

Rule 2.4 Lawyer as Third-Party Neutral
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (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 American Bar Association (“ABA”) Model Rule 2.4 (Lawyer Serving as Third-Party Neutral). The evaluation was made with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. 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. This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

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

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.”

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 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 (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).

Rule 2.4 Lawyer ~~Serving As~~ Third-Party Neutral
(Redline Comparison of the Proposed Rule to ABA Model Rule)

- (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 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.