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Ethical considerations when a lawyer serves as an expert witness

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The role of the expert witness in litigation is critical and indispensable, underpinning the facts and theories in diverse litigation across nearly every professional field. While experts typically hail from non-legal disciplines — from medicine to finance — this article will focus on the specialized and often ethically complex area of attorneys who provide expert witness testimony. This intersection is most prominent in legal malpractice cases, where expert evidence is generally mandated to establish the required standard of care and scope of duty (see *Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1239).

Lawyers, even when providing services for which they expressly disclaim the formation of an attorney-client relationship or the provision of any legal advice or services, are still subject to violations of the laws and rules governing lawyer conduct, set forth in Business & Professions and the Rules of Professional Conduct.

Some common ethical issues which can arise include:

- May a lawyer ethically testify as an expert witness adverse to former client?
- May a lawyer ethically represent the client who is adverse to the party on whose behalf a previously testified as an expert?
- May a lawyer ethically serve as an expert witness against a current client of the lawyer's firm in an unrelated matter?

Previously, California attorneys engaged as expert witnesses relied solely on their own ethical compasses to answer these and other ethical issues arising from such work. The State Bar's Standing Committee on Professional Responsibility and Conduct is currently publishing for public comment its Formal Opinion Interim No. 20-0001. If adopted, this guidance will provide a clear roadmap for California attorneys navigating these issues, moving the profession away from reliance solely on an 'ethical compass' and toward clear, practical standards.

The expert vs. the former client: Navigating RPC 1.9

RPC 1.9 prohibits an attorney from accepting representation that would be adverse to a former client in the same or a substantially related matter. However, because expert engagement is not legal representation, it appears that RPC 1.9 would not be an issue. The fundamental reason an expert engagement is not considered legal representation or the formation of an attorney-client relationship in California is due to the nature of the services provided, and the role the expert individual plays in the litigation.

Distinction in role: Witness vs. advocate

- **Expert witness role (attorneys):** The attorney's function, when acting solely as an expert, is to provide specialized knowledge, opinions and analysis to help the trier of fact (the judge or jury) understand complex issues (like the standard of care in a legal malpractice case). The expert is serving the court by offering impartial (or semi-impartial, as retained) professional opinion. The expert is not acting as an advocate for the client in the case and therefore has not been engaged in the practice of the law.
- **Legal representation role:** On the other hand, an attorney acting as a lawyer serves as an advocate, providing legal advice, negotiating and making strategic decisions to advance the client's interests in the matter. This is what creates the confidential, fiduciary and contractual attorney-client relationship.

Contractual limitation (the engagement agreement) and express disclaimer

In best practice, the attorney-expert explicitly disclaims to prevent the formation of an attorney-client relationship through the expert engagement agreement. This contract typically states that the expert's role is strictly limited to reviewing materials, forming opinions and testifying, and that they will not be providing legal advice or representation to the retaining client. An attorney can effectively avoid forming a relationship by express actions or words.

Conflict of interest rules

Since no attorney-client relationship is formed, many of the stringent conflict of interest rules (such as Rule 1.7 con-

cerning conflicts with current clients or Rule 1.9 concerning former clients) do not strictly apply to the expert engagement itself. The expert is not "representing" a client within the meaning of these rules. However, although the conflict rules don't apply, an attorney-expert is still bound by general ethical duties, such as not using confidential information acquired from a current or former client in their testimony.

In summary, the key difference is that the attorney-expert is functioning as a highly qualified, specialized witness — not as the client's legal counsel or fiduciary advisor — a distinction usually cemented by the specific terms of the engagement contract. But this is not the end of the analysis, because attorneys must always protect their client's privilege. This obligation is expressly referenced in RPC 1.9(c). [See also B&P §6068(e), RPC 1.6, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 823]. The onus is on the expert to ensure that requested opinions can be provided without relying on or otherwise using protected information of the former client.

Re-entry: When an expert becomes an advocate

Because engagement as an expert does not create an attorney-client relationship, there is no inherent prohibition on subsequently representing a party, even an adverse party, from the matter in which the attorney acted as an expert. But there are still ethical matters to address.

There may be express or implied contractual limitations imposed on a former expert, such as confidentiality or refraining from accepting subsequent adverse positions. There may be protective orders issued in the prior matter. These limitations may impact the effectiveness of the former expert to adequately represent their potential new client. Any material limitation on an attorney's ability to represent a client must be disclosed pursuant to RPC 1.7(b).

Acting as both expert and attorney for an adverse party

This is the most problematic scenario and at first seems to be the least likely to actually occur. However, RPC 1.10(a) imputes the conflicts of a single lawyer to the entire firm. The first step in this situation is to ensure that the attorney acting as an expert will have no access to the (adverse) client's privileged information. [B&P §6068(e), RPC 1.6].

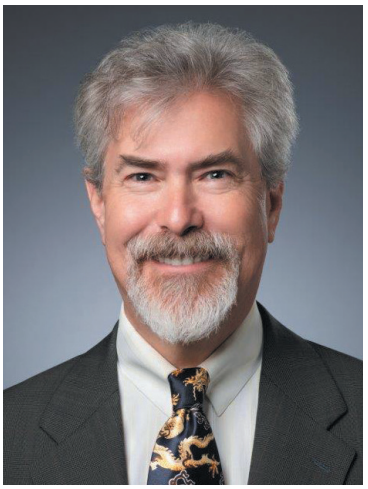
RPC 1.7(a) prohibits representation that is directly adverse to another client. This would appear to turn on the issue of whether engagement as an expert is found to be directly adverse representation. In *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, an attorney was held to have breached his fiduciary duties to a former client by serving as a PMQ in a matter adverse to his former client. Similarly, in Oasis West, our Supreme Court upheld denial of an anti-SLAPP motion brought against an attorney who advocated against a former client's real estate development in a political rather than judicial context. Fundamental to this decision were the continuing obligations of loyalty and confidentiality. Additionally, RPC 1.7(b) may restrict the scope of activities that the attorney and their firm may take on behalf of a client who is adverse to the party employing attorney and an expert.

RPC 1.7(c)(1) requires disclosure of a lawyer's (or firm's) legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter. While RPC 1.7(c)(1) is limited by the "same matter" condition, attention should be paid to the potential need for disclosure.

Conclusion

The separation between an attorney's role as a testifying expert and as legal counsel is more than a technicality; it is the linchpin that prevents an ethical crisis. An expert — even one who is a licensed lawyer — operates outside the traditional fiduciary bubble, sidestepping the rigid rules of client loyalty and imputed conflicts. This distinction is crucial, yet perilous. Because the expert engagement is not legal representation, it can allow attorneys to avoid crippling conflict-of-interest rules that could otherwise halt litigation. However, this freedom demands vigilance. For the retaining firm, a fuzzy engagement letter is an invitation to disqualification or malpractice; for the testifying lawyer, breaching a former client's confidentiality, even in an unrelated expert role, remains a career-ending risk.

The lesson is simple: when contracting with an attorney-expert, assume nothing. Similarly, when an attorney-expert enters into an expert engagement, they should be diligent both in their retainer and in their actions, limiting their activities to solely providing opinions based on presented facts and not providing what could be interpreted as legal advice. As an expert, one should generally err on the side of avoiding even the appearance of cutting ethical hairs, performing conflict checks prior to accepting engagement and declining if there appears to be an ethical conundrum. The only true safe harbor lies in absolute clarity over function, privilege and the precise boundaries of the relationship.



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