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PERSPECTIVE

A New Judicially Created Privilege For Lawyers?

Good news for lawyers: In *Freedman v. Brutzkus*, 2010 DJDAR 3763, a case "of first impression," the 2nd District Court of Appeal has ruled that there is no "actionable representation" by an attorney to the other side when an attorney signs an agreement stating "approved as to form and content." Given that many settlement agreements contain just such an endorsement, it is no surprise that the Association of Southern California Defense Counsel filed an amicus brief urging such a result. Every lawyer should now breathe a sigh of relief for all those controversial settlement contracts or somewhat ambiguous agreements they approved as to form and content. But if this ruling eliminates third party liability for a lawyer's signature approving an agreement's form and content, then what in the world does it mean when attorneys affix their signatures on the document?

TIM REUBEN specializes in business, real estate and intellectual property litigation and is founder and managing principal of Reuben Raucher & Blum in Westwood. He is also President of the SoCal Business Litigation Inn of Court.

In the predecessor lawsuit, which led to this unfortunate dispute between two lawyers, Gary Freedman was counsel to an apparel manufacturer, Teddi, and represented Teddi in 2002 in negotiating an agreement with another clothing business, Carol Anderson Inc. (CAI). Freedman had served as CAI's counsel prior to 2000, and had initially proposed to CAI that he withdraw and not represent Teddi in this negotiation. But CAI did not object to Freedman's adverse representation and agreed to waive any conflict. In fact, the final agreement expressly recited that Freedman represented only Teddi in the negotiations; that CAI consented; and that all conflicts were waived. Mark Brutzkus, who represented CAI, signed the contract approving both its form and content.

However, unbeknownst to Freedman and contrary to the terms of the agreement, CAI really was relying on Freedman in entering into the contract. Brutzkus testified that his client told him that it was signing based on CAI's "longstanding professional relationship" with Freedman, but Brutzkus never told Freedman that fact — instead Brutzkus expressly approved the content of the contract, which inaccurately stated the opposite. When Teddi ultimately breached the agreement and declared bankruptcy, CAI then sued Freedman, claiming he had represented CAI despite the explicit statements and waivers in the agreement. Freedman litigated the matter, which was ultimately settled by his malpractice carrier. Freedman then sued Brutzkus for fraud based on his "approval as to form and content." The trial court sustained the demurrer without leave to amend and Freedman appealed.

Justice Norman L. Epstein, one of our most esteemed and talented appellate court justices, wrote for a unanimous court that the recital only indicates that "an attorney has advised or is advising his own client of the attorney's approval...and does not operate as a representation to an opposing party's attorney..." Frankly, this holding does seem to make the attorney's signature utterly superfluous to the opposing side — and we know it is not. The attorney approval clearly means something to the opposing parties and many agreements would not get made if the attorney refused to sign off on them. And clearly such a sign off cannot only mean that the other side was represented — indeed, there is often an express recital in the agreement that each side has had the opportunity to consult an attorney of his choice. Based on the plain meaning of the words, the lawyer signature approving "as to form and content" would appear to mean much more.

It has long been debated what approval 'as to form and content' means and whether it puts an attorney on the hook, and many attorneys have frequently refused to sign such an acknowledgment because of that uncertainty.

Justice Epstein opined that the only "reasonable meaning" is that the lawyer is acknowledging that " he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties." Isn't that a representation to the other side? And presumably it is an important representation — the other side wants an opponent's attorney acknowledging the document correctly describes the deal. Freedman relied on Brutzkus affirming along with CAI that the acknowledgment that he only represented Teddi was true and correct. Certainly if a party later claims that the signed written agreement was a mistake or a fraud, the attorney's approval can be pointed to as evidence to the contrary. So why shouldn't the lawyer be held to his representation that the written agreement correctly embodies the deal if his client has told him otherwise? Why is this not a case where the lawyer has misled the other side?

The court's analysis is certainly inconsistent with authorities cited in the opinion involving civil liability of attorneys for making false representations on behalf of their clients. In *Shafer v. Berger Kahn, et al*, (2003) 107 Cal App 4th 54, the court held that lawyers representing insurers can be liable for false representations about insurance coverage to the insured, because an attorney's deceit about coverage "undermines the administration of justice." The *Shafer* court went on to state: "A misrepresentation can occur through direct statement or through affirmation of a representation of another, as when a lawyer knowingly affirms a client's false or misleading statement." Isn't that just what Brutzkus did? And other cases have also held that attorneys can be liable to third parties by making misrepresentations. *Vega v. Jones, Day et al.* (2004) 121 Cal App 4th282 (lawyers liable for concealment of toxic stock provisions and providing false disclosure schedule); *Cicone v. URS Corp.* (1986) 183 Cal App 3d 194 (lawyer liable for making false statement to induce closing a transaction). One has trouble logically distinguishing the jurisprudence of those cases from the instant one.

Here Freedman apparently followed the conflict rules in obtaining written waivers — but he was sued anyway. Sadly, following the rules does not insulate an attorney from a client filing a specious lawsuit. Brutzkus' conduct however is more problematic. Certainly Brutzkus was bound by the rules to maintain client confidentiality and could have committed an ethical breach by telling Freedman what his client had said about reliance on Freedman. On the other hand, Brutzkus could have just approved only as to form but not as to content, and to this extent, Freedman was justified in feeling misled. Regardless, the Court has now determined that this misrepresentation is simply not actionable.

This case thus constitutes a kind of judicially created absolute privilege for attorneys — one that is akin to Civil Code Section 47(b), the litigation privilege that is also absolute. The Court's holding does not follow logically from existing law but it appears to be implicitly based on an unspoken policy decision by the Court, limiting the potential exposure of attorneys. It has long been debated what approval "as to form and content" means and whether it puts an attorney on the hook, and many attorneys have frequently refused to sign such an acknowledgment because of that uncertainty. Other lawyers have likely signed such an approval without a second thought, believing such approvals were standard boilerplate of no particular import. Now thanks to this case, attorneys just need to worry about their own clients when they have signed such a statement — third parties have no claim. This round goes to the lawyers.

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REUBEN RAUCHER & BLUM PC
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Reuben Raucher & Blum is a litigation boutique in Westwood. The firm's practice focuses on trial and appellate work including business, real estate, construction, intellectual property, entertainment, insurance, unfair competition and family law, including custody, support and valuation.