

You have presented a hypothetical situation in which Judge A is a federal district court judge in Virginia. Attorney B, who served as a law clerk to Judge A three or more years ago, is now an associate attorney in a large firm with multiple offices, including an office in Virginia, although Attorney B is not physically located in the Virginia office, nor is Attorney B admitted to practice law in Virginia. Attorney B does, however, regularly appear in Virginia pro hac vice.

In one such case, Attorney B represents the defendant in a federal action in the same district and division in which Attorney B had served the clerkship and in which Judge A is still an active judge. Under the local practice of the court, cases are not assigned to a particular judge and motions and trials are assigned to judges by the chief judge. You indicate that a motion to dismiss the case in question was filed by Attorney B and heard by Judge A, without disclosure by either Judge A or Attorney B that Attorney B had previously been the clerk of Judge A. You state that the motion was unsuccessful but that Judge A encouraged Attorney B to file a motion for summary judgment.

You further indicate that Attorney B subsequently filed a motion for summary judgment in the same action which is again assigned to Judge A. The motion for summary judgment, in addition to raising various substantive legal questions, also involves three additional issues directly implicating the conduct and actions of Attorney B: (1) Attorney B defaulted on requests for admissions under Rule 36; (2) Attorney B's client had previously been ordered by a magistrate of the same court to provide certain discovery material to the summary judgment motion, as to which Attorney B also defaulted; and (3) various other discovery disputes and problems had arisen with respect to the summary judgment motion, many of which also implicated the actions or inactions of Attorney B (e.g., failure to file a timely affidavit in support of the motion). These issues are raised by the plaintiff either in opposing summary judgment or by separate motion scheduled by the clerk to be heard contemporaneously by Judge A.

At the hearing on the summary judgment motion, Judge A and Attorney B again fail to disclose any prior relationship between them. Judge A proceeds to rule on the "merits" of the summary judgment motion and declines to reach the foregoing issues implicating Attorney B's actions and defaults on the grounds that they are "procedural," rendered "moot" by addressing the merits, even though Attorney B concedes that the "procedural" issues were potentially dispositive in favor of the plaintiff. You indicate that Judge A thereby avoided reaching any issue that calls into question the conduct, competence, or negligence of Attorney B.

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Finally, you advise that since Attorney B had been a clerk for Judge A long before the case in question had been filed, there is no question as to whether Attorney B was privy to any prior judicial proceedings related to this dispute.

You have asked the committee to opine, under the facts of the inquiry, as to several issues related to any duty or obligation requiring either or both Judge A and Attorney B to disclose the prior relationship.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; DR:7-102(A)(3) which prohibits a lawyer from concealing or knowingly failing to disclose that which he is required by law to reveal; DR:9-101(A) which precludes a former judge from accepting private employment in a matter upon the merits of which he has acted in a judicial capacity; and DR:9-101(C) which provides that a lawyer 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 responds to your inquiries relative to the facts presented as follows:

1. As to whether Judge A had any obligation or duty to disclose the prior relationship with Attorney B, the committee recognizes that this inquiry raises a question of judicial ethics, rather than lawyer ethics, and is, therefore, beyond the purview of the committee.
2. As to the minimum steps necessary for Judge A to take to remedy the problem, if such a duty or responsibility existed, since the committee has opined that issue #1 is beyond its purview, the question of minimum steps necessary to remedy the problem has been rendered irrelevant.
3. The committee believes that the Code of Professional Responsibility does not require an attorney to disclose that he or she had previously served as a law clerk for a presiding judicial official. The committee notes that, under the facts presented, the case in question was not related in any way to the work previously performed by Attorney B as clerk for Judge A, and Attorney B neither stated nor implied an ability to improperly influence Judge A. There is, therefore, no impropriety under DR:9-101(A) or DR:9-101(C). In the absence of any ethical or other legal requirement of disclosure, there has been no violation of DR:7-102(A)(3).
4. Since the committee has opined that Attorney B did not have a duty to disclose the prior relationship, the question as to the minimum steps necessary to remedy the problem has been rendered irrelevant.
5. Since the committee has opined that issue #1 is beyond its purview, the question of whether the matter above described must be reported to the appropriate judicial authorities has been rendered irrelevant.

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Furthermore, since the committee has opined that Attorney B did not have a duty to disclose the prior relationship with Judge A and that thus, minimum steps were not necessary, the committee opines that there is no duty to report Attorney B's failure to disclose to the Bar.