NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1209 (12/01/2020)

TOPIC: Retention of former appellate judge with respect to easement on which judge previously ruled.

DIGEST: A former appellate judge, who was on a panel which issued a dispositive order about the scope of an easement, is personally disqualified from representing the owner of the servient estate of the same easement with respect to legal questions involving obstructions to the easement, equitable relief, adverse possession, and "overburdening" of the easement. However, the firm to which the former appellate judge is counsel may, pursuant to Rule 1.12(d), undertake the representation upon appropriate screening and notification.

RULES: 1.11(e), 1.12(a), 1.12(d)

FACTS

1. The inquirer is a New York lawyer who formerly served as a New York State appellate judge. Ten years ago, inquiring counsel was on a panel which issued a dispositive order confirming the validity and scope of an easement. Inquiring counsel, having retired from the bench, is now "of counsel" to a firm. That firm has been approached by the owner of the servient estate of the same easement with respect to questions involving the potential legal effect of obstructions to the easement, the possible availability of equitable relief to the owner of the dominant estate, the applicability of adverse possession, and whether subdivision of the dominant estate would result in an "overburdening" of the easement.

QUESTION

2. Does inquiring counsel's service as a judge in the appellate case preclude inquiring counsel or inquiring counsel's firm from undertaking this new representation?

OPINION

Is the former judge personally disqualified?

3. Rule 1.12(a) of the New York Rules of Professional Conduct ("Rules") provides: "A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity."

4. "A conflict under Rule 1.12(a) is a non-waivable conflict" (N.Y. State 1064, ¶ 4 (2015)), and should be read in conjunction with both the New York Code of Judicial Conduct (22 NYCRR Part 100) and Judiciary Law § 17. *See,* Roy D. Simon, Jr., *Simon's New York Rules of Professional Conduct Annotated* (May 2019 Update) §1.12:2.

5. In N.Y. State 1064 (2015), cited by the Appellate Division in *People v. Burks*, 172 A.D.3d 1640, 1642 (3d Dep't), *lv. to app. den'd*, 33 N.Y.3d 1102 (2019), this Committee opined that Rule 1.12(a) prohibited a former family court judge from privately representing a parent in a permanent neglect proceeding because the same parent had appeared before the judge in a previous neglect proceeding, and the judge had issued an order "upon the merits" to put the subject child in foster care. This Committee further opined that Rule 1.12(a) also prohibited the former judge from representing the parent in a proceeding to modify child support when the inquirer, as a judge, had issued orders upon the merits related to custody and visitation in the same matter, and custody and visitation issues would be revisited as part of the application to amend child support.

6. In analyzing a former judge's obligations under Rule 1.12(a), Opinion 1064 identified three terms used in the Rule which this Committee was required to define: "judicial capacity," "matter," and "merits."

7. For purposes of the instant inquiry, there is no need to revisit the questions of "judicial capacity" or "merits," since the inquirer was plainly acting in a "judicial capacity" and ruling on the "merits" when he served on the appellate panel. The sole issue before us is whether the advice which the owner of the servient estate now seeks from inquiring counsel or from inquiring counsel's firm is with respect to the same "matter" that was before inquiring counsel as a jurist.

8. Relying heavily upon Comment [10] to Rule 1.11, this Committee in Opinion 1064 adopted a "facts, parties, and time" test. Comment [10] to Rule 1.11 provides:

> In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters.

9. Addressing the first test factor – whether the matters "involve the same basic facts" -- in the appellate case which came before inquiring counsel, it is apparent that the trial court and then the appellate court were required to determine the intent of the original parties to the easement with respect to the use to be made of the easement. It would appear that this same intent would be relevant in determining whether a subdivision of the dominant property would "overburden" the easement. As explained in John W. Bruce and James D. Ely, Jr., *The Law of Easements & Licenses & Land*, §8:13 (June 2020 Update) (footnotes omitted): "The scope of an easement may be expanded beyond the terms of the grant or the original usage, but the dominant owner may not unreasonably increase the burden on the servient estate…. Since these rights are relative, courts must strive to protect the interests of both parties…. What constitutes an undue burden depends on the facts of particular situations, and general conclusions are difficult to draw." As this same analysis could be applied to a consideration of the impact of obstructions,

or even the applicability of adverse possession, the earlier litigation, and the present consultation, may be said to involve the same basic facts.

10. Turning to the second test factor – "same or related parties" -- the owners of the respective dominant and servient estates are the same as, or in privity with, or successors to, the parties to the earlier litigation. For purposes of the current consultation, those same parties stand in the shoes of their predecessors, asserting the same bundle of legal rights.

11. Turning to the third and final test factor – the time elapsed -- a decade has passed since the appellate case on which inquiring counsel sat as a judge. However, the earlier litigation turned upon the construction of the specific written and recorded easement agreement, which remains unchanged. Therefore, the passage of time has little mitigating impact on the relatedness of the matters.

12. Accordingly, it is our opinion that the appellate case and the current consultation involve the same "matter" for purposes of Rule 1.12(a)(1).

Is the former judge's law firm disqualified?

13. We have also been asked whether the firm with which inquiring counsel is associated may take on the representation of the servient estate owner.

14. Under Rule 1.12(d), screening will avoid imputation of a former judge's conflict as long as the prerequisites of that section are followed. Rule 1.12(d) provides:

> (d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the firm acts promptly and reasonably to:
>
> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
>
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
>
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
>
> (iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

> (2) There are no other circumstances in the particular representation that create an appearance of impropriety.

15. If the inquirer's law firm complies with Rule 1.12(d) by promptly and properly screening off the inquirer and by providing the specified notifications, and if no other circumstances in the particular representation create an appearance of impropriety, then Rule 1.12 will not prohibit the firm from accepting the representation despite the inquirer's personal disqualification.

CONCLUSION

16. A former appellate judge who was part of a panel which issued a dispositive order in a case involving the scope and extent of an easement is personally disqualified under Rule 1.12(a) from representing the owner of the servient estate of the same easement with respect to questions involving that easement. However, pursuant to Rule 1.12(d), the firm to which the former appellate judge is counsel may undertake the representation upon appropriate screening and notification.

(25-20)