



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am handling a significant case in which I am preparing to argue to a federal district court in our state that a state law cause of action against our client under relatively recent legislation is preempted by federal law. I've just learned that one of my partners in the firm is coincidentally preparing to argue in state court on behalf of a different client that preemption does not apply.

I discovered this by accident, given that our firm (similar to other firms) does not track the specific legal arguments being made over time in individual cases as part of its conflict-checking system. Now that I know about it, what do I do? Is this an actual conflict, or something that will just be difficult to explain to the clients if they find out we are arguing both sides of the same argument at the same time?

A: Positional or issue conflicts occur when a lawyer (or firm) is advocating a substantive position in one matter that could be detrimental to the interests of another client in a different matter. This situation raises questions such as whether the first decision rendered will be persuasive or even binding precedent affecting the other case; whether the judge(s) will discount the lawyers' advocacy knowing the firm is on both sides of the issue; and whether the clients will be concerned by, or even subject to divided loyalties of the lawyers involved? The issue is dealt with to a certain extent in Model Rule 1.7, Comment 24, which states that ordinarily "a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients," and that the "mere fact" that precedent might be created adverse to the interest of a client in an unrelated matter does not create a conflict of interest. If, however, there is a significant risk that the advocacy for one client will materially limit the lawyer's effectiveness for another client in a different case, then a conflict will exist.

Formal Ethics Op. 93-377 (1993) also looks at the issue primarily in the framework of a material limitation conflict under Rule 1.7(a)(2). Is the importance of the issue likely to affect the ultimate outcomes? Is the determination in one case likely to have a significant impact on the determination in the other? Will there be any "inclination by the lawyer, or her firm, to 'soft pedal,' de-emphasize or alter certain arguments to avoid impacting the other case?" It concludes on the one hand that a conflict does exist when a lawyer or firm argues opposing substantive positions in the same jurisdiction at the same time; and on the other hand that no conflict exists when the matters are not litigated in the same jurisdiction and there is no substantial risk that either representation will be adversely

affected by the other. Of course, there is a huge gray area between these two outcomes, in which the lawyer(s)/firm involved must examine the factors referenced above as to whether a material limitation conflict exists.

There is also the matter of whether the matter should be disclosed to affected clients, especially if the decision is to proceed with both representations. As a practical matter, disclosure and consent (where disclosure may be made, and consent obtained under Rule 1.7(b)) may cure both any actual conflict of interest and inoculate the firm against client surprise and disappointment upon learning its lawyer or firm is arguing a position adverse to its interest.

In the situation you describe above, the two matters are not in the same jurisdiction (one is in state court, the other federal), but are in the same state, where decisions of state and federal courts on a legal issue are likely to have significant influence, one upon the other. You should consider whether either representation is likely to adversely affect the other given the importance of the issue involved, and whether there is any other material limitation on the ability of you and your partner to vigorously present your arguments in the interests of your respective clients, and to have them fairly received by the courts involved. The safe route is either not to knowingly proceed with both matters, or to obtain informed consent if possible from the affected clients.

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.