

Proposed Rule 1.12 [n/a]

“Former Judge, Arbitrator, Mediator”

(Draft #6, 02/17/10)

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

RPC 3-310(A)

Statute

Case law

Cho v. Superior Court (1995) 39 Cal.App.4th 113

- 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)

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

Vote (see tally below)

Favor Rule as Recommended for Adoption 11
Opposed Rule as Recommended for Adoption 0
Abstain 1

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

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

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

February 2010

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.12 closely tracks Model Rule 1.12, 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.

* Proposed Rule, Draft 6 (02/17/10).

<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>(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 (de), 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 consent</u>, confirmed in writing.</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 negotiate for<u>participate in discussions regarding prospective</u> employment with any person who is involved as a party, or as <u>a lawyer for a party, 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 negotiate for<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 after<u>with</u> the lawyer has notified<u>approval of</u> the judge or other adjudicative officer.</p>	<p>Paragraph (b) is a modified version of Model Rule 1.12(b). 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.</p> <p>Second, 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>

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		<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) 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.</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) 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:</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 timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and</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 must be effective.</p>

<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>(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 ruleRule.</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>(d) (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>

<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">Comment</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">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.</p>	<p>[1] This Rule generally parallels Rule 1.11. <u>“Personally and substantially” includes the receipt or acquisition of confidential information that is material to the matter.</u> 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, <u>or acquire confidential information.</u> 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, <u>such as uncontested procedural duties typically performed by a presiding or supervising judge or justice.</u> Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.</p>	<p>Comment [1] is based on Model Rule 1.12, cmt. [1]. The Commission has added language 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.</p> <p>The Commission has also added language to the third sentence of the Model Rule comment to explain more precisely the kinds of duties that would fall outside the Rule.</p> <p>The last two sentences of Model Rule 1.12, cmt. [1] have been deleted because they are inapplicable in California.</p>

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<p>[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.</p>	<p>[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 <u>written consent</u>, 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.</p>	<p>Comment [2] is identical to Model Rule 1.12, cmt. [2], except that California's more client-protective "informed written consent" has been substituted to conform to the changes to paragraph (a). See Explanation of Changes for paragraph (a).</p> <p>For the same reason, the reference to Model Rule 1.0(b) (definition of "confirmed in writing") has been deleted.</p>
<p>[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.</p>	<p>[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 <u>Paragraph</u> (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.</p>	<p>Comment [3] is based on Model Rule 1.12, cmt. [3]. The revisions are necessary to conform the comment to new paragraph (c), which does not provide for screening of adjudicative officers to avoid imputation of their disqualification to members of their law firms. See Explanation of Changes for paragraph (c).</p>
<p>[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	<p>[4] <u>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.</u> Requirements for screening procedures are stated in Rule [1.0(k)]. Paragraph (ed) (1) does not prohibit the screened lawyer from receiving a salary or partnership</p>	<p>Comment [4] is based on Model Rule 1.12, cmt. [4] and clarifies that the permissive screening provisions in paragraph (d) apply only to law clerks to adjudicative officers. See Explanation of Changes for paragraph (d).</p>

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<p>[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.</p>	<p>share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p> <p>[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.</p>	<p>Comment [5] is identical to Model Rule 1.12, cmt. [5].</p>

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

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 ~~negotiate for~~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 ~~negotiate for~~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~~includes 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~~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.

should be given as soon as practicable after the need for screening becomes apparent.

- [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 ~~4-01.0.1~~(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 and Business and Professions Code section 6068(e), 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 ~~4-01.0.1~~(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

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" includes 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 1.0.1(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 and Business and Professions Code section 6068(e), 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 1.0.1(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 = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	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 “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	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 the burden of proving that a former judge’s, etc.</p>	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.

¹ 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 = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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.</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>	
3	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</p>	<p>The Commission agrees with this criticism. It therefore recommends that the language of subparagraph (b) be amended to read as follows:</p> <p>“A lawyer shall not participate in discussions regarding prospective employment with any person . . . A lawyer serving as a law clerk . . . may participate in discussions regarding prospective employment . . .</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</p>

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

**TOTAL = 3 Agree = 0
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative officer."	Canon 3E(5)(h) of the Code of Judicial Ethics.

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

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no direct counterpart to Rule 1.12.

District of Columbia: Rule 1.12 does not include former judges.

Georgia: Rule 1.12(b) adds that a law clerk who accepts employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantively "shall promptly provide written notice of acceptance of employment to all counsel of record in all such matters in which the prospective employee is involved."

Illinois: Rule 1.12(c) covers any lawyer who "knows or reasonably should know" of the former judge's or arbitrator's disqualification. Rule 1.12(c)(1) requires that the disqualified lawyer receive "no specific share" of the fee.

Massachusetts extends the law clerk exception in Rule 1.12(b) to law clerks working for mediators.

New York: DR 9-101(A) forbids a lawyer to "accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity." DR 9-101(B)(3) provides that a lawyer "serving as a public officer or employee shall not . . . (b) [n]egotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially."

Pennsylvania: Rule 1.12 tracks ABA Model Rule 1.12 except Pennsylvania Rule 1.12(a) does not require that client consent be "confirmed in writing." Texas has no equivalent to Rule 1.12(d).