



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Our firm represented a nearby city in a nuisance claim against the operator of a quarry, arising from its heavy truck traffic. A settlement was reached, by which the quarry operator agreed to allow the City to designate the route its trucks could travel to and from the quarry. Time has passed, and now we've been asked to represent several individuals who own land along the designated route to bring a nuisance action against the quarry operator related to the truck traffic. Our former client City would not be a party, and our new clients would be adverse to the same quarry operator we were adverse to before when representing the City. It seems like we're on the same side as before. Is there any conflict issue here?

A: There is. As discussed in ABA Formal Op. 497, Conflicts Involving Materially Adverse Interests (Feb. 10, 2021), there is a type of "material adverseness" that can create a conflict of interest when a lawyer attempts to attack or undermine their own prior work or the result obtained for a former client, even when the former client is not directly involved in the subsequent matter. The scenario described above is that of *Zerger & Mauer*, 751 F.3d 928 (8th Cir. 2014), discussed in Formal Op. 497 at 5.

Even though the City was not a party to the subsequent nuisance action brought by their former law firm, it successfully sought to disqualify the law firm from suing the City's former adversary on the basis that the subsequent suit was advocating a position that would contradict a term in the settlement agreement result the firm achieved for the City, and would create a real possibility that other routes for the truck traffic would come into play. The court held that the City had the right to expect that its former counsel would not advocate positions that would pose a serious threat of once again embroiling it in protracted litigation. Formal Op. 497 notes that "general economic or financial adverseness" alone does not constitute "material adverseness" when a former client is not a party to a subsequent matter; the "adverseness" must be assessed for "demonstrable and material harm" to determine if it is material. *Id.*, at 1,9.

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.