

PROFESSIONAL LIABILITY UPDATE

FEE SHARING

By Jennifer A. Becker

***Brown v. Grimes* (2011) 192 Cal.App.4th 265**

The Second District holds that under basic contract principles, a referring attorney's breach of his agreement to pay the source of his referrals was a breach of the fee sharing agreeing and disallowed recovery. In addition, neither the referring nor the accepting attorney could enforce a fee sharing contract that did not comply with the ethical rules of California or the state where the underlying action was litigated.

Non-attorney Paul Ross referred James Brown some Texas personal injury cases. Milton Grimes agreed to handle the cases and share the fees with Brown. Grimes agreed to pay Brown a high percentage with the understanding that Brown would compensate Ross. The clients signed Grimes's fee agreement addendum acknowledging the Brown fee division, but no percentages were stated.

Grimes performed most of the legal services and considered Brown as a referrer of clients. Ross acted as the "project coordinator," and performed numerous services.

Grimes sent Brown his share of the fees as the first few cases settled, but ceased doing so after a dispute erupted over Ross's conduct. Brown did not pay Ross out of the fees he received, and denied he agreed to share fees with Ross. Ross asserted Brown had agreed to pay him ninety percent of the fees. Grimes set aside the disputed amount in trust.

Brown and Grimes filed cross-complaints against each other on contractual theories. Ross sued both Grimes and Brown. Grimes settled the Ross dispute by agreeing to pay a sum from the money in trust for Brown.

The trial court ruled in limine that Texas law governed the fee sharing agreement. At a bench trial the judge found Grimes more credible and held Brown could not enforce the fee sharing agreement because he breached the condition that he pay Ross. In addition, Brown had unclean hands as a result of his fee-splitting agreement with a non-lawyer, a violation of both the California Rules of Professional Conduct and the Texas Disciplinary Rules. Further, the terms of the agreement had not been fully disclosed properly to the clients, as required by Texas law.

On the cross-complaint, Brown was ordered to return the fees Grimes had already paid to him, less a stipulated amount for the value of his services under *quantum meruit*. The trial court also concluded the settlement agreement between Ross and Grimes resolved Ross's claims against Brown.

The Court of Appeal agreed with the trial court's application of California law, which mirrored Texas law, to the issue of Grimes's contractual obligation. A key term of the Grimes-Brown agreement was Brown's oral agreement to pay Ross. Brown breached this agreement when he did not compensate Ross or acknowledge his obligation to do so. The Court of Appeal would not disturb the

trial court's factual finding that Brown's reasons for not paying Ross or acknowledging an obligation to do so were unpersuasive.

Basic contract law dictates that when one party fails to perform a contractual obligation, the other party may be discharged from its duty to perform. Whether an obligation is material is largely question of fact. The trial court's determination that Brown's refusal to pay Ross was a material breach was supported by substantial evidence.

Brown asserted that breach of his obligation to pay Ross could be addressed by paying damages to Grimes, not requiring Brown to forfeit his fee. Whether a promise is an independent covenant, so that breach does not excuse the other party's performance, is based on the intention of the parties as deduced from the agreement. The trial court resolved this factual question against Brown. As a result of Brown's breach, Grimes expended attorneys' fee and paid money to settle Ross's claims.

The Court of Appeal reversed the trial court's decision that Brown pay restitution for the amounts Grimes had already paid under the fee sharing agreement. Restitution is an appropriate remedy when there has been a total breach, that is, total failure of consideration or repudiation. Grimes received consideration: the referral of cases worth millions of dollars in fees. Brown breached only a portion of the agreement by not paying Ross. Brown's non-performance did not pertain to the referral of cases, the essence of the contract. Brown provided the contingent-fee opportunity to Grimes, giving Grimes consideration that cannot be restored. Restitution would bear no relationship to restoring Grimes to his position before the contract was made and would provide Grimes with an added windfall.

The Court of Appeal did not agree with Grimes's contention that the unclean hands doctrine precluded Brown from enforcing his agreement due to Brown's fee sharing with Ross, a non-lawyer. To deny relief to a party under the unclean hands doctrine, the improper conduct must be in the particular transaction or connected with the subject matter of the litigation. Brown's agreement with Ross, although related to the transaction, is attenuated from the Grimes-Brown agreement. The Ross agreement did not directly affect or infect the

relationship between Grimes and Brown and was not inequitable conduct towards Grimes.

Moreover, it would not be inequitable to enforce the executed portion of the Grimes-Brown agreement notwithstanding the Brown-Ross agreement. Grimes knew of Ross's activities and his agreement with Brown before Grimes was compensated. Grimes actually benefitted from the Brown-Ross agreement.

Under Texas law, the agreement between Grimes and Brown was unenforceable because the clients did not consent to the fee sharing agreement at the outset of the representation. This differed from California law where clients can agree to fee sharing after some services have been rendered, but prior to payment of any fee. Under both California and Texas law, a party cannot enforce a fee-sharing agreement that is invalid under state disciplinary laws. Thus Grimes was not entitled to recover money already paid to Brown.

A dissenting justice would not have discharged Grimes from his duty to perform under the agreement. Grimes, the attorney who collected the fees on behalf of the clients, breached the fee sharing agreement when he withheld Brown's share of fees. When Grimes settled with Ross using the disputed Brown fee in his trust account, Brown's obligation to Ross was resolved. Thus, Grimes's ability to retain the remaining fees set aside for Brown in his trust account provided him more than he had bargained for.

Comment: This case illustrates the importance of appreciating the ethical rules pertaining both to California Practice and whichever jurisdiction governs the matter. Here a fact determination conferred on Grimes a benefit he did not bargain for, and deprived Brown the benefits of the agreement. The importance of strict compliance with ethical rules is a theme repeatedly emphasized in reported decisions.