Law Firm has had well over 50% of our cases referred by other lawyers. Our office has paid out millions of dollars in co-counsel and referring fees." As will be shown, Meleyco was either intentionally stealing from Reeve or he was grossly incompetent in failing to obtain proper written client consent.



Reeve and his friend met with Meleyco and they discussed the fact that Meleyco would pay to Reeve the referral fee, but Meleyco's written retainer agreement that Luoma signed did not reference the referral fee. Nevertheless, Meleyco eventually confirmed the fee split agreement in letters to both Reeve and the client. In Meleyco's letter to the client, he explained that the fee split did not increase the fee to the client, and at the bottom of the letter was typed: "I, JAMES G. LUOMA, acknowledge receipt of this letter and understand the contents." Luoma signed this acknowledgement. Luoma testified at trial that his signature meant that he agreed to the fee split arrangement. I presume that Meleyco testified the same way, since he had drafted the letter.

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In 2007, Luoma and his daughter settled with one defendant for $3,375,000. But Luoma was dissatisfied with the low amount of his up front cash recovery after deducting for attorney fees, costs, and the more than $1 million in annuities for his daughter. The proposed attorney fees included a referral fee of $177,187.50 to Reeve. To give Luoma more cash from the settlement, Meleyco and Luoma schemed to reduce Reeve's referral fee to $20,000. Meleyco sent Reeve a check for $20,000, indicating it was a referral fee amount that Luoma deemed appropriate. Reeve never negotiated the check. However, this referral fee is not at issue here because the jury found that Reeve had filed suit after the statute of limitations period had run.

Then in 2011, Luoma and his daughter settled with a second defendant for $900,000. Meleyco pocketed the entire $315,000 in attorney fees. In the trial court, the jury reached a verdict in favor of Reeve for $78,750, based on both the breach of contract and the quantum meruit causes of action. On Reeve's motion, the trial court awarded Reeve $49,364.35 in prejudgment interest. The trial court denied Meleyco's motion for new trial or for judgment notwithstanding the verdict, stating that "the jury got it right!"

The Court of Appeal sided with Meleyco's position that Reeve cannot recover for breach of contract because Luoma did not provide written consent for the referral fee agreement. Unfortunately, no mention is made in the opinion to the fact that it was Meleyco's own negligence that produced this result, or why that isn't a valid basis to uphold the breach of contract verdict. Let's face it, Meleyco breached his duty to obtain necessary written client consent! Sometimes I think judges can't see the forest for the trees.

Here is the law governing the case. Former rule 2-200(A) provides that "A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless: [¶] . . . [t]he client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division . . . ." As previously noted from the Chambers case, a fee-sharing agreement between attorneys is unenforceable as against public policy if the client did not give this informed, written consent to the fee-sharing agreement.

On the issue of consent, the Court of Appeal chose to base its ruling on definitions from the Oxford English Dictionary. The opinion states, "Consent is different from disclosure or receipt, and it is also different from understanding. Disclosure is the "action of making something openly known . . . ." (Oxford English Dict. [as of Mar. 18, 2020].) Receipt refers to "[s]omething received . . . ." (*Id*. at [as of Mar. 18, 2020].) Understanding is "[t]o comprehend; to apprehend the meaning or import of; to grasp the idea of." (*Id*. at [as of Mar. 18, 2020].) Whereas consent is a "[v]oluntary agreement to or acquiescence in what another proposes or desires . . . ." (Id. at [as of Mar. 18, 2020].) Written consent requires written words expressing agreement or acquiescence, not just words expressing receipt or understanding. Luoma's acknowledgement was deficient in this regard."

The Court of Appeal also found no ambiguity in the writing that would allow for clarification through the extrinsic evidence of the testimony of Luoma. Finally, the court held that Reeve's quantum meruit theory violated the the two year statute of limitation. (Code Civ. Proc., § 339; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996.)

Reeve has filed a Petition for Review by the California Supreme Court. In his petition he points to the statutes and case law that the Court of Appeal ignored pertaining to the issue of consent. The current Rules of Professional Conduct Rule 1.0.1 defines "informed consent" and "informed written consent" as follows:

(e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

(e-1) "Informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing. (asterisks omitted.)

This definition is consistent with former Rule 3-310 of the Rules of Professional Conduct, which defined "Informed written consent" for purposes of avoiding conflicts of interests as "the client's or former client's

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written agreement to the representation following written disclosure." (Rule 3-310(A)(2).)

This definition was interpreted by the *Second District in Sharp v. Next Entertainment Inc.* (2008) 163 Cal.App.4th 410 such that written acknowledgement sufficed. In that case, "[e]ach of the 21 employees signed a conflict waiver acknowledging that the Guild would subsidize the attorney fees for the two class action lawsuits and that the firm represented the Guild in other matters." (Sharp, supra at p. 418, emphasis added.) Furthermore, "the Guild signed a conflict waiver acknowledging that it would not interfere with the independent professional judgment of plaintiffs' counsel and memorializing the fact that plaintiffs and not the Guild controlled the litigation." (*Id.* at p. 420, emphasis added.) The Second District held these "were effective conflict waivers and thus, the trial court did not err in declining to disqualify the entire Rothner firm." (*Id*. at p. 424.)

Although the exact language of the waivers was not set forth therein, the Sharp opinion described them as merely acknowledging that the firm would be representing the employees and the Guild would be paying the fees. It was the parties' awareness of the arrangement and acknowledgement thereof that constituted consent. The opinion states:

"Here, all plaintiffs, who were the named representatives of the putative classes, were fully aware of all conflicts, which they waived. Plaintiffs signed conflict waiver forms in which they acknowledged that the Guild was paying for the litigation. Plaintiffs knew that the Rothner firm represented the Guild. Plaintiffs were adamant that they would control the outcome of the litigation and would decide the outcome of the case. The Guild signed a conflict waiver acknowledging that it would not interfere with the independent judgment of plaintiffs' counsel and memorializing that plaintiffs, and not the Guild, controlled the litigation. Pursuant to court order, plaintiffs were informed that the proper goal of the litigation was not to facilitate the Guild's unionizing activities, and plaintiffs provided written consent acknowledging that they had been so informed." (Sharp, supra at p. 431, emphasis added.)

Based on the parties' awareness of the arrangement and their written acknowledgements thereof, the Second District held that "The Guild and plaintiffs provided written consent to the trial court's order." (Ibid.)

That Court went on to explain:

"Thus, all clients who were directly affected by any purported conflict, the Guild, and all plaintiffs, were fully apprised of any potential conflicts of interests, understood the role of the Rothner firm, the aim of the litigation, and who was to control the litigation. The clients (the Guild and plaintiffs) understood the relevant circumstance and the actual and foreseeable consequences of the Rothner firm's simultaneous representation of them. The written waivers demonstrated that the Guild and plaintiffs understood and acknowledged the presence of all purported conflicts of interests and the material risks of continued representation by the Rothner firm. Plaintiffs and the Guild made rational choices armed with full disclosures and provided informed written consent to the simultaneous representation by the Rothner firm." (Sharp, supra, at p. 431.)

The Second District reiterated, "In order for there to be valid consent, clients must indicate that they "know of, understand and acknowledge the presence of a conflict of interest...." (Sharp, supra, at p. 429, citing *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240, 1255.)

A similar definition of written consent can be found in Antelope Valley Groundwater Cases (2018) 30 Cal.App.5th 602, 617-618. As the Fifth District stated therein, "Once the client has been provided with sufficient information about the situation, the client can make a rational choice...based upon full disclosures as to the risks of the representations, the potential conflicts involved, and the alternatives available as required by the particular circumstances." *(Id.* at pp. 617-618, citing Sharp, supra, 163 Cal.App.4th at p. 430.)

Another decision regarding "written consent" to a fee-sharing agreement is *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 320, wherein the Second District reviewed a letter that a client had written to the California State Bar, withdrawing his complaint against an attorney (plaintiff Cohen), who was seeking a portion of the contingent fee earned by the client's attorney of record (defendant Brown). In that letter, the client

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preme Court. Hopefully, they will take it up and reverse it or at least depublish it.

[1] Under current rule 1.5.1 of the State Bar Rules of Professional Conduct (superseding former rule 2-200 as of November 1, 2018), the client-consent element of a fee sharing agreement requires that "the client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms that are parties to the division; and (iii) the terms of the division." (Rules Prof. Conduct, rule 1.5.1(a)(2).)

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