

## Rule 1.12: Former Judge, Arbitrator, Mediator

### Or Other Third-Party Neutral

#### 1. Current Kentucky Rule with Official Comments:

##### SCR 3.130(1.12) Former judge or arbitrator

(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, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for 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 as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(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:

(1) The disqualified lawyer is 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 appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

#### Supreme Court Commentary

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a

matter pending in the court, but in which the former judge did not participate. 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.

## 2. Proposed Kentucky Rule with Official Comments:

### SCR 3.130(1.12) Former judge ~~or~~, arbitrator, mediator

#### or other third-party neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, ~~arbitrator~~ 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 after consultation, confirmed in writing.

(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 ~~or arbitrator~~ 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 ~~or arbitrator~~.

(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:

(1) ~~The~~ the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) ~~Written~~ written notice is promptly given to the parties and any appropriate tribunal to enable ~~it~~ them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a ~~multi-member~~ multimember arbitration panel is not prohibited from subsequently representing that party.

#### ~~Supreme Court Commentary~~ Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a ~~multi-member~~ 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.

[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.

[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.

[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.

### **3. Discussion and Explanation of Recommendation:**

#### **a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.**

(1) In the Rule significant changes are:

- (a) New clauses in paragraphs (a) and (b) add arbitrators, mediators and other third-party neutrals to the scope of the prohibitions contained in those paragraphs.
- (b) Revised language in paragraph (a) replaces “consent after consultation” with “informed consent confirmed in writing.” See Rule 1.0(e) Terminology.

(2) In the Comments significant changes are:

- (a) New Comments “[2]” and “[3]” explain why arbitrators, mediators and third-party neutrals are included in the Rule.
- (b) New Comments “[4]” and “[5]” explain that the screening issue is addressed in Rule 1.0(k) Terminology.

(3) The ABA Reporter’s Explanation of Changes to MR 1.12 expresses the Committee’s view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 1.12

TEXT:

1. Caption: Change to "Former Judge, Arbitrator, Mediator or Other Third Party Neutral". In the caption and thereafter throughout the Rule, terminology is modified to encompass a more expansive category of neutrals that participate in court based and private dispute resolution.

2. Paragraph (a): Add other third party neutrals

This paragraph has been modified to add mediators and other third party neutrals. The term "arbitrator" was moved because arbitrators, like mediators and other third party neutrals, typically do not have law clerks.

3. Paragraph (a): Change from "consent after consultation" to "give informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "give informed consent," as defined in Rule 1.0(e). No change in substance is intended.

4. Paragraph (a): Consent "confirmed in writing"

The Commission recommends requiring that the consent here be confirmed in writing, as with other conflict of interest Rules. "Confirmed in writing" is defined in Rule 1.0(b).

5. Paragraph (b): Add references to other third party neutrals

As with paragraph (a), the Commission has added references to mediators and other third party neutrals and deleted "arbitrator" from the sentence addressing law clerks.

#### 6. Paragraph (c): Nonconsensual screening of other third party neutrals

Under the current Rule, the individual disqualification of a former judge or arbitrator under this Rule is not imputed to associated lawyers in a law firm if the conditions in (c)(1) and (2) are satisfied. The Commission determined that mediators and other third party neutrals should be treated in the same manner because 1) there is typically less confidential information obtained in these proceedings than when the lawyer represents clients in a client lawyer relationship and 2) although the third party neutral usually owes a duty of confidentiality to the parties, it is not the same duty of confidentiality owed under Rule 1.6. The Commission also heard testimony that third party neutrals do not share information with other lawyers in the firm in the same way that lawyers representing clients do. Finally, the Commission was concerned that failure to permit screening might inhibit the extent to which lawyers serve as third party neutrals, particularly in voluntary, court based alternative dispute resolution programs.

#### 7. Paragraph (c)(1): Add "timely"

The Commission is recommending a definition of "screened" that includes a requirement that the lawyer be "timely" isolated from participation in the matter. Nevertheless, the Commission believes that the timeliness requirement is so important that it should appear in the text as well. This change is being recommended for all of the Rules that provide for screening. See Rules 1.10, 1.11 and 1.18.

#### COMMENT:

[2] This Comment has been added to explain the textual addition to paragraph (a) of the Rule, i.e., its applicability to arbitrators, mediators and other third party neutrals.

[3] This entirely new Comment explains the rationale for imputing the conflicts of a personally disqualified lawyer unless the requirements of paragraph (c) are met.

[4] This entirely new Comment addresses the requirements of paragraph (c)(1) and has a cross reference to the definition of "screened" in Rule 1.0(k).

[5] This entirely new Comment addresses the requirements of paragraph (c)(2).

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 1.12 from MR 1.12.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.