

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2.4

**Lead Drafter:** Clopton  
**Co-Drafters:** Eaton, Stout  
**Meeting Date:** November 13 – 14, 2015

### I. 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

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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.

### II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

### III. 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 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 Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards

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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] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

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

### IV. PROPOSED RULE (REDLINE TO MODEL RULE 2.4)

#### 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.~~

~~[1][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 [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](#)~~

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~~for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. [Judicial Council Standards for Mediators in Court Connected Mediation Programs](#) or the [Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration](#).~~

~~[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] [Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.](#)

[4] [This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.](#)

### V. PUBLIC COMMENTS SUMMARY

- None.

### VI. OCTC / STATE BAR COURT COMMENTS

- JAYNE KIM, OCTC, DATE:

None.

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- **RUSSELL WEINER, OCTC, 6/15/2010:**

Comments 1, 3, and 4 seem more appropriate for treatises, law review articles, and ethics opinions.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

OCTC did not comment on Rule 2.4 in their September 27, 2001 memo to the first Commission.

- **STATE BAR COURT:** No comments received from state bar court.

### VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

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](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 (AK, AZ, AR, CO, CT, DE, DC, ID, IN, IA, KS, KY, LA, MN, MD, MI, MN, MS, MO, NE, NV, NH, NC, ND, OK, PA, RI, SD, VT, WA, WV, WI, WY); thirteen jurisdiction have adopted a rule substantially similar to Model Rule 2.4 (FL, HI, IL, MA, MT, NJ, NM, NY, OH, OR, SC, TN, UT); five jurisdictions, including California, have not adopted a rule derived from Model Rule 2.4 (AL, CA, GA, TX, VA).

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

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

1. Whether to delete 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. Whether to retain Comment [4] from the ABA Model Rule as proposed Comment [2].  
**[NOTE: including this Comment is contingent on the Commission adopting Rule 1.12 (Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral), or something similar]**
  - 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 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

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or other neutral. Including this cross-reference (as did RRC1) 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 MR 1.12.

- Cons: This may be viewed as an unnecessary additional Comment.

3. Whether to add proposed Comment [3].

- Pros: This Comment serves to highlight that the third-party neutrals may be subject to 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: This may be viewed as an unnecessary additional Comment.

4. Whether to add proposed Comment [4].

- 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 [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. Whether to include ABA 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. Whether to include the first sentence of RRC1's proposed Rule 2.4(a) which states: "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." (emphasis on RRC1 added language)

- Pros: No need to change from the ABA language as a third-party neutral should not be acting as anything other than impartial.
- 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.

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

1. No substantive changes to the Model Rule are recommended.

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

1. Add a new Comment [2] (contingent upon the Commission adopting a Rule similar to Rule 1.12) referencing the Rule that applies to conflicts involving a former judge or other neutral.
2. Add a new Comment [3] in recognition that the conduct of lawyers who serve as third

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party neutrals may also be subject to other regulation than that expressly identified in Comment [1].

3. Add a new Comment [4] to reference proposed Rule 2.4.1 and clarify 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 drafting team determined the Rule should be added to the Rules as it provides important public protection by regulating lawyer third party neutrals.

## **IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

There are no open issues.

## **X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

### **Clopton**

- [Date]: Email Comment

### **Eaton**

- [Date]: Email Comment

### **Stout**

- [Date]: Email Comment

## **XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

### **Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 2.4, derived from ABA Model Rule 2.4 as amended, in the form attached to this report and recommendation.

### **Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 2.4, derived from ABA Model Rule 2.4 as amended, in the form attached to this Report and Recommendation.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2.4**

**Lead Drafter:** Clopton  
**Co-Drafters:** Eaton, Stout  
**Meeting Date:** November 13 – 14, 2015

**XII. DISSENTING POSITION(S)**

None.

**XIII. FINAL COMMISSION VOTE/ACTION**

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-710 [2.4.1]**

**Lead Drafter:** Clopton  
**Co-Drafters:** Eaton, Stout  
**Meeting Date:** November 13 – 14, 2015

### **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. DRAFTING TEAM'S RECOMMENDATION AND VOTE**

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

### **III. PROPOSED RULE (CLEAN)**

#### **Rule 1-710 [2.4.1] 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] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[3] 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.

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

Lead Drafter: Clopton  
Co-Drafters: Eaton, Stout  
Meeting Date: November 13 – 14, 2015

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

#### Rule ~~1-710 Member~~ 2.4.1 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

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

[3] 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. PUBLIC COMMENTS SUMMARY

None.

### VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 9/29/15:**

OCTC does not recommend any revisions to Rule 1-710.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

OCTC supports this rule.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

OCTC did not comment on Rule 1-710 in their September 27, 2001 memo to the first Commission.

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

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

**Lead Drafter:** Clopton  
**Co-Drafters:** Eaton, Stout  
**Meeting Date:** November 13 – 14, 2015

### VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

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

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

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

1. Re-word the black letter 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 changes are intended.
  - Cons: None identified.
2. Add Comment [3] to provide a cross-reference to proposed Rule 2.4 relating to lawyers acting as third-party neutrals.
  - Pros: Proposed Comment [3] 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: This may be viewed as an unnecessary additional Comment.

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

1. Whether to add the phrase “quasi-judicial capacity” to 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. meaning of a judge’s “quasi-judicial activities” in Code of Judicial Ethics, Canon 4B.)
2. Whether to add proposed Comment [3] 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.

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

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

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

**Lead Drafter:** Clopton  
**Co-Drafters:** Eaton, Stout  
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### 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 intended to provide better clarity and to conform to the style used elsewhere in the Rules.
2. Add a new Comment [3] as 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. The drafting team 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.

## IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

## X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

### Clopton

- [Date]: Email Comment

### Eaton

- [Date]: Email Comment

### Stout

- [Date]: Email Comment

## XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

### Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1-710 [2.4.1] in the form attached to this report and recommendation.

### Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1-710 [2.4.1] in the form attached to this Report and Recommendation.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-710 [2.4.1]**

**Lead Drafter:** Clopton  
**Co-Drafters:** Eaton, Stout  
**Meeting Date:** November 13 – 14, 2015

**XII. DISSENTING POSITION(S)**

None.

**XIII. FINAL COMMISSION VOTE/ACTION**

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)



# THE STATE BAR OF CALIFORNIA

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Date: September 29, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for October 2015 meeting

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  - E. Rule 1-710: Member as Temporary Judge, Referee, or Court-Appointed Arbitrator
- III. Closing Comment

### I.

#### OPENING COMMENT

The following comments address the rules to be considered at the Commission's October 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

**II.**  
**POINTS FOR CONSIDERATION**

[TEXT OMITTED]

**E. Rule 1-710: Member as Temporary Judge, Referee, or Court-Appointed Arbitrator**

1. OCTC does not recommend any revisions to rule 1-710.

[TEXT OMITTED]

**III.**  
**CLOSING COMMENT**

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

**CURRENT CALIFORNIA RULE 1-710**  
**“Member as Temporary Judge, Referee, or Court-Appointed Arbitrator”**

***I. Text of Current Rule:***

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. (Added by order of the Supreme Court, operative March 18, 1999.)

***II. Background/Purpose:***

**A. Introduction**

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.

**B. 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. Thus, there is a clear enforcement mechanism to redress violations of those standards by lawyers.

**C. The First Commission’s Proposed Rule**

The first Commission proposed a rule that carried forward current Rule 1-710 in providing that a lawyer is subject to Canon 6D of the Code of the Judicial Ethics when acting as a temporary judge, referee, or court-appointed arbitrator. However, that rule,

proposed rule 2.4.1, included two clarifying revisions to current Rule 1-710. First, in Comment [1], which carried forward the first Discussion paragraph to Rule 1-710, the term “quasi-judicial” was added to make clear that the nature of a lawyer’s service as governed by the Rule is not strictly limited to conduct as a judge. Second, a new Comment [3] was added providing a cross reference to proposed rule 2.4 (Lawyer as a Third Party Neutral). Comment [3] stated: “This Rule is 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.”

**III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):***

A. 2001 Comment. OCTC did not comment on Rule 1-710 in their September 27, 2001 Memo to the first Commission.

B. 2010 Comment. In a June 15, 2010 letter commenting on the proposed rules of the first Commission, OCTC provided the following comment on proposed rule 2.4.1 [Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator]:

“OCTC supports this rule.”

C. 2015 Comments.

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

**IV. *Potential Deficiencies in the Current Rule:***

A. The current rule does not include an attorney acting in a quasi-judicial capacity. Is the current rule deficient in its ability to discipline an attorney acting in such a capacity?

B. Is the current rule deficient in its use of “temporary judge, referee or court-appointed arbitrator”? Are there other terms, or third-party neutrals, that are subject to Canon 6D who should also be specifically contemplated within this rule?

C. The current rule does not require an attorney who is acting as a temporary judge, referee, or court-appointed arbitrator to inform the parties that the lawyer is not representing them, nor explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role in a representative capacity when the lawyer knows or reasonably knows the party does not understand the lawyer’s role in the matter.

**V. *California Context:***

A. 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>

B. *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. The facts included Mr. Scott having presided over the arraignment of an individual who had previously sold him drugs, at which proceeding Mr. Scott authorized reduction of the defendant's bail. Following the entering of his 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 certain probationary conditions, but the Review Department of the State Bar Court recommended 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 began by addressing 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 an opportunity 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 made clear that jurisdiction was retained 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.)

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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."

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.

C. *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

In a legal malpractice action, plaintiff 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])

D. Recent Amendments to the California Code of Judicial Ethics

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 reflect changes to Canon 6D and Canon 2C.

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](#).

## **VI. *Approach In Other Jurisdictions (National Backdrop):***

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

B. Model Rule 2.4. Forty-six jurisdictions have adopted some version of ABA Model Rule 2.4 (Lawyer Serving as Third-Party Neutral). Four jurisdictions, in addition to California, have not adopted a version of the rule. See ABA State Adoption, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 2.4: Lawyer Serving as Third-Party Neutral,” revised May 8, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_2\\_4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_4.authcheckdam.pdf) [last visited 9/2/15]

Thirty-three jurisdictions have adopted Model Rule 2.4 verbatim.<sup>2</sup> Thirteen jurisdictions have adopted a rule substantially similar to Model Rule 2.4.<sup>3</sup> Four jurisdictions, in addition to California, have not adopted Model Rule 2.4.<sup>4</sup>

#### **VII. *Public Comment Received by the First Commission:***

The clean text of proposed new Rule 2.4.1 drafted by the first Commission and adopted by the Board to replace rule 1-710 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 1-710, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-710 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

#### **VIII. *Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:***

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may

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

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

<sup>4</sup> The four jurisdictions are: Alabama, Georgia, Texas, and Virginia.

have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the rule should make clear the rule covers lawyers acting in “quasi-judicial” capacities as well as acting as temporary judges.

(2) Whether the terms “Temporary Judge, Referee, or Court-Appointed Arbitrator” sufficiently identify all persons who are subject to Canon 6D of the Code of Judicial Ethics.

(3) Whether a related rule governing a lawyer acting as a third-party neutral generally should be recommended for adoption by the Board (compare ABA Model Rule 2.4).

**IX. Research Resources:**

- [In re Scott \(1991\) 52 Cal.3d 968](#)
- [Furia v. Helm \(2003\) 111 Cal.App.4<sup>th</sup> 945](#) [4 Cal.Rptr.3d 357]
- [Canon 6D of the Code of Judicial Ethics](#)
- [California Code of Civil Procedure section 1281.85](#)
- [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](#)
- [ABA Model Rule 2.4](#) (Lawyer Serving as Third-Party Neutral)