



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Several years ago I documented and closed a business deal for a client. The other party is now using what it considers a loophole in the contract to refuse to make a substantial payment that would otherwise be due. The client has made it pretty clear that he considers the loophole to be my fault, but wants our firm to advise him on whether he should accept a compromise being offered by the other side to mitigate the loss, and if not, whether to pursue litigation. What issues does this present?

A: Malpractice allegations (or identification of circumstances that may give rise to them) present the likelihood of a "material limitation" conflict under Model Rule 1.7(a)(2), arising out of the lawyer's or law firm's self-interest in avoiding exposure. You must determine in this situation, based on an objective standard, whether you or your firm can provide independent judgment and competent representation in view of the nature of the allegation and possibility of exposure.

In some circumstances, the interests of the lawyer and client may be completely aligned in the mutual desire to prevent or mitigate the loss, and the law firm's pre-existing knowledge of the matter and willingness to work with the client on fees may benefit the client; in others, the possibility of multiple outcomes that may favor or disfavor the client's subsequent claim against the lawyer for any loss create difficult issues concerning the law firm's motives and judgments. These must be examined and weighed, and if appropriate, dealt with in the context of a fully informed client consent, confirmed in writing. This is also a circumstance in which the client should be advised to obtain outside counsel concerning whether your firm should continue in the 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 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.

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.