

20-0001ISSUE

1. Under what circumstances may a lawyer ethically testify as an expert witness in a matter adverse to a former client of the lawyer's law firm?
2. Under what circumstances may the law firm of a lawyer that formerly served as a testifying expert witness ethically subsequently represent a new client adverse to the party on whose behalf the lawyer previously offered expert testimony?
3. Under what circumstances may a lawyer ethically serve as a testifying expert witness against a current client of the lawyer's law firm in an unrelated matter?

DIGEST

A lawyer may ethically testify as an expert witness in a matter adverse to a former client provided that the lawyer's testimony does not undermine the work done for the former client, disclose information acquired by virtue of the representation which is protected by Business and Professions Code section 6068(e) or Rule 1.6, or use such information to the disadvantage of the former client. In certain circumstances, however, judicially developed principles of disqualification may still prevent a lawyer whose testimony would be permissible under the Rules of Professional Conduct from serving as an expert witness.

No ethical principal bars the law firm of a lawyer that has previously testified as an expert witness from subsequently representing a client who is adverse to the party on whose behalf the lawyer previously testified. To the extent that the lawyer remains under express or common law contractual obligations stemming from the lawyer's prior expert role, and respecting those obligations would significantly limit the firm's representation of the firm's client, then the law firm must obtain the client's informed written consent prior to the representation. See Rule 1.7(b). Even if there is no material limitation conflict under Rule 1.7(b), the law firm is required to make written disclosure of the lawyer's continuing legal obligation to the adverse party pursuant to Rule 1.7 (c) (1).

A lawyer may ethically serve as an expert witness against a current client of the lawyer's law firm in an unrelated matter, provided that the lawyer does not disclose or use 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**

**Scenario 1 (Lawyer then Expert)**

Law Firm represents Company in negotiating a long-term commercial lease. During the 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 the party opposing Company in that lawsuit to testify against Company regarding business valuation and damages. In Expert's engagement agreement with the retaining law firm, Expert explicitly states that Expert's role is limited to providing opinion testimony and that Expert will not be acting as an attorney for or providing any legal advice to either the opposing party or to the lawyers representing the opposing party. Expert limits Expert's role to providing opinion testimony in accordance with the terms of the engagement agreement.

**Scenario 2 (Expert then Lawyer)**

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

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

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

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

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

Law Firm represents Company in litigation. Expert, a lawyer at Law Firm, is asked to testify as an expert witness on behalf of the party opposing Company, in a separate, unrelated matter that is

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67 not in any way adverse to Company. Expert has never performed any work on any matter on  
68 behalf of Company nor has Expert obtained any confidential information about Company.

## 69 DISCUSSION

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

71 A lawyer is always subject to discipline, whether or not engaged in the practice of law, for  
72 conduct that violates provisions like Business and Professions Code Section 6106 or Rule 8.4.<sup>1</sup>  
73 There are also a number of Rules of Professional Conduct which are applicable regardless of  
74 whether a lawyer is engaged in the practice of law.<sup>2</sup> The focus in this opinion, however, is on  
75 the application of conflict rules, Rules 1.7 and 1.9, and imputation under Rule 1.10, to the  
76 conduct of lawyers acting as testifying experts. These rules, like others not discussed here,  
77 apply when the conduct in question either is or reasonably could be viewed by a lay person as  
78 the practice of law in the context of an attorney-client relationship. We therefore turn to the  
79 question whether expert witness services can be so viewed.

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<sup>1</sup> 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).

<sup>2</sup> 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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While as a matter of longstanding policy the Committee does not opine on whether a particular activity constitutes the practice of law, this Opinion assumes for purposes of analysis that a lawyer serving only as a testifying expert witness is not engaged in the practice of law. This assumption appears reasonable is because, notwithstanding the fact that a testifying expert may be a lawyer, a testifying expert's function is generally limited to providing expert testimony relevant to a disputed issue of fact that will be helpful to the trier 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. In addition, there is no privilege that protects against compelled disclosure of communications between a testifying attorney expert and the party that retained the expert; instead, such communications are subject to both discovery and cross-examination. Finally, Moreover, it would not make sense to conclude that determine that a lawyer testifying as an expert was engaged in the practice of law, whereas a doctor, accountant, or accident reconstructionist performing the same function was not doing so., or any other number of expert witnesses were not, despite the fact that all experts were engaged in the same general function.<sup>3</sup> That assumption is consistent with authorities from other jurisdictions that have considered the issue. ABA Formal Opinion 97-407 (citing authorities).

It is a closer question whether a lawyer's service as a testifying expert witness, though a non-legal service,<sup>4</sup> is "law-related" in a way that could call for the application of the rules of professional conduct that apply to lawyers who are engaged in providing legal services. In California, that question depends on whether the conduct in question involves the assumption of a fiduciary relationship or is otherwise sufficiently related to the practice of law that the person retaining the lawyer's services could reasonably believe that the lawyer "is offering legal services or...advice that involves legal judgment or considerations." Formal Opinion 1999-154; Formal Opinion 1995-141. Whether the consumer of a lawyer's services could reasonably believe that those services are legal in nature depends on the circumstances, including the relationship of the services to the lawyer's practice of law, the lawyer's statements and conduct, and any relevant course of dealings. *See Kane & Kritzer, Inc. v. Altagen* (1980) 107 Cal.App.3d 36, 40-42; Cal. State Bar Form.Opn. 2003-161, at 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. Cal. State Bar Formal Opinion 1995-141; *compare Butler v. State Bar*, 42 Cal. 3d 323, 329 (1986); *cf.* Rule 1.13 (f); Rule 4.3 (a). At the same time, 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*

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<sup>4</sup> 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.

*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); Cal. State Bar Formal Opinion 2003-161 n.1. Consistent with this case law, we have previously opined that a lawyer who offers a service that is law related, but who clearly informs the consumer in writing that the lawyer is not providing legal services or legal advice, is not subject to Rules of Professional Conduct that apply only to the provision of such services. Cal. State Bar Formal Opinion 1999-154.

The question whether a lawyer’s provision of expert testimony could be considered “law-related” has not been decided in California, and, given the open-textured nature of the California standard, the answer may depend importantly on the circumstances of the individual case. The ABA Committee concluded that providing expert testimony was not law related, but the Committee was not unanimous on the issue. ABA Opinion 97-407. We need not decide that question here, however, because the lawyer experts in question expressly disclaimed in writing that they were forming an attorney client relationship or providing legal advice and acted in accordance with that disclaimer. Moreover, those disclaimers were made to parties who were represented by lawyers in the matter. In those circumstances it would not be reasonable for a consumer of those expert services to believe that the lawyer was providing legal services or that an attorney-client relationship had been formed.<sup>5</sup>

*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, (2002) 96 Cal.App.4th 1017, is not to the contrary. In *American Airlines*, a lawyer had represented American Airlines in earlier related disputes and also in resisting discovery in a pending lawsuit. *Id.* at 1023-1025. The lawyer later served, over American Airlines’ objection, as a Federal Rule 30(b)(6) witness (a person most qualified company representative) in the same lawsuit for a party who was arguably adverse to American Airlines where the scope of legitimate questioning necessarily encompassed American Airlines’ confidential information. *Id.* at 1027-1028.

In subsequent litigation, the Court of Appeal relied on former Rule 3-310 (C), forbidding representation of clients with conflicting interests, as a basis for concluding that the lawyer had breached fiduciary duties to American Airlines by acting for both American Airlines and an adverse party in the same matter. *Id.* at 1032-1033. In response to lawyer’s contention that Rule 3-310 (C) was not applicable because testifying as an Rule 30 (b) (6) witness was not the practice of law and did not involve the formation of an attorney-client relationship, the court stated:

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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<sup>5</sup> 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)

152 single transaction or in some other common enterprise or legal  
153 relationship.” *Ibid.*

154 The court also relied upon the fiduciary agency relationship a person most qualified witness has  
155 with the company. *Id.* at 1034.

156 The *American Airlines* court’s conclusion that the Rule 30 (b) (6) witness is “representing” a  
157 client or engaging in “legal employment” is consistent with the law discussed above regarding  
158 law-related services. The court found that Rule 30 (b) (6) witnesses assume a fiduciary duty to  
159 the party who retains them. Under the principles discussed above, a lawyer who assumes a  
160 fiduciary relationship is subject to the relevant Rules of Professional Conduct in carrying out  
161 that role, even if that relationship does not involve the practice of law. See Cal. State Bar  
162 Formal Opinion 1995-141. However, serving as a testifying expert witness does not involve the  
163 assumption of a fiduciary relationship. In addition, a disclaimer that serving as an expert  
164 witness is not the provision of legal services or the formation of an attorney-client relationship,  
165 like the one sought and obtained in each of the above scenarios, and acting in accordance with  
166 that disclaimer, should be sufficient render the services non-legal in nature. See Cal. State Bar  
167 Formal Opinion 1999-154,

168 Application to Each Scenario

169 Scenario 1(Lawyer then Expert):

170 Here, Law Firm formerly represented Company in litigation. Thus, Company is a former client,  
171 meaning Rule 1.9 is potentially applicable. Rule 1.9 (a) provides that:

172 A lawyer who has formerly represented a client in a matter shall not thereafter  
173 represent another person\* in the same or a substantially related matter in which that  
174 person’s\* interests are materially adverse to the interests of the former client unless the  
175 former client gives informed written consent.\*

176 Rule 1.9 does not bar the Lawyer’s subsequent service as a testifying expert because that  
177 service is not the “representation” of a client within the meaning of that rule. As assumed  
178 above, Expert’s new work as a testifying expert is not the practice of law and does not involve  
179 the provision of legal services. For that reason, there is no subsequent representation to trigger  
180 Rule 1.9(a).

181 A lawyer’s ethical duties to a former client are not limited, however, to situations in which the  
182 lawyer is engaged in legal representation of another client. As Comment [1] to Rule 1.9  
183 explains, a lawyer owes two duties to a former client: not to “(i) do *anything* that will injuriously  
184 affect the former client in any matter in which the lawyer represented the former client, or (ii)  
185 *at any time* use against the former client knowledge or information acquired by virtue of the  
186 previous relationship.” The second of these duties is expressly codified in Rule 1.9 (c):

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A lawyer who has formerly represented a client in a matter or whose present or former firm\* has formerly represented a client in a matter shall not thereafter:

(1) use information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;\* or

(2) reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client except as these rules or the State Bar Act permit with respect to a current client.

Neither the obligation not to do anything to undermine the prior representation nor the obligation to avoid use or disclosure of confidential client information are limited to subsequent legal representations. Indeed, 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." Accordingly, in providing services as a testifying expert, the Lawyer may not offer testimony that has the effect of undermining the work done for the former client in the earlier representation and may not, in the preparation of or presentation of such testimony, use or disclose the former client's confidential information to the client's disadvantage.

In this scenario, there is no indication that the lawyer's testimony would tend to injure the former client in connection with the prior representation. Moreover, while the facts indicate that the lawyer's law firm received confidential information that may be relevant to the subject of the lawyer's proposed expert testimony, they do not state whether the lawyer himself possesses such information, or, if the lawyer does, the likelihood that lawyer's testimony could involve using or disclosing such information adversely to the former client. If the lawyer has such information, and the competent performance of his role as an expert would foreseeably require its use or disclosure, the lawyer's testimony would violate Rule 1.9 (c) to the extent any confidential client information were used or disclosed. Absent these circumstances, the lawyer's testimony would not violate Rule 1.9 (c).

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 from acting as a testifying expert based upon the risk that the testimony will involve the use of such information. That determination may depend, among other things, on whether there is a substantial relationship between the first representation and the second expert engagement and whether the testifying expert was personally involved in the prior representation. 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). In addition, if the expert is found to possess confidential information of the former

client, 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, and the question is whether the performance of those services gives rise to an ethical prohibition on the subsequent representation of a new client by Expert or the Expert's law firm adverse to the party who retained the Expert. As noted above, Rule 1.9 applies only when a lawyer formerly represented a client. The Expert's role in giving testimony, however, was not the practice of law or the representation of a client. Given the Expert's written disclaimers that the Expert was practicing law or forming a lawyer-client relationship, and his conduct in accordance with such disclaimer, a party retaining the Expert's services could not have reasonably believed that Expert was engaging in the practice of law. For those reasons, Plaintiff is not a "former client" within the meaning of Rule 1.9, and that rule's limitations on subsequent adverse representations do not apply. (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."))

Expert may, however, still owe duties to Plaintiff, as defined by express or implied terms of the contract under which the expert was retained. Those duties may include an obligation not to act adversely to the retaining party in related matters or not to disclose the retaining party's confidential information except as specifically required in order to perform the role of a testifying witness. Even if the Expert has testified, those contractual obligations may prevent the Expert from participating in a representation that is adverse to the retaining party, or from using or disclosing information learned from the retaining party that did not come out during the course of that testimony.

Assuming that the Expert's express or implied contractual obligations to the retaining party would limit the Expert's ability to participate in the representation, the Expert would then have at least a conflict of interest under Rule 1.7 (b). Rule 1.7(b) requires the client's informed written consent when there is "a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with ... a third person." Here there would be a significant risk that the Expert's ability to represent Defendant would be materially limited by the Expert's obligations to the party that retained him, requiring that Defendant provide informed written consent to the conflict. Whether the Expert's fulfillment of those obligations would impair the ability of the firm to provide effective representation would depend on the lawyer's likely role in the representation. If the Expert's involvement is not necessary to provide effective representation to the Defendant and the Expert's



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compliance with the Expert's contractual obligations does not impair the Firm's ability to provide such representation, then the Law Firm would not be obliged to seek Defendant's informed consent to the representation, unless the Expert's conflict is imputed to the Firm as a whole.

Rule 1.10(a) acts to impute one lawyer's conflicts under either Rule 1.7 (current clients) or Rule 1.9 (former clients) to the lawyer's entire firm. Imputation under Rule 1.10(a)(1) does not apply 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." The conflict created by the Expert's contractual obligations to the retaining party are personal to the expert. Accordingly, assuming that the firm can provide effective representation of the client without the expert's participation and without compromising the fulfillment of the expert's contractual obligations to the retaining party, the expert's conflict should not be imputed to the entire firm, and the firm should not be required to seek informed consent to the expert's personal conflict of interest.

The Law Firm will still be required, however, to comply with Rule 1.7 (c), which provides that even when the firm does not have a conflict requiring informed written consent under 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, at least if Expert still owes contractual or agency duties of confidentiality<sup>6</sup>; thus, Law Firm will be required to provide that written disclosure to Defendant.

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

The third scenario involves concurrent matters, with Expert testifying in one matter on behalf of one party adverse to a party whom the Expert's Law Firm represents in separate, unrelated litigation. The issue here is whether the Expert's acting as a testifying expert triggers the Rule 1.7 (a) prohibition on undertaking a representation adverse to a current client, which would in turn require the current client's informed consent to the engagement. The judicial opinions and ethics opinions that have addressed this issue, including the ABA opinion on the topic, have concluded that giving expert testimony adverse to a current client in an unrelated matter does not trigger Rule 1.7, because giving expert testimony is not the practice of law and does not involve the representation of a client. See ABA Opn 97-407; DC Opn. 377; *Commonwealth Ins. Co. v. Stone Container Corp.* (N.D.Ill. 2001) 178 F.Supp.2d 938. As previously discussed, we

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<sup>6</sup> Under California law once an expert is designated, the attorney-client privilege is 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 may no longer be any ongoing duty of confidentiality owed. Absent facts not present in this scenario wherein Expert still owes some contractual or agency duty of confidentiality, Expert and Law Firm would be permitted to represent Defendant in the separate but substantially related matter if Expert had been disclosed in a California state matter.

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299 believe that under California law, providing expert testimony is not the practice of law or the  
300 representation of a client, and, at least if appropriate disclaimers have been made and the  
301 lawyer acts in accordance with the disclaimers, cannot reasonably be regarded as the practice  
302 of law.

303 A leading case nationally is *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F. Supp. 2d  
304 938, 943-945 (N.D. Ill. 2001). *Commonwealth* addressed the question of whether a lawyer  
305 expert could testify against a current client of the firm in an insurance coverage dispute, when  
306 the firm's representation of the client in a Chinese joint venture project was substantively  
307 unrelated and conducted by lawyers located in a firm office in another city. The court, applying  
308 Illinois law, held that the Rules of Professional Conduct did not apply to the lawyer's work as an  
309 expert witness because there was no lawyer-client relationship, and that under the "spirit" of  
310 the Rules, disqualification was not required by the firm's duty of loyalty to the current client  
311 because the two assignments were both substantively and organizationally so far afield from  
312 each other. The court made clear that it might have reached a different result if it had  
313 concluded that the representation of the client had given the firm substantial confidential  
314 information that might have been used by the expert to the client's detriment.

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316 In Scenario 3, Expert is ethically permitted to testify adverse to Law Firm's current client,  
317 provided that Expert may not use or disclose any confidential information of Law Firm's client  
318 Company during Expert's work as a testifying Expert. (Rule 1.6(a); Bus. & Prof. Code § 6068(e).

319 Though Expert may ethically testify in this scenario, Law Firm continues to owe obligations to its  
320 current client under Rule 1.7(b) and Rule 1.7 (c) (1). The question whether a potential conflict  
321 exists under Rule 1.7 (b) depends on the factual circumstances. If the Expert's testimony  
322 adverse to client is in a matter that is substantively unrelated to the matter in which the firm is  
323 representing Client, however, Expert's role as a testifying expert would not likely pose a risk of  
324 materially impacting the firm's representation of the client, since the Expert's testimony will  
325 have no impact on the outcome of that representation and the firm can effectively represent  
326 the client in the matter without any material limitations based on the content or effectiveness  
327 of Expert's testimony. Likewise, we do not believe disclosure to the client would normally be  
328 required under Rule 1.7(c)(1). This is because Rule 1.7(c)(1) is limited to situations in which a  
329 lawyer has a "legal, business, financial, professional, or personal relationship with or  
330 responsibility to a party or witness *in the same matter*." (emphasis added). Here, the facts are  
331 clear that the party on whose behalf Expert has been asked to testify is not a party to the  
332 litigation in which Law Firm represents Company. Thus, by its plan terms, Rule 1.7(c)(1) does  
333 not apply.

334 However, even if ethically permissible, the concurrent representation and testimony may risk  
335 disqualification. See *Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, *supra* 124 Cal.App.4th  
336 at p. 602-605 [discussed in scenario 1, above]. See also *Commonwealth Ins. Co. v. Stone*  
337 *Container Corp.*, *supra* 178 F. Supp. 2d at pp. 943-945 [suggesting the outcome may have been

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338 different had there been a risk of sharing of confidential information]. Law Firm may need to  
339 disclose that risk to its client, pursuant to Rule 1.4(a).

### 340 .Scenario 4 (Concurrent Expert and Lawyer, part 2)

341 In this final scenario Expert has been asked to testify on behalf of a party who is adverse to  
342 Company in litigation in which the firm represents Company. The proposed testimony would  
343 be in a different matter, in which the retaining party is not adverse to Company and in which  
344 the firm plays no role. The conclusions of Scenario 3 with respect to the applicability of Rules  
345 1.7 (a) and (b) would apply with even greater force in this scenario because the proposed  
346 testimony is not adverse to the current client. But unlike in Scenario 3, Law Firm must provide  
347 written disclosure of the expert assignment to the Company. This is because Rule 1.7(c)(1),  
348 discussed above, is applicable since Expert, a member of Law Firm, will have a business or  
349 professional relationship with a party in the same matter in which Law Firm is representing  
350 Company.

## 351 CONCLUSION

352 A lawyer acting solely as a testifying expert witness is not “representing” the party on whose  
353 behalf the lawyer is testifying. Thus, the conflict rules, Rules 1.7, 1.9, and 1.10, do not directly  
354 apply to the expert work. However, lawyers acting as testifying expert witnesses still must  
355 adhere to those conflict rules vis a vis their clients, either current or former. In addition, lawyers  
356 serving as testifying expert witnesses must be cognizant of any expert contractual or common  
357 law obligations or disqualification rules that may operate to bar representation even when the  
358 ethical rules would permit it.