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RPC 1.12:
Arbitrators, Mediators, and Pro Tem Judges

Mark J. Fucile
Fucile & Reising LLP

We usually think of RPC 1.12 as the "former judge's rule" because it addresses the circumstances when a former judge or the former judge's law firm may—and may not—represent a party in a proceeding the former judge handled while on the bench. Lawyers sometimes forget, however, that the rule also applies to arbitrators, mediators, and *pro tem* judges. These other situations can be much more common for many law firms. Senior litigators often serve as arbitrators or mediators. Other firm lawyers may serve as *pro tem* judges—particularly in Multnomah County where, under Supplementary Local Rule 5.016, most summary judgment motions are heard by *pro tem* judges. In this column, we'll survey RPC 1.12 as applied to these other roles. We'll first look at how RPC 1.12 imputes conflicts of an arbitrator, mediator or *pro tem* judge to that person's law firm as a whole and then survey how otherwise disqualifying conflicts can be addressed through screening.

Before we do, however, three qualifiers are in order.

First, law firms should also carefully review RPC 1.12(a) if they are thinking of hiring a former judge and are involved in a case the judge handled earlier while on the bench. Under RPC 1.12(c), a former judge's conflict will be imputed to the law firm absent timely screening of the judge from the matter or a

conflict waiver from all of the parties. If not addressed, the conflict can pose a risk of both regulatory discipline for the former judge and disqualification for the firm. *In re Maurer*, 364 Or. 190, 431 P.3d 410 (2018), surveys the former and *Dahlen v. City of Bend*, 56 Or. LUBA 789 (2008), discusses the later.

Second, law firms thinking of discussing possible future employment with a sitting judge should closely review RPC 1.12(b), which generally prohibits a judge from negotiating for employment with a party or a party's lawyer or law firm in an active matter in which the judge is participating "personally and substantially." OSB Formal Opinion 2009-181 (rev. 2016) addresses the parameters of the prohibition in RPC 1.12(b) and notes that the Code of Judicial Conduct and other law governing public employees also generally apply in this scenario.

Third, Oregon has a unique rule—RPC 2.4, patterned on former Oregon DR 5-106 rather than the corresponding ABA Model Rule—governing lawyer-mediators that prohibits a lawyer-mediator from later representing one party against another in the same or related proceeding but does allow the mediator to document and assist the parties in implementing the settlement. OSB Formal Opinion 2005-101 (rev. 2022) discusses RPC 2.4 in detail. We'll address the

prohibition here but leave assisting parties with documenting and implementing settlements for another day.

Imputed Conflicts

RPC 1.12 generally prohibits arbitrators and *pro tem* judges from personally representing a party in a matter in which the arbitrator or *pro tem* judge presided absent the consent of all parties (unless the arbitrator was a "partisan" panel member under RPC 1.12(d)). RPC 2.4(a)(1) prohibits a mediator outright from later representing a party involved in a mediation against another party in that same or a related matter. *In re Van Thiel*, 24 DB Rptr. 282 (Or. 2010), for example, involved a lawyer-mediator who was disciplined under RPC 2.4(a)(1) for first mediating a marital dissolution and, when the mediation was unsuccessful, later represented one spouse against the other in the same case.

RPC 1.12(c) also imputes the conflict of an arbitrator, mediator, or *pro tem* judge to that lawyer's law firm as a whole. For example, a firm lawyer acting as a *pro tem* judge might have denied a summary judgment motion. Later, the law firm might be approached about handling an appeal from the same case following trial. RPC 1.12(c) imputes the *pro tem* judge's conflict to the law firm. Although waivers by all parties are theoretically possible under RPC 1.12(a),

waivers can be difficult to obtain on a practical level in this setting and the parties are under no legal obligation to grant them. Alternatively, RPC 1.12(c) allows the firm to unilaterally screen the *pro tem* judge and handle the appeal through other firm lawyers.

While a practical solution, screening is dependent on the firm identifying the conflict. For firms with lawyers who act as arbitrators, mediators, and *pro tem* judges, it is imperative that they systematically enter party information into their conflict systems just as they would for other engagements. RPC 1.12(c) requires that screening be "timely"—in other words, firms can't necessarily wait until a problem surfaces later.

Screening

Mechanically, screening under RPC 1.12(c) is handled similarly to lateral-hire screening under RPCs 1.10(c) and 1.0(n). OSB Formal Opinion 2005-120 (rev. 2015) outlines the steps for screening in detail as does Section 13.3-4(a) in the most recent edition of the Oregon State Bar's *Ethical Oregon Lawyer*. Most screens typically include a formal acknowledgment (usually by declaration or affidavit to provide a contemporaneous written record) by the lawyer involved that they will not be involved in the matter concerned and internal notification to other firm lawyers and staff of the screen. Under RPC 1.12(c)(2), "written notice [of the

screen must be] . . . promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule."

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.860.2163 and Mark@frllp.com.