

Ethics Advisory Opinion Committee
Opinion Number 18-03
Issued: June 12, 2018

ISSUE

1. Is there a conflict of interest if a member of a law firm assumes the representation of a party on appeal in a case where another member of the firm testified as an expert witness on behalf of the opposing party? The issue as presented assumes that the testifying attorney did not have an attorney-client relationship with the party that engaged the attorney to testify.

OPINION

2. If there is in fact no attorney-client relationship between the attorney who testified as an expert witness (the “**Testifying Attorney**”) and the party who engaged that attorney to testify, then the subsequent representation of the adverse party in an appeal of the same case by a member of the law firm of the Testifying Attorney, would not create a professional conflict of interest under either Rule 1.7 or 1.9 of the Utah Rules of Professional Conduct (the “**Rules**”) with the party who engaged the Testifying Attorney. However, the non-existence of an attorney-client relationship between the Testifying Attorney and the party who engaged that attorney to testify requires a factual analysis and should not be assumed, as discussed hereafter. Additionally, if the Testifying Attorney obtains confidential information regarding the party that engaged the witness, a disqualifying conflict could arise that could preclude representation of the adverse party.

BACKGROUND

3. The Testifying Attorney is a member of a law firm (the “**Firm**”) engaged to testify as an expert witness by Party A in litigation against Party B. The Firm routinely screens the Testifying Attorney’s participation as an expert witness from the remaining members of the Firm. We have been asked to assume that the Testifying Attorney acts only as an expert witness, and no

attorney-client relationship is created between the testifying attorney and Party A. The non-existence of an attorney-client relationship between the Testifying Attorney and the engaging party, Party A, is clearly communicated to Party A and documented. After a judgment is entered in favor of Party A, Party B elects to appeal the judgment and seeks to engage the Firm to represent it on appeal. The Firm intends to assume the representation of Party B on appeal, and continue to screen the Testifying Attorney from all matters related to the appeal.

ANALYSIS

4. If, in fact, there is no attorney-client relationship created between the Testifying Attorney and Party A, then there would be no professional conflict of interest under Rules 1.7 or 1.9 that would preclude the Firm from representing the adverse party in the appeal. This conclusion is based upon the fact that there cannot be a professional conflict of interest when there is no attorney-client relationship between the Testifying Attorney and Party A. *See also* ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 97-407, "Lawyer as Expert Witness or Expert Consultant," May 13, 1997 (the "**ABA Opinion**"); D.C. Bar Ethics Op. 337, "Lawyer as Expert Witness," (issued Dec. 2006); *Televisa, S.A. de C.V. v. Univision Commun., Inc.*, 635 F. Supp. 2d 1106, 1108 (C.D. Cal. 2009) (citing cases discussing conflicts created with attorney-expert witnesses).

5. Although the Ethics Advisory Opinion Committee has been asked to assume that there was no attorney-client relationship between the Testifying Attorney and Party A, it is important to note that whether or not an attorney-client relationship exists is generally an issue of fact based upon the expectations of the parties, and can be expressed or implied. *See Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 727-28 (Utah Ct. App. 1990) ("Such a showing is subjective in that a factor in evaluating the relationship is whether the client thought an attorney-

client relationship existed.”); *see also Norman v. Arnold*, 2002 UT 81, ¶ 19, 57 P.3d 997 (“We ... remand for a factual determination whether, under the totality of the circumstances, the Normans reasonably believed that Arnold represented their interests....”). Accordingly, in order to avoid the application of the Rules to the relationship between them, an attorney engaged by a party to testify as an expert witness should make clear to that party that no attorney-client relationship exists between them, and that as an expert witness the Rules governing the attorney-client relationship do not apply.

6. Whether or not an attorney-client relationship is created is a factual issue, as noted above. Even if the engagement letter of the attorney who is to act as an expert witness states that no attorney-client relationship is created, the attorney could thereafter become involved with strategy and confidential communications with the party and the party’s trial attorney, and thereby create the reasonable expectation of the party that an attorney-client relationship has been created. Notwithstanding the disclaimer in the letter, an attorney-client relationship can still arise if the attorney acts as a consultant as opposed to solely an expert witness. This could then lead to a conflict for the attorney’s law firm if it were to undertake the representation of the adverse party on the appeal.

7. At one time, as noted in the ABA Opinion, a testifying attorney-expert would not generally become involved in trial strategy or otherwise act as a consultant, because essentially all of the communications between the expert witness and the trial attorney for the engaging party could be discovered. ABA Opinion at 4. However, under the now existing discovery rules, *see* Utah Rule of Civil Procedure 26(b)(7), discovery related to an expert is more limited, and, as a result, an expert witness can now act as a consultant and take a greater role in the litigation without

fear that all of the communications between the trial attorney and expert witness will be discoverable.

8. When an attorney expert witness takes on the role of a consultant, and acts more like the attorney for the party, then the expert witness may create the impression and expectation of the client that there is an attorney-client relationship. *See Televisa*, 635 F. Supp. 2d at 1108. The ABA Opinion noted that an attorney engaged to testify as an expert witness but who also acted as a consultant could thereby create an attorney-client relationship. ABA Opinion at 6. Once the party has the reasonable expectation that the attorney-client relationship exists, then all of the Rules governing the relationship would apply, including conflict rules. At that point, the attorney-expert witness should disclose and obtain consent to make necessary adverse disclosures as part of the responsibilities of an expert witness.

9. There are potential conflict issues with the Firm representing Party B in the appeal adverse to Party A. For example, under Rule 1.7, an attorney is prohibited from representing a party when there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to another existing or former client, or the personal interest of the attorney. Specifically, Rule 1.7, Conflict of Interest: Current Clients, provides in part:

(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: ...

(a)(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.

Utah R. Prof'l Conduct 1.7.

A conflict of one attorney in a firm is imputed to all members of the firm under Rule 1.10, Imputation of Conflicts of Interest: General Rule, which states in pertinent part:

(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 the prohibition is based on 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.

Utah R. Prof'l Conduct 10(a).

10. If the testifying attorney as part of preparation to testify obtained confidential information of the party which engaged the attorney-witness, the attorney could be required to keep the information confidential based upon legal principles outside of the Rules, such as rules of agency or fiduciaries. *See* ABA Opinion. This could create a significant risk that the responsibilities of the Testifying Attorney to Party A could materially limit the Firm's ability to represent Party B. Another potential limiting issue is that the Firm may be required to seek to undermine the credibility of their own member on the appeal.

11. If a conflict does exist because of continuing responsibilities of the Firm to Party A, a waiver could possibly be sought from Party B. However, the conflict may be unwaivable. Rule 1.7(b) provides that before a conflict may be waived, the lawyer must reasonably believe "that the lawyer will be able to provide competent and diligent representation to each affected client..." Utah R. Prof'l Conduct 1.7(b). The question that must then be answered is: can the Firm provide competent representation if it is limited because of undisclosed confidential information or the potential inability to aggressively challenge the testimony of the Testifying Attorney? As noted in Comment 8 of Rule 1.7, even "where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests..." Utah R. Prof'l Conduct 1.7 cmt. 8. These issues must be addressed and resolved before the Firm accepts the engagement of Party B.

12. Another factor to consider regarding a potential conflict with Party B is whether the Testifying Attorney may have to testify again if there is a retrial of the matter. This could put the Firm in the position of taking an adverse position to an existing or former client on the same or a substantially related matter, which would violate the conflict provisions of either Rule 1.7 (existing clients) or Rule 1.9 (former clients).

13. The issue posed to the Ethics Advisory Opinion Committee makes reference to screening the Testifying Attorney. Screening is a procedure that has limited availability under the Rules. *See, e.g.*, Rule 1.10(c) (regarding an attorney's lateral transfer between firms); Rule 1.12(c) (mediators, judges, and similar positions). Screening may not resolve a conflict unless it is specifically allowed under the Rules, but its use can give additional protection to a party.

CONCLUSION

14. If there is in fact no attorney-client relationship between the Testifying Attorney and Party A, who engaged that attorney to testify, then the subsequent representation of the adverse party, Party B, in an appeal of the case by a member of the same Firm as the Testifying Attorney would not create a conflict of interest under the pertinent Rules. However, the non-existence of an attorney-client relationship between the Testifying Attorney and the party who engaged that attorney to testify, Party A, must be clearly documented, and the Testifying Attorney must avoid any actions that could reasonably be interpreted by Party A as creating an attorney-client relationship. The Firm must also be aware that representation of the new client they propose to represent in the appeal, Party B, could also have conflict issues that would have to be resolved.