



Dear Ethics LawyerTM

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am a banking lawyer who frequently handles acquisitions of banks or branches of banks. Recently, a family-owned bank group in our region has quietly let it be known that it would entertain offers to sell. One of our clients, let's call them Bank A, contacted me a few days ago to assist them in preparing the legal documents for a bid to purchase it involving a combination of cash and stock. Today another prospective client, Bank B, has contacted one of my partners to assist them in preparing a bid.

I seem to recall from one of your prior columns that this could be a conflict. If so, can't we just get waivers from both bank groups to allow us to use separate teams of lawyers to assist each bid, each walled off from the other? We won't be advising on the amount of either bid; our role in each will simply be to prepare a legal offering package, and if successful (in which case, we'd only be representing one of them), the acquisition documents.

A: Under Rule 1.7(a)(2), a "material limitation" conflict exists when there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Here, your firm would be assisting two clients in a "zero sum" bidding war, that only one of them can win. And even though you indicate that you will not be determining the amount of the bid, you will have knowledge of each bid's amount and perhaps other terms and conditions that if known by one or the other of your prospective clients could be used to enhance their bid to the detriment of the other. This is a conflict as you suspect.

Your follow-up question about obtaining a waiver to allow two separate walled-off teams of lawyers to independently advise the two clients in making their respective bids presents an interesting scenario, but one that you should approach very carefully, if at all. As with other concurrent conflicts, "material limitation" conflicts are waivable by the affected clients, i.e., the representation can be undertaken, if the four elements set forth in Rule 1.7(b) are met. As applied to this situation, Rule 1.7(b)(2) and (3) are met or do not apply, leaving 1.7(b)(1) and (4) to satisfy. Rule 1.7(b)(1) requires that the lawyers involved reasonably believe that they will be able to provide competent and diligent representation to each affected client. So, for example, you should consider whether each of your teams could be effectively and completely walled off from the other (as to communications, files, documents, etc.) but still have the necessary expertise and strength to meet the competence and diligence standards. This determination carries risk of a losing bidder later claiming that they were not given the same

resources or that some “leak” in the “wall” occurred. Equally as important, you also must consider whether the lawyers can truly do their best for each client, given their own and the firm’s respective economic and other interests in maintaining them as clients. This element must be considered carefully and is another source of risk.

Perhaps even more significantly, Rule 1.7(b)(4) requires that each client give informed consent, confirmed in writing. “Informed consent” is defined in Rule 1.0(e) as “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” It is difficult to see why either entity would agree for their law firm to advise a competing bidder. In addition, this requirement may well present a catch-22 in the situation you describe. In order to obtain informed consent from each of these clients to the “separate team” representation, you would need to advise each about the existence and identity of the other as a prospective bidder, yet Rule 1.6 prohibits you from revealing information pertaining to the representation of either of them without their consent. Thus, even asking for informed consent would reveal the existence of another bidder in a way that either or both may not wish to have disclosed. And even if it is already known that multiple bidders are in play, any request for consent would have to be very carefully staged. For example, you might first consider asking the client you have already undertaken to represent in the matter whether they would consent to the concept (without revealing the identity of the second prospective client), and if so, whether they would then consent to your revealing their identity to the second/prospective client for purposes of obtaining their agreement. Even if otherwise agreeable to the concept, they may well not agree without knowing the identity of the second/prospective client. You would then have to go to the second/prospective client to get their consent to reveal their identity, which they might not agree to do without knowing the other’s identity. If you get past all of those hurdles, only then could you explain enough about the matter to attempt to get each client’s informed consent.

All in all, this would be a very difficult and somewhat risky needle to thread. Consider whether the juice would be worth the squeeze. It may be possible in limited circumstances with commercial parties if done very carefully, but it carries real ethical and business (client alienation) risks.

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 134 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.