

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 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 injuriously affect the former client in any matter in which the attorney formerly represented the client,¹ 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 prevent a lawyer whose testimony would be permissible under the Rules of Professional Conduct from serving as an expert witness^[JF1]^[SB2]. JF Comment Is this statement correct, or does the case law rely upon the Rules of Professional Conduct in support of DQ?

SB Comment This is correct.

No ethical principle 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. If the lawyer remains under common law or express 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

¹ *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564.

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information of the law firm's current client^{[JF3][SB4]}. 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. JF Comment This implies that if the expert witness personally possesses confidential information of the current client, he can still testify "against" the current client in an unrelated matter. Is that right? I read our discussion of the Commonwealth case to be saying just the opposite.

SB Comment I view this statement as consistent with Commonwealth which holds that lawyer may testify in unrelated matter adversely to current client under Rule 1.7: "Aon argues there is no such relationship because: (1) Heller Ehrman is not providing any legal services to Aon; and (2) there are no expectations of confidentiality in the relationship between Heller Ehrman and Aon, and thus no privilege that can attach to the communications between Heller Ehrman and Aon. Moreover, Aon argues that there are no common law rules that apply to disqualify Heller Ehrman, since there are no issues of confidentiality in this case (Aon Resp. at 2). We agree with Aon." So, confidentiality concerns would present risk of DQ under common law rules, but not under rules of professional conduct.

DISCUSSION

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

A lawyer is 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 8.4.² Multiple Rules

² 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;

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of Professional Conduct also apply regardless of whether a lawyer is engaged in the practice of law.³

The focus in this opinion, however, is on the application of conflict rules, Rules 1.7 and 1.9, and imputation under Rule 1.10, to the conduct of lawyers acting as testifying experts. These rules typically apply when the conduct in question either is or reasonably could be viewed by a lay person as the practice of law in the context of an attorney-client relationship; however, as discussed below, an expert witness generally is not engaged in the practice of law or in an attorney-client relationship solely from offering opinion testimony.

Even when a testifying expert is 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. 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 here that a lawyer serving only as a testifying expert witness is not engaged in the practice of law.⁴

Here, the lawyer Experts expressly disclaimed in writing that they were forming an attorney-client relationship or providing legal advice or services and acted in accordance with that disclaimer. Moreover, the disclaimers were made to parties who were represented by lawyers in the matter. Under these circumstances it would not be reasonable for a consumer to believe

(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).

³ 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 a lawyer acting as a witness. However, the provisions of Rule 3.7 only place additional requirements on a 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 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 role as a testifying expert witness.

⁴ This assumption is consistent with authorities from other jurisdictions that have considered the issue. See ABA Formal Opinion 97-407 (citing authorities). We also do not need to address whether a lawyer's service as a testifying expert witness, although a "non-legal" service, is generally considered "law-related" for purposes of the application of the rules of professional conduct. 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.

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71 that the lawyer was providing legal advice or services or that an attorney-client relationship had
72 been formed. See Cal. State Bar Formal Opns. 1999-154, 2003-161, n. 1.⁵

73 The holding in *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, (2002) 96
74 Cal.App.4th 1017, that a lawyer breached his fiduciary duties to his former client (American
75 Airlines) by serving as a federal Rule 30 (b)(6) (person most qualified) witness in a matter
76 adverse to American Airlines is not to the contrary. In *American Airlines*, the lawyer had
77 represented American Airlines in earlier related disputes and provided legal advice to American
78 Airlines concerning discovery in a pending lawsuit. *Id.* at 1023-1025. The lawyer later served,
79 over American Airlines' objection, as a Rule 30(b)(6) witness in the same lawsuit for a party who
80 was arguably adverse to American Airlines, and the questioning encompassed American
81 Airlines' confidential information. *Id.* at 1027-1028.

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

88 Application of Rule 3-310(C) does not require representation of
89 both clients *as an attorney*. The discussion section which follows
90 Rule 3-310 states: "Subparagraphs (C)(1) and (C)(2) are intended
91 to apply to all types of legal employment, including the
92 concurrent representation of multiple parties in litigation or in a
93 single transaction or in some other common enterprise or legal
94 relationship."

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

97 The Court found that Rule 30 (b)(6) witnesses owe a fiduciary duty to the party who retains
98 them. *Id.* at 1034. We have previously concluded that a lawyer who assumes a fiduciary
99 relationship is subject to the relevant Rules of Professional Conduct in carrying out that role,
100 even if that relationship does not involve the practice of law. See Cal. State Bar Formal Opinion
101 1995-141. However, serving as a testifying expert witness does not involve a fiduciary
102 relationship. In addition, a disclaimer that serving as an expert witness is not the provision of
103 legal services or the formation of an attorney-client relationship, like the one sought and
104 obtained in each of the above scenarios, and acting in accordance with that disclaimer, should

⁵ Other bar associations 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 Bar Ethics Opinion 337; see also ABA Formal Opinion 97-407.

be sufficient to render the services non-legal in nature. See Cal. State Bar Formal Opinion 1999-154. [ADD PARENTHETICAL EXPLANATION]

B. Application to Different Factual Scenarios

Scenario 1 (Lawyer then Testifying 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 (Defendant) 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 Defendant or to the lawyers representing Defendant. Expert limits Expert's role to providing opinion testimony in accordance with the terms of the engagement agreement.

Here, Company is a former client, and Rule 1.9 is potentially applicable. Rule 1.9 (a) provides that:

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

Rule 1.9 does not apply to Lawyer's subsequent work as a testifying expert because that service is not the legal "representation" of a client within the meaning of the rule. As assumed above, Expert's new work as a testifying expert is not the practice of law and does not involve the provision of legal services.

A lawyer's ethical duties to a former client are not limited, however, to situations in which the lawyer is engaged in legal representation of another client. A lawyer owes two duties to a former client: 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." Rule 1.9, Cmt. [1] (emphasis added). The second of these duties is codified in Rule 1.9(c):

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

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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.

These obligations described in Rule 1.9(c) are not 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 injuriously affects the former client in any matter in which the attorney formerly represented the client and may not, in the preparation of or presentation of such testimony, use former client’s confidential information to the client’s disadvantage or disclose the confidential information.

In this scenario, there is no indication that Lawyer’s testimony would injure the former client. While the facts indicate that the Lawyer’s Law Firm received confidential information that may be relevant to the subject of Lawyer’s proposed expert testimony, they do not state whether Lawyer possesses this information, or, if Lawyer does, the likelihood that Lawyer’s expert testimony could involve using or disclosing this information adversely to the former client. If Lawyer has confidential information, and the competent performance of Lawyer’s role as an expert would foreseeably require its use or disclosure, Lawyer’s testimony would violate Rule 1.9 (c) to the extent any confidential client information were used to the client’s disadvantage or disclosed. Absent these circumstances, Lawyer’s expert testimony would not violate Rule 1.9 (c).

However, even if Expert does not disclose or impermissibly use Company’s confidential information, 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 depends, 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 Expert is found to possess the former client’s confidential information, 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 (Testifying 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 Plaintiff's lawyers. Expert performs expert services independently and no other lawyers at Expert's firm, Law Firm, assist Expert with such services or obtain access to Plaintiff's confidential information. 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 Plaintiff or the lawyers representing Plaintiff. 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, Law Firm is retained by the adverse party in the legal malpractice litigation, Defendant, in a separate but substantially related matter. In this scenario, Expert performs testifying services first on behalf of Plaintiff, and the question is whether those services give rise to an ethical prohibition on the subsequent representation of Defendant by Expert or Expert's Law Firm. As noted above, Rule 1.9 applies only when a lawyer formerly represented a client. 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 not practicing law or forming a lawyer-client relationship, and his conduct in accordance with such disclaimers, 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 Expert was retained. Those duties may include an obligation not to act adversely to Plaintiff in related matters or not to disclose Plaintiff's confidential information, except as specifically required to perform the role of a testifying witness. Even if Expert has testified, those contractual obligations may prevent Expert from participating in a representation that is adverse to Plaintiff, or from using or disclosing information learned from the retaining party or Plaintiff that was not revealed during the course of the testimony.

If Expert's express or implied contractual obligations to Plaintiff limit Expert's ability to participate in the representation, Expert would have a conflict of interest under Rule 1.7 (b). Rule 1.7(b) [SB5] 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." Under Scenario 2, there is a significant risk that Expert's ability to represent Defendant would be materially limited by

Expert's contractual obligations to Plaintiff, requiring that Defendant provide informed written consent to the conflict. Whether Expert's fulfillment of those obligations would impair the ability of Law Firm to provide effective representation would depend on Lawyer's likely role in the representation. If Expert's involvement is not necessary to provide effective representation to Defendant and Expert's compliance with Expert's contractual obligations does not impair Law Firm's ability to represent Defendant, then Law Firm would not be obliged to seek Defendant's informed consent to the representation, unless Expert's conflict is imputed to the Firm. **SB Comment Just a note that we should be consistent throughout with spacing before subsections.**

Rule 1.10(a) imputes 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 Expert's contractual obligations to the retaining party are personal to Expert and no other lawyers at Law Firm assisted Expert with Expert's prior expert witness services or obtained access to Plaintiff's confidential information. Accordingly, if Law Firm can provide effective representation of Defendant without Expert's participation and without compromising the fulfillment of Expert's contractual obligations to Plaintiff, Expert's conflict should not be imputed to the Law Firm, and Law Firm should not be required to seek informed consent to Expert's personal conflict of interest.⁶

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 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. If Expert still owes contractual or agency duties of confidentiality to Plaintiff,⁷ Law Firm will be required to provide that written disclosure to Defendant. **SB Comment Confirmed that the act of designation alone does not waive the privilege. The rule we deduce from the cases is this: The designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege because his**

⁶ As discussed above in connection with Scenario 1, Expert may still be subject to disqualification under judicially developed expert disqualification standards. See *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1078–1088 (Law firm retained by defendant was disqualified for having retained as expert witness accounting firm previously interviewed by plaintiff's attorneys for same lawsuit and to whom plaintiff's attorneys had disclosed confidential information before deciding not to retain firm as expert witness).

⁷ Under California law once an expert is designated and testifies or discloses a significant part of a privileged communication, 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. If Expert does not owe any contractual or agency duties of confidentiality, Expert and Law Firm would be permitted to represent Defendant in the separate but substantially related matter.

initial status is that of a possible expert witness. If the designation is withdrawn before the party discloses a significant part of a privileged communication (as in this case), or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure; if the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition) the privilege [**340] is waived. (*Sanders v. Superior Court*, *supra*, 34 Cal. App. 3d 270, 279; *County of Los Angeles v. Superior Court*, *supra*, 222 Cal. App. 3d at pp. 654–655; *Tennenbaum v. Deloitte & Touche* (9th Cir. 1996) 77 F.3d 337, 341 [in determining whether the privilege has been waived, the “triggering event is disclosure, not a promise to disclose”]; *Lohman v. Superior Court* (1978) 81 Cal. App. 3d 90, 95 [146 Cal. Rptr. 171] [***14] [“the intent to disclose does not operate as a waiver, waiver comes into play after a disclosure has been made”].)

[Shooker v. Superior Court, 111 Cal. App. 4th 923, 930](#)

Scenario 3 (Concurrent Expert Testifying for Opposing Party Adverse to Company and Law Firm Representation of Company in Separate, Unrelated Matter) [Sarah: I am having a difficult time trying to succinctly clarify the difference between Scenarios 3 and 4 so welcome any edits to these parentheticals.]

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 separate and entirely unrelated to the matter in which Law Firm represents Company. The entity 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.

The third scenario involves concurrent matters, and raises the issue of whether 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 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, 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 assume that providing expert testimony is not the practice of law, and could not reasonably be considered a “law-related” service if appropriate disclaimers have been made and the lawyer acts in accordance with the disclaimers.

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A leading case nationally on this issue is *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F. Supp. 2d 938, 943-945 (N.D. Ill. 2001). *Commonwealth* addressed 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. 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.

In Scenario 3, Rule 1.7(a) is not triggered by Expert's role as a testifying expert. Law Firm, however, owes obligations to its current client (Company) under Rule 1.7(b) and Rule 1.7 (c)(1). Because Expert's testimony adverse to Company is in a matter that is unrelated to the matter in which Law Firm is representing Company and Expert does not have Company's confidential information, Expert's role as a testifying expert would not likely pose a risk of materially impacting Law Firm's representation of Company. Under these circumstances, Expert's testimony will have no impact on the outcome of the matter in which Law Firm is representing Company and Law Firm can effectively represent Company in the matter without any material limitations based on the content or effectiveness of Expert's testimony. Likewise, we do not believe disclosure to the client would be required under Rule 1.7(c)(1) because this rule is limited to situations in which a lawyer has a "legal, business, financial, professional, or personal relationship with or responsibility to a party or witness *in the same matter*." (emphasis added). Here, the party on whose behalf Expert has been asked to testify is not a party to the litigation in which Law Firm represents Company. Thus, by its plain terms, Rule 1.7(c)(1) does not apply.

However, even if ethically permissible, the concurrent representation and testimony may risk disqualification. *See Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, *supra* 124 Cal.App.4th at p. 602-605 (discussed in scenario 1, above)]; *see also Commonwealth Ins. Co. v. Stone Container Corp.*, *supra* 178 F. Supp. 2d at pp. 943-945 (suggesting the outcome may have been different had there been a risk of sharing of confidential information). Law Firm may need to disclose that risk to its client, pursuant to Rule 1.4(a) or (b). [Should we change "may need" to should? Also, we don't mention this potential duty when discussing disqualification risk in Scenarios 1 and 2 above. I believe we should also incorporate above if we decide to keep here.]

Scenario 4 (Concurrent Expert Testifying for Opposing Party that is Not Adverse to Company and Law Firm Representation of Company in Separate, Unrelated Matter Where Opposing Party is Adverse to Company)

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 that litigation, but in a separate, unrelated matter that does not involve Company and is not in any way adverse to Company.

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328 Expert has never performed any work on any matter on behalf of Company nor has Expert
329 obtained any confidential information about Company.

330 The conclusions reached in Scenario 3 with respect to the inapplicability of Rules 1.7 (a) and (b)
331 likewise apply with even greater force in this scenario because the proposed testimony is not
332 adverse to the current client. But unlike Scenario 3, Law Firm must provide written disclosure
333 of the expert assignment to the Company because Expert has a business or professional
334 relationship with a party in the same matter in which Law Firm is representing Company.

CONCLUSION

336 A lawyer acting solely as a testifying expert witness is not “representing” the party on whose
337 behalf the lawyer is testifying. Still, lawyers acting as testifying expert witnesses still must
338 adhere to the Rules of Professional Conduct, including conflict rules with respect to their
339 current or former representation of their clients. In addition, lawyers serving as testifying
340 expert witnesses must be cognizant of any expert contractual or common law obligations or
341 disqualification standards that may operate to bar representation even when the ethical rules
342 would permit it.

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~~THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 20-0001~~

~~LAWYER AS EXPERT WITNESS~~

ISSUE

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 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 injuriously affect the former client in any matter in which the attorney formerly represented the client,¹ 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 prevent a lawyer whose testimony would be permissible under the Rules of Professional Conduct from serving as an expert witness[JF1][SB2].

No ethical principle 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. If the lawyer remains under common law or express 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[JF3][SB4]. Depending on the circumstances, informed

¹ *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564.

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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 Testifying 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 (Defendant) 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 Defendant or to the lawyers representing Defendant. Expert limits Expert's role to providing opinion testimony in accordance with the terms of the engagement agreement.~~

Scenario 2 (Testifying 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 Plaintiff's lawyers. Expert performs expert services independently and no other lawyers at Expert's firm, Law Firm, assist Expert with such services or obtain access to Plaintiff's confidential information. 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 Plaintiff or the lawyers representing Plaintiff. 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, 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 Testifying for Opposing Party Adverse to Company and Law Firm Representation of Company in Separate, Unrelated Matter That Does Not Involve Opposing Party) [Sarah: I am having a difficult time trying to succinctly clarify the difference between Scenarios 3 and 4 so welcome any edits to these parentheticals.]

~~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 separate and entirely unrelated to the matter in which Law Firm~~

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~~represents Company. The entity 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 Testifying for Opposing Party that is Not Adverse to Company and Law Firm Representation of Company in Separate, Unrelated Matter Where Opposing Party is Adverse to Company)~~

~~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 that litigation, but in a separate, unrelated matter that does not involve Company and is not in any way adverse to Company. Expert has never performed any work on any matter on behalf of Company nor has Expert obtained any confidential information about Company.~~

DISCUSSION

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

A lawyer is 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 8.4.² Multiple Rules

² 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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of Professional Conduct also apply regardless of whether a lawyer is engaged in the practice of law.³

The focus in this opinion, however, is on the application of conflict rules, Rules 1.7 and 1.9, and imputation under Rule 1.10, to the conduct of lawyers acting as testifying experts. These rules typically apply when the conduct in question either is or reasonably could be viewed by a lay person as the practice of law in the context of an attorney-client relationship; however, as discussed below, an expert witness generally is not engaged in the practice of law or in an attorney-client relationship solely from offering opinion testimony.

Even when a testifying expert is 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. 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 here that a lawyer serving only as a testifying expert witness is not engaged in the practice of law.⁴

Here, the lawyer Experts expressly disclaimed in writing that they were forming an attorney-client relationship or providing legal advice or services and acted in accordance with that disclaimer. Moreover, the disclaimers were made to parties who were represented by lawyers in the matter. Under these circumstances it would not be reasonable for a consumer to believe that the lawyer was providing legal advice or services or that an attorney-client relationship had been formed. See Cal. State Bar Formal Opns. 1999-154, 2003-161, n. 1.⁵

The holding in *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, (2002) 96 Cal.App.4th 1017, that a lawyer breached his fiduciary duties to his former client (American Airlines) by serving as a federal Rule 30 (b)(6) (person most qualified) witness in a matter adverse to American Airlines is not to the contrary. In *American Airlines*, the lawyer had represented American Airlines in earlier related disputes and provided legal advice to American

³ 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 a lawyer acting as a witness. However, the provisions of Rule 3.7 only place additional requirements on a 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 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 role as a testifying expert witness.

⁴ This assumption is consistent with authorities from other jurisdictions that have considered the issue. See ABA Formal Opinion 97-407 (citing authorities). We also do not need to address whether a lawyer's service as a testifying expert witness, although a "non-legal" service, is generally considered "law-related" for purposes of the application of the rules of professional conduct. 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.

⁵ Other bar associations 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 Bar Ethics Opinion 337; see also ABA Formal Opinion 97-407.

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Airlines concerning discovery in a pending lawsuit. *Id.* at 1023-1025. The lawyer later served, over American Airlines' objection, as a Rule 30(b)(6) witness in the same lawsuit for a party who was arguably adverse to American Airlines, and the questioning 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 the lawyer's contention that Rule 3-310 (C) did not apply because testifying as a 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 single transaction or in some other common enterprise or legal relationship."

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

The Court found that Rule 30 (b)(6) witnesses owe a fiduciary duty to the party who retains them. *Id.* at 1034. We have previously concluded that a lawyer who assumes a fiduciary relationship is subject to the relevant Rules of Professional Conduct in carrying out that role, even if that relationship does not involve the practice of law. See Cal. State Bar Formal Opinion 1995-141. However, serving as a testifying expert witness does not involve a fiduciary relationship. In addition, a disclaimer that serving as an expert witness is not the provision of legal services or the formation of an attorney-client relationship, like the one sought and obtained in each of the above scenarios, and acting in accordance with that disclaimer, should be sufficient to render the services non-legal in nature. See Cal. State Bar Formal Opinion 1999-154. [ADD PARENTHETICAL EXPLANATION]

B. Application to ~~Each Scenario~~ Different Factual Scenarios

Scenario 1 (Lawyer then Testifying 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 (Defendant) in that

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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 Defendant or to the lawyers representing Defendant. Expert limits Expert's role to providing opinion testimony in accordance with the terms of the engagement agreement.

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

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

Rule 1.9 does not apply to Lawyer's subsequent work as a testifying expert because that service is not the legal "representation" of a client within the meaning of the rule. As assumed above, Expert's new work as a testifying expert is not the practice of law and does not involve the provision of legal services.

A lawyer's ethical duties to a former client are not limited, however, to situations in which the lawyer is engaged in legal representation of another client. A lawyer owes two duties to a former client: 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." Rule 1.9, Cmt. [1] (emphasis added). The second of these duties is codified in Rule 1.9(c):

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.

These obligations described in Rule 1.9(c) are not 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

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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 injuriously affects the former client in any matter in which the attorney formerly represented the client and may not, in the preparation of or presentation of such testimony, use former client’s confidential information to the client’s disadvantage or disclose the confidential information.

In this scenario, there is no indication that Lawyer’s testimony would injure the former client. While the facts indicate that the Lawyer’s Law Firm received confidential information that may be relevant to the subject of Lawyer’s proposed expert testimony, they do not state whether Lawyer possesses this information, or, if Lawyer does, the likelihood that Lawyer’s expert testimony could involve using or disclosing this information adversely to the former client. If Lawyer has confidential information, and the competent performance of Lawyer’s role as an expert would foreseeably require its use or disclosure, Lawyer’s testimony would violate Rule 1.9 (c) to the extent any confidential client information were used to the client’s disadvantage or disclosed. Absent these circumstances, Lawyer’s expert testimony would not violate Rule 1.9 (c).

However, even if Expert does not disclose or impermissibly use Company’s confidential information, 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 depends, 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 Expert is found to possess the former client’s confidential information, 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 (Testifying 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 Plaintiff’s lawyers. Expert performs expert services independently and no other lawyers at Expert’s firm, Law Firm, assist Expert with such services or obtain access to Plaintiff’s confidential information. 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 Plaintiff or the lawyers representing Plaintiff. 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, Law Firm is retained by the adverse party in the legal malpractice litigation, Defendant, in
a separate but substantially related matter.

In this scenario, Expert performs testifying services first on behalf of Plaintiff, and the question is whether those services give rise to an ethical prohibition on the subsequent representation of Defendant by Expert or Expert's Law Firm . As noted above, Rule 1.9 applies only when a lawyer formerly represented a client. 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 not practicing law or forming a lawyer-client relationship, and his conduct in accordance with such disclaimers, 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 Expert was retained. Those duties may include an obligation not to act adversely to Plaintiff in related matters or not to disclose Plaintiff's confidential information, except as specifically required to perform the role of a testifying witness. Even if Expert has testified, those contractual obligations may prevent Expert from participating in a representation that is adverse to Plaintiff, or from using or disclosing information learned from the retaining party or Plaintiff that was not revealed during the course of the testimony.

If Expert's express or implied contractual obligations to Plaintiff limit Expert's ability to participate in the representation, Expert would have a conflict of interest under Rule 1.7 (b). Rule 1.7(b) [SB5] 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." Under Scenario 2, there is a significant risk that Expert's ability to represent Defendant would be materially limited by Expert's contractual obligations to Plaintiff, requiring that Defendant provide informed written consent to the conflict. Whether Expert's fulfillment of those obligations would impair the ability of Law Firm to provide effective representation would depend on Lawyer's likely role in the representation. If Expert's involvement is not necessary to provide effective representation to Defendant and Expert's compliance with Expert's contractual obligations does not impair Law Firm's ability to represent Defendant, then Law Firm would not be obliged to seek Defendant's informed consent to the representation, unless Expert's conflict is imputed to the Firm.

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Rule 1.10(a) imputes 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 Expert's contractual obligations to the retaining party are personal to Expert and no other lawyers at Law Firm assisted Expert with Expert's prior expert witness services or obtained access to Plaintiff's confidential information. Accordingly, if Law Firm can provide effective representation of Defendant without Expert's participation and without compromising the fulfillment of Expert's contractual obligations to Plaintiff, Expert's conflict should not be imputed to the Law Firm, and Law Firm should not be required to seek informed consent to Expert's personal conflict of interest.⁶

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 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. If Expert still owes contractual or agency duties of confidentiality to Plaintiff,⁷ [SB6] Law Firm will be required to provide that written disclosure to Defendant.

Scenario 3 (Concurrent Expert Testifying for Opposing Party Adverse to Company and Law Firm Representation of Company in Separate, Unrelated Matter ~~That Does Not Involve Opposing Party~~) [Sarah: I am having a difficult time trying to succinctly clarify the difference between Scenarios 3 and 4 so welcome any edits to these parentheticals.]

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 separate and entirely unrelated to the matter in which Law Firm represents Company. The entity 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.

⁶ As discussed above in connection with Scenario 1, Expert may still be subject to disqualification under judicially developed expert disqualification standards. See *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1078–1088 (Law firm retained by defendant was disqualified for having retained as expert witness accounting firm previously interviewed by plaintiff's attorneys for same lawsuit and to whom plaintiff's attorneys had disclosed confidential information before deciding not to retain firm as expert witness).

⁷ Under California law once an expert is designated and testifies or discloses a significant part of a privileged communication, 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. If Expert does not owe any contractual or agency duties of confidentiality, Expert and Law Firm would be permitted to represent Defendant in the separate but substantially related matter.

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The third scenario involves concurrent matters, ~~with Expert testifying in one matter on behalf of one party adverse to a party that Expert's Law Firm represents in separate, unrelated litigation. The~~ and raises the issue ~~here is of~~ whether 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 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, 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 assume that providing expert testimony is not the practice of law, and could not reasonably be considered a "law-related" service if appropriate disclaimers have been made and the lawyer acts in accordance with the disclaimers.

A leading case nationally on this issue is *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F. Supp. 2d 938, 943-945 (N.D. Ill. 2001). *Commonwealth* addressed 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. 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.

In Scenario 3, Rule 1.7(a) is not triggered by Expert's role as a testifying expert. Law Firm, however, owes obligations to its current client (Company) under Rule 1.7(b) and Rule 1.7 (c)(1). Because Expert's testimony adverse to Company is in a matter that is unrelated to the matter in which Law Firm is representing Company and Expert does not have Company's confidential information, Expert's role as a testifying expert would not likely pose a risk of materially impacting Law Firm's representation of Company. Under these circumstances, Expert's testimony will have no impact on the outcome of the matter in which Law Firm is representing Company and Law Firm can effectively represent Company in the matter without any material limitations based on the content or effectiveness of Expert's testimony. Likewise, we do not believe disclosure to the client would be required under Rule 1.7(c)(1) because this rule is limited to situations in which a lawyer has a "legal, business, financial, professional, or personal relationship with or responsibility to a party or witness *in the same matter.*" (emphasis added). Here, the party on whose behalf Expert has been asked to testify is not a party to the litigation in which Law Firm represents Company. Thus, by its plain terms, Rule 1.7(c)(1) does not apply.

However, even if ethically permissible, the concurrent representation and testimony may risk disqualification. *See Brand v. 20th Century Ins. Co./21st Century Ins. Co., supra* 124 Cal.App.4th

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at p. 602-605 (discussed in scenario 1, above)]; *see also Commonwealth Ins. Co. v. Stone Container Corp.*, *supra* 178 F. Supp. 2d at pp. 943-945 (suggesting the outcome may have been different had there been a risk of sharing of confidential information). Law Firm may need to disclose that risk to its client, pursuant to Rule 1.4(a) or (b). [Should we change “may need” to should? Also, we don’t mention this potential duty when discussing disqualification risk in Scenarios 1 and 2 above. I believe we should also incorporate above if we decide to keep here.]

Scenario 4 (Concurrent Expert Testifying for Opposing Party that is Not Adverse to Company and Law Firm Representation of Company in Separate, Unrelated Matter Where Opposing Party is Adverse to Company)

~~In this final scenario, Expert has been asked to testify on behalf of a party who is adverse to Company in litigation in which Law Firm represents Company. The proposed testimony would be in a different matter not involving Company, in which the retaining party is not adverse to Company and in which Law Firm plays no role.~~ 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 that litigation, but in a separate, unrelated matter that does not involve Company and is not in any way adverse to Company. Expert has never performed any work on any matter on behalf of Company nor has Expert obtained any confidential information about Company.

The conclusions reached in Scenario 3 with respect to the inapplicability of Rules 1.7 (a) and (b) likewise apply with even greater force in this scenario because the proposed testimony is not adverse to the current client. But unlike Scenario 3, Law Firm must provide written disclosure of the expert assignment to the Company because Expert has a business or professional relationship with a party in the same matter in which Law Firm is representing Company.

CONCLUSION

A lawyer acting solely as a testifying expert witness is not “representing” the party on whose behalf the lawyer is testifying. Still, lawyers acting as testifying expert witnesses still must adhere to the Rules of Professional Conduct, including conflict rules with respect to their current or former representation of their clients. In addition, lawyers serving as testifying expert witnesses must be cognizant of any expert contractual or common law obligations or disqualification standards that may operate to bar representation even when the ethical rules would permit it.