

**Draft Opinion 20-0001 – Lawyer as Expert Witness
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Comment	COPRAC Response
1	Lea, Susan (17498020)	N	O	It is not possible to retain any ethical integrity in carrying out or performing the privileges you are granting to lawyers by these proposed changes. I have been an expert witness. I have long been an attorney. These proposed changes are not fair or feasible.	
2	Mitchell, Frederick (17540160)	N	O	The proposed opinion erodes a sacred relationship created by attorney-client privilege. The opinion also compromises the attorney-work product. Clients would be reticent to disclose incriminating facts if the attorney could later testify to those matters. The opinion interferes with the truth seeking function of the courts. This would be especially true in criminal cases. It is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client	

¹ S = Support SM = Support If Modified O = Oppose NP = No Position

**TOTAL = 7 S = 1
SM = 2
O = 4**

**Draft Opinion 20-0001 – Lawyer as Expert Witness
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No.	Commenter/Signatory	Comment on Behalf of Group?	Position ¹	Comment	COPRAC Response
				<p>relationship.</p> <p>If the client is encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects because the client is assured of secrecy, why create a moral dilemma for the lawyer and needless trepidations for the client? The formula for failed litigation is ignorance triggered by surprise. The literal bedrock of the attorney-client privilege is protection of client information. If the opinion is accepted, the fiduciary obligation is no longer mandatory, it is discretionary. Further, the attorney would need to disclose the option to testify as an expert witness. It is doubtful that any client would agree to full disclosure if his or her confidant could give adverse testimony.</p> <p>Redact the words "expert witness" and replace them with "attorney witness" and the proposed opinion is no... ... longer an option worth consideration.</p>	
3	Gliaudys, George (17524430)	N	S		

**TOTAL = 7 S = 1
SM = 2
O = 4**

**Draft Opinion 20-0001 – Lawyer as Expert Witness
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position¹	Comment	COPRAC Response
4	Griffin, Darrel (17632462)	N	O	This creates too many conflicts against representing clients.	
5	Vereen, Donald (17673842)	N	O	This comment is about a complaint filed against an attorney.	
6	OCBA (Gregg) (17698910)	Y	SM	*see attachment	
7	California Lawyer Assn. (Buchanan) (17710562)	Y	SM	*see attachment	

Public Comment - Proposed Opinion 20-0001

Commenting on behalf of an organization	Yes
Professional Affiliation	California Lawyers Association
Name	Alison Buchanan
City	San Jose
State	California
Email address	alison.buchanan@hogefernton.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.	CLA_ethics_committee_COPRAC_Interim_Op._20-0001_-_lawyer_as_expert_witness_SIGNED.pdf (367 KB)

August 16, 2023

Committee on Professional Responsibility and Conduct (COPRAC)
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Formal Opinion Interim No. 20-0001
(Lawyer as Expert Witness)

Dear COPRAC members:

On behalf of the California Lawyers Association Ethics Committee, we appreciate the opportunity to comment on COPRAC's Formal Opinion Interim No. 20-0001.

The ethical issues arising from a lawyer serving as an expert witness is an important topic for an opinion, and in particular, the conflict of interest issues that may arise are very important.

We have several comments and thoughts on the opinion, as follows.

1. Points Applicable to Opinion Generally

The opinion indicates that rules 1.7 and 1.9, as well as 1.10, “typically apply where the conduct in question either is or reasonably could be viewed by a layperson as the practice of law in the context of an attorney client relationship.” There is no citation for this principle, which is likely because it is not correct. There is a body of law governing what constitutes the “practice of law” which is not dependent in any way on the subjective views of a layperson.

Part of the issue here may be that the opinion consistently conflates the issue of what is the practice of law and whether an attorney-client relationship is formed. Those two issues are distinct. And that distinction matters: whether the conflict rules apply depend in most cases on whether there is an attorney-client relationship formed, not on whether the expert is engaged in the practice of law.

Whether an attorney-client relationship is formed will depend on circumstances, and that could happen even if the parties’ agreement specifies that no attorney-client

relationship shall be formed. It may be helpful to point that out, so that people can take care not to create an unwanted attorney-client relationship.

2. Scenario 1 Lawyer Then Testifying Expert

In this scenario, Law Firm represents Company in connection with a commercial lease. Years later, Lawyer is retained as a testifying expert adverse to Company in a trade secret matter, to testify as to business valuation and damages.

The primary issue with the analysis presented in this scenario is that the opinion does not clearly set forth how Rule 1.9 applies here. For one thing, the opinion on page 4 states categorically that “Rule 1.9 does not apply to Lawyer’s subsequent work as a testifying expert . . .” That is not accurate, as the opinion itself makes clear in the next paragraph and the discussion of Rule 1.9(c). Perhaps the sentence should instead read “1.9(a).” Next, as the opinion points out, a lawyer owes two duties to a former client, as set forth in comment [1]: 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.” The opinion ignores the first of these duties. We recognize that the facts suggest that the new matter is unrelated to the first matter, but we suggest that the first duty should at least be mentioned before moving on to the second issue involving analysis of access to or risk of use of confidential information.

The opinion focuses on the second duty, as set forth in Rule 1.9(c), which provides that “a lawyer who has formerly represented a client in a matter or whose present or former law firm formerly represented a client in a matter shall not thereafter: (1) use information protected by Business & Professions Code section 6068 subdivision (e) and rule 1.6 acquired by virtue of the representation of the 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 [such] information . . .” . . . However, this analysis could be clarified.

First, the question under Rule 1.9(c) is not, as the opinion suggests, whether “Lawyer’s testimony would injure the former client.” The term “injure” is not in Rule 1.9(c), and it makes sense to assume that in fact the expert testimony will injure the former client in some way- that is presumably why the expert is being retained. The issue under Rule 1.9 is more accurately framed as whether Lawyer’s expert testimony would involve use of Company’s confidential information to the former client’s disadvantage, or would involve revealing such information. That is true whether Lawyer was involved in the prior representation or not, since Rule 1.9(c) applies where a lawyer’s “present or former law firm formerly represented a client in a matter.” The opinion could be much more clear on this point.

Second, the opinion then presents a conclusion as to the risk of disqualification of Expert, which may or may not be appropriately within the scope of an ethics opinion, since disqualification is an issue to be decided by courts. Further, it is not clear what the specific basis is for the opinion's conclusion that a "risk that the testimony will involve the use" of the former client's confidential information could disqualify the Expert, particularly where it is not clear whether this particular expert has access to that information.

3. Scenario 2 Expert Then Law Firm Representation

This scenario hinges on whether Expert owes continuing contractual duties to the party that retained the Expert. Such obligations are, in our collective experience, fairly rare and unlikely, especially in the case of a testifying expert, a fact that may be useful to point out. One question to consider is whether to include in this analysis duties that could possibly be imposed by the court, such as a protective order. Note: The digest refers to "common law or express contractual obligations." It is not at all clear from the opinion what such common law obligations might be.

An additional point is with respect to the sentence on page 7: "The conflict created by any of Expert's contractual obligations to the retaining party is personal to the Expert . . ." There is no explanation for how that conclusion was reached with respect to the facts here, where Expert was presumably a member of the Law Firm at the time Expert performed those services. It may be the case that certain obligations may be personal to Expert in these circumstances, such that any conflict would not be imputed. But that statement does not appear to be categorically true, just as the opposite would not always be true, depending on the facts.

4. Scenario 3 Concurrent Law Firm Representation and Lawyer As Adverse Expert

The scenario that may present the most difficulty for many lawyers is Scenario 3, where Law Firm represents Company, while at the same time a lawyer in the firm is retained as an adverse expert to testify against Company in an unrelated matter. The opinion concludes that a lawyer may serve as an expert in that circumstance, provided that the lawyer does not use or disclose confidential information of the firm's current client. The hypothetical at page 8 provides further that the lawyer serving as the expert is not a party to any action in which the Law Firm represents Company, never performed any work on any matter on behalf of Company and has no confidential information about company. These are important qualifiers, such that if any of these were true, the implication is that the lawyer could not serve as an expert, but this is not explicitly stated. In addition, these important limitations are not captured in the digest which only

requires that the lawyer not disclose or use confidential information of the law firm's current client.

While we understand the technical analysis, we find this concept concerning, as the current client would undoubtedly commonly find it disloyal for an expert to show up who is a member of the law firm representing the client in an unrelated matter. This fact makes the absence of any discussion in the opinion of the duty of loyalty owed by the firm to current clients a significant omission. This question is not only one of whether the Rules of Professional Conduct apply, but whether the common law principles of a duty of loyalty and imputation would prevent a lawyer in a law firm representing a client from being an adverse expert.

The authority for this section is heavily premised on one Illinois opinion, which involved a lawyer in a different office, and characterized the two assignments as "substantively and organizationally far afield," and where the client had not provided substantial confidential information to the firm that could have been used in by the expert to the client's detriment. We question whether the single out of state case is compelling authority for this section of the opinion.

There is a further assumption embedded in the reasoning of this particular section that the expert does not have access to the client's confidential information. Depending on the circumstances, in particular the size of the firm, and whether lawyers are in the same office, same department, same meetings, and the access or lack thereof and/or sharing of firm files and records, this may or may not be an appropriate assumption.

As to whether the expert's engagement poses a risk of material limitation under Rule 1.7, footnote 8 provides that there may be circumstances in which such a material limitation would arise, requiring a conflict waiver and a disclosure. This is an important point and should be elevated. An explanation of what information would need to be disclosed by the law firm about the expert's testimony to the client that the expert will be testifying against would be helpful, including consideration of the possibility that such a disclosure may not be possible under the terms of the expert's engagement, which may require confidentiality, and the possibility that, therefore, the expert may not be able to take on the engagement. Further, the opinion states that the relevant standard under Rule 1.7 is "materially impacting," which is not what Rule 1.7 says.

Finally, the paragraph that immediately precedes the conclusion, requiring that certain information about the expert's engagement be given to the client of the law firm, raises several concerns and helps highlight the central issue of the duty of loyalty. First, we are unclear about the basis for the disclosures enumerated. Second, we are concerned that depending on the terms of the expert's engagement, such disclosure might not be permissible. Third, we are concerned that the disclosures recommended are insufficient

if they are meant to encompass an “explanation of the potential risks and adverse consequences” to the client that would truly enable the client to make an informed decision about whether it wishes to continue the law firm’s representation. And the opinion never addresses the central question of why and how it would be permissible for Law Firm to put Client in this position, given the duty of loyalty the firm owes Client.

Thank you for your consideration of these views.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alison Buchanan", with a stylized flourish at the end.

Alison Buchanan, Chair
California Lawyers Association
Ethics Committee

Public Comment - Proposed Opinion 20-0001

Commenting on behalf of an organization	No
Name	Darrell Griffin
City	Stockton
State	California
Email address	dglawmail@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	This creates too many conflicts against representing clients.

Public Comment - Proposed Opinion 20-0001

Commenting on behalf of an organization	No
Name	Donald Vereen
City	Bakersfield
State	California
Email address	Donald.Vereen@laverne.edu
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I filed a letter 22-0-03991- Accusation against a State Bar Attorney. I was instructed how to send copies of my complaint. I followed those instruction's. Every time I sent information or evidence I was told to use 3 forms. Proof of Service--Accusation. In The Supreme Court of The State Of California. and Verification--- Accusation. Every time I found more evidence I used the information given me when I sent new evidence. I have green cards return to me telling me that my information was received. I have citified cards sent back to me stated they had received my information started back 02/13/ 2023. On July 2023 I received a letter saying the verification form was not in the evidence received. On July 20, 2023 I sent a copy of the verification that was with the evidence and the citified green cards that the verification was received and the signature that it had been received. I received a letter on July 26,2023 from Jorge E. Navarrete Clerk and Executive Officer of the Supreme Court. "the court never received your verification form; therefore, the court can no longer entertain your request." I had sent the verification form dated and the citified card that it</p>

was received. Because of this time has ran out
for this case .I done everything I was suppose to
do now I think Jorge E. Navarrete should be held
accountable. I Have all my records if needed.

Public Comment - Proposed Opinion 20-0001

Commenting on behalf of an organization	No
Name	Frederick Mitchell
City	Sacramento
State	California
Email address	drfmitchell@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>The proposed opinion erodes a sacred relationship created by attorney-client privilege. The opinion also compromises the attorney-work product. Clients would be reticent to disclose incriminating facts if the attorney could later testify to those matters. The opinion interferes with the truth seeking function of the courts. This would be especially true in criminal cases. It is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship.</p> <p>If the client is encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects because the client is assured of secrecy, why create a moral dilemma for the lawyer and needless trepidations for the</p>

client? The formula for failed litigation is ignorance triggered by surprise. The literal bedrock of the attorney-client privilege is protection of client information. If the opinion is accepted, the fiduciary obligation is no longer mandatory, it is discretionary. Further, the attorney would need to disclose the option to testify as an expert witness. It is doubtful that any client would agree to full disclosure if his or her confidant could give adverse testimony. Redact the words "expert witness" and replace them with "attorney witness" and the proposed opinion is no...

... longer an option worth consideration.

Frederick Mitchell (4L)

Krause & Associates

Law & Motion Dept.

Public Comment - Proposed Opinion 20-0001

Commenting on behalf of an organization	No
Name	George J. Gliaudys, Jr.
City	West Covina
State	California
Email address	maplgrv78@earthlink.net
From the choices below, we ask that you indicate your position. (This is a required field.)	Support

Public Comment - Proposed Opinion 20-0001

Commenting on behalf of an organization	Yes
Professional Affiliation	Orange County Bar Association
Name	Michael Gregg
City	Newport Beach
State	California
Email address	jmazo@ocbar.org
From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>August 15, 2023</p> <p>California State Bar Committee on Professional Responsibility and Conduct</p> <p>Re: COPRAC Proposed Interim Op. 20-0001</p> <p>Dear Ladies and Gentlemen,</p> <p>We are writing on behalf of the Orange County Bar Association with comments on the above-reference proposed ethics opinion concerning expert witnesses. We appreciate the efforts of the Committee to provide guidance concerning conflict of interest issues raised by expert witnesses. However, we have some concerns with various parts of the discussion of the opinion, as discussed below.</p> <p>When Rule 1.7 and 1.9 Apply</p> <p>On page 3, the opinion indicates that rule 1.7 and 1.9, as well as 1.10, “typically apply where the conduct in question either is or reasonably could be viewed by a layperson as the practice of law in the context of an attorney client relationship.”</p> <p>There is no citation for this. There is a body of</p>

law governing what constitutes the “practice of law” which is not dependent on the subjective views of a layperson. We request that this analysis be refined.

Testifying or Consulting Expert

One issue we found troubling is that the opinion discusses testifying experts and does not address issues arising from an engagement as a consulting expert, for example stating at page 3 that an “expert’s function is generally limited to providing expert testimony relevant to a disputed issue that will be helpful to the trier of fact.” The opinion posits that “an expert witness generally is not engaged in the practice of law.” In many cases, experts are engaged in a consulting capacity prior to being engaged to testify and are not “solely offering testimony” as described in...

... the opinion. This is commonly not the case, raising the issue of whether a different analysis would apply under circumstances in which an expert is consulting.

We think that this should be acknowledged, and that the opinion should address whether, under such circumstances, the expert is engaged in the practice of law if the expert is providing legal consultation and whether such a situation would change the analysis of the conflict rules, in order to extend the usefulness of the opinion from a practical perspective. Indeed, many times an expert is hired first in a consulting capacity, while disclaiming legal representation, raising the issue of whether the rules will apply differently even if the expert is later designated to testify.

Accordingly, it is important to consider the ethical issues arising from this relationship. Otherwise

the opinion will apply only to a very narrow range of situations, with the absence of guidance regarding consulting experts rendering the opinion of somewhat limited usefulness.

Lawyer Then Testifying Expert

In this section of the proposed opinion, on page 5, the opinion states “there is no indication Lawyer’s testimony would injure the former client.” Yet, the inherent role of an expert witness is to do exactly that. We think this statement should be revised.

While there is a reference to the duty of an expert not to do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, this concept is not fully considered in the analysis. Instead, this section focuses primarily on the use of confidential information by the Expert. ...

... The distinct duty not to do anything injurious to the client in any matter in which the lawyer formerly represented the client should also be given consideration and analysis.

Testifying Expert Then Lawyer

This section discusses whether a disclosure under section 1.7(c) is required and indicates that a law firm may be required to make a disclosure of any contractual duties still owed by Expert to Plaintiff. A common continuing obligation of an expert is a protective order in the case in which the expert was engaged that limits disclosures by the expert. Typically, when the expert is engaged, the protective order is in place and not subject to negotiation. The ongoing obligations arising from such a protective order may limit the ability to obtain the conflict waiver required by rule 1.7(b) and may prohibit the disclosure required under rule 1.7(c)(1). It would be helpful if the opinion addressed this common

scenario. As written, the opinion assumes there would be no impediment to the required disclosure.

Also, in this section, footnote 7 should be amended to consider that the designation of an expert differs under federal law.

Expert Against Current Client

The opinion concludes that a lawyer may serve as an expert against a current client of the lawyer's law firm in an unrelated matter, provided that the lawyer does not use or disclose confidential information of the firm's current client. The hypothetical at page 8 provides further that the entity on whose behalf Expert will testify is not a party to any action in which the Law Firm represents Company, Expert never performed any work on any matter on behalf of Company and...

... Expert has no confidential information about Company. These are important qualifiers, such that if any of these facts were different, the implication is that the lawyer could not serve as an expert, but this is not explicitly stated. In addition, these important limitations are not captured in the digest which only requires that the lawyer not disclose or use confidential information of the law firm's current client.

While we understand the technical analysis, we find this concept concerning, as the current client would undoubtedly commonly find it disloyal for an expert to show up who is with the same law firm representing the client in an unrelated matter. Relatedly, there is no discussion of why the duty of loyalty owed by the lawyer

representing Company would not be imputed under rule 1.10 to all lawyers in Law Firm, thereby prohibiting any of them from testifying as an expert against client, even in an unrelated matter.

The authority for this section is heavily premised on one Illinois opinion, which involved a lawyer in a different office, and characterized the two assignments as “substantively and organizationally far afield,” and the client had not provided substantial confidential information to the firm that could have been used in by the expert to the client’s detriment. We question whether the single out of state case is compelling authority for this section of the opinion. Further, the opinion is unclear as to whether all of the facts in the case would be required in order for an expert to testify against a current client. As a practical matter at the inception of an expert engagement, it is difficult to make...

... these assessments in a reliable manner, particularly where the client of the firm has a long-time relationship with the firm with a number of matters crossing a wide range of subject areas.

There is a further assumption embedded in the reasoning of this particular section that the expert does not have the client’s confidential information. Depending on the circumstances, in particular the size of the firm, and whether lawyers are in the same office, same department, same meetings, and the access or lack thereof and/or sharing of firm files and records, this may or may not be an appropriate assumption.

As to whether the expert’s engagement poses a risk of material limitation, footnote 8 provides that there may be circumstances in which such a material limitation would arise, requiring informed

written consent to the representation. This is an important point and should be elevated. An explanation of what information would need to be disclosed by the law firm about the expert's testimony to the client that the expert will be testifying against would be helpful, including consideration of the possibility that such a disclosure may not be possible under the terms of the expert's engagement, which may require confidentiality, and the possibility that, therefore, the expert may not be able to take on the engagement.

Finally, the paragraph that immediately precedes the conclusion, requiring that certain information about the expert's engagement be given to the client of the law firm, raises several concerns. First, we are unclear about the basis for the disclosures enumerated. Second, we are concerned that depending on the terms of the...

... expert's engagement, such disclosure might not be permissible. Third, we are concerned that the disclosures recommended are insufficient if they are meant to encompass an "explanation of the potential risks and adverse consequences" to the client that would truly enable the client to make an informed decision about whether it wishes to continue the law firm's representation.

We are uncertain as to when, as mentioned in the digest, a conflict waiver or written disclosure under rule 1.7 be required. Are we to extrapolate that if the facts deviate from those described in the Commonwealth decision and the ethics opinions, a conflict waiver would be appropriate? While the opinion as drafted

indicates that a conflict waiver “may” be required, further guidance on when a conflict waiver or disclosure would be needed, and a more expansive description as to what may need to be disclosed to obtain the client’s informed written consent, including the possibility that the expert’s engagement may not permit such disclosures, would be helpful.

Disqualification Discussion

We would appreciate seeing the expansion of the discussion regarding when a lawyer may be disqualified for serving as an expert, even though doing so would not be unethical. We question whether a lawyer would be acting ethically by taking on an engagement as an expert where the engagement would result in disqualification of the lawyer, without advising the client.

Thank you for the opportunity to comment on this opinion.

Orange County Bar Association

Michael A. Gregg
President

ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.

[OC_Bar_Letter_Re_COPRAC_Proposed_Interim_Op._20-0001.pdf \(1.80 MB\)](#)



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BAR ASSOCIATION**

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OC WOMEN LAWYERS ASSOC.

THURGOOD MARSHALL BAR ASSOC.

August 15, 2023

California State Bar Committee on Professional Responsibility and Conduct

Re: COPRAC Proposed Interim Op. 20-0001

Dear Ladies and Gentlemen,

We are writing on behalf of the Orange County Bar Association with comments on the above-reference proposed ethics opinion concerning expert witnesses. We appreciate the efforts of the Committee to provide guidance concerning conflict of interest issues raised by expert witnesses. However, we have some concerns with various parts of the discussion of the opinion, as discussed below.

When Rule 1.7 and 1.9 Apply

On page 3, the opinion indicates that rule 1.7 and 1.9, as well as 1.10, “typically apply where the conduct in question either is or reasonably could be viewed by a layperson as the practice of law in the context of an attorney client relationship.” There is no citation for this. There is a body of law governing what constitutes the “practice of law” which is not dependent on the subjective views of a layperson. We request that this analysis be refined.

Testifying or Consulting Expert

One issue we found troubling is that the opinion discusses testifying experts and does not address issues arising from an engagement as a consulting expert, for example stating at page 3 that an “expert’s function is generally limited to providing expert testimony relevant to a disputed issue that will be helpful to the trier of fact.” The opinion posits that “an expert witness generally is not engaged in the practice of law.” In many cases, experts are engaged in a consulting capacity prior to being engaged to testify and are not “solely offering testimony” as described in the opinion. This is commonly not the case, raising the issue of whether a different analysis would apply under circumstances in which an expert is consulting.

We think that this should be acknowledged, and that the opinion should address whether, under such circumstances, the expert is engaged in the practice of law if the expert is providing legal consultation and whether such a situation would change the analysis of the conflict rules, in order to extend the usefulness of the opinion from a practical perspective. Indeed, many times an expert is hired first in a consulting capacity, while disclaiming legal representation, raising the issue of whether the rules will apply differently even if the expert is later designated to testify.

Accordingly, it is important to consider the ethical issues arising from this relationship. Otherwise the opinion will apply only to a very narrow range of situations, with the absence of guidance regarding consulting experts rendering the opinion of somewhat limited usefulness.

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Also, in this section, footnote 7 should be amended to consider that the designation of an expert differs under federal law.

Expert Against Current Client

The opinion concludes that a lawyer may serve as an expert against a current client of the lawyer’s law firm in an unrelated matter, provided that the lawyer does not use or disclose confidential information of the firm’s current client. The hypothetical at page 8 provides further that the entity on whose behalf Expert will testify is not a party to any action in which the Law Firm represents Company, Expert never performed any work on any matter on behalf of Company and Expert has no confidential information about Company. These are important qualifiers, such that if any of these facts were different, the implication is that the lawyer could not serve as an expert, but this is not explicitly stated. In addition, these important limitations are not captured in the digest which only requires that the lawyer not disclose or use confidential information of the law firm’s current client.

While we understand the technical analysis, we find this concept concerning, as the current client would undoubtedly commonly find it disloyal for an expert to show up who is with the same law firm representing the client in an unrelated matter. Relatedly, there is no discussion of why the duty of loyalty owed by the lawyer representing Company would not be imputed under rule 1.10 to all lawyers in Law Firm, thereby prohibiting any of them from testifying as an expert against client, even in an unrelated matter.

The authority for this section is heavily premised on one Illinois opinion, which involved a lawyer in a different office, and characterized the two assignments as “substantively and organizationally far afield,” and the client had not provided substantial confidential information to the firm that could have been used in by the expert to the client’s detriment. We question whether the single out of state case is compelling authority for this section of the opinion. Further, the opinion is unclear as to whether all of the facts in the case would be required in order for an expert to testify against a current client. As a practical matter at the inception of an expert engagement, it is difficult to make these assessments in a reliable manner, particularly where the client of the firm has a long-time relationship with the firm with a number of matters crossing a wide range of subject areas.

There is a further assumption embedded in the reasoning of this particular section that the expert does not have the client’s confidential information. Depending on the circumstances, in particular the size of the firm, and whether lawyers are in the same office, same department, same meetings, and the access or lack thereof and/or sharing of firm files and records, this may or may not be an appropriate assumption.

As to whether the expert’s engagement poses a risk of material limitation, footnote 8 provides that there may be circumstances in which such a material limitation would arise, requiring informed written consent to the representation. This is an important point and should be elevated. An explanation of what information would need to be disclosed by the law firm about the expert’s testimony to the client that the expert will be testifying against would be helpful, including consideration of the possibility that such a disclosure may not be possible under the terms of the expert’s engagement, which may require confidentiality, and the possibility that, therefore, the expert may not be able to take on the engagement.

Finally, the paragraph that immediately precedes the conclusion, requiring that certain information about the expert’s engagement be given to the client of the law firm, raises several concerns. First, we are unclear about the basis for the disclosures enumerated. Second, we are concerned that depending on the terms of the expert’s engagement, such disclosure might not be permissible. Third, we are concerned that the disclosures recommended are insufficient if they are meant to encompass an “explanation of the potential risks and adverse consequences” to the client that would truly enable the client to make an informed decision about whether it wishes to continue the law firm’s representation.

We are uncertain as to when, as mentioned in the digest, a conflict waiver or written disclosure under rule 1.7 be required. Are we to extrapolate that if the facts deviate from those described in the *Commonwealth* decision and the ethics opinions, a conflict waiver would be

appropriate? While the opinion as drafted indicates that a conflict waiver “may” be required, further guidance on when a conflict waiver or disclosure would be needed, and a more expansive description as to what may need to be disclosed to obtain the client’s informed written consent, including the possibility that the expert’s engagement may not permit such disclosures, would be helpful.

Disqualification Discussion

We would appreciate seeing the expansion of the discussion regarding when a lawyer may be disqualified for serving as an expert, even though doing so would not be unethical. We question whether a lawyer would be acting ethically by taking on an engagement as an expert where the engagement would result in disqualification of the lawyer, without advising the client.

Thank you for the opportunity to comment on this opinion.

Orange County Bar Association

A handwritten signature in black ink, appearing to read 'MA Gregg', with a stylized flourish at the end.

Michael A. Gregg

President

Public Comment - Proposed Opinion 20-0001

Commenting on behalf of an organization	No
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From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	It is not possible to retain any ethical integrity in carrying out or performing the privileges you are granting to lawyers by these proposed changes. I have been an expert witness. I have long been an attorney. These proposed changes are not fair or feasible.