ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.12(a). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 90-4
November 4, 1990

Topic: Appearance of impropriety; representation by former judge of a party to litigation ruled upon by the judge.

Digest: An attorney may not accept private employment in a matter upon which he has personally and substantially participated in a judicial capacity without full disclosure and consent by all parties.

Ref: Illinois Rules of Professional Conduct (1990), Rule 1.12(a)
Illinois Code of Professional Responsibility (1980), Rule 9-101(a)
ISBA EC 9-3
In re Marriage of Thornton, 138 Ill. App. 3d 906

FACTS

An associate judge resigned from the bench five years ago in 1985. As an associate judge, he heard several hundred divorce cases.

QUESTIONS

1. Can the former judge represent a former litigant who appeared before him for any ruling of any nature?
2. Can the former judge represent anyone in an unrelated matter who appeared before the judge in a

dissolution proceeding, even though the judge has not been a member of the judiciary for almost five years?

OPINION

1. Under former Rule 9-101(a) of the 1980 Code of Professional Responsibility, "a lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." Under this former rule, the former judge would have been clearly disqualified from handling post-judgment matters in any case on which the judge made any ruling on the merits.

The specific inclusion of the phrase "on the merits" was a limitation on the scope of Rule 9-101(a). This language indicated that the former judge should not be automatically disqualified from representing a party who appeared before the judge in a dissolution proceeding, provided the rulings by the judge were on purely procedural or uncontested matters, having nothing to do with the merits of the case. However, the former judge would have had to exercise great caution to conform with the spirit of former Canon 9; "a lawyer should avoid even the appearance of professional impropriety." In the Thornton case, the court held that a law firm need not be disqualified from representation of a litigant where a former judge, who had ruled upon discovery requests in the case at issue, became a member of the firm which represented the husband. There, the law firm screened the former judge from participation in the case. There the court relied not only on Rule 9-101(a), but also on ABA Model Rules of Professional Conduct, Rule 1.12.

Rule 1.12 of the Illinois Rules of Professional Conduct, effective August 1, 1990, which succeeds former Section 9-101(a), provides:

> " * * * a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer * * * unless all parties to the proceeding consent after disclosure."

See also ISBA Ethical Consideration 9-3.

Rule 1.12 clearly takes a more liberal stance to the situation at issue than did Rule 9-101(a) of the 1980 Illinois Code of Professional Responsibility.

The language "participated personally and substantially as a judge" is broader in its phraseology than, but essentially the same as, the 1980 language "upon the merits of which he has acted in a judicial capacity." The major change in this provision is the addition of a sweeping new exception to the general prohibition against representation of a former litigant contained in the ending phrase "unless all parties to the proceeding consent after disclosure."

With the addition of this language, in contrast to the 1980 Code, a former judge is not ethically precluded from representing a client on a post-judgment matter even if the former judge rendered a ruling on the merits of that case as long as all parties are fully apprised of the judicial participation in that proceeding and consent to the judge's representation of the litigant. Therefore, it is the Committee's opinion that while utmost caution and discretion should still be exercised by the former judge in deciding whether to take on such a matter in the first instance, the 1990 Rules of Professional

Conduct do not automatically disqualify the former judge from providing such representation.

2. With respect to Question 2, the Committee see nothing in either the 1980 Code or the 1990 Rules which precludes the former judge from representing "anyone who appeared before the judge in a dissolution proceeding," if the matter of that representation is unrelated to the action over which the former judge presided or made any rulings, substantive or otherwise.

The Committee's opinions on this matter, whether under the present Code or the new Rules, are unaffected by the amount of time that has elapsed since the former judge's resignation from the bench. The critical factors are the nature and extent of the former judge's participation in the case, not the length of time since the judge's departure from the bench.

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