

Rule 2.4 Lawyer as Third-Party Neutral
(Proposed Rule Adopted by the Board on November 17, 2016)

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] In serving as a third-party neutral, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

[2] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm* are addressed in rule 1.12.

[3] This rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See rule 2.4.1.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 2.4
(No Current Rule)
Lawyer as Third-Party Neutral**

EXECUTIVE SUMMARY

In connection with the consideration of current rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator), the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated ABA Model Rule 2.4 (Lawyer Serving as Third-Party Neutral). The result of the evaluation is proposed rule 2.4 (Lawyer as Third-Party Neutral). Although the Commission’s proposed rule has no direct counterpart in the current California rules, the general concept of regulating a lawyer’s conduct as a neutral rather than an advocate is found in current rule 1-710.

Rule As Issued For 90-day Public Comment

The main issue presented by this Commission study is whether a new rule should be adopted. The Commission is recommending adoption of a rule primarily because a new disciplinary standard that imposes duties on lawyers when acting in a “quasi-judicial” capacity would enhance public protection in an area of conduct engaged in by lawyers that has expanded¹ since the last comprehensive revision of the rules in 1989. Proposed new rule 2.4 would protect the public by helping to assure that a lawyer’s role is properly understood when it is intended to be distinct from the typical, and historically common, function of a lawyer as a client’s advocate. Specifically, the rule would require that a lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them and explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

In considering this rule, the Commission examined the underlying public policy issue of State Bar regulation of lawyers who engage in conduct that is judicial in nature. The Commission noted the analogous precedent of current rule 1-710 (applicable when a lawyer as a court-connected temporary judicial officer) and California Supreme Court decisional law recognizing the propriety of the State Bar discipline notwithstanding that misconduct occurred in judicial, as opposed to, lawyering activity. In *In re Scott* (1991) 52 Cal.3d 968 (“Scott”), the Supreme Court addressed the inherent power to impose attorney discipline for conduct occurring in the performance of judicial functions. While acting as a municipal court judge, respondent Michael Scott pled guilty to criminal charges of possession of cocaine and resigned his judicial post as a condition of a plea bargain. Following the entry of a guilty plea, the court referred Mr. Scott’s 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

¹ See [Ethical Conundrums for the 21st Century Lawyer/Mediator – “Toto, I’ve Got a Feeling We’re Not in Kansas Any More,”](https://www.yumpu.com/en/document/view/43738400/ethical-conundrums-for-the-21-century-lawyer-mediator-american) by Melvin A. Rubin and Brian F. Spector, posted online at: <https://www.yumpu.com/en/document/view/43738400/ethical-conundrums-for-the-21-century-lawyer-mediator-american> in which the authors observe that: “21st Century civil mediation is increasingly dominated by lawyers escaping from private trial/commercial litigation practice.”

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 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 concluded that it retained jurisdiction in the attorney discipline system to determine Mr. Scott’s 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.)

Scott, at pages 976-977. Consistent with the foregoing, proposed new rule 2.4 would make clear in the rules that there can be attorney disciplinary consequences when a lawyer acts as a third-party neutral. The proposed comments also promote compliance with other related regulatory standards by including references to the Judicial Council Standards for Mediators in Court Connected Mediation Programs and the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

National Background – Adoption of Model Rule 2.4

As California does not presently have a direct counterpart to Model Rule 2.4, this section reports on the adoption of the Model Rule in United States’ jurisdictions.

The ABA State Adoption Chart for ABA Model Rule 2.4, from which proposed rule 2.4 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_4.authcheckdam.pdf

Thirty-three jurisdictions have adopted Model Rule 2.4 verbatim; thirteen jurisdiction have adopted a rule substantially similar to Model Rule 2.4; five jurisdictions have not adopted a rule derived from Model Rule 2.4.

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 [1-710]

Commission Drafting Team Information

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

I. CURRENT CALIFORNIA RULE

There is no California Rule that corresponds to Model Rule 2.4, from which proposed Rule 2.4 is derived. However, there is current rule 1-710, which concerns lawyers serving as temporary judges. It is recommended that current rule 1-710 be carried forward in the proposed Rules as Rule 2.4.1.

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 [1-710]
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 2.4 [1-710]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 2.4 Lawyer as Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] In serving as a third-party neutral, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-

party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

[2] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm* are addressed in rule 1.12.

[3] This rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See rule 2.4.1.

IV. CURRENT ABA MODEL RULE

Rule 2.4 Lawyer Serving as Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see rule 1.0(m)), the lawyer's duty of candor is governed by rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by rule 4.1.

V. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 2.4)

Rule 2.4 Lawyer ~~Serving As~~ as Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

~~[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction.~~

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~~[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.~~

[42] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm* are addressed in rule 1.12.

~~[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see rule 1.0(m)), the lawyer's duty of candor is governed by rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by rule 4.1.~~

[3] This rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See rule 2.4.1.

VI. RULE HISTORY

There is no counterpart to Model Rule 2.4 in the California Rules of Professional Conduct. However, there is current rule 1-710, which concerns lawyers serving as temporary judges. It is recommended that current rule 1-710 be carried forward in the proposed Rules as Rule 2.4.1. What follows is the history of current rule 1-710.

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.

Although the origin and history of Model Rule 2.4 was not the primary factor in the Commission's consideration of proposed Rule 2.4, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 435 - 439, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VII. 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 and its Comments.

Commission Response: No response required.

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

VIII. 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. Both comments agreed with the proposed rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

IX. 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.¹
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

¹ California Code of Civil Procedure § 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."

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], “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.4th 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.4th 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](#).

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](#).

In addition to the foregoing, the following additional authorities relating to third-party neutrals were considered:

- Rules 10.780 – 10.783, California Rules of Court
- Rules 3.850 – 3.872, California Rules of Court
- Ethics Standards for Neutral Arbitrators in Contractual Arbitration
- Los Angeles County Bar Association Ethics Opinion 514

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for ABA Model Rule 2.4, from which proposed Rule 2.4 is derived, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_4.authcheckdam.pdf (Last accessed on 2/7/17.)
- Thirty-two jurisdictions have adopted Model Rule 2.4 verbatim.² Thirteen jurisdictions have adopted a rule substantially similar to Model Rule 2.4.³ Five jurisdictions, including California, have not adopted a rule derived from Model Rule 2.4.⁴

X. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Recommend deleting the word “Serving” from the title of the Rule.
 - Pros: Deleting the word “Serving” results in using less words while retaining the same meaning.
 - Cons: None identified.
2. Recommend including new Comment [1], which has no counterpart in Model Rule 2.4.
 - Pros: This Comment serves to highlight that the third-party neutrals in California may be subject to specific court rules, codes of ethics, or other law they must follow. The Report and Recommendation for proposed Rule 2.4.1 also recommends including this same Comment.
 - Cons: None identified.
3. Recommend adding as Comment [2] Model Rule 2.4, Comment [4].
 - Pros: It has been the Commission’s practice to include cross-references to related rules (e.g. Rules 1.4 (Communication) and 1.4.1 (Communication of

² The thirty-three jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, West Virginia, Wisconsin, Wyoming.

³ The thirteen jurisdictions are: Florida, Hawaii, Illinois, Massachusetts, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, South Carolina, Tennessee, and Utah.

⁴ The five jurisdictions are: Alabama, California, Georgia, Texas, and Virginia.

Settlement Offers), contain cross-references to one another). This Comment provides an important cross-reference to a rule that applies to conflicts involving a former judge or other neutral. Including this cross-reference (as did the first Commission) will alert the lawyer acting as a third party neutral to important duties that apply after the lawyer has completed providing third party neutral services.) Its retention depends on whether the Commission recommends adoption of a rule analogous to Model Rule 1.12.

- Cons: This may be viewed as an unnecessary additional Comment.
4. Recommend including new Comment [3], which has no counterpart in the Model Rules.
- Pros: This Comment provides an important cross-reference for practitioners and the public that temporary judges, referees and court-appointed arbitrators are regulated under proposed Rule 2.4.1 [current rule 1-710], not this Rule. A similar cross-reference to this Rule is contained in a Comment to proposed Rule 2.4.1.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include Model Rule 2.4, Comments [1], [3] and [5].
 - Pros: These Comments are viewed as either unnecessary because they fail to provide interpretive guidance or fail to explain how the Rule is applied.
 - Cons: None identified.
2. Include the first sentence of the first Commission's proposed Rule 2.4(a) which provides: "A lawyer serves as a third-party neutral when the lawyer ***is engaged to assist impartially*** two or more persons who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them." (Bold and italics text denotes the first Commission's added language.)
 - Pros: No need to change from the ABA language as a third-party neutral should be impartially.
 - Cons: Party arbitrators owe different duties to the parties that have retained them and should not necessarily be subject to the same standards as neutral arbitrators.

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. Although no substantive changes to the Model Rule are recommended, there is no similar rule in the current California Rules. In that respect, there are changes in the duties set forth in the California Rules.

D. Non-Substantive Changes to the Current Rule:

1. Addition of a new Comment [2] referencing the Rule that applies to conflicts involving a former judge or other neutral.
2. Addition of a new Comment [3] referencing proposed Rule 2.4.1 and clarifying that when lawyers act as temporary judges, referees, or court-appointed arbitrators, Rule 2.4.1, and not this Rule, applies.

E. Alternatives Considered:

1. The only alternative considered was not to recommend proposed Rule 2.4. The Commission determined the Rule should be added to the Rules as it provides important public protection by regulating lawyer third party neutrals.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 2.4 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 2.4 in the form attached to this Report and Recommendation.