

You have presented a hypothetical situation in which a lawyer served as a law clerk for a federal district court judge during which time a private firm appeared before the judge on behalf of a plaintiff. The lawyer assisted the judge with the case. You indicate that, as a law clerk, the lawyer's duties involved attendance in court, legal research, contact with the attorneys for both parties, and drafting opinions and orders based on the research, evidence, briefs of counsel, and discussions with the judge.

You advise that, during the lawyer's tenure as law clerk, the plaintiff moved for a voluntary dismissal of the case, and the case was dismissed. Subsequently, the plaintiff refiled the complaint. Although the refiled case was reassigned to the same judge, the law clerk did not work on the case. The lawyer then ceased to serve as the judge's clerk and accepted employment with the private firm that appeared on behalf of this plaintiff. After the lawyer left employment with the judge, the plaintiff voluntarily dismissed the second complaint. You indicate that the plaintiff wishes to file a new complaint with the federal district court. The new case, although related, concerns the applicability of a different statute than that involved in the first two cases.

You state that the judge has a policy that neither the former law clerk, nor any member of the former law clerk's firm, can practice before him for one year after the former law clerk's tenure has ended. You also state that any case filed in the district court by the former law clerk's firm is assigned to one of the other judges in that court.

You have asked the Committee to opine whether, under the facts of the inquiry, (1) the lawyer/former law clerk can work on the new case which will be assigned to a judge other than the judge for whom the lawyer formerly worked and since it involves the applicability of a different statute; and (2) if the lawyer/former law clerk cannot work on the new case, whether the law firm can continue to represent the plaintiff if a "Chinese wall" is implemented to prevent the lawyer/former law clerk's exposure to the case.

The appropriate and controlling Disciplinary Rules related to your inquiry are DRs 9-101(A), (B), and (C) [DR:9-101], 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 opinion that, as you have described them, the activities engaged in by the law clerk in assisting the Judge would constitute the former clerk's having had "substantial responsibility" in the matter before the federal district court. Thus, in accord with the mandates of Disciplinary Rules 9-101(A) and (B) 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

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participate in the new case would give the appearance of impropriety even if none exists. See LE Op. 1334. The Committee also believes that the facts of assignment of the case to a different judge and the applicability of a different statute are irrelevant to the opinion reached, since the new case remains related to the case for which the former law clerk exercised substantial responsibility. Further, any personal or financial involvement by the former law clerk in the matter would be per se violative of DR:9-101(B).

With regard to your inquiry as to the efficacy of a "Chinese wall," the Committee is of the opinion that since DR:9-101 and its component subparts contain no corollary to the imputed disqualification of DR:5-105(E), it would not be per se improper for lawyers in the former clerk's firm to continue to represent the plaintiff in the federal district court by which the new lawyer has previously been employed. In addition, according to the facts you provided, the assignment of the new case to one of the other judges in the court would vitiate any imputation to the firm of an appearance of impropriety. Since no imputed disqualification is mandated by Disciplinary Rules 9-101(A) and (B), the Committee opines that although the attorney may not participate, professionally or financially, in the representation, no formal screening will be necessary. See LE Op. 1430. To the extent that this conclusion and those of LE Op. 1430 are in conflict with that portion of LE Op. 1334 which determined that the establishment of a screening device was required to obviate the former law clerk's firm's disqualification, that opinion is overruled as to that conclusion.

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Legal Ethics Committee Notes. – Rule 1.11(b) probably would require that the law clerk be screened.