Connecticut Bar Association

*Professional Ethics Committee*

30 Bank Street
PO Box 350
New Britain
CT 06050-0350
*06051 for 30 Bank Street*
P: (860) 223-4400
F: (860) 223-4488

Approved December 18, 2013

# INFORMAL OPINION 2013-09

## FORMER PROBATE COURT JUDGE'S COMPLIANCE WITH RULE 1.12(a)

You are a former probate judge, now in private practice. You ask whether you are precluded by Rule 1.12(a) from representing a client in connection with a matter that involves the parties to and issues involved in an earlier probate court proceeding that was pending in your court but that ended after minimal involvement on your part. If you *are* now disqualified from representing the client, you ask what measures you might take to comply with rule 1.12(a) as respects future matters.

**Facts:**

You have provided us with the following facts: You were a Judge of Probate and are now in private practice. You practice in the area of probate law, including within the jurisdiction where you served as a judge. While you were a judge, a party filed in your court an application for an involuntary conservatorship. You appointed a lawyer for the respondent (the person sought to be conserved) pursuant to Connecticut General Statutes, § 45a-649. You indicate that your appointment of the lawyer was not much more than clerical function: you did not review the substance or merits of the application; you did not make any judgment concerning whether the respondent was capable of engaging an attorney; you did not select a particular attorney based upon the needs of the respondent. In short you did not exercise your judgment or discretion except to determine that the application was one for a conservatorship. The conservatorship application was later withdrawn without any further action, consideration, or involvement on your part.

After leaving the probate court bench, you entered private practice. A few years later, the same applicant who had filed the application for an involuntary conservatorship while you were a judge, retained you to file an application for temporary conservatorship in the probate court concerning the same respondent. When the applicant retained you, you did not recognize

the client's name or recall your fleeting involvement in the earlier conservatorship application. On the day of the hearing on the application for temporary conservatorship the now-presiding probate judge stated in a facsimile message to you that it appeared you had "presided over" the earlier application for involuntary conservatorship, and that, under Rule 1.12(a) of the Rules of Professional Conduct you "may be disqualified to represent the petitioner . . ."

Another lawyer accompanied you to the hearing and argued that your participation in the earlier application was *de minimus* and should not disqualify you. You do not recall whether the now-presiding probate judge actually ruled that you were disqualified under Rule 1.12(a) from representing the applicant. Nevertheless, the hearing on the conservatorship application proceeded without your participation.

**Questions:**

You have asked the committee (1) whether your limited involvement as a judge in the earlier application disqualifies you from representing the petitioner in the later application and (2) if so, what can you do to avoid future disqualification under Rule 1.12(a).

The committee declines to offer an opinion as to your first inquiry. The issue was clearly before a presiding probate judge and may well have been ruled upon. If the judge did not rule that you were disqualified, and the conservatorship remains active, the disqualification issue is more appropriately addressed by the judge than by us. We generally do not opine on questions that have already been decided by a court or that are at issue in pending litigation. We will, however, provide some guidance relating to your second inquiry concerning how you as a former judge may protect yourself from future disqualification under Rule 1.12(a).

**Analysis:**

Your question primarily involves Rule 1.12(a) of our Rules of Professional Conduct. Rule 1.12(a) provides, in relevant part:

> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
>
> (a) Except as stated in subsection (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or third-party neutral, unless all parties to the proceeding via informed consent confirmed in writing.

Your question turns upon how to determine when your private practice clients seek to have you represent them "in connection with" a "matter" in which you participated personally as

a judge.

The proper understanding of these issues derives from the purpose of the rule, which is intended to prevent the abuse of public office or appointment. See Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.12:101 (2d ed. 1994). The rule is essentially a conflicts-of-interest rule for lawyers who have served as judges or other adjudicative officers, or who have served as third-party neutrals. See Ann. Mod. Rules Prof. Cond. s. 1.12.

The reach of the proscription of the rule requires an understanding of the term "matter," as used in this context, and when representation of a prospective client would be deemed to be "in connection with" such a matter.

Some of the authorities that have interpreted the term "matter" in the context of Rule 1.12 are reported in the American Bar Association's Annotated Model Rules of Professional Conduct, Seventh Edition, 2011 under Rule 1.12. The ABA's Annotated Model Rules includes the following among its citations:

> Durham County v. Richards & Assocs., Inc., 742 F.2d 811 (4th Cir. 1984) (dispute about motion to compel arbitration of contractor's claims against owner did not involve same "matter" as prior arbitration of another contractor's damage claims against general contractor on same project; no disqualification of contractor's lawyer even though he arbitrated other contractor's damage claims); In re Marrone, No. CIV.A. 02-9364, 2003 WL 22416375 (E.D. Pa. Oct. 22, 2003) (affirming disqualification of debtor's counsel in bankruptcy proceedings; when serving as bankruptcy judge, counsel assigned two of debtor's "numerous" previous bankruptcies); Schultz v. Schultz, 783 So. 2d 329 (Fla. Dist. Ct. App. 2001) (trial court abused its discretion by disqualifying wife's counsel in divorce solely because retired partner in counsel's firm was appointed arbitrator in shareholder suit against husband and his company; matters were different); James v. Miss. Bar, 962 So. 2d 528 (Miss. 2007) (lawyer violated Rule 1.12 by undertaking representation of woman seeking to modify post-divorce child custody order; as chancellor, lawyer presided over child abuse case involving husband's visitation); In re Onorevole, 511 A.2d 1171 (N.J. 1986) (no violation of Rule 1.12(a) when retired administrative law judge who heard budget appeal involving township board of education later retained as private lawyer by same

board to investigate and bring tenure charges against its superintendent); In re Brittingham, 319 S.W.3d 95 (Tex. 2010) (lawyer who as justice had served on appeals court panel affirming two trial court orders in ancillary probate proceeding disqualified from representing relators in mandamus arising from same ancillary proceeding; "matter" not limited to discrete appeal or proceeding); Ala. Ethics Op. 93-04 (1993) (former judge may not represent party in motion related to divorce decree he signed, even if decree based upon waiver and agreement and required minimal judicial participation; former judge may, however, represent party divorcing spouse whose previous divorce judge adjudicated); S.C. Ethics Op. 93-26 (1993) (former family court judge may not represent party alleging violation of order he entered as judge unless all parties to proceeding consent after disclosure, even though order routine and entered on consent); cf. Lee v. Pac. Telesis Group Comp. Disability Benefits Plan, No. C 09-3504 SBA, 2010 WL 2721449 (N.D. Cal. July 7, 2010) (applying California's "substantially factually related" test to disqualify lawyer for ERISA disability plaintiff who mediated someone else's ERISA disability claim against plan administered by same defendants).

What these authorities make clear is that what constitutes the same "matter" for purposes of Rule 1.12(a) is intensely fact-specific, involving the identity of the parties, the operative facts, and the relevant legal issues encompassed in what you handled as a judge.

A proposed engagement would not involve the same "matter" under Rule 1.12(a) as one you were involved in as a judge if:

(a) the parties to the proposed engagement are the same, but the relevant facts and legal issues are entirely unrelated to the proceedings you handled as a judge; or

(b) the legal issues in the proposed engagement are the same, but the parties and facts are entirely unrelated to the matter you handled as a judge.

However, where the proposed engagement would involve one or more of the same parties and some of the same operative facts and/or legal issues as a matter with which you were personally involved as a judge, then the proposed engagement may well be deemed to be the same "matter" with which you were involved as a judge for purposes of Rule 1.12(a). (This could be true even if, from the court's standpoint, the proposed engagement is a new proceeding.) If the proposed engagement is the same "matter," Rule 1.12(a) would preclude you

from representing anyone (not simply the participants in the matter when it was before the lawyer as a judge) "in connection with" the matter unless you obtain the informed consent, confirmed in writing, from "all parties to the proceeding."

We recognize that it is difficult for a former judge to identify all matters in which he or she participated as a judge. For example, a probate judge may, over the course of his or her service, sign thousands of orders for matters that are later withdrawn or, for whatever reason, are not pursued, adjudicated or acted upon by the judge in any material way. Likewise, a Superior Court judge may have pre-tried thousands of cases and have no recollection of the cases or the names of parties involved. The courts' electronic systems do not track every instance in which a judge "participates" in cases on the courts' dockets. So how can a former judge reasonably protect him or herself from possible disqualification under Rule 1.12(a)? One reasonable approach might be to ask, at the outset of a proposed engagement, whether the potential client or any of the other parties involved in the engagement have previously had any dealings with each other in court. If the answer is "yes," follow-up questions relating to the nature of the previous court proceedings might rule out any possible involvement you could have had as a judge. If you are unable to rule out your possible involvement as a judge, you would be well-advised to take reasonable measures, such as contacting the court clerk to inquire as to whether you participated in any proceedings identified by the potential client. If you did participate in such a proceeding as a judge, you would then need to analyze whether the proposed engagement involves the same "matter" under Rule 1.12(a) and, if so, obtain the informed consent, confirmed in writing, of "all parties to the proceeding" before undertaking the representation.

THE COMMITTEE ON PROFESSIONAL ETHICS

By_____
John R. Logan, Chair