



# The State Bar of California

## **Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral (Rule Approved by the Supreme Court, Effective November 1, 2018)**

- (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 seek employment from 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 seek employment from 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 personally and 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 multi-member 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 personally prohibited from participating.

**NEW RULE OF PROFESSIONAL CONDUCT 1.12  
(No Former 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,<sup>1</sup> 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.

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

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<sup>1</sup> 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.

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).<sup>2</sup>

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 that 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 that 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.

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

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<sup>2</sup> 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.

most lawyers who work in the California courts; and, in the proposed rule as initially circulated for public comment, (iii) the deletion of the reference to the person as having “personally” participated because it is redundant; case law provides 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). As initially circulated for public comment, the introductory clause of paragraph (c) was derived from the first Commission’s rule 1.12(c) and differed 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, e.g., *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 administration 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.

### **Revisions Following 90-Day Public Comment Period**

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. Notwithstanding the Commission’s earlier concerns about redundancy, 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 circulated for public comment. 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 Commission Action on the Proposed Rule Following 45-Day Public Comment Period**

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.

The Board adopted proposed rule 1.12 at its March 9, 2017 meeting.

### **Supreme Court Action (May 10, 2018)**

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. The Court amended paragraph (b) by substituting the phrase “seek employment from” for “participate in discussions regarding prospective employment with.” Also in paragraph (b), the Court added the terms “personally and” before “substantially.” In Comment [1], the spelling of the term “multimember” was corrected be a hyphenated word. In Comment [3], the phrase “personally prohibited from participating” was substituted in the place of the term “disqualified.” In addition, omitted asterisks for defined terms were added.

**Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral  
(Redline Comparison to the ABA Model Rule)**

- (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~~seek employment ~~with~~from 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~~seek employment ~~with~~from 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;
  - (~~4~~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.
- (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~~multi-member 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~~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)(~~4~~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~~personally prohibited from participating.~~

~~[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.~~