

20-0001ISSUE

1. May a lawyer testify as an expert witness in a matter adverse to a former client of the lawyer's law firm?
2. May 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?
3. May a lawyer serve as a testifying expert witness against a current client of the lawyer's law firm in an unrelated matter?

DIGEST

Generally, a lawyer may ethically testify as an expert witness in a matter adverse to a former client provided that the lawyer does not use information acquired by virtue of the representation which is protected by Business and Professions Code section 6068(e) or Rule 1.6 to the disadvantage of the former client, nor may such information generally be revealed. However, the expert witness, and the retaining law firm, may be disqualified unless they can show that no confidential information was shared by the expert.

The law firm of a lawyer that has served as a testifying expert may subsequently take on a client adverse to the party on whose behalf the lawyer previously offered expert testimony. However, if the lawyer who testified possesses confidential information as a result of the prior expert work, then the law firm may be required to obtain the client's informed written consent prior to the representation, which may be difficult or impossible without breaching the expert's duty of confidentiality. Even if the expert does not work on the new matter, the expert may need to be screened from the concurrent representation, with written disclosure of the relationship provided to the new client, under Rule 1.7(c)(1). In addition, the law firm may be disqualified unless it can show that no confidential information was shared by the expert.

A lawyer may serve as an expert witness against a current client of the lawyer's law firm in an unrelated matter. However, the lawyer acting as an expert may not use or disclose confidential information of the law firm's current client. Depending on the circumstances, informed written consent under rule 1.7(b), or written disclosure of the relationship under Rule 1.7(c)(1), may be required

STATEMENT OF FACTS

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32 Scenario 1 (Lawyer then Expert)

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

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

40 Scenario 2 (Expert then Lawyer)

41 Expert, a lawyer, serves as a testifying expert witness regarding the standard of care on behalf
42 of Plaintiff, a plaintiff in a legal malpractice litigation matter, in a California state case. Expert is
43 engaged by the lawyers for Plaintiff. In Expert's engagement agreement with the retaining law
44 firm, Expert explicitly discloses that Expert's role is limited to providing opinion testimony and
45 that Expert will not be providing any legal advice to either Plaintiff or the lawyers representing
46 Plaintiff in the legal malpractice litigation.

47 During Expert's service as a testifying expert for Plaintiff, Expert learned certain non-public
48 information about Plaintiff. Later, Expert's firm, Law Firm, is retained by the other party in the
49 legal malpractice litigation, Defendant, in a separate but substantially related matter.

50 Scenario 3 (Concurrent Expert and Lawyer, part 1)

51 Expert, a lawyer at Law Firm, is retained as a testifying expert witness against Company, a
52 current client of Law Firm. The matter upon which Expert will testify is entirely unrelated to the
53 matter in which Law Firm represents Company. The party on whose behalf Expert will testify is
54 not a party to any action in which Law Firm represents Company. Moreover, Expert has never
55 performed any work on any matter on behalf of Company nor has Expert obtained any
56 confidential information about Company.

57 Scenario 4 (Concurrent Expert and Lawyer, part 2)

58 Law Firm represents Company in litigation. Expert, a lawyer at Law Firm, is asked to testify as an
59 expert witness on behalf of the party opposing Company, in an unrelated matter that is not in
60 any way adverse to Company. Expert has never performed any work on any matter on behalf of
61 Company nor has Expert obtained any confidential information about Company.

DISCUSSION

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

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.¹ This is because, notwithstanding the fact that a testifying expert may be a lawyer, a testifying expert's function is generally 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

The ABA Committee's non-unanimous Opinion 97-407 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).

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. 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). This Opinion specifically does not address a scenario in which an attorney is hired as a consulting expert, where the purpose is to consult and advise, rather than testify.

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 "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.

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86 However, it is also settled that a lawyer can avoid the formation of an implied lawyer-client
87 relationship through words or actions making it unreasonable for the putative client to infer
88 that such a relationship exists, and that the sophistication of the client is relevant in assessing
89 the reasonableness of the client's belief. *Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd.*, 150
90 F.R.D. 648, 651-52 (N.D. Cal. 1993) (applying California law); *see also People v. Gionis*, 9 Cal. 4th
91 1196 (1995); Formal Opinion 2003-161 n.1. Thus, while the ABA Opinion 97-407 ultimately
92 concluded that serving as a testifying expert was not a law-related service, this question is more
93 nuanced under California law, and turns on specific facts of each individual circumstance.

94 Consistent with that case law, we have previously opined that a lawyer offering a law-related
95 service and not engaged in the practice of law, who clearly informs the consumer in writing that
96 the lawyer is not providing legal services or legal advice, is not subject to the entire Rules of
97 Professional Conduct. Formal Opinion 1999-154. Applying these principles then, and assuming
98 that the lawyer in question is providing only expert witness testimony in a matter as opposed to
99 practicing law, we believe that a lawyer who explicitly disclaims a lawyer client relationship and
100 states the lawyer will not be practicing law, in an engagement agreement or other disclosure,
101 has sufficiently satisfied the requirement such that it would be unreasonable for a consumer of
102 those expert services to believe the lawyer was practicing law or that an attorney-client
103 relationship had formed.⁴

104 Of course, a lawyer is always subject to discipline, whether or not engaged in the practice of
105 law, for conduct that violates provisions like Business and Professions Code Section 6106 or

⁴ Other states that have considered the question have also opined that a lawyer serving as a testifying expert witness does not thereby establish an attorney-client relationship, and thus is not bound by conflict of interest rules. (*See e.g.* DC Opinion 337)

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106 Rule 8.4.⁵ There are also a number of Rules which are applicable regardless of whether or not a
107 lawyer is engaged in the practice of law.⁶

108 The focus of this Opinion is on the application of conflict rules, Rule 1.7, 1.9, and imputation
109 under Rule 1.10, to lawyers acting as testifying experts.

110 Application to Each Scenario

111 Scenario 1(Lawyer then Expert):

112 Here, Law Firm formerly represented Company in litigation. Thus, Company is a former client,
113 meaning Rule 1.9 is potentially applicable. As a preliminary matter, the Committee does not
114 believe that subsection (a) or (b) of Rule 1.9 is applicable, as those subdivisions provide for
115 limitations on subsequent “representations” of new clients which are adverse to the former
116 client. As set forth above, Expert’s new work as a testifying expert is not the practice of law nor
117 is it a “law related service.” As such, there is no subsequent representation to trigger Rule

⁵ 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).

⁶ See, e.g. Rule 2.4 (lawyer acting as third party neutral); Rule 2.4.1 (lawyer acting as temporary judge); Rule 3.3 (candor to the court not limited to instances where lawyer is representing a client or otherwise practicing law). 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.

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1.9(a) or (b). However, in the earlier litigation, Law Firm learned confidential information related to its former client Company's business. Thus, Rule 1.9(c) is potentially applicable.

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 and Professions Code section 6068(e) or Rule 1.6 to the disadvantage of the former client other than when the Rules otherwise permit or if the information has become generally known, nor may such information be disclosed other than when permitted by the Rules or State Bar Act with respect to a current client. As Comment [1] to Rule 1.9 explains, a lawyer owes the duty to a former client, even after termination, not to "(i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship." In *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 823, cited in Comment [1], the California Supreme Court stated: "It is not difficult to discern that use of confidential information against a former client can be damaging to the client, even if the attorney is not working on behalf of a new client and even if none of the information is actually disclosed." Thus, provided Expert upholds the aforementioned requirements of Rule 1.9(c) with regard to confidential information, Expert is ethically permitted to testify in a matter against Company.

However, even if Expert does not disclose or impermissibly use Company's confidential information, and thus does not violate Rule 1.9(c), Expert could still be disqualified. Such disqualification is dependent upon a number of factors, including whether there is a substantial relationship between the first representation and the expert assignment and Expert's involvement in the former representation, or lack thereof. See *Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 602-605 (discussing disqualification standard when expert witness had previously represented opposing party). Likewise, the law firm retaining expert could also be disqualified unless it can show that no confidential information was shared by Expert. (See *Shadow Traffic v. Superior Court (Metro Traffic Control, Inc.)* (1994) 24 Cal.App.4th 1067, 1085 [holding there is a rebuttable presumption that an expert who has gained confidential information from one party in litigation shared it with the hiring second party].)

Scenario 2 (Expert then Lawyer):

In this scenario, Expert performs testifying services first. Expert has neither formed an attorney-client relationship with Plaintiff, nor is Expert engaged in a law related service, particularly given the disclaimer Expert provided in Expert's retention agreement. 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. (See also D.C. Ethics Opinion 337 (Feb. 1, 2007) ("D.C. Rule 1.9 governing conflicts of interest with former clients would not apply to prohibit a lawyer from subsequently taking an adverse position to the party for whom the lawyer testified as an expert witness, even where the matter for which the lawyer testified and the matter involved in the subsequent representation are substantially related to one another.") However, Expert may still

owe duties 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).

Thus, subject to Expert's contractual and common law duty to keep the information privileged as an agent, Law Firm may be permitted to represent Defendant in the related litigation. This hypothetical is silent as to whether Expert will be personally working on the new matter as an attorney for Defendant. If Expert will be, then, given Expert's duties under agency law, Defendant's informed written consent under Rule 1.7 will be required of Law Firm if, under Rule 1.7(b), Law Firm's ability to represent Defendant is materially limited by Expert's responsibilities to or relationship with a third party – Plaintiff. A key word in Rule 1.7(b) is "informed." It is not hard to imagine a situation where Expert's duty of confidentiality to Plaintiff prevents Expert from giving Defendant the information necessary to determine whether to sign a waiver. (*See* Rule 1.7, Comment 7.) If that is the case, then Expert may be effectively barred from representing Defendant.

However, Law Firm may still be able to take on the new matter on behalf of Defendant, provided Expert is screened from the representation. Rule 1.7(c) provides that even when there is not a significant risk requiring compliance with Rule 1.7(b), written disclosure is still required when a lawyer has, or knows that another lawyer in the firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same manner. In this hypothetical, Expert has such a relationship; thus, Law Firm will be required to provide that written disclosure to Defendant.

Rule 1.10(a) acts to impute one lawyer's conflicts under either 1.7 (current clients) or 1.9 (former clients) to the lawyer's entire firm. But 1.10(a)(1) excludes from that imputation situations where "the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Assuming that the prohibition of Expert in representing Defendant is a "personal interest," Rule 1.10 would not impute Expert's prohibition to the entire firm. However, in such a situation, Expert should be screened from the case, consistent with Comment [2], which provides that while Rule 1.10(a) does not prohibit representation by others in a law firm where the prohibited person is a non-lawyer, "[s]uch persons, however, ordinarily must be screened from any personal participation in the matter." (Rule 1.10(a), Comment [2].) Here, Expert was working as a non-lawyer on behalf of Plaintiff. Thus, such screening should be sufficient to satisfy Law Firm's ethical duties. However, like in the previous scenario, it is likely that there will be a presumption of Expert's disclosure of confidential information, which must be rebutted by Law Firm to prevent disqualification. (*See Shadow Traffic v. Superior Court (Metro Traffic Control, Inc.)* (1994) 24 Cal.App.4th 1067, 1085.

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Of course, under California law once Expert is designated and testifies, 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.) As such, there is no ongoing duty of confidentiality owed. Absent facts not present in this scenario, and assuming no other basis for Expert's continued confidentiality, Expert and Law Firm are permitted to represent Defendant in the separate but substantially related matter.

Scenario 3 (Concurrent Expert and Lawyer, part 1)

The third scenario involves concurrent matters, with Expert testifying on behalf of one party while Law Firm represents the other in unrelated litigation. 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 with regard to expert testimony because an expert is not practicing law. See ABA Opn 97-407; DC Opn. 377; *Commonwealth Ins. Co. v. Stone Container Corp.* (N.D.Ill. 2001) 178 F.Supp.2d 938.

A leading case nationally is *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F. Supp. 2d 938, 943-945 (N.D. Ill. 2001). *Commonwealth* addressed the question of 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 lawyer'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 this issue by ethics opinion, in the Rules, or in case law. However, a similar factual scenario 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 Federal Rule 30(b)(6) witness (a person most qualified company representative) in a deposition against American Airline's request for a different party that was arguably adverse to American Airlines. The Court disqualified the expert and found that he had 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 litigation or in a

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236 single transaction or in some other common enterprise or legal
237 relationship.”

238 In support of that conclusion, the *American Airlines* Court cited language in the Discussion to
239 former Rule 3-310(C) stating that it applied to “all types of legal employment.” It also relied
240 upon case law decided under former Rule 5-102 (B), which held that a lawyer could not
241 “represent conflicting interests.” The court also relied upon the *fiduciary agency* relationship a
242 person most qualified witness has with the company.

243 *American Airlines* is distinguishable given the fact that the opinion was based upon fiduciary
244 duties owed by a 30(b)(6) witness, whereas an expert witness is fundamentally different than a
245 person most qualified given the specific lack of any fiduciary duty. Moreover, *American Airlines*
246 based its analysis upon language that is no longer contained in the California Rules of
247 Professional Conduct. Based upon these significant differences, this Committee does not
248 believe that Rule 1.7 applies to Expert’s work as a testifying Expert against Company.

249 Law Firm, however, is bound by Rule 1.7(b) vis a vis its current client, Company. Rule 1.7(b)
250 requires informed written consent when there is “a significant risk the lawyer’s representation
251 of the client will be materially limited by the lawyer’s responsibilities to or relationships with ...
252 a third person.” A conflict under Rule 1.7(b) is imputed to other members of Law Firm pursuant
253 to Rule 1.10(a). Moreover, under Rule 1.7(c), even when there is not a significant risk requiring
254 a lawyer to comply with 1.7(b), informed written consent is still required when “the lawyer ...
255 knows that another lawyer in the lawyer’s firm has a legal, business, financial, professional, or
256 personal relationship with or responsibility to a party or witness in the same matter.” Rule
257 1.7(c)(1).

258 Under Rule 1.7(b), the crucial question is whether there is a “significant risk” that Law Firm’s
259 representation of Company will be materially limited by Expert’s services on behalf of a party
260 adverse to Company. As discussed in previous sections, Rule 1.10(a) acts to impute a conflict
261 under Rule 1.7 to an entire firm when any lawyer within the firm has a conflict. Thus, an
262 analysis of whether Expert has a conflict under Rule 1.7 is appropriate. However, since Expert
263 owes no fiduciary duties to the party opposing company, it is not clear that Expert’s work would
264 pose any material limitations to the representation of Company. For example, even if Expert
265 were to learn confidential information which would benefit Company, and which Expert is
266 barred from disclosing due to confidentiality, Company will be in no worse (or better) position
267 than had Expert never learned such information. Whether such a significant risk of a material
268 limitation is present is a fact-based inquiry and depends upon specific facts of each situation.

269 Likewise, we do not believe disclosure is required under Rule 1.7(c)(1). This is because Rule
270 1.7(c)(1) is limited to situations in which a lawyer has a “legal, business, financial, professional,
271 or personal relationship with or responsibility to a party or witness *in the same matter.*”
272 (emphasis added). Here, the facts are clear that the party on whose behalf Expert has been
273 asked to testify is not a party to the litigation in which Law Firm represents Company. Thus, by
274 its plan terms, Rule 1.7(c)(1) does not apply.

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275 Finally, Expert obviously is not permitted to use or disclose any confidential information of Law
276 Firm's client Company during Expert's work as a testifying Expert. (Rule 1.6(a); Bus. & Prof.
277 Code § 6068(e).

278 Scenario 4 (Concurrent Expert and Lawyer, part 2)

279 Unlike in scenario 3, in this final scenario Expert has been asked to testify on behalf of
280 Company's adverse party in litigation in which Expert's firm, Law Firm, represents Company.
281 However, the proposed testimony is in litigation entirely unrelated to that in which Law Firm
282 represents Company. Also unlike in scenario 3, the proposed testimony is not in any way
283 adverse to Company.

284 Despite the fact that the testimony is not adverse, because Expert is being asked to testify on
285 behalf of the opposing party in litigation in which Law Firm is representing Company, Law Firm
286 must provide written disclosure of the relationship to Company. This is because Rule 1.7(c)(1),
287 discussed above, is applicable since Expert, a member of Law Firm, will have a business or
288 professional relationship with a party in the same matter in which Law Firm is representing
289 Company.

290 CONCLUSION

291 A lawyer acting solely as a testifying expert witness is not "representing" the party on whose
292 behalf the lawyer is testifying. Thus, the conflict rules, Rules 1.7, 1.9, and 1.10, do not directly
293 apply to the expert work. However, lawyers acting as testifying expert witnesses still must
294 adhere to those conflict rules vis a vis their clients, either current or former. In addition, lawyers
295 serving as testifying expert witnesses must be cognizant of disqualification laws.