



# Dear Ethics Lawyer™

**The Legal Ethics Project.** Supporting professionalism with information.

**Q:** Dear Ethics Lawyer,

My firm currently represents two sophisticated commercial parties: client A on tax matters and client B in environmental work. Our firm's engagement letter with each contains a paragraph providing for an advance waiver of conflicts for matters that are unrelated to the engagement. A and B now desire to enter into an asset purchase/sale unrelated to any work done by our firm for either one. A has already secured different counsel. May our firm advise B in the transaction? Are there any additional requirements or disclosures that must be made?

**A:** An advance waiver links the law firm's acceptance of the matter and corresponding ethical duties to the client with the client's willingness to accept the firm's ability to work for other clients in unrelated areas, even if adverse, thereby balancing the protection to clients that the conflicts rules are designed to provide with the expressed bargain struck between the firm and client. An advance waiver is effective if it meets the test of Model Rule 1.7(b): (1) the lawyer reasonably believes that competent and diligent representation can be provided to both client; (2) the representation is not prohibited by law; (3) the adversity is not in the same litigation or proceeding before a tribunal; and (4) each affected client has given informed consent. *See also* ABA Formal Ethics Op. 05-436 (2005).

Often, the issue with an advance waiver is whether adequate informed consent has occurred, *i.e.*, did the client understand at the time of the agreement what future adversity might occur. The more sophisticated the client, the easier this test is to meet, and advance waivers for unrelated matters are generally enforced against sophisticated commercial parties like the ones in this question. For less sophisticated parties, it may be necessary in some circumstances to have discussed or identified the types of future matters that the waiver is designed to cover (or to do so now in the context of a new waiver). In addition, the lawyer must always remember to get a current waiver from the new client if necessary. Here both parties have provided advance waivers, so no additional step is necessary.

***The Ethics Lawyer***

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## 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 125 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](mailto: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.