

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* [in accordance with Rule 1.0.1(k)] 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 the former a judge or other adjudicative officer, 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 generally requires direct participation but may also include the supervision of a subordinate's participation, for example, in a chambers with multiple 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 before the judge or other third party neutral. 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)(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.

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- (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 or² clerk is participating substantially, but only with the approval of the court.
- (c)³ If a lawyer is prohibited from representation by paragraph (a), ~~but not by virtue of previous service as a mediator or settlement judge, no~~ 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;
- (2) the prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom; and
- (23) 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 the former a judge or other adjudicative officer, 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 generally requires direct participation but may also include the supervision of a subordinate's participation, for example, in a chambers with multiple 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 before the judge or other third party neutral. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the

¹ Change made to conform Rule 1.12 to proposed revisions to 1.11.

² Change suggested by LACBA.

³ Change suggested by Kevin Mohr to improve the awkward syntax of the sentence as circulated for public comment. No change in meaning is intended.

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. ~~For purposes of this Rule, the term “substantially” signifies that~~ 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)(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.

**Proposed Rule 1.12 Former Judge, Arbitrator, Mediator
or Other Third-Party Neutral
Synopsis of Public Comments**

TOTAL = 3
A = 0
D = 0
M = 3
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43bl	Committee on Professional Responsibility and Conduct (COPRAC)	Y	M	(a)	<p>COPRAC supports the concept of the rule and its comments, but has some suggested revisions.</p> <p>1. Section (a) regulates the conduct of a lawyer who has “participated substantially” as a judge, or other judicial officer. As we have suggested in our comments to proposed Rules 1.10 and 1.11, COPRAC believes that it is important to provide guidance on what the term “participated substantially” means. This is not a term that exists in the current California rules.</p> <p>We note that the meaning of the word “substantially” is discussed in Comment [1]. However, we do not believe its provisions provide sufficient clarity. Comment [1] now provides:</p> <p>“For purposes of this Rule, the term “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</p>	<p>1. The Commission has substituted the term “personally and substantially” for “substantially” and revised Comment [1] to clarify with more specificity what is meant by that term in proposed Rule 1.12.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire material confidential information.”</p> <p>While it appears this comment is generally derived from Comment [1] to Model Rule 1.12, there is an uncharacteristic triple negative in the above sentence, which makes it difficult to understand. We read Comment [1] as saying that “substantially participated” describes those situations in which the lawyer participated in some manner in the matter, and “acquire[d] material confidential information” in doing so. If so, COPRAC believes that concept could be stated more simply in the comment.</p>	
				(b)	<p>2. COPRAC also believes a change to Rule 1.12(b) is warranted. Under Model Rule 1.12(b), a law clerk need only notify his or her judge before she interviews with a party or a law firm with a matter pending before the court. Presumably, the judge would thereafter take the clerk off any case involving that party or law firm, thus eliminating any</p>	<p>2. The Commission has not made the suggested change. The Commission continues to believe that the judge must provide approval to engage in negotiations, which it expects would be given in nearly every circumstance. However, there may be occasions when it would be improper, e.g., because of the sensitivity of</p>

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					<p>potential conflict. However, under proposed Rule 1.12(b), a law clerk would not just have to notify the judge, but would also have to obtain the judge's "approval" before any interview with such individuals or entities could take place.</p> <p>As written, the proposed Rule would allow the judge to withhold "approval," and thus "veto" the law clerk's employment choices, and deny him or her an opportunity to interview to join certain firms, during the tenure of the law clerk's employment. COPRAC believes notice by the law clerk alone, without the subsequent judicial "approval," sufficiently protects the public and is the better rule.</p>	the issues in the matter before the court or the notoriety of the case, where the judge should have input on the timing of the negotiations, even if that results in the staff attorney or law clerk losing the employment opportunity.
X-2016-76aa	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M		Paragraph (b) states, in pertinent part, "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 clerk is participating substantially, but only with the approval of the court." We	The Commission has made the suggested change.

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					recommend that the second reference to “clerk” in this sentence be changed to “judicial staff attorney or law clerk” to make clear that this provision applies to both positions.	
X-2016-104aa	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	M		<p>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.</p> <p>2. OCTC supports the Comments.</p>	<p>1. 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:</p> <p>“Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.</p> <p>The second sentence of that definition prohibits “willful blindness.”</p> <p>2. No response required.</p>