

**From:** [Kevin Mohr](#)  
**To:** [Lee, Mimi](#)  
**Cc:** [ignazio.ruvolo@jud.ca.gov](mailto:ignazio.ruvolo@jud.ca.gov); [Difuntorum, Randall](#); [McCurdy, Lauren](#)  
**Subject:** Re: RRC - 1.12 [3-310] - III.G.  
**Date:** Wednesday, January 06, 2010 3:43:58 PM  
**Attachments:** [RRC - 3-310 \[1-12\] - Public Comment Chart - By Commenter - DFT2.1 \(01-06-10\)IR-KEM.doc](#)  
[RRC - 3-310 \[1-12\] - Rule - DFT5.2 \(01-06-10\)ML-KEM - CLEAN-LAND.doc](#)  
[RRC - 3-310 \[1-12\] - Compare - Rule Explanation - DFT3.2 \(01-06-10\)ML-RD-KEM.doc](#)  
[RRC - 3-310 \[1-12\] - Rule - DFT5.1 \(01-05-10\)ML - CLEAN-LAND.doc](#)  
[RRC - 3-310 \[1-12\] - Compare - Introduction - DFT2.2 \(01-06-10\)ML-KEM.doc](#)

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Hey Mimi & Nace:

I've reviewed the documents and they looked fine except I've made some minor changes to several and attached revised documents as follows:

1. Dashboard, Draft 2.1 (1/6/10)ML. I've added a footer to the second page so we can keep track of the drafts and deleted the text box after "Not Controversial".
2. Introduction, Draft 2.2 (1/6/10)ML-KEM. I've substituted "January 2010" for "September 2009" and revised the first sentence. It's in track changes so you can see the changes I've made. With the most recent change, I don't think we can say our proposed rule is "nearly identical" to the MR.
3. Rule Comparison Chart, Draft 3.2 (1/6/10)ML-RD-KEM. The second "discussions" was missing an "s" at the end.
4. Rule, Draft 5.2 (1/6/10)ML-KEM. Same as #3.
5. Public Comment Chart, Draft 2.1 (1/6/10)IR-KEM. I've corrected a couple of typos and re-sorted the commenters in alphabetical order.

I think these are ready for the agenda package. Thanks,

Kevin

Lee, Mimi wrote:

Hi Kevin and Nace:

I have made the changes to (b) that Nace recommended and updated the comparison tables to reflect these changes. Randy has added an explanation

for the changes to (b) in the rule comparison chart as well. Please review. If all looks good, we'll go ahead with these as the final docs.

Mimi

\*\*\*\*\*

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# Proposed Rule 1.12 [n/a] “Former Judge, Arbitrator, Mediator”

(Draft #5.1, 01/05/10)

**Summary:** This proposed new rule regulates the conduct of lawyers who may be asked to represent a client in a matter in which the lawyer previously participated personally and substantially as a judge, arbitrator, mediator or other third-party neutral. The Rule generally prohibits such representation unless all of the parties to the proceedings give their informed written consent. The rule also states that such conflicts may be imputed to other lawyers but that the imputation of the conflict can be avoided by establishing an ethical wall to screen the affected lawyer.

## Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law

Rule

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart:  Yes  No

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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Minority Position Included on Model Rule Comparison Chart:  Yes  No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction and also the explanation for paragraphs (a) and (c) in the Model Rule comparison chart.

Not Controversial – Explanation:

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.12\* Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

January 2010

(Draft rule to be considered for public comment.)

### *INTRODUCTION:*

Proposed Rule 1.12 ~~is nearly identical to~~ closely tracks Model Rule 1.12, ~~except for~~ but incorporates three substantive changes: (i) substituting the current California Rules' more client-protective requirement of "informed written consent" for the Model Rule's "informed consent, confirmed in writing," see Explanation of Changes, paragraph (a); (ii) expanding the restriction on employment negotiations between adjudicative officers or their staff and parties or their representatives appearing before them, see Explanation of Changes, paragraph (b); and (iii) limiting to former law clerks the availability of ethical screening to avoid imputed disqualification of a law firm after leaving judicial employment, see Explanation of Changes, paragraphs (c) and (d).

Variation in Other Jurisdictions. Every jurisdiction has adopted some version of Model Rule 1.12; most have adopted Model Rule 1.12 with little or no variation. D.C. Rule 1.12 applies only to non-judicial, third party neutrals. Judges and law clerks are governed under D.C. Rule 1.11. New York, one of only two jurisdictions that has adopted law firm discipline, expressly requires that the *law firm* to which the former adjudicative officer moves to takes steps to properly screen the former adjudicative officer. There are minor variations concerning consent and notice in other jurisdictions. E.g., Georgia, Pennsylvania.

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\* Proposed Rule, Draft 5.1 (01/05/10).



<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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.</p>	<p>(a) Except as stated in paragraph (<del>e</del>), 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 <u>written</u> consent, <del>confirmed in writing</del>.</p>	<p>Paragraph (a) is identical to Model Rule 1.12(a), except that the cross-reference is to paragraph (e) because of the addition of new paragraph (c), and the requirement of California's more client-protective "informed written consent" instead of the Model Rule's "informed consent, confirmed in writing."</p>
<p>(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.</p>	<p>(b) A lawyer shall not <del>negotiate for</del><u>participate in discussions regarding prospective</u> employment with any person who is involved as a party, or as a lawyer for a party, <u>or with a law firm for a party</u>, 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 <del>negotiate for</del><u>participate in discussions regarding prospective</u> employment with a party, or <u>with a lawyer involved or a law firm for a party</u> in a matter in which the clerk is participating personally and substantially, but only <del>after</del><u>with</u> the <del>lawyer has notified</del><u>approval of</u> the judge or other adjudicative officer.</p>	<p>Paragraph (b) is <u>nearly identical a modified version of</u> <del>to</del> Model Rule 1.12(b), <del>except that in the first sentence, First, the phrase "negotiate for," that appears in two places, has been replaced with the phrase "participate in discussions regarding prospective." The Commission's replacement language is consistent with the Model Rule language 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 Commission's language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics.</del></p> <p><u>Second,</u> the phrase "or with a law firm for a party" has been added for clarification. It makes clear that negotiations are prohibited not only with a lawyer actually appearing in the matter, but also with that lawyer's law firm. The same clarifying change is made in the second sentence. In addition, the Commission has added the</p>

\* Proposed Rule, Draft 5.1 (01/05/10), redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>requirement that the judge or adjudicative officer must <i>approve</i> negotiations by a law clerk, not just be given notice of the negotiations as specified in the Model Rule.</p>
	<p>(c) <a href="#">Except as provided in paragraph (d), 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.</a></p>	<p>The Commission has added paragraph (c) to provide for greater confidence in the integrity of the judicial system and in the administration of justice by not allowing judges to leave a case, join a law firm involved in the matter, and have that firm continue to act as counsel in the case over the objection of one of the parties simply by screening the former judge from the case.</p>
<p>(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:</p>	<p>(ed) If a lawyer is disqualified by paragraph (a) <a href="#">because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal</a>, no lawyer in a <a href="#">law</a> firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:</p>	<p>Paragraph (d) is based on Model Rule 1.12(c). Together with proposed paragraph (c), it permits screening only of law clerks to avoid imputation in a law firm. See <i>Cho v. Superior Court</i> (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863]. The Commission recommends screening for law clerks because the aforementioned concerns over reduced confidence in the administration of justice by screening adjudicative officers is not as great for law clerks. 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.</p>
<p>(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p>	<p>(1) the disqualified lawyer is <del>timely and effectively</del> screened from any participation in the matter and is apportioned no part of the fee therefrom;</p>	<p>In subparagraph (d)(1), the Commission has added “and effectively” to “timely” to emphasize that not only must a screen be implemented in a timely manner, but it also</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	and	must be effective.
<p>(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.</p>	<p>(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this <del>rule</del>Rule.</p>	<p>Subparagraph (d)(2) is identical to Model Rule 1.12(c)(2).</p>
<p>(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.</p>	<p><del>(d)</del> (e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.</p>	<p>Paragraph (e) is identical to Model Rule 1.12(d).</p>

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

(Commission's Proposed Rule – Clean Version)

- (a) Except as stated in paragraph (e), 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 written consent.
- (b) A lawyer shall not participate in discussions regarding prospective employment with any person who is involved as a party, or as a 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 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 personally and substantially, but only with the approval of the judge or other adjudicative officer.
- (c) Except as provided in paragraph (d), 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.
- (d) If a lawyer is disqualified by paragraph (a) because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal, no lawyer in a law firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
  - (1) the disqualified lawyer is timely and effectively 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.
- (e) 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. "Personally and substantially" is intended to include the receipt or acquisition of confidential information that is material to the matter. 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, or acquire confidential information. 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, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. 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.

- [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 written consent. [See Rule 1.0(e).] 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. Paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm.
- [4] Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met. Requirements for screening procedures are stated in Rule [1.0(k)]. Paragraph (d)(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.



**Rule 1.12 Former Judge, Arbitrator, Mediator.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Committee on Alternative Dispute Resolution, State Bar of California	M			The term "matter," as used in Proposed Rule 1.12, should be defined as its absence will make the effect and application of the Proposed Rule uncertain.	The Commission does not agree that the term "matter" requires further definition.
1	San Diego County Bar Association Legal Ethics Committee	M			<p>It is unclear whether "personally and substantially" is intended to include anything beside "confidential information that is material to the matter." If not, then the sentence should read: "Personally and substantially is intended to be limited to the receipt or acquisition of confidential information that is material to the matter." If so, then the sentence should read: "Personally and substantially is intended to include, without limitation, the receipt or acquisition of confidential information that is material to the matter."</p> <p>Since the rule is intended to foster confidence in the legal system and clients most likely would be shocked to find a former Judge, Arbitrator, Mediator representing an adversary, client's should not have to burden of proving that former judge's, etc. participation actually entailed the receipt of material confidential information. Rather, if a form judge, etc., has heard facts about the</p>	Comment [1] adequately discusses and defines "personally and substantially" as used in this rule, and no further clarification is warranted. The second paragraph of the public comment is already addressed in the Rule.

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.12 Former Judge, Arbitrator, Mediator.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>substantive claims involved in the former or pending matter, the former judge, etc., should be required to obtain written consent from the parties before undertaking any representation.</p> <p>If this recommendation is adopted, the modified language should read:</p> <p>“Personally and substantially’ is intended to include, <u>without limitation</u>, the receipt or acquisition of confidential information that is material to the matter <u>or participation in a matter that included knowledge of facts related to the substantive claims in that matter.</u>”</p>	
2	Santa Clara County Bar Association	M			<p>Subparagraph (b) is ambiguous as to whether the rule applies to the interviewing stage as opposed to the “negotiating employment” stage. The rule should apply to the interviewing stage though requiring the judges’ approval for an interview is not necessary.</p> <p>The following language should be added at the conclusion of subparagraph (b) as it now reads:</p> <p>“In addition, a law clerk may interview with a party, or with a lawyer or law firm for a party in a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative</p>	<p>The Commission recommends that the language of subparagraph (b) be amended to read as follows:</p> <p>“A lawyer shall not <b>participate in discussions regarding prospective employment</b> with any person . . . A lawyer serving as a law clerk . . . may <b>participate in discussions regarding prospective employment</b> , , ,</p> <p>This change is intended to broaden and to clarify what was previously intended by “negotiate for employment” as used in the earlier version. This new language also tracks more closely that used in Canon 3E(5)(h) of the Code of Judicial Ethics.</p>

**Rule 1.12 Former Judge, Arbitrator, Mediator.  
[Sorted by Commenter]**

**TOTAL =** \_\_    **Agree =** \_\_  
**Disagree =** \_\_  
**Modify =** \_\_  
**NI =** \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					officer."	



## Rule 1.12 – Public Comment – File List

E-2009-351g SDCBA [1.12]

E-2009-358f Santa Clara County Bar [1.12]

E-2009-371 State Bar ADR Committee [1.12]





**SAN DIEGO COUNTY  
BAR ASSOCIATION**

November 11, 2009

Audrey Hollins  
Office of Professional Competence,  
Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of  
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 5 of the Proposed Amendments to the Rules of  
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics  
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

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District Nine Representative**  
James W. Talley

SDCBA Legal Ethics Committee  
Subcommittee for Responses to Requests for Public Comment  
Coversheet to Recommendations on State Bar of California Rules Revision Commission  
Batch 5

- Rule 1.2      Scope of Representation [N/A]  
APPROVE
- Rule 1.6      Confidentiality of Information [3-100, B&P 6068(e)]  
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.8.2    Use of Confidential Information [3-100, 3-310]  
APPROVE
- Rule 1.8.13   Imputation of Personal Conflicts [N/A]  
APPROVE
- Rule 1.9      Duties to Former Clients [3-310]  
APPROVE
- Rule 1.10     Imputation of Conflicts: General Rule [N/A]  
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
- Rule 1.12     Former Judge, Arbitrator, Mediator [N/A]  
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.14     Client with Diminished Capacity [N/A]  
APPROVE
- Rule 2.1      Advisor [N/A]  
APPROVE
- Rule 3.8      Responsibilities of a Prosecutor [5-110]  
NO POSITION TAKEN – see comments
- Rule 8.5      Choice of Law [1-100(D)] SIMMONS  
APPROVE

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5**  
**SDCBA Legal Ethics Committee Deadline October 8, 2009**  
**Subcommittee Deadline October 26, 2009**  
**State Bar Comment Deadline November 13, 2009**

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: \_\_\_\_\_None\_\_\_\_\_

Proposed New Rule No./ Title: 1.12 Former Judge, Arbitrator, Mediator

**QUESTIONS (please use separate sheets of paper as necessary):**

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [X] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [ X ] No [ ]

(3) Is the new rule **worded correctly and clearly**? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [ ] No [ X ]

Proposed Rule 1.12 specifically addresses duties of former judges, arbitrators, mediators, special masters, etc. who subsequently represent clients. Essentially it prohibits them from representing a client when they have previously participated or are participating “personally and substantially” in a matter. “Personally and substantially is intended to include the receipt or acquisition of confidential information that is material to the matter.”

It is unclear whether “personally and substantially” is intended to include anything beside “confidential information that is material to the matter”. If not, then the sentence should read: “Personally and substantially is intended to be limited to the receipt or acquisition of confidential information that is material to the matter.” If so, then the sentence should read: “Personally and substantially is intended to include, without limitation, the receipt or acquisition of confidential information that is material to the matter.” In any event, see comment (5) below, which renders this objection moot if adopted.

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [ X ] No [ ] Not Applicable; no existing rule.

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Since the rule is intended to foster confidence in the legal system and clients most likely would be shocked to find a former judge, etc., representing an adversary, client's should not have the burden of proving that a former judge's, etc., participation actually entailed the receipt of material confidential information. Rather, if a former judge, etc., has heard facts about the substantive claims involved in the former or pending matter, the former judge, etc., should be required to obtain written consent from the parties before undertaking any representation. If this recommendation is adopted, the modified language should read:

“Personally and substantially” is intended to include, without limitation, the receipt or acquisition of confidential information that is material to the matter or participation in a matter that included knowledge of facts related to the substantive claims in that matter.

**CONCLUSIONS (pick one):**

We approve the new rule in its entirety.

We approve the new rule with modifications.\*

We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.\*

We abstain from voting on the new rule but submit comments for your consideration.\*

If you select one of the \* options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on *one* Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009**

## Your Information

Professional Affiliation  Santa Clara County Bar Association

Commenting on behalf of an organization 

Yes

No

\* Name Jil Dalesandro, President

\* City San Jose

\* State California 

\* Email address (You will receive a copy of your comment submission.) chrisb@sccbba.com

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

\* Select the Proposed Rule that you would like to comment on from the drop down list.

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A] 

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Subparagraph (b) is ambiguous as to whether the rule applies to the interviewing stage as opposed to the "negotiating employment" stage. The rule should apply to the interviewing stage though requiring the judges' approval for an interview is not necessary. The following language should be added at the conclusion of subparagraph (b) as it now reads: "In addition, a law clerk may interview with a party, or with a lawyer or law firm for a party in a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative officer."



# THE STATE BAR OF CALIFORNIA

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San Francisco, CA 94105-1639  
Telephone: (415) 538-2306  
Fax: (415) 538-2305

– COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

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December 4, 2009

Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, California 94105

Re: Proposed Rule 1.12 – Former Judge, Arbitrator, Mediator

Dear Ms. Hollins:

The State Bar of California's Committee on Alternative Dispute Resolution ("the ADR Committee") has studied and discussed Proposed Rule of Professional Conduct 1.12 – Former Judge, Arbitrator, Mediator.

This will communicate the ADR Committee's concern, based on its review, that the absence of a definition of the term "matter," as used in Proposed Rule 1.12, will make the effect and application of the proposed rule uncertain.

### Disclaimer

**This position is only that of the State Bar of California's Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.**

Very truly yours,

James R. Madison  
Chair, 2009-2010  
The State Bar of California  
Committee on Alternative Dispute Resolution

cc: Randall Difuntorum  
Lauren McCurdy

**RRC – Rule 1.12 [3-310]  
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December 14, 2009 McCurdy E-mail to Drafters (Ruvolo, KEM, Peck & Vapnek), cc Chair, Vice-Chairs & Staff:

Rule 1.12 Drafting Team (RUVOLO, Mohr, Peck, Vapnek):

This message provides the assignment background materials for Rule 1.12 on the January agenda. **The assignment deadline is Monday, January 11, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (staff prepared template)
4. introduction (text of public comment version of the introduction – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (version of chart as issued for public comment)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

**Attached:**

- RRC - 3-310 [1-12] - Dashboard - ADOPT - DFT1.1 (8-31-09).doc
- RRC - 3-310 [1-12] - Compare - Introduction - DFT2 (09-01-09)2.doc
- RRC - 3-310 [1-12] - Compare - Rule Explanation - DFT3 (09-04-09)2.doc
- RRC - 3-310 [1-12] - Compare - Comment Explanation - DFT2 (09-01-09)2.doc
- RRC - 3-310 [1-12] - Rule - DFT5 (09-01-09) - CLEAN-LAND.doc
- RRC - 3-310 [1-12] - Public Comments Complete (12-14-09).pdf
- RRC - 3-310 [1-12] - Public Comment Chart - By Commenter - DFT1 (12-14-09)AT.doc
- RRC - 3-310 [1-12] - State Variations (2009).pdf

**January 4, 2010 Ruvolo E-mail to Drafters (KEM, Peck & Vapnek), cc McCurdy:**

Attached is a proposed comment to the public comment chart. As noted, only one comment warrants a change in my view, and that is not to use the phrase “negotiate for employment” in (b) and instead use the language in Canon 3E. The Dashboard and other documents look ok. If you agree then Lauren, etc can make the change in the rule chart.

**Attached:**

RRC - 3-310 [1-12] - Public Comment Chart - By Commenter - DFT2 (01-04-10)IR.doc

**January 6, 2010 Lee E-mail to Ruvolo & KEM, cc Difuntorum & McCurdy:**

I have made the changes to (b) that Nace recommended and updated the comparison tables to reflect these changes. Randy has added an explanation for the changes to (b) in the rule comparison chart as well. Please review. If all looks good, we'll go ahead with these as the final docs.

**Attached:**

RRC - 3-310 [1-12] - Dashboard - ADOPT - DFT2 (01-05-10)ML.doc

RRC - 3-310 [1-12] - Compare - Introduction - DFT2.1 (01-05-10)ML.doc

RRC - 3-310 [1-12] - Compare - Rule Explanation - DFT3.1 (01-05-10)ML-RD.doc

RRC - 3-310 [1-12] - Compare - Comment Explanation - DFT2.1 (01-05-10)-ML.doc

RRC - 3-310 [1-12] - Rule - DFT5.1 (01-05-10)ML - CLEAN-LAND.doc

RRC - 3-310 [1-12] - State Variations (2009)2.pdf

RRC - 3-310 [1-12] - Public Comment Chart - By Commenter - DFT2 (01-04-10)IR.doc

**January 6, 2010 KEM E-mail to Ruvolo & Lee, cc McCurdy & Difuntorum:**

I've reviewed the documents and they looked fine except I've made some minor changes to several and attached revised documents as follows:

1. Dashboard, Draft 2.1 (1/6/10)ML. I've added a footer to the second page so we can keep track of the drafts and deleted the text box after "Not Controversial".

2. Introduction, Draft 2.2 (1/6/10)ML-KEM. I've substituted "January 2010" for "September 2009" and revised the first sentence. It's in track changes so you can see the changes I've made. With the most recent change, I don't think we can say our proposed rule is "nearly identical" to the MR.

3. Rule Comparison Chart, Draft 3.2 (1/6/10)ML-RD-KEM. The second "discussions" was missing an "s" at the end.

4. Rule, Draft 5.2 (1/6/10)ML-KEM. Same as #3.

5. Public Comment Chart, Draft 2.1 (1/6/10)IR-KEM. I've corrected a couple of typos and re-sorted the commenters in alphabetical order.

I think these are ready for the agenda package.

**January 6, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:**

I realize this assignment is nearly complete, however, I just wanted you to know that the public comment compilation omitted the full text of the State Bar's ADR Committee comment, despite the fact that the comment was accounted for on the commenter table. I've attached a revised public comment compilation in the event you wish to read the full text of the comment.

My apologies for the oversight.

***Attached:***

RRC - 3-310 [1-12] - Public Comments Complete - REV (01-06-10).pdf

**January 6, 2009 Ruvolo E-mail to McCurdy, cc Drafters, Chair, Vice-Chairs & Staff:**

Thanks, but I think we've got these points covered.

**January 12, 2009 McCurdy E-mail to KEM, cc Ruvolo, Difuntorum & Lee:**

Thanks Kevin for all of your work in gathering these items. I noticed that there's no Dashboard 2.2 attached. Please check the attachments and make sure we have the right pieces for this item. (Note that the Introduction listed in your message is identified as draft 2.2, but the footer file name on the attached Intro. says 2.1.)

**January 12, 2010 KEM E-mail to McCurdy, cc Ruvolo, Difuntorum & Lee:**

Sorry about that. The dashboard should have been described as draft 2.1 of the dashboard. See attached.

As for the Introduction, you need to do a "print preview" to update the footer on the computer screen (unfortunately, I don't know where that function is on Word 2007; I still use 2003). Regardless, if you print it out, it will show 2.2 in the footer also.

Please let me know if you have any other questions.

***Attached:***

RRC - 3-310 [1-12] - Dashboard - ADOPT - DFT2.1 (01-06-10)ML.doc

**January 12, 2010 Ruvolo E-mail to McCurdy, Difuntorum, Lee & KEM:**

I agree. Thanks for all of your help Kevin.

**January 16, 2010 Kehr E-mail to RRC:**

Here are my comments on these materials:

1. The RRC Response to the ADR Committee implies that Rule 1.12 currently contains some definition of "matter", which I don't think is correct. In fact, the Commission

determined not to define “matter” (a motion to add a definition was not seconded – Kevin: I’m I right that this was the Commission’s final word?). I therefore suggest changing this Response to say: “The Commission does not believe that ‘matter’ is subject to a useful definition and determined not to include one in Rule 1.0.1. This appears to be the usual conclusion as there is none in the Model Rules and only five jurisdictions have included a definition of ‘matter’ in their Rules.”

2. The RRC Response to the first San Diego comment seems to me to be correct in substance but dismissive in tone. I suggest substituting the following for that sentence: “Comment [1] states that ‘personally and substantially’ is not limited to the acquisition of confidential information but also includes the judge’s personal participation in a matter. Whether a judge personally participated in a matter might be more easily determined than whether the judge received confidential information, and both aspects therefore should be preserved in the Comment.”
3. It would be more gracious if the Response to the first Santa Clara comment were to begin: “The Commission agrees with this criticism. It therefore recommends ....”
4. I notice that the second sentence of Comment [1] refers to the intent of the Rule.

**January 17, 2010 Sondheim E-mail to RRC:**

1. Nits P. 325, Comment, last paragraph, fifth line, change "to" to "the" so it reads: should not have the burden.

last line, change "form" to "former" so it reads: former judge.

2. P. 326: I think a separate point is being made by the last paragraph of the Comment which is not responded to by our change to subparagraph (b). There should be a response to this point.

**January 18, 2010 Vapnek E-mail to RRC:**

I concur with RLK comments for the most part.

1. RLK's suggested language is fine, or we could say that "matter" is so well known that no definition is required and include the fact that only a handful of jurisdictions have included such a definition.
2. I think the San Diego people have misread the comment. RLK's suggested response is fine.
3. I'm with RLK on being gracious in our responses.
4. Did I miss something? Did we vote to give up on spelling out what we intend with the rules?