



**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. 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. 94-9
September, 1994**

Topic: Consultation with former judge regarding case still pending

Digest: A former judge may not participate in a matter in which he was previously substantially involved as a judge. A firm failing to screen or prevent a former judge's participation in a case in which he was substantially involved results in the firm's disqualification.

Ref.: Illinois Rules of Professional Conduct, Rule 1.12(a)
ISBA Advisory Opinion No. 800

FACTS

A former judge, following his departure from the bench and return to private practice, has discussions with and gives advice to a lawyer regarding a pending case over which the judge presided and made substantive rulings while on the bench. Such discussions and advice include analysis of the evidence and rulings of the subsequent judge hearing the case, as well as the providing of direction and opinions as to the ongoing proceedings over which he formally presided.

QUESTIONS

1. Has the former judge, now a lawyer, violated provisions of the Rules of Professional Conduct?

2. Has the lawyer speaking with and obtaining advice and direction from the former judge violated provisions of the Rules of Professional Conduct and, if so, must he withdraw from the proceedings?

OPINION

Rule 1.12 sets forth certain prohibitions on the part of former judges who return to private practice. Rule 1.12(a) provides:

Except as provided in Rule 1.12(d), 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, arbitrator or law clerk to such a person unless all to the proceeding consent after disclosure.

It is clear in the present instance that the former judge participated personally and substantially as a judge in the case upon which he is now being consulted and giving advice. However, inasmuch as the prohibitions of Rule 1.12(a) are drawn in the context of a former judge representing someone in connection with a matter in which he was substantially involved while on the bench, the question is raised as to whether Rule 1.12(a) applies to the present situation. We believe that it does.

From the facts submitted, it does not appear that the former judge is a member of or affiliated with the firm which is drawing upon his advice. Nor does the inquiry state that he is being compensated for his efforts. It can thus be argued that the judge is not representing anyone in connection with the matter, and that Rule 1.12(a) does not apply.

However, we do not believe that the Rule is intended to be read so narrowly. Clearly, whether for compensation or not, the former judge is assisting those representing one of the parties previously before him in a judicial capacity. Such being the case, we believe the language of Rule 1.12(a) to be broad enough to encompass the situation. Providing guidance in this respect is our prior Opinion No. 800. Such Opinion dealt with the previous Rule 9-101(a), which provided that "[a] lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." While the facts there involved a judge who became a member of one of the firms which had previously appeared before him, we commented that, as to cases on which the judge previously acted in a substantive capacity, "he is disqualified from all further involvement in that matter." We believe that such is the proper breadth of the prohibition intended by Rule 1.12(a), and that the former judge's consulting with, assisting, and providing direction and opinions to the lawyer in a case over which the judge formerly presided runs afoul of the Rule.

Such being the case, the lawyer obtaining the judge's assistance has participated in a violation of the Rule, and he and his firm are disqualified from further representation in the case under the rationale of Rule 1.12(c), which provides for disqualification of a firm which fails to screen a former judge from participation in the matter over which he previously presided.

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