UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	**:**	**Case No. 97 – 1040 – CH**
SUPERIOR COAL COMPANY,		**Chapter 7**
Debtor.		
In the Matter of	**:**	**Case No. 97 – 1041 – CH**
IOWA COAL MINING COMPANY, INC.,		**Chapter 7**
Debtor.		
In the Matter of	**:**	**Case No. 97 – 1042 – CH**
STAR COAL MINING COMPANY, INC., aka STAR COAL COMPANY,		**Chapter 7**
Debtor.		

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ORDER – MOTIONS TO DISQUALIFY ATTORNEYS FOR PETITIONING CREDITORS

On March 10, 1997, three Creditors of Superior Coal Company, Iowa Coal Mining Company, Inc., and Star Coal Mining Company, Inc. (collectively "the Coal Companies") filed what were captioned "Complaint for Involuntary Bankruptcy and Request for Appointment of Interim Trustee;" the pleadings were refiled on April 22, 1997 as Amended Petitions for Involuntary Bankruptcy. Prior to hearing on the merits of the Involuntary Petitions, the Debtors

filed a Motion to Disqualify Creditors' Counsel. On February 18, 1998, hearing was held on the Debtors' Motion and the Objections thereto. Debtors, the Coal Companies, were represented by attorney William W. Graham; the petitioning creditors, St. Paul Fire and Marine Company, Merchants Bonding Company, and United Fire and Casualty Company ("the Sureties"), were represented by attorney Mark D. Walz. At the conclusion of the hearing, the Court took the matter under advisement upon a briefing schedule. Post-trial briefs have been filed and the Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. James Huyser is the president and sole shareholder of Superior Coal Company and Iowa Coal Mining Company, Inc.; Superior Coal and Iowa Coal own Star Coal Mining Company, Inc.

2. From 1989 to 1994, attorneys associated with the law firm of Gamble & Davis, P.C. ("Gamble Firm") provided legal services to James Huyser and the Coal Companies. The Gamble Firm was initially hired to handle litigation on behalf of Huyser and Iowa Coal against Monroe County, which resulted in a judgment against Monroe County in an action commonly referred to as Iowa Coal II. The Gamble Firm's representation of Huyser and the Coal Companies expanded to include all legal aspects of the businesses.

3. R. Jeffrey Lewis represented Huyser and the Coal Companies on several matters while at the Gamble Firm.

4. Robert "Beau" Gamble was involved in developing a business plan, presentations to financial institutions, and other financial matters for Huyser and the Coal Companies while at the Gamble Firm.

5. As part of its legal representation, attorneys at the Gamble Firm drafted agreements between the Coal Companies and the Sureties in 1991 or 1992. These agreements and their subsequent modifications are the basis of the Sureties' claims in this case.

6. Proceeds from the Iowa Coal II judgment were distributed by order of the Iowa District Court for Monroe County. Recipients included James Huyser, the Gamble Firm, and the Lewis Firm.

7. The Gamble Firm was dissolved on July 31, 1994. Beau Gamble is one of three directors still involved in the process of wrapping up its dissolution. Funds received from the Iowa Coal II judgment have not been distributed to the Gamble Firm's shareholders.

8. Beau Gamble and Julie Johnson McLean, shareholders in the Gamble Firm, moved to the law firm of Davis, Brown, Koehn, Shors & Roberts, P.C. ("Davis Firm") when the Gamble Firm dissolved. Beau Gamble and Julie Johnson McLean are shareholders of the Davis Firm.

9. Five shareholders of the Gamble Firm, including R. Jeffery Lewis, established the law firm of Lewis, Webster, Johnson, Van Winkle & DeVolder ("Lewis Firm"), which continued representing Huyser and the Coal Companies since 1994.

10. The Davis Firm has been representing the Sureties in negotiations regarding the agreements drafted by the Gamble Firm on behalf of the Coal Companies. The negotiations ended when Thomas E. Salsbery and Mark D. Walz, attorneys at the Davis Firm, representing the

Sureties in these actions, filed Involuntary Bankruptcy Petitions against the three Coal Companies.

11. Based on discovery documents served on the Coal Companies post-petition, it is reasonable to believe that if an Order for Relief is entered in these cases, the cases will involve actions to recover pre-petition transfers, including funds paid from the Iowa Coal II proceeds to Huyser, the Gamble Firm, and/or the Lewis Firm.

12. The Lewis Firm ceased representing the Coal Companies on January 20, 1998.

13. Counsel for the Coal Companies filed Motions to Disqualify the Sureties' Counsel on February 13, 1998.

14. James Huyser is concerned that information concerning business matters and financing that Beau Gamble was involved in while at the Gamble Firm remain confidential and not be used by any party with interests adverse to either himself or the Coal Companies.

DISCUSSION

There can be no doubt that Huyser and the Coal Companies were clients of Beau Gamble and the Gamble Firm. When the Gamble Firm broke up, Huyser and his legal matters went with Jeffrey Lewis to the Lewis Firm. Beau Gamble went to the Davis Firm. Now Huyser and the Coal Companies are faced with attorneys of the Davis Firm as opposing counsel in three involuntary bankruptcy cases.

It became apparent to the Lewis Firm that if these bankruptcy cases should go forward, the firm and its attorneys held a financial interest that could be contrary to that of their clients, Huyser and the Coal Companies. The Lewis Firm withdrew as counsel in this case.

Huyser and the Coal Companies believe that the Davis Firm and its attorneys also have a conflict of interest and should be disqualified from representing the Sureties. Prior to trial on the involuntary petitions, the Coal Companies filed Motions to Disqualify the Sureties' counsel. The Coal Companies assert three grounds for disqualification based on conflicts of interest under Canons 4, 5, and 9 of the Iowa Code of Professional Responsibility for Lawyers:

> 1) attorneys with the Davis Firm may be witnesses in anticipated litigation regarding attorney fees paid to the Gamble Firm that they were previously shareholders in;
> 2) services performed for Iowa Coal by the Gamble Firm and its attorneys are substantially related to matters in this bankruptcy; and
> 3) the Davis Firm's continued representation of the Sureties presents an appearance of impropriety.

The Sureties oppose disqualification; the Davis Firm has handled legal matters for them since 1991. They contend that the matter before the Court is limited to the involuntary petition, the motion to disqualify was filed as a tactical measure, and that there is not a substantial relationship between the subject matter of the Gamble Firm's prior representation and the subject matter of these proceedings that would present a conflict of interest. They argue that even if there were a conflict of interest between Beau Gamble and/or Julie Johnson McLean and the Sureties, any conflict has been waived. Additionally, the Davis Firm has placed Beau Gamble and Julie Johnson McLean behind a "Chinese wall" regarding the Davis Firm's representation of the Sureties. They argue this action preserves any confidences Beau Gamble might hold and insulates the remainder of the firm from disqualification based on any conflict of interest held by Beau Gamble and/or Julie Johnson McLean.

Motions to disqualify are subject to "particularly strict judicial scrutiny" because of the potential for abuse by opposing counsel. Harker v. C.I.R., 82 F.3d 806, 808 (8th Cir. 1996). This court does not believe this motion was filed to gain a tactical advantage in the bankruptcy

proceedings as the motions were filed early in the case after counsel for the movants had disqualified themselves for the same reasons urged in this motion. The importance of establishing and preserving public trust in the legal profession and the adversarial legal system is a matter which concerns the court and forms a basis for the court's ruling herein.

Ethical standards are the backbone that gives support to the public's perception of the legal profession. As the bones grow and develop in an ever-changing legal environment, competing interests keep them from become too rigid or too pliant. They must remain strong and healthy to support the public's trust in the legal profession and its ability to govern itself, and not become less respected than pond scum.

Federal law regarding ethical matters is largely based in the ABA's framework for the ethical practice of law throughout the nation. As the Eighth Circuit articulated in 1979, "judicial effort to light a disqualification path is unlikely to result in an early formulation of rules universally applicable to the Canons of the Code of Professional Responsibility." State of Ark. v. Dean Foods Products Co., Inc., 605 F.2d 380, 383 (1979). Since the Dean Foods case was decided, the Canons and Code of Professional Responsibility were replaced by the ABA's Model Rules of Professional Conduct. The Model Rules, developed for the national practice of law, are consistent with obligations imposed upon professionals by other laws, including constitutional, fiduciary, and agency law. The majority of jurisdictions now base their ethical and professional standards on these Model Rules. See ABA, Annotated Model Rules of Professional Conduct vii (3d ed. 1996).

The parties disagree as to which set of ethical standards applies, likely due to the fact that neither the Model Code nor Model Rules have been adopted by the courts in this district. The Local Rules of this Court require attorneys to be in good standing of the Bar of the Supreme

Court of Iowa. See L.R. 5 (b), (c). The argument can be made that this requirement implicitly supports application of the ethical standards that apply to Iowa attorneys, the Iowa Code of Professional Responsibility for Lawyers. On the other hand, by not expressly adopting any one set of ethical standards, an equally convincing argument can be made for applying the Model Rules, which the national practice of law support and which have been adopted by the majority of jurisdictions. Without mandating which standards should apply in all cases, the Court finds that the Davis Firm's continued representation of the Sureties in these cases violates both the Iowa Code of Professional Responsibility for Lawyers and the ABA Model Rules of Professional Conduct.

Iowa Model Code of Professional Responsibility for Lawyers

Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." EC 4-6 states in pertinent part that "[t]he obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

Canon 5 states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Although the subject matter of this Canon is commonly referred to as "conflicts of interest," its application is actually much broader as illustrated by the EC's and DC's to Canon 5 which speak of clients with "differing interests." "Differing interests" is defined to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

Canon 9 states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." EC 9-1 states that "[c]ontinuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through

our legal system. A lawyer should promote public confidence in our system and in the legal profession." EC 9-2 states, in part, that "[w]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

While the Canons do not expressly regulate the ethical dynamics that arise when an attorney changes firms, they do provide the framework for balancing the competing interests of the Sureties' right to counsel of their choice against protecting confidences and secrets of Huyser and the Coal Companies while maintaining the integrity of the legal profession.

In analyzing disqualification matters based on violations of the ethical Canons of the Code of Professional Responsibility, courts apply a "substantially related" test: an attorney is prohibited from representing a party if there is a substantial relationship between the subject matter of the attorney's former representation and the attorney's current adverse representation. See generally, Dean Foods, 605 F.2d at 383-85; Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 754 (2d Cir. 1975).

Beau Gamble's former representation of, and thereby acquisition of confidences and secrets of, Huyser and the Coal Companies is not limited to the financial matters handled personally by him. As clients of Beau Gamble and the Gamble Firm, there is an "irrefutable presumption that confidences were disclosed" by Huyser and the Coal Companies. See Dean Foods, 605 F.2d at 384 (cites omitted). Based on Beau Gamble's position as a partner in the Gamble Firm, confidences shared with attorneys who did work for Huyser and the Coal Companies are presumed to have been shared with him. See Dean Foods, 605 F.2d at 385 (cites omitted). One of the matters handled by the Gamble Firm on behalf of the Coal Companies was the drafting of the agreements between the Coal Companies and the Sureties. Thus, two matters

that Beau Gamble shared the confidences of Huyser and the Coal Companies on are the financing of the Coal Companies and the bonding agreements with the Sureties.

The Court finds that the Gamble Firm's prior representation of Huyser and the Coal Companies is substantially related to the involuntary petitions in two ways. Confidences shared with Beau Gamble pertained to the finances of the Coal Companies; the Coal Companies' financial situations are substantive issues in involuntary bankruptcy proceedings. Additionally, the bonding agreements are the Sureties' basis for their claims which are a requirement for the Sureties' standing to file the involuntary petitions.

If trial is held on the involuntary petitions, the focus will be on the Coal Companies' ability to pay debts as they came due. Cash flow is substantially related to the financing and capital structure of the corporations. Beau Gamble was personally involved in the financial aspects of the Coal Companies; he developed a business plan and presentations for financial institutions. Confidential information Beau Gamble received regarding the financial aspects of the Coal Companies could be used against the Coal Companies by their creditors. Beau Gamble has a duty to protect the confidences that he obtained while representing Huyser and the Coal Companies at the Gamble Firm. The financial structure of the Coal Companies and the financial aspects in an involuntary bankruptcy are the same or substantially related matters.

Huyser and Jeff Lewis both testified that the financial and legal issues that existed between the Sureties and the Coal Companies when the bonding agreements were entered into are the same issues the parties had been negotiating about until the involuntary petitions were filed. Those bonding agreements provide the basis for the Sureties to have standing to file involuntary petitions against the Coal Companies. See 11 U.S.C. § 303 (b)(1). In this context, the agreements themselves and the undersecured positions held by the Sureties are inextricably linked.

Beau Gamble is prohibited from representing the Sureties based on the substantial relationship that exists between matters previously handled on behalf of Huyser and the Coal Companies while Beau Gamble was a member of the Gamble Firm. Because Beau Gamble is a member of management of the Davis Firm, he is again presumed to share in the confidences of work done by others in his firm. See Dean Foods, 605 F.2d at 385. To avoid even the appearance of impropriety, members of the Davis Firm would also be prohibited from representing the Sureties in these cases.

ABA Model Rules of Professional Conduct

Whether Thomas Salsbery and Mark Walz can ethically represent the Sureties in this case depends on whether any disqualification of Beau Gamble or Julie Johnson McLean would be imputed to all members of the Davis Firm. The pertinent portion of Rule 1.10, Imputed Disqualification: General Rule, is:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.
>
> . . .
>
> (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Counsel for Sureties argue that Sureties have waived any conflict of interest. This argument misses the point - Huyser has not waived any conflict of interest created by his former relationship with Beau Gamble and the Gamble Firm. Thus, if Beau Gamble or Julie Johnson McLean would be prohibited from representing Huyser or the Coal Companies under the cited Rules, their disqualification would be imputed to all members of the Davis Firm.

Beau Gamble's potential conflict of interest based on his former representation of Huyser and the Coal Companies is covered by Rule 1.9, Conflict of Interest: Former Client, which reads:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

The Sureties filed involuntary bankruptcy petitions against the Coal Companies; their interests are materially adverse. The Court has found that the financing of the Coal Companies and the bonding agreements between the Coal Companies and the Sureties are substantially related to the involuntary bankruptcy cases. Huyser and the Coal Companies have not consented to Beau Gamble representing the Sureties. Beau Gamble is prohibited from representing the Sureties pursuant to Rule 1.9 (a).

Any confidential information Beau Gamble has regarding the financial aspects of the Coal Companies is material to the debtor-creditor relationship and any potential reorganization or liquidation in bankruptcy. Beau Gamble is therefore additionally prohibited from representing the Sureties, pursuant to Rule 1.9 (b)(2).

Because Beau Gamble is prohibited from representing the Sureties by Rule 1.9 and his former clients have not consented to such representation, Beau Gamble's conflict of interest is imputed to all members of the Davis Firm by operation of Rule 1.10.

Disqualification of Counsel

Although the Iowa Code of Professional Responsibility for Lawyers and the ABA's Model Rules establish guidelines for the professional conduct of attorneys, violations are not per se grounds for disqualification of counsel. See generally Central Milk Producers Coop. v. Sentry Food Stores, Inc., 573 F.2d 988, 991 (8th Cir. 1978); Meat Price Investigators Ass'n v. Spencer Foods, Inc., 572 F.2d 163 (1978). Dependent upon the circumstances, a Chinese wall may be effective in preserving the confidences of a former client while avoiding disqualification of the entire firm. See, i.e. Matter of Davenport Communications Ltd. Partnership, 109 B.R. 362 (Bankr. S.D.Iowa 1990); Central Milk, 573 F.2d at 991.

In the conflict at hand, however, the Court finds that the appearance of impropriety and Beau Gamble's duty to his former clients that is imputed to his new firm cannot be rectified by placing him behind a Chinese wall. This is not a case where an entry-level associate attorney changed law firms. Beau Gamble had an equity interest in the Gamble Firm and was privy to the confidences of Huyser and the Coal Companies. Beau Gamble now has an equity interest in the Davis Firm and is presumed to know the matters his firm and its attorneys are involved in, including the representation of the Sureties. To preserve the confidences of Huyser and the Coal Companies and to ensure that the public's perception the practice of law is nothing less than professional, the Davis Firm is disqualified from representing the Sureties in these involuntary bankruptcy cases.

ORDER

IT IS THEREFORE ORDERED that the Motion to Disqualify Creditors' Counsel is GRANTED; Robert Gamble and members of the Davis, Brown, Koehn, Shors & Roberts law firm are disqualified from representing the Sureties in these cases.

Dated this _____ day of April 1998.

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RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT