Lawyers’ Risk Management Newsletter

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Judges, Former Law Clerks, and Conflicts of Interest

In this article we review conflicts of interest issues that arise when a judge’s former law clerk works in a law firm with a matter in front of the judge for whom the law clerk formerly worked.

The decision in the case of *Straw v. Avvo Inc.* in the US District Court for the Western District of Washington, Case no. C20-0294JLR, April 21, 2021 raises interesting issues concerning the conflicts of interest that may arise when judicial clerks move into private practice. In this case the plaintiff sought the recusal of the judge presiding over his case, arguing that because Avvo’s law firm, Davis Wright Tremaine LLP (“DWT”), employed an attorney who formerly served as one of the judge’s law clerks while his case was pending, “the existence of [the law clerk] on the roster of attorneys at DWT . . . favors the trial judge’s clerk, his firm, and that firm’s clients.” Mr. Straw argued, therefore, that the judge violates his duty to be fair and impartial by continuing to preside over this case. Citing earlier cases in the district that had held that “A rule barring former law clerks and externs, much less their entire law firms, from appearing in a particular court would be unreasonable and unjustified,” the judge declined to recuse himself. He also noted that the clerk had not worked on Mr. Straw’s case while a law clerk nor on the case since joining the law firm.

From the law firm’s perspective in these situations, the relevant rule is ABA Model Rule of Professional Conduct Rule 1.12(a) and 1.12 (c) which deal with the imputation of conflicts that arise because of the firm’s employment of a former judge or law clerk who participated “personally and substantially in a matter.” Rule 1.12(a). Rule 1.12(c) provides as follows:

> When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> 1. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> 2. written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule

Comment [5] to Rule 1.12 adds, “Notice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.”

Requirements for screening procedures are stated in Rule 1.0(k), which defines screening as “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.”

In sum, under Rule 1.12(c), if a former government lawyer is disqualified based upon personal and substantial participation in the same matter, his or her new colleagues can use screening and notice to avoid imputation. *See Comparato v. Schait*, 180 N.J. 90, 98 (2004) (“The current rule [1.12] is explicit in that regard, but also makes clear that proper screening of such clerks can avoid firm-wide disqualifications.”).

While not an exhaustive list, a handful of ethics opinions have provided guidance on what qualifies as adequate screening. Utah Eth. Op. 145 (1994) observes, “Critical to construction of an effective screening procedure is timing.

The screening procedure must be in place at the time the conflict arises, which in this case is when the investigator begins employment." In addition, "The new employee must not actively work on the file . . . . In fact, the files should be physically segregated from the employee to avoid both intentional and inadvertent access to them by the employee. The employee should be instructed not to access these files or discuss the files or any related matters with other members of the firm. In addition, other employees of the firm should be instructed: (1) not to discuss these files or related matters in the employee's presence; (2) not to allow the employee to review related documents or materials; and (3) not to receive any information from the employee regarding these files.'" (quoting Mich. Ethics Op. No. RI-115 (1992); *see also* Mich. Ethics Op. No. RI-4 (same).) California Ethics Op. 1993-128 (1993) states that effective screening procedures in addition to the ones above might include (1) a principal of the law firm being responsible for the implementation and modification of any screening procedures.

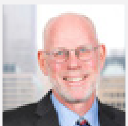
Of these factors, timeliness in implementing a screen and giving notice is critical. *See e.g., Am. Tax Funding, LLC v. City of Schenectady*, No. 1:12-CV-1026 MAD/RFT, 2014 WL 6804297, at *4 (N.D.N.Y. Dec. 2, 2014) (first inquiring whether a firm acted promptly and reasonably by establishing a "screen either from the first moment the conflicted attorney transfers to the firm or when the firm first receives actual notice of the conflict").

Notably, having attorneys work from home may make screening procedures more effective. *See e.g., Monument Builders of Pennsylvania, Inc. v. Cath. Cemeteries Ass'n, Inc.*, 190 F.R.D. 164, 168 (E.D. Pa. 1999) (not disqualifying law firm because the former clerk "primarily works from home" and the firm could establish a screen to prevent the disqualifying attorney from accessing any files).

These ethics opinions and cases demonstrate that creating and implementing swift and effective screening procedures may prevent a law firm's disqualification, regardless of the size of the firm. *See e.g., Hamed v. Yusuf,* 69 V.I. 221, 2018 WL 1320364 (Super. Ct. St. Croix Division 2018) (declining to disqualify the other attorney in the two-attorney firm from representing the plaintiff, where co-counsel removed over 95% of the case files from the office and placed them in storage, placed the remaining files in a locked cabinet in his office, placed files on a separate server, set up separate email accounts for the case, advised his three-person office staff not to discuss the case with the former clerk at any time or forward to her any correspondence, and made clear to the staff and the client that there was to be no communications whatsoever between the client and the former clerk).

Further information

If you would like further information on any issue raised in this update please contact:



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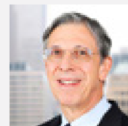

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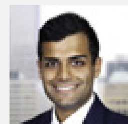

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