



**New York State Bar Association
Committee on Professional Ethics**

Opinion 985 (10/8/13)

Topic: Former law clerk appearing before judge who employed clerk

Digest: A lawyer is permitted to appear, and assist others who appear, before a judge by whom the lawyer was employed, on matters unless the lawyer had substantial personal participation in the matter.

Rules: 1.12(b)(2)

FACTS

1. The inquiring lawyer has served as a law clerk of a judge in the past. Now the lawyer has opportunities to advise and provide legal analysis to clients or other lawyers in matters before the judge for whom the lawyer had worked. None of the opportunities relate to any matters before the judge while the lawyer worked for the judge.

QUESTION

2. May a lawyer who formerly served as a legal clerk, appear, or assist those who appear, before the judge who had employed the lawyer?

3. If prohibited from appearing before the judge for whom the lawyer worked, may the lawyer appear before judges of the same court for whom the lawyer did not work?

OPINION

4. The only Rule of the New York Rules of Professional Conduct that addresses this matter is Rule 1.12. It states in relevant part, "...unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a law clerk to a judge..." Rule 1.12(b)(2).

5. In order to trigger the requirement for informed consent, the matter must be one in which the law clerk had substantial personal involvement. Thus absent written informed consent from the parties, confirmed in writing, a former law clerk is prohibited by this Rule from appearing

before the judge in such a matter.^{1,2}

6. In the present inquiry, the lawyer asks only whether it is permissible to appear or advise others who will appear before the judge for whom the lawyer worked in new matters, that is, those matters which had not been before the judge while the lawyer was employed by the judge.

7. The application of these principles is illustrated in the Second Department's decision, *In re Coleman*, 69 AD3d 846 (2010). There the court held that a lawyer who had served as supervising attorney in the law department supporting the Surrogate's Court was not disqualified from appearing in that court on matters which had been handled by the lawyer's former law department. The court held that the record did not support a finding that "the former government attorney was "personally involved to an important, material degree, in the investigati[on] or deliberative processes regarding the transactions or facts in question" (*In re Coleman*, at 849).

8. Given that the former law clerk is not prohibited by Rule 1.12 from appearing before the judge who employed the lawyer, the lawyer is permitted to appear before other judges of the same court as the judge for whom the lawyer worked.

CONCLUSION

9. A lawyer is permitted to appear, and assist others who appear, before a judge by whom the lawyer was employed, on matters unless the lawyer had substantial personal participation in the matter.

(25-13)

¹ Whether the Judge has any obligations, or is required to consent to the former law clerk's appearance before the Judge, is a question under the Code of Judicial Conduct; this Committee expresses no opinion about the application or interpretation of the Code of Judicial Conduct.

² What constitutes "substantial and personal involvement" has been discussed by this Committee in several opinions. For example, Opinion 748 (2001) sets forth factors which might require disqualification of a government prosecutor from representing a criminal defendant who was investigated and prosecuted while the lawyer was employed in the prosecutor's office. That Opinion states, "DR 9-101(B) (the predecessor to Rule 1.12 (b)) made clear that disqualification must be based on the lawyer's personal participation to a significant extent." The factors to be considered in analyzing whether the involvement of a lawyer was personal and substantial include serving more than a supervisory role, having responsibility for more than mere ministerial aspects of a matter, assisting in the research and writing of decisions on the merits and interaction with parties by which the clerk might have had access to confidential information.