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

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

DIGEST: A lawyer may ethically testify as an expert witness in a matter adverse to a former client provided that the lawyer's testimony does not injuriously affect the former client in any matter in which the attorney formerly represented the client,[1] disclose information acquired by virtue of the representation which is protected by Business and Professions Code section 6068, subdivision (e) or rule 1.6 of the Rules of Professional Conduct,[2] 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 who 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 contractual or other confidentiality 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 under rule 1.7(c)(1).

A lawyer should carefully consider, in conjunction with law firm management, whether a lawyer can ethically serve as an expert witness against a current client of the lawyer's law firm in an unrelated matter. Even if a lawyer does not disclose or use confidential information of the law firm's current client, the potential expert retention may implicate rules 1.4. 1.6, 1.7, and duties of loyalty, for the lawyer, the law firm, or

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1 *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505].

2 Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

both. 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.

AUTHORITIES INTERPRETED: Rules 1.4, 1.6, 1.7, 1.9, 1.10, 2.4, 2.4.1, 3.3, 3.7, and 8.4 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6068, subdivision (e) and 6106.

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.[3] Multiple Rules of Professional Conduct also apply regardless of whether a lawyer is engaged in the practice of law.[4]

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[3] 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:
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> (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;
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> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
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> (c) engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation;
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> (d) engage in conduct that is prejudicial to the administration of justice;
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> (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
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> (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).

[4] 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 a 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

The focus in this opinion 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 lawyer is engaged in the practice of law in the context of an attorney-client relationship;[5] 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.

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.[6]

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. Disclaimers alone will not necessarily avoid the formation of an attorney-client relationship, which may be express or implied based on a party's reasonable expectations under the circumstances.[7] Under the circumstances described herein, however, 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 the attorney "is not offering and does not intend to provide legal services or legal advice" would help avoid confusion by the client that the attorney is rendering legal services]; 2003-161 at 4, fn. 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 expert

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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 the lawyer's role as a testifying expert witness.

[5] See Cal. State Bar Formal Opn. No. 1999-154 [when lawyer "is performing tasks that are traditionally understood to constitute legal services, such as providing legal advice and reviewing legal documents," the lawyer must comply with the California Rules of Professional Conduct].

[6] This assumption is consistent with authorities from other jurisdictions that have considered the issue. (See ABA Formal Opn. No. 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 nonlegal 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. State Bar Formal Opn. No. 1995-141.) It is well-settled that a lawyer or law firm has the right to provide nonlegal services. (*Id*. [citing 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.

[7] See, e.g., *Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1732 [20 Cal.Rptr.2d 756]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 1]; Cal. State Bar Formal Opn. 2003-161, at pp. 2–3 (discussing factors relevant to determining the formation of an implied attorney-client relationship).

lawyers are not engaged in the practice of law, the conflict of interest rules would not generally apply to the expert engagement.[8]

B. Application to Different Factual Scenarios

1. Scenario 1 (Lawyer then Testifying Expert)

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

Years later, Company sues a competitor alleging claims of misappropriation of trade secrets. Expert, a lawyer at Law Firm, is retained by the party opposing Company (Defendant) in that lawsuit to testify against Company regarding business valuation and damages. In Expert's engagement agreement with the retaining law firm, Expert explicitly states that Expert's role is limited to providing opinion testimony and that Expert will not be acting as an attorney for or providing any legal advice to Defendant or the lawyers representing Defendant. Expert limits Expert's role to providing opinion testimony in accordance with the terms of the engagement agreement.

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

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

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

A lawyer's ethical duties to a former client are not limited, however, to situations in which the lawyer is engaged in the legal representation of another client. A lawyer owes two duties to a

[8] 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 Opn. No. 337 (2007); ABA Formal Opn. No. 97-407.) The holding in *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017 [117 Cal.Rptr.2d 685], 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 1032–1033.) 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.

former client: not to "(i) do *anything* that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) *at any time* use against the former client knowledge or information acquired by virtue of the previous relationship." (Rule 1.9, Cmt. [1] [emphasis added].) The second of these duties is codified in rule 1.9(c):

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
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> (1) use information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; or
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> (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 [124 Cal.Rptr.3d 256], cited in Comment [1] to rule 1.9, the 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 'Expert's testimony would injure the former client in the commercial leasing matter in which 'Law Firm previously represented the client.[9] While the facts indicate that the Law Firm 'received confidential information that may be relevant to the subject of 'Expert's proposed expert testimony, they do not state whether Expert possesses this information, or, if Expert does, the likelihood that Expert's' expert testimony could involve using or disclosing this information adversely to the former client. If Expert has confidential information, and the competent performance of Expert's 'role as an expert would foreseeably require its use or disclosure, Expert's 'testimony would violate rule 1.9(c) to the extent any confidential client information was used to the client's disadvantage or disclosed. Absent these circumstances, 'Expert's expert testimony would not violate rule 1.9(c).[10]

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[9] Of course, the expert testimony may negatively impact the former client in the trade secret matter, but the law firm represents the former client in the trade secret matter.

[10] 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. (See, e.g., *Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 602–605 [21 Cal.Rptr.3d 380] [discussing disqualification standard when the expert witness had previously represented the opposing party]; *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1085 [29 Cal.Rptr.2d 693]

2. 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 in his individual capacity and Expert's law firm, Law Firm, is not a party to the engagement agreement. Expert performs expert services independently and no other lawyers at '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 their 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 nonpublic information about Plaintiff.

After Expert's expert witness engagement is completed, 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 Expert's written disclaimers that Expert was not practicing law or forming a lawyer-client relationship, and Expert's conduct in accordance with these disclaimers, a party retaining Expert's services could not have reasonably believed that Expert was engaging in the practice of law or forming a lawyer-client relationship. 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 Opn. No. 337 (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 is 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, [11] 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. In addition, the parties to the legal malpractice litigation may have entered into a protective order

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[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].) The issue of disqualification is beyond the scope of this opinion.

[11] 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 [4 Cal.Rptr.3d 334]; *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 [158 Cal.Rptr.3d 761].)

approved by the court that imposes duties on Expert not to use or disclose confidential documents or information received pursuant to the protective order, except for the purposes of the pending legal malpractice litigation.

If Expert's confidentiality obligations to Plaintiff under the retainer agreement or a protective order materially limit Law Firm's representation of Defendant, a material limitation conflict of interest under rule 1.7(b) would exist. 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." In the event of a material limitation conflict, if Expert's confidentiality obligations prevent Law Firm's ability to make the necessary disclosures under rule 1.0.1(e) to obtain Defendant's informed written consent, then it would not be able to undertake the representation. Whether Expert's fulfillment of Expert's contractual obligations would impair the ability of Law Firm to provide effective representation would depend on Expert'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 of Expert's confidentiality obligations to the retaining party is personal to Expert as it arises out of the contract between Expert and Plaintiff's lawyers or a protective order applicable to Expert. Neither Expert's law firm nor other lawyers at Expert's law firm are parties to the contract, or subject to the protective order. In addition, 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 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 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, under 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).)

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"].)

3. 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. May the lawyer serve as an Expert? If so, may Law Firm continue with the representation of Company?

a. Rule 1.6.

Rule 1.6 prohibits the disclosure of confidential information of a client without informed consent. (See rule 1.6(a); Bus. & Prof. Code, § 6068(e)(1).) A significant issue is whether Expert or staff at the law firm has obtained confidential information about the client. If Expert has never performed any work on any matter on behalf of Company and has not obtained any confidential information about Company, rule 1.6 might not be implicated.

Lawyers or staff at law firms might see or learn confidential client information even if they are not directly working on a client's matters. Since Expert is a lawyer at Law Firm, assessing whether Expert has confidential information about Company requires a detailed assessment. Assume that Expert has access to the financial reports of Law Firm, including billing, collections, revenue, and related details about Law Firm clients, including Company. In that context, one can imagine multiple ways that Expert might obtain confidential information about Company, beyond matter-specific information, that would implicate rule 1.6. If Expert receives regular financial reports at Law Firm detailing how much Company has paid Law Firm, or has budgeted for legal matters at Law Firm, or whether Company has paid its invoices at Law Firm, for example, any of these details might constitute confidential information of a client under rule 1.6. Expert would have a corresponding duty to keep this information confidential. If that were not possible in the context of Expert's expert witness engagement, the retention could involve disclosures that are prohibited by rule 1.6.

b. Rule 1.7(a)

Rule 1.7(a) prohibits representation of a client "if the representation is directly adverse to another client in the same or a separate matter." (See rule 1.7(a).)

As noted above, some courts and ethics opinions that have addressed this issue, including an ABA opinion, have concluded that giving expert testimony is not the practice of law and does not involve the representation of a client. (See ABA Formal Opn. No. 97-407; DC Bar Ethics Opn. No. 337 (2019); *Commonwealth Ins. Co. v. Stone Container Corp.* (N.D. Ill. 2001) 178 F.Supp.2d 938, 943–945.) In this reasoning, Expert's expert witness engagement does not trigger rule 1.7(a), which requires informed consent for conflicts only in connection with the representation of a client.[12]

California courts have analyzed this issue and reached different conclusions on this question, but in a highly fact-dependent context (see, e.g., *American Airlines, supra* [attorney violated California Rules of Professional Conduct by accepting engagement as expert witness adverse to client when confidential information had been obtained and an actual conflict of interest "clearly arose;" court factually distinguished *Commonwealth* and rejected its conclusion that "representation" in this context required an attorney-client relationship for both engagements]); *Oasis West Realty, supra* [disagreeing with the conclusion in *American Airlines* "that an attorney can violate the rule if there is no second attorney-client relationship or second employment of any kind"].)

c. Rule 1.7(b)

Rule 1.7(b) may apply. To the extent that Law Firm's "ability to consider, recommend or carry out an appropriate course of action" for Company "will be materially limited as a result of" its financial interests in Expert's expert witness engagement or Law Firm's "responsibilities to or relationship with" Expert (who is a lawyer at Law Firm) and Expert's new retention, 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] [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 . . . ."].)

Significantly, if "[o]ther rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code, § 6068, subd. (e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of [rule 1.7] is likewise precluded." (See Comment [7] to rule 1.7.)

[12] As previously discussed, although providing expert testimony is not the practice of law, it could reasonably be considered a "law-related" service if appropriate disclaimers have not been made and Expert doesn't act in accordance with the disclaimers.

d. Rule 1.7(c)(1)

Rule 1.7(c) provides: "a lawyer shall not represent a client without written disclosure of the relationship to the client and compliance with paragraph (d) where: (1) the lawyer has, or knows that another lawyer in the lawyer's firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter. . . ." (Rule 1.7(c)(1).) However, 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.**" (Rule 1.7 (c)(1) [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, rule 1.7(c)(1) does not appear to apply.

However, rule 1.7(c)(1) could apply if Expert's expert witness engagement were for a witness in the same matter in which Law Firm represents Company.

e. Other Duties to Clients

Duty of loyalty. Expert and Law Firm, and the lawyers at the firm, each must assess whether Expert's expert witness engagement would violate their duties of loyalty to Company. Those duties of loyalty are extremely broad:

"Perhaps the most fundamental quality of the attorney-client relationship is the absolute and complete fidelity owed by the attorney to his or her client. . . . It is that total loyalty to the interests of the client which makes possible and encourages the confidences essential to effective attorney-client communications and, as important, to the administration of justice. An early Court of Appeal said, '[a]n attorney at law should be a paragon of candor, fairness, honor and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times and under all circumstances be held to the full measure of what he ought to be.'" (Cal. State Bar Formal Opn. No. 1984-83 [citations omitted].)

A lawyer's duty of loyalty extends beyond the scope of the Rules of Professional Conduct: "It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent . . . . By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests." (*Santa Clara County Counsel Attys. Ass'n v. Woodside* (1994) 7 Cal.4th 525, 548 [28 Cal.Rptr.2d 617, 629–630 (emphasis added; internal quotes omitted) [superseded by statute on other grounds as stated in *Coachella Valley Mosquito & Vector Control Dist. v. California Pub. Employment Relations Bd.* (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234]].)

This duty of loyalty, therefore, would adhere equally to Expert, Law Firm, and its lawyers. "The threshold question for an attorney . . . is whether he or she feels there would be any possibility of a dilution of that duty of complete fidelity to the client due" to the circumstances. (Cal. State Bar Formal Opn. No. 1984-83.)

In this context, it is not difficult to imagine how Expert's expert witness engagement could violate the duty of loyalty for each lawyer involved. Expert and Law Firm—to the extent that Law Firm shares in Expert's fees—would be compensated for taking positions adverse to Company, a current client of Law Firm. That is unlikely to comport with the "absolute and complete fidelity" to Company that each owes. At a minimum, however, every lawyer involved must assess this scenario in the context of their duty of loyalty, whether as Expert who is a lawyer of Law Firm and owes duties to Law Firm's clients or as Law Firm management who is considering permitting one of its lawyers to take on an unrelated expert matter adverse to one of its current clients.

Duty of communication. Rule 1.4(a)(3) requires a lawyer to "keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." (Rule 1.4(a)(3).) Here, Law Firm likely would have a duty under this rule to communicate the fact that one of its lawyers will be an expert witness whose testimony will be adverse to Company because this is a significant development relating to its representation.

Even if Scenario 3 does not otherwise implicate confidentiality, conflicts of interest, or other duties to clients, Law Firm should explain to Company that Expert will be testifying adverse to Company in an unrelated matter and the risk that Expert's testimony may be given undue weight if the relationship is known to the jury because Expert is testifying against a current client. This explanation of potential risks and adverse consequences in the unrelated matter may be necessary to permit Company to make an informed decision regarding whether it wishes to continue with Law Firm's ongoing representation. Practically, this disclosure is likely to be an unwelcome development for Company and the disclosure itself could be a significant reason for Law Firm to encourage Expert to decline the expert witness engagement.

CONCLUSION

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

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.