



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Our firm is currently advising Client A on whether a product it is developing would infringe a patent held by Competitor B. B has now asked a lawyer with the firm to represent it in an unrelated breach of contract lawsuit brought by one of its distributors. Can this conflict be waived?

A: Ordinarily, a concurrent conflict under Model Rule 1.7(a) can be waived under Rule 1.7(b) if the representations would not create a "material limitation" of responsibilities to either client, the lawyers/firm involved reasonably believe they can provide competent representation, the representation is not in the same matter or proceeding before a tribunal, and the representations are not otherwise prohibited by law. An effective waiver, however, requires informed consent (confirmed in writing) by each affected client. This is difficult as one of the matters involves a patent infringement review that is most likely considered highly confidential by Client A, i.e., the simple fact that A believes that a review of B's patent for possible infringement by its prospective product is necessary is a telling fact that would likely give B a strategic advantage, as well as perhaps the idea to conduct its own review given A's product in development.

Therefore, unless A is willing for the law firm to disclose the nature of the patent infringement review to B, as would be necessary for B's informed consent, this conflict precludes the firm from proceeding to represent B. Perhaps making the matter even more complicated, at the outset, the firm could not relate to B that it is A on the other side of a conflict. The firm would have to simply indicate to B that there is a conflict with a party that cannot yet be identified, and obtain B's permission to approach that party to describe the representation requested by B in order obtain that unidentified party's consent. This is a difficult path the firm may wisely choose not to pursue.

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 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.

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.