

APPEARANCE OF IMPROPRIETY –
“CHINESE WALL” – LAW CLERK –
VICARIOUS DISQUALIFICATION:
FORMER BANKRUPTCY LAW CLERK
ACCEPTING EMPLOYMENT WITH
FIRM WHICH REPRESENTS
CREDITORS COMMITTEE IN ONGOING
BANKRUPTCY MATTER.

You have advised that as a law clerk for a federal bankruptcy judge, a lawyer's duties included attendance in court, legal research, and drafting written opinions and orders based on pertinent research, evidence, briefs submitted by parties, and discussions between the judge and the law clerk. The law clerk subsequently accepted employment as an associate with a law firm which represents the creditors' committee in one of the complex bankruptcy cases on which the clerk had assisted the judge. The creditor's committee has instituted or will institute several lawsuits on behalf of the debtor and is also involved in consummating a settlement of another adversary proceeding on which the associate worked when a law clerk.

You have requested that the Ethics Committee opine as to the propriety of the law clerk/associate's firm continuing to represent the Creditors' Committee if a "Chinese Wall"/screening device is erected between the firm and the associate as to that case. Additionally, you have asked if the firm is required to establish such a screen, and conversely, if the firm could continue such representation without a screen with respect to any motions or adversary proceedings not filed until after the associate's clerkship with the judge had terminated, especially if such proceedings would concern no issues similar to any issues in the case decided by the judge during the associate's tenure as a law clerk. Finally, you have inquired if the agreement of all parties after full disclosure would permit the firm to continue representation (presumably without a screen) in such matters, whether pending during the associate's tenure as law clerk or not, and, most critically, whether such agreement of the parties would also permit the associate/former law clerk to work on those matters (also presumably without a screen).

The appropriate and controlling premise is Canon 9 which mandates generally that a lawyer should avoid even the appearance of professional impropriety. The specific disciplinary rules which are applicable to the circumstances you have presented are DR:9-101(A), (B), and (C) which dictate, respectively, that a lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity or in which he had substantial responsibility while he was a public employee, and shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

The Committee is of the view that the activities of a (former) law clerk may be measured using the same criteria as the activities of a judge in determining whether the law clerk's actions are improper or result in the appearance of impropriety even when no per se impropriety exists. (See, e.g., *Kennedy v. Great Atlantic & Pacific Tea Co., Inc.*, 551 F.2d 593, 596 (5th Cir., 1977)) It is elementary that neither a judge nor his law clerk has the opportunity to establish an attorney-client relationship with any of the parties to a proceeding before the court, nor do they have access to any information that is confidential or that would be protected by any provisions related to the preservation of secrets and confidences. It is apparent to the committee that, since law clerks and judges review and preside over public information, they are not in a position to obtain any secret information or strategy development related to the presentation of a matter before the court.

The Committee is of the opinion, however, that, as you have described them, the activities engaged in by the law clerk in assisting the judge would constitute the clerk's having had "substantial responsibility" in the matter before the judge, regardless of whether that responsibility was exercised in an attorney-client context or in a judicial context. Thus, in accord with the mandates of DR:9-101(A) and (B), the guidance provided in Ethical Consideration 9-3 [EC:9-3], and the public perception that judges discuss confidentially with their clerks the underlying rationale for decisions made in a matter, the committee is of the belief that for the former law clerk to accept employment in connection with any such matter would give the appearance of impropriety even if none exists. The Committee adopts the reasoning of ABA Informal Opinion 1092 which describes the law clerk's role as "the judge's right hand, ... [with] an important role in the decision-making process and in shaping his ultimate decision." Obviously, therefore, the former law clerk/associate would be personally disqualified from working on any matter on which he had done legal research, drafted opinions or orders, or participated in discussions with the presiding judge.

The Committee has recently opined that the establishment of a "Chinese Wall"/ screening device is an acceptable means of averting a firm's vicarious disqualification based upon the taint of a former government lawyer's personal disqualification under DR:9-101(B). (See LE Op. 1302, LE Op. 1303) Under the circumstances you have described, the committee believes that LE Op. 1302, which requires the establishment of a screen in order to obviate the firm's disqualification, is dispositive of the issue. (See also LE Op. 881) The committee is further of the view, however, that such a screen would not be required as to motions or adversary proceedings which have been filed subsequent to the termination of the clerkship provided that those motions or proceedings are not substantially related to the issues for which the clerk did have substantial responsibility.

The Committee opines that the agreement of all parties to the firm's continued representation, without the implementation of a screening device, would not be sufficient to overcome the appearance of impropriety whether on the part of the firm or of the former law clerk. There plainly is no "cure by consent" for the creation of an appearance of impropriety; rather, such consent might foster the public's lack of confidence in law and lawyers by conjuring up images of collusion and improper influence upon the tribunal. (See EC:9-2)

Finally, the Committee cautions that the court or the individual judge for whom the associate served as clerk may have adopted specific restrictions on the activities of a law clerk after the termination of the clerkship. The Committee urges that the associate/former law clerk adhere stringently to any such restrictions. (See also L. Bartlett & A. Rubin, Law Clerk Handbook § 2.2 at 24 (Federal Judicial Center, 1989))

Committee Opinion
April 20, 1990

Editor's Note. – Requests for LEOs No. 1302 and 1303 were withdrawn following the Virginia Supreme Court's disapproval of LEO No. 1302. The Committee did not alter the conclusions reached in LEO No. 1334.