

The Professional Liability Law Blog

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INSURANCE PROFESSIONALS, ACCOUNTANTS AND STOCK BROKERS



[Olsen v. Harbison: Litigation Privilege Bars Fee Claim by One Co-counsel Against the Other](#)

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The California Court of Appeal has published another decision pertaining to the division of fees between attorneys who jointly represent a client. On this occasion, the Court of Appeal held that one of the attorneys was not required to share the fee with the other attorney who had been fired by the client.

A client retained an attorney to represent her in a personal injury action. After filing the action, the attorney engaged another lawyer to help him prosecute the case. The client signed a fee agreement acknowledging the agreement between the attorneys as to how they would split the fees. Shortly thereafter, the client fired her initial lawyer. The second lawyer prosecuted the case to a settlement of \$775,000, whereupon the initial lawyer sued his former co-counsel for his share of the fees.

The trial court rejected each theory alleged by the aggrieved attorney, which included quantum meruit, breach of contract, fraud and deceit, intentional interference with contractual relationship and imposition of constructive trust. In an opinion ordered published on December 28, 2010, the California Court of Appeal (Third Appellate District) affirmed in all respects. [Olsen v. Harbison](#), 10 C.D.O.S. 16041.

As to the quantum meruit claim, the Court of Appeal held that any such claim should have been brought against the client, as the services at issue were rendered to the client, not the co-counsel. Although there have been cases approving a quantum meruit action between co-counsel, that was in situations in which the client had not approved the fee agreement. When the client had in effect a direct relationship with both lawyers and had approved their fee agreement, a claim for quantum meruit must be directed against the client.

The Court of Appeal affirmed dismissal of the attorney's claims for fraud and deceit due to California's litigation privilege, set forth in California Civil Code Section 47 (b), which provides that statements made in the course of judicial proceedings are absolutely privileged. The privilege has been extended to statements made prior to or in conjunction with litigation. The policy behind the privilege is to protect litigants and their counsel from litigation ancillary to the primary proceeding. It protects against all claims with the sole exception of malicious prosecution. The Court of Appeal held that the communications between the two lawyers which formed the basis for the fraud claim were made in conjunction with the pending personal injury litigation and for the purpose of assisting the client. Thus, any claim based on them was barred by the litigation privilege.

The litigation privilege likewise barred the claim for interference with contractual relations. As to the plaintiff attorney's breach of contract claim, once the client discharged the attorney, the agreement between the two lawyers was extinguished as it was predicated on the agreement with the client. Furthermore, as the litigation privilege barred all claims but for malicious prosecution, the plaintiff lawyer could not obtain through a contract claim that which he was precluded from seeking by means of a tort claim. In short, the plaintiff attorney had no viable remedy against his co-counsel; his only source of recourse was to pursue his former client.