

ETHICS OPINION

RO-93-04

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QUESTION:

"As you and I discussed, effective January 4, 1993, I became a member of the law firm of H██████████ L██████████ S██████████ & I██████████ here in M██████████. Prior to January 4, and for the past 15 plus years, I served as a Circuit Judge in the 13th Judicial Circuit in M██████████ handling primarily domestic relations matters. Please advise whether or not it is permissible for me to represent an individual under the following situations:

EXAMPLE NO. ONE

Party A and Party B were divorced by a consent decree commonly called in Mobile an answer, waiver and agreement. As a Circuit Judge, I signed the divorce decree based upon Party A and Party B's agreement. There was no trial on the merits and no litigated motions related to the divorce. One party, Party A or Party B, has asked me to represent them in a subsequent hearing on a motion relating to the original decree.

EXAMPLE NO. TWO

Party A and Party B filed for a divorce. After a trial on the merits and receiving testimony and evidence in open court, I rendered a ruling incorporated into a judgment of divorce. Party A or Party B has asked me to represent them in a subsequent motion relating to the original judgment of divorce.

EXAMPLE NO. THREE

Party A and Party B were divorced by me by either answer and waiver or by a trial on the merits. Subsequent to the judgment of divorce, Party A marries Party C. Party A and Party C seek a divorce and one of them asks me to represent them on this matter.

My interpretation and understanding of the Code of Professional Responsibility does not allow me to represent anyone in connection with a matter in which I participated personally and substantially as a judge unless all parties to the proceeding consent after consultation. I feel certain this applies to Example No. Two, however I do not feel that consent is required in Examples No. One and Three. During my 15 years as a Circuit Judge I granted approximately 30,000 divorces involving over 60,000 people here in M██████████ County. The large majority and at least 90 percent of these cases were answer, waiver and agreements of which I feel I did not partici-

pate personally and substantially, but only acted in an administrative capacity."

* * *

ANSWER:

An attorney who previously served as the judge in a domestic relations proceeding, either contested or uncontested, who signs the final decree dissolving the marriage and granting the divorce, may not, thereafter, represent either party to those divorce proceedings unless all parties to the proceeding consent after consultation.

DISCUSSION:

Rule 1.12(a), Alabama Rules of Professional Conduct, states as follows:

"Rule 1.12. Former Judge or Arbitrator

- (a) Except as stated in paragraph (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 parties to the proceeding consent after consultation."

A portion of the Comment to Rule 1.12 also states:

* * *

"So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits."
(emphasis supplied)

The operative words of Rule 1.12(a) are "matter in which the lawyer participated personally and substantially". The questions propounded in the instant inquiry lead to the obvious conclusion that the "matter" issue is established and the representations and actions of the former judge are so connected that no further discussion as to "matter" is required.

However, the "participated personally and substantially" principle requires a more detailed, case by case approach in determining whether representation is prohibited.

The Disciplinary Commission is of the opinion that the rendering of the decree by the former judge does constitute "personal and substantial participation" in the context as envisioned by Rule 1.12(a). By explanation,

instances where such would not exist would be those cases when a judge to whom the case was not assigned granted a continuance due to the absence of the presiding judge in that particular case. Other exceptions would be situations wherein the trial judge to whom the case is not assigned conducts scheduling conferences, status dockets, and the like, but enters no order dealing with the substantive merits involved in the litigation, and takes no action which could affect the rights of the parties to the divorce proceedings.

Regardless of the fact that answer and waiver divorces involve minimal participation by the judge presiding in those cases, the judge still enters the final decree of divorce adopting any provisions of property settlement agreements, etc., which directly affect the rights and responsibilities of the parties to those proceedings. Further, most judges, even in uncontested divorces, establish discretionary guidelines as to what issues make the proceedings "uncontested", whether child support guidelines have been met, and the like. In view of the ramifications of the judge's participation by entering the final decree of divorce, and adopting those documents necessary to dissolve the marriage and granting the divorce, he has "participated personally and substantially" so as to prohibit representation of either party subsequent thereto, absent consent of all parties after consultation.

Therefore, in examples One and Two, above, a lawyer who formerly presided as a judge in those factual scenarios cannot now represent either party to those proceedings in following matters absent consent of all parties subsequent to consultation.

With regard to Example No. Three, such would not appear to constitute a "matter" as envisioned by Rule 1.12(a). Therefore, you may represent Party A since this divorce matter is in no way related to your prior participation as a judge in that prior divorce proceeding.

The second edition of the ABA's Annotated Model Rules of Professional Conduct, in discussing Rule 1.12(a), states, at page 213:

"What is 'Personal and Substantial' Participation?"

Like Rule 1.11, Successive Government and Private Employment, Rule 1.12 applies only to matters in which the participation was 'personal and substantial'. The phrase originally comes from the federal conflict of interest statute, 18 U.S.C. §207(a)(3).

See Rule 1.11, Legal Background at 78 (Proposed Final Draft, May 30, 1981) (noting that Rule 1.11(a), which Rule 1.12(a) tracks, 'adopts, in part, the language of the relevant federal statute extending disqualification to matters in which the lawyer 'participated personally and substantially ... through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise''')."

JAM/vf

4/5/93