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Q: Dear Ethics Lawyer,

I am defending a putative class action for one of our firm's largest business clients. Plaintiff's counsel frequently files class actions and has at least four of them, that I am aware of, against clients of our firm. The class described in the suit I am defending is quite broad, which gave me an idea.

After looking into it, I believe that at least two of our clients who are currently being sued by plaintiff's firms in other matters would be within the class described in the matter I am defending. It seems to me that this places plaintiff's counsel adverse to their own class members. Doesn't this create a conflict under Rule 1.7 for which I could seek their disqualification?

A: As I often write in this column, you should check authorities in your applicable jurisdiction, but Model Rule 1.7 appears to address this situation in defining who the lawyer's client is in the context of class actions. Comment 25 to Rule 1.7 provides:

> When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

In your situation, the fact that plaintiff's counsel in your case is adverse to unnamed class members in other matters does not (at least without more) create a conflict for them. The situation would be different if a named class representative was adverse to their counsel. It could also be different if there were facts creating a material limitation conflict under Rule 1.7(a)(2) concerning plaintiff's counsel's representation of the class while being adverse to one of the unnamed class members in other matter(s), e.g., possibly arising from any centrality of the unnamed class member in proof or defense of the allegations in the suit. Similarly, although perhaps unlikely, you

should also consider whether your defense of the class action creates any issues (material limitation conflict or otherwise) with your representation of other firm clients whom you know to be members of the class.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 134 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.