



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I have been asked to advise and represent a witness who has been subpoenaed to testify in a civil trial in which her employer is being sued for breach of contract by another business entity who was a party to the contract. I performed a conflict check through our firm's system and learned that another lawyer in our firm is representing a different witness who is on the parties' witness list in the same proceeding. Neither of these individuals has a claim against them and neither is making a claim against any of the parties or the other witness. Could there be a conflict here? How do I analyze this?

A: This scenario presents conflict possibilities that are somewhat more subtle than when one party makes a claim against another. To rule out a conflict, you must understand what each witness is expected to testify to, and the relationship of each witness's testimony to the other. There are at least three ways in which the testimony of one witness could be adverse to the other. First, even in the absence of a (then-pending) claim, the testimony of a witness could implicate another, e.g., witness one could testify that a bad act was directed by witness two. Second, a witness's credibility could be called into question by the other, e.g., witness two directly contradicts the testimony of witness one on a material issue. Third, there could be a material limitation conflict in certain circumstances in which the firm's ability to advise one witness-client might be affected by the nature of their advice to the other, e.g., handling inconsistent recollections or advising about whether to invoke privilege or Fifth Amendment rights. Context is important, and the only way to avoid a conflict is to assess the relevant knowledge and needs of each witness.

In some instances, acquiring and comparing this information simply may not be possible. It could be advantageous for one or more of the witnesses not to disclose or share all of what they might be able to testify about. In that circumstance, the firm should not proceed.

Finally, as a practical matter, if the information has been shared and it does not appear that a conflict exists between the interests of the two witnesses, the lawyers involved should disclose (with consent) the potential representation of each witness to the other. Unanticipated questions and issues often arise during trial, creating the possibility for an unanticipated conflict at a later time. Each witness should have the opportunity to consider this possibility from the beginning.

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.