AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 97-407 **May 13, 1997**
Lawyer as Expert Witness
or Expert Consultant

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.

Model Rules 1.7(b) and 1.10(a) apply to the lawyer's representation of a client adverse to a party for whom he is serving as a testifying expert. If the duty of confidentiality to the party on whose behalf the lawyer serves as a testifying expert would "materially limit" the responsibilities of the lawyer to one of his clients, the lawyer and any firm with which the lawyer is associated may be prohibited from concurrently representing that client. Ordinarily it would not be reasonable for the lawyer to believe in those circumstances that the representation of the client will not be adversely affected, and thus client consent would not permit the representation. Moreover, even though these requirements of the Model Rules are satisfied, other law, including the law of client-lawyer privilege and the law of agency, may prohibit the lawyer and his law firm from representing the

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

client, unless the party on whose behalf the lawyer serves as a testifying expert waives its right to object.

After the testifying expert relationship has concluded, the testifying expert and his law firm may be precluded from representing a client in a matter in which use of the party's confidential information would be necessary. Model Rules 1.9(a) and 1.9(c) do not apply because the party for whom the lawyer was asked to testify is not a former client. Nevertheless, the responsibilities of the lawyer under other law to maintain the confidentiality of the party's information may materially limit the representation in the subsequent matter, and it may not be reasonable for the lawyer to believe that the representation would not be adversely affected; if so, Model Rules 1.7(b) and 1.10(a) would bar the subsequent representation.

Opinion

The Committee has been asked whether, under the Model Rules of Professional Conduct, a lawyer who is retained to testify as an expert witness on behalf of a party who is another law firm's client may undertake a representation directly adverse to that party. Further, if the lawyer expert may not undertake the representation adverse to a party on whose behalf he is currently serving as a testifying expert, may the lawyer undertake the adverse representation *after* his testimony on behalf of the party has been concluded? Finally, if the lawyer in either situation is disqualified, may another lawyer with whom the lawyer is associated in a firm nevertheless undertake the representation?

The answers to these and related questions discussed in this Opinion depend in part upon whether the lawyer expert either has a client-lawyer relationship with the party or is engaged in providing the party with a "law-related service" within the purview of Model Rule 5.7. In either case, the lawyer expert would in that capacity be subject to the Model Rules, including Rule 1.7 ("Conflict of Interest: General Rule") and Rule 1.9 ("Conflict of Interest: Former Client"), and the conflict of interest of the lawyer expert would be imputed under Rule 1.10 to all lawyers associated with him in a firm. Based on the analysis and assumptions in Part I of this Opinion, the Committee concludes that under the Model Rules a lawyer serving solely as a testifying expert witness on behalf of another law firm's client, as distinct from a consultant providing expert legal advice to the firm and its client, does not thereby occupy a client-lawyer relationship with the party for whom he may be called to testify, and is not thereby providing law-related services. The lawyer nevertheless should take reasonable precautions to avoid confusion in the minds of the retain-

ing law firm and its client as to the different duties applicable to service as a testifying expert.

Moreover, the lawyer expert witness has duties under other law, such as a duty to protect the confidences of the party for whom the lawyer may testify, that may limit the lawyer and his law firm in the representation of a client in a matter adverse to the party for whom he serves or previously has served as a testifying expert.[1] These limitations on the lawyer testifying expert are analyzed in Part II of this Opinion.

I. A Lawyer Serving Solely as a Testifying Expert as Distinct from an Expert Consultant Does Not Thereby Occupy a Lawyer-Client Relationship or Provide a "Law-related Service."

A lawyer who is expert on a legal subject may be engaged to serve one of two distinct roles: as an expert witness who is expected to testify at a trial or a hearing as a "testifying expert," or as a nontestifying "expert consultant." In this Part I, the Committee (a) analyzes the role of the lawyer testifying expert as distinguished from the role of the lawyer expert consultant in respect of whether the testifying expert forms a client-lawyer relationship; (b) cautions as to the lawyer's duty to clarify his responsibilities in either role, especially in circumstances where the roles become blurred; and (c) examines whether the role of testifying expert falls within the purview of Model Rule 5.7.

(a) A lawyer employed as a testifying expert does not form thereby a client-lawyer relationship.

The Model Rules note that "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." MODEL RULES OF PROFESSIONAL CONDUCT, Scope [15] (1995). Thus, the question whether a testifying expert and the party for whom he is expected to testify have formed a relationship sufficient to invoke the ethical obligations of the Model Rules is generally a question of fact determined by principles beyond those set forth in the Model Rules.

The Committee previously has stated that, as a general matter, a client-lawyer relationship can "come into being as a result of reasonable expectations [of the client] and a failure of the lawyer to dispel these expectations." ABA Formal Opinion 95-390 at 8; *see also* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:103-105 (1989).

1. The Committee neither makes factual findings nor decides purely legal questions. The Committee nevertheless may assume factual and legal conclusions in order to render an opinion as to ethical responsibilities under the Model Rules, and here does so.

Clients reasonably expect that lawyers whom they consult to perform legal services for them are bound by certain basic professional obligations, including duties of confidentiality and loyalty, and avoidance of conflict of interest.

The Committee believes, however, as 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. The testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm's side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates. A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert. Moreover, if an expert may testify at trial and his name has been provided to opposing counsel pursuant to applicable procedural rules, he may be deposed by the opposing party. Communications between the expert and the retaining law firm or its client employed by the expert in preparing his testimony ordinarily are discoverable.[2]

2. *See, e.g.,* Fed. R. Civ. Proc. 26(a)(2) and 26(b), which permit broad discovery of testifying experts, but sharply limit discovery of consulting experts retained to advise in the litigation. Some courts require production of all oral and written communications by counsel with a testifying witness even though ordinarily protected as opinion work product. *E.g.,* Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991). Other courts continue to employ a case-by-case analysis and, absent compelling circumstances, deny discovery of lawyers' opinions and mental impressions communicated to testifying experts notwithstanding the 1993 changes to FRCP §26. *E.g.,* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995), following Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1993). *See also* 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE: Civil 2d (1994) §2031 at 439, noting that *Bogosian* probably was overruled by the 1993 amendments. *See also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §141(Proposed Final Draft No. 1 March 29, 1996) (adopting the *Bogosian*

State bar ethics committees have rendered opinions on related issues that support the conclusion that a lawyer serving as a testifying expert does not thereby occupy a client-lawyer relationship with the party for whom he is engaged to testify. The Virginia State Bar, Standing Committee on Legal Ethics, Opinion 1884 (1989) was asked whether a lawyer had a conflict of interest if the lawyer executed affidavits as an expert for both the plaintiffs and the defendants in the same litigation, but on different issues. Noting that the issue, whether the expert had a client-lawyer relationship, involved a "factual determination and is beyond the purview of the committee," the committee added:

> Should the attorney's capacity have been purely that of an expert witness, the Code of Professional Responsibility should be inapplicable in that situation as it does not in any way preclude an individual from serving as an expert witness for both parties to an action.[3]

In contrast, protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant, who ordinarily is not expected to testify. That role at least implicitly promises the client all the traditional protections under the Model Rules, including those governing counseling and advocacy, confidentiality of information and loyalty to the client. In short, a legal consultant acts like a lawyer representing the client, rather than as a witness. Unlike the testifying expert, the expert consultant need not be identified,

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approach). Assuming, however, that questions are not asked at the deposition or trial about all such communications, the lawyer expert as an agent has duties of confidentiality to the principal under other law apart from duties under specific Model Rules. *See* RESTATEMENT (SECOND) OF AGENCY §387 (agent's use of principal's confidences for the agent's or another's benefit is improper absent principal's consent), and §395 (agent must not use or communicate principal's confidential information whether or not related to the transaction unless generally known or otherwise agreed) (1958); and *see also id*. §396 (agent's duties continue following termination of the agency).

3. Other state bar ethics opinions also have found that a client-lawyer relationship does not arise between a testifying expert and the party for which the lawyer is engaged to testify. *See, e.g.,* State Bar of S.D., Ethics Comm. Opinion 91-22 (1992) (lawyer serving as testifying expert for insurance company A defending a bad faith claim brought by insurance company B may represent an insured of insurance company B in an unrelated claim against a third party, in part because insurance company A is not the testifying expert's client); Phila. (Pa.) Bar Ass'n, Professional Guidance Comm. Opinion 88-34 (1988) (permissible [under the Pennsylvania Rules of Professional Conduct] for a lawyer to serve as a testifying expert for a party while at the same time serving as a testifying expert for the party's opponent in another unrelated suit).

and her legal advice and communications with the client and trial counsel are not expected to be disclosed, absent client consent after consultation. In sum, 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.

(b) The lawyer should assure his role as testifying expert is made clear and obtain client consent should his role change to consulting expert.

In order to avoid any misunderstanding that no client-lawyer relationship is created, the testifying expert should make his role clear at the outset of the engagement. A written engagement letter accepted by both the engaging law firm and its client is much to be preferred. The engagement letter should define the relationship, including its scope and limitations, and should outline the responsibilities of the testifying expert, especially regarding the disclosure of client confidences. It is the responsibility of the firm that has engaged the testifying expert to assure that its client is fully informed as to the nature of the testifying expert's role. *See* Model Rule 1.4.

The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice. The testifying expert may sometimes become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case.

When this blending of roles occurs, the lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the law firm's client. The lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer's expert testimony by undermining its objectivity.[4] The lawyer also is bound by the Model Rules relating to conflicts of interest and imputed disqualification with respect to service as expert consultant. *See infra* nn. 10, 11 and 13.

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4. *See* Model Rule 1.2(c) stating: "A lawyer may limit the objectives of the representation if the client consents after consultation." Obtaining client consent after "consultation," see MODEL RULES OF PROFESSIONAL CONDUCT, Terminology (1995), is in this instance the joint responsibility of the law firm and the expert. *See also* Model Rules 1.4 and 1.5(e). Disclosure of all materials furnished to the expert by trial counsel, including opinion work product, may be ordered by courts following *Intermedics*, *supra* n. 2, when the testifying expert also serves as expert consultant. *See, e.g.*, Furniture World, Inc. v. D.A.V. Thrifty Stores, Inc., 168 F.R.D. 61 (D. N.M. 1996).

(c) The testifying expert does not provide a "law-related service."

A question remains under the Model Rules whether a lawyer who serves solely as a testifying expert provides "law-related services" as contemplated by Model Rule 5.7.[5] If so, the lawyer testifying expert would be subject to all the Model Rules unless the provision of the services satisfies the requirements of subparagraphs (a)(1) or (a)(2) of Rule 5.7, even though he has no client-lawyer relationship with the party on whose behalf he is to testify.

In answering the question, the Committee finds significant but not dispositive that Model Rule 5.7 is intended to address potential conflicts that arise when lawyers engage in businesses ancillary to their law practices, and that nowhere in the extensive literature surrounding adoption of Model Rule 5.7 is it suggested that a problem exists when lawyers serve as testifying experts.[6] Of greater significance is that the way in which tes-

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5. Model Rule 5.7 ("Responsibilities Regarding Law-related Services") states:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Model Rule 5.7 has been adopted in the Virgin Islands. Pennsylvania has adopted a similar rule that is based on the same rationale. At this date, no other jurisdiction has a rule dealing expressly with ancillary or law-related services.

6. Adoption of Rule 5.7 followed directly from the Stanley Commission's recommendation that "[t]he Bar should study the issue of the participation of law firms and individual lawyers in business activities, certainly where either actual or potential conflicts of interest may be involved." Report of ABA Commission on Professionalism, *". . . In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 280-81 (1986). One of three areas of concern prompting this recommendation was that

> some firms now operate businesses which may provide services that those firms believe are ancillary to the practice of law—real estate development or investment banking, for example. Other firms or individual lawyers have become active in businesses which have little or nothing to do with their practice. *Id*. at 280.

The reports, published debates and articles surrounding the adoption of Model Rule 5.7

tifying experts provide their services eliminates as a practical matter the need for the protection that Model Rule 5.7 was designed to afford recipients of law-related services in order to avoid any misperception by the recipient of the services that the protections normally part of the client-lawyer relationship apply. See Rule 5.7 Comment [1]. As noted in Part I.(b), the testifying expert should appropriately define his role at the outset of the engagement so that the law firm's client will not be confused that the Rules of Professional Conduct apply in the relationship with the testifying expert.

While some members of the Committee believe that the plain language of Rule 5.7 encompasses testifying expert services rendered in "circumstances . . . not distinct from the lawyer's provision of legal service to client," Model Rule 5.7(a)(1), the clear majority believes that the words do not apply. In the view of the majority, lawyers serving as testifying experts do not offer their services "in conjunction with" the legal services they offer to their clients, Model Rule 5.7(b). Rarely does a testifying expert provide services directly to a client. The client invariably is represented by its own trial counsel, who manages the role to be played by the testifying expert in discovery, preparation and trial. Accordingly, the majority concludes that testifying expert services and trial counsel services always remain distinct with regard to a particular matter. Rule 5.7, adopted in only one jurisdiction, should not be construed to reach beyond the intent of its drafters.

For these reasons, the Committee concludes that testifying expert services are not "law-related services" under Model Rule 5.7. Thus, the testifying expert's role as a witness excludes not only a client-lawyer relationship with the party on whose behalf he is to be called, but also a law-related service provider relationship that would require all of the Model Rules

and its predecessor also make it clear that the perceived problems related solely to lawyers being involved in businesses ancillary to their law practices and not at all to lawyers testifying as experts. *See, e.g.,* ABA Section of Litigation, *Recommendation and Report on Law Firms' Ancillary Business Activities* (1990) (recommending that the ABA adopt a rule prohibiting ancillary businesses, summarized at 6 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 82); ABA Special Coordinating Committee on Professionalism, *Special Report to the House of Delegates on Ancillary Business Activities of Lawyers and Law Firms* (1990) (recommending that the ABA adopt a rule allowing, but regulating, ancillary businesses, summarized at 6 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 429); Dennis J. Block, Irwin H. Warren, & George F. Meierhofer, Jr., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739 (1992) (defending the ABA's first version of Model Rule 5.7, adopted in 1991 and rescinded in 1992, that made ancillary businesses unethical). Other authorities are gathered in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT at 91:410-91:413 (1994). Predecessor Model Rule 5.7 was adopted by the ABA House of Delegates in 1991 and rescinded in 1992.

to apply to his relationship.[7]

II. The Lawyer Testifying Expert Has Responsibilities to Others That Under the Model Rules May Limit Representation of Clients by the Lawyer or His Firm.

In this Part II, the Committee answers the questions posed at the beginning of this Opinion by analyzing the limitations that the Model Rules impose upon the lawyer and his firm as a result of his serving as a testifying expert when the lawyer is called upon (a) to represent a client concurrently in a matter adverse to the party for whom the lawyer currently is serving as a testifying expert, or (b) to represent a client after the conclusion of the testifying expert service.[8]

(a) Rule 1.7(b) may bar concurrent representation of a client adverse to the party for whom the lawyer is serving as a testifying expert.

The Committee assumes for purposes of this Opinion that the testifying expert owes a duty of confidentiality as well as other duties to the party on whose behalf he is engaged to testify.[9] Accordingly, if the testifying

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7. The lawyer who serves as a testifying expert is, however, subject to the Model Rules that govern lawyers generally, particularly Rule 8.4 ("Misconduct"). *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). Thus, for example, were the expert witness to testify falsely, discipline under Model Rule 8.4 would be warranted. *See also* ABA Formal Opinion 336 (1974).

8. A lawyer who is called upon to serve as a testifying expert in litigation in which information relating to the representation of a former client may be relevant is barred by Rule 1.9(c), *infra* n. 14, from using or revealing information relating to the earlier client representation in the earlier matter that is not generally known, except as permitted under Rules 1.6 or 3.3. *See also* Rule 1.8(b). If the former client is the opposing party, the testifying expert is subject, not only to a disciplinary charge, but also to disqualification as an expert witness in the 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). *Compare* cases cited *infra* n. 9 involving efforts to disqualify non-lawyer experts.

9. The Committee believes that most courts would find that the lawyer testifying expert is a subagent of the party on whose behalf he is engaged to testify. *See supra* n. 2. Courts, in cases seeking to disqualify expert witnesses from testifying for an opponent, have either held or assumed that a nonlawyer testifying expert (or a nonlawyer expert consultant) occupies a confidential relationship to the party on whose behalf the expert originally was engaged that is limited to the matters on which he was engaged as an expert. *See, e.g.,* 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 testi-

expert's concurrent representation of a client in a matter adverse to the party for whom the expert is to testify might be materially limited by his responsibilities as a subagent to maintain the party's confidences or by other duties he owes the party, Model Rule 1.7(b)[10] applies to that concurrent representation. At least in circumstances where the party's material confidential information clearly would be useful in the representation of the client, the Committee is of the opinion that the testifying lawyer could not reasonably believe that the representation of a client would not be adversely affected and, therefore, client consent is no cure. Similarly, where the testifying expert might be called upon to testify for the party and could be subject to cross-examination by a lawyer from the expert's own law firm, on behalf of a client of the firm, the representation of a client would be barred both by Model Rule 1.7(b) and by Model Rule 3.7(b).[11] Under Model Rule 1.10(a),[12] the testifying lawyer's disqualifica-

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mony therefore might violate the lawyer-client privilege, that defendant's counsel was upholding its obligations to preserve client confidences under DR 4-101 of the predecessor Code of Professional Responsibility, and that plaintiff's use of the expert "would be fundamentally unfair"); 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); 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 as in the *Paul* case 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).

10. Model Rule 1.7(b) states:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

11. Rule 3.7(b) states:

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

See also State Bar of Mich., Comm. on Professional and Judicial Ethics Opinion RI-21 (1989) (firm barred from representing defendant when newly arrived "of counsel" to the firm previously had provided an expert opinion on plaintiff's behalf and would be called as a witness in the litigation).

12. Model Rule 1.10(a) states:

tion would be imputed to his law firm.

If the lawyer reasonably concludes that despite the possibility of a material limitation, the representation of a client will not be adversely affected by his duties as a testifying expert, the consent of the client after consultation is nonetheless required. This may be true, for example, if the matter in which the lawyer will testify and the matter in which a client seeks representation are entirely unrelated, and no material confidential information that the testifying lawyer has learned from the party has relevance to the second matter.

(b) Rule 1.7(b) also may bar subsequent representation if materially limited as a result of the earlier relationship.

If the party for whom a lawyer in the firm had acted as a testifying expert later sued a client of the expert's law firm on an *unrelated* matter, neither the testifying expert nor his law firm ordinarily would be barred from representing the defendant client. Model Rule 1.9(a)[13] would not apply, not only because the matters are unrelated, but also because a client-lawyer relationship did not exist when the lawyer acted as a testifying expert for the party in the earlier litigation, and Model Rule 5.7 did not apply to the testifying expert services. Even if the matter for the client is the same as or substantially related to the earlier litigation in which the lawyer had served as a testifying expert, neither Rule 1.9(a) nor Rule 1.9(c)[14] would apply because the testifying expert service did not involve a client-lawyer relationship or a law-related service.

Although neither Rule 1.9(a) nor Rule 1.9(c) applies, the expert and lawyers associated in his firm nevertheless may have duties of confidentiality under other law that might materially limit the representation of the current client, even in a matter which is unrelated to the earlier engage-

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(a) When 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, 1.8(c), 1.9 or 2.2.

13. Model Rule 1.9(a) states:

(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 the person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

14. Model Rule 1.9(c) states:

(c) A lawyer who 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 Rule 1.6 or Rule 3.3 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 Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

ment.[15] For example, if the representation of the current client were to require the use of confidential financial information learned in his testifying role, the lawyer and his firm would be barred from undertaking the current client representation by Rule 1.7(b) and Rule 1.10(a) unless they reasonably believe the representation will not be adversely affected by the lawyer's duty of confidentiality owed the party for whom the lawyer earlier had served as a testifying expert and the current client consents after consultation.

Summary

A lawyer who serves as a testifying expert on behalf of a party represented by another law firm does not thereby occupy a client-lawyer relationship or perform a law-related service within the purview of Model Rule 5.7. He nevertheless should make the nature and scope of the relationship clear at the outset. If the lawyer's role is or later becomes that of an expert consultant for the party as described in this Opinion, a client-lawyer relationship with the party is established, and the lawyer is subject to all of the Model Rules in connection with that engagement.

Even though service solely as a testifying expert is not as such governed by the Model Rules, concurrent representation of a client adverse to the party for whom the lawyer serves as a testifying expert ordinarily is barred by Model Rule 1.7(b) as a result of constraints imposed by other law. Subsequent representation may, for the same reason, also be barred where the party's confidential information is relevant to the subsequent representation or where other factors make it unreasonable to conclude that the representation will not be adversely affected.

15. The testifying expert's duties of confidentiality continue after the relationship with the party terminates. *See supra* nn. 2 and 12.