

**Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral  
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (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.

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[4]<sup>1</sup> The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

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<sup>1</sup> The consensus of the drafting team was to add language from proposed Rule 1.10, Comment [5] to proposed Rule 1.11 as a new Comment [4] in response to OCTC’s concerns expressed in their public comment letter dated January 9, 2017.

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**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.

[\[4\]<sup>1</sup> The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.](#)

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- (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;
  - (~~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~~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.~~

~~[43] Requirements for screening procedures are stated in Rule 1.0(k).~~ Paragraph (c)(~~42~~) 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.

[4]<sup>1</sup> The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

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<sup>1</sup> The consensus of the drafting team was to add language from proposed Rule 1.10, Comment [5] to proposed Rule 1.11 as a new Comment [4] in response to OCTC's concerns expressed in their public comment letter dated January 9, 2017.



~~[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.~~



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

**TOTAL = 2**      **A = 1**  
**D = 0**  
**M = 1**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21m	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	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 OCTC’s September 27, 2016 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.” Nevertheless, the Commission has added a new comment similar to proposed rule 1.10, cmt. [5], to alert managerial and supervisory lawyers to their duties under rules 5.1 and 5.3 regarding ethical screens.</p> <p>2. No response required.</p>

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

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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
Y-2016-7g	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Y	A		COPRAC supports the adoption of proposed Rule 1.12 as revised.	No response required.