

Committee Opinion  
May 11, 1992

LEGAL ETHICS OPINION 1447

APPEARANCE OF IMPROPRIETY –  
PUBLIC OFFICIAL: CLERK OF COURT  
ENGAGED IN PRIVATE PRACTICE.

You have indicated that an active member of the Virginia State Bar, who has been serving for many years as Clerk of the Circuit Court in his county of residence, now wishes to become affiliated with a law firm which has offices in both the county of the Clerk's residence and an adjoining county in the same judicial circuit. The attorney/Clerk would be shown as "of counsel" on the law firm's letterhead, would be included on the firm's malpractice insurance policy, and would work on a schedule agreed upon by all parties. You have further indicated that the schedule would not conflict with the schedule required by the attorney's duties as Clerk and would include regular office practice hours in both offices of the firm as well as some research time. In addition, certain office management projects might be undertaken for the firm. Finally, you have indicated that, with the repeal of Virginia Code § 54-45 in 1988, no statutory prohibition is known which would preclude this public official, Clerk of a Circuit Court, from practicing law.

You have asked the Committee to opine as to three issues related to the facts as presented. Specifically, you have inquired (1) whether it would be proper for a Clerk of the Circuit Court to be listed as "of counsel" on the letterhead and other communications of a law firm in the locality in which he is serving as Clerk; (2) what limitations exist relative to the types of law practice in which the Clerk could engage on behalf of the law firm; and (3) whether a conflict of interest problem which arose that prevented the Clerk from handling a certain case for the law firm would also prevent the other attorneys in the firm from taking that case.

The appropriate and controlling disciplinary rules relative to your inquiry are:

DR:9-101(C) which prohibits a lawyer from stating or implying that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;

DR:8-101(A)(3) which prohibits a lawyer from accepting anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official;

DR:5-101(A) which precludes a lawyer from accepting employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances; and

DR:9-101(B) which prohibits a lawyer from accepting private employment in a matter in which he had substantial responsibility while he was a public employee. [emphasis added]

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Further guidance is available through Ethical Consideration 8-8 [ EC:8-8] which cautions, in pertinent part, that "[a] lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." [emphasis added]

With regard to your first inquiry as to the propriety of a Clerk of the Circuit Court being listed as " of counsel" on the letterhead and other communications of a law firm in the circuit in which he is serving as Clerk, the Committee has previously opined that it is improper for a legislator-attorney (who is not precluded from private practice) to allow his name to be continued in association with his private law firm unless he actively continues to practice as a member thereof. See LE Op. 206.

Under the facts you have provided, the Committee is of the opinion that it would not be violative of DR:9-101(C) for the attorney/Clerk to be listed as "of counsel" on the letterhead and other communications. However, the Committee is of the further opinion that the attorney/Clerk's identification as "of counsel" to a specific firm may carry an inference that the firm is able to improperly influence a public official. Thus, the Committee cautions that if the attorney/Clerk become affiliated with a firm, the firm would run the risk of vicarious disqualification in matters it may wish to pursue in the attorney/Clerk's circuit. [see discussion infra ]

In addition, with regard to your second inquiry as to what limitations exist relative to the types of law practice in which the Clerk could engage on behalf of the law firm, the Committee has previously opined that it is improper for a Commonwealth's Attorney to defend criminal cases in courts in which he prosecutes, in any federal court in the Commonwealth, or in courts where he does not prosecute unless it is clear that there is no possible conflict of interest, real or apparent, and that the prestige of the office is in no way used in defense of the case. See LE Op. 188. As articulated in LE Op. 188, the Committee believes that the attorney/Clerk's acceptance of employment in matters which may involve activity in his own circuit represent a perception of the exploitation of his public office. In the circumstances you posit, the Committee opines that it would be improper for the attorney/Clerk to accept any employment in a matter which has any possibility of litigation, filing or other activity in his own circuit since to do so may give rise to the implication of accepting remuneration for the purpose of influencing his action as a public official.

Finally, you have inquired as to whether an ethical impropriety which prevented the Clerk from handling a certain case for the law firm would also prevent the other attorneys in the firm from taking that case. While the Committee is cognizant that DR:9-101 and its component subparts contain no mandated imputed disqualification, the Committee opines, under the circumstances presented herein, that when the attorney/Clerk is precluded from personally or financially participating in any matter as a result of his simultaneous service as Clerk, it would be per se improper for other lawyers in the firm to assume such representation. See DR:9-101(C); LE Op. 188 ("Council continues to believe that a Commonwealth's Attorney may defend only those criminal cases in

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jurisdictions where he does not normally prosecute and under such circumstances that there is no reasonable perception of the exploitation of the prestige of his public office or a conflict of interest between his public duties and his duties as a defense attorney." [emphasis added])