

## **ISSUE OUTLINE FOR 20-0001**

### **I. ISSUE**

Under what circumstances, if any, is a lawyer acting as an expert subject to the Rules of Professional Conduct and if not all rules, which ones?

Conflict issues which arise as a result of testifying expert work done by a lawyer

### **II. AUTHORITIES**

1. California Rules of Professional Conduct 1.4, 1.6, 1.7, 1.9, 1.10
2. Case Law
3. Model Rule 5.7 (or California law re the same – consult ancillary business opinion)

### **III. AREAS OF POTENTIAL INTEREST**

1. The difference between two categories of experts: (1) a testifying expert; (2) a consulting expert acting more in a role of co-counsel than expert. There is no reason to believe, assuming proper clarifications are made by the expert, that the former would be any different than any other testifying expert, and thus presumably would not require the lawyer to adhere to the Rules of Professional Conduct. A consultant, however, is a more nuanced issue, and often times will look more like co-counsel, which would make the rules applicable to the lawyer's assignment. This would generally be a fact-based analysis.
  - a. Issue with testifying expert speaking with opposing party? If expert is not bound by rules – which all states and the ABA considering the issue have opined and which we likely will too – what stops expert from speaking with other side? This opinion could also include application of rules that are relevant governing lawyers in litigation when experts have been disclosed, if we want to expand that far.
  - b. I'm not sure I see this as being a hypothetical. Perhaps explanatory as to what we believe the rules are and how they apply.
2. The bulk of the opinion can explore the issues of both concurrent subsequent potential adverse expert retentions, as well as concurrent and subsequent adverse retention as an expert and as counsel. Both issues would include imputation based upon Rule 1.10.
  - a. Potential hypothetical to explore these issues:

Lawyer is retained by another law firm to serve as a testifying expert on behalf of Client. Lawyer has properly disclosed to retaining firm that

Lawyer is not acting as counsel for Client, and the law firm has adequately disclosed the same to Client. Later, Lawyer learns that another attorney in Lawyer's firm is counsel for Client's opposing party in the matter in which Lawyer is testifying, in a lawsuit in another state involving substantially the same issues.

1. Variations on this hypothetical can include the timing of the expert work and other representation, i.e. subsequent instead of concurrent. Would screening play any role? What if instead of an expert retention and legal representation, it was another expert retention for the adverse party in the same or similar litigation.