

1 THE STATE BAR OF CALIFORNIA
2 STANDING COMMITTEE ON
3 PROFESSIONAL RESPONSIBILITY AND CONDUCT
4 FORMAL OPINION INTERIM NO. 20-0001
5 LAWYER AS EXPERT WITNESS

6 **ISSUE**

7 May a lawyer ethically testify as an expert witness in matters involving current or former clients
8 of the lawyer or the lawyer's law firm?

9 **DIGEST**

10 A lawyer may ethically testify as an expert witness in a matter adverse to a former client
11 provided that the lawyer's testimony does not injuriously affect the former client in any matter
12 in which the attorney formerly represented the client,¹ disclose information acquired by virtue
13 of the representation which is protected by Business and Professions Code section 6068(e) or
14 Rule 1.6, or use such information to the disadvantage of the former client. In certain
15 circumstances, however, judicially developed principles of disqualification may prevent a
16 lawyer whose testimony would be permissible under the Rules of Professional Conduct from
17 serving as an expert witness.

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

27 A lawyer may ethically serve as an expert witness against a current client of the lawyer's law
28 firm in an unrelated matter, provided that the lawyer does not disclose or use confidential
29 information of the law firm's current client. Depending on the circumstances, informed written
30 consent under Rule 1.7(b), or written disclosure of the relationship under Rule 1.7(c)(1), may be
31 required.

32

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

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 the law governing lawyers, such as Business and Professions Code Section 6106 or Rule 8.4.² Multiple Rules 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 and does not enter into an attorney-client relationship solely by offering opinion testimony.

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).

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.

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

Under the scenarios described below, 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 Experts were providing legal advice or services or that an attorney-client relationship had been formed. See Cal. State Bar Formal Opns. 1999-154 (an "express disclaimer" that attorney "is not offering and does not intend to provide legal services or legal advice" would help avoid confusion by client that attorney is rendering legal services), 2003-161 at 4, n. 1 ("An attorney can avoid the formation of an attorney-client relationship by express actions or words."). Because no attorney-client relationship is formed by a lawyer acting solely as an expert witness and the Expert lawyers are not engaged in the practice of law, the conflict of interest rules would not generally apply.⁵

B. Application to Different Factual Scenarios

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; ABA Formal Opinion 97-407. 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 contrary to our conclusion. *American Airlines, supra*, 96 Cal.App.4th at 1032-33. In *American Airlines*, the Court of Appeal relied on the fiduciary duties that a person most qualified witness has with the company who retains the witness and the application of the Rules of Professional Conduct to lawyers assuming fiduciary relationships. *Id.* at 1034. In contrast, a lawyer acting solely as an expert witness does not generally assume a fiduciary relationship.

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66 Scenario 1 (Lawyer then Testifying Expert):

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

71 Years later, Company sues a competitor alleging claims of misappropriation of trade secrets.
72 Expert, a lawyer at Law Firm, is retained by the party opposing Company (Defendant) in that
73 lawsuit to testify against Company regarding business valuation and damages. In Expert's
74 engagement agreement with the retaining law firm, Expert explicitly states that Expert's role is
75 limited to providing opinion testimony and that Expert will not be acting as an attorney for or
76 providing any legal advice to Defendant or to the lawyers representing Defendant. Expert limits
77 Expert's role to providing opinion testimony in accordance with the terms of the engagement
78 agreement. **SB: This is limited to situations where lawyer is representing a client in an attorney-**
79 **client relationship so should not apply here. Also, Law Firm's attorney-client relationship**
80 **concluded.**

81

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

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

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

92 A lawyer's ethical duties to a former client are not limited, however, to situations in which the
93 lawyer is engaged in legal representation of another client. A lawyer owes two duties to a
94 former client: not to "(i) do *anything* that will injuriously affect the former client in any matter
95 in which the lawyer represented the former client, or (ii) *at any time* use against the former
96 client knowledge or information acquired by virtue of the previous relationship." Rule 1.9, Cmt.
97 [1] (emphasis added). The second of these duties is codified in Rule 1.9(c):

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

100 (1) use information protected by Business and Professions Code section 6068,
101 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. In *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 823, cited in Comment [1] to Rule 1.9, 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.”

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 Network 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). In *Shadow Traffic Network, supra*, 24 Cal.App.4th at 1078-1088, a law firm retained by the defendant was disqualified for having retained an accounting firm as an expert witness that was previously interviewed by the plaintiff’s attorneys for the same lawsuit and to whom plaintiff’s attorneys had disclosed confidential information before deciding not to retain the accounting firm as an expert witness.

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 these 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. 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 Expert's conduct in accordance with these 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 its 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,⁶ 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 materially limit Expert's ability to participate in the representation of Defendant, Expert would have 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." Whether Expert's fulfillment of

⁶ 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, supra*, 24 Cal.App.4th at 1079-1080; *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 691-692.

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Expert's contractual 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.

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 any Expert 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.

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 duties of confidentiality to Plaintiff, Law Firm will be required to provide that written disclosure to Defendant.

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, supra*, 24 Cal.App.4th at 1078–1088 (discussed in Scenario 1 above). Law Firm should disclose any significant disqualification risks to its client, pursuant to Rule 1.4 (b), which requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." If Expert is subject to ongoing contractual duties of confidentiality to Plaintiff, Law Firm should explain to Defendant the risk that Plaintiff may seek to disqualify Law Firm from representing Defendant in the separate, but substantially related matter based on the ongoing confidentiality duties. This explanation would assist the Defendant in making informed decisions regarding the representation. *See* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.").

In addition, if Law Firm knows that Defendant expects Law Firm or Expert to reveal Plaintiff's confidential information in breach of Expert's confidentiality obligations, Law Firm would be required to disclose its inability to do so under Rule 1.4(a)(4). *See* Rule 1.4(a)(4) (requiring a lawyer to "advise the client about any relevant limitation on the lawyer's conduct when the

217 lawyer knows* that the client expects assistance not permitted by the Rules of Professional
218 Conduct or other law.”).

219 Scenario 3 (Concurrent Testifying Expert and Law Firm Representation)

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

227 This scenario involves concurrent matters and raises the issue of whether Expert’s role as a
228 testifying expert triggers the Rule 1.7 (a) prohibition on undertaking a representation adverse
229 to a current client, which would require the current client’s informed written consent to the
230 engagement. The judicial opinions and ethics opinions that have addressed this issue, including
231 the ABA opinion, have concluded that giving expert testimony adverse to a current client in an
232 unrelated matter does not trigger Rule 1.7, because giving expert testimony is not the practice
233 of law and does not involve the representation of a client. See ABA Opn 97-407; DC Opn. 377;
234 *Commonwealth Ins. Co. v. Stone Container Corp.* (N.D. Ill. 2001) 178 F.Supp.2d 938, 943-945. As
235 previously discussed, we assume that providing expert testimony is not the practice of law, and
236 could not reasonably be considered a “law-related” service if appropriate disclaimers have been
237 made and the lawyer acts in accordance with the disclaimers.

238 A leading case nationally on this issue is *Commonwealth*, *supra*, 178 F.Supp.2d at 943-945 (N.D.
239 Ill. 2001). *Commonwealth* addressed whether a lawyer expert could testify against a current
240 client of the firm in an insurance coverage dispute, when the firm’s representation of the client
241 in a Chinese joint venture project was substantively unrelated and conducted by lawyers
242 located in a firm office in another city. The court, applying Illinois law, held that the Rules of
243 Professional Conduct did not apply to the lawyer’s work as an expert witness because there was
244 no lawyer-client relationship. Under the “spirit” of the Rules, disqualification was not required
245 based on the firm’s duty of loyalty to the current client because the two assignments were both
246 substantively and organizationally so far afield from each other. The court made clear that it
247 might have reached a different result if it had concluded that the representation of the client
248 had given the firm substantial confidential information that might have been used by the
249 expert to the client’s detriment.

250 In Scenario 3, Rule 1.7(a) is not triggered by Expert’s role as a testifying expert because lawyer
251 is not representing a client. Law Firm, however, potentially owes obligations to its current client
252 (Company) under Rule 1.7(b) and Rule 1.7 (c)(1). Because Expert’s testimony adverse to
253 Company is in a separate matter that is unrelated to the matter in which Law Firm is
254 representing Company and Expert does not have Company’s confidential information, Expert’s
255 role as a testifying expert would not likely pose a risk of materially impacting Law Firm’s

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representation of Company. Under these circumstances, Expert's testimony will likely 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. To the extent Law Firm's "ability to consider, recommend or carry out an appropriate course of action" for the Company "will be materially limited as a result of" its financial interests in Expert's expert witness engagement or as a result of the business, professional or personal relationships between the lawyers representing the Company and the Expert, Rule 1.7(b) would apply and require Law Firm to obtain Company's informed written consent to the representation. See Rule 1.7(b), Comment [4] (also explaining that the "risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm . . ."). SB: I added this based on our meeting notes, but it seems highly unlikely under our facts since the matters are separate and unrelated so perhaps we just include, if at all, in a footnote.

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.

). [After evaluating further, I don't believe paragraph (a) applies. While paragraph (b) is a closer call, it seems unlikely that the entity for whom the expert witness is testifying would seek to disqualify the law firm in the separate and unrelated matter and that motion appears to lack any merit under both the CRPC and the case law/common law standards governing expert disqualification.] (Ken: 1.4(b), JF: 1.4(a)(4) material limitation, 1.4(a)(3) clients and significant developments, SB: 1.7(b) potential application) SB: I believe material limitation issues are more directly addressed via Rule 1.7. Paragraph(a)(4) deals with situations where the company is seeking assistance that is not permitted under the CPRC or other law. Scenario 4 doesn't implicate this paragraph. Justin/Ken: I would appreciate your recommendations on what you believe the Law Firm would be required to disclose to the client under Rule 1.4(a)(3) or 1.4(b). I don't view the Expert engagement in a separate matter as a "significant development relating to the representation" that would require disclosure. I'm also unclear how paragraph (b) would apply to this scenario. My notes from our last meeting talk about the potential application of this paragraph based on the testimony of the Expert lawyer testifying against the Law Firm's client being given undue weight or credibility. But, I don't see how this potential issue would require a disclosure under paragraph (b). KB: Sarah: What I was thinking at the meeting, was that because the expert is testifying against a current client of the firm the expert's testimony may be given undue weight if the relationship is known to a jury, which could be detrimental to the firm's client.

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CONCLUSION

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

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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.

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. 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.

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

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- (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).

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.

REDLINE

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~~Here~~Under the scenarios described below, 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 Experts were providing legal advice or services or that an attorney-client relationship had been formed. See Cal. State Bar Formal Opns. 1999-154 (an "express disclaimer" that attorney "is not offering and does not intend to provide legal services or legal advice" would help avoid confusion by client that attorney is rendering legal services), 2003-161 at 4, n. 1 ("An attorney can avoid the formation of an attorney-client relationship by express actions or words."). Because no attorney-client relationship is formed by a lawyer acting solely as an expert witness and the Expert lawyers are not engaged in the practice of law, the conflict of interest rules would not generally apply.⁵

B. Application to Different Factual Scenarios

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; ABA Formal Opinion 97-407. 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 contrary to our conclusion. *American Airlines, supra*, 96 Cal.App.4th at 1032-33. In *American Airlines*, the Court of Appeal relied on the fiduciary duties that a person most qualified witness has with the company who retains the witness and the application of the Rules of Professional Conduct to lawyers assuming fiduciary relationships. *Id.* at 1034. In contrast, a lawyer acting solely as an expert witness does not generally assume a fiduciary relationship.

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67 Scenario 1 (Lawyer then Testifying Expert):

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

72 Years later, Company sues a competitor alleging claims of misappropriation of trade secrets.
73 Expert, a lawyer at Law Firm, is retained by the party opposing Company (Defendant) in that
74 lawsuit to testify against Company regarding business valuation and damages. In Expert's
75 engagement agreement with the retaining law firm, Expert explicitly states that Expert's role is
76 limited to providing opinion testimony and that Expert will not be acting as an attorney for or
77 providing any legal advice to Defendant or to the lawyers representing Defendant. Expert limits
78 Expert's role to providing opinion testimony in accordance with the terms of the engagement
79 agreement. SB: This is limited to situations where lawyer is representing a client in an attorney-
80 client relationship so should not apply here. Also, Law Firm's attorney-client relationship
81 concluded.

82

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

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

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

93 A lawyer's ethical duties to a former client are not limited, however, to situations in which the
94 lawyer is engaged in legal representation of another client. A lawyer owes two duties to a
95 former client: not to "(i) do *anything* that will injuriously affect the former client in any matter
96 in which the lawyer represented the former client, or (ii) *at any time* use against the former
97 client knowledge or information acquired by virtue of the previous relationship." Rule 1.9, Cmt.
98 [1] (emphasis added). The second of these duties is codified in Rule 1.9(c):

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

101 (1) use information protected by Business and Professions Code section 6068,
102 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. In *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 823, cited in Comment [1] to Rule 1.9, 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.”

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 Network 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). In *Shadow Traffic Network, supra*, 24 Cal.App.4th at 1078-1088, a law firm retained by the defendant was disqualified for having retained an accounting firm as an expert witness that was previously interviewed by the plaintiff’s attorneys for the same lawsuit and to whom plaintiff’s attorneys had disclosed confidential information before deciding not to retain the accounting firm as an expert witness.

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 these 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. 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 Expert's conduct in accordance with these 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 its 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,⁶ 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 materially limit Expert's ability to participate in the representation of Defendant, Expert would have 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." Whether Expert's fulfillment of

⁶ 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, supra*, 24 Cal.App.4th at 1079-1080; *DeLuca v. State Fish Co., Inc.* (2013) 217 Cal.App.4th 671, 691-692.

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Expert's contractual 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.

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 any Expert 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. ~~I understand that~~

~~questions were raised at the last meeting about whether the imputation analysis is precise enough. For example, there is the wrinkle that lawyers at law firms do share the expert fees with the law firm. If there is a screen, does that fee sharing need to be addressed? Response: However, we are relying on Rule 1.10(a)(1) which does not require screening or that the tainted lawyer be prohibited from sharing fees. Screening and the prohibition on fee sharing is addressed in paragraph (a)(2), where the conflict is based upon rule 1.9(a) or (b) and arises out of the prohibited lawyer's association with a prior firm and the prohibited lawyer did not substantially participate in the matter. This subsection is inapplicable to scenario 2.]~~

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 duties of confidentiality to Plaintiff, Law Firm will be required to provide that written disclosure to Defendant.

~~In addition, as~~ 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, supra*, 24 Cal.App.4th at 1078–1088 (discussed in Scenario 1 above). Law Firm should disclose any significant disqualification risks to its client, pursuant to Rule 1.4 (b), which requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." If Expert is subject to ongoing contractual duties of confidentiality to Plaintiff, Law Firm should explain to Defendant the risk

that Plaintiff may seek to disqualify Law Firm from representing Defendant in the separate, but substantially related matter based on the ongoing confidentiality duties. This explanation would assist the Defendant in making informed decisions regarding the representation. [See Rule 1.4\(b\) \(“A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.”\)](#).

In addition, if Law Firm knows that Defendant expects Law Firm or Expert to reveal Plaintiff’s confidential information in breach of Expert’s confidentiality obligations, Law Firm would be required to disclose its inability to do so under Rule 1.4(a)(4). See Rule 1.4(a)(4) (requiring a lawyer to “advise the client about any relevant limitation on the lawyer’s conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”). ~~[We should discuss the potential application of Rule 1.4(a) (b) to this scenario; it does not appear to apply to the other scenarios.]~~

Scenario 3 (Concurrent Testifying Expert and Law Firm Representation)

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.

This scenario involves concurrent matters and raises the issue of whether Expert’s role 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 written 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, 943-945. 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*, *supra*, 178 F.Supp.2d at 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~~[based on](#) 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

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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~~^{9ightt} 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- because lawyer is not representing a client. Law Firm, however, potentially 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 separate 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 likely 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. To the extent Law Firm's "ability to consider, recommend or carry out an appropriate course of action" for the Company "will be materially limited as a result of" its financial interests in Expert's expert witness engagement or as a result of the business, professional or personal relationships between the lawyers representing the Company and the Expert, Rule 1.7(b) would apply and require Law Firm to obtain Company's informed written consent to the representation. See Rule 1.7(b), Comment [4] (also explaining that the "risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm . . ."). SB: I added this based on our meeting notes, but it seems highly unlikely under our facts since the matters are separate and unrelated so perhaps we just include, if at all, in a footnote.

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 602-605 (discussed in scenario 1, above); see also *Commonwealth*, *supra*, 178 F.Supp.2d at 943-945 (suggesting the outcome may have been different had there been a risk of sharing of confidential information).~~ [After evaluating further, I don't believe paragraph (a) applies. While paragraph (b) is a closer call, it seems unlikely that the entity for whom the expert witness is testifying would seek to disqualify the law firm in the separate and unrelated matter and that motion appears to lack any merit under both the CRPC and the case law/common law standards governing expert disqualification. Also, I don't believe the rule would apply to

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296 ~~scenario 1, but we should consider incorporating into scenario 2.~~ 1-1 (Ken: 1.4(b), JF: 1.4(a)(4)
297 material limitation, 1.4(a)(3) clients and significant developments, SB: 1.7(b) potential
298 application] SB: I believe material limitation issues are more directly addressed via Rule 1.7.
299 Paragraph(a)(4) deals with situations where the company is seeking assistance that is not
300 permitted under the CPRC or other law. Scenario 4 doesn't implicate this paragraph.
301 Justin/Ken: I would appreciate your recommendations on what you believe the Law Firm would
302 be required to disclose to the client under Rule 1.4(a)(3) or 1.4(b). I don't view the Expert
303 engagement in a separate matter as a "significant development relating to the representation"
304 that would require disclosure. I'm also unclear how paragraph (b) would apply to this scenario.
305 My notes from our last meeting talk about the potential application of this paragraph based on
306 the testimony of the Expert lawyer testifying against the Law Firm's client being given undue
307 weight or credibility. But, I don't see how this potential issue would require a disclosure under
308 paragraph (b). KB: Sarah: What I was thinking at the meeting, was that because the expert is
309 testifying against a current client of the firm the expert's testimony may be given undue weight
310 if the relationship is known to a jury, which could be detrimental to the firm's client.

CONCLUSION

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