

**Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator  
(Proposed Rule Adopted by the Board on November 17, 2016)**

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

**Comment**

[1] This rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See rule 2.4.



**PROPOSED RULE OF PROFESSIONAL CONDUCT 2.4.1**  
**(Current Rule 1-710)**  
**Lawyer as Third-Party Neutral**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator)<sup>1</sup> in accordance with the Commission Charter. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 2.4.1 (Lawyer as Third-Party Neutral).

**Rule As Issued For 90-day Public Comment**

Proposed rule 2.4.1 carries forward current rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics when acting as a temporary judge, referee, or court-appointed arbitrator. Like the current rule, the proposed rule provides a disciplinary path for lawyers who violate applicable judicial ethics standards. Current rule 1-710 originated from a Supreme Court request sent to the State Bar in 1996, following the Supreme Court’s consideration of a report and recommendation of the Supreme Court Advisory Committee on Judicial Ethics, the body which drafted the California Code of Judicial Ethics that became effective on January 15, 1996. In drafting that Code, the Advisory Committee determined that while standards could be imposed on lawyers serving as temporary judges, the Commission on Judicial Performance lacked disciplinary jurisdiction over the conduct of lawyers. Accordingly, the Supreme Court directed the State Bar to consider a new Rule of Professional Conduct that would permit the Bar to discipline lawyers who violate Canon 6D while acting in a judicial capacity. In response to the Supreme Court’s request, rule 1-710 was developed, adopted by the Board and subsequently approved by the Supreme Court operative March 18, 1999.

In studying the current rule, the Commission determined that no substantive changes were warranted but some amendments are recommended as indicated below.

In the black letter text, minor stylistic revisions are recommended for clarity, including the global substitution of “lawyer” for “member.”

The current second paragraph of the Discussion section to rule 1-710 is recommended to be omitted as unnecessary. There also was concern that retaining it might cause ambiguities in construing other rules.<sup>2</sup>

A new Comment [3] is recommended to clarify that the rule does not apply to a lawyer serving as a third-party neutral in a mediation or settlement conference or a neutral arbitrator pursuant

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<sup>1</sup> There is no direct counterpart to this rule in the American Bar Association Model Rules; however, Model Rule 2.4 generally addresses lawyer conduct as a third-party neutral. Model Rule 2.4 is discussed in the executive summary of proposed rule 2.4.

<sup>2</sup> The current language states: “Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.” As a general proposition, this is true of every rule and the Commission believes that nothing in the instant rule suggests otherwise so as to justify its retention in proposed rule 2.4.1.

to an arbitration agreement. This comment also provides a cross reference to proposed new rule 2.4 as that rule is intended apply to conduct not within the scope of proposed rule 2.4.1.

### **Post-Public Comment Revisions**

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

## COMMISSION REPORT AND RECOMMENDATION: RULE 2.4.1 [1-710]

### Commission Drafting Team Information

**Lead Drafter:** Judge Karen Clopton  
**Co-Drafters:** Daniel Eaton, Judge Dean Stout

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### **I. CURRENT CALIFORNIA RULE**

#### **Rule 1-710 Member as Temporary Judge, Referee, or Court-Appointed Arbitrator**

A member who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject under the Code of Judicial Ethics to Canon 6D, shall comply with the terms of that canon.

#### **Discussion**

This rule is intended to permit the State Bar to discipline members who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.

### **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

#### **Commission:**

Date of Vote: October 21 & 22, 2016  
Action: Recommend Board Adoption of Proposed Rule 2.4.1 [1-710]  
Vote: 11 (yes) – 0 (no) – 0 (abstain)

#### **Board:**

Date of Vote: November 17, 2016  
Action: Board Adoption of Proposed Rule 2.4.1 [1-710]  
Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **III. COMMISSION'S PROPOSED RULE (CLEAN)**

#### **Rule 2.4.1 [1-710] Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator**

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

## Comment

[1] This rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See rule 2.4.

## IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-710)

### Rule 2.4.1 [1-710] ~~Member~~ Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator

A ~~member~~lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject ~~under~~to Canon 6D of the Code of Judicial Ethics ~~to Canon 6D~~, shall comply with the terms of that canon.

### Comment~~Discussion~~

~~Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law.~~

[1] This rule is intended to permit the State Bar to discipline ~~members~~lawyers who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. See rule 2.4.

## V. RULE HISTORY

In a letter dated January 3, 1996 from the Supreme Court to the State Bar, the State Bar was asked to propose a new Rule of Professional Conduct regulating a member of the State Bar's conduct when acting as a temporary judge. The promulgation of a rule was recommended to the Supreme Court by the Supreme Court Advisory Committee on Judicial Ethics. That committee observed that while the Code of Judicial Ethics sets standards regulating a temporary judge, the enforcement jurisdiction of the Commission on Judicial Performance extends only to sitting judges. In response, rule 1-710 was adopted by the State Bar Board of Governors on January 25, 1997 and thereafter approved by the Supreme Court, operative on March 18, 1999. As adopted, rule 1-710 functions as a conduit for the State Bar's enforcement of a lawyer's violation of Canon 6 of the Code of Judicial Ethics. Although the rule does not set substantive standards for lawyer conduct, it does incorporate by reference the duties imposed on lawyers acting in a temporary judicial capacity set forth in Canon 6D. In essence, the rule establishes an enforcement mechanism to redress violations of those standards by lawyers.

Current rule 1-710 provides that a lawyer is subject to Canon 6D of the Code of Judicial Ethics when acting as a temporary judge, referee, or court-appointed arbitrator. Rule 1-710 has no ABA Model Rule counterpart.

## **VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. OCTC supports this rule, but believes that the Commission should consider whether to put language in the rule in case the Code of Judicial Ethics is changed or renumbered.

Commission Response: The Commission has not made the suggested change. It has referenced the Code of Judicial Ethics so that if the Code should change, it would not be necessary to change the rule. The important concept is that the lawyer must comply with the Code, which regulates the lawyer in the stated circumstances.

OCTC supports Comment [2], but finds Comment [1] unnecessary, as the rule on its face permits the discipline of attorneys for violations of the rule. (See proposed Rule 1.0(b)(1).) Further, with the exception of public and private reprovals, the State Bar does not discipline attorneys. Only the Supreme Court can discipline attorneys.

Commission Response: The Commission has retained Comment [1] as drafted. It appears in slightly different form in current rule 1-710 and was added at the request of the Supreme Court. The Commission is not aware of any misunderstandings or other problems that have resulted from its inclusion in the current rule.

- **State Bar Court:** No comments were received from State Bar Court.

## **VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY**

During the 90-day public comment period, two public comments were received. One comment agreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

### **A. Related California Law**

1. California law related to current rule 1-710. California Rule of Professional Conduct 1-710 applies applicable portions of the Code of Judicial Ethics to

attorneys acting as a temporary judge, referee or court-appointed arbitrator. Section 1281.85 of the Code of Civil Procedure imposes Judicial Council ethics standards on arbitrators who are not court-appointed.<sup>1</sup>

2. *In re Scott* (1991) 52 Cal.3d 968 re the Supreme Court's inherent power to impose attorney discipline for conduct occurring in the performance of judicial functions. While acting as a municipal court judge, Michael Scott pled guilty to possession of cocaine and resigned his judicial post as a condition of his plea bargain. While presiding over the arraignment of a defendant who had previously sold him drugs, Mr. Scott authorized reduction of the defendant's bail. Following the entry of Mr. Scott's guilty plea, the court referred his convictions to the State Bar for a report and recommendation as to whether Mr. Scott should be suspended from the practice of law. A hearing panel of the State Bar Court recommended suspension from the practice of law with probationary conditions, but the Review Department of the State Bar Court recommended that Mr. Scott be disbarred. Mr. Scott appealed his disbarment to the California Supreme Court arguing, "the facts and circumstances of the offense as well as [his] subsequent conduct and the many compelling factors in mitigation present here warrant against the imposition of disbarment . . . ."

In rendering its decision, the California Supreme Court noted its authority to impose attorney discipline upon Mr. Scott for conduct engaged in as a member of the judiciary. The Court observed that by resigning his judicial post as a condition of his plea bargain, the Commission on Judicial Performance did not have jurisdiction to "discipline him as a member of the judiciary" and, citing Cal. Const., art. VI, § 18, subd. (b), the Court further observed that Mr. Scott's resignation from the bench was "tantamount to a preemptive strike-precluding his almost certain removal from judicial office by this court after proceedings before the Commission on Judicial Performance." (*Scott* at p. 976.) Notwithstanding his resignation from the bench, the Court observed that it retained jurisdiction to determine his fitness to practice law:

"Our inherent power over the admission, disbarment, and suspension of attorneys has long been recognized." *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889 [123 Cal.Rptr. 101, 538 P.2d 229, 92 A.L.R.3d 803] [attorney suspended for acts of moral turpitude committed prior to his admission to practice law].) "[U]nder our inherent power we may discipline an attorney for conduct 'either in or out of [his] profession' which shows him to be unfit to practice . . . ." (*Id.* at p. 890, quoting *The People v. Turner* (1850) 1 Cal. 143, 150.)

As we recently explained in *Kenwick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297 [267 Cal.Rptr. 293, 787 P.2d 591],

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<sup>1</sup> California Code of Civil Procedure section 1281.85 provides, in part: "a person serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with the ethics standards for judges adopted by the Judicial Council pursuant to this section."

“California law makes a reasonable distinction between suspension from law practice based on the attorney’s conduct *while a judge* and suspension or disbarment that is based on other conduct and ordinarily arises out of proceedings before the State Bar. Investigation of judges’ conduct for purposes of judicial discipline is entrusted to the commission, and if this court accepts the commission’s recommendation of removal, the question of suspension is [then] determined by this court.” (*Id.* at pp. 310-311, italics in original; see also *In re Craig* (1938) 12 Cal.2d 93 [82 P.2d 442].)

*In re Scott* (1991) 52 Cal.3d 968, 976-977.

3. *Furia v. Helm* (2003) 111 Cal.App.4<sup>th</sup> 945 re, in a malpractice context, the application of the Rules of Professional Conduct to a lawyer’s conduct as a mediator. Plaintiff former client brought an action for malpractice and established the breach of duty element against a mediator who was also the attorney for the adverse party. The court affirmed the defendant attorney’s general demurrer based on plaintiff’s failure to allege recoverable damages (no causation because plaintiff did not rely on mediator’s advice). However, in its decision the court cautioned that an attorney who agrees to act as a neutral mediator assumes a duty to perform as a mediator with the skill and prudence ordinarily to be expected of a person performing that role.

The court referred to Rule of Professional Conduct 3-310(C) and reasoned that the role of mediator has the same duty to disclose potential conflicts that an attorney has when accepting representation of clients. The opinion suggests that even in the absence of an attorney-client relationship, before an attorney agrees to serve as a mediator, there should be complete disclosure of all facts and circumstances, which, in the attorney’s judgment, may influence the party’s selection of a mediator. Failure to make such disclosure may result in civil liability. (See, *Furia v. Helm* (2003) 111 Cal.App.4<sup>th</sup> 945 [4 Cal.Rptr.3d 357].)

4. Recent Amendments to the California Code of Judicial Ethics relevant to rule 1-710. The California Code of Judicial Ethics was most recently amended on January 21, 2015, and these changes become effective on January 21, 2016. The amendments included changes to Canon 6D and Canon 2C, which will affect lawyers governed by rule 1-710.

Canon 6D(5)(b) requires a temporary judge, referee, or court-appointed arbitrator to disclose in writing or on the record membership in any organization that practices “invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation, except for membership in a religious or an official military organization of the United States and membership in a nonprofit youth organization so long as membership does not violate Canon 4A [conduct of extrajudicial activities].” This Canon was amended by retaining only “a religious organization” as an exception to the disclosure requirement. Therefore, reference to “an official military organization of the United States and

membership in a nonprofit youth organization so long as membership does not violate Canon 4A [conduct of extrajudicial activities]” has been deleted from Canon 6D(5)(b) as part of the most recent revision.

Canon 2C is entitled “Membership in Organizations” and it states:

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

This canon does not apply to membership in a religious organization or an official military organization of the United States. So long as membership does not violate Canon 4A, this canon does not bar membership in a nonprofit youth organization.

Similar to the amendments made to Canon 6D(5)(b), Canon 2C was amended by eliminating the exceptions for membership in nonprofit youth organizations and military organizations. The exception for membership in a religious organization was retained. A press release announcing these amendments can be found here: [http://www.courts.ca.gov/documents/sc15-Jan\\_23.pdf](http://www.courts.ca.gov/documents/sc15-Jan_23.pdf).

Prior to January 21, 2015, the California Code of Judicial Ethics was last amended on October 30, 2012, and those changes became effective on January 1, 2013. This revision was the first comprehensive review of the code since the court adopted the code in 1996. Some of the topics addressed by the amendments included: campaign contributions in judicial elections; conduct by candidates for judicial office, including incumbent judges; ex parte communications; definitions of impartiality, integrity, impropriety, and independence; settlements conferences; gifts, honoraria, and reimbursements; comments on pending cases; and disqualification of judges who make extrajudicial statements committing themselves to reach a particular result. A press release announcing these amendments can be found here: [http://www.courts.ca.gov/documents/oc12-Nov\\_14a.pdf](http://www.courts.ca.gov/documents/oc12-Nov_14a.pdf).

## **B. ABA Model Rule Adoptions**

There is no ABA Model Rule corresponding to California rule 1-710.

## **IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

### **A. Concepts Accepted (Pros and Cons):**

1. Recommend revising the black letter of current rule 1-710 to state “is subject to Canon 6D of the Code of Judicial Ethics”; as opposed to “is subject under the Code of Judicial Ethics to Canon 6D”.

- Pros: The proposed revision provides more clarity and precision. In addition, it is grammatically correct. No substantive change is intended.

- Cons: None identified.
2. Recommend adding Comment [2] to provide a cross-reference to proposed Rule 2.4 relating to lawyers acting as third-party neutrals pursuant to an agreement.
    - Pros: Proposed Comment [2] provides an important cross-reference to a comparable rule. Proposed Rule 2.4.1 is limited to situations in which an attorney is acting as either a temporary judge, referee, or court-appointed arbitrator. This cross-reference helps to inform the reader there is a separate rule applicable to lawyers acting as third-party neutrals who are not subject to this Rule.
    - Cons: None identified.

### **B. Concepts Rejected (Pros and Cons):**

1. Add the phrase “quasi-judicial capacity” to clarify the application of the rule.
  - Pros: This would help expand the scope of the Rule to include lawyers acting in “quasi-judicial” capacities as well as acting as temporary judges, referees or court-appointed arbitrators.
  - Cons: This addition may cause confusion as to what is meant by a lawyer serving in a “quasi-judicial” capacity. (Cf. the meaning of a judge’s “quasi-judicial activities” in Code of Judicial Ethics, Canon 4B.)
2. Add Comment [2] to the black letter of the Rule.
  - Pros: Important and substantive provisions should be contained in the black letter of the Rule, as opposed to in the Comments.
  - Cons: These cross-references are best contained in the Comments and is the approach used elsewhere in the proposed Rules.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

### **C. Changes in Duties/Substantive Changes to the Current Rule:**

1. No changes in duties/substantive changes are recommended to the current rule.

### **D. Non-Substantive Changes to the Current Rule:**

1. The phrase “and is subject to Canon 6D of the Code of Judicial Ethics” has been added to replace the following phrase, “and is subject under the Code of Judicial Ethics to Canon 6D.” This revision is recommended to provide better clarity and

to conform to the style used elsewhere in the Rules. No substantive change is intended.

2. Addition of new Comment [3], which is simply a cross-reference to proposed Rule 2.4 relating to lawyers acting as third-party neutrals pursuant to, for example, an arbitration agreement.

#### **E. Alternatives Considered:**

1. The only alternative considered was not to recommend proposed Rule 2.4.1, The Commission determined that the Rule should be retained as it provides important public protection by bridging a regulatory gap the Supreme Court recognized when it recommended consideration of this Rule in 1995.

#### **X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

##### **Recommendation:**

The Commission recommends adoption of proposed Rule 2.4.1 [1-710] in the form attached to this Report and Recommendation.

##### **Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 2.4.1 [1-710] in the form attached to this Report and Recommendation.