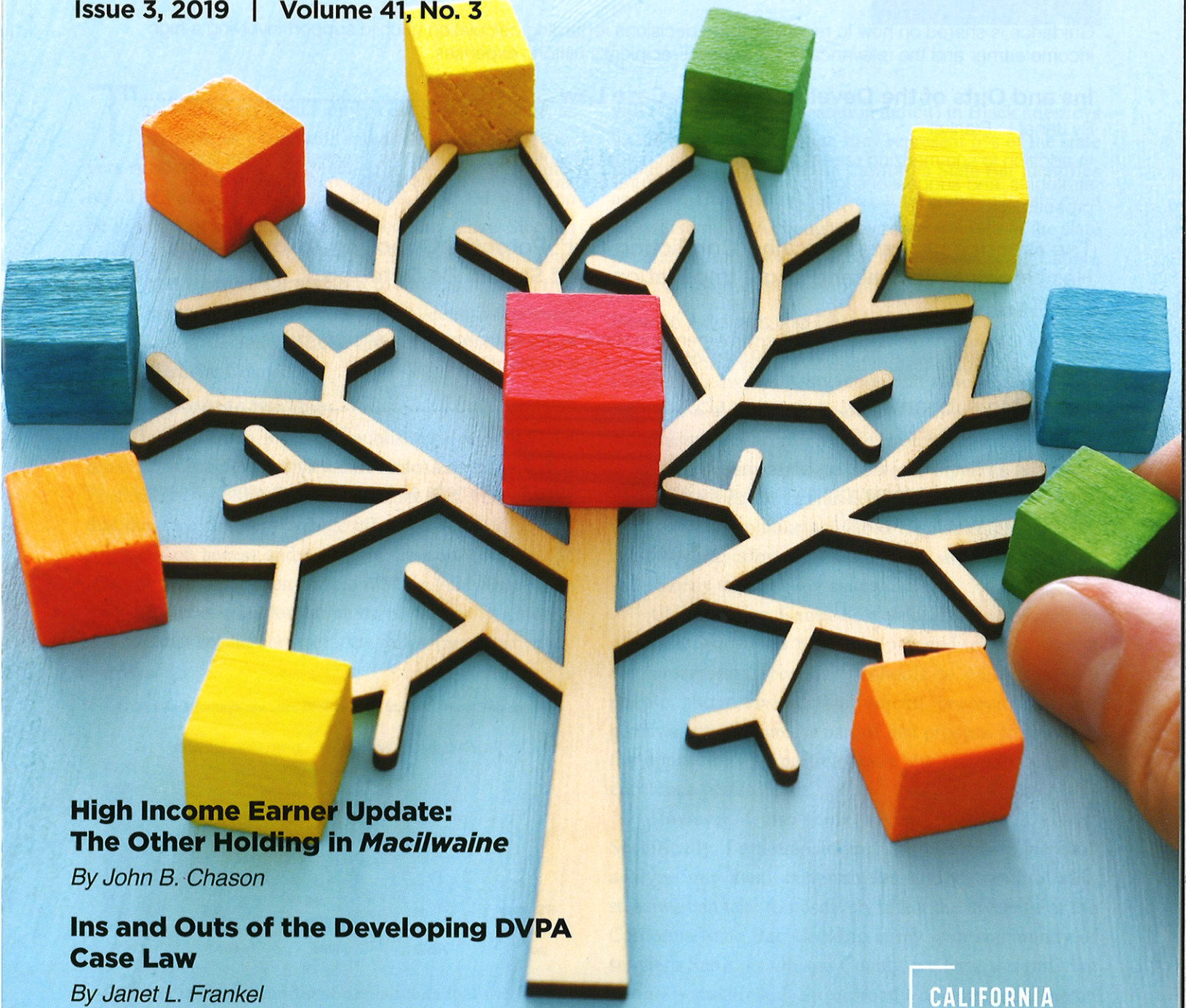
CALIFORNIA LAWYERS ASSOCIATION

FAMILY LAW NEWS

Issue 3, 2019 | Volume 41, No. 3



High Income Earner Update: The Other Holding in *Macilwaine*

By John B. Chason

Ins and Outs of the Developing DVPA Case Law

By Janet L. Frankel

Leave Me A Loan

By Justin O'Connell

CALIFORNIA LAWYERS ASSOCIATION

The Practice of Systematically "Conflicting Out" Potential Opposing Attorneys Has Negative Ethical and Legal Implications and Should Be Deterred

Jill Hersh, CFLS[1]

Jill Hersh has been a member of the Bar since 1978. She is the managing attorney for the Hersh FamilyLaw Practice, a trial and appellate family law firm. She is a fellow of the International Academy of Family Lawyers and the American Academy of Matrimonial Lawyers and is the 2006 recipient of the CLAY award for her work in Family Law. Jill is a Certified Family Law Specialist whose firm specializes in complex family law matters, ranging from complex and high asset matters to same-sex and high conflict parenting disputes. Jill has argued before the Supreme Courts of California and Vermont and was the lead trial and appellate lawyer in the published appellate decisions, *In Re Guardianship of Olivia J* and *Marriage of de Guigne*, and the published Supreme Court decisions, *Estate of MacDonald* and *K.M. v. E.G.* She has written articles and is an instructional speaker in Family Law and serves as a private and pro tem settlement judge.

I have noticed a proliferation of instances in which a potential client has been unable to find an attorney of her/his choice "in county" because virtually "everyone" has been "conflicted out" by her/his spouse. This precludes the potential client's ability to find a suitable lawyer in her/his county of residence, creates unnecessary and added duress finding counsel, and also deprives attorneys of clients. In some instances, this may constitute interference with access to counsel if a hearing date is imminent.[2]

The purpose of this article is to explore the current ethical and legal environment surrounding the formation of the attorney/client relationship and the attempt to disrupt the other party's ability to form that relationship.

This article is not intended to challenge the entitlement of a potential consumer of legal services to interview several attorneys to obtain information or determine her/his choice of counsel. It is intended to challenge the legitimacy of the opposing party's rights and conduct when such a critical mass of attorneys has been conflicted out that it gives the appearance of bad faith on the part of the opposing party. For example, I recently was contacted by a potential client who called 19 attorneys in her county and found that all of them were "conflicted out" and could not speak with her. The attorney whom her spouse eventually did hire was not one of those 19 and not located in their county of residence.

Attorneys generally advise against contesting Motions to Disqualify because of the attendant costs and delay. Perhaps this advice is also given because lawyers usually do not have a very thorough understanding of the actual law underlying the questions: "Who is a true 'prospective client?'" and "Has privilege actually attached?" We should rethink this under suspicious circumstances. It would be a potential deterrent to this bad faith behavior if we conducted targeted discovery (at our own cost), before deciding whether or not to withdraw or oppose the motion. It may even amount to sanctionable conduct should discovery disclose a pattern of behavior sufficiently egregious to constitute a breach of fiduciary duty—perhaps of a magnitude to constitute extrinsic fraud.

Based upon a review of the law, Rules of Professional Conduct, ethics opinions, and judicial policy statements on this issue, I have concluded the following:

- A person who consults an attorney when it is not a good faith consultation "for the purpose"

of potentially engaging that attorney's services is not protected by the attorney/client privilege because she/he is not a "prospective client".

- The attorney(s) who is(are) consulted for these bad faith ulterior reasons has not received confidential information because the interview was not "for the purpose" of potential engagement, and that attorney should not be "conflicted out" of representing the opposing party.
- An attorney who advises a client to conduct interviews of potential opposing counsel for the ulterior purpose of "conflicting out" those attorneys commits a reportable State Bar violation.
- An individual who conducts the interviews for the ulterior purpose of "conflicting out" an attorney and then brings a motion to disqualify that attorney may be sanctioned for a breach of fiduciary duty.

Definition of a true "prospective client" under Evidence Code section 951 and Rule of Professional Conduct 1.18

Evidence Code section 951 defines a "client" for the purpose of establishing the attorney/client privilege, and states: "A...."client" means a person who directly or through an authorized representative, consults a lawyer **for the purpose** of retaining the lawyer or securing legal services or advice from him in his professional capacity..." (emphasis added)

This language is consistent with new Rules of Professional Conduct, rule 1.18, which went into effect November 1, 2018, entitled "Duties to Prospective Client". Rule 1.18 defines a "prospective client" for purposes of regulating attorney conduct respecting duties of loyalty and confidentiality. The text of the Rule integrates the Evidence Code's codified standard for imbuing a person with the rights and protections of a "prospective client" by integrating "for the purpose of", stating: "(a) A person who, directly or through authorized representation, consults a lawyer **for the purpose** of retaining the lawyer or seeking legal services or advice from the lawyer in the lawyer's professional capacities, is a prospective client. (emphasis added)

However, the State Bar, giving expression to ABA policy,[3] excludes from protection those persons who consult an attorney with an ulterior purpose. State Bar Comment [2] to Rule 1.18 states:

> ...not all persons who communicate information to a lawyer are entitled to protection under this rule." A person "who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a 'prospective client' within the meaning of Paragraph (a).[4]

There are legal and ethical consequences for attorneys who directly or indirectly engage in the bad-faith "conflicting out" of potential opposing counsel:

An attorney who suborns a client's bad faith consultations in order to disqualify particular attorneys violates State Bar Rule 8.4, "Misconduct", effective November 1, 2018, which in part states:

> It is professional misconduct for a lawyer to
>
> (a) violate these rules or the State Bar Act, knowingly assist, solicit, or induce another to do so, or do so through the acts of another,...
>
> (c) engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation,
>
> (d) engage in conduct that is prejudicial to the administration of justice.

Earlier policy statements by the courts and from ethics opinions in other jurisdictions having the same or similar rules for misconduct provide guidance in this area. The summary of these policy statements and ethics opinions is that efforts to disqualify professionals from opposing parties are forms of fraud, deceit, or misrepresentation that interfere with the administration of justice. This bad faith conduct vitiates the attempt to form an attorney/client relationship, thus freeing the professional to go forth as counsel for the opposing party.

The court, in *Kenney v. Superior Court*,[5] was asked to rule on discovery issues related to a medical expert in a malpractice case. The court was commenting on the potential public policy implications of a Defendant's hiring a "committee" of medical experts for a case and said:

> We are aware of the possible abuses of the so-called "medical committee" system. Obviously it is **not in the interests of justice** to countenance any attempt by defendant or

> his counsel in a medical malpractice action to "corner" the supply of "top-drawer" medical experts, silencing them as potential plaintiff's witnesses by the process of placing them on a committee to be consulted by the defense in every claim against a doctor...[6]

The court in *Wang Laboratories, Inc. v. Toshiba Corp.*[7] gave a lengthy policy analysis of "conflicting out" potential opposing professionals, encouraging courts to reject such conduct, stating:

> **Disqualification** of an expert is "likely **inappropriate**" **if** it were **not** objectively **reasonable** for the first party who claims to have retained the consultant **to conclude that a confidential relationship existed** OR no confidential or privileged information is disclosed by the first party to the consultant.
>
> Were this not so, lawyers could then disable potentially troublesome experts merely by retaining them, without intending to use them as consultants. Lawyers using this ploy are not seeking expert help with their case; instead they are attempting only to prevent opposing lawyers from obtaining an expert. This is not a legitimate use of experts, and **courts should not countenance it by employing the disqualification sanction in aid of it.** (emphasis added)[8], [9]

As if anticipating new Rule 1.18 Comment [2], the court in *Shadow Traffic Network v. Superior Court* stated at footnote 9: It is legitimate concern to "allow a party to deplete the pool of available experts simply by quickly interviewing all of the available experts, even though it had no intention of retaining all of them."[10]

Professor Fred C. Moss echoed the concerns of the courts, when he stated: "This is not a litigation strategy, but a deception to reduce the supply of professionals for nothing more than a tactical advantage."[11]

Therefore, as a policy matter, disqualifying a group of professionals in order to preclude their work for an opposing party interferes with the "administration of justice". The court "should not countenance" this practice and extend protections when a lawyer has been interviewed with an ulterior purpose that is not in "good faith".[12] This is equally true if an attorney induces a client to disqualify potential opposing counsel.[13]

Furthermore, such conduct is a form of fraud and deceit.[14] The Oregon court, in *In re Ositis* found that an attorney lied with the intent to deceive "through the acts of another" when he attempted to "neutralize" other lawyers.[15] This is consistent with Professor Moss's view that the ethical prohibition on "dishonesty, fraud, deceit, or misrepresentation"[16] is violated if a lawyer induces a client to disqualify potential opposing counsel by misrepresenting the true purpose of her/his consultation. A 2005 Oregon ethics opinion concurs with Professor Moss, stating: "A lawyer cannot misrepresent the identity or motive of the interviewer."[17], [18]

There are legal and ethical consequences for parties who engage in the bad faith "conflicting out" of potential opposing counsel:

A party acting independently as a bad faith interlocutor of potential attorneys has culpability separate from an attorney who suborns or colludes in such conduct. According to Evidence Code section 951, such conduct does not establish an attorney/client relationship, ergo, the attorney/client privilege. In part, Evidence Code section 951 reads: "A "client" means a person... who consults a lawyer for the purpose of retaining... service or advice". This definition and defining standard for rights and privileges of a client to attach is mirrored at Rule of Professional Conduct 1.18 Comment [2], wherein a person is not entitled to the protections of a client if the communication is "without a good faith intention to seek advice or representation". Such a person is not a "prospective client" within the meaning of the Rule of Professional Conduct. Thus, such a person does not meet the standards for application of the privileges flowing from Evidence Code section 951.

The court may impose a "sanction" of denying disqualification against a moving party who has acted in bad faith:

Motions to disqualify counsel usually rely entirely upon the fact of contact with opposing counsel and an allegation that information was transmitted through that contact. It is too quickly assumed that these two factors establish a prima facie case of a disqualifying contact. Seldom is the actual applicability of Evidence Code section 951 and Rule of Professional Conduct 8.4 examined. Furthermore, only since November 1, 2018, has the new Rule of Professional Conduct 1.18 with Comment [2] been in effect.

Motions to disqualify counsel are really claiming that (1) confidential information was provided (2) in good faith "for the purpose of" engaging counsel, and (3) counsel should be precluded from utilizing that information in the service of the other spouse. However, rarely are these rights explicitly articulated within the meaning of Evidence Code section 952 and Rule of Professional Conduct 1.18 and rarely are these elements tested for authenticity.

It is not correct to assume that "contact" with "information" equals disqualification. The burden of proof should be on the moving party to allege the actual elements for disqualification before h/she enjoys the rights and privileges of a "prospective client" and is able to deprive her/his spouse of the lawyer of her/his choice. The spouse who would be deprived of chosen counsel should have the right to test, dispute, or refute the elements alleged in the motion and not so automatically be deprived of her/his attorney. As the court said in *Wang Laboratories*, bad faith conduct should not be "countenanced [by the court] by employing the disqualification sanction in aid of it."[19]

"Good faith" as a required and standard element to create the attorney/client privilege appears to be generally accepted as a condition precedent for disqualification.

The Kentucky Ethics Opinion from 1987 states that:

> ...a lawyer may be precluded from accepting employment adverse to a prospective client who did not retain the lawyer, if the prospective client revealed to the lawyer confidence and secrets about a matter in good faith effort to secure legal counsel...[20]
>
> If an attorney-client relationship was never formed and the lawyer did not obtain confidence or secrets in the manner so indicated, the lawyer should not be precluded form adverse representation. If the rule were otherwise, the legitimate interests of counsel and persons seeking his services would be sacrificed for no apparent purpose. Such a rule could also be abused by a prospective party who might be tempted to "neutralize" available counsel in a given geographical area.[21]

The Vermont Bar suggested that presumptions favoring disqualification should not be the norm and that the Rule of Professional Conduct should be construed only to protect the interests intended, stating at Opinion 84-05:

> We note that all too often motions to disqualify opposing counsel 'have become common tools of litigation process, being used...for purely strategic purposes'. We disapprove of such tactics. We will not interpret our disciplinary rules to promote such a tactic in the name of erring on the side of caution. We will interpret our rules to vindicate the purpose they serve.[22]

The Vermont Bar went on to discuss the meaning of "client" in relation to the question of disqualification, "The question remains whether the plaintiff ever was the firm's client".[23] The Vermont Rules of Evidence are incorporated into the ethics opinion. Vermont Rule of Evidence section 502(a)(1) states: "A client is a person...who consults a lawyer with a view to obtaining professional legal services from him." This is nearly indistinguishable in meaning from the language of Evidence Code section 951, to wit: "for the purpose of".

The Vermont discussion referred to a lawyer's duty to preserve the confidence of a "client" and not the "confidence and secrets of others", i.e., non-clients. "If it were otherwise, a prospective litigant could disqualify an attorney he thinks his opponent will likely hire simply by placing a feeler call to the attorney and then blurting out a "confidence", the revelation of which is not so very embarrassing".[24] This is in contrast to an "unseemly" situation in which a client is opposed by counsel he "revealed a confidence in a good faith effort to secure legal counsel".

The Virginia Bar found that a husband's bad faith vitiated any "reasonable expectation of confidentiality" that would ordinarily attach to an "initial consultation".

> ...the husband did not meet with Attorney B for the legitimate purpose of obtaining legal representation...His primary purpose in meeting with Attorney B was to preclude him from representing his Wife. The husband's purpose does not create the sort of "reasonable expectation of confidentiality" Rule 1.6 exists to protect. Accordingly, no duty of confidentiality is created for Attorney B out of the visit with this husband who misrepresented his purpose for the appointment...no conflict of interest was triggered by that initial consultation. Attorney B is not required to withdraw.[25], [26]

These ethics opinions agree that the "sanction" of disqualification against an attorney may be replaced by the "sanction" of denying disqualification against a party who has acted in bad faith. Denial of disqualification results in a deterrent by allowing counsel to use any information provided in the "bad faith" consultation on behalf of the opposing spouse.

"Conflicting out" potential attorneys may be a breach of the fiduciary duties owed between spouses:

A party who engages in this "bad faith" conduct knows or should know that she/he "harasses" or "maliciously injures" the other.[27] This behavior should be discouraged. The venality of attempting to prevent a spouse from appropriate representation should be considered a breach of fiduciary duty between spouses. A scheme to deprive a spouse of legal counsel and to impose the duress of a fruitless attempt to consult multiple lawyers should be recognized for what it is, i.e., a violation of the duty of "good faith" and "fair dealing".[28] In California, [s]pouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relationship with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take unfair advantage of the other...[29] A fiduciary duty imposes on a person "a duty to act with the utmost good faith in the best interests of" her/his spouse."[30]

A scheme to "conflict out" potential appropriate counsel carries a possible sanction of being denied the benefit of the "conflicts" that the party attempted to create. Depending upon the order of magnitude of the scheme, this conduct may be a breach of fiduciary duty.[31]

Embedded in this breach of fiduciary duty may be an attempt to commit extrinsic fraud or the successful commission of extrinsic fraud. This is a "fraud or deception practiced upon a party by his or her adversary, based on conduct or activities outside of the court proceedings themselves, which is designed to deprive the other party of the opportunity to present a claim or defense."[32], [33], [34] The practice of "neutralizing" potential opposing lawyers has been viewed by the New Jersey Bar as a conduct "prejudicial to the administration of justice".[35], [36] It follows that conduct calculated to deprive a party of representation is a form of fraud and deception that is "prejudicial to the administration of justice". It follows that such conduct prejudices access to the process of justice. In turn, this tactic violates the "duty of good faith and fair dealing" owed by one spouse to the other and the rule that "neither shall take any unfair advantage of the other."[37]

Conclusion:

The right of a party to claim a conflict is limited and does not apply to all contact or consultations. All persons who consult lawyers are not potential clients. Therefore, information exchanged is not necessarily privileged. A Motion to Disqualify opposing counsel is also an attempt to deprive the opposing party of the attorney of her/his choice. Is the attorney/client privilege being used for its intended purpose or is it being used as a weapon? Deprivation of chosen counsel is a severe consequence and should not be acceded to without careful thought and consideration. A scheme to deprive the opposing party of skilled legal representation should not be rewarded and execution of such a scheme may expose both the party and/or her/his counsel to severe consequences.

Endnotes

1 I would like to thank my colleague, Brenda Sanders, for her research and assistance.

2 It already is the policy of the State of California to ensure that each party is represented. CAL. FAM. CODE § 2030 states, in part, "the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights...". The court should insure that each party is represented early in the proceedings by construing the CAL. EVID. CODE , the CAL. RULES OF PROF'L CONDUCT , and CAL. FAM. CODE § 751 to insure that the party's rights are not thwarted so early in the proceeding as to frustrate the "administration of justice", i.e., prevent a party from being able to readily hire counsel in order to access the court's help under CAL. FAM. CODE § 2030.

3 ABA MODEL RULES OF PROF'L CONDUCT, rule 1.18 cmt. 2 "... Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client'".

4 This Comment was derivative of the Model ABA language at footnote 1, and was published in conjunction with the final Model Rules of Professional Conduct, rule 1.18 that became effective November 1, 2018.

5 Kenney v. Super. Ct., 255 Cal. App. 2d 106 (1967).

6 *Id.* at 113.

7 Wang Laboratories, Inc. v. Toshiba Corp., 762 F. Supp. 1246 (1991).

8 *Id.* at 1248.

9 I am aware of situations in which a forensic accountant has been unable to act in a case because opposing counsel has contacted that accountant on the pretext of using his/her services and does not actually use her/his services. This practice is another example

of "bad faith" that should actually free the forensic accountant from any duty to decline representation for the opposing party.

10 Shadow Traffic Network v. Super. Ct., 24 Cal. App. 4th 1067 (1994).

11 Fred C. Moss, *The Ethics of 'Conflicting Out' Experts and Lawyers*, DALLAS BAR ASSOCIATION (2016).

12 CAL. RULES OF PROF'L CONDUCT r. 8.4(d).

13 CAL. RULES OF PROF'L CONDUCT r. 8.4(a).

14 CAL. RULES OF PROF'L CONDUCT r. 8.4 (c).

15 *In Re* Ositis, 40 P. 3d 500 (Or. 2002).

16 TEX. RULES OF PROF'L CONDUCT r. 8.04(a)(1).

17 Ore. Ethics Opinion 2005-132, Note 3.

18 *See* OREGON RULES PROF'L CONDUCT rr. 4.2, 8.4(a)(3).

19 *Wang*, 762 F. Supp., at 1248.

20 KENTUCKY BAR ASSOC. ETHICS OPINION KBA E-316 (Jan. 1987).

21 *Id.*

22 VBA ADVISORY ETHICS OPINION 84-05 (1984).

23 *Id.*

24 *Id.*

25 VERMONT BAR LEGAL ETHIC OPINION 1794, (2004).

26 The committee also noted that an attorney who directs a new client to undertake strategic elimination of attorneys for the opposing party would be in violation of Virginia's Rule 3.4(j)'s prohibition against taking any action on behalf of a client "when the lawyer knows or which it is obvious that such action would merely serve to harass or maliciously injure another." "Their Rule 8.4(a) establishes that it is improper for an attorney to violate the rules through the actions of another." This is very much like the prohibition contained in CAL. RULE OF PROF'L. CONDUCT r. 8.4. *See* above.

27 *See Wang*, 762 F. Supp. 1246.

28 Extreme patterns of "conflicting out" counsel may be part of a continuing and longstanding pattern of spousal abuse.

29 CAL. FAM. CODE § 721.

30 *See* CAL. JURY INSTRUCTION 4100. (Fiduciary Duty Explained).

31 Counsel should be aware that a party's breach of fiduciary duty may be imputed to her/his lawyer. Annotation to California Jury Instruction 4100 states: "A third party who knowingly assists a trustee in breaching his or her fiduciary duty may, dependent upon the circumstances, be held liable along with the trustee for participating in the breach of trust." Stueve Bros. Farms, LLC v. Berger Kahn, 222 Cal. App. 4th 303, 325 (2013). This is consistent with CAL. RULE OF PROF'L. CONDUCT r. 8.4 (a), allowing for vicarious culpability if the attorney knowingly assisted in or induced the client's conduct.

32 24 AM. JUR. 2d *Divorce and Separation* § 418.

33 Query whether the Evidence Code exception to privilege at section 956 could include sufficiently egregious conduct under the fraud exception? CAL. EVID. CODE § 956 states that there is no attorney/client privilege "if the services of the lawyer were sought or obtained to enable anyone to commit or plan a fraud".

34 This comes full circle to ethical violations under State Bar Rule 8.4(c): (It is professional misconduct for a lawyer to) "(c) engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." It is unethical under CAL. RULE OF PROF'L. CONDUCT r. 8.4(a) to "assist, solicit, or induce" another to engage in such conduct.

35 *See* N.J. ETHICS OPINION 703 (2006).

36 Again, like California Rules of Professional Conduct, rule 8.4(a): The New Jersey Bar gave an ethics opinion that "inducing clients to neutralize potential opposing lawyers violates the rule against conduct prejudicial to the administration of justice." *See* N.J. ETHICS OPINION 703 (2006).)

37 CAL. FAM. CODE § 721.