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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am Associate General Counsel for Universal Shipping Company, a large transportation conglomerate. We have many subsidiaries, including some that are engaged in ancillary businesses and do not have "Universal" in their name. Today, I discovered that a law firm that is currently representing Universal Shipping in a transactional matter also represents a commercial party in a contract lawsuit against Smith Food Services, Inc., an ancillary business we acquired a few years ago as a wholly-owned subsidiary. Smith provides food and beverage service to airlines and railroads, and we left its management in place, so it functions as a free-standing subsidiary. Does the law firm have a conflict?

A: The answer here depends upon the factual circumstances. In ABA Op. 95-390 (1995), a majority of the Committee opined that a parent-subsidiary relationship does not automatically create a conflict when a lawyer represents one and is adverse to the other. This was carried forward in Comment 34 to Model Rule 1.7: "A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a)." However, the Comment continues to note that a conflict can exist if under the factual circumstances the affiliate should also be considered a client, the lawyer and client have agreed to affiliates as clients, or the lawyer's obligations to either the organizational client or the affiliate would create a "material limitation" of the lawyer's ability to represent either.

Cases determining whether a subsidiary should be treated as one with the parent for conflicts purposes look at a variety of factors, depending upon the jurisdiction. Some employ an alter-ego type analysis. Many look at the extent of independent management and/or operations, whether they have the same in-house legal representation, the similarity of the matters involved, whether information obtained by the lawyer in representing one would be relevant to the adverse matter, etc. See, e.g., *Gartner, Inc. v. HCC Specialty Underwriters, Inc*., No. 20-cv-4885 S.D.N.Y. Jan. 14, 2022) (corporate affiliate conflict depends upon examination of the "degree of operational commonality" and "extent to which one [entity] depends financially on the other"). See also *Freivogel on Conflicts*. In determining whether there is a "material limitation" under Rule 1.7(a)(2), the focus is on whether there are any factors, such as the lawyer's depth of relationship and fee interest as to one client provides a motive for the lawyer to less vigorously represent the other client.

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.