UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#55 (5/11 hrg off)
cc: Chad Holley, Staff Atty

**CIVIL MINUTES - GENERAL**

| Case No. | CV 14-00519 PSG (DTBx) | Date | April 14, 2015 |
|---|---|---|---|
| Title | Dilip Patel, *et al*. v. 7-Eleven, Inc. | | |

| Present: The Honorable | Philip S. Gutierrez, United States District Judge |
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| Wendy Hernandez | Not Reported |
|---|---|
| Deputy Clerk | Court Reporter |
| Attorneys Present for Plaintiff(s): | Attorneys Present for Defendant(s): |
| Not Present | Not Present |

**Proceedings (In Chambers): Order GRANTING Motion to Disqualify Counsel**

Before the Court is Defendant 7-Eleven, Inc.'s ("Defendant") motion to disqualify Plaintiffs' counsel, Gerard Marks ("Marks") and Marks & Klein, LLP ("M&K"). Dkt. # 55. After considering the arguments presented in the moving, opposing, and reply papers, and at a hearing on April 13, 2015, the Court GRANTS the motion and DISQUALIFIES Marks and M&K from further participation in this case.

## I. Background

Plaintiffs Dilip Patel, Saroj Patel, and Saroj Patel, Inc. (collectively, "Plaintiffs") filed this lawsuit on March 18, 2014. Dkt. # 1. Plaintiffs bring this suit alleging that Defendant unlawfully terminated their 7-Eleven franchise located in Riverside, California. *SAC* ¶¶ 6, 40. Plaintiffs assert causes of action for: (1) violation of the California Franchise Relations Act, Cal. Bus. & Prof. Code §§ 20000, *et seq*.; (2) violation of California Unfair Business Practices Act, Cal. Bus. & Prof. Code §§ 17200, *et seq*.; (3) breach of implied covenant of good faith and fair dealing; and (4) false imprisonment. *See id*. ¶¶ 120-149. This motion concerns whether it was proper for Marks and M&K to pay McCord, a former 7-Eleven employee, for testimony connected to this lawsuit. The key issue is whether McCord was paid for providing fact or expert testimony.

In February 2014, McCord, a then-current employee of Defendant in its Asset Protection Department, contacted Plaintiffs' lead attorney, Marks. *Mot*. 3:25-26. McCord had been working for Defendant for approximately nine months, since May 2013. *Id*. 2:23-24. During his employment, McCord had filed a complaint with Defendant's Human Resources department, alleging mistreatment by co-workers when he was grieving the death of his mother. *Id*. 3:7-10.[1] After an investigation resulted in Defendant's inability to substantiate the allegations, McCord

[1] It was later revealed in a deposition of McCord on June 3, 2014, that McCord had fabricated his mother's death to get time off from work. *Speyer Decl*., Ex. 32.

sent Defendant a $150,000 demand letter (that was rejected) and emailed his supervisor, stating that he was "incredibly motivated [] to expose [Defendant]." *Id*. 3:10-21.

When McCord contacted Marks by email, he pitched that he could provide evidence of Defendant's alleged misconduct against franchisees to assist with litigation against Defendant. *Id*. 4:6-12; *Speyer Decl.*, Ex. 11 ("I could tell that some stores were getting prioritized for take-backs for the wrong reasons, and I can provide evidence to this."). In the same email, McCord also stated to Marks that he felt he was "personally targeted with abuse by [his] supervisor" because of jealousy and that he was "disgusted" with Defendant's investigation operations. *Id.* McCord has also represented via text message to Marks that he "loves it when [Defendant is] in deep shit." *Id*., Ex. 21.

In his initial discussions with Marks, McCord offered his services as a "Loss Prevention Consultant" for $300 per hour with a $2,500 minimum. *Id.*, Ex. 10. Marks hired McCord, formally stating that McCord would "advise [] whether the interview techniques and circumstances [relative to Plaintiffs] were proper as to both 7-Eleven interview directives, as well as to professionally accepted loss prevention interview ethics and practices." *Id*., Ex. 14. McCord produced a document with specific information about how Defendant's Asset Protection department and the people within it operate, a general summary of proper interview techniques, and analysis of Defendant's interview with Plaintiffs. *Id.*, Ex. 13. From this document, Plaintiffs' counsel drafted a "Certification of Kurt McCord" (the "Certification") which was later signed by McCord and filed in this case.[2] *Mot.* 6:4-10; Dkt. # 25, Ex. E. Marks paid McCord $2,500 for McCord's work on Plaintiffs' case. *Mot*. 4:19-22; 5:9-13. The Certification contains information regarding McCord's experience as an employee in Defendant's Asset Protection department, discussion of Defendant's interview of the Patels, as well as McCord's descriptions of franchisor/franchisee relationships and how the asset protection industry traditionally works. *See* Dkt. # 55-1, Ex. A.

Defendant alleges that Plaintiffs' counsel improperly paid McCord for the fact testimony contained in these documents and now moves to disqualify Plaintiffs' counsel, or, alternatively, to revoke their *pro hac vice* privileges. Dkt. # 55.

## II. Legal Standard

[2] Plaintiffs' counsel used another analysis prepared by McCord in a separate case against Defendant, along with the Patel analysis, to create the Certification. *Mot*. 5:9-6:10. McCord was paid $5,000 for his work on that separate analysis. *Id*. 5:11-26.

California law governs this motion. *See In re Cnty. of L.A.*, 223 F.3d 990, 995 (9th Cir. 2000) ("[W]e apply state law in determining matters of disqualification[.]"). "The disqualification of counsel because of an ethical violation is a discretionary exercise of the trial court's inherent powers." *Crenshaw v. MONY Life Ins. Co.*, 318 F.Supp.2d 1015, 1020 (S.D. Cal. 2013) (citing *U.S. v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996)).

Determining whether to disqualify counsel will ultimately involve consideration of the "conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern, though, must be the preservation of public trust in the scrupulous administration of justice and the integrity of the bar." *See In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 586 (1991). Thus, in certain situations, "[t]he recognized and important right to counsel of one's choosing must yield to considerations of ethics that run to the very integrity of our judicial process." *Id.*

Notably, however, a party seeking disqualification bears a "heavy burden." *See City & Cnty. of S.F. v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 851 (2006). Motions to disqualify are strongly disfavored. *Visa U.S.A., Inc. v. First Data Corp.*, 241 F.Supp.2d 1100, 1104 (N.D. Cal. 2003). In fact, "[b]ecause a motion to disqualify is often tactically motivated and can be disruptive to the litigation process, disqualification is a drastic measure that is generally disfavored and should only be imposed when absolutely necessary." *Concat LP v. Unilever, PLC*, 350 F.Supp.2d 796, 814 (N.D. Cal. 2004) (citations omitted); *see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985) (expressing "concern about 'tactical use of disqualification motions' to harass opposing counsel"); *Optyl Eyewear Fashion Int'l Corp. v. Styles Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985) ("Because of this potential for abuse, disqualification motions should be subjected to particularly strict judicial scrutiny.") (internal quotations omitted); *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 300-01 (1989) ("Motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent.").

## III. Discussion

The parties do not dispute that it is improper to pay a fact witness for the content of his testimony. *See Mot.* 9:7-22; *Opp.* 6:9-20; Cal. Rules of Prof. Conduct 5-310(B) ("a member shall not … pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony …"). Defendant argues that McCord is not an expert and paying him thus violates California Rule of Professional Conduct 5-310. *Mot.* 9:3-6.[3] Plaintiffs counter with two categories of argument. First, they argue that McCord was

[3] Defendant alternatively argues that payment of McCord violates Canon 9 of the Model Code and the federal anti-bribery statute (18 U.S.C. § 201), but because analysis under Rule 5-310 is

paid as an expert witness, not a fact witness. *Opp*. 6:12-15. Second, they assert that, even if McCord is not an expert, payment was still proper because it was not "contingent upon the content" of his testimony, payment was compensation for McCord's "preparation time," and McCord was paid as a "litigation consultant." *Id*. 6:9-15, 6:21-23, 8:7-23.

A. Classifying McCord's Testimony

The main thrust of Defendant's argument is that McCord is not an expert; therefore, he was a fact witness who received improper compensation from Plaintiffs' counsel. *Mot*. 13:1-11. Plaintiffs contend that McCord is "an expert incarnate" and point to his experience in asset protection and two industry-related certifications in support. *Opp*. 3:4-24. The Court concludes that McCord is not qualified to testify in these areas as an expert witness. Furthermore, even if McCord's testimony contained some proper expert analysis, it also contains fact testimony regarding Defendant. The Court holds that McCord was improperly compensated for that fact testimony.

*i. Expert Testimony*

Federal Rule of Evidence 702 states: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. Rules of Evid. 702.

According to Rule 702, the threshold determination for the admission of expert testimony is whether "the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education" to render a particular opinion. *See Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 813 (9th Cir. 2014); *U.S. v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) ("Trial courts must ensure that experts are qualified to render their opinions…"). Further, expert testimony must assist the trier or fact in understanding evidence or determining a fact and issue, *Primiano v. Cook*, 598 F.3d 558, 563 (9th Cir. 2010), and must be "both relevant and reliable," *Estate of Barabin v. Asten Johnson, Inc*., 740 F.3d 457, 463 (9th Cir. 2014) (en banc).

McCord's Certification contains some discussion that may be considered within the purview expert testimony: franchisor/franchisee industry standards, loss prevention industry

dispositive of the motion, the Court does not reach the alternative theories.

standards, and interview standards. However, the Certification also contains discussion of McCord's personal experiences while employed with Defendant and observations of Defendant's conduct, testimony which is factual in nature. Examples include the alleged misconduct of Defendant's Asset Protection team, the "dysfunctional nature" and dissention of the Centralized Investigations Team, and McCord's experiences as part of that team. Regarding the three areas of expert testimony discussed in the McCord Certification, the Court concludes that McCord is not qualified to present expert testimony in those areas.

1. Franchisor/Franchisee Industry Standards

The Court is not convinced that McCord is qualified as an expert on franchisor/franchisee industry standards. It appears that McCord's experience with franchisor/franchisee relationships comes solely from his employment with a franchisor (Defendant), from May 2013 to February 2014, amounting to less than a year. *See Opp*. 3:13-24; *Speyer Decl*., Ex. 11. The Court also notes that McCord's experience with franchisor/franchisee relationships involves a single employer. This limited experience is an insufficient basis for McCord to opine on industry-wide franchisor/franchisee standards.

2. Asset Protection Standards

McCord has more experience in the asset protection field, having worked with three separate employers in asset protection beginning in December 2007. *See Opp*., Ex. A at 22. However, McCord began working in this field in an "entry-level" position when he was just "a few months out of college," and has only accumulated slightly over six years of work experience in the industry. *Speyer Decl.*, Ex. 11. The Court is not convinced that this amount of on-the-job training, without any additional relevant education or formal training in the area, qualifies McCord as an "expert" in asset protection standards. Cases holding that witnesses qualified as experts in their fields based on their work experience involve those who have worked in their respective industries for much longer periods than McCord. *Compare Hangarter v. Provident Life and Accident Ins. Co*., 373 F.3d 998, 1015 (9th Cir. 2004) (holding that 25 years of experience in the insurance industry qualified expert to testify about claims adjustment standards) *and Pyramid Techs*., 752 F.3d at 814 (holding that trial court abused its discretion in determining witness with 38 years of experience in property damage repair was not qualified as an expert), *with Ouimet v. USAA Casualty Inc. Co.*, No. EDCV 00-752-VAP, 2004 WL 5865274, at *1-2 (C.D. Cal. July 14, 2004) (seven years employment as defense counsel for a medical malpractice insurer and experience at an industry seminar did not qualify a witness to give expert testimony on the practices and norms of insurance companies regarding bad faith claims), *Jerden v. Amstutz*, 430 F.3d 1231, 1234, 1239-40 (9th Cir. 2005) (on-the-job experience reviewing special MRI reports as a neurosurgical nurse practitioner for at least three years did

not demonstrate great enough expertise to allow the nurse practitioner to opine on his interpretation of the MRI), *and Subramani v. Wells Fargo Bank, N.A.*, No. 13-cv-01605-SC, 2015 WL 1138449, at *3 (N.D. Cal. March 13, 2015) (4,000 hours of research and study in the foreclosure field over the past four years and a position as "Chief Forensic Securitization Audit and Mortgage Fraud Consultant" was likely insufficient to qualify witness as an expert in mortgage securitization and foreclosures).

To the extent that Plaintiffs assert McCord is an expert solely regarding *Defendant*'s asset protection policies based on his time spent working for Defendant, the Court also concludes that the May 2013 through February 2014 period of employment is insufficient experience to qualify McCord as an expert in Defendant's policies.

Further, in assessing a proposed witness' qualifications, some courts consider whether the witness has relevant advanced degrees or has been qualified as an expert in other cases. *See F.T.C. v. BurnLounge, Inc*., 753 F.3d 878, 888 (9th Cir. 2014); *Gold v. Midland Credit Mgmt., Inc*., No. 13-cv-02019-BLF, 2015 WL 1037700, at *2 (N.D. Cal. March 10, 2015); *Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, 816 F.Supp.2d 869, 886-87 (E.D. Cal. 2011). The Court notes that McCord does not possess any advanced degrees related to asset protection and has not been qualified as an expert witness in any other case.

3. Interview Standards

The Court is also not convinced that McCord is qualified as an expert in interview standards. Though he is a Certified Forensic Interviewer and possesses a certification from the International Association of Interviewers, there is no showing as to what McCord did to obtain these certifications (hours of study required or what tasks he completed or tests he passed) and whether they are respected in the industry. The Court refuses to hold that McCord qualifies as an expert in interview standards on the basis of two unexplained certifications.

For the reasons discussed above, the Court concludes that McCord is far from the "expert incarnate" that Plaintiffs' counsel claim and that he is not qualified pursuant to Rule 702's requirement. Given McCord's only moderate experience in the fields about which Plaintiffs' counsel supposedly hired him to expertly testify, the Court discerns that Plaintiffs' counsel actually hired McCord for his unique factual insight into the workings of Defendant's asset protection department, not for his "expertise" in asset protection and interview standards. Thus, it appears to the Court that Plaintiffs' counsel hired and paid McCord for his factual testimony regarding Defendant's inside operations, not his "expert" insight and analysis. If Plaintiffs' counsel were actually interested in asset protection or interview expertise, they would have engaged a more qualified individual.

*ii. Payment for Fact Testimony*

Additionally, even assuming that McCord was qualified as an expert in some areas, the Court still concludes that he was primarily paid for his fact testimony, rather than any expert testimony that he might have provided. When McCord offered his services to Plaintiffs' counsel, he provided details of "what he perceived as significant wrongdoing in 7-Eleven's asset protection division, the flawed nature of its investigations, and its transparent efforts to target vocal franchisees." *Speyer Decl*., Ex. 31 ¶ 8. In a later e-mail, McCord further described the information he could provide, revealing that he had "evidence" that "some stores were getting prioritized for take-backs for the wrong reasons," and had inside knowledge on how Defendant's cases are built, the systems used to build them, issues that Defendant encounters to closing cases, and "other details that may be the difference in winning or losing." *Id*., Ex. 11. This was McCord's pitch. McCord's descriptions of the information he promised and the value he would add to franchisee cases point to his ability to provide fact testimony regarding the inner workings of Defendant's franchisee investigations. The Court concludes that Plaintiffs' counsel hired and paid McCord because it wanted this fact testimony.

B. Ethical Violation

To maintain the effective administration of justice and the integrity of the Court, the Central District of California requires attorneys who appear before this Court to submit to California law governing professional conduct. *See* L.R. 83-3.1.2. California Rule of Professional Conduct 5-310 ("Rule 5-310") provides in part that a member shall not:

> Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case.
> Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:
>
> (1) Expenses reasonably incurred by a witness in attending or testifying.
>
> (2) Reasonable compensation to a witness for loss of time in attending or testifying.
>
> (3) A reasonable fee for the professional services of an expert witness.

*Id*.

There is a dearth of California and Ninth Circuit case law interpreting Rule 5-310's application in circumstances similar to this case. Out-of-circuit cases interpreting their own similar statutes have held that the purpose behind prohibiting payment to fact witnesses is to "prohibit a lawyer from paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice. Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so." *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Assn*., 865 F.Supp.1516, 1526 (S.D. Fla. 1994), *rev'd in part on other grounds*, 117 F.3d 1328, 1335 n.2 (11th Cir. 1997); *accord Dyll v. Adams*, No. 3:94-CV-2734-D, 1997 WL 222918, at *2 (N.D. Tex. April 29, 1997) ("Payment for factual testimony is generally prohibited even if the testimony sought is truthful.") (citations omitted); *Caldwell v. Cablevision Sys. Corp*., 925 N.Y.S.2d 103, 106 (N.Y. App. Div. 2011) (stating that, though witnesses are entitled to attendance fees and travel expenses, the "giving of testimony as to facts within one's knowledge is a matter of public duty" and an "'inherent burden of citizenship' which requires no compensation;" to compensate otherwise would be "'subversive of the orderly and efficient administration of justice,' even where a witness is contracted to tell the truth, rather than to testify falsely," and payment creates an incentive, even unconscious, toward biased testimony.) (citations omitted); *State of N.Y. v. Solvent Chem. Co., Inc*., 166 F.R.D. 284, 289 (W.D.N.Y. 1996) ("The payment of a sum of money to a witness to 'tell the truth' is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.") (citing *In re Robinson*, 136 N.Y.S. 548, 556 (N.Y. App. Div. 1912), *aff'd* 103 N.E. 160 (N.Y. 1913)).

Plaintiffs argue that, even if McCord did not provide expert testimony, payment for his testimony was still proper under Rule 5-310 because it was not "contingent upon the content" of his testimony, was compensation for McCord's "preparation time," and because McCord was acting as a "litigation consultant." *Opp*. 6:9-15, 6:21-23, 8:7-23. These arguments are not successful.

Payment to McCord in the circumstances of this case is the type of payment that Rule 5-310 intends to prohibit. To the extent that Plaintiffs claim that payment was not "contingent" upon the content of McCord's testimony because Plaintiffs' counsel did not *instruct* McCord to testify in a certain way, that argument overstates the rule. McCord indicated the sort of factual testimony that he could provide, for a fee, and Marks and M&K hired him to provide that testimony. This arrangement is "quid pro quo" payment for testimony. As discussed above, it is inconsequential whether McCord's Certification is truthful or not, so Plaintiffs' showing that McCord's testimony has been corroborated is irrelevant. *Id*. 6:13-15. Defendant does not assert that the *content* of McCord's testimony gives rise to a violation of the Rules of Professional Conduct; rather, Defendant argues that *paying* for the sort of testimony that McCord provided,

even if the testimony is otherwise entirely admissible and appropriate, violates Rule 5-310. The Court agrees.

Further, Plaintiffs argue that, even if McCord provided factual testimony, payment is still proper because it was for McCord's "preparation time." *Opp*. 7:27-9:26. Plaintiffs rely on an opinion from the California Committee on Professional Responsibility and Conduct, which states that "a witness may be compensated under other circumstances which are not specified" in Rule 5-310(B)'s three subparagraph exceptions. Cal. St. Bar Comm. Prof. Resp., Formal Op. 1997-149, 1997 WL 197243, at *2 (considering whether an attorney may pay a non-expert witness for time spent preparing for a deposition or trial). Plaintiffs also cite to two out-of-circuit cases addressing similar ethical rules prohibiting the payment of fact witnesses in support. The court in the first case determined that payment to a fact witness was proper, stating that a "witness may be compensated for the time spent preparing to testify or otherwise consulting on a litigation matter in addition to the time spent providing testimony in a deposition or at trial." *Prasad v. MML Investors Servs., Inc*., 04 Civ. 380 (RWS), 2004 WL 1151735, at *6 (S.D.N.Y. May 24, 2004). In the second case, payment to a "Designated Consultant" who was also a fact witness in the case was held to be proper, "[s]o long as he is paid for his time in connection with his work as a Designated Consultant, and not for his time as a fact witness." *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp*., C.A. No. 3099-VCN, 2011 WL 3689007, at *3 (Del. Ch. May 23, 2011).

The Court is not persuaded by Plaintiffs' "preparation time" argument. The authority cited by Plaintiffs suggests that "preparation time" is meant to apply to time a witness spends readying for depositions, hearings, or trial appearances. First, the California Committee on Professional Responsibility and Conduct opinion expressly addresses the narrow question of whether a non-expert witness may be paid "for the time spent preparing for a deposition or trial." Formal Op. 1997-149, 1997 WL 197243, at *1. McCord did not undergo any preparation for a deposition or trial in this case. The court's holding in *Prasad* has the same qualification: a fact witness may be compensated for the time spent preparing to testify. *Prasad*, 2004 WL 1151735, at *6.[4] Again, McCord has not testified at any hearing or trial in this case. *See also Rocheux Int'l of N.J. v. U.S. Merchs. Fin. Grp., Inc*., Civ. No. 06-6147, 2009 WL 3246837, at *3 (D.N.J. Oct. 5, 2009) ("Typically, lawyers may only compensate fact witnesses for (1) reasonable expenses incurred by a witness to *attend the trial*, and (2) reasonable compensation for the loss of the witness's *time in attending the trial to testify*) (citing *In re PMD Enters*., 215 F.Supp.2d 519, 529-30 (D.N.J. 2002) (emphasis added)). In *Rocheux*, a disgruntled former employee of defendant had contacted the plaintiff offering damaging testimony regarding defendant's

[4] The *Prasad* court also discusses the propriety of payment for "consulting" time, a concept separate from the "preparation time" argument which is discussed in the section below. *Prasad*, 2004 WL 1151735, at *6.

business practices. *Rocheux*, 2009 WL 3246837, at *1-2. The court determined that paying this employee to produce an affidavit was improper because the affidavit contained factual testimony and the payment "most certainly did not compensate for his costs of attending trial or time lost during trial." *Id*. at *4. The final case cited by Plaintiffs also does not support Plaintiffs' position, as the court held that payment to the witness for his time spent as a fact witness would be improper. *BAE Sys. Info*., 2011 WL 3689007, at *3.

Additionally, even if McCord's time spent on this matter falls within the definition of "preparation time," the Court is not convinced that Marks and M&K paid McCord for "preparation" rather than the actual testimony provided. The $2,500 given to McCord was a flat-rate "minimum" for McCord's services relative to this case. *Speyer Decl*., Exs. 10, 14. The money was paid before McCord had done any work on the case. *See id*., Ex. 14. McCord also did not submit any billing statements or provide Plaintiffs' counsel with information on how much time he ultimately spent on the case. The record does not support Plaintiffs' argument that McCord was paid for his preparation time as a non-expert witness.

Lastly, Plaintiffs argue that the payment was proper because McCord was acting as a "litigation consultant." *Opp.* 6:21-7:26. Plaintiffs rely on a case in which a court held that a large payment to a litigation consultant was proper because "consultants and expert witnesses may be paid reasonable fees for their time." *Aristocrat Techs. v. Int'l Game Tech*., c-06-03717 RMW, 2010 WL 2486194, at *2 (N.D. Cal. June 15, 2010). The court in *Aristocrat* relied on the reasoning in another case that concluded a consulting agreement between a party and an inventor was "no different than an expert witness who is paid for his time." *Id.* (citing *Ellison Educ. Equip., Inc. v. Chen*, SACV 02-1184-JVS (ANx), 2004 WL 3154592, at *19 (C.D. Cal. Dec. 21, 2004)). These cases are inapposite. *Ellison* and *Aristocrat* dealt with highly qualified inventors acting as consultants in patent litigation cases that the courts treated as non-testifying experts. This situation is not presented here, where McCord is not qualified as an expert, and, as discussed above, the record shows that McCord was paid for his fact testimony about Defendant's practices, not his knowledge of the asset protection industry generally.

Based on the foregoing, the Court concludes that Marks and M&K violated Rule 5-310 by paying McCord because they compensated a witness for providing factual testimony.

C. Disqualification of Counsel

As discussed above, disqualification of counsel for an ethical violation ultimately involves consideration of the "conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern, though, must be the preservation of public trust in the scrupulous administration of justice and

the integrity of the bar." *See In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 586 (1991). Thus, in certain situations, "[t]he recognized and important right to counsel of one's choosing must yield to considerations of ethics that run to the very integrity of our judicial process." *Id.* However, "[m]otions to disqualify counsel are strongly disfavored." *Visa U.S.A., Inc. v. First Data Corp.*, 241 F.Supp.2d 1100, 1104 (N.D. Cal. 2003). "[D]isqualification imposes heavy burdens on both the clients and courts: clients are deprived of their chosen counsel, litigation costs inevitable increase and delays inevitably occur. As a result, [] motions [to disqualify] must be examined carefully to ensure that literalism does not deny the parties substantial justice." *Sharp v. Next Entertainment, Inc.*, 163 Cal. App. 4th 410, 424 (2008) (internal quotation omitted).

This case presents a situation in which Plaintiffs' "recognized and important right to counsel of one's choosing" must yield to considerations of ethics to maintain standards of professional responsibility and preserve the public trust in the integrity of the bar. In this case, the Court cannot do "substantial justice" by any other sanction than disqualification of Marks and M&K. The Court considered whether the more targeted and less disruptive penalty of striking McCord's Certification and excluding him from testifying would appropriately sanction Marks and M&K for their ethical violation. *See, e.g., Rocheux,* 2009 WL 3246837, at *4 (excluding witness testimony as a sanction for improper compensation); *Golden Door*, 865 F.Supp. at 1526-27 (same). However, exclusion of McCord is not an effective sanction in this case because, regardless of a Court order, Plaintiffs are unlikely to rely on McCord for evidentiary support in the remainder of this litigation. Information discovered about McCord after his retention and payment has created serious credibility problems for McCord as a witness.[5] At a hearing before the Court on April 13, 2015, Defendant's counsel emphatically represented that McCord's exclusion from the case would not benefit Defendant, suggesting that exclusion of McCord would not punish Plaintiffs' counsel because it would not deprive Plaintiffs' case of a valuable witness. In order to maintain ethical standards of professional responsibility, the Court must assess a sanction against Plaintiffs' counsel's conduct that actually punishes counsel for its ethical wrongdoing. Because a lesser effective sanction is not available in this case, the Court concludes that disqualification of counsel as a result of their ethical violation is necessary to maintain the integrity of these proceedings.

## IV. Conclusion

[5] For example, as discussed in the Background Section, McCord lied about the death of his mother to get time off work from 7-Eleven then demanded further compensation because his co-workers allegedly mistreated him while he was grieving this "death." *See Mot.* 3:7-21; *Speyer Decl.*, Ex. 32.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | CV 14-00519 PSG (DTBx) | Date | April 14, 2015 |
|---|---|---|---|
| Title | Dilip Patel, *et al*. v. 7-Eleven, Inc. | | |

For the foregoing reasons, the Court GRANTS Defendant's motion to disqualify counsel and hereby DISQUALIFIES Marks and M&K from further participation in this case.

**IT IS SO ORDERED.**