



# Dear Ethics Lawyer™

## The Legal Ethics Project. Supporting professionalism with information.

**Q:** Dear Ethics Lawyer,

You successfully represent a client in the sale of her Company for some serious money. It is a stock sale and the Company will continue to operate, but as a free-standing subsidiary of the Buyer. The stock purchase agreement contains an earn-out provision and representations and warranties that may or may not give rise to issues between the Seller client and the Buyer down the road. The Seller client will want your assistance on those matters if they arise. Meanwhile, because you are familiar with the Company and impressed Buyer in the sale, Buyer wants you to continue to represent the Company going forward. May you do both?

**A:** Perhaps, but there are some moving parts to consider. The fundamental question is whether you could represent Company in one or more types of matters, and simultaneously be adverse to Buyer (Company's corporate parent) on potential purchase agreement issues for Seller. It is important to understand: (a) the nature of the work you would be doing for the Company going forward, e.g., would it be related to the earn-out or the representations and warranties; and (b) whether ongoing work for the Company would expose you to confidences of Buyer (the corporate parent) that would be relevant to any future dispute. If either of these factors is present, then it is unlikely that you could proceed without a conflict of interest that would be very difficult to solve even with an advance waiver. The extent to which the Company is operated (management, legal representation, etc.) separately from Buyer as its parent is also relevant. ABA Formal Ethics Op. 95-390 (1995) provides a good framework of analysis concerning your ability to represent one member of a corporate family (Company) and then be adverse to another (Buyer).

It is also important to analyze whether in this scenario the relationships, or your interest in the fees relating to them, could give rise to a material limitation of your ability to represent the Seller in a future dispute or to represent the Company in other regards, without acting with less enthusiasm for either.

Furthermore, even if you conclude that you may proceed because the ongoing work for the Company would be so unrelated to any future dispute between Buyer and Seller, does not involve your receipt of material confidential information of Buyer relating to that area of dispute, and of sufficiently immaterial size or importance to give rise to a material limitation, you should nevertheless be clear in engagement letters about your simultaneous representation of Company and Seller, and your role as counsel for Seller in any future disputes with Buyer about the sales agreement. You should also get informed consents from Buyer, Seller and Company to an advance waiver consistent with this framework that clearly explains the relationships and risks of conflicting interests. Then also remember to re-examine the effectiveness of that waiver if and when a dispute between Buyer and Seller actually arises in the future, e.g. was consent sufficiently "informed" in light of the dispute that has actually arisen.

### *The Ethics Lawyer*

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## 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](mailto: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.