RULE CHANGE 2012(12)

COLORADO RULES OF PROFESSIONAL CONDUCT

Rule 1.12. Former Judge, 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 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.

(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.

(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 timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the parties and any appropriate tribunal, to enable the parties and the tribunal to ascertain compliance with the provisions of this Rule; and

(3) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

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

Source: COMMENT [1] AMENDED AND ADOPTED, EFFECTIVE JULY 11, 2012; ~~E~~entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[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. PARAGRAPH III(B) ~~Paragraphs C(2), D(2) and E(2)~~ of the Application Section of the ~~Model~~ COLORADO Code of Judicial Conduct ~~provide~~ PROVIDES that A ~~a part-time judge, judge pro tempore or retired judge recalled to active service,~~ PART-TIME JUDGE "shall not act as a lawyer in ~~any~~ A proceeding in which ~~he~~ THE JUDGE HAS served as a judge or in any other proceeding related thereto." ~~Canon 3(C)(1)(b)~~ RULE 2.11(A)(5)(A) of the Colorado Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge served as a lawyer in the matter in controversy, or ~~a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter~~ THE JUDGE WAS ASSOCIATED WITH A LAWYER WHO PARTICIPATED SUBSTANTIALLY AS A LAWYER IN THE MATTER DURING SUCH ASSOCIATION. 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(b) and (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. 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.

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Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, OR UNLESS A JUDGE INITIATES SUCH A COMMUNICATION AND THE LAWYER REASONABLY BELIEVES THAT THE SUBJECT MATTER OF THE COMMUNICATION IS WITHIN THE SCOPE OF THE JUDGE'S AUTHORITY UNDER A RULE OF JUDICIAL CONDUCT;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(I) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or

(d) engage in conduct intended to disrupt a tribunal.

Source: (B) AND COMMENT [2] AMENDED AND ADOPTED, EFFECTIVE JULY 11, 2012; ~~E~~entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Colorado Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, ~~unless authorized to do so by law or court order~~ SUBJECT TO TWO EXCEPTIONS: (1) WHEN A LAW OR COURT ORDER AUTHORIZES THE LAWYER TO ENGAGE IN THE COMMUNICATION, AND (2) WHEN A JUDGE INITIATES AN EX PARTE COMMUNICATION WITH THE LAWYER AND THE LAWYER REASONABLY BELIEVES THAT THE SUBJECT MATTER OF THE COMMUNICATION IS WITHIN THE SCOPE OF THE JUDGE'S AUTHORITY TO ENGAGE IN THE COMMUNICATION UNDER A RULE OF JUDICIAL CONDUCT. EXAMPLES OF EX PARTE COMMUNICATIONS AUTHORIZED UNDER THE FIRST EXCEPTION ARE RESTRAINING ORDERS, SUBMISSIONS MADE IN CAMERA BY ORDER OF THE JUDGE, AND APPLICATIONS FOR SEARCH WARRANTS AND WIRETAPS. *SEE ALSO* CMT. [5]. COLO. RPC 4.2 (DISCUSSING COMMUNICATIONS AUTHORIZED BY LAW OR COURT ORDER WITH PERSONS REPRESENTED BY COUNSEL IN A MATTER). WITH RESPECT TO THE SECOND EXCEPTION, RULE 2.9(A)(1) OF THE COLORADO CODE OF JUDICIAL CONDUCT, FOR EXAMPLE, PERMITS JUDGES TO ENGAGE IN EX PARTE COMMUNICATIONS FOR SCHEDULING, ADMINISTRATIVE, OR EMERGENCY PURPOSES NOT INVOLVING SUBSTANTIVE MATTERS, BUT ONLY IF "CIRCUMSTANCES REQUIRE IT," "THE JUDGE REASONABLY BELIEVES THAT NO PARTY WILL GAIN A PROCEDURAL, SUBSTANTIVE, OR TACTICAL ADVANTAGE AS A RESULT OF THE EX PARTE COMMUNICATION," AND "THE JUDGE MAKES PROVISION PROMPTLY TO NOTIFY ALL OTHER PARTIES OF THE SUBSTANCE OF THE EX PARTE COMMUNICATION, AND GIVES THE PARTIES AN OPPORTUNITY TO RESPOND." CODE OF JUD. CONDUCT, RULE 2.9(A)(1). SEE ALSO CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES, CANON 3(A)(4)(B)("A JUDGE MAY. . . (B) WHEN CIRCUMSTANCES REQUIRE IT, PERMIT EX PARTE COMMUNICATION FOR SCHEDULING, ADMINISTRATIVE, OR EMERGENCY PURPOSES, BUT ONLY IF THE EX PARTE COMMUNICATION DOES NOT ADDRESS SUBSTANTIVE MATTERS AND THE JUDGE REASONABLY BELIEVES THAT NO PARTY WILL GAIN A PROCEDURAL, SUBSTANTIVE, OR TACTICAL ADVANTAGE AS A RESULT OF THE

EX PARTE COMMUNICATION[.]"). THE SECOND EXCEPTION DOES NOT AUTHORIZE THE LAWYER TO INITIATE SUCH A COMMUNICATION. HOWEVER, A JUDGE WILL BE DEEMED TO HAVE INITIATED A COMMUNICATION FOR PURPOSES OF THIS RULE IF THE JUDGE OR THE COURT MAINTAINS A REGULAR PRACTICE OF ALLOWING OR REQUIRING LAWYERS TO CONTACT THE JUDGE FOR ADMINISTRATIVE MATTERS SUCH AS SCHEDULING A HEARING AND THE LAWYER COMMUNICATES IN COMPLIANCE WITH THAT PRACTICE. WHEN A JUDGE INITIATES A COMMUNICATION, THE LAWYER MUST DISCONTINUE THE COMMUNICATION IF IT EXCEEDS THE JUDGE'S AUTHORITY UNDER THE APPLICABLE RULE OF JUDICIAL CONDUCT. FOR EXAMPLE, IF A JUDGE PROPERLY COMMUNICATES EX PARTE WITH A LAWYER ABOUT THE SCHEDULING OF A HEARING, PURSUANT TO RULE 2.9(A)(1) OF THE COLORADO CODE OF JUDICIAL CONDUCT, BUT PROCEEDS TO DISCUSS SUBSTANTIVE MATTERS, THE LAWYER HAS AN OBLIGATION TO DISCONTINUE THE COMMUNICATION.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Amended and Adopted by the Court, En Banc, July 11, 2012, effective immediately.

By the Court:

Nathan B. Coats
Justice, Colorado Supreme Court