

Opinion No. 2 of 2004

Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

This opinion of the Indiana State Bar Association Legal Ethics Committee ("Committee") addresses the application of Indiana Rule of Professional Conduct 1.12 to the following fact situation.

Facts

Lawyer, a retired circuit court judge in County X, is now engaged in the private practice of law and has been retained by Husband to represent him in a custody modification matter in County Y. After filing his Petition to Modify Custody, Lawyer received a letter from Wife's counsel informing Lawyer that during his tenure as Judge he presided over a CHINS (Child In Need of Services) proceeding in County X which involved the same parties now involved in this custody modification action. Neither Lawyer nor Husband has any memory of Lawyer's involvement in the CHINS proceeding; however, after being notified by Wife's counsel of this potential conflict, Lawyer did verify with the court records that he was indeed the presiding judge in said action.

Issues

Does Lawyer's representation of Husband violate Rule 1.12 of the Indiana Rules of Professional Conduct? How can former and sitting judges protect themselves from such potential ethical dilemmas?

Analysis

The fact scenario described above presents an issue of first impression to this Committee. Since the adoption of Indiana's current Rules of Professional Conduct in 1987, this Committee has not had occasion to consider the practical effects of Rule 1.12(a) upon former judges. The Committee, therefore, will not only use this opportunity to answer the question posed to it, but also will discuss ways in which this issue might be avoided in the future, or even if avoidance is a possibility.

Rule 1.12(a) of the Indiana Rules of Professional Conduct provides in pertinent part that "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge..., unless all parties to the proceeding consent after consultation."

In order to determine whether or not Lawyer's representation of Husband would violate Rule 1.12(a), the Committee must first consider whether Lawyer "participated personally and substantially" in the CHINS proceeding, and second, whether the CHINS proceeding and the custody modification action are considered the same "matter" for purposes of Rule 1.12(a). This agenda leads first to the following question:

What does it mean to "participate personally and substantially" in an action for purposes of Rule 1.12(a)?

According to the official Comment to Rule 1.12, the meaning of personal and substantial participation is twofold. First, the Comment recognizes that many jurisdictions have multi-member courts, meaning that there is not one judge who hears every case, rather there are several judges who divide the caseload. As such, a for-

mer judge is not prohibited from representing a client who appeared before the court so long as he was not the presiding judge in said case and, thus, did not personally participate in it.

Second, the Comment recognizes that in a multi-member court, it is possible for a judge to participate administratively, without necessarily participating substantially. The Indiana Rules of Professional Conduct define a matter as "substantial" when it is "a material matter of clear and weighty importance."¹ Mere ministerial participation that does not reach the merits of the case is not the type of substantial participation envisioned by the rule.²

Given the facts as presented to this Committee, there is little doubt that Lawyer participated both personally and substantially in the CHINS proceeding. He acted personally in that he was the presiding judge in the case and substantially in that, as the final arbiter in said CHINS proceeding, his function went beyond what would be considered merely administrative or ministerial.

The fact that neither Lawyer nor Husband now remembers Lawyer's participation in the CHINS proceeding does not defeat the proposition that Lawyer's participation was substantial. In *In re Joseph B. Marrone*,³ neither the lawyer nor his client remembered that the lawyer was the sitting judge in the client's prior bankruptcy hearing. Still the court found that the former judge in fact had participated substantially and personally and that he was thus disqualified from representing his client in his current bankruptcy proceeding.

Thus, as to part one of the test set forth in Rule 1.12(a), this Committee finds that Lawyer did participate substantially and personally in Husband's prior case.

Having satisfied part one of the test, the Committee must now determine whether the former CHINS proceeding and Husband's current custody modification action are considered the same "matter" for purposes of Rule 1.12(a).

When are two actions considered the same "matter" for purposes of Rule 1.12(a)?

In 1963, the Committee touched upon the question of two actions constituting the same matter when another former circuit court judge asked whether he ethically could represent a wife in an action to modify an Order for support, which order he had originally issued as the presiding judge. Although the Committee at that time was considering Canon No. 36 of the Canons of Professional Ethics rather than Rule 1.12 of the

Rules of Professional Conduct, the language and intent of the two rules are similar. The Committee at that time concluded that the prior Order and the action to modify were the same matter and that it would be an ethical violation for the former judge to represent the wife.⁴

The question currently before this Committee is a novel one in that the legal matters at issue clearly do not involve the same proceeding or even the same court; however, they do involve the same parties and potentially the same issues. Rule 1.12 does not set forth a specific definition of a "matter." The Comment to Rule 1.12, however, states that Rule 1.12 generally parallels Rule 1.11 except that Rule 1.11 relates to former government employees in private practice,

rather than to judges. Further, Rule 1.11(d) defines a matter as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties."

One commentator has put it simply, stating that the same issue of fact involving the same parties and the same situation or conduct is the same matter.⁵ In addition, the United States District Court for the Eastern District of Pennsylvania, having considered the meaning of the term "matter" as set forth in Rule 1.12(a), held that where two actions involve the same parties and largely the same facts and conduct,

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they should be considered the same matter.⁶

In order to determine whether the CHINS proceeding and the custody modification action are considered the same matter, the Committee will use the test set forth above. In reviewing these two actions, it is clear that they involved the same parties – Husband, Wife and their children. Further, in both actions, the courts must consider the same issues – the best interests of the children and the conduct of the parties with regard to their children.⁷ As such, this Committee is of the opinion that these two actions must be considered the same matter for purposes of Rule 1.12(a).

Appearance of impropriety

Under the Model Code of Professional Responsibility as originally promulgated by the American Bar Association in 1969, lawyers and judges were advised in Canon 9 that they must avoid even the appearance of impropriety. Although the Model Code of Professional Responsibility has since been replaced in most states by the more recently drafted Model Rules of Professional Conduct, the objective of Canon 9 holds true in Rule 1.12. Specifically, one court has said that the objectives that Rule 1.12 is designed to serve include the following:

[P]revention of the possibility that a judge might take action or refuse to take action while a judge in order to enhance employability or financial rewards in private practice; prevention of the possibility that a former judge might take unfair advantage of judicial access to confidential information; and prevention of an appearance of impropriety.⁸

Applying these objectives to the case currently before this Committee, it is irrelevant whether Lawyer learned, had the opportunity to learn, or even remembers any

confidential information about Wife that he may or may not have been privy to as a result of that proceeding. After all, it is the mere appearance of impropriety that case law tells us Rule 1.12 seeks to avoid,⁹ and, given that Wife has questioned already the appropriateness of Lawyer's representation of Husband in this action, it seems clear that there, in fact, has been an appearance of impropriety.

How can judges avoid these conflicts?

Going forward, perhaps the most obvious way to avoid this type of potential conflict is for each judge to keep a database of each case that he or she presides over personally and substantially. In this age of computers, it seems, at first blush, as if it would not be too taxing for a judge to keep such a record. Still, while a database may seem like an easy fix to this problem, there remain several impracticalities that must be considered.

First, who will pay to maintain such a database? The state? The county? The Judge personally? Is it fair to ask the state to subsidize a program that is of benefit to the Judge alone and which provides no benefit to the state?

Second, if the state were to fund such a program, does the cost of maintaining it outweigh its benefit? While there is a small benefit to be gained by the Judge – namely, his peace of mind – the infrequency of this problem suggests that the expense of maintaining such a database may be economically unjustifiable. We do not mean to say that former judges rarely deal with this specific fact scenario. They surely face this dilemma on a regular basis. However, as this is the first time that this question has been presented to the Committee in more than 40 years of drafting these Advisory Opinions, it appears that

such situations generally resolve themselves informally.

A third practical problem revolves around the physical custody of the record. Who will be responsible for storing the database? The Judge? His secretary? The Clerk? Again, asking anyone other than the Judge to be responsible for maintaining the database is essentially the same as asking the state to subsidize it.

Fourth, putting aside the financial difficulties of maintaining such a database, and even assuming that someone would assume responsibility for its maintenance, there remains no protection against the eventual omission of the name of an ancillary party who later becomes an interested party and a possible source of conflict. Nor does it address the frequency with which parties change their last names, particularly in the area of family law, which accounts for a substantial percentage of a judge's docket.

Finally, even if a database could be put into use for newly elected judges, retired judges who are currently practicing law and who never kept such a database, such as the former judge in the current fact scenario, still are unprotected. So are sitting judges who heretofore have not kept such a database, and any such database now created would forever be an incomplete record. Additionally, there are still some judges who have never kept any kind of computerized record of his or her caseload, making it nearly impossible for any such database to now be regenerated.

Given the questions raised above, the Committee recognizes that situations like the current one are perhaps unavoidable and that there are, unfortunately, no clear solutions to be offered within the context of the current Rules of

Professional Conduct. The Committee can only stress to all former judges that they must be particularly aware of this potential for conflict and must exercise great caution when accepting new clients.

Conclusion

For the reasons stated above, the Committee concludes that Lawyer's representation of Husband violates Rule 1.12 of the Indiana Rules of Professional Conduct and that Lawyer must cease his representation of Husband unless or until Wife consents to said representation.

In addition, the Committee cautions all sitting and former judges of the potential for such conflicts and suggests much forethought before accepting new clients in order to avoid similar conflicts in the future.

Finally, the Committee acknowledges that the existing rules may not satisfactorily address the problem exemplified by the subject situation. To some extent, attorneys face a similar issue as they move from one firm to another. Unless lists of past clients move with those lawyers, they face the potential of undetected conflicts of interest. The only difference for such lawyers is that the issue will arise under Rule 1.9 rather than Rule 1.12. While it would be helpful to have a "safe harbor" rule to rely upon, the Committee is not currently aware of any such provision in the current Rules or in any that are proposed as part of the Ethics 2000 reforms.

Solution by amendment

In view of the practical impediments to compliance with current Rule 1.12, it may be fair to consider amending the Rule so that a violation occurs only if the former judge knowingly represents an individual (hereinafter a "prohibited client") who was a material party to a mat-

ter in which the former judge personally and substantially participated. Such a "knowingly" element already exists in Rule 1.12(c) in the context of imputed disqualification of other members of the former judge's firm. Thus, in the present case, a law partner of the former judge would not violate Rule 1.12 by representing the Husband, unless that lawyer knew of the former judge's involvement in the CHINS matter. A similar safeguard should be made available to former judges.

The Committee does not feel the Rules are intended to erect impossible standards or traps that cannot be avoided. Nor should attorneys be encouraged to disregard the Rules by making them hopelessly difficult to obey. Adding a requirement of intent to Rule 1.12(a) would protect lawyers from ethical violations brought about by situations for which there are no practical means of prevention. A former judge would still have substantial reasons to be careful in tracking prohibited clients, since the possibility of being forced to withdraw from a case mid-stream is something no lawyer enjoys. In cases in which a former judge is unaware of the fact that his client is a prohibited client, the Committee feels no violation of Rule 1.12(a) should exist unless the lawyer continues the representation after becoming aware of the problem. A Rule change as described seems to meet this need.

The change necessary to resolve the problem identified in this opinion could be accomplished by changing Rule 1.12(a) to read as follows:

A lawyer who knows or should reasonably know that such lawyer participated personally and substantially in a matter as a judge or other adjudicative officer, arbitrator or law clerk to such person shall not represent anyone in connection with the

same matter, except as stated in paragraph (d), unless all parties to the proceeding consent after consultation.

The proposed change would not allow an attorney to continue to represent a client if it came to light that the attorney had previously played a personal and substantial role in the matter in a judicial capacity. Consequently, a former judge should still inquire of prospective clients as to the previous contacts with the court the former judge served. Though such inquiries are hardly fool proof, they may reduce the risk of a mid-case withdrawal by the former judge. In appropriate circumstances, similar inquiries could be made as to the contact opposing parties may have had with the former judge's court. ☺

1. Indiana Rules of Professional Conduct, Definitions.
2. See Indiana Rules of Professional Conduct, Comment to Rule 1.12.
3. 2003 WL 22416375 (E.D. Pa.).
4. See Indiana State Bar Association Legal Ethics Committee Opinion 16 of 1963.
5. See *Isidor Paiewonsky Associates, Inc. v. Sharp Properties, Inc.*, 1990 WL 303427 (D. Virgin Islands), citing C. Wolfram, Modern Legal Ethics § 8.10 (1986) at 471, 472-73 (additionally stating that the word "is more in the direction of universality than delimitation.")
6. *Monument Builders of Pennsylvania, Inc. v. The Catholic Cemeteries Ass'n, Inc.*, 190 F.R.D. 164, 166 (1999).
7. See generally Indiana Code §§ 31-34, et seq.
8. *Isidor Paiewonsky Associates, Inc. v. Sharp Properties, Inc.*, supra note 4, at 9.
9. See *id.* While lawyer behavior creating the appearance of impropriety is not per se forbidden by the Rules of Professional Conduct, such a proscription is at the heart of Canon 2 of the Code of Judicial Conduct. In applying Rule 1.12, it seems fair to give weight to the objectives of the Code.