Wisconsin Ethics Opinion E-09-04: Conflicts arising from dual roles as Family Court Commissioner and Guardian ad Litem

December 26, 2009

Synopsis: When a lawyer has personally and substantially participated in a matter as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, the lawyer may not thereafter represent anyone in connection with the matter, and this prohibition includes acting as a GAL in the same matter. A lawyer participates "personally and substantially" in a matter when the lawyer's involvement rises above remote and incidental involvement and directly affects the rights of the parties or the merits. Personal and substantial participation includes even routine activities such as approving stipulated agreements and issuing orders without meeting the parties. Personal and substantial participation does not, however, necessarily require issuance of orders or other similar affirmative acts. In Wisconsin, this prohibition is not subject to waiver by the parties, but an individual affected lawyer may be timely screened to defeat the disqualification of an entire firm. For purposes of the Rule, a "matter" may continue in a different form, such as a different case with a different caption, if the parties are the same and the matter involves largely the same facts and issues.

Introduction

This opinion is in response to questions posed to the State Bar's Standing Committee on Professional Ethics (the "Committee") by a lawyer who is employed half-time serving as a Family Court Commissioner ("FCC") and half-time serving as *Guardian ad Litem* ("GAL") for children in Child in Need of Protection or Services ("CHIPS") cases and Termination of Parental Rights (TPR) cases in the same county. Because the requesting lawyer ('requestor") is employed as both an advocate and an adjudicative officer in the same county and in actions affecting the family, there is a potential that the lawyer may become involved in the same matter in both capacities at different times.

Before addressing the specific questions posed by the requestor, the Committee first notes that conduct as an FCC is subject to the Code of Judicial Conduct, found in SCR Chapter 60, rather than the Rules of Professional Conduct for Attorneys (the "Rules") found in SCR Chapter 20. The Judicial Commission, rather than the State Bar's Committee on Professional Ethics, issues opinions on judicial conduct, and the Committee therefore expresses no opinion as to what extent the Code of Judicial Conduct governs the conduct of the requestor as FCC. This opinion is limited to discussion of the role of the Rules in governing the conduct of the requestor as GAL.

Question One

Is there a distinction under SCR 20:1.12(a) between ministerial acts and more substantive, discretionary acts? More specifically, does the routine signing of documents, such as Order To Show Cause papers setting hearings, stipulations, fee waivers and mediation orders as FCC preclude later involvement in the matter as GAL?

Would the following examples of participation in a matter as FCC give rise to a conflict under SCR 20:1.12(a) if I were to later act as an advocate in the same matter?

a) I sign a form Order to Show Cause for Contempt as FCC (no contact with parties, but ordering one or both of them to appear for a hearing), but do not hold the hearing (i.e., it is set on the calendar for the full time FCC).
b) I sign a negative notice order (a document prepared by our Child Support Agency under an order so authorizing), modifying an existing order on child support, but never meet the parties.
c) I sign a stipulation submitted by the parties which modifies child support or some other financial issue, but never meet the parties.
d) I sign a stipulation submitted by the parties which modifies legal custody and/or placement of the child(ren), but never meet the parties.
e) I sign a default paternity judgment.
f) I preside over a child support contempt proceeding, but learn nothing about issues such as custody or placement.

Response

The first question asks when a lawyer may become involved in a matter as GAL after having been involved in that matter as FCC. Put another way, the questions asks when a lawyer may act as an advocate in a matter after having previously served in a judicial capacity in the same matter. More specifically, the question is focused on whether involvement in a matter by performing "ministerial" acts, as opposed to involvement by more substantive acts, will prevent the lawyer from later acting as an advocate in the same matter. The relevant Rule, SCR 20:1.12(a) reads as follows:

> *Except as stated in par. (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 or law clerk to such a person or as an arbitrator, mediator or other 3rd−party neutral.*

In light of the language of the Rule, the relevant question becomes what constitutes "personal and substantial" participation in a matter. The Comment, paragraph [1], to SCR 20:1.12 provides some guidance:

> *The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited*

from representing a client in a matter pending in the court, but in which the former judge did not participate. 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.

Thus, "remote or incidental administrative responsibility that did not affect the merits" does not constitute personal and substantial participation in a matter. The Rule and Comment lack further elaboration, and there are no Wisconsin cases or ethics opinions on point. We therefore look to other sources for guidance.

One legal ethics treatise[1] illustrates the concept of personal and substantial participation with the following example:

The Court of Appeals of one of the states is a multimember court that typically sits in panels of three judges. Not long ago, a panel decided a controversial case over a strong dissent. The losing party petitioned for a hearing en banc, but the petition was denied.

One of the judges who did not sit on the original panel, L, retired from the court soon thereafter and entered private practice.

L should be considered to have participated "personally and substantially" in the court's determination of the petition for rehearing...In order to vote on the petition for rehearing, L presumably had to familiarize herself with at least some details of the case. That takes the matter out of the category of cases merely "pending" while L was a member of the court, as suggested by Comment [1] to Rule 1.12. By the same token, her involvement was more than "remote or incidental administrative responsibility that did not affect the merits"...

Ethics Committees of various state bars have also addressed this issue. *South Carolina Ethics Advisory Opinion 93-26 (1993)* opined that a judge who, without any inquiry into the merits of the action, approved and adopted a routine agreement of the parties participated personally and substantially in the matter. The opinion reasoned that approving an agreement of the parties is substantial participation in a matter because it involved the entry of an order on the merits in the case. The South Carolina Bar also followed this reasoning in *Ethics Advisory Opinion 99-06 (1999)*, wherein it was found that acting as a trial judge who merely incorporated the rulings of other judges and approved consent orders in matters that directly affected both parties reached the level of personal and substantial participation, rather than "remote or incidental administrative responsibility." The Illinois State Bar's Ethics Committee, in *Advisory Opinion 800 (1983)* opined "to the extent that (a judge) participated judicially in the merits of a particular matter, including the hearing of prove-ups on default judgments, routine matters and non-contested motions, he is disqualified from all further involvement in that matter."

[1] Geoffrey C. Hazard, Jr. & William Hodes, *The Law of Lawyering* §16.3, Illustration 16-1, (3rd ed. 2002 & Supp. 2005).

In *Ethics Opinion Number 1993-04 (1993),* the Ethics Committee of the State Bar of Alabama opined that a former judge would be precluded from acting as an advocate in a matter in which the former judge had simply signed the divorce decree based upon agreement of the parties and explained their reasoning as follows:

> *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…*

Case law from other jurisdictions similarly supports the proposition that even routine, uncontested actions that affect the merits of the matter constitute personal and substantial participation in a matter. In *Office of Disciplinary Counsel v. Christ, 74 Ohio St.3d 308, 658 N.E.2d 746 (1996)*, a former judge who had signed the final judgment entry in a divorce was found to have violated Ohio's disciplinary rules by subsequently representing one of the parties in post judgment motions while in private practice. In *Application for Disciplinary Action against Hoffman, 670 N.W.2d 500 (2003)*, a former judge unsuccessfully argued that conducting a default divorce did not constitute "personal and substantial" participation in a matter and the North Dakota supreme court held that, as a matter of law, a judge who presides over a divorce, whether by default or trial, participates personally and substantially in a matter.

The Committee agrees with the above referenced authorities and believes that *any* participation in a matter that reaches the merits or directly affects the rights of the parties constitutes personal and substantial participation within the meaning of SCR 20:1.12(a). Thus, the approval of stipulated agreements or the issuance of orders necessarily directly affects the parties and/or merits, and therefore would constitute personal and substantial participation in a matter. It is important to note here, however, that personal and substantial participation in a matter is not limited to, and does not require, certain specific actions, such as approving stipulations. SCR 20:1.12(a) governs subsequent conflicts for all third party neutrals, not just judges and adjudicative officers, and mediators, who issue no orders and approve no stipulations, clearly participate personally and substantially in mediations they conduct. Any participation in a matter in a substantive way, such as presiding over a settlement conference,[2] will constitute personal and substantial participation in a matter, even if no orders are issued.

The distinction between involvement in a matter that gives rise to a later conflict and that which does not is the distinction between *administrative,* rather than *ministerial* (as that term is used by the requestor) involvement and substantive involvement. If, for example, an FCC were to handle a matter in a purely administrative way, such as merely approving the assignment of a

[2] *See e.g. Cho v. Superior Court, 39 Cal. App. 4th 113, 45 Cal. Rptr. 2d. 863 (Cal. Ct. App. 1995).*

new case to another FCC pursuant to a predetermined rotation schedule, then such involvement would not prevent the FCC from later acting as an advocate in the matter. If, however, the FCC had issued an order to appear or preliminary injunction, then the participation is personal and substantial.

With respect to the specific examples presented by the requestor, the Committee notes that in each example, an order is issued, a stipulation is approved or another action is undertaken that directly affects the rights of the parties or merits, and therefore each example constitutes personal and substantial participation in the matter.

Question Two

Is there a difference if the parties in the family case are not identical to the parties in the subsequent CHIPS or TPR case? For example, if I hold a child support contempt hearing where the father, John Jones, has not paid child support to the mother, Jane Adams, with respect to their child, John Jr., and the subsequent CHIPS case involves the same father, John Jones, but a different mother and a different child.

Response

The second question asks when two cases are the same "matter" for purposes of the SCR 20:1.12(a). Neither the language of SCR 20:1.12, nor its comment defines "matter." The comment in paragraph [1], however, notes that SCR 20:1.12 generally parallels Rule 1.11. SCR 20:1.11(e) defines "matter" as follows:

> *(1) any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and*
> *(2) any other matter covered by the conflict of interest rules of the appropriate government agency.*

The comment to SCR 20:1.11(e) further explains the definition of "matter:"

> *For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.*

SCR 20:1.11 governs conflicts in successive government and private employment of lawyers and it has been noted that, for purposes of SCR 20:1.12, the definition of a "matter" is narrower, because judges and adjudicative officers do not confront the broader array of tasks and issues faced by lawyers employed by the government.[3] It is evident that almost any matter that a judge or adjudicative officer is involved in is a "judicial or other proceeding," and thus the definition in SCR 20:1.11(d) provides only limited guidance. With no Wisconsin cases or ethics opinions on point, we again look for other sources of guidance.

[3] *See The Law of Lawyering, §16.3.*

In *Ethics Opinion No. 2 of 2004*, the State Bar of Indiana's Ethics Committee discussed what constitutes a "matter" under Rule 1.12(a).

> *One commentator has put it simply, stating that the same issue of fact involving the same parties and the same situation or conduct is the same matter.*[4] *In addition, the United States District Court for the Eastern District of Pennsylvania, having considered the meaning of the term "matter" as set forth in Rule 1.12(a), held that where two actions involve the same parties and largely the same facts and conduct, they should be considered the same matter.*[5]

This analysis is consistent with the holdings of courts that have also looked at the question of what constitutes a "matter" for purposes of Rule 1.12. In *James v. Mississippi Bar, 962 So.2d 528 (2007),* the Mississippi supreme court found a child abuse proceeding and a subsequent child custody modification proceeding involving the same parties to be the same matter for purposes of Rule 1.12(a), noting that the two cases, while having separate docket numbers, involved the same parties, the same issues and the same concerns. By way of contrast, in *Durham County v. Richards & Associates Inc.,* 742 F.2d 811 (4th Cir. 1984), a court held that a lawyer's prior service as arbitrator of a general contractor's damage claim against the project owner did not preclude his later representation of the electrical contractor on the same project seeking to compel arbitration of its dispute with the owner, ruling that the later dispute over arbitrability "clearly [did] not involve the same 'matter'".

The above cited cases illustrate an important point about the meaning of the term "matter." While different cases can be the same matter for purposes of SCR 20:1.12(a), the mere fact that cases are related does not, without more, mean that the separate cases are the same matter.[6] As noted previously, in order for different cases to be considered the same matter, they must involve the same parties and largely the same facts and issues.

Applying this analysis to the facts presented (a child support enforcement action and subsequent CHIPS action involving the same father but different mothers and children), the Committee believes that the CHIPS action would likely not be the same "matter" as the child support enforcement action. While both matters involve the same father, the other parties

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[4] *See Isidor Paiewonsky Associates, Inc. v. Sharp Properties, Inc.,* 1990 WL 303427 (D. Virgin Islands), *citing* C. Wolfram, Modern Legal Ethics § 8.10 (1986) at 471, 472-73 (additionally stating that the word "is more in the direction of universality than delimination.")

[5] *Monument Builders of Pennsylvania, Inc. v. The Catholic Cemeteries Ass'n, Inc., 190 F.R.D. 164,166 (1999).*

[6] Unlike SCR 20:1.9 (Duties to former clients), which holds that a lawyer has a conflict with respect to a former client when the lawyer takes a position adverse to the former client in a matter that is *substantially related* to the prior representation of the former client, SCR 20:1.12 prohibits subsequent involvement as a lawyer only in the same matter.

(mothers, children[7] and perhaps units of government) in the matters would likely be different, and generally the issues and facts involved in a CHIPS action are different than those involved in a child support enforcement action. Therefore, these separate cases are almost certainly not the same matter for purposes of SCR 20:1.12(a).

The Committee's answer to this question is provisional because the question of whether or not two actions are the same "matter" is always driven by specific facts. Hence we opine that the two actions in question are *likely* not the same matter and a more definite answer would require more facts, although the fact the two matters involve different parties makes it highly unlikely that they could be considered the same matter. There may be circumstances in which the issues, facts and parties in a child support enforcement action are so entwined with a subsequent CHIPS action that they would be the same "matter," or in which a case remains the same "matter" even though different parties are involved at different times. For example, an FCC who sets child support for the first child of a father of different children by different mothers, would likely be precluded from acting as an advocate in a matter involving a different child where child support was at issue. Each instance requires individual attention.

Question 3

Does it matter that the disqualification arising under the Rule, which prohibits me from serving as GAL and which arises from slight involvement with the parties as FCC, does not serve any of the purposes behind the rule? As GAL, I don't represent either parent – I represent the best interests of the child(ren).

Response

The third question essentially asks whether disqualification arising from "slight involvement" under SCR 20:1.12(a) is inconsistent with the purposes of the rule. With respect to the purpose of the Rule, it has been explained as follows:

> *Judging is a public function and judges are working for the public at large, even as they adjudicate cases between specific parties. Public confidence in the judicial system would be undermined in the absence of Rule 1.12(a), as suspicions would then be raised whether the judge had anticipated the private representation when making the public decision, or whether a private party had in some way improperly influenced the decision.*[8]

In the *James* cases discussed above, the Mississippi supreme court noted that the purpose of Rule 1.12 is to safeguard the integrity of the legal profession. Thus, while the Rule serves to prohibit the very real conflict of a lawyer as advocate questioning or challenging decisions made by that very lawyer in a prior adjudicative or third-party neutral role, another important purpose

[7] Although children are technically not "parties" to certain actions affecting the family, the Committee believes that a GAL in a matter is "representing" someone within the meaning of SCR 20:1.12, as well as other conflicts Rules. See the response to question 3.

[8] *The Law of Lawyering*, §16.3

of the Rule is to preserve public confidence in the judiciary.[9] Further, the anticipation of future employment in a matter presents a very real danger of affecting judicial decisions to the detriment of one or more of the parties. The Committee therefore believes that all disqualifications arising from conflicts under SCR 20:1.12(a) promote the purpose of the Rule because any lawyer who acts as an advocate in a matter after having served as an adjudicative officer in the same matter may raise questions about the independence of the judiciary or other third-party neutrals and thus undermine public confidence in the adjudicative process. In addition, disqualifications arising under the Rule serve to prevent the real possibility of anticipated future employment coloring judicial decisions.

The requestor also notes that the role of GAL is to represent the best interests of the children, rather than the parents who are typically parties in CHIPS and TPR actions. GALs, like other lawyers, are bound by the Rules of Professional Conduct.[10] Further, conflict rules have been applied to GALs, despite their unique role,[11] and the Wisconsin supreme court has held that an individual whose best interests are represented by a GAL has the status of a client for purposes of SCR 20:4.2.[12] Therefore, the prohibition in SCR 20:1.12(a) on representing "anyone" in connection with a matter in which a lawyer has served as a judge or adjudicative officer includes acting as a GAL.

Other Considerations

While the requestor did not pose any questions to the Committee with respect to two important aspects of SCR 20:1.12, the Committee believes it is important to touch briefly upon these topics should other lawyers who act as adjudicative officers or third party neutrals look to this opinion for guidance. First, the prohibition contained in SCR 20:1.12(a) on acting as an advocate in a matter after having served in an adjudicative officer or third party neutral is, unlike ABA Model Rule 1.12 and the equivalent Rules of many other states, ***not*** subject to waiver by the parties. There is therefore no possibility in Wisconsin of circumventing the restriction of the Rule by seeking the consent of the parties involved in a matter. Second, while SCR 20:1.12(a) does not permit waiver, pursuant to SCR 20:1.12(c), a firm with which a former adjudicative officer or third party neutral is associated may defeat the imputation of the conflict of the affected lawyer to other lawyers in the firm by timely screening, ensuring that the screened lawyer receives no portion of the fee and promptly providing written notice to the parties and any appropriate tribunal. For a definition of screening, see SCR 20:1.0(n).

[9] The Committee notes that, in Wisconsin, conflicts arising under SCR 20:1.12(a) are not subject to waiver. The fact that affected parties are not allowed to waive the conflict reinforces this view of the purpose of the Rule being public protection rather than protection of specific individuals.

[10] See SCR 20:4.5.

[11] See *Matter of Guardianship of Tamara L.P., 177 Wis.2d 770, 503 N.W.2d 333 (App. 1993); In the Interest of Steveon R.A., 196 Wis.2d 171, 537 N.W.2d 142 (Ct. App. 1995).*

[12] See *Disciplinary Proceedings against Kinast, 192 Wis.2d 36, 530 N.W.2d 387 (1995).*