

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

### **Commission Drafting Team Information**

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

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

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

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

#### **Discussion**

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

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

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

#### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 2.4.1 [1-710]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

#### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 2.4.1 [1-710]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **III. PROPOSED RULE 2.4.1 [1-710] (CLEAN)**

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

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

## Comment

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

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

## IV. COMMISSION'S PROPOSED RULE 2.4.1 [1-710] (REDLINE TO CURRENT CALIFORNIA RULE 1-710)

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

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

### Comment~~Discussion~~

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

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

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

## V. RULE HISTORY

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

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

## **VI. 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, but believes that the Commission should consider whether to put language in the rule in case the Code of Judicial Ethics is changed or renumbered.
2. OCTC supports Comment 2, but finds Comment 1 unnecessary, as the rule on its face permits the discipline of attorneys for violations of the rule. (See proposed rule 1.0(b)(1).) Further, with the exception of public and private reprovals, the State Bar does not discipline attorneys. Only the Supreme Court can discipline attorneys. (*In re Rose* (2000) 22 Cal.4th 430, 439; Business & Professions Code section 6077.

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

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

Two public comments, including the above comment from OCTC, were received. One comment agreed with the proposed rule. One agreed only if modified. 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**

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

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

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

1. Recommend revising the black letter of current rule 1-710 to state "is subject to Canon 6D of the Code of Judicial Ethics"; as opposed to "is subject under the Code of Judicial Ethics to Canon 6D".
  - Pros: The proposed revision provides more clarity and precision. In addition, it is grammatically correct. No substantive change is intended.
  - Cons: None identified.

2. Recommend adding Comment [2] to provide a cross-reference to proposed Rule 2.4 relating to lawyers acting as third-party neutrals pursuant to an agreement.

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

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

1. Add the phrase “quasi-judicial capacity” to clarify the application of the rule.

- Pros: This would help expand the scope of the Rule to include lawyers acting in “quasi-judicial” capacities as well as acting as temporary judges, referees or court-appointed arbitrators.
- Cons: This addition may cause confusion as to what is meant by a lawyer serving in a “quasi-judicial” capacity. (Cf. the meaning of a judge’s “quasi-judicial activities” in Code of Judicial Ethics, Canon 4B.)

2. Add Comment [2] to the black letter of the Rule.

- Pros: Important and substantive provisions should be contained in the black letter of the Rule, as opposed to in the Comments.
- Cons: These cross-references are best contained in the Comments and is the approach used elsewhere in the proposed Rules.

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

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

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

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

1. The phrase “and is subject to Canon 6D of the Code of Judicial Ethics” has been added to replace the following phrase, “and is subject under the Code of Judicial Ethics to Canon 6D.” This revision is recommended to provide better clarity and to conform to the style used elsewhere in the Rules. No substantive change is intended.

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

**E. Alternatives Considered:**

1. The only alternative considered was not to recommend proposed Rule 2.4.1, The 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.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

That the Board of Trustees of the State Bar of California adopt proposed Rule 2.4.1 [1-710] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

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

