Ethical Problems in Advising Migratory Divorce

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Mr. Lawyer, my husband and I have relied on you in our business matters all these years, but now we really need help. We can’t keep this up any longer. Sure, we’ve tried and tried, but we both know the party’s over. We’ve both got to get out. What do we have to do to bury this thing decently as soon as we can—and keep it quiet? Jack and I can’t wait a year to get married; that’s asking too much, especially with four kids. Can you arrange for me to go to Reno to get it over with in six weeks? Or is there any place we can get it done even quicker?"

What answers may the California lawyer give his client that are consistent with his oath as an attorney? The “safe” answers seem easy enough—either decline the case entirely, or refer the wife to Nevada counsel, or insist on getting her a California decree and nothing else. But will any of these answers really help this family? The first two may expose them to the risk of ultimate invalidity of the divorce decree, while leaving up in the air the all-important effects of the divorce on the future custody and support of the children, the wife’s support rights, as well as property agreements and tax arrangements. On the other hand, insisting upon a rigid observance of California’s one year waiting period may be emotionally and socially unacceptable, and a California decree is often almost impossible to keep from the press.

Either of these extremes—declining the case or insisting on a California decree alone—would unquestionably be “ethical.” But what about the middle road? Can the lawyer help to arrange an out-of-state divorce, knowing the parties expect to return to California as quickly as possible? Are there any facts which the California lawyer might discover in the course of the case which he must be prepared to dis-
close to the California courts in any later litigation over divorce, custody, support, or probate, even against his client’s wishes? There is no clear answer to these ethical problems in the United States today, and the only California case discussing them is quite unsettling to the California lawyer who assumes that his usual adversary ethics can carry him through any matrimonial hassle.

We propose in this paper, first, to review briefly the current dilemma of “state interest” vs. “party autonomy” in the substantive law of American migratory divorce; second, to review the opinions of courts and bar committees concerning the lawyer’s duty in migratory divorce cases; third, to consider the only California case directly discussing the ethics of migratory divorce, Griffith v. State Bar, and its implications for California lawyers in the light of our law of divorce jurisdiction; fourth, to re-examine the present law in terms of family law practice; and finally, to tender some conclusions concerning a modern, workable, yet honorable code of ethics for the California family lawyer.

The discussion will focus on the ethical responsibility of the California lawyer in dealing with the California incidents of divorce decrees obtained in other jurisdictions by California clients. These incidents may be a later (or concurrent) matrimonial suit in California in which the jurisdiction of the foreign court to grant a divorce may be attacked, a later suit for support under the doctrine of divisible divorce, a suit for enforcement of support from a foreign state under the Uniform Reciprocal Enforcement of Support Act, or even a bigamy prosecution.

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3 These terms are suggested in Ehrenzweig, Conflict of Laws § 71, at 236 (1962) [hereinafter cited as Ehrenzweig], and we use them to describe the clash between a state’s asserted interest “in limiting divorces to deserving spouses” and the spouses’ desire to decide for themselves whether to continue their marriage.

4 We may define migratory divorce as divorce sought by persons “whose change of residence has been motivated by the desire to obtain a divorce under more liberal legislation than that enforced in their former domicile.” Groves, Migratory Divorce, 2 Law & Contemp. Prob. 293, 294 (1935). Justice Frankfurter has referred to these clients as “permanent residents who leave the State to change their spouses rather than to change their homes . . .” Sherrer v. Sherrer, 334 U.S. 343, 361 (1948) (dissenting opinion). We will use the term “divorcing court” to refer to the out-of-state court rendering the decree, and “home state” to refer to the state of the spouses’ usual residence.

5 40 Cal. 2d 470, 254 P.2d 22 (1953).

6 CAL. CODE CIV. PROC. §§ 1650-92.

7 This paper discusses only the ethical problems incident to migratory divorce. In most states there are also important problems of divorce ethics raised by the defenses of collusion and recrimination. For discussion of the defendant’s lawyer’s “duty” to raise these defenses, or of the plaintiff’s lawyer’s “duty” to present to the divorce court even those facts which would bar his client’s suit, see Drinker, Problems of Professional Ethics
"State Interest" v. "Party Autonomy"

Unlike Baron Turton's view of the law of real property succession, the law of divorce jurisdiction has never been clear and certain. In the scant one hundred years since legislation has made available divorce through court action, there have been few signs of a systematic pattern emerging. For present purposes we can distinguish four basic types of migratory divorces: "participating" divorces, ex parte divorces, mail-order divorces, and extranational divorces. Several recent Supreme Court decisions have made it clear that vastly different consequences ensue from these differing types of divorce; the ethical responsibilities of counsel for the parties vary correspondingly.

Under current case law, the simplest situation is the "participating" divorce. The defending party, as well as the plaintiff, appears in the foreign (divorcing) court and participates in that court's determination of its own jurisdiction. The divorcing court always has jurisdiction to determine its own jurisdiction, and the principles of res judicata prevent a "participating" defendant from relitigating the issue of the divorcing court's jurisdiction. In 1948 the Supreme Court held in Sherrer v. Sherrer that where the defendant has participated such a finding of jurisdiction is entitled to full faith and credit, thus constitutionally barring the defendant from relitigating it.

Under the Sherrer doctrine, the parties to a "participating" divorce

in Matrimonial Litigation, 66 HARV. L. REV. 443 (1953), and Note, The Role of the Lawyer in Divorce: Some Ethical Problems, 21 U. PITZ. L. REV. 720, 727-30 (1960); 2 THE CALIFORNIA FAMILY LAWYER § 32.31 (1963) [hereinafter cited as FAMILY LAWYER]. See also In re Backes, 16 N.J. 430, 109 A.2d 273 (1954), for an especially fearsome application of these rules by a conservative court.

8 See, e.g., Barber v. Barber, 51 Cal. 2d 244, 331 P.2d 628 (1958); 2 FAMILY LAWYER § 32.10; Comment, 4 HASTINGS L.J. 37 (1952); Comment, 22 So. CAL. L. REV. 155 (1949). On what constitutes "participating," see 2 FAMILY LAWYER § 32.12.

9 334 U.S. 343 (1947).

10 The Sherrer doctrine is limited to interstate divorce, since no full faith and credit need be given to divorce decrees of foreign countries. States are still free to invoke comity, res judicata, or estoppel to bar an attack on a foreign country divorce. Ehrenzweig § 73. California has greatly extended the effect of Sherrer by use of estoppel. Barber v. Barber, 51 Cal. 2d 244, 331 P.2d 628 (1958); 2 FAMILY LAWYER § 32.10; Comment, 4 HASTINGS L.J. 37 (1952); Comment, 22 So. CAL. L. REV. 155 (1949). On what constitutes "participating," see 2 FAMILY LAWYER § 32.12.

11 Sherrer held that the requirement of full faith and credit bars a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the court of a sister state where (1) the defendant participates in the divorce proceedings, (2) defendant has an opportunity to contest the jurisdiction, and (3) the decree is not susceptible to collateral attack in the court of the state which rendered the decree. Johnson v. Muehberger, 340 U.S. 581 (1951), extended this bar to the daughter of a first wife, who wanted to attack the husband's divorce from the second wife in order to cut off the third wife's statutory share of the estate. Cook v. Cook, 342 U.S. 126 (1951), extended the principle to "strangers to the decree."
have an unchallengable decree; it would appear that there is no ethical impropriety in helping them to obtain such a decree. But it is important to keep in mind that Sherrer did not hold that all "participating" divorces are valid, but only that participants cannot later challenge them. Such divorces may perhaps be assailable under rare circumstances (as in a bigamy prosecution in the home state) so that the lawyer, in weighing his ethical responsibilities, may have to consider whether participation completely relieves him of complications raised by the more vulnerable ex parte and mail-order decrees.

In an ex parte divorce, only one spouse appears in the divorcing jurisdiction, and the defendant is served constructively.\(^\text{12}\) In the leading ex parte divorce cases, Williams v. North Carolina\(^\text{13}\) (Williams I) and Williams v. North Carolina\(^\text{14}\) (Williams II), the Supreme Court held that the full faith and credit clause requires each state to accept sister state ex parte decrees as valid only if the home state finds that the divorcing court had jurisdiction over the parties.\(^\text{16}\) It is important to keep in mind that the Supreme Court did not rule that no state could recognize foreign ex parte decrees, and the decision did not affect the general presumption that a foreign decree valid on its face is valid until declared void by a court of competent jurisdiction.\(^\text{16}\)

California has accepted the invitation of the second Williams case in which the Supreme Court permitted North Carolina to re-examine Nevada's jurisdictional finding. The California courts will review the jurisdictional findings of sister state courts in ex parte proceedings to

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\(^{12}\) Frequently, the plaintiff will have moved to the divorcing state with a genuine intention to stay there. These cases are omitted from our discussion here, since we are limiting "migratory divorce" to divorce involving a trip away followed soon after by return "home." See note 4 supra.

\(^{13}\) 317 U.S. 287 (1942) (assuming plaintiff spouse was properly domiciled in Nevada, North Carolina required to give the ex parte Nevada decree full faith and credit as a defense to a bigamy prosecution).

\(^{14}\) 325 U.S. 226 (1944) (North Carolina allowed to re-examine Nevada's domicile finding in order to convict petitioner of bigamy, the Court leaving open what law would govern the re-examination).

\(^{15}\) It may be that the Supreme Court will lay down a constitutional test of domicile, but until it does so, Williams II appears to allow states to use their own test in passing upon the ex parte divorcing court's jurisdiction. See Kopasz v. Kopasz, 107 Cal. App. 2d 308, 237 P.2d 284 (1951) (California law alone considered). The court added this warning in Williams II: "The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicile and therefore a want of power in the court rendering the judgment." 325 U.S. at 233.

\(^{16}\) The Williams II opinion stated that "the burden of undermining the verity which the Nevada decree imports rests heavily upon the assailant." 326 U.S. at 233. See Rice v. Rice, 336 U.S. 674 (1949). See also CAL. CODE CIV. PROC. § 1963 (16)-(18), (33).
decide whether they are entitled to full faith and credit.\textsuperscript{17} Therefore, the California lawyer must be aware that the defendant may collaterally attack these ex parte decrees in our courts. This vulnerability may lead to ethical restrictions upon the affirmative use he may make of a foreign decree, even if it is valid on its face.

The third major type of decree is the mail-order divorce, usually procured from Mexico, in which neither party has appeared in person in the divorcing court. Although these divorces are authorized under the laws of most Mexican jurisdictions,\textsuperscript{18} they are uniformly condemned in the United States. They have nonetheless been granted some recognition in this country, despite the usual appellate pronouncements that they are legal nullities.

Finally, extranational decrees must depend for their recognition entirely on doctrines of comity, estoppel, and state-imposed res judicata, since they are entitled to no protection under the Constitution. What is this magic ingredient “domicile,” which apparently is required to immunize foreign ex parte and extranational decrees from collateral attack? American courts and legislatures have generally insisted that for a court to have jurisdiction to sever the marriage bonds, the marriage, or the parties to it, must somehow be domiciled in the jurisdiction.\textsuperscript{19} But the states’ definitions of domicile, the presumptions they have established concerning it, and the direct evidence they require to prove its existence vary greatly—from the apparent absence of any statutory minimum in an Alabama “participating” divorce\textsuperscript{20} to three years in Connecticut.\textsuperscript{21} Except for a unique New York doctrine,\textsuperscript{22} state

\textsuperscript{18} See 2 Family Lawyer § 33.18.
\textsuperscript{19} “[W]hen it comes to dissolving a marriage status, throughout the English-speaking world the basis of power to act is domicile.” Sherrer v. Sherrer, 334 U.S. 343, 357 (1948) (dissenting opinion of Frankfurter, J.). That this statement is too sweeping, see Alton v. Alton, 207 F.2d 667, 678 (3d Cir. 1953) (dissenting opinion of Hastie, J.); Ehrenzweig § 71, at 238-42; Stimson, Jurisdiction in Divorce Cases: the Unsoundness of the Domiciliary Theory, 42 A.B.A.J. 222 (1956).
\textsuperscript{20} Ala. Code tit. 34, § 29 (1958); see text accompanying notes 48-51 infra. (discussed infra at p. 19).
\textsuperscript{22} New York permits couples married in New York to divorce there, no matter where their households or how brief their sojourn in the state. See Ehrenzweig § 71, at 239 n.30. Ehrenzweig discusses this rule as an exception to the domicile requirement, but it may also be viewed as merely extending the definition of the term; i.e., that the marriage remains somehow domiciled there.
laws and decisions generally do not permit courts to grant divorces where neither spouse is a domiciliary at that time.\textsuperscript{23}

Domicile was of little significance in the days of legislative divorce and the early years of judicial divorce, when American society was more observant of the religious prohibitions against divorce, and when families tended to stay in the communities where they had established roots. To ensure that the marriage, and the family of which it was the foundation, would not be broken up without having answered to the community of which it was an integral part, it was natural that marital difficulties would be settled at home. During the latter part of the nineteenth century, all Anglo-American jurisdictions adhered to this principle of hometown “local resolution.”\textsuperscript{24} The foreign state was usually almost as anxious to prevent use of its divorce machinery by non-domiciliaries as the home state was to keep the resolution of domiciliaries’ marital discord within its boundaries. Also, the grounds for divorce were strict and fairly uniform in the early days of judicial divorce, so there was little incentive to migrate for divorce.

The twentieth century, however, has produced drastic changes in our concept of marriage and the family. Nowadays, for all too many Americans, marriage changes quickly from a “gateway to repentance” to a “device for punishment.”\textsuperscript{25} Nevertheless, many home states refuse to indulge the resulting demands for immediate divorce. Like New York\textsuperscript{26} they limit the grounds for divorce to adultery, or like Texas\textsuperscript{27} and California,\textsuperscript{28} they impose fixed delays before rendering the interlocutory or the final decree of divorce.\textsuperscript{29} Other states now have laws and customs to provide divorces quickly, and with few questions asked, for out-of-state citizens. Although these jurisdictions continue to insist

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\item \textsuperscript{23} Some states make exceptions for locally stationed servicemen. See generally 2 \textsc{Family Lawyer} §§ 11.3-11.13.
\item \textsuperscript{24} \textsc{Ehrenzweig} § 71, at 238 n.24.
\item \textsuperscript{25} \textit{Compare} Barnes v. Barnes, 110 Cal. 418, 421, 42 Pac. 904, 905 (1895) (denying annulment for wife’s concealed antenuptial unchastity: “Previous unchaste conduct, although concealed, does not invalidate a marriage. ‘Public policy pronounces otherwise and opens marriage as the gateway to repentance and virtue.’ \textit{Caveat emptor governs}.’”), with DeBurgh v. DeBurgh, 39 Cal. 2d 858, 864, 250 P.2d 598, 601 (1952) (“It is a degradation of marriage and a frustration of its purposes when the courts use it as a device for punishment.”).
\item \textsuperscript{26} N.Y. Dom. Rel. Law §§ 6-8.
\item \textsuperscript{27} Tex. Rev. Civ. Stat. art. 4632 (1960) (sixty days).
\item \textsuperscript{28} Cal. Civ. Code § 132 (one year).
\item \textsuperscript{29} Direct restraints on remarriage are usually ineffective since most states recognize all foreign marriages, even of their own domiciliaries, if not violative of a basic public policy of the recognizing (home) state. \textit{Compare} Cal. Civ. Code § 63 with Cal. Civ. Code §§ 59-60. See also \textit{In re Mays Estate}, 305 N.Y. 486, 114 N.E.2d 4 (1953); \textsc{Ehrenzweig} § 79.
\end{itemize}
that the jurisdiction of their courts depends upon "bona fide domicile," in practice the trial courts inquire hardly at all into the plans of the applicants. The resulting stream of litigants from the strict states to Nevada, Idaho, Alabama, Arkansas, Florida, and the Virgin Islands has produced a great cleavage between state interest and party autonomy, for many home states are jealous of their role as a third party in loco parentis to every divorce suit.

What law is to decide whether domicile is present? In Williams II the Supreme Court left the definition of domicile up to the home court, but if the Court continues to hold that "bona fide domicile" is a constitutional prerequisite to interstate recognition of divorce decrees under the full faith and credit clause, it will eventually have to define minimum standards of "constitutional domicile" for purposes of full faith and credit." Especially difficult will be the question of how far the home state's definition can deviate from the one used by the divorcing state. Nevada purports to require an intention to remain indefinitely in the divorcing state. Suppose Nevada should adopt a "sojourn" statute that explicitly dispenses with the domicile requirement or makes six weeks' residence conclusive evidence of domicile, such as the one adopted in the Virgin Islands and struck down in 1955 by the Supreme Court in Granville-Smith v. Granville-Smith, on non-constitutional grounds. The Court would then have to decide not only whether Nevada could constitutionally assert jurisdiction on mere fixed-term residence without proof of intent to remain, but also whether another state could ignore such a Nevada definition of domicile in determining whether to give full faith and credit to a Nevada ex parte divorce.

We have been examining the pronouncements of legislatures and courts on the necessity of domicile; but in some states the executive, too, has given force to the requirement that there be domicile for divorce by threatening or instituting bigamy proceedings against a person who marries again after receiving a decree in a state where the

32 "The Constitution does not mention domicile ... judges have imported it." Williams v. North Carolina II, 325 U.S. 226, 255 (1944) (dissenting opinion of Rutledge, J.). It may be that the Court eventually will expressly disavow the requirement. See generally Alexander, The Follies of Divorce, 36 A.B.A.J. 105 (1950); Paulsen, Divorce Jurisdiction by Consent of the Parties, 26 Ind. L.J. 380 (1951).
33 E.g., Barber v. Barber, 47 Nev. 377, 222 Pac. 284 (1924).
34 349 U.S. 1 (1954).
home-state authorities believe he has not established a bona fide domicile. Williams II expressly permits a re-examination of domicile for purposes of bigamy prosecution. It is presently an open question whether the res judicata doctrine of Sherrer, as extended in 1951 Johnson v. Muelberger, will "estop" even a bigamy prosecutor from relitigating the jurisdiction of the divorcing court, or whether the theory that "the state is a party to every divorce proceeding" and was unrepresented in the foreign divorce proceedings, will permit conviction even in cases of "participating" divorces.36

Until the recent exposition of the doctrine of "divisible divorce," the home state could point out that ex parte divorces threatened not only the existence of the marriage, but also the ancillary support rights to which the stay-at-home spouse might otherwise have been entitled. With the advent of Estin v. Estin, Vanderbilt v. Vanderbilt, and Hudson v. Hudson the United States and California Supreme Courts have declared it proper to litigate support rights independent of the out-of-state action to sever the marriage bonds; therefore, little remains of this argument. The last major effort to re-establish the supremacy of state interest, the Uniform Divorce Recognition Act, makes residence in the "home" state twelve months before divorce and eighteen months after divorce presumptive evidence of lack of domicile in the divorcing state, and declares divorces without such domiciles "of no force or effect" in the home state. Only a few states have enacted this legislation; it has had little practical effect because most divorces are "participating" and not subject to challenge despite the presumptions of invalidity set forth in the act.

The Law and Bar Association Opinions on Ethics in Migratory Divorce

Many American cases, as well as opinions of bar association ethics and grievance committees, have commented upon the ethical duty of the family lawyer in migratory divorce. Many of these expressions of

36 340 U.S. 581 (1950). "When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the union." 340 U.S. at 587.

37 See generally Ehrenzweig § 74.

37 334 U.S. 541 (1948).


40 Cal. Civ. Code §§ 150-150.4. California adopted the act in 1949 but it has had an especially limited application due to the liberal use of estoppel and standing-to-sue arguments to bar challenges to divorces ostensibly condemned by the act.
judicial and professional opinion date from before World War II, and changed social attitudes toward divorce have weakened their authority. Others, such as Griffith v. State Bar, to be discussed below, represent more recent judicial pronouncements which circumscribe very strictly the lawyer's ethical duty in migratory divorce. In almost every state the bar association grievance and ethics committees are generally composed of the more conservative lawyers in the community, who are frequently associated with firms which avoid family law problems as "messy" and unbecoming of the profession. The existing opinions, while significant as the only extant formal expression of the views of the organized bar, must, therefore, be taken with salt sufficient to counteract their frequently impractical loftiness.

There is debate even upon the preliminary question of whether a lawyer may inform a prospective migrant what the law of another state or country appears to provide (e.g., residence requirements, grounds for divorce, etc.). On the one hand, the ABA Committee on Professional Ethics and Grievances has suggested that giving this advice to a client is proper, provided it is made clear that the lawyer is not licensed to practice in the foreign jurisdiction, and provided that lawyers take responsibility for the information they supply. The contrary view is that a lawyer not licensed to practice in the state whose law is being examined must not supply information as to that state's requirements, since he is not a member of its bar, not amenable to its discipline, and presumably not always up-to-date on judicial decisions, rules changes, or changing standards in the foreign state. The courts ought to hold that an attorney is acting within his proper province when he informs his clients as to what appears to be the law in another jurisdiction. A clear labeling of his status as a non-prac-

41 40 Cal. 2d 470, 254 P.2d 22 (1953).
42 See Diamond, The Lawyer and Family Law, a Point of View, in 1 Family Lawyer 43 (1962).
43 We have defined "migrant" as a spouse intending to return promptly to his home in California. See note 4 supra.
44 Hereinafter cited as ABA Committee; its opinions are designated ABA Opinion — (No.) and are printed in a supplemented volume, ABA Opinions of the Committee on Professional Ethics and Grievances (1957).
45 Compare ABA Opinion 263 (1944) concerning foreign lawyers: "Ordinarily the Chicago lawyer would not be qualified or equipped to advise as to how the transaction could be carried through comfortably to the laws of that foreign country; yet it is clear that a lawyer assumes a substantial degree of legal responsibility for the correctness of the advice he undertakes to give. By giving such advice he represents that he is qualified to do so."
46 He may still be disciplined in his own state for fraud on a foreign court.
47 This view would class the out-of-state lawyer with the law student, who must keep silent on all legal questions, no matter how tempting.
titioner there, coupled with an outline of the sources used, plus a caution that more conclusive and up-to-date information may be available from a member of the other state's bar, ought to satisfy his ethical duty.

Can the California lawyer advance a professional opinion on open or ambiguous questions of law which appear to have no clear-cut answer in the foreign jurisdiction? It would appear that he must have this authority to serve his client adequately, especially if the foreign state is far away and the local lawyer is acting not merely as a legal encyclopedia for his divorce client, but as confidant and old friend, so that in practical terms it would be extremely difficult to refuse to examine the foreign law and render a professional opinion. For example, at present it is not at all certain what interpretation the Supreme Court of Alabama will finally give to Title 34, section 29 of the Code of Alabama, which provides that the evidence must show the complainant to be a "resident" of Alabama at the time the bill for divorce is filed.\(^48\) Nor has the Nevada Supreme Court definitively stated whether Nevada's professed requirement of intent to remain in Nevada "indefinitely"\(^49\) would encompass a plaintiff who answered the judge that by "indefinitely" she meant she didn't know whether she would go back to Los Angeles on Thursday or Friday.\(^50\) Should the California lawyer refuse to research or discuss these issues, even if they are clearly material to the suit of long-time clients? Hopefully, the California Supreme Court will not require him to turn his back on his clients' marital difficulties.

There are two reasons generally given for not going out of state. One is couched in terms of public policies: the state of the family domicile is said to have a dominant interest in the matrimonial status of its citizens, so that it should be the sole arbiter of their proposed divorce. The other is a rule of practice: because of the uncertainty of the law, and the widespread reliance upon the state-interest approach just mentioned, a foreign divorce runs great risk of non-recognition, and thus should be avoided lest it prove unenforceable upon return home. We will consider these two arguments separately.

In In re Backes\(^61\) the Supreme Court of New Jersey stated the conservative position in the following language:

> The law regards divorce actions as imposing special responsibilities


\(^50\) See Drinker, Problems of Professional Ethics in Matrimonial Litigation, 66 Harv. L. Rev. 443, 462 n.74 (1953).

upon the court and attorneys as officers of the court. This is because in every suit for divorce the State is in fact if not in name a third party having a substantial interest. The public is represented by the conscience of the court . . . and “The law regards these actions which tend to disrupt the marriage status with regret—certainly it does not encourage them . . .

Our rules of court governing matrimonial actions . . . cast special burdens upon attorneys in the conduct of such actions, in purposeful reflection of the deep concern for the maintenance of the integrity of such proceedings to avert disservice to the public interest. The rules recognize that protection of the State’s interest in particular cases necessarily lies with the attorneys in the first instance because of their superior knowledge of facts made known to the court ordinarily through their representations.52

It is apparent that the New Jersey court’s concept of “state interest” encompasses more than insuring that a New Jersey court will be the one to hear all of the facts; “state interest” means an interest in keeping husband and wife married. For example, New Jersey continues to follow the rule that recrimination is not merely a defense to divorce, but is an absolute bar no matter what the wishes of the spouses, if any facts exist to support such a charge against the plaintiff.53

In the Backes case, plaintiff’s attorney charged the defendant wife with desertion, not mentioning that his client had married more than seven years after his separation from defendant, at which time he had believed the defendant dead. Defendant pleaded plaintiff’s “adultery” as a bar to divorce. The New Jersey Supreme Court of Errors suspended Backes for one year (three judges out of seven voting for disbarment) for failing to disclose in the complaint that his client had remarried after seven years.54 We have not found another recent case imposing such a fiercely rigid standard. California would surely not be so dogmatic. Our supreme court has many times expressed its concern over the growing divorce rate, but it has recognized that the law must reflect, as well as determine, the mores of the times. In the celebrated 1952 case of DeBurgh v. DeBurgh,55 the court decided that in appropriate cases proof of a cause of divorce against the plaintiff would

52 Id. at 433-34, 109 A.2d at 274-75.
53 For some years following Sherrer v. Sherrer, 334 U.S. 343 (1948), New Jersey even refused to apply the rule of compulsory recognition of sister state migratory participating divorces laid down in that case, wherever it found what it believed to be “fraud” on the sister state’s court. New Jersey has now abandoned that position. Nappe v. Nappe, 20 N.J. 337, 120 A.2d 31 (1956).
54 The New York committees do not even consider such action unethical, let alone ground for disbarment. Drinker likewise disagrees with New Jersey. Drinker, supra note 50, at 448-49.
55 39 Cal. 2d 858, 250 P.2d 598 (1952).
no longer automatically bar a divorce, but might lead instead to a granting of divorce to both parties. The court said that "it is a degradation of marriage and a frustration of its purposes when the courts use it as a device for punishment."\(^6\)

Even the ABA Committee remarked, as early as 1932, that

in many divorce cases the best interests of both parties will be promoted by a reconciliation; but in other cases the best interests of one or the other or even of both parties will be promoted by the divorce. If the attorney honestly believed that the best interests of his client would be prejudiced by a reconciliation, it was, in the opinion of the committee, entirely proper for him to advise his client to that effect.\(^5\)

The practical effect of New Jersey's rigidity has been largely alleviated by the res judicata doctrines of *Sherrer v. Sherrer*,\(^8\) *Johnson v. Muehleberger*,\(^5\) and *Cook v. Cook*.\(^6\) The New Jersey Supreme Court has had to subordinate its views to the constitutional compulsion of those cases, albeit reluctantly.\(^6\)

Even before *Sherrer* the grievance committees had begun to recognize the propriety of legal advice on out-of-state divorces. The early decisions did not explicitly base their conclusions on the right and duty of the lawyer to inform his clients of all means open to achieve their aims.\(^6\) In 1912 a majority of the New York County Committee held it proper for a New York lawyer to advise that a New York decree prohibiting the client's marriage with the correspondent did not bar her going to Connecticut and contracting a new marriage which the New York courts would recognize as valid and not punishable as a contempt.\(^6\) But the committee added that it disapproved of the lawyer's going to Connecticut with the client and giving her away, as "likely to be misunderstood" and tending to "diminish public respect for the profession." Thereafter a majority of the same committee ruled that it was proper for a New York lawyer to represent a deserted wife

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\(^5\) ABA, *Canons of Professional Ethics* Canon 8 (1908); see Drinker, *Legal Ethics* 102-03 (1953). "Counsel can hardly be expected, therefore, to refuse their assistance to spouses seeking a legal status sanctioned by the highest court of the country." Ehrenzweig § 72, at 243.

\(^6\) N.Y. County Opinion 12 discussed in Drinker, *Legal Ethics* 122 (1953).
in making an agreement with the husband: she agreed to change her domicile to a state where desertion would be sufficient for divorce, and he agreed to accept service and pay a substantial settlement and fees. The majority stated that it

was unable to agree with the minority that the mere fact that the statutes of New York do not provide for the relief desired in the case suggested is sufficient ground to condemn the arrangement or the participation of a New York lawyer in aid of relief elsewhere according to the law there in force. In the opinion of the majority, the vice of such arrangements does not arise from the state of the law in New York, but from possible imposition upon the foreign court by concealment of the actual facts, and a fraudulent resort to the foreign state by one only colorably a resident of such state. 

It is interesting that even this committee was not concerned with state interest, but with imposition on the other spouse (the ex parte situation), and with fraud on the foreign court.

A minority considered it unprofessional to assist in an arrangement "the object of which is to escape the operation of the laws of this state ...." And a recent writer has remarked as follows:

"The lawyer, the client and the court all collude in misrepresenting that Nevada has sufficient connection with the marital status to give it jurisdiction to dissolve the marriage. Under this reasoning, a fraud is perpetrated by all participants upon New York, the state of domicile to which the parties will return. Nevada has no interest in the status of the parties, that state likely will never see them again (unless for a subsequent "quickie" divorce). New York is the vitally interested state, for it is no legal myth that the state of domicile has an interest in the status of its citizens in marriage and divorce. It is the state which must cope with the imminent problems of divorce, such as the woman becoming a public charge or an immoral person in order to sustain herself, and the welfare of the children whose home has been broken.

Nevertheless, after Williams-like ex parte proceedings or mail-order divorces, the way is still open for state courts to apply this state interest doctrine as strictly as the New Jersey court did in the Backes case. But the recent development of the doctrine of divisible divorce has re-

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64 N.Y. County Opinion 100 discussed in DRINKER, LEGAL ETHICS 123 (1953).
65 No longer an important problem since the advent of the "divisible divorce."
66 Note, The Role of the Lawyer in Divorce: Some Ethical Problems, 21 U. Priit. L. Rev. 720, 728-29 (1960). The author appears to be unaware that custody may always be litigated at home. The reference to "immoral women" would have been more appropriate in the 19th century.
67 "State interest" may yet find its renaissance in a possible state prosecution for bigamy despite Sherrer. See text accompanying notes 35-36 supra.
duced the need for invoking the state interest to protect deserted wives and children; they now can relitigate at home the support and custody awards of a foreign ex parte divorce decree.

Consider New York's vital state interest in the marriage and divorce of its Governor, Nelson Rockefeller. Surely if we are to expect anyone to eschew an arrangement "the object of which is to escape the operation of the laws of this state," it should be the Governor. Yet we all recognize that it would have been impossible for the Governor to have played the charade of "hotel divorce" which would have been a prerequisite to a New York divorce. What real state interest does New York now have in the Rockefeller or Murphy families?

The second major reason commonly given for not going out of state is a more practical one than the traditional state interest approach. Given the uncertainty in this area of the law, the argument goes, the client runs too great a chance of having his foreign decree declared invalid after he returns home. It is true that a far more satisfactory professional job can be done at home, but it does not follow that a client ought not to be allowed to make this choice for himself, after being candidly told of the risks he runs. Moreover, the risks vary widely, depending upon the type of divorce, where procured, the degree of spousal cooperation, the competence, common sense and fairness of counsel and of the clients, and whether a California underpinning by way of simultaneous local proceeding has been provided. Let us consider this argument in terms of the four major types of divorce: participating, ex parte, mail-order, and extranational. Since the argument is based on the probability of judicial non-recognition of a decree, our discussion will necessarily refer to the general law of divorce jurisdiction already discussed above.

Participating sister state divorces present the least problem. With the possible exception of a later bigamy prosecution, the Sherrer and Johnson cases make it virtually impossible to challenge the foreign decree, so long as the issue of the foreign court’s jurisdiction has been litigated (as it always must be, at least impliedly). Even conservative writers, though they deplore the result of the Sherrer doctrine, agree that since it is in fact true that clients can immunize their admittedly migratory divorce by "participating," counsel have an unquestioned right and duty to advise clients of this possible solution to their problems.

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68 See text accompanying notes 35-36 supra.
69 See, e.g., Note, The Role of the Lawyer in Divorce: Some Ethical Problems, 21 U. P.R.R. L. Rev. 720, 729 (1960). These writers consider it very important that many courts, including the California Supreme Court, continue to distinguish between "valid"
Ex parte divorces present the real problem here. As indicated below, the lawyer ought to make every effort to avoid ex parte proceedings; but if one is unavoidable, the client certainly runs a greater risk of having it overturned as fraudulent if it can later be established that it is a migratory divorce. Deprived of the broad umbrella of Sherrer, Johnson, and Cook, the lawyer whose client is the plaintiff in an ex parte proceeding must make absolutely clear to his client the added risk he is taking. A “California underpinning”70 may save the divorce, but the lawyer must make it a rule of practice to obtain the absent spouse’s waiver if at all possible.

Another problem area is that of Mexican divorces. These decrees come in two common varieties: the one-day stopover, and the mail-order decree. The Juarez divorce has become more fashionable among wives of ballplayers and movie idols than the comparatively mundane Vegas sojourn. It is also much quicker. The neon signs greeting the tourist in Tijuana proclaim in urgent flashes:

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WHIL-U-WAIT

In a stopover Mexican divorce there is at least some appearance in court by a party to the marriage. Even if both parties appear, however, the divorces are not “participating” divorces in the sense in which we have been using the term above, since a Mexican adjudication of its own jurisdiction is not entitled to the constitutional benefits of the full faith and credit clause. They are properly considered as extranational divorces, discussed below.71

A mail-order divorce is one obtained without either party actually journeying to Mexico. These divorces are proper under most Mexican decrees and decrees which, though “invalid” “legal nullities” with “no force or effect,” nevertheless may not be challenged. “But surely the Court, speaking in Sherrer and the related cases, did not intend to condone fraudulent divorces; it held only that such may not be collaterally attacked when defendant has appeared . . . . It is submitted that the latter argument is the stronger one. Just because it cannot be attacked does not justify the lawyer in perpetrating a fraudulent divorce. To advise in favor of such a divorce may be analogized to counseling one who has an absolute privilege to utter a slander because he has an absolute defense.” Ibid. Quaere whether one with an absolute defense can utter a slander? See also Drinker, Problems of Professional Ethics in Matrimonial Litigation, 66 Harv. L. Rev. 443, 454 (1953) (treat a Sherrer-type divorce as the practical equivalent of a “valid” decree); Groves, Migratory Divorce, 2 Law & Contemp. Probs. 293, 298 (1935).

70 Used here to mean a simultaneous local proceeding.
71 See text accompanying notes 90-92 infra.
laws, for appearance by counsel alone in divorce matters appears to be no more shocking to Mexican practitioners than representation by counsel alone in tax or probate matters is in this country. But the idea that party autonomy should be so far extended is anathema to most American courts. Even Congress has echoed this view by declaring it a felony to mail foreign divorce information with intent to solicit business.

We shall see that some states, including California, follow a strict doctrine of estoppel to deny any divorce in which the attacker has participated or acquiesced. This doctrine has not been adopted under constitutional compulsion, but rather reflects the general equitable principles behind estoppel, as well as an important social policy against upsetting subsequent marriages. Should not this same doctrine apply to mail-order decrees? To our knowledge, California has not yet so held, but it would be entirely in keeping with her broad application of the doctrines of estoppel and standing-to-sue to do so. If a judgment of a sister state can be "invalid" and of "no force or effect" and yet be unassailable, there is no reason why mail-order decrees warrant a different treatment, especially where both spouses have participated.

It is best for the California lawyer to assume that a mail-order decree is as yet totally void for all purposes in this state; yet the lawyer is doing less than his duty to his client if he does not point out that there have been some curious American decisions in recent years which have given effect to Mexican mail-order decrees. Although state courts roundly condemn such decrees as violative of "law, procedure and public policy," declaring them "legal nullities," they have

72 See 2 FAMILY LAWYER § 33.18.
73 Yet over three-fourths of the states allow plaintiff, defendant, and witnesses all to appear in a divorce action by deposition only. California is in the small minority.
74 18 U.S.C. § 1714 (1958). There have been no cases, but anyone presuming to write on this topic should be careful.
75 See note 69 supra.
76 California cases holding mail-order decrees void as against the public policy of the state are: DeQuesnoy v. Henderson, 24 Cal. App. 2d 11, 74 P.2d 294 (1937); Kegley v. Kegley, 16 Cal. App. 2d 216, 60 P.2d 482 (1936); Ryder v. Ryder, 2 Cal. App. 2d 426, 434, 37 P.2d 1067, 1072 (1934) ("It would be a strange situation if the court where the parties reside were bound by the rules of public policy and the parties could, by subterfuge or evasion, by correspondence, obtain a decree in another forum."). Note that all of these district court cases antedate Williams v. North Carolina I, 317 U.S. 287 (1942), and Sherrer v. Sherrer, 334 U.S. 343 (1943), as well as the recent California Supreme Court decisions firmly establishing estoppel as more important than defeating otherwise "invalid" Mexican jurisdiction. Spellens v. Spellens, 49 Cal. 2d 210, 317 P.2d 613 (1957) (a "stopover" case). See 2 FAMILY LAWYER § 33.46.
nevertheless been held effective: to deny a widow a statutory share in her husband's estate;\(^7\) to govern "private claims";\(^8\) and to bar a compensation claim.\(^9\) Can counsel be expected to ignore these very real effects of "legal nullities" when his clients inquire of him? Most of these cases force the party who obtained the decree to eat its bitter fruits as well; but there are cases in which such decrees have been considered in favor of the party seeking to present the decree.\(^1\)

In 1942 the ABA Committee roundly condemned as "illegal and unethical" the practice of "participating and aiding in the procurement of admittedly illegal Mexican divorces for New York residents."\(^2\) Even more ominous is \textit{In re Anonymous},\(^3\) in which the Appellate Division, First Department, considered a motion to discipline a New York attorney who had participated in obtaining a Mexican mail-order divorce for New York clients. The court stated:

> Respondent conceded that he knew of the views expressed by our courts in the cited cases. He so advised his client. He contends, however, that his conduct in advising the client should not be found reprehensible in the absence of an express prohibition by this court against the assistance by a New York attorney in securing such a divorce.

> It should be unnecessary for the courts to have to expressly advise attorneys that their conduct is to be performed within the law and not in an attempt to flout it. . . .

> In view of the novelty of this proceeding and in the absence of any collusive conduct by the respondent, the motion for an order adjudging the respondent guilty of professional misconduct is denied.

> For the information of the Bar, we state, however, that repetition of like conduct in the future by an attorney will be deemed sufficient basis for appropriate disciplinary action.\(^4\)

> It is no wonder that this troubled area of mail-order divorces inspired Judge Conway of the New York Court of Appeals to remark in his dissent in \textit{In re Rathscheck's Estate}:

\(^7\) \textit{In re} Rathscheck's Estate, 300 N.Y. 346, 90 N.E.2d 887 (1950).
\(^2\) ABA Opinion 248 (1942).
By reversing, we make it necessary for an attorney to advise a client . . . in a contemplated application for a Mexican mail-order decree based solely upon a collusive contract violating our State public policy, that if both enter into such contract (since both must agree and sign) the client will insure the fact that if the marital partner survives, that partner will have no distributive share in the client's estate. An attorney will be under the necessity of advising his client that if he or she disregards the public policy of this State and enters into such a collusive contract to dissolve the marriage, and obtains a mail-order divorce upon it, while it will not affect the marriage obligation in this State, it will immediately put into operation and fix forever rights of descent and distribution of the survivor of the two spouses; that that will be true regardless of what either or both of them may do thereafter and regardless even of a decree of our Supreme Court declaring the Mexican mail-order divorce void and of no effect, upon direct attack with personal jurisdiction of both parties. There may be no repentance.86

There may indeed be no repentance. If the courts are so uncertain as to the actual effect of a mail-order divorce, they should be especially circumspect in condemning attorneys for having guessed wrong. Certainly with the substantive law as it is in several states, the lawyer cannot take the courts at their word that mail-order decrees are "legal nullities." It is no wonder that Ehrenzweig concludes that "the principal practical difference between a Nevada divorce and a Mexican divorce now appears to be the comparative inexpensiveness of the latter."87 There is only one practical solution to this dilemma, and Henry Drinker has put it succinctly, if hesitatingly:

In connection with these cases a distinction may perhaps be drawn between advising a local client of his or her rights, and affirmatively participating, even to the extent of recommending a Mexican lawyer. Much can be said in favor of a lawyer's right and duty to advise an intelligent client correctly on any question of law as to which the client consults him and as to which he is competent to give advice.88

Even if one's home state still declines to recognize a Mexican mail-order decree for any purpose, the lawyer must inform his client that other states, such as New York, may give the decree some effect should he later move there; and it is far from certain that the lawyer's home state will never change its position. Even this lowly wetback decree is entitled to share in the dignity of the doctrine that a divorce decree, once granted and valid on its face, must be presumed valid until declared otherwise.

86 300 N.Y. at 350, 90 N.E.2d at 892.
87 EHRENZWEIG § 72, at 243.
88 DRINKER, LEGAL ETHICS 150 n.9 (1953).
The authors conclude that it is both unjust and inconsistent with the confused state of the law to consider it unethical for counsel to help clients, who have been warned of the perils, find competent foreign counsel, let alone merely to advise them of the effects a mail-order divorce may have upon their lives.\textsuperscript{9}

The fourth major group of divorces is extranational decrees. Since the decline of interest in Parisian decrees, which were all the rage in the 1930's,\textsuperscript{90} only Mexican divorces seem to have caught the fancy of the jet set, and the stateside overtones of other extranational divorces have accordingly diminished greatly. Since extranational decrees are not entitled to full faith and credit, each state is free to accept or reject them case by case. What standards should govern counsel in such cases? Ehrenzweig has suggested what might be called the "likelihood" test: "If, as is the case in New York, a foreign non-domiciliary divorce may be recognized as valid, there is no reason why an American attorney should not assist in its procurement. On the other hand, he should be held to act unethically if assisting in obtaining a divorce likely to be held void in his or the spouses' state."\textsuperscript{91} While safe, this test seems to the authors much too impractical and hesitating.

Though it may never rank with mobilia sequuntur personam, "you never can tell 'til you try" is as familiar to lawyers as is the growing penchant of judges to reconsider their past rigidities. In this special area of the extranational decree, unfettered by full faith and credit problems, counsel ought to be free to argue for whatever the local court will be willing to recognize, and should not be required to avoid all cases in which the state court will "likely" refuse to recognize the extranational decree.\textsuperscript{92} True, the prudent lawyer will not advise his clients to rely on such a decree if there is any question in his mind

\textsuperscript{89} For excellent material on Mexican divorces, see \textit{2 Family Lawyer} § 33, and especially the bibliography following § 33.48.


\textsuperscript{91} Ehrenzweig § 72, at 243. (Emphasis added.) Professor Ehrenzweig bravely adds: "But the problem is complicated by certain discrepancies between judicial language and action." \textit{Ibid.}

about his own court’s view of it; but surely this should not become the standard for discipline in such an uncharted sea.

Duty to Foreign Court? (Herein of “Deceiving” a Nevada Court)

It would be well to begin this section by warning the reader that, if the reasoning of the courts in the matters we have so far considered has seemed at times tortuous, the present section is never-never land. In this section we encounter that mythical beast, the Nevada trial judge, who is “deceived” into believing testimony by a Van Nuys schoolteacher that she intends to remain in Las Vegas “indefinitely.”

Up to this point we have been discussing the responsibility of the lawyer toward his own jurisdiction (usually that of the spouses’ customary residence); here we shall discuss counsel’s responsibility toward the courts in which his client will be seeking a migratory divorce.

Let us again begin with a statement of the conservative position:

Once an attorney has [informed his client of the sister state’s laws] . . . and leaves it to the voluntary decision of the client as to whether such a proceeding is to be instituted by the client in a foreign jurisdiction, counsel may suggest the name of a reputable attorney in such other state . . . . We deem it advisable to state this warning, however, that at that point the attorney should terminate the relationship of attorney and client, present his bill and be paid for his services. Any participation thereafter in the divorce proceeding in the foreign state may form a foundation of a charge that the New Jersey attorney is particeps criminis when subsequently a fraud is perpetrated upon the courts of the foreign state . . . .

The New Jersey court rightly condemns “fraud,” but what is “fraud” under the circumstances of the typical migratory divorce, whether in Mexico, Nevada, or Alabama? The Mexican courts operate under statutes of the Mexican states, the most important of which recognize voluntary submission as a sufficient basis for divorce jurisdiction in their own courts. Presumably then, no Mexican court is deceived if the parties in fact appear there, since they need testify to no intentions of residence which they do not intend to fulfil. Drinker suggests that

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93 Nappe v. Nappe, 20 N.J. 337, 346, 120 A.2d 31, 36 (1956); accord, ABA Opinion 84 (1932) (fraud upon the court “where such residence is not intended to be bona fide but is for the sole purpose of obtaining the divorce”).


95 See 2 FAMILY LAWYER §§ 33.22-33.32.
the same result would obtain "should Nevada or Florida amend its divorce law by providing that a sojourn of six weeks or ninety days will be sufficient to give its courts jurisdiction." Though such a change would resolve problems of "duty" to these divorcing courts, would it resolve all ethical problems? The Supreme Court continues to intimate that some sort of domiciliary intent is necessary to give constitutional protection to out-of-state divorces; therefore, problems of home-state recognition might remain.

Likewise, Bishop James A. Pike, of the San Francisco Bar, has pointed out that in Nevada it is true that fraud is built into the arrangement, in one sense: there is no intent to change residence and to answer the standard question of the foreign court as to intention to settle there, there is a quick affirmation of that which in no way corresponds to the true situation. Yet, in another way, it is not fraud: nobody is fooled. It is certainly not fraud upon the court, since by virtue of the whole pattern, the court is actually part of the fraud. In short, no judge is deceived; no one intends to deceive anyone, and no one does.

It seems fair to conclude that, at least as to Nevada, Florida, the Virgin Islands, and Idaho, cries of "deception" of the divorcing courts are incredibly naive, or else they are hypocritical justifications for attacking lawyers on the basis of an honorable Canon which has no practical application here. Karl Llewellyn has remarked in this connection:

There are those who refuse to cook evidence, even in divorce cases. But it is not over healthy to keep in operation any system built on a theory as to controversy, fault and collusion in which the bulk of otherwise decent people who have occasion to deal with it, regard as necessary to cheat. Neither made-to-order evidence nor perjury are useful social products. Drinker, Problems of Professional Ethics in Matrimonial Litigation, 66 Harv. L. Rev. 443, 464 (1953).

Compare Granville-Smith v. Granville-Smith, 349 U.S. 29 (1955), in which the Supreme Court invalidated as ultra vires the Virgin Islands statute which provided that six weeks residence was conclusive evidence of domicile.

Pike, Beyond the Law 48 (1963). Bishop Pike adds; "One difficulty with this solution is that it is expensive; not everyone can afford a six-week vacation in Reno, including the inevitable loss involved in playing the one-armed bandit." Ibid. His appraisal is borne out by Drinker, supra note 96, at 462-63; Note, The Role of the Lawyer in Divorce: Some Ethical Problems, 21 U. Pitt. L. Rev. 720, 729 (1960). See also Alexander, The Follies of Divorce, 36 A.B.A.J. 105, 107 (1950), for a denunciation of states which "prostitute their honor" by an "amiable inclination" to further divorces in order to "fatten our marital misfortune." Ingram & Ballard, The Business of Migratory Divorce in Nevada, 2 Law & Contemp. Prob. 302, 307 (1935) contains a fascinating discussion of the practicalities of Nevada business life which underlie its divorce attitude.

On the therapeutic value of legal fictions, see Pike, Beyond the Law 90 (1963); Drinker, supra note 96, at 463 n.78.

Llewellyn, Behind the Law of Divorce, 33 Colum. L. Rev. 249, 281 (1933).
Nor should modern couples be forced to choose between bigamy and perjury, or rather, misstatements of fact "which, in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it."101

A slightly different situation obtains in a state like Alabama, where the available evidence indicates that the reputation of the state for "quickies" is the result of an accidentally liberal statute, rather than of calculated business-getting.102 Section 29 of Title 34 of the Code of Alabama states that the evidence must show the complainant to be a resident of Alabama at the time the bill for divorce is filed. No fixed period is stated. In the 1963 Alabama case of Hilley v. Hilley,103 plaintiff wife flew from Maryland to Birmingham, filed suit the next day, returned immediately to Maryland, and six months later returned to stay in a Birmingham motel for a few weeks prior to trial. After the decree was granted, her husband appealed the issue of residence to the Supreme Court of Alabama, which affirmed the trial court. The court held that the question of residence or domicile is mainly one of intent. Even though the wife had been in Alabama only twenty-four hours when the bill was filed, it could not be said that the trial court was palpably wrong, because, if the court has jurisdiction of both parties, Alabama law requires no specific period of residence.104

In the light of such decisions, it would seem that Alabama's concern over its being "defrauded" by sojourning would-be divorcees is rapidly dwindling to that of Nevada and Florida. Nevertheless, such short stays in the divorcing jurisdiction suggest caution. Although the foreign court is not deceived, the home court is especially likely to try to overturn an Alabama "one-day" divorce unless it is clearly a participating divorce. Also a "California underpinning" is virtually essential.105

Fraud is as reprehensible in California divorce proceedings as in any other matter in which a court relies on counsel not to falsify a fact

102 For a discussion of the business motives behind the six-week statutes, see Bergeson, The Divorce Mill Advertises, 2 LAW & CONTEMP. PROB. 348 (1935).
105 No cases have been found in California construing a one-day Alabama trip, but both New Jersey and New York have recently refused to review the evidence of domiciliary intent, despite stringent allegations of fraud. Hudson v. Hudson, 36 N.J. 549, 178 2d 202 (1962); Genola v. Sharer, 79 N.J. Super. 308, 191 A.2d 491 (Super. Ct. 1963); Shapiro v. Shapiro, 18 App. Div. 2d 34, 238 N.Y.S.2d 102 (1963).
material to the case. The California Supreme Court, for example, has affirmed orders of disbarment for willfully filing divorce complaints that alleged: (1) more than one year of marriage and thus more than one year of non-support, when the marriage was known to be only a few months old, and (2) that the service of summons was genuine, when it was in fact fraudulently drawn up by the attorney. Where there is no fraud, but only an uncertainty in a very confused area of the law, should attorneys be disciplined as though they had conspired to tell their courts a falsehood? It is certainly hornbook law that family lawyers have traditionally owed a much higher duty of disclosure to the state; but is this imposition justified in the modern world, especially when attorneys in other areas of the law are held to no such rigid standards? The reasons usually given for such extreme duty to disclose in matrimonial matters are the state's interest in the parties' marriage, the belief that spouses do not really know their own interests, and the desire to protect children and innocent, deserted spouses. Throughout this article we have used recrimination and collusion cases as examples because American and English courts have long required in those cases a high duty of disclosure of events occurring before the employment of present counsel, though operating to defeat the client's interest.

Are these policies for an extraordinary duty still sound in reason and justice? It would seem not. The American courts are slowly replacing the principle that a marriage must be kept together at all costs with a recognition that sometimes divorce may benefit the entire family. At the same time, everyone knows that spouses will

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108 In re Wharton, 114 Cal. 367, 46 Pac. 172 (1896) (counsel was also charged with filing a false affidavit of service of summons purporting to bear his own wife's signature, in his own divorce proceeding. He who acts as his own attorney . . . ).
109 "The public policy of California may not permit the recognition of a foreign divorce decree when the foreign jurisdiction has no legitimate interest in the marital status of the parties, when the sole purpose of seeking the divorce in a foreign court is to evade the laws of this state . . . or when the divorce is ex parte without reasonable notice to the defendant." Scott v. Scott, 51 Cal. 2d 249, 256, 331 P.2d 641, 645 (1958) (concurring opinion of Traynor, J.).
110 See, e.g., DeBurgh v. DeBurgh, 39 Cal. 2d 858, 240 P.2d 625 (1952); Dickson v. Dickson, 9 Tenn. (1 Yerg.) 110, 112 (1826).
111 E.g., In re Backes, 16 N.J. 430, 109 A.2d 273 (1954); see text accompanying notes 51-54 supra.
112 "It is hard to think of a sillier reason for refusal of divorce than the fact that both spouses desire it and wish the deed to be done with decency. It is hard to see wisdom in denying divorce unless one of the parties is alleged to be criminal or tortious. It is hard to approve of conducting an operation of social surgery in the public atmos-
find a way to untangle unwanted marital bonds if they desire to do so. California’s grounds are as lenient as any state’s; only the waiting period produces mass exodus. Mr. Justice Clark has remarked, “The only constitutional bugaboo is a judge-made one, domicile. . . . Divorce is an intensely practical matter, and if a husband and wife domiciled in any State want a divorce enough, we all know they can secure it in several of our states.”

The authors submit that all of the above reasons indicate that the standard of disclosure of the facts surrounding previous sister state divorces should be no different from that generally required of counsel. It is no more reasonable to require a wife’s attorney to explain that he doesn’t think she was domiciled in Alabama when she got her divorce ten years ago, than it would be to require a defense attorney to disclose that he thinks his client is guilty. Many other examples of touchy areas come to mind. Why should the family lawyer, in dealing with a comparatively private matter, have to disclose more against his client’s interest than a tax attorney, who is representing a man against his government? It is probably due largely to these archaic, unduly rigid standards that family lawyers still are second-class in the eyes of conservative bar associations. Let us review some of the anomalies which arise when the family lawyer is compelled to lay before the court everything against, as well as everything for, a client’s position.

(1) Confidential communications. Usually the client’s earlier caprices in other states come out in casual conversation, as part of the background of the matter counsel is presently investigating. The attorney has a duty to preserve the confidences of his client acquired by virtue of the attorney-client relationship. Even the ABA Committee has held that this duty must ordinarily be paramount to that of disclosing former clients’ misrepresentation of domicile to the lawyer’s own court. In 1944 the Committee held that an attorney consulted on a divorce, who finds that the client has not the requisite residence in the lawyer’s state, and who later hears that the client has seen another lawyer who does not know of the non-residence, must not reveal what he knows to court or attorney. The “fraud” is not fraud

sphere of the prize ring. The legal attitude of some of our states is so far from enlightened that among persons of refinement and decency there has been wide readiness to overlook the fraudulent pretensions in the way of avoidance by the Nevada alternative.” Powell, And Repent at Leisure, 58 Harv. L. Rev. 930, 990-91 (1945).


ABA Opinion 216 (1941); ABA Opinion 250 (1943); ABA Opinion 274 (1946); ABA, CAMONS OF PROFESSIONAL ETHICS Canon 37 (1908).

ABA Opinion 268 (1944).
at all, but merely a refusal to relitigate on his own motion a matter previously determined in another court, usually before the attorney became connected with the cause. It would seem unrealistic as well as unfair to require the confidentiality of these communications to be violated.

(2) The constitutional protection against self-incrimination. As we shall see in Griffith v. State Bar, as long as the state is able to prosecute for bigamy, a court is forcing a litigant to incriminate himself if it compels him to discuss in detail facts which might indicate a lack of jurisdiction in the prior, divorcing court. The answer seems obvious.

(3) Hearsay and the client's conclusions. Often the remarks of the client are merely his own conclusions ("I probably wasn't there long enough," or "Mr. Lawyer, somebody told me that divorce I got is no good"). Ordinarily, counsel was not present at the divorce, or even privy to the facts at the time. There is even less reason to compel him to use this incompetent testimony against his client's interests than there is to bar, as we do, his using hearsay and opinions in favor of his client.

(4) Estoppel. Under the rules discussed in more detail below, even strangers, let alone the other spouse, may be estopped to challenge an "otherwise invalid" foreign decree. This principle must also prevent counsel from raising evidence in derogation of the decree, since his client could never overturn the decree, even if he wanted to.

(5) Bona fide controversy and arguments. We have been discussing "invalid" foreign decrees as though they always came in black and white. Of course most divorce decrees come in various shades of passionate grey. How is the attorney to judge whether he must betray his client, when even the United States Supreme Court cannot agree where the line ought to be drawn? In the light (or dark) of recent case law, can it ever be justly said that "it would be obvious to any lawyer that the decree was invalid"? The law in the client's home state may change; he may move to a jurisdiction which will uphold the decree, or it may be uphill for some purposes but not others, or it may be impervious to attack by some persons and not by others. Surely this is controversy enough.

(6) Full faith and credit ruling in the trial court. Finally, what should a hapless attorney do when, despite all of the explaining he can muster, the trial court elects to uphold a sister state divorce under the full faith and credit clause? Surely in such a situation it would be

\[116\] 40 Cal. 2d 470, 254 P.2d 22 (1953).
outrageous to say that the decree is "invalid," since a court of competent jurisdiction in the attorney's home state declared it valid. Yet as we shall see, a California attorney was recently suspended under just such circumstances.

The peril to the lawyer in his daily practice is greater to the man whose tastes do not run to domestic relations law. The tax counsellor, the commercial practitioner, the business lawyer who never goes to the divorce court is frequently the first to be asked for advice by the long-standing client who can afford the expense incident to migration, or who cannot survive publicity in the local press. He is most likely to be the one consulted by the clergymen, the public official, or the professor, where discreet handling is absolutely essential to the client's professional existence. Similarly, even the lawyer who has wide experience in divorce practice, and who might feel that he had a grasp of the intricacies of the "validity" of an out-of-state divorce decree, would realize that no obvious answers are to be found if he were to work out the problems in the detail set out in this paper.

In sum, the authors conclude that there is no more reason for demanding disclosure of every possible defect in a prior decree, than there is for demanding disclosure against the client's interest in any other type of case. Such a requirement is unfair to counsel and client. It serves no significant social purpose and leads to unwarranted disrespect for an area of law practice that is demanding enough without the ecclesiastical court burdens of past centuries. Fraud in family law is no more tolerable than in juvenile, tax, or criminal matters, but it should be defined and policed no more strictly.

Although several American cases have touched upon the attorney's ethical problems in migratory divorce, there appears to be only one California case in this important area, Griffith v. State Bar. In 1953 the California Supreme Court imposed a two year suspension on an attorney. Griffith was charged on three counts. The first count, alleging that he had solicited business through a capper, was dismissed by the supreme court as not proven and we do not discuss it here. The second count charged him with misleading a court concerning a Texas divorce decree. The supreme court held the evidence on this count sufficient to sustain a two year suspension. The third count charged him with moral turpitude and dishonesty in obtaining a Texas divorce for a woman not domiciled in Texas and with advising her that the decree was valid. The supreme court discussed, but expressly declined to rule upon, the sufficiency of the evidence adduced to support this charge and upon the propriety of Griffith's conduct under the circumstances.
According to their testimony in Los Angeles before the local administrative committee of the State Bar, Gladys and Dale Kelley had been married in 1944 in Omaha. They had moved to Los Angeles in 1947 and had lived in California ever since. They separated in June 1950; Dale sued for divorce in Los Angeles in July 1950 and received an interlocutory decree which granted him custody of the two children.

Gladys, wishing to marry again as soon as possible, felt that she was unable to wait a year for the California decree to become final. In June 1950 she consulted Mr. Willie Hawkins in Los Angeles who, though not licensed to practice law, promised to procure a Texas divorce for her through P. J. Hemphill, a Dallas lawyer. Gladys stated that she paid Hawkins $120 dollars. Gladys later testified that she had never been to Texas, and had not gone there for the divorce, which apparently was granted on a deposition sent to her by Hemphill, as authorized by Texas law. The Texas decree, dated September 15, 1950, included three misstatements of fact: (1) that she had been a resident of Texas for one year and of the county for six months; (2) that there were no children of the marriage; and (3) that the defendant, Dale Kelley, had waived service and appearance in the Texas action.

Armed with this Texas decree, Gladys Kelley married Duane Vanderbush, a seaman, in Los Angeles on November 4, 1950. At about that time she first consulted Griffith in hopes of obtaining a modification of the California custody award. Griffith agreed to represent her in that action. During the course of several office visits, Griffith learned of the Texas decree, and he may have advised Gladys and Duane that the Texas decree was “invalid,” because Gladys had not been domiciled in Texas when the decree was granted, and because Dale had not waived service. Apparently Griffith meant that it was his prediction that a California court would, if asked to reexamine the decree, refuse full faith and credit on the ground that Gladys had not been in Texas and Dale had not waived service. Griffith could not have unequivocally concluded that the decree was invalid, since a sister state divorce decree, valid on its face, must be presumed valid until declared void by a court of competent jurisdiction, and the burden of proof rests heavily upon the attacker,117 and Gladys would undoubtedly have been estopped to attack the decree.

Later, while Duane was at sea, Dale Kelley signed a bigamy complaint against Gladys in the office of the Los Angeles District Attorney. Gladys later testified that Dale had threatened her with a

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117 See note 16 supra.
bigamy prosecution unless she abandoned her custody fight. Gladys retained Griffith to represent her on the bigamy charges and was released on bail. Acting on a suggestion of an assistant district attorney, Griffith advised her that by suing to annul her second marriage the Vanderbushes could demonstrate that Gladys had in good faith believed her prior marriage ended. Griffith thereupon filed suit for annulment on behalf of Duane Vanderbush against Gladys. Griffith was, therefore, simultaneously representing Duane in the annulment matter and Gladys in the bigamy proceeding, with the full knowledge and consent of both parties. As a matter of strategy he had recommended instituting the annulment proceedings to help Gladys' bigamy defense, but he found himself in an adverse posture to her in the annulment action. Griffith later testified that he realized there was a potential conflict of interests, but that it did not violate the canons of professional ethics since each client knew all of the facts, and consented to his representing the other. Whichever way the annulment proceeding came out, Gladys' bigamy defense would be helped. If the judge held the second marriage valid, this would indicate that she had had a reasonable belief that it was valid, while if the Vanderbush marriage were held invalid, Gladys would still have made a good faith effort to correct her marital status.

On January 19, 1951, Griffith represented Gladys at her preliminary hearing on the bigamy charge. The annulment action came on for trial on March 12, 1951, before Judge Henry Willis in Los Angeles. Because the exact words of the colloquy between Griffith and Judge Willis are so important to an understanding of the supreme court's interpretation of the attorney's "duty to disclose," and because the supreme court's per curiam opinion does not give the exact words, we reprint the short transcript.

118 It has been suggested that this technique "should be equally prophylactic whether the divorce [or annulment] were granted, or were denied on the ground that the marriage had already been severed." Powell, And Repent at Leisure, 58 Harv. L. Rev. 930, 1004 (1945).

119 "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts." ABA, Canons of Professional Ethics Canon 6 (1908). See generally Drinker, Legal Ethics 103-30 (1953).

120 Compare People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956), which overruled prior decisions that a reasonable belief of prior divorce is not a defense to a bigamy charge. Vogel was not the law in 1951, but a finding of reasonableness might have been a mitigating circumstance. Also, a final decision of a California court upholding the out-of-state decree might have been res judicata on that issue in the bigamy prosecution.

121 Judge Willis, now deceased, was reputed to be one of California's leading experts on annulments.
Direct examination of Duane Vanderbush by his attorney, Mr. Griffith:

Q. Did you enter into a ceremony of marriage with the defendant... on the 4th day of November 1950? A. Yes.
Q. At the time of the ceremony was Mrs. Vanderbush divorced from her former husband? A. No, she wasn't.
Q. Did you believe that she had been divorced from her former husband? A. I did.

Mr. Griffith: That is all from this witness, your Honor.

The Court: What have you now to prove the former marriage?

Mr. Griffith: I have Mrs. Vanderbush here, your Honor. It is a case in which Mrs. Vanderbush had relied upon a Texas decree of divorce.

The Court: Did you try to get the record?

Mr. Griffith: I have the record of the Texas decree, but that is being questioned.

The Court: Let's have it.

Mr. Griffith: That was prior to the date of this marriage, your Honor. There has been some question as to the validity of the Texas decree.

The Court: Who questioned it?

Mr. Griffith: The former husband.

The Court: His questioning doesn't amount to anything.

Mr. Griffith: I quite agree with your Honor, except for the fact that a bigamy complaint was filed at the instigation of the former husband and that is now pending. But it is my opinion and will be my position throughout the entire matter that that decree is valid on its face. But at the same time we are confronted with that problem there, the bigamy action pending, and in order to show the good faith, not only of this plaintiff but of the defendant, Mrs. Vanderbush, we have instituted these proceedings. The decree of annulment, your Honor, is not the wish of either of the parties of this action, but it is brought about through pressure of this former husband contesting the validity of the Texas decree.

The Court: Well, on September 15, 1950, this divorce was granted in Texas dissolving the bonds of marriage between Gladys A. Kelley and Dale Kelley. Now, Duane Donald Vanderbush married Gladys Kelley in Long Beach on November 4, 1950.

Mr. Griffith: That is correct.

The Court: That is a couple or three months after this decree of divorce was entered.

Mr. Griffith: That is correct, your Honor.

The Court: The Constitution of the United States says that I have to give that full faith and credit on its face.

Mr. Griffith: That is correct.

The Court: That proves that the lady was divorced and that she was free to marry this man.

Mr. Griffith: Thank you very much, your Honor.

The Court: Is that all you wanted?
Mr. Griffith: Yes, that is all.
The Court: The adjudication is the plaintiff is not entitled to have the marriage annulled on the ground stated.
Mr. Griffith: That [sic] you very much. That is what we wanted, your Honor . . . .122

Four months later, in July 1951, Griffith returned to Judge Willis with affidavits pointing out the three erroneous statements recited in Gladys' Texas decree (Texas residence, no children, and Dale's waiver of service), and moved to set aside the judgment. The judge refused and announced in court to Griffith:

There is no need to argue it Mr. Griffith. This is a valid decree of the Texas court. Now I have read all of your affidavits that you have filed, but what has that got to do with the decree of the Texas court?123

Apparently upon complaint by Dale Kelley, a local administrative committee investigated Griffith's representation of the Vanderbushes. After four long hearings, the committee (and later the Board of Governors) found that Griffith "sought to and did mislead the judge of the Superior Court in connection with the representation of Duane Donald Vanderbush in the annulment action tried before said judge."124

On Griffith's petition for review, the California Supreme Court concluded per curiam that:

There can be no doubt but that petitioner misled the court because he knew that the Texas decree was invalid for the reason that both Mr. and Mrs. Kelley were in California and were not domiciled in Texas at the time action for divorce was commenced. There was no reasonable basis for him to assert that he could not tell whether the Texas decree was void due to the complexity of the law on the validity of out-of-state divorces because in this case it would be obvious to any lawyer that the decree was invalid. . . . It is patent that he did not want an annulment but rather a declaration of the validity of the Texas decree and he achieved that result by leading the court to believe that the Texas decree was valid when he knew it was not. The second count presents, therefore, grounds for disciplinary action. . . .

In view of the previous record of petitioner . . . we believe the punishment recommended is supportable because of petitioner's conduct as charged in count two. Therefore, it is ordered that petitioner be, and he is hereby, suspended from the practice of law for

122 Record, pp. 34-36.
123 Record, p. 251.
124 Record, p. 4.
a period of two years, this order to become effective 30 days from
the filing of this decision.\textsuperscript{125}

The authors confess amazement that an attorney should lose his
license for two years for not challenging a California court's decision
that a Texas decree was entitled to full faith and credit in this state.
The question which seems most immediate is whether the law of
recognition of out-of-state divorce decrees in California is so clear and
certain that "it would be obvious to any lawyer that the decree was
invalid." A partial explanation may lie in the fact that throughout the
proceedings before the State Bar, and even in his brief before the
supreme court, Griffith's attorney conceded that the Texas decree was
invalid\textsuperscript{126} and that petitioner knew it was invalid.\textsuperscript{127}

To understand just how crucial the added information Griffith had
received from Gladys Vanderbush was to the "validity" of the Texas
decree, and thus to the annulment action, and thus to Griffith's "mis-
leading" the court, let us inquire whether there is a bona fide question
of validity. Then let us add the facts of no Texas domicile and no waiver
of service and ask again whether it can truly be said that "it would be
obvious to any lawyer that the decree was invalid." We will not be
stating what the law of California is today; we are rather concentrating
on discovering whether the law is really so clear and certain that law-
yers could not ethically disagree.

\textbf{The Decree on Its Face}

First, it would appear that every lawyer is justified in relying on
a decree regularly pronounced by a competent court of a sister state,
if it is valid on its face. California Code of Civil Procedure section 1913
provides as follows:

The effect of a judicial record of a sister State is the same in this
State as in the State where it was made. . . .

Similarly, California Code of Civil Procedure section 1963(16) states
a rebuttable presumption:

That a court or judge, acting as such, whether in this State or any

\textsuperscript{125} 40 Cal. 2d at 475-76, 254 P.2d at 25-26. (Emphasis added.) Griffith had pre-
viously been disciplined for misappropriation of funds. Griffith v. State Bar, 26 Cal. 2d
273, 158 P.2d 1 (1945). Although it is customary to consider previous discipline in
determining the penalty, McGregor v. State Bar, 24 Cal. 2d 283, 148 P.2d 865 (1944),
the court should never do so in setting the standard of conduct. Since it is not correct
to declare the conduct of one already disciplined to be unethical if the same conduct
by a lawyer without a record is not improper, we must conclude that the supreme court
deemed Griffith's conduct, at least in the Vanderbush matter, disciplinable.

\textsuperscript{126} Brief for Petitioner, p. 21.

\textsuperscript{127} Id. at 12, 17 (semble).
other state or country, was acting in the lawful exercise of his juris-
diction;

And California Code of Civil Procedure section 1963(17) provides:

That a judicial record, when not conclusive, does still correctly
determine or set forth the rights of the parties.

These presumptions should be especially applicable in the area of
domestic relations, where there is a vital social need to have a reason-
able certainty of ascertaining marital status. They have been invoked
again and again in California courts, and the United States Supreme
Court has confirmed their application to interstate divorce cases.

Second, both the full faith and credit clause and the California
cases establish a heavy burden of proof upon the party attacking the
decree. Similarly, California cases decided both before and after the
enactment in 1949 of the Uniform Divorce Recognition Act are in
accord with the Williams II requirement that the assailant must
shoulder the burden of proof.

Third, there is no federal constitutional compulsion to refuse to
recognize an out-of-state divorce, even if it can be clearly established
that the parties were not domiciled in the divorcing state at the time
the decree was rendered; therefore, a California judge of competent
jurisdiction remains constitutionally free to give full faith and credit
to a foreign ex parte decree whatever its faults.

Fourth, two routine applications of the doctrine of estoppel would
have prevented an attack on the Vanderbush decree, thus serving as
additional grounds for Judge Willis' decision. First, even though the
Texas decree was probably ex parte, Gladys could not properly have
testified in the annulment as to any facts tending to impugn the
decree, since she had procured it. Not only would such evidence not
have altered Judge Willis' decision (as witness his later refusal to
modify it), but Gladys would not be heard to question the decree
which she obtained. Second, Duane Vanderbush (whom Griffith

129 See note 15 supra.
130 See note 16 supra.
131 CAL. CIV. CODE §§ 150-50.4.
132 Not only is he constitutionally free to do so, he must give it recognition if
attacked on any ground but lack of domicile. Williams v. North Carolina II, 325 U.S.
228 (1945); Williams v. North Carolina I, 317 U.S. 287 (1942). He must recognize
it despite defects of domicile if it is a "participating" divorce decree. See text accom-
panying notes 8-11 supra.
133 Watson v. Watson, 39 Cal. 2d 305, 248 P.2d 19 (1952); Rediker v. Rediker,
35 Cal. 2d 796, 221 P.2d 1 (1950). Not even the Uniform Divorce Recognition Act
will defeat such estoppel. Dietrich v. Dietrich, 41 Cal. 2d 497, 505, 261 P.2d 209, 273
was representing in the annulment action) not only had no standing to object to Gladys' prior divorce, but also was estopped from introducing evidence attacking Gladys' divorce, since he had helped her procure it. Because of this further estoppel Judge Willis could not have found the decree invalid no matter what further report Griffith made to him concerning the Texas decree. Finally, the Vanderbush decree recited that the defendant had waived service, thus, at least on its face, bringing into play the rule of Sherrer v. Sherrer that a defendant who participated in a divorce is forever barred under the full faith and credit clause from relitigating the question of Texas jurisdiction. Since California has held that participation within the Sherrer rule includes submitting to the jurisdiction of the foreign court, the waiver of service on its face prevented the application of the Uniform Divorce Recognition Act by requiring full faith and credit to the sister state decree.

It would be fair to conclude that the Texas decree had at least these elements of validity: (a) it appeared valid on its face; (b) like any other judgment, it was entitled to the presumption in favor of its validity; (c) a "heavy burden" rested on the assailant; (d) it was in fact held valid by a court of competent jurisdiction both before and after "full disclosure"; and (e) at least two applications of the doctrine of estoppel would prevent any California court from entertaining evidence of its validity. Against this array can be mounted only the presumption set out in the Uniform Divorce Recognition Act, which would at most merely balance the above considerations. The constitutionality of California Code of Civil Procedure section 150.2, which sets out

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136 334 U.S. 343 (1948).

137 See note 10 supra.


139 See generally ERENNZWEIG, § 75; 3 WINTER, SUMMARY OF CALIFORNIA LAW 2608-09 (7th ed. 1960); 2 FAMILY LAWYER §§ 32.8, 32.21.
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certain conditions which are "prima facie evidence" of lack of out-of-state domicile, has yet to be considered; but Rice v. Rice,\textsuperscript{140} suggests that this presumption of invalidity may itself violate the full faith and credit clause. The Court based its approval of a Connecticut finding of no Nevada domicile upon the fact that the attacker had fairly met what the Court referred to as his proper burden of proof.\textsuperscript{141} It follows that it was not "obvious to any lawyer that the decree was invalid," and there was a good faith basis for Griffith's contention that it was valid.

The holding in Griffith concerning the Vanderbush matter raises many puzzling questions of legal ethics. However, there appear to be two key questions. What duty has the California family lawyer to re-examine the material facts behind out-of-state divorce decrees presented to him by clients who wish to act in California in reliance on them? Secondly, if there be no such general duty, is a duty nevertheless imposed should the lawyer happen to hear any casual remarks of clients which might cast doubt on the jurisdictional findings of the foreign divorce court?

The Griffith case does not pass upon whether the California lawyer is entitled to give full faith and credit in his office. There is no more justification for making such an inquiry mandatory than there is for requiring every attorney to demand proof that his clients' property has not been stolen from someone else. A state like New Jersey, which, as we have seen,\textsuperscript{142} imposes extremely rigid standards on lawyers connected with divorce proceedings to prevent divorce at whatever cost, might find some justification for such a requirement. But California's renunciation of this philosophy in DeBurgh v. DeBurgh\textsuperscript{143} would suggest that it is not only fair but consonant with our public policy to allow attorneys to extend the same credence to jurisdictional findings in sister state divorce decrees that they are permitted to extend in every other area of the law.

We conclude that the duty of the California lawyer should not include an obligation to inquire anew into the facts serving as a basis for jurisdiction to divorce, and a fortiori, that if he knows nothing of any complications, he has no duty to reveal them to a California court in subsequent proceedings.

A no less important problem is whether the incidental mention of facts which might mitigate against the decree creates an affirmative

\textsuperscript{140} 336 U.S. 674 (1949).
\textsuperscript{141} See Marsh, The Uniform Divorce Recognition Act, 24 Wash. L. Rev. 259 (1949).
\textsuperscript{142} See text accompanying notes 51-54 supra.
\textsuperscript{143} 39 Cal. 2d 858, 250 P.2d 598 (1952).
duty to investigate or to disclose them to the California court. Although we have mentioned it before, it is important to keep in mind the split-level character of the applicable law. Since a decree may be "invalid" yet unassailable, talk about "validity" is often meaningless unless we ask "valid for what purpose," and "as to whom"? The most that an opinion of "validity" can mean in this context is a prediction that a California court will treat the decree as effective to define marital status in this State. In the Vanderbush matter, this is exactly what happened in Judge Willis' court.

Did Lloyd Griffith have a duty to volunteer to Judge Willis what his client had said to him concerning residence and waiver? It seems at best anomalous to hold that Griffith misled the judge, when the judge obviously was incapable of being either led or misled. Just as it would have been impossible for Griffith, unlicensed in Texas, to have been absolutely certain of the validity of a Texas decree, so he could not be absolutely certain of its invalidity, or be expected to act entirely on the premise that the decree was unquestionably invalid.

There are other reasons, however, for dismay at the Court's conclusion. We have discussed them in their general context above and will now briefly apply them to the facts of the Griffith case.

First, does it not violate Gladys' attorney-client privilege for her attorney to state in court, even on his own initiative any facts revealed to him in the course of his representation of her on the charge of bigamy? Second, the statements were merely Gladys' remarks concerning her residence; the attorney never had personal knowledge of the truth of those statements, and not even at the State Bar hearings was there any direct testimony by Dale Kelley or anyone else tending to establish that he had not appeared or been served in the Texas proceeding. Thus, Gladys' remarks on this subject, bearing in mind that they come from a background of many consultations with Griffith, appear to be far from absolute proof to Griffith that the decree was void.

Third, and even more important, Griffith would have been-incriminating his own client if he had introduced into the annulment record any evidence tending to impugn the Texas decree.

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144 See note 69 supra.

145 "It is no secret to the Bar that the Court in which the action was being tried is not a forum in which it is easy for an attorney to oppose an attitude assumed by the judge." Brief for Petitioner, p. 29.

146 This argument was one of the few raised by counsel for Griffith in his petition for review. Brief for Petitioner, pp. 18–21. In general the brief consisted of abject admissions of guilt, which in the author's opinion were unjustified, and probably resulted in a less thorough examination of the very difficult underlying problems this article has been exploring than might have been hoped for.
District Attorney could have used such evidence in the later criminal trial even if Judge Willis ruled (as he did) that such evidence could not affect the validity of the Texas decree. The supreme court attempted to dispose of this argument by stating that:

that is not a satisfactory explanation because it would appear that in a sense he was representing conflicting interests, that is, Mrs. Kelley in the bigamy case and Vanderbush in the annulment proceeding.\(^{147}\)

It appears that the court is punishing Griffith with suspension only because of his representing conflicting interests. Whatever the wisdom of the dual representation, it constitutes no basis for suspension since the two clients consented.\(^{148}\) Given the complicating factor of conflicting interests, should not the court have considered his duty when in court he was confronted with the dilemma of whether to incriminate his bigamy client? As Griffith later testified:

[M]y mind went into a whirl. I had a duty to disclose to the Court the fact that there was a Texas decree which I felt under the circumstances was void and I had over here a client . . . who was facing bigamy prosecution and whom I had to protect against self-incrimination.\(^{149}\)

Finally, Judge Willis refused to hear more on the subject at the time of the original hearing; his later denial shows he would not have altered his conclusion no matter what evidence was offered. The transcript demonstrates that Griffith pointed out all of the important problems, that the decree was being questioned by Dale Kelley, and that Gladys was being prosecuted for bigamy despite her Texas decree. The transcript indicates that the judge was abrupt, reached conclusions quickly, interrupted counsel, and made it clear that he thought the matter settled. In short, for purposes of discipline, the California court gave substance to the distinction between “valid” and “invalid but unassailable” divorces, even though it recognizes no such distinction in the substantive law of divorce jurisdiction.

The Griffith case also raised another important ethical question on which the supreme court declined to pass. Count three against Lloyd Griffith condemned him “for falsely advising his client Alva Porter McDonald that a Texas divorce decree obtained for her by petitioner through [P. J.] Hemphill, an attorney in Texas, was valid.”\(^{150}\) The evidence showed that Alva had been born and had grown up in Texas,\(^{151}\)
that she married Carol in 1942, that they separated in 1944 and he remarried, and that Alva had left Texas in 1945 for Los Angeles. She last heard from Carol in a letter from Arkansas. His family resided in Houston. She came to Griffith in 1949 to clear up her marital status, since she had recently married Orrin McDonald, but had not, to her knowledge, been divorced from Carol. Griffith collected a fee for the divorce from Alva which he forwarded to Hemphill, but he acted as an intermediary between Hemphill and Alva McDonald.\footnote{Hemphill was a licensed Texas attorney who had satisfactorily handled a previous real property problem for Griffith. They had apparently never met, nor was Griffith aware of the divorce Hemphill had obtained for the Vanderbushes at the time Hemphill arranged for it.}

There was a conflict in the evidence as to whether Griffith was merely a conduit through which Alva and Hemphill corresponded, or whether Alva retained Griffith to obtain the divorce. It is a fair reading of the evidence to say that Griffith transmitted the papers and fee, but confined his personal involvement to comments on the probable effect of the decree.

Was it Griffith's procuring of the Texas decree, his informing Alva that the decree might be "legal,"\footnote{Despite the State Bar's statement, Brief for Respondent, p. 3, there is no evidence that Griffith stated that the decree would be "valid" or "invalid"—only "legal."} or was it both that constituted moral turpitude? Since the supreme court expressly declined to pass judgment on the ethical problems raised by count three, we cannot be sure what its position would be on these problems.

The problem raised by count three is how far may a California lawyer associate himself with an out-of-state attorney in arranging a foreign divorce for a client who appears to be domiciled in California? It does not appear to have been seriously contended in California that the mere arranging of a divorce in another jurisdiction for a client whom the lawyer believes to be domiciled here, and whom the lawyer has reason to believe will return to the state, is in itself an "evasion" of our laws. Similarly, it appears that the California lawyer has not only the right, but the affirmative duty, to inform his client of all of the possible ways in which the law will uphold his acts or carry out his desires.\footnote{ABA, CANONS OF PROFESSIONAL ETHICS Canon 8 (1908); see DRINKER, LEGAL ETHICS 102-03 (1953).} As we have seen, estoppel, res judicata, and "participating" divorces will often effect the parties' desires despite "state interest."

Applying these principles to the present facts let us inquire whether Griffith was guilty of moral turpitude by involving himself in Alva's
Texas divorce to the extent he did, or by advising Alva that her decree would be "legal."

Alva testified without contradiction that she told Griffith she wanted a quick divorce, but could not afford to leave the state for any length of time. She suggested that perhaps her continuous Texas residence before separation would give her a sufficient nexus with Texas. Griffith thereupon corresponded with Hemphill. Hemphill advised Griffith that since the last "matrimonial domicile" was Texas, and her first husband was in Texas, Alva could obtain a divorce there on her deposition. Hemphill made up the papers and sent them to Griffith, who forwarded them without inspection or comment to Alva.

It appears that at no time did Griffith pretend to practice Texas law. He told Alva that he had previously worked with Hemphill; he arranged for the two to exchange the papers; and he relied on Hemphill's professional judgment concerning Texas law. True, Griffith did not independently examine the Texas case and statute law, but he never affected to have done so; he consulted a Texas practitioner and informed his client of the results, stating to her that based upon what the Texas lawyer told him, he believed that in Texas the domicile for purposes of divorce jurisdiction remains that of the husband, especially if he is the deserted spouse.\footnote{This was the rule for forty years under Haddock v. Haddock, 201 U.S. 562 (1906).} Whether this analysis of the substantive law was right or wrong, the supreme court should not find that such a lawyer was guilty of moral turpitude, or even that "petitioner ... knew that the Texas decree was invalid."\footnote{40 Cal. 2d at 475, 254 P.2d at 25. (Emphasis added.)}

It may be that Griffith can be explained by suggesting that the court was more willing to find Griffith guilty because of his prior suspension.\footnote{See note 125 \textit{supra}.} If this explanation should be correct, then the authors express concern that the official reports now contain such an unintended castigation of a California attorney's conduct in two very complex, yet common, migratory divorce situations. Apparently the court intended every word it used, and genuinely felt that Griffith's conduct in the Vanderbush matter merited discipline; his association with Mrs. McDonald and Hemphill was deemed questionable enough to be discussed at length\footnote{The court had evidence enough on the first count to discipline Griffith, without discussing the Vanderbush or McDonald matters, had it desired to reach that result. 40 Cal. 2d at 472, 254 P.2d at 23.} without resolving it in his favor. Therefore, California family lawyers, and all other lawyers who have oc-
occasion to consider the possible California effects of a foreign divorce decree, had better take salutory warning. It would appear that in Griffith v. State Bar the supreme court has established extremely strict standards of volunteering the disclosure of all hearsay information that might help strike down a foreign divorce decree valid on its face, even if the disclosure would send the client to prison for bigamy. The court also discussed at length, but declined to decide, whether a California practitioner is guilty of moral turpitude if he transmits papers and fee to an out-of-state attorney and informs his client that, according to the other attorney's understanding of the sister state divorce law, the divorce would be "legal" in that state.

Let us hope that the supreme court did not mean all that it said in Griffith v. State Bar. Let us further hope that the supreme court will not in the future adhere to the rigid standard laid down in Griffith. It is submitted that such a standard is neither just nor practicable. We can take some solace in the fact that the case has been cited in California only once, and then on an evidence point.199

Practical Considerations

What ought the lawyer, specialist or not, do in these delicate situations? First, a "California underpinning" is essential. Where counsel knows that clients have roots in their California community, and plan to return, a quiet California proceeding will start the one year running, and will guarantee that no one will ever question the validity of the action. Adequate provision must be made for children, custody, support, and property settlement. Only after this has been worked out can the parties afford to consider the frills of an out-of-state action. If the clients can afford it, a one-day Alabama proceeding may be sufficient (both parties appearing), otherwise the conventional six weeks in Reno or Sun Valley will be more appropriate. In the light of the above discussion, it would seem eminently proper for counsel to recommend counsel in the sister state. This out-of-state decree is the one which will protect the family name, the children, and the professional associations of the clients; for the parties may "remarry" in the out-of-state jurisdiction as soon as the decree has been entered. Of course the California attorney will be prudent to act as though the decree is a legal nullity, whether or not it is one. In California, Civil Code section 61(1) nullifies any marriage entered into after an interlocutory decree and before the entry of the final California decree. It will be necessary for the couples to go to a clergyman after the one year has

expired, and after the final decree has been entered in the California action, to have a quiet ceremony. The lawyer should consider it his professional duty to enter the final decree, with accompanying affidavits, as soon as possible and not rely on his clients to return for it.

If at all possible, the attorney should avoid out-of-state proceedings in which the defendant does not make a general appearance. If such proceedings are absolutely necessary, he should underpin the foreign decree by following the appropriate publication procedure in California. We have seen how much more precarious is the legal status of out-of-state ex parte decrees, but more importantly, they breed family confusion and strife. Desertion to obtain a divorce is no more satisfactory a solution to marital discord than is desertion in its usual setting. However difficult it may be to work out a satisfactory agreement over property settlement and child custody, such an agreement is far preferable to the bitterness, expense, uncertainty, and litigation which so often results from unilateral divorce. When counsel fail to arrive at a settlement both sides can live with before they tackle the additional burdens of an out-of-state divorce, they are inviting a personal share of the ousted spouse’s bitterness and wrath. The best way to solve conflicts problems is to avoid them, and the best way to avoid State Bar complaints is to remove or alleviate the emotional rancor which instigates them.

As for mail-order divorces, counsel must remonstrate as strongly as possible against them, but it would seem unquestionably proper to inform his clients of just what effects the courts have given to them. At the very least, counsel should insist that they be participating divorces, with both parties present; this factor may be sufficient to invoke an estoppel, even though Sherrerd and Johnson do not protect them under the full faith and credit clause because they are extra-national.

Summary and Conclusions

With the law of migratory divorce so uncertain, it is unfair to require of family lawyers an extremely high duty to disclose information adverse to their client’s interests. It is best that citizens should solve their legal dilemmas in the state of which they are permanent inhabitants, but in the light of the restrictive divorce laws of some states, and frequently because of publicity that could wreck a career, out-of-state divorces are a necessary aspect of our lives. Lawyers should not be castigated or criticized merely for taking part in this social bloodletting; their standards should be no stricter than those of their
brethren at the bar engaged in other specialties. Professional workmanship will require that the most conservative and pessimistic view be taken of foreign decrees, and this will require proper California underpinning; but professional sanctions ought not to descend with harder blows on attorneys in this field than in any other. Legal fictions have their place in family law, just as in ejectment or trover. Genuine fraud ought to be punished but not a good faith attempt to walk the tightrope between a client's interest and the disclosing of all of his possible follies.

Like the District of Columbia judge who denied recognition of a Nevada decree where the husband and wife had sojourned together in Reno for six weeks by remarking that he would not permit the pair to "litigate by day and copulate by night, inter sese and pendente lite," we may not personally approve of Reno divorces; but the important task of the family lawyer is to put them into their proper social context, to make them acceptable as necessary evils, rather than to shun them, only to find them back on our legal doorsteps years later. The family lawyer must "neither be a prig on the one hand nor a conspirator on the other."160 Let us hope that the judges will be able to sort out our confused substantive law of migratory divorce, with an assist from more enlightened legislatures. Let us hope too that lawyers will do their part by recognizing that in family law they perform as valuable social engineering as they do in criminal, probate, or corporation law, and that the grievance committees and the reviewing judges will establish workable, just, and equal standards for all.