



# Dear Ethics Lawyer™

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

**Q:** Dear Ethics Lawyer,

My no-good brother-in-law has been fired, again. I know this because after downing his customary six-pack of Old Milwaukee at a family barbecue, he gave me all the excruciating details, including his view that he was fired because of his age and some younger workers brought in, although he did concede that he might not have worked very hard.

I listened as politely as I could to this tale of woe. When at the end of it all, he asked what he should do about a discrimination claim, I told him somewhat absent-mindedly that his recourse would be to file a discrimination charge against his employer with the EEOC. I never discussed representing him. Now, months later, I see a conflicts check request at our firm showing his former employer as an existing client of the firm, and my brother-in-law as the adverse party. The nature of the matter? Defend an age discrimination charge, of course. I would not be involved in the matter, but does my firm have a conflict here?

**A:** This is certainly a serious issue. Absent informed consent by your brother-in-law and the firm's client, you and your firm may well be disqualified under this set of facts. In the conversation with your brother-in-law, you may have inadvertently, but effectively formed an attorney-client relationship with him, by not only listening to and obtaining confidential information from him concerning his potential claim (including an admission about his work that could be used against him), but also giving him some legal advice about filing a charge of discrimination. Because of this, you (and the firm by imputation under Rule 1.10) could well have a Rule 1.7 conflict. Next time, cut off the conversation early with the admonition that you cannot hear his information because your firm may represent the company. That will avoid conflict issues and also give you a legitimate excuse to change the conversation.

Model Rule 1.18 provides some protection for lawyers having threshold conversations with prospective clients who have received disqualifying information, allowing others in the firm to represent the opposing party, but only if (in the absence of consent from both parties) the lawyer took reasonable measures to avoid exposure to more disqualifying information than was necessary, the lawyer is timely screened from the matter, and written notice is promptly given to the prospective client. Here you made no real effort to stem the flow of information from your brother-in-law, acquiring information that could be used against him, and you even went a step further to provide some fundamental advice. You also did not set up any screening to protect the information you received. There

would be a substantial question about whether notice and screening now months later would be timely and effective.

In some circumstances, there could also be a separate issue concerning whether representing a client adverse to a family member would give rise to a personal interest "material limitation" conflict under Rule 1.7(a)(2). That seems unlikely here given what appears to be the absence of a close relationship. In any event, given that you would not be representing the firm's client against your brother-in-law, that would not be an issue. Rule 1.10(a) does not impute personal interest conflicts from an affected lawyer to others in the firm.

### *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.