Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral
(Proposed Rule Adopted by the Board on March 9, 2017)

(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, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.*

(b) A lawyer shall not participate in discussions regarding prospective employment with any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third*party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm* for a party, in a matter in which the staff attorney or clerk is participating substantially, but only with the approval of the court.

(c) If a lawyer is prohibited from representation by paragraph (a), other lawyers in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter only if:

(1) the prohibition does not arise from the lawyer's service as a mediator or settlement judge;

(2) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] Paragraphs (a) and (b) apply when a former judge or other adjudicative officer, or a judicial staff attorney or law clerk to such a person,* or an arbitrator, mediator or other third-party neutral, has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation, as may occur in a chambers with several staff attorneys or law clerks. Substantial participation requires that the lawyer's involvement was of significance to the matter. Participation may be substantial even though it was not determinative of the outcome of a particular case or matter. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, the lawyer

participated through decision, recommendation, or the rendering of advice on a particular case or matter. However, 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, or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also 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, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. The term “adjudicative officer” includes such officials as judges pro tempore, referees and special masters.

[2] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See rule 2.4.

[3] Paragraph (c)(2) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.12
(No Current Rule)
Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: 1.7 (current client conflicts) [rule 3-310(B) and (C)]; 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. The Model Rules also include Model Rule 1.8, which compiles in a single rule 10 separate conflicts of interest concepts,[1] and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

(2) proposed rule 1.12 (conflicts of interest involving former judges, third party neutrals and their staffs), which provides for imputation and screening when judges or other third party neutrals, or their staffs, move into private practice. Proposed rule 1.12 largely adheres to the structure and substance of Model Rule 1.12 but makes changes to the black letter text to clarify the limitations on negotiations for employment (paragraph (b) and specific limitations in California case law on the ability of a law firm to screen a former judge who has acted as a mediator or settlement judge after the judge has moved into private practice with the firm.

Proposed rule 1.12 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

[1] Rather than gather disparate conflicts concepts in a single rule, the Commission has recommended that each provision that corresponds to a concept in Model Rule 1.8 be assigned a separate rule number as is done in the current California rules. For example, the proposed rule corresponding to Model Rule 1.8(a) is numbered 1.8.1; the rule corresponding to Model Rule 1.8(b) is numbered 1.8.2, and so forth. Each of these rules will be addressed in separate executive summaries.

1. ***Recommendation of the ABA Model Rule Conflicts Framework***. of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).[2]

2. ***Recommendation of addressing duties of former judges, third party neutrals, and their staffs in a rule that tracks the organization of Model Rule 1.9***. There are four provisions in the proposed Rule, one which states the basic prohibition on representations of private clients after leaving service as a judge or third party neutral, or as legal staff thereto (paragraph (a), one which sets forth the limitations on employment negotiations when still a sitting judge, third party neutral or staff (paragraph (b)), one that provides for imputation of the paragraph (a) prohibition to other lawyers in the firm to which the former judge, third party neutral or staff person has moved, and for the availability of screening to avoid the imputation (paragraph (c)), and a fourth provision that excepts from the rule a party arbitrator (paragraph (d).)

Proposed rule 1.12 is the final piece in the trio of rules intended to regulate the lateral movement of lawyers between private firms (rule 1.10), between government service and private practice (rule 1.11), and between service in the judicial branch or as a third party neutral and practice in the private sector (rule 1.12). If the first two rules are adopted, then rule 1.12 should also be adopted in light of special concerns relating to the integrity of the judicial process and the critical need for clear guidance on precisely what conduct is permitted in negotiating for employment as a judicial employee and the necessary restrictions on the availability of an ethical screen to rebut the presumption of shared confidences by a former judicial employee in a private firm.

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

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[2] Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California rules (e.g., Model Rule 1.8(a) is covered by California rule 3-300 [Avoiding Interests Adverse To A Client] and Model Rule 1.8(e) is covered by California rule 4-210 [Payment of Personal or Business Expenses By Or For A Client)].)

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is recommending rule counterparts to those rules, each of which is the subject of separate Report and Recommendations.

Paragraph (a) states the general prohibition on a former judge, arbitrator, or other third party neutral, and members of their respective staffs, from participating in a case in which they were substantially involved as a judicial employee. It is identical to Model Rule 1.12(a) except for (i) California's heightened consent requirement being substituted; (ii) the addition of the term "judicial staff attorney" to the introductory clause of paragraph (a) to accurately reflect the title of most lawyers who work in the California courts; and (iii) the deletion of the reference to "personally" participated as redundant, as case law is clear that a lawyer will not be found to have "substantially participated" in a matter unless the lawyer was personally involved in the representation.

Paragraph (b) prohibits negotiations for employment while still working as a judge, or for the judiciary or other third party neutral. The Commission has recommended replacing the phrase "negotiate for" with the phrase "participate in discussions regarding prospective." This replacement language is taken from the first Commission's proposed rule 1.12. The language is consistent with the Model Rule in covering negotiations for employment, but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as "employment negotiations." In addition, the language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics.

Paragraph (c). The introductory clause of paragraph (c) is derived from the first Commission's rule 1.12(c) and differs substantially from the Model Rule. The provision excludes from the availability of screening lawyers who previously served as mediators or settlement judges. This change was made because permitting screening of settlement judges and mediators, who not only receive confidential information from the parties but actively seek such information, would reduce confidence in the administration of justice. See *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 125 [45 Cal. Rptr. 2d 863] (no amount of screening of a settlement judge who had received confidential information could assuage concerns of the parties to the settlement discussions). Further, not permitting screening of law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.

Paragraph (d) is identical to Model Rule 1.12(d) and provides that a partisan party arbitrator does not raise the same administrative of justice concerns as an impartial judge or third party neutral, and so is not subject to the prohibitions of rule 1.12.

There are three Comments to rule 1.12, all of which provide guidance in interpreting or applying the rule. Comment [1] is derived largely from the first Commission's modification of the Model Rule Comment. Language has been added to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter. This is similar to proposed rule 1.9(b). Comment [2] alerts lawyers to the possibility that other law or codes of conduct might impose more stringent standards than this disciplinary rule. Comment [3] includes the important clarification of how the screening requirement regarding fees in subparagraph (c)(1) is applied. It corresponds to similar provisions in proposed rules 1.10 and 1.11.

National Background – Adoption of Model Rule 1.12

Every jurisdiction except California has adopted some version of Model Rule 1.12. Sixteen jurisdictions have adopted Model Rule 1.12 verbatim. The remaining jurisdictions largely track the Model Rule language, with only non-substantive changes.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission changed the phrase "participated substantially," in paragraph (a), and "participating substantially" in paragraph (b), to "participated personally and substantially" and "participating personally and substantially", respectfully. The change was made to provide uniformity with the ABA Model Rule, as well as with government statutes and regulations that use the same phrase. This change also conforms to similar revisions made to proposed rule 1.11.

In paragraph (c), a phrase was removed and edited as a new subparagraph (c)(1). The change was made to improve the awkward syntax of the paragraph as originally drafted and no change in the application of the rule is intended.

Comment [1] was amended to provide guidance as to when participation is personal and substantial. Comment [3] was amended to update an internal reference to paragraph (c)(2) of the rule.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.12

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Hon. Dean Stout

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.12, from which proposed Rule 1.12 is derived.]

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(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 or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. 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. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017
Action: Recommend Board Adoption of Proposed Rule 1.12
Vote: 13 (yes) – 0 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.12
Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(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, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.*

(b) A lawyer shall not participate in discussions regarding prospective employment with any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third*party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm* for a party, in a matter in which the staff attorney or clerk is participating substantially, but only with the approval of the court.

(c) If a lawyer is prohibited from representation by paragraph (a), other lawyers in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter only if:

(1) the prohibition does not arise from the lawyer's service as a mediator or settlement judge;

(2) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] Paragraphs (a) and (b) apply when a former judge or other adjudicative officer, or a judicial staff attorney or law clerk to such a person,* or an arbitrator, mediator or other third-party neutral, has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation, as may occur in a chambers with several staff attorneys or law clerks. Substantial participation requires that the lawyer's involvement was of significance to the matter. Participation may be substantial even though it was not determinative of the outcome of a particular case or matter. A finding of substantiality should be based not

only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, the lawyer participated through decision, recommendation, or the rendering of advice on a particular case or matter. However, 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, or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also 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, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. The term "adjudicative officer" includes such officials as judges pro tempore, referees and special masters.

[2] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See rule 2.4.

[3] Paragraph (c)(2) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.12)

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(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, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent~~, confirmed in writing~~.*

(b) A lawyer shall not ~~negotiate for~~participate in discussions regarding prospective employment with any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other ~~third-party~~third*party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may ~~negotiate for~~participate in discussions regarding prospective employment with a party, or with a lawyer ~~involved~~or a law firm* for a party, in a matter in which the staff attorney or clerk is participating ~~personally and~~ substantially, but only ~~after the lawyer has notified the judge or other adjudicative officer~~with the approval of the court.

(c) If a lawyer is ~~disqualified~~prohibited from representation by paragraph (a), ~~no lawyer~~other lawyers in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter ~~unless~~only if:

(1) the prohibition does not arise from the lawyer's service as a mediator or settlement judge;

(~~1~~2) the ~~disqualified~~prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(~~2~~3) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this ~~rule~~rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] ~~This rule generally parallels rule 1.11. The term "personally and substantially" signifies that~~ Paragraphs (a) and (b) apply when a former judge or other adjudicative officer, or a judicial staff attorney or law clerk to such a person,* or an arbitrator, mediator or other third-party neutral, has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation, as may occur in a chambers with several staff attorneys or law clerks. Substantial participation requires that the lawyer's involvement was of significance to the matter. Participation may be substantial even though it was not determinative of the outcome of a particular case or matter. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, the lawyer participated through decision, recommendation, or the rendering of advice on a particular case or matter. However, 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~~, or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also 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~~. Compare the Comment to rule 1.11. The term "~~, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. The term "adjudicative officer~~"~~" includes such officials as judges pro tempore, referees~~,~~ and special masters~~, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this rule, those rules correspond in meaning.~~.

[2] ~~Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See rule 1.0(e) and (b).~~ Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See rule 2.4.

~~[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.~~

[4~~3~~] ~~Requirements for screening procedures are stated in rule 1.0(k).~~ Paragraph (c)(~~1~~2) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

~~[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.~~

V. RULE HISTORY

Although the origin and history of Model Rule 1.12 was not the primary factor in the Commission's consideration of proposed Rule 1.12, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 299 – 308, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowingly" in subsection (c) of this rule as it has for proposed Rule 1.9 and the General Comments section of this letter.

   Commission Response: The Commission has considered this issue when drafting the rule and determined that the "know" standard is the appropriate standard for this rule. First, it is a national standard, every jurisdiction having adopted it. Second, the definition in proposed Rule 1.0.1(f) provides:

   > "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

   The second sentence of that definition prohibits "willful blindness."

2. OCTC supports the Comments.

   Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. Three comments agreed with the proposed Rule and two comments agreed only if modified. During the 45-day public comment period, two public comments, including the above comment from OCTC, were received. One commenter agreed with the proposed rule and on agreed if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

California has no rule similar to Model Rule 1.12, which permits an ethical screen to rebut the presumption of shared confidences in a law firm when a former judge or judicial employee possesses material confidential information by virtue of his or her former government employment. However, there is a California case, *Cho v. Superior Court* (1995) 39 Cal.App.4th 113 [45 Cal.Rptr.2d 863], which held that an ethical screen could not rebut the presumption of shared confidences, at least where the former judge had obtained confidential client information during a settlement conference:

> No amount of assurances or screening procedures, no "cone of silence," could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in confidential settlement conferences with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm-which is now pressing or defending the lawsuit against that litigant. No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent. (39 Cal.App.4th at 125.)

The court did not opine on whether a former judicial officer's law firm should be disqualified because the judge had presided over the same or substantially similar

matter now being handled by the law firm but had actually received confidential information of any party as in a settlement conference.[1]

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.12, from which proposed Rule 1.12 is derived, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_12.pdf [Last visited 2/6/17]

- Every jurisdiction except California has adopted some version of Model Rule 1.12. Sixteen jurisdictions have adopted Model Rule 1.12 verbatim.[2] The remaining jurisdictions largely track the Model Rule language, with only non-substantive changes.

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of the Model Rules' framework of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed Rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed Rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers) and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

    - Pros: Such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different

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[1] Compare Model Rule 1.12, Cmt. [3]:

> [3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[2] The jurisdictions are Arizona, Delaware, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, and Vermont.

conflicts of interest principles are organized within the Rules as other jurisdiction in the country has adopted the ABA conflicts rules framework.

- Cons: There is no evidence that the current rule regimen, i.e., a single rule (rule 3-310) and case law, has been ineffective in regulating conflicts of interest between or among clients.

2. General: Recommend adoption of proposed Rule 1.12, patterned on Model Rule 1.12, which would regulate the lateral movement of judges, third party neutrals, and their staffs into private practice.

   - Pros: Proposed Rule 1.12 is the final piece in the trio of rules intended to regulate the lateral movement of lawyers between private firms (Rule 1.10), between government service and private practice (Rule 1.11), and between service in the judicial branch or as a third party neutral and practice in the private sector (Rule 1.12). If the first two rules are adopted, then Rule 1.12 should also be adopted in light of special concerns relating to maintaining the integrity of the judicial process and the critical need for clear guidance on precisely what conduct is permitted in negotiating for employment as a judicial employee and the necessary restrictions on the availability of an ethical screen to rebut the presumption of shared confidences by a former judicial employee in a private firm.

   - Cons: None identified.

3. Substitute the term "prohibited" for "disqualified" throughout the rule.

   - Pros: The substitution accurately reflects that the rule is a disciplinary rule rather than a civil standard for disqualification.

   - Cons: Regardless of whether the rule is part of a set of disciplinary rules, it will be relied upon and cited to by courts in the context of disqualification motions, just as rule 3-310 currently is.

4. Recommend carrying forward California's heightened requirement of "informed written consent."

   - Pros: It is a more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires *written* disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a more lenient and less-protective requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict and does not require written disclosure of the potential adverse consequences.

   - Cons: None identified.

5. Recommend adoption of paragraph (a), derived from Model Rule 1.12(a), which states the general prohibition on a former judge, arbitrator, or other third party neutral, and members of their respective staffs, from participating in a case in which they were substantially involved as a judicial employee.

    - Pros: As noted, the integrity of the judicial process requires that clear guidelines be set forth regarding appropriate conduct after leaving service as a judge, third party neutral, or a member of their staff. The Model Rule provision has been revised to further those objectives: (i) California's heightened consent requirement has been substituted for the Model Rule's more lenient "consent, confirmed in writing"; (ii) the term "judicial staff attorney" has been added to the introductory clause of paragraph (a) to accurately reflect the title of most lawyers who work in the California courts; and (iii) the reference to "personally" participated has been deleted as redundant because case law is clear that a lawyer will not be found to have "substantially participated" in a matter unless the lawyer was personally involved in the representation.

    - Cons: None identified.

6. Recommend adoption of paragraph (b), derived from Model Rule 1.12(b), which generally prohibits negotiations for employment while still working as a judge, or for the judiciary or other third party neutral.

    - Pros: This provision is an added piece in maintaining the integrity of the judicial process. The Model Rule provision has been revised to further that objective:

      (1) The phrase "negotiate for" has been replaced with the phrase "participate in discussions regarding prospective." This replacement language is taken from the first Commission's proposed Rule 1.12. The language is consistent with the Model Rule in covering negotiations for employment, but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as "employment negotiations." In addition, the language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics.

      (2) The provision clarifies that a government lawyer is prohibited from negotiating not only with a lawyer or party involved in a matter in which the government employee is substantially participating, but also with anyone from a law firm of a lawyer involved in the matter.

      (3) Although the provision permits a law clerk or judicial staff attorney to negotiate for employment, such lawyer may do so only with the judge's approval, rather than just having to "notify" the judge as in the Model Rule.

    - Cons: None identified.

7. Recommend adoption of paragraph (c), derived from Model Rule 1.12(c), which sets forth the requirements for screening a former judge, third party neutral or

member of their staffs. It differs substantially from the Model Rule in excluding from the availability of screening lawyers who previously served as mediators or settlement judges.

- Pros: The change is warranted because permitting screening of settlement judges and mediators, who not only receive confidential information from the parties but actively seek such information, would reduce confidence in the administration of justice. See *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 125 [45 Cal.Rptr.2d 863] (no amount of screening of a settlement judge who had received confidential information could assuage concerns of the parties to the settlement discussions).

  On the other hand, not permitting screening of judicial staff attorneys and law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.

- Cons: None identified.

8. Recommend adoption of paragraph (d), identical to Model Rule 1.12(d), which provides that a partisan party arbitrator does not raise the same administrative of justice concerns as an impartial judge or third party neutral, and so is not subject to the prohibitions of Rule 1.12.

   - Pros: The adoption of this provision will further the development of a national standard. The same concerns regarding the integrity of the judicial system that are apparent when an impartial decision-maker goes into private practice are not present when a party arbitrator later is involved in the same matter.

   - Cons: None identified.

9. Recommend adoption of the Comments to the proposed Rule.

   - Pros: There are three Comments to Rule 1.12, all of which provide guidance in interpreting or applying the rule:

     Comment [1] is derived largely from the first Commission's modification of the Model Rule Comment. Language has been added to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter. This is similar to proposed Rule 1.9(b). This Comment also defines what constitutes personal and substantial participation in the matter.

     Comment [2] alerts lawyers to the possibility that other law or codes of conduct might impose more stringent standards than this disciplinary rule.

Comment [3] includes the important clarification of how the screening requirement regarding fees in subparagraph (c)(1) is applied. It corresponds to similar provisions in proposed Rules 1.10 and 1.11.

- Cons: The rule is sufficiently transparent, particularly given the revisions made to the corresponding model rule, so as to not to require further clarification in Comments.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption in paragraphs (b) and (c) of a provision based on Colorado Rule 1.10(d)(4), which would have required that:

   "the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client."

   - Pros: This clause provides an objective standard ("reasonably believes") for testing the effectiveness of the screen. It provides a better test of the an ethical screen's effectiveness than does Model Rule 1.10(a)(2)(iii)'s requirement that requires the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client "certifications of compliance with the Rules and with the screening procedures" with which the former client has been provided as required by Rule 1.10(d)(2)(ii). The imposition of an objective standard ("reasonably believe") is more protective of a former client's interests than the Model Rule's formulaic requirement of providing "certifications" at "reasonable intervals." As provided in proposed Rule 1.0.1(l), "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." That the lawyers' reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not, then the partner's decision would be a "reasonable resolution of an arguable question of professional duty," so there would be no conflict with proposed Rule 5.2(b) as posited in the "Cons," below.

   - Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission's proposed Rule 5.2(b) is unclear. Proposed Rule 5.2(b) provides that: "A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm's screening

procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Although the concepts of imputation and screening in proposed Rule 1.12 exists in current law, e.g., *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 125 [45 Cal.Rptr.2d 863], the proposed rule would nevertheless be a substantive change in that the concept would now be included as a disciplinary rule.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.12 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.12 in the form attached to this Report and Recommendation.