



Dear Ethics LawyerTM

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

A lawyer in our firm represents an insured as client pursuant to an arrangement with an insurance company under a policy that has a duty to defend the claim. Our firm has now been asked by another client to represent it adverse to the insurance company in a completely unrelated coverage dispute. May the firm do so without a waiver? What other ethical considerations apply?

A: The answer to this question depends in substantial part upon whether the insurance company is by virtue of the insurance defense arrangement a client of the firm—if so there is a Model Rule 1.7(a) conflict, for which a waiver would be required in order to proceed. In most jurisdictions, the insurance defense relationship is considered "tripartite," in which insurance defense counsel is considered to have both the insured and the insurer as clients at least for some purposes (with the insured often considered the "primary" client). So you must first consider the law of the relevant jurisdiction(s) involved concerning the nature of an insurance defense relationship.

There are also other considerations that may create a conflict of interest. You should check the engagement letter with the insurer (and any included outside counsel policies or guidelines that have been agreed to by your firm) to determine whether you have by contract agreed that the insurer and/or its affiliates are your client for conflicts purposes. You should also consider the extent of your relationship with the insurer and the possible effect of that relationship on your ability to be freely adverse to the insurance company and to prosecute an action against it. If your firm is handling a series or group of cases for insureds of the insurer, or if the magnitude of the matter(s) being handled is such that there is a significant financial interest in ongoing business, you may have a Rule 1.7(a)(2) "material limitation" conflict that would need to be considered and dealt with by informed consent of the insured and your prospective client. Finally, you should also consider whether in your insurance defense dealings with the insurer whether you have acquired confidential information about its operations, policies, propensities, etc., that would create a conflict even in an unrelated matter.

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 132 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.