

## PROFESSIONAL LIABILITY UPDATE

### DISQUALIFICATION CONFLICTS

By John B. Sullivan

#### ***Fiduciary Trust International of California v. Superior Court (2013) 218 Cal.App.4<sup>th</sup> 465***

*The Second District affirms disqualification of a marital trust's trustees' law firm since it previously represented husband and wife in forming their estate plan.*

Sandler & Rosen drafted wills for Willet and Betty Brown. Willet's will established a marital trust expected to generate several million dollars in annual income. It named Betty as the marital trust's income beneficiary for life. Upon her death, the principal of the trust was to be transferred into an Exemption Equivalent Trust to benefit each of Willet's four children. Betty's will, in turn, left a majority of her estate to the Exemption Equivalent Trust. After Willet died, Betty revoked her will and drafted a new instrument transferring the majority of her assets into a trust to benefit her daughter.

Following Betty's death, Sandler & Rosen represented the trustees of the marital trust. Betty's personal representative, Fiduciary Trust International of California (Fidelity), asserted the marital trust, not Betty's individual trust, was responsible for substantial taxes due on Betty's estate.

Fiduciary moved to disqualify Sandler & Rosen because its representation of the marital trust's trustees was substantially related to prior estate planning work for Betty and Willet. After the trial court denied the motion, the Court of

Appeal issued a writ of mandate directing the trial court to vacate its order.

Sandler & Rosen had represented Betty in a matter substantially related to the firm's representation of the marital trust. Disqualification was required regardless of whether confidential information was actually passed from Betty to Sandler & Rosen.

Although Betty was a joint client with Willet, and was not entitled to claim an attorney-client privilege as to him, this did not diminish Sandler & Rosen's responsibility to her. After severing a relationship with any client, an attorney cannot injure the former client in any matter in which the attorney formerly represented client. Moreover, an attorney cannot use knowledge or information acquired by virtue of a previous representation against a former client. In the present litigation, Sandler & Rosen asserted the documents it prepared during the joint representation should be interpreted to substantially reduce the value of Betty's estate, harming her interests.

There are circumstances, most commonly where one joint client agrees to an advance waiver,

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where an attorney can represent a former joint client against another joint client in a substantially related matter. However, there was no advance waiver, no evidence Betty retained personal counsel to advise her, and no evidence the firm disclosed the adverse aspects of joint representation.

*Comment:* The case reminds estate planning attorneys to clearly explain the rules of joint representation to clients at the outset of the representation. Counsel should analyze the interests of joint clients, and, absent an advance waiver, decline to represent the interests of one joint client against another.