

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 2.4 [1-710]**

### **Commission Drafting Team Information**

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### **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 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. 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 2.4 (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. PROPOSED RULE (REDLINE TO 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<sub>1</sub> or other matter<sub>1</sub> 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.~~

~~[21] The role of~~In serving as 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 Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model~~ Judicial Council Standards of Conduct for Mediators ~~jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.~~ 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] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

## **V. 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.)

## **VI. OCTC / 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.
- **State Bar Court:** No comments were received from State Bar Court.

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Two comments, including the above comment from OCTC, were received and both agreed with the proposed rule. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

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

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 jurisdictions 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).

**IX. 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 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 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.
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 RRC1'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." (emphasis on RRC1 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. Adding a new Comment [2] referencing the Rule that applies to conflicts involving a former judge or other neutral.
2. Add a new Comment [3] 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 Commission determined the Rule should be added to the Rules as it provides

important public protection by regulating lawyer third party neutrals.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

That the Board of Trustees of the State Bar of California adopt 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.