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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Our firm defended client X in a product liability suit in which other companies in the same industry were also defendants. The various defendants, including our client, entered into a written joint defense agreement and collaborated as a group on strategy, briefing and arguments in the matter. During discovery initiated by the plaintiff, we learned that our co-defendant Y had hired one of X's engineers who had delivered to Y confidential and proprietary product designs of X, which Y had then used to improve its product. The product liability case has been settled, and now X would like our firm to pursue an action against Y and the former engineer for misappropriation of trade secrets and other claims relating to Y's use of X's intellectual property. We sent a demand letter to Y and its counsel responded, alleging that we have a conflict of interest because of our participation in the joint defense agreement with Y, and the relationship of product design at issue there to the similar issue that would be at issue in the new matter. Is this a problem for us?

A: The majority rule is that representation of a client participating in a joint defense group does not by itself create an ethical issue that would disqualify a lawyer or law firm from being adverse to another party in the joint defense group arising out of the same facts. This result can change if there was sharing of the other party's confidential information relevant to the matter as part of the joint defense arrangement. See, e.g., ABA Formal Op. 95-395 (July 24, 1995)(Obligations of a lawyer who Formerly Represented a Client in Connection with a Joint Defense Consortium). The outcome can also depend upon the terms of the joint defense (or common interest) agreement, including whether the parties agreed as part of the arrangement to share confidential factual information and whether it would remain confidential as between the participants, or agreed that any sharing would not create a conflict of interest when used in another matter.

In any event, in the instance you describe the relevant information from Y did not come from a sharing of information by the co-defendant, but from discovery initiated by the plaintiff. Therefore, Y cannot contend that you were given the information by Y in confidence as part of the joint defense group. Please check the authorities in your relevant jurisdiction to make sure that it follows the majority rule, as well as the specific terms of the joint

defense agreement, but it appears unlikely that there is a conflict of interest that would preclude your representation of X against Y in this matter.

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.