

## **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 1.7, 1.9, 1.10, 8.4(b)-(d).
2. *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, (2002) 96 Cal.App.4th 1017
3. *Commonwealth Ins. Co. v. Stone Container Corp.* (N.D.Ill. 2001) 178 F.Supp.2d 938
4. Model Rule 5.7 and related CA case law
5. COPRAC Opinions 1995-141
6. ABA Opinion 97-407

### **III. DISCUSSION**

1. Testifying experts versus consulting.
  - a. These obviously can blend together and often an expert will start as one and transition into the other. We cannot, of course, get into issues of what the practice of law is. While generally a testifying witness is not “practicing law,” this issue depends on the facts and circumstances including whether the expert forms an attorney-client expert with the lawyer retaining the expert or that lawyer’s client. This would be especially true if the expert (as he/she should) clarifies that he/she is not the attorney for the retaining lawyer or that lawyer’s client (best practice would be in writing or in retention agreement). This position seems clear and makes sense – why would a testifying expert who happens to be a lawyer be practicing law, but not a doctor, or accountant, or any other of type of expert. A consulting expert likely comes closer, but would depend on the “what is the practice of law” question that we do not opine on. Suffice to say, if the consultant is practicing law, of course he/she is bound by all of the rules of professional conduct. If not.....?
  - b. Discussion of MR 5.7 and whether testifying expert is a law-related activity. Even though 5.7 was not included in the new rules, there is ample law for a discussion.

2. Whether the rules apply even if not practicing law and law related activity. This is the meat of the opinion, and if so, which rules.
  - a. The focus here should be on conflicts. Most opinions and the ABA opinion seem to say that the rules, including conflicts, do not generally apply for expert testimony. See ABA Opn 97-407; *Commonwealth Ins. Co. v. Stone Container Corp.* (N.D.Ill. 2001) 178 F.Supp.2d 938. However, the testimony is relevant to another client, and how the rules may affect the lawyers' legal services on behalf of another client. For instance, potential hypothetical to explore these issues:
    - i. 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. What is the effect of Lawyer's retention on the case in which the firm actually is providing legal services?
      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.
    - b. Application of CRPC that do not depend on the formation of attorney-client relationship or practice of law:
      - i. California Rules 8.4(b)-(d)
3. California has an outlier case though, *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, (2002) 96 Cal.App.4th 1017
  - a. In *American Airlines*, a lawyer who previously represented AA later served as a 30b6 (PMK) witness against AA's request for a different party that was arguably adverse to AA. The Court found that the lawyer breached fiduciary duties to AA, stating: "Application of Rule 3-310(C) does not require representation of both clients *as an attorney*. The discussion section which follows Rule 3-310 states: 'Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship.'" In support of that conclusion it cited language in the Discussion to the rule stating that it applied to "all types of legal employment." It also relied upon case law decided under former Rule 5-102 (B), which said that a lawyer could not

“represent conflicting interests.” The court also relied upon the *fiduciary agency* relationship a PMK witness has.

- i. This language is problematic in reaching what should be the correct decision, that a lawyer serving as a testifying expert witness – no different than any other expert – is not bound by the Rules of Professional Conduct (other than those that are applicable to lawyers regardless of practicing law). There are a few ways to handle the language in this case should we believe that the lawyer is not bound:
  1. Expert witness is fundamentally different than a PMK. An expert is not an agent and thus has no fiduciary duty.
  2. The Rule has now changed to 1.7 and 1.9, which are much more detailed than former rule 3-310, and thus the language is not applicable, particularly as it cited former comments.
  3. The language is dicta not necessary to the opinion (since the impermissible conflict with the lawyer’s rule-based confidentiality obligations to the complaining client would have existed even if the witness arrangement gave rise only to common law contract and agency obligations)

#### **IV. CONCLUSION**

A lawyer acting as an expert witness is subject to the Rules of Professional Conduct if he/she is practicing law. Assuming a lawyer acting as a witness is *not* practicing law, either as a consulting or testifying expert, the lawyer is not bound by the Rules, except for those that generally apply regardless of whether the lawyer is practicing law. However, that expert work may have an effect on the lawyer’s or the lawyer’s firm’s other clients where the lawyer/firm is practicing law, and in which case the Rules would be applicable.