

20-0001ISSUE

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 testify as an expert in a matter adverse to a former client?

May a lawyer or the law firm of a lawyer that 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?

DIGESTAUTHORITIES INTERPRETED

1. California Rules of Professional Conduct 1.7, 1.9, 1.10, 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 FACTSScenario 1

Law Firm represents Company in negotiating a long term commercial lease. During the course of that representation, Law Firm learns confidential information about Company's business model and structure. Once the long term lease is executed, Law Firm sends Company a letter notifying Company that the attorney-client relationship has concluded.

Years later, Company sues a competitor alleging claims of misappropriation of trade secrets. Expert, a lawyer at Law Firm, is retained by Company's opposing party in that lawsuit to testify regarding business valuation and damages against Company.

Scenario 2

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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 retaining 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 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 the matter concluded. Later, Expert's firm, Law Firm, was retained by the other party in the legal malpractice litigation, Defendant, in a different but related matter.

Scenario 3

Same as in Scenario 2, except the retention of Law Firm occurs after Expert has already testified.

Scenario 4

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

A. Application of the Rules of Professional Conduct to a Testifying Expert

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

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. 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 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.¹

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, and for purposes of this Opinion is assumed to be doing so. Accordingly, the entirety of the Rules of Professional Conduct apply to a consulting lawyer expert who serves more in the role of co-counsel than as a witness.

2. A Lawyer Working Solely as a Testifying Expert is Not Engaged in “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 is at least presumptively subject to the entire Rules of Professional Conduct; the latter is not. Even where the lawyer or law firm is providing non-legal services that are distinct from the lawyer’s practice of law, the entire 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.² 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

¹ 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.

² *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.

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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 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;³ *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, we have previously opined that a lawyer offering a law-related service and not engaged in the practice of law, who clearly informs the consumer in writing that the lawyer is not providing legal services or legal advice, is not subject to the entire Rules of Professional Conduct. Formal Opinion 1999-154. Applying these principles then, and assuming that the lawyer in question is providing only expert witness 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,

³ "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.

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 entirety of the Rules of Professional Conduct do not apply vis a vis the party retaining the lawyer testifying expert, either on their own or through counsel.

3. Application of the Rules of Professional Conduct to a testifying 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 8.4.⁴ There are also a number of Rules which are applicable regardless of whether or not a lawyer is engaged in the practice of law. For instance, the duties owed to a former client under Rule 1.9(c) are applicable regardless of whether a lawyer is providing legal services; Rule 1.15 specifically provides for the safeguarding of funds held for the benefit of a client “*or other person to whom the lawyer owes a contractual, statutory, or other legal duty*”; Rule 2.4 specifically applies when a lawyer is acting as a third-party neutral, as opposed to providing legal services and Rule 2.4.1 for lawyers acting as a temporary judge, referee or court appointed arbitrator; Rule 3.3 requires candor the Court, and is not limited to instances where a lawyer is representing a client or otherwise practicing law; and finally, the prohibitions set forth in Chapters 5, 6, 7, and 8 of the Rules of Professional Conduct are not limited by their

⁴ 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).

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terms to instances whereby a lawyer is “practicing law.”⁵ A lawyer acting as a testifying expert – or engaged in almost any other activity – is bound by these universally applied Rules.

Rule 3.7 specifically applies to lawyers acting as a witness. However, the provisions of Rule 3.7, on their face, only place additional requirements on lawyer acting as an advocate in a trial in which the lawyer is likely to be a witness. (Rule 3.7(a).) A testifying expert witness, as set forth above, is not an advocate. Moreover, Rule 3.7(b) allows one lawyer within a firm to act as a witness while another member of a firm is the advocate. Thus, for purposes of this Opinion, Rule 3.7 is inapplicable to lawyer’s acting as a testifying expert witness.

Of particular import to the question of lawyers acting as expert witnesses is Rule 1.7, the Rule addressing current conflicts of interest. Most state ethics opinions to have addressed the question of lawyers testifying as an expert, and the ABA opinion on the topic, say that Model Rule 1.7 or the State’s counterpart, 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 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 has not directly addressed the matter by ethics opinion, in the Rules, or in case law. However, a similar issue was addressed in the California case of *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, (2002) 96 Cal.App.4th In *American Airlines*, a lawyer who previously represented American Airlines later served as a 30b6 (PMK) witness against American Airline’s request for a different party that was arguably adverse to American Airlines. The Court found that the lawyer breached fiduciary duties to American Airlines, 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

⁵ This list is not meant to be exhaustive, but rather to illustrate that many rules are not specific to a lawyer acting in a traditional lawyer-client relationship.

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 fiduciary duties owed by a 30(b)(6) witness. 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. As such, this committee does not believe that a lawyer acting as an expert witness is bound, in that capacity, by Rule 1.7. However, as set forth below, serving as an expert may have conflict-related implications under Rule 1.7 and 1.9 to the lawyer’s, or the lawyer’s law firm’s, clients outside of the expert testimony context.

4. Application to Each Scenario

Scenario 1:

Here, Law Firm formerly represented Company in litigation. In that litigation, Law Firm learned confidential information related to Company’s business. Under Rule 1.9(c), a lawyer who has formerly represented a client in a matter may not use information acquired by virtue of the representation which is protected by Business Professions Code section 6068(e) and Rule 1.6 to the disadvantage of the former client other than when the Rules otherwise permit or if the information has become generally relevant, nor may such information be disclosed other than when permitted by the Rules.

The hypothetical is silent as to whether Expert personally acquired such information. To the extent that Expert did, Expert is prohibited from using that information to Company’s disadvantage. Thus, in all likelihood, Expert would be precluded from serving as an expert witness against Company. (*See Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811; *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].)

Even if Expert did not personally acquire the information, Rule 1.10 may apply to impute that knowledge.

Scenario 2:

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, Plaintiff is not a “former client” within the meaning of Rule 1.9, and so the limitations on subsequent adverse representations are not present. However, Expert may still have duties owed to Plaintiff, as defined by agency and contract law. One of those, particularly

prior to being designated as a trial witness, is 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).⁶

Thus, subject to Expert's contractual and common law duty to keep the information privileged as an agent, Law Firm would be permitted to represent Defendant in the related litigation. However, given Expert's duties under agency law, Defendant's informed written consent under Rule 1.7 would be required of Law Firm. This is because, under Rule 1.7(b), Expert's ability to represent Defendant would be materially limited by Expert's responsibilities to or relationship with a third party – Plaintiff, and that material limitation is imputed to Law Firm under Rule 1.10(a).

Scenario 3

In this hypothetical, the issue of Expert's duties owed to Plaintiff are no longer present. As discussed in detail above, Expert was not Plaintiff's attorney, and so owed no duties as an attorney or towards Plaintiff as a former client under Rule 1.9. The only duties owed to Plaintiff would be the duty of confidentiality, as a necessary third-party agent. However, in this hypothetical Expert was disclosed, and thus there no longer is any privilege. As such, the Committee sees no barrier to Law Firm – or Expert for that matter – representing Defendant in related litigation.

Scenario 4

Finally, in this scenario we are asked to assume that Expert has, despite his engagement agreement saying Expert will not do so, engaged in the practice of law. Given that assumption, Plaintiff is Expert's client. Since Expert's knowledge is imputed to Law Firm under Rule 1.10(a), Law Firm would be barred from representing Defendant unless *both* Defendant and Plaintiff gave their informed written consent under Rule 1.7(b) (or 1.9 for Plaintiff, if Expert's engagement with Plaintiff had concluded).

CONCLUSION

⁶ 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.

Drafter's Comments:

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Could do this as the same litigation but I can't imagine a scenario where Defendant would waive that conflict (although I suppose they *could* since it would not be prohibited under 1.7(d) since there is only one "client"

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This is an interesting one. Would a lawyer who is a party to a case, and has his/her own lawyer, be subject to discipline for failure to have candor?

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Fine line to get into substantive law of expert disqualification. But on the whole, I do think these cases deal with ethics of duties owed. This section needs more work specifically with regards to confidentiality and continuing fiduciary duties owed to former clients under Oasis and Brand.

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A strict reading of 1.10 says a lawyer may not represent a client when anyone in a firm is prohibited under 1.9. Here, Expert would not be representing anyone. I am a bit hesitant to say, however, that the knowledge of a former client does not impute to subsequent non-legal services situations such as testifying. More research/analysis needed

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Would Expert be permitted to represent Defendant with informed written consent? Under the Rule I think the answer is yes, but that causes me concern. Could we write in a screening requirement and allow Law Firm? I think preventing Law Firm completely is too harsh a result.