

PROPOSED AMENDED RULE 1-710

At its July 9, 2004 meeting, the Commission tentatively approved proposed amended rule 1-710. This proposal has not been considered or approved by the Board of Governors of the State Bar of California. Tentative approval means that the proposed new rule will not be the subject of further amendments until such time as the Chair places the rule on the Commission's agenda for consideration of transmission to the Board of Governors Committee on Regulation, Admissions and Discipline with a request that the Board Committee authorize a public comment distribution of the proposed new rule. (Note: The issue of a rule numbering system is a topic that the Commission will consider at a future meeting.)

This document provides the following resources: (1) the text of proposed new rule 1-710; (2) a redline/strikeout version of the proposed rule comparing it to current rule 1-710;(3) explanatory notes; and (4) excerpts from the Commission's May 7-8, 2004 and July 9, 2004 meeting summaries.

Proposed Amended Rule 1-710 Clean Version

(As amended following the Commission's July 9, 2004 meeting.)

Proposed 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 to Canon 6D of the Code of Judicial Ethics, shall comply with the terms of that canon.

Discussion:

[1] 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 or quasi-judicial capacity pursuant to an order or appointment by a court.

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

[3] Rule 1-710 is not intended to apply to a member 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 1-720.

Proposed Amended Rule 1-710 Comparison Version

(Underlined text is proposed addition; strike-through text is proposed deletion.)

Proposed Amended 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 to Canon 6D of the Code of Judicial Ethics ~~to Canon 6D~~, shall comply with the terms of that canon.

Discussion:

[1] 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 or quasi-judicial capacity pursuant to an order or appointment by a court.

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

[3] Rule 1-710 is not intended to apply to a member 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 1-720.

Explanatory Notes

Title:

No amendment is recommended for the rule title. The title accurately reflects that the rule is intended to apply only to members who serve as temporary judges, referees or as court-appointed arbitrators. Neutral arbitrators appointed by agreement of the parties, as well as lawyers who serve as a third-party neutral in any mediation or settlement conference, whether appointed by a court or by agreement of the parties, are governed under proposed new rule 1-720.

Text:

1. Changes to the text of the current rule are stylistic only. No change in substance is intended.

Discussion:

1. Paragraph [1] of the proposed Discussion remains largely unchanged from the current rule. The phrase “quasi-judicial” has been added to clarify that members may be subject to discipline under this rule not only when they commit misconduct when acting in a judicial capacity as temporary judges, but also when they do so when acting in a quasi-judicial capacity as a referee or court-appointed arbitrator.
2. Paragraph [2] of the proposed Discussion remains unchanged from the current rule. It clarifies that the rule is not intended to abrogate other applicable law.
3. Paragraph [3] of the proposed Discussion has been added to clarify that rule 1-710 applies only to members when they have been appointed by a court to act in a judicial or quasi-judicial capacity, and that the conduct of members who serve as neutrals in mediations or settlement conferences, or in arbitrations pursuant to an arbitration agreement is governed under proposed new rule 1-720.

Excerpt from the Commission’s May 7-8, 2004 Meeting Summary

* * * * *

C. Consideration of Rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator)

The Commission considered a March 23, 2004 draft of proposed amended rule 1-710 presented by Mr. Ruvolo.

By vote of 6 yes, 2 no, 1 abstain, the Commission determined to split the current draft into two rules, one only on temporary judges and the other addressing other categories of third party neutrals. By a vote of 10 yes, 0 no, 0 abstain, the Commission determined to start with MR 2.4, as modified by 1-710(3), and that the first sentence of Discussion paragraph 1 will become the discussion for a separate rule on temporary judges.

In addition, there was consensus to: change the second “member’s” to “lawyer’s”; delete paragraphs 2 and 3 of the Discussion; delete citation to the *Kelly* case in paragraph 2 of the rule; and delete the phrase “in any mediation or any settlement conference.”

The co-drafters were assigned a redraft and asked to review MR 2.4 further to determine whether any other aspects should be considered.

Among the points raised during the discussion were the following.

- (1) The inclusion of a requirement that a third party neutral (“TPN”) must disclaim an attorney-client representation of the parties may imply that absent such disclaimers the services of a TPN generally constitute a “practice of law.”
- (2) Because the mediation standards were not conceived as State Bar disciplinary rules, concepts that are aspirational should not be incorporated by proposed amended rule 1-710 and concepts that do represent core conduct standards should be modified, to the extent necessary to serve as disciplinary rules.
- (3) As different standards apply, for ease of reading, the proposed rule should be split into two separate rules: one on temporary judges; and another on other TPN’s.
- (4) Consideration should be given to including conduct as an “arbitrator” and tracking MR 2.4.
- (5) In the proposed separate rule for TPN’s, consideration should be given to including explicit discussion language clarifying that temporary judges are not covered by the rule but are covered by 1-710.

Excerpt from the Commission's July 9, 2004 Meeting Summary

* * * * *

D. Consideration of Rule 1-710

The Commission considered draft 3 (6/8/04) of proposed amended rule 1-710 and proposed new rule 1-720 presented by Mr. Ruvolo. * * * Regarding proposed amended rule 1-710, Mr. Ruvolo indicated that he agreed with two modifications suggested by Mr. Sapiro in his July 7, 2004 e-mail message: (1) deletion of paragraph numbering in the rule text (e.g., deleting "(A)"); and (2) using the phrase "is subject to Canon 6D of the Code of Judicial Ethics" in the place of the comparable phrase found in current RPC 1-710. There was no opposition to the Commission's adoption of these changes to proposed amended rule 1-710.* * *

A motion was made to accept the rule [for tentative approval] as drafted by Mr. Ruvolo with the changes already adopted. The motion carried with a Commission vote of 9 yes, 2 no, and 0 abstentions.

+++++

General information about the Commission, including: its charter; meeting schedule; and a member-staff roster is available at the State Bar of California website. Go to: www.calbar.ca.gov/ethics and access the link to the "Commission for the Revision of the Rules of Professional Conduct."