

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 law firm of a lawyer ~~that~~^{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, ~~Rule~~ 3.3, 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

Scenario 1

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 Expert 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.

Scenario 2

Same as in Scenario 1, except the retention of Law Firm occurs after Expert has already testified.

Scenario 3

Same as in Scenario 2, except that, despite Expert's engagement agreement stating otherwise, Expert provides legal services to Plaintiff, including advice to the hiring lawyers on pre-trial and trial strategy, and reviewing and commenting on briefs.

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, not

¹ Business and Professions Code section 6106 states:

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.
If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

Rule 8.4 states:

It is professional misconduct for a lawyer to:

(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or
(f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

withstanding the fact that a testifying 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 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

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.

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.

“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 pattern of custom and practice or attorney's prior relationship with the client](#) ~~the client's sophistication~~ and the lawyer’s statements and conduct. [See Kane & Kritzer, Inc. v. Altagen \(1980\) 107 Cal.App.3d 36, 40-42; Cal. State Bar Form.Opn. 2003-161, at 3;](#)⁴ [Fox v. Pollack \(1986\) 181 Cal.App.3d 954, 959.](#) 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 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

⁴ ["Factors to be considered in making a determination that such a relationship was formed include: whether the attorney volunteered his services to the speaker; whether the attorney agreed to investigate a matter and provide legal advice to the speaker about the matter's possible merits; whether the attorney previously represented the speaker; whether the speaker sought legal advice and the attorney provided that advice; whether the setting is confidential; and whether the speaker paid fees or other consideration to the attorney. Cal. State Bar Form. Opn. 2003-161, at 1.](#)

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 [and no legal advice or services are provided](#), 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

Scenario 1:

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 [being designated as a trial witness](#)~~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. [See Evid. C. § 952, Law Rev. Comm'n Comment; City & County of San Francisco v. Sup.Ct. \(1951\) 37 Cal.2d 227, 234-23 \(communication to physician engaged by attorney to examine client necessary to "interpret" client's condition to attorney\).](#)⁵

[Most state ethics opinions to have addressed the question of lawyers testifying as an expert, and the ABA opinion on the topic, say that the rules, including those addressing conflicts of interest, 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 the rules may affect the lawyers' legal services on behalf of another client, either concurrent or subsequent.](#)

[The leading case nationally is 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](#)

⁵ Once the Expert is designated as a testifying expert, the privilege would be lost. [See Shooker v. Sup.Ct. \(Winnick\) \(2003\) 111 Cal.App.4th 923, 928-930; Shadow Traffic Network v. Sup.Ct. \(Metro Traffic Control, Inc.\) \(1994\) 24 Cal.App.4th 1067, 1079, 1080; DeLuca v. State Fish Co., Inc. \(2013\) 217 Cal.App.4th 671, 691-692.](#)

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.

California, however, is the state with an outlier opinion, *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, (2002) 96 Cal.App.4th 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 person most qualified witness has with the company. This Committee believes *American Airlines* is distinguishable given the fact that the opinion was based upon a 30(b)(6) expert. An expert witness is fundamentally different than a person most qualified – as discussed above, an expert is not an agent of a party and thus has no fiduciary duty.

[ISSUE FOR DISCUSSION AS A COMMITTEE IS WHETHER WE AGREE THAT RULE 1.7 IS APPLICABLE TO EXPERT WITNESSES, EVEN IF WE DETERMINE THEY ARE NOT PRACTICING LAW OR LAW RELATED SERVICES. OUR FACT SCENARIO IS DISTINGUISHABLE FROM COMMONWEALTH WHERE RULE 1.7(B) DID NOT APPLY BECAUSE THE REPRESENTATION OF THE CLIENT CAME FIRST]

Scenario 2

Scenario 3

- i. [*Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 607 (attorney disqualified from acting as expert witness because he had represented opposing party 12 years earlier).]

CONCLUSION