

Standard for Subcommittee  
for JCOPE Staff Recusal Based on Former Government Involvement

1. For all existing or new matters undertaken by JCOPE, the intake and case management system should indicate whether any current JCOPE employee had a previous connection to the matter under consideration. If such a connection exists, the employee should document his or her involvement in the prior matter. A recusal subcommittee of the JCOPE Commissioners will review the information and make a determination as to whether that employee should be screened from any participation in the current investigation by JCOPE.
2. N.Y. Rule of Professional Conduct 1.11 (reprinted below) provides that a lawyer who formerly served as public officer or employee of the government shall not represent a client in connection with a matter when the lawyer previously participated “personally and substantially” as a public officer or employee. Rule 1.11 permits the representation if the former government agency gives it consent in writing.
3. While Rule 1.11 is inapplicable to instances where, as here, government lawyers may have prior exposure to matters through other government service, as an independent governmental entity, it is incumbent for JCOPE to maintain the absolute appearance of impartiality. Accordingly, JCOPE has adopted a stringent standard that will require recusal of staff if it is found that they "personally and substantially" participated in a matter while serving in a prior government position.
4. The determination of whether a person participated “personally and substantially” is taken from 5 C.F.R. § 2737.201 (D) (2007) which utilizes that term in its imposition of a 2-year bar on former federal employees. 18 USC Sec. 207 (a)(1)(B) (2007) It provides:

The restrictions of section 207 (a) apply only to those matters in which a former Government employee had “personal and substantial participation, “exercise: though decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise.” To participate “personally” means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. “Substantially” means that the employee’s involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or

involvement on an administrative or peripheral issue...[}he  
single act of approving or participation in a critical step may be  
substantial. It is essential that the participation be related to a  
“particular matter involving a specific party.”