

Ethics Issues in the Use of Expert Witnesses

By Neil J Wertlieb

Neil J Wertlieb is an experienced transactional lawyer (he has spent the past two decades as a Partner at Milbank, Tweed, Hadley & McCloy LLP), an Adjunct Professor at UCLA School of Law, the General Editor of Ballantine & Sterling: California Corporation Laws, and a former Chairman of the California State Bar's Committee on Professional Responsibility and Conduct. Mr. Wertlieb has served as an expert witness in disputes involving business transactions and corporate governance, and in cases involving attorney malpractice and attorney ethics. For additional information, please visit www.WertliebLaw.com.

This article is based on written materials presented by Neil J Wertlieb as a Panelist on "Ethics Issues Relating to the Use of Expert Witnesses," presented at the American Bar Association's National Conference on Professional Responsibility in St. Louis, MO, on June 2, 2017.

Ethical Issues for Litigators Who Engage Experts

Fees for Expert Witnesses

The rules of professional conduct in virtually every state are based on the Model Rules of Professional Conduct adopted by the American Bar Association. The ABA Model Rules include a rule that indicates the payment of a contingency fee to expert witnesses is prohibited:

ABA Model Rule 3.4, Fairness to Opposing Party and Counsel:

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

...

Selected Comments

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

As noted in Comment [3] to Model Rule 3.4, the law in most jurisdictions prohibits the payment of contingency fees to expert witnesses. *See, e.g., Person v. Ass'n of Bar of City of New York*, 554 F.2d 534 (2d Cir. 1977) [experts should be unbiased and objective witnesses, not swayed by the incentive of receiving a higher payout if their testimony is "successful"].

It is important to note that this prohibition does not prohibit the payment of reasonable fees and expenses for the professional services of an expert witness. And, because the prohibition relates to witnesses, it probably does not prohibit contingency fees to consulting experts who do not testify (i.e., an expert that has not been, or at least not yet been, designated as a testifying witness). *See, e.g., Wilhelm v. Rush*, 18 Cal.App.2d 366 (1937) [suggesting contingency fees may be paid to consulting expert who does not testify]. (See below for further discussion regarding consulting experts.)

Procuring Favorable Testimony from Expert

Litigators are also prohibited from making false statements to a tribunal, and are prohibited from encouraging their experts to make false statements to a tribunal. ABA Model Rule 3.3 is illustrative on this issue:

ABA Model Rule 3.3, Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

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Selected Comments

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

This prohibition extends to suborning perjury. *See, e.g., Nix v. Whiteside*, 475 U.S. 157 (1986) ["The suggestion sometimes made that 'a lawyer must believe his client, not judge him' in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury."]. *See also In re Jones*, 5 Cal.3d 390 (1971) ["Under the circumstances shown disbarment would be appropriate.... [Respondent] practiced a wilful deception upon the court and upon the public.... The crimes of which respondent was convicted involve moral turpitude.... It is utterly reprehensible for an attorney at law to actively procure or knowingly countenance the commission of perjury Knowingly offering as genuine and true a written instrument fraudulently antedated and fraudulently fabricated is equally reprehensible."]

Interaction with Adverse Experts

Although it may surprise and/or disappoint many litigators, there are ethical limitations on how they may interact with expert witnesses engaged by the opposing side in their cases. For example, while litigators may view it as their responsibility to zealously attempt to discredit or impeach an adverse expert, there may be ethical issues where the discrediting facts or assertions bear no relationship to the truthfulness of the expert's testimony. Litigators should consult the rules relating to Respect for Rights of Third Persons and Fairness to Opposing Party and Counsel:

ABA Model Rule 4.4, Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

...

Selected Comments

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons....

ABA Model Rule 3.4, Fairness to Opposing Party and Counsel

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(e) A lawyer shall not ... in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused

....

These prohibitions extend to intimidation and witness tampering. *See, e.g., Sutch v. Roxborough Mem'l Hosp.*, 2016 BL 380025, No. 1836 EDA 2015 (Pa. Sup. Ct. 2016) [intimidation of opposing party's expert warranted disqualification and monetary sanction]; and *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996) [witness tampering].

Litigators should also be cautious about contact with experts outside of the courtroom. *See, e.g., Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537 (9th Cir. 1996) [testimony may be excluded based on ex parte contact with expert witness]. *See also County of Los Angeles v. Sup. Ct. (Hernandez)*, 222 Cal.App.3d 647 (1990) [disqualification may be mandatory where plaintiff's counsel who employed expert previously employed (but subsequently withdrawn) by defendant was disqualified from representing plaintiff as a result of access to work product of defendant's counsel (expert's report)].

Privilege, Work Product and Confidentiality

The application of the important issues of privilege, work product and confidentiality with respect to experts often depends on whether the expert is a testifying expert or a consulting expert. Consulting experts (i.e., those experts not designated as testifying witnesses) are those experts hired to help the litigators who hired them understand the complexities of a case; whereas testifying experts are hired to help the trier of fact understand the complexities of a case.

Generally speaking, communications with consulting experts are confidential and privileged, and their work product is not discoverable by the opposing party. Consulting experts, however, may (and often do) switch to testifying experts. It is not uncommon for an expert to be engaged originally as a consulting expert, and then later be designated as a testifying expert. In which case, the discovery rules with respect to testifying experts apply.

Generally speaking, communications with testifying experts are NOT confidential or privileged. The following are generally discoverable with respect to testifying experts: all evidence used by the expert in forming his or her opinions; all notes, outlines and memoranda prepared by the expert; and all communications between the testifying expert and the litigator who engaged them—including, if applicable, when the expert was a consultant before being designated as a testifying expert.

The applicable Federal Rules of Civil Procedure are as follows:

Federal Rules of Civil Procedure 26(a)(2)(A):

A party must disclose to the other parties the identity of any witness it may use at trial to present evidence under [certain specified] Federal Rule of Evidence.

Federal Rules of Civil Procedure 26(b)(4)(B):

[D]rafts of any report or disclosure [are protected.]

Federal Rules of Civil Procedure 26(b)(4)(D):

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. . . .

The American Bar Association issued an opinion in 1997 that opined that attorneys who serve as consulting experts are akin to co-counsel:

ABA Formal Opinion 97-407:

“The lawyer as expert consultant occupies the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the Model Rules of Professional Conduct.”

See, e.g., Shadow Traffic Network v Superior Court 24 Cal.App.4th 1067 (1994) [“As for the work-product doctrine, codified in Code of Civil Procedure section 2018, reports prepared by an expert as a consultant are protected until the expert is designated as a witness.”; “privilege is lost upon designation of the expert as a witness because the decision to use the expert as a witness manifests the client’s consent to disclosure of the information”; a law firm risks vicarious disqualification when it retains an expert witness who was previously interviewed (even if not retained) by the opposing party, if confidential info was shared]. *See also DeLuca v. State Fish Co., Inc.*, 217 Cal.App.4th 671, 690-691 (2013) [once an expert is designated as a trial witness, the expert’s opinions are no longer subject to the attorney-client privilege or work product protection, even if the expert was initially employed as a consultant; as a result, the testifying expert is not in possession of confidential information and can be retained by opposing counsel].

While the applicable rules may protect draft reports, the protection does not extend beyond the drafts themselves, and testifying experts may be compelled to testify regarding the preparation of their reports. *See, e.g., In re Application of Republic of Ecuador*, 280 F.R.D. 506 (N.D. Cal. 2012) [“notes, task lists, outlines, memoranda, presentations, and draft letters authored by . . . testifying experts . . . must be disclosed as they are not protected as draft reports and are not independently protected as work product.”]. *See also Tessera Inc. v. Sony*, No. C-11-04399 EJD (HRL), 2013 U.S. Dist. Lexis 150427 (N.D. Cal. Oct. 18, 2013) [citing Rule 26(b)(4)(B), the court distinguished between draft report & the facts surrounding the preparation of the draft report, concluding that work product privilege applies “only to the draft itself in recorded form, not any information related to the preparation of the report”]; and *Wechsler v. Hunt Health System*, 2003 U.S. Dist. LEXIS 2589 (S.D.N.Y. 2003) [no prohibition against having an expert work on a single version of a single electronic document (no obligation to create drafts of reports)].

The designation of a testifying expert is not always dispositive on the issue of discoverability—e.g., the designation may be withdrawn. *See, e.g., Shooker v. Superior Court (Winnick)*, 111 Cal.App.4th 923 (2003) [“The designation of a party as an expert trial witness is not in itself an implied waiver of the party’s attorney-client privilege because his initial status is that of a *possible* expert witness. If the designation is withdrawn before the party discloses a significant part of a privileged communication . . . , or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure; if the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition) the privilege is waived.”].

A related privilege issue may arise when the litigator communicates with his or her client in the presence of the expert. If and when the expert is designated as a testifying expert, the communication may not be privileged. *See, e.g., United States v. Kovel*, 296 F.2d 918 (2nd Cir. 1961) [suggesting that the presence of a consulting expert does not constitute a waiver of privilege].

Criminal Matters

Special rules apply to the use of expert witnesses by litigators in criminal matters. The American Bar Association has adopted rules relating to criminal lawyers’ relationship with experts (the rules being dependent on whether the lawyer is on the defense side or on the prosecution side):

ABA Criminal Justice Standards for the Defense Function, Standard 4-4.4, Relationship with Expert Witnesses:

- (a) An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.
- (b) Defense counsel should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.
- (c) Before engaging an expert, defense counsel should investigate the expert’s credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert’s background and credentials for potential impeachment issues. Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.
- (d) Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert’s opinion on the relevant subject.
- (e) Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert’s expertise, including ethical rules that may be applicable in the expert’s field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert’s role in

the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert's testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert's testimony or the result in the case. Nor should defense counsel promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed.

ABA Criminal Justice Standards for the Prosecution Function, Standard 3-3.5, Relationship with Expert Witnesses:

(a) An expert may be engaged for consultation only, or to prepare an evidentiary report or testimony. The prosecutor should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.

(b) A prosecutor should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of a government or other expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, the prosecutor should investigate the expert's credentials, relevant professional experience, and reputation in the field. The prosecutor should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, the prosecutor should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) A prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.

(e) Before offering an expert as a witness, the prosecutor should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as effective cross-examination of any defense expert on the same topic. The prosecutor should explain to the expert that the expert's

role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert's testimony. The prosecutor should not fix the amount of the fee contingent upon the expert's testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert's testimony.

(g) The prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion. The prosecutor should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect confidentiality and the public interest, for example by not sharing with the expert confidences and work product that the prosecutor does not want disclosed.

(h) The prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.

Attorneys in the U.S. Department of Justice should also be aware of the following policy from the United States Attorneys' Manual:

U.S. Attorneys' Manual, 3-19.111—Expert Witness

An expert witness qualifies as an expert by knowledge, skill, experience, training or education, and may testify in the form of an opinion or otherwise. (*See* Federal Rules of Evidence, Rules 702 and 703). The testimony must cover more than a mere recitation of facts. It should involve opinions on hypothetical situations, diagnoses, analyses of facts, drawing of conclusions, etc., all which involve technical thought or effort independent of mere facts.

Ethical Issues for Attorneys Acting as Expert Witness

It is important for litigators to be familiar with the rules, if any, that may be applicable to the conduct of their expert witnesses. If the expert is licensed or certified (whether as an attorney, doctor, accountant or otherwise), the expert's compliance with the rules applicable to their profession may be relevant to their performance as an expert—e.g., failure to comply may result in disqualification, or in the expert being embarrassed and/or their testimony impeached.

It is also important for attorneys who act as expert witnesses to be aware of the possible application of the Rules of Professional Conduct to their conduct in that capacity.

Attorney-Client Relationship

As noted above, the American Bar Association has opined that consulting experts may be akin to co-counsel. In that same opinion, the ABA opined that testifying experts are not acting pursuant to an attorney-client relationship, and therefore, may not be subject to the Rules of Professional Conduct.

ABA Formal Opinion 97-407:

“A lawyer serving as an expert witness to testify on behalf of a party who is another law firm’s client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a “law-related service” to the party within the purview of Model Rule 5.7 such as would render his services as a Testifying Expert subject to the Model Rules of Professional Conduct. However, to avoid any misunderstanding, the testifying expert should make his limited role clear at the outset. Moreover, if the lawyer has gained confidential information of the party in the course of service as a testifying expert, the lawyer may as a matter of other law have a duty to protect the party’s confidential information from use or disclosure adverse to the party.”

“[A]s long as the lawyer’s role is limited to service as a testifying expert and this is explained at the outset, the client of the law firm which has engaged the testifying expert’s services cannot reasonably expect that the relationship thus created is one of client-lawyer. A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness.”

“[T]estifying expert services are not “law-related services” under Model Rule 5.7.”

See, e.g., Televisa, S.A. de C.V. v. Univision Communications, Inc., 2009 U.S. Dist. LEXIS 33689 (C.D. Cal. 2009) [attorney expert witnesses do not have a client]; and *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F.Supp.2d 938 (2001) [“when a law firm undertakes the role of testifying expert for a client, this undertaking, or ‘engagement,’ does not form an attorney-client relationship and thus does not constitute a representation within the meaning of the ethical rules.”].

Other ethics opinions are also on point. *See, e.g., District of Columbia Ethics Op. 337* (2007) [lawyer serving as expert witness has no lawyer-client relationship with party hiring lawyer].

Despite the above authority supporting the position that attorney testifying experts are not subject to the Rules of Professional Conduct, there is authority for application of certain Rules to the actions of attorney expert witnesses. *See, e.g., Attorney Grievance Commission of Maryland v. Breschi*, 340 Md. 590, 667 A.2d 659 (1995) [willful failure to file income tax return on time justifies disbarment, supporting the notion that a lawyer who serves as a testifying expert is nevertheless subject to rules of professional conduct that govern lawyers generally].

Certain Rules do not apply to attorney expert witnesses by the very nature of the engagement. For example, because expert witnesses are not advocates, there are no obligations with respect to zealous representation. Expert witnesses (including attorney experts) are not advocates in litigation, but rather sources of information and opinions who assist the trier of fact in understanding the relevant evidence.

On the other hand, certain Rules do apply, either because of strong public policy reasons or as the context makes clear. For example, the duty of confidentiality applicable in many jurisdictions is paramount, and attorney experts are cautioned to abide by these rules in their professional work even absent an attorney-client relationship. In addition, attorney experts should consider the following Rules:

Conflicts of Interest and Disqualification

As all attorneys should know, attorneys (acting as such) owe a duty of loyalty to their clients. With respect to current clients, attorneys cannot accept or continue representation of more than one client if the representation involves a concurrent conflict of interest (absent informed consent, confirmed in writing):

ABA Model Rule 1.7, Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Selected Comments

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client....

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively....

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. ... Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.

With respect to former clients, attorneys cannot represent a person in a matter if the attorney formerly represented another client in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client (absent informed consent, confirmed in writing):

ABA Model Rule 1.9, Duties to Former Clients

(a) 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 consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Selected Comments

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule....

The Rules provide that the conflict of interest of one attorney in a firm is imputed to all attorneys in the firm:

ABA Model Rule 1.10, Imputation of Conflicts of Interest: General Rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
 - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

...

The duty of loyalty of an attorney to a current or former client may extend to the obligations of an attorney acting as an expert witness, even though the expert does not have an attorney-client relationship with the party or legal counsel who has engaged them. As a result, an attorney may be ethically barred from acting as an expert witness on behalf of a party that is adverse to a current client or to a former client with respect to a matter substantially related to the matter in which the attorney (or his or her law firm) represented the former client. *See, e.g., Oasis West Realty v. Goldman*, 51 Cal.4th 811 (2011) [subsequent matter need not be an attorney-client engagement].

Similarly, experts may be disqualified from working with one side in a dispute if they had previously worked with the opposing side in the same case. *See, e.g., W.R. Grace & Co., et al. v. Gracecare, Inc., et al.*, 152 F.R.D. 61 (D. Md. 1993) [lawyer patent expert for defendant disqualified because of earlier consultation with plaintiff's counsel in the same case, intending to retain the lawyer to advise on patent law as well as a possible rebuttal expert]. *See also Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, 124 Cal.App.4th 594 (2004) [expert witness barred as a result of prior legal representation of opposing party in substantially related litigation, even though representation was 12 years earlier]; and *Conforti & Eisele, Inc. v. Div. of Building Constr.*, 405 A.2d 487 (N.J. Super. Ct. Law Div. 1979) [nonlawyer expert disqualified as witness for plaintiff when defendant had used the expert to advise it earlier in the same litigation, reasoning that the expert may have been the agent of defendant's counsel and his testimony therefore might violate the lawyer-client privilege, that defendant's counsel was upholding its obligations to preserve client confidences, and that plaintiff's use of the expert "would be fundamentally unfair"].

But not all authorities are in accord. *See, e.g., Stencel v. Fairchild Corp.*, 174 F.Supp.2d 1080 (2001) [conflict of interest where attorneys testify as witnesses do not raise the same concerns that are present when the conflicts involve prior legal representation]. *See also Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988) [plaintiff's nonlawyer expert not disqualified from testifying that the cause of injuries was defective design of defendant's baseball helmet on which the expert previously had advised defendant, rejecting the presumption of disclosed confidences under the lawyer rules and finding that defendant failed to prove any discussion about plaintiff's injury occurred between the expert and the defendant]; and *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334 (N.D. Ill. 1990) [nonlawyer expert for defendant not disqualified where he worked closely with plaintiff's expert at the same research center, rejecting use of an analogy to the predecessor Code of Professional Responsibility and refusing to apply vicarious disqualification as if the two experts were lawyers in the same law firm].

Client Trust Accounts

An interesting question arises for attorney experts with respect to advance fee retainers. The Rules in many jurisdictions require that attorneys deposit advance fee retainers in a client trust account until such fees are earned. Such Rules generally require that the funds be segregated from the attorney's or law firm's funds, and may not be deposited into a firm operating account until earned. *See* ABA Model Rule 1.15:

ABA Model Rule 1.15 Safekeeping Property

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(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property....

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

...

Selected Comments

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account....

Attorney experts may, and often do, receive advance fee retainers in connection with the work they do as expert witnesses. There is little authority to provide guidance on whether such funds must, or even may, be deposited into a client trust account. The fact that such funds do not belong to the attorney expert until earned suggests that such funds should be so deposited for the protection of the expert's client. On the other hand, the prohibition on commingling may suggest otherwise, especially since that there is no attorney-client relationship between the expert witness and the client, and as ABA Formal Opinion 97-407 (cited above) opined, expert witnesses are not even providing a "Law-Related Service."

There is authority that advance fees paid to an attorney for mediation services need not be deposited into a client trust account, because the mediator attorney has no attorney-client relationship and is not acting as an advocate. *See Arizona State Bar Assoc. Op. No. 03-07 (2003)* [lawyer serving as mediator does not represent clients and should not deposit into trust advance fees received for mediation services].