

20-0001

ISSUE

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

May a lawyer or the lawfirm of a lawyer who has served as a testifying expert subsequently take on a new client adverse to the party on whose behalf the lawyer previously offered expert testimony?

DIGEST

AUTHORITIES INTERPRETED

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; 1999-154
6. ABA Opinion 97-407

STATEMENT OF FACTS

A lawyer, Expert, serves as a testifying expert witness regarding the standard of care for lawyers in like or similar circumstances on behalf of Plaintiff, a plaintiff in a legal malpractice litigation matter. Expert is engaged by the lawyers for Plaintiff. In Expert's engagement agreement with the law firm, Expert explicitly discloses that Expert's role is limited to providing opinion testimony and that Expert will not be providing any legal advice of to either Plaintiff or the lawyers representing Plaintiff in the legal malpractice litigation.

During Expert's service as a testifying expert witness on behalf of Plaintiff, expert learned certain non-public information about Plaintiff. Prior to testifying as a witness, Expert's firm, Law Firm, was retained by the other party in the legal malpractice litigation, Defendant, in a related matter.

ALTERNATIVE SCENARIOS: (1) After testifying, such that the information was no longer confidential because expert had been deposed/testified; (2) non-related matter; (3) after Expert's service as a testifying expert was completed, so it could potentially be a former client

under 1.9. [NOT SURE THIS WOULD EVEN BE RELEVANT SINCE, AS DISCUSSED BELOW, PLAINTIFF IS NEVER A CLIENT. THE FOCUS NEEDS TO BE ON THE ACTUAL CLIENT, NOT THE ONE FOR WHOM LAWYER IS TESTIFYING]

DISCUSSION

1. Distinction between a testifying expert witness and a consulting expert.

A lawyer is always subject to discipline, whether or not engaged in the practice of law, for conduct that violates provisions like Business and Professions Code Section 6106 or Rule 8.4.¹ This Committee's prior opinions have defined non-legal services as "services that are not performed as part of the practice of law and which may be performed by non-lawyers without constituting the practice of law." Cal Formal Opn. No. 1995-141.³ It is well-settled that a lawyer or law firm has the right to provide non-legal services. *Id.* (citing Charles W. Wolfram, *Modern Legal Ethics* (1986) pp. 897-898).

While the committee does not opine on the practice of law, this Opinion assumes that a lawyer serving only as a testifying expert witness is not engaged in the practice of law. This is because, notwithstanding the fact that a testing expert may be a lawyer, a testifying expert's function is solely limited to providing testimony helpful for a finder of fact. Indeed, the law itself is not normally a proper subject of expert testimony. *See Kasem v. Dion-Kindem* (2014) 230 Cal. App. 4th 1395, 1400. Moreover, it would not make sense to determine that a lawyer testifying as an expert was engaged in the practice of law, whereas a doctor, accountant, accident reconstructionist, or any other number of expert witnesses were not, despite the fact that all experts were engaged in the same general function.²

Conversely, a lawyer who acts as a consulting expert, without any expectation or even possibility that the lawyer will testify, is often engaged in the practice of law. Accordingly, the Rules of Professional Conduct may apply to a consulting lawyer expert, who oftentimes serves more in the role of co-counsel than as a true expert. This opinion addresses only the question of whether the Rules apply to a lawyer testifying expert.

2. Law Related Services

California law recognizes a distinction between non-practice of law activities that are related to or resemble the practice of law and those that are/do not. *See, e.g.,* Formal Opinion 1995-141. The former are at least presumptively subject to the Rules of Professional Conduct; the latter are not. Even where the lawyer or law firm is providing non-legal services that are distinct from the lawyer's practice of law, the Rules of Professional Conduct can still apply if the non-legal

¹ [quote statute and rule]

² In fact, there is nothing per se barring an inactive lawyer from providing expert testimony which would otherwise be provided by a lawyer, provided that the inactive lawyer had the requisite experience to qualify as an expert on the subject. While this Committee does not comment on the unauthorized practice of law, it would be fair to say that providing such testimony – for instance on the standard of care of lawyers in like or similar circumstances – would not be the practice of law.

services are sufficiently related to the practice of law that the lawyer's involvement in them could "reasonably lead prospective clients to misperceive the nature of the services being offered." Formal Opn. No. 1999-154. The California authorities do not provide a comprehensive listing of "law-related" non-legal activities that are potentially subject to the Rules of Professional Conduct. It is clear that acting as a fiduciary or investment advisor is such an activity. See Cal. State Bar Formal Opn. No. 1995-141 (fiduciary) and Cal. State Bar Formal Opn. No. 1999-154 (investment advisor). Beyond that, however, there is little relevant authority. Specifically, the Committee is aware of no case, opinion or decision definitely holding that a lawyer serving as a testifying expert is engaged in an activity related to or resembling the practice of law.

Given the limited California authority defining law-related activities, it is both permissible and helpful to look for guidance in national sources of authority, such as the Model Rules of Professional Conduct.³ American Bar Association Model Rule 5.7, which has no California counterpart, defines "law-related services" subject to the Rules of Professional Conduct as those "that might reasonably be performed in connection with legal services and in substance are related to the provision of legal services." This definition reflects the same concern as California law: the risk of client confusion concerning the nature of the services being provided. In a close call, in which apparently even all of the committee members did not agree, ABA Opinion 97-407 determined that "testifying expert services are not "law -related services" under Model Rule 5.7. Thus, the testifying expert's role as a witness excludes not only a client-lawyer relationship with the party on whose behalf he is to be called, but also a law-related service provider relationship that would require all of the Model Rules to apply to his relationship." *Id.* pp. 8-9.

The ABA Committee's non-unanimous opinion reflects the fact that it is an open, or at the very least close, question as to whether testifying as an expert to assist the trier of fact so closely resembles the practice of law that it falls in the "law related" category thus potentially subjecting the lawyer expert witness to the Rules of Professional Conduct. California law recognizes that the client's reasonable expectations as to whether there is an attorney-client relationship are a function of the circumstances, including the client's sophistication and the lawyer's statements and conduct. [CITATION] A lawyer providing non-legal services has a duty to clarify whether and to what extent a lawyer-client relationship exists, at least when a lawyer knows or reasonably should know that the consumer believes that such a relationship exists. Formal Opinion 1995-141; *compare Butler v. State Bar*, 42 Cal. 3d 323, 329 (1986); *cf.* Rule 1.13 (f); Rule 4.3 (a).

However, it is also settled that a lawyer can avoid the formation of an implied lawyer-client relationship through words or actions making it unreasonable for the putative client to infer that such a relationship exists and that the sophistication of the client is relevant in assessing

³ See, Rule 1.0, Comment [4]; *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 642, 655-656 [82 Cal.Rptr.2d 799]; and Cal. State Bar Formal Opn. No. 2010-180 n.7.

the reasonableness of the client's belief. *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 651-52 (N.D. Cal. 1993) (applying California law); *see also People v. Gionis*, 9 Cal. 4th 1196 (1995); Formal Opinion 2003-161 n.1. Thus, while the ABA Opinion 97-407 ultimately concluded that serving as a testifying expert was not a law-related service, this Committee believes that the question is more nuanced under California law, and turns on specific facts of each individual circumstance.

Consistent with that case law however, we have previously opined that a lawyer offering a law-related service who clearly informs the consumer in writing that the lawyer is not providing legal services or legal advice is not subject to the Rules of Professional Conduct. Formal Opinion 1999-154. Applying these principles then, and assuming that the lawyer in question is providing only testimony in a matter as opposed to practicing law, we believe that a lawyer who explicitly disclaims a lawyer client relationship and states the lawyer will not be practicing law, in an engagement agreement or other disclosure, has sufficiently satisfied the requirement such that it would be unreasonable for a consumer of those expert services to believe the lawyer was practicing law or that an attorney-client relationship had formed. As such, in the instance where an attorney-client relationship is specifically disclaimed, the Rules of Professional Conduct should not apply vis a vis the party retaining the lawyer testifying expert, either on their own or through counsel.

3. Application to Each Scenario

As set forth in the discussion above, it is the opinion of the Committee that Expert has neither formed an attorney-client relationship with Plaintiff, nor is Expert engaged in a law related service. As such, the Rules of Professional Conduct do not apply with regard to Expert's work on behalf of Plaintiff. However, Expert may still have duties owed towards Plaintiff, as defined by agency and contract law. One of those, particularly prior to providing any testimony, would be the duty to keep client confidences, as Expert would be a necessary third party and bound by the attorney-client privilege and confidentiality, as an agent of Plaintiff's lawyers. [CITATION]

1. 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, either concurrent or subsequent.
 - a. *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F. Supp. 2d 938, 943-945 (N.D. Ill. 2001). *Commonwealth* involved the question whether a lawyer expert could testify against a current client of the firm in an insurance coverage dispute, when the firm's representation of the client in a Chinese joint venture project was substantively unrelated and conducted by lawyers located in a firm office in another city. The court, applying Illinois law, held that the Rules of Professional Conduct did not apply to the firm's work as an expert witness because there was no lawyer-

client relationship, and that under the “spirit” of the Rules disqualification was not required by the firm’s duty of loyalty to the current client because the two assignments were both substantively and organizationally so far afield from each other. The court made clear that it might have reached a different result if it had concluded that the representation of the client had given the firm substantial confidential information that might have been used by the expert to the client’s detriment.

- a. California has an outlier case though, *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, (2002) 96 Cal.App.4th 1017
 - i. 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.
 1. 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:
 - a. Expert witness is fundamentally different than a PMK. An expert is not an agent and thus has no fiduciary duty. [I AGREE WITH THIS. HOWEVER, IS THERE A POTENTIAL FIDUCIARY DUTY *PRIOR* TO TESTIMONY, WHEN THE PRIVILEGE STILL ATTACHED TO AN EXPERT, EVEN A TESTIFYING EXPERT, SIMILAR TO A PMQ?]
 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. [DO NOT AGREE]

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) [DO NOT AGREE]

CONCLUSION