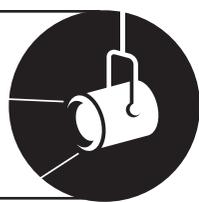


SPOTLIGHT ON

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Midterm Elections Live Up to Hype



Barrett Marson

Before being inundated with television ads, Facebooks videos, and radio spots featuring marquee matchups between Republicans and Democrats, voters get to endure primary season.

There are a few big races coming up on the August primary ballot for the Legislature, statewide offices and Congress. In some legislative and congressional districts, the primary determines the winner on the November ballot.

U.S. Rep. Ruben Gallego faces state Sen. Catherine Miranda in the 7th Congressional District Democratic primary. The winner faces no competition in the general election.

And in the Southeast Valley, state Rep. Eddie Farnsworth squares off against Jimmy Lindblom in the GOP primary for senate. The winner faces just token opposition in the heavily Republican district.

But two heavyweight matchups will overshadow all other Maricopa County legislative races and will bring significant attention and quite possibly unprecedented levels of spending.

Don Shooter, evicted from the Arizona House earlier this year after numerous accusations of sexual harassment and inappropriate behavior, looks to regain the Senate seat he held for six years in District 13. He faces the current senator, Sine Kerr, who

was appointed to seat, and Brent Backus. Shooter's comeback attempt was almost cut short because of allegations he didn't live in the district. The state Supreme Court sided with Shooter.

The woman who precipitated Shooter's downfall, Michelle Ugenti-Rita, faces a tough battle as she also tries to win a Senate seat.

In District 23, fired Department of Economic Security director Tim Jeffries seeks redemption and a spot in the Legislature. Kristina Kelly, a newcomer to politics, plays the outsider untouched by controversy.

But these primary battles are just the warm-up to heated battles on the November ballot. In every statewide office, a Democrat is challenging the Republican officeholder. A very competitive U.S. Senate race and several tight congressional races also will crowd your mailboxes and show up in the middle of your favorite cable and broadcast television shows. In addition to the candidate races, expect spirited debates on as many as four ballot initiatives. It's unclear how many propositions will eventually qualify for the ballot – several will be challenged as backers and foes square off in court to determine if they will duel at the ballot box.

The August primary in full swing now is just the prelude to the bigger battles that lie ahead in November. Get ready to be inundated with information – or misinformation. ■

Q&A



LAWYER LIABILITY AND ETHICS

Manufactured Disqualification of Experts and Counsel



Joseph Brophy

A few months ago, the State Bar of Texas felt the need to issue an opinion prohibiting a lawyer from retaining an expert, or intentionally disclosing confidential information to a prospective expert, for the purpose of attempting to disqualify or otherwise prevent the expert from being used by an opposing party. I was reminded of the episode of the Sopranos where Tony contacts all of the top divorce lawyers in town so that none of them could represent Carmela when she asked for a divorce. That is perhaps ethical (relatively) for Tony Soprano, but not for lawyers.

Believe it or not, these things happen. In *Kenney v. Superior Court*, 255 Cal. App. 2d 106, 113 (1967), the California Court of Appeals recognized that, particularly in smaller communities, defendants in medical malpractice actions may try to 'corner' the supply of 'top-drawer' medical experts by placing them on a committee to be consulted by the defense in every claim against a doctor for malpractice. The court in *Wang Laboratories, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246 (E.D.Va. 1991) also expressed concern about such tactics. More recently, there have been several state bar opinions from other states addressing similar issues. It is unclear from the Texas opinion if the bar in that state was addressing a festering problem.

If a lawyer shares confidential information with a prospective expert during preliminary discussions, in some cases the expert may be disqualified from providing testimony on behalf of or otherwise assisting the opposing party. The policy objectives favoring disqualification include preventing conflicts of interest, preserving the adversarial nature of litigation, and maintaining judicial integrity. This routine aspect of representation, however, can be turned into litigation skullduggery.

As an example, Lawyer A hires an expert for a client's case and then discusses the case with other experts on the pretext that Lawyer A is considering whether to retain them. Lawyer A's true purpose, however, is to ensure his client's adversary cannot hire the expert.

Is this ethical? No. Arizona's Ethical Rule 8.4(a)(3) prohibits a lawyer from engaging in "dishonesty, fraud, deceit or misrepresentation." In "neutralizing" the experts, Lawyer A has acted with the intent to deceive since the lawyer had no intent of actually retaining the experts. Importantly, misrepresentations under Rule 8.4(a)(3) do not have to be "material" to violate the rule. Additionally, Rule 4.4(a) provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." The hypothetical above violates that rule as well.

The Rules of Professional Conduct have similar provisions to prevent similar tactics by litigants seeking to disqualify potential opposing lawyers, like in the Sopranos example above. Although Arizona has not addressed this specific issue with a written opinion, Comment 2 to Arizona's Rule 1.18, provides that "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'" This strongly suggests that if a party shares confidential information with a lawyer solely to create a conflict of interest, then the lawyer may represent the party's adversary in the same matter since the confidences were not disclosed in a good faith effort to obtain legal assistance. See also, Restatement of Law Governing Lawyers §15, cmt. c. (In deciding whether to disqualify counsel, the court may consider whether the now-adverse party disclosed confidences in a good faith effort to determine whether to hire the lawyer or for the purpose of preventing the lawyer from representing an adversary).

Disqualification of a lawyer or expert is considered a very drastic remedy that is to be used sparingly. If that disqualification is sought or obtained based on a conflict manufactured for no other reason than to achieve a tactical advantage, then it can land the person seeking the disqualification in hot water. Act accordingly. ■

Joseph Brophy is a partner with Jennings Haug Cunningham in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@JHC.law.

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