



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am in-house counsel for a corporation dealing primarily with Mr. P, who is president and a substantial shareholder. Mr. P has asked me to prepare a legal analysis that would lay out the tax ramifications of a proposed compensation and benefits package for all corporate officers, and make recommendations about how to optimize it.

Because part of the motivation in considering the new package is the recruitment and retention of corporate officers, he asks that the memo address ramifications to both the corporation and to affected individuals, including himself, who would be subject to the new package. He provides his relevant tax information (as do other existing corporate officers). What are the ethical considerations?

A: A starting point to consider here is who is your client? This should be clarified with the corporation and with Mr. P and other corporate officers to avoid or account for any potential conflict situation. Model Rule 1.13(f). If you are representing only the corporation—even in advising the corporation about the ramifications of the benefit package to corporate officers as part of evaluating the strategy—then there is no conflict. But, that also could mean that no privilege attaches to any communications you may have with individual corporate officers about the ramifications to them as individuals, unless the communications can be fairly characterized as discussions relating to the interests of the company in recruiting and retention.

On the other hand, if either by agreement or by a failure to clarify the relationships, you are also deemed to be representing or advising the corporate officers as individuals concerning what may be in their individual interests, then there is at least a potential conflict situation. In that scenario (joint representation), your advice in connection with the package could perhaps be questioned as favoring one or other of the company or the officers, or officer(s) with particular characteristics. In a joint representation scenario, before proceeding you would need to conclude that you can undertake the representation without material limitation on your ability to advise all concerned (see Rule 1.7(a)(2)), and you would need informed consent confirmed in writing by all. Because Mr. P is affected, he could not provide that consent on behalf of the company as well as himself; the company's consent would need to be provided by the Board, with affected officers recused. See Rule 1.13(g).

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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.

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.