

## **PROPOSED NEW RULE 1-720**

At its July 9, 2004 meeting, the Commission tentatively approved proposed new rule 1-720. 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 1-720; (2) a redline/strikeout version of the proposed rule comparing it to Model Rule 2.4; (3) explanatory notes; (4) concepts considered but not recommended; and (5) excerpts from the Commission's May 7-8, 2004 and July 9, 2004 meeting summaries.

### **Proposed New Rule 1-720 Clean Version**

(As approved at the Commission's July 9, 2004 meeting.)

#### **Proposed New Rule 1-720. Member as Third-Party Neutral.**

(A) A member serves as a third-party neutral when the member is engaged to assist impartially two or more persons who are not clients of the member 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 a neutral arbitrator, a mediator or in such other capacity as will enable the member to assist the parties to resolve the matter.

(B) A member serving as a third-party neutral shall inform unrepresented parties that the member is not representing them. When the member knows or reasonably should know that a party does not understand the member's role in the matter, the member shall explain the difference between the member's role as a third-party neutral and a member's role as one who represents a client.

(C) A member serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 1620.4 [confidentiality], 1620.5 [impartiality, conflicts of interest, disclosure, and withdrawal], 1620.6(b) and (d) [truthful representation of background; assessment of skills; withdrawal], 1620.8 [marketing], and 1620.9 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs.

(D) A member serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with standards 5 [general duty], 6 [duty to refuse appointment], 7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [Arbitrators' duty to inform themselves about matters to be disclosed], 10 [disqualification], 11 [duty to refuse gift, request, or favor], 12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Discussion:

[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, neutral 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 Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. See Discussion paragraphs [6] and [7].

[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.

[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. Depending upon the circumstances of the matter, a conflict of interest may preclude the lawyer from accepting the representation. Cf. *Cho v. Superior Court* (1995) 39 Cal. App.4th 113 [45 Cal.Rptr.2d 863] (former judge who was hired by defendant disqualified where judge had received ex parte confidential information from plaintiff while presiding over the same action, and screening would not be effective to avoid imputed disqualification of defendant's firm.)

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct and the State Bar Act.

[6] Paragraph (C) is intended to permit the State Bar to discipline a member who fails to comply with certain enumerated Judicial Council mediator standards whenever the member is serving as a third-party neutral in a mediation or settlement conference.

[7] Paragraph (D) is intended to permit the State Bar to discipline a member who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the member is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.

[8] Nothing in rule 1-720 shall be deemed to limit the applicability of any other rule or law.

[9] Rule 1-720 is not intended to apply to temporary judges, referees or court-appointed arbitrators. See rule 1-710.

**Proposed New Rule 1-720 Comparison to ABA Model Rule 2.4**

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

~~Rule 2.4~~ Proposed New Rule 1-720. ~~Lawyer Member Serving~~ as Third-Party Neutral.

(A) A ~~lawyer member~~ serves as a third-party neutral when the ~~lawyer member is engaged to~~ assists impartially two or more persons who are not clients of the ~~lawyer member~~ 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 a neutral~~ arbitrator, a mediator or in such other capacity as will enable the ~~lawyer member~~ to assist the parties to resolve the matter.

(B) A ~~lawyer member~~ serving as a third-party neutral shall inform unrepresented parties that the ~~lawyer member~~ is not representing them. When the ~~lawyer member~~ knows or reasonably should know that a party does not understand the ~~lawyer's member's~~ role in the matter, the ~~lawyer member~~ shall explain the difference between the ~~lawyer's member's~~ role as a third-party neutral and a ~~lawyer's member's~~ role as one who represents a client.

(C) A member serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 1620.4 [confidentiality], 1620.5 [impartiality, conflicts of interest, disclosure, and withdrawal], 1620.6(b) and (d) [truthful representation of background; assessment of skills; withdrawal], 1620.8 [marketing], and 1620.9 [compensation and gifts] of the Judicial Council Standards for Mediators in Court Connected Mediation Programs.

(D) A member serving as a neutral arbitrator pursuant to an arbitration agreement shall comply with standards 5 [general duty], 6 [duty to refuse appointment], 7 [disclosure], 8 [additional disclosures in consumer arbitrations administered by a provider organization], 9 [Arbitrators' duty to inform themselves about matters to be disclosed], 10 [disqualification], 11 [duty to refuse gift, request, or favor], 12 [duties and limitations regarding future professional relationships or employment], 14 [ex parte communications], 15 [confidentiality], 16 [compensation], and 17 [marketing] of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Comment Discussion:

[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, **neutral** 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 Arbitration 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.~~ **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. See Discussion paragraphs [6] and [7].**

[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 (bB) 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.~~ Depending upon the circumstances of the matter, a conflict of interest may preclude the lawyer from accepting the representation. Cf. *Cho v. Superior Court* (1995) 39 Cal. App.4th 113 [45 Cal.Rptr.2d 863] (former judge who was hired by defendant disqualified where judge had received ex parte confidential information from plaintiff while presiding over the same action, and screening would not be effective to avoid imputed disqualification of defendant's firm.)

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. ~~When and the State Bar Act, 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.~~

[6] Paragraph (C) is intended to permit the State Bar to discipline a member who fails to comply with certain enumerated Judicial Council mediator standards whenever the member is serving as a third-party neutral in a mediation or settlement conference.

[7] Paragraph (D) is intended to permit the State Bar to discipline a member who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the member is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.

[8] Nothing in rule 1-720 shall be deemed to limit the applicability of any other rule or law.

[9] Rule 1-720 is not intended to apply to temporary judges, referees or court-appointed arbitrators. See rule 1-710.

## Explanatory Notes

### *Title:*

The rule title chosen for this new rule reflects the fact that the format and content of the rule has drawn upon Model Rule 2.4 (entitled “Lawyer Serving As Third-Party Neutral”) of the American Bar Association’s Model Rules of Professional Conduct. The decision to explore the concept of this proposed new rule arose as an extension of the Rules Revision Commission’s consideration of proposed amendments to rule 1-710.

### *Text:*

1. Paragraph (A), which for the most part tracks the language of paragraph (a) to Model Rule 2.4, defines the term “third-party neutral.” Where appropriate, “member” has been substituted for “lawyer.” In addition, the phrase, “is engaged to assist impartially” has been substituted for “assists” to more accurately describe the engagement of a neutral, and the word “neutral” has been added to modify the word “arbitrator” to emphasize that this rule is applicable only to neutral arbitrators, and not party arbitrators.
2. Paragraph (B) is nearly identical to the language of paragraph (b) in Model Rule 2.4. As with paragraph (A), “member” has been substituted for “lawyer” where appropriate. The ABA Ethics 2000 Commission Reporter’s Explanation of Changes to Model Rule 2.4 notes:

“Paragraph (b) requires the lawyer serving as a third-party neutral to inform unrepresented parties in all cases that the lawyer does not represent them. The potential for confusion is sufficiently great to mandate this requirement in all cases involving unrepresented parties. Consistent with the standard of Rule 4.3, paragraph (b) requires the lawyer to explain the differences in a lawyer’s role as a third-party neutral and the role of a lawyer representing a party in situations where the lawyer knows or reasonably should know that the unrepresented party does not understand the lawyer’s role as a third-party neutral.”

It should be noted that the California Rules Revision Commission has not yet addressed whether to adopt the concept contained in Model Rule 4.3. That issue is a topic that the Commission will address at a future meeting.

3. Paragraph (C) has no counterpart in Model Rule 2.4. Paragraph (C) provides that a member who serves as a third-party neutral in any mediation or any settlement conference, whether appointed by the court or by agreement of the parties, must comply with the enumerated provisions of the Judicial Council Standards for Mediators in Court Connected Mediation programs. Only non-aspirational standards at the core of the ethical tenets of impartial mediators were included in the enumerated provisions in paragraph (C).
4. Paragraph (D) has no counterpart in Model Rule 2.4. Paragraph (D) provides that a member who serves as a neutral arbitrator pursuant to an arbitration agreement must comply with the enumerated provisions of the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Only non-aspirational standards at the core of the ethical tenets of impartial arbitrators were included in the enumerated provisions in paragraph (D).

### *Discussion:*

1. Paragraph [1] of the proposed Discussion is identical to comment [1] to Model Rule 2.4, with the exception that “neutral” has been added to modify “arbitrator” in the second sentence to emphasize that this rule is applicable only to neutral arbitrators, and not party arbitrators.

2. The first two sentences of paragraph [2] of the proposed Discussion are identical to the first two sentences of comment [2] to Model Rule 2.4. These two sentences explain that lawyers who serve as third-party neutrals must look to other law or ethics standards in comporting their conduct to the law. While the third sentence of the Model Rule comment gives examples of other law or ethics codes that are applicable to lawyers serving as third-party neutrals, the third sentence of paragraph [2] expressly refers to the specific ethics standards that govern members who serve as third-party neutrals. Paragraph [2] also provides a cross-reference to paragraphs [6] and [7] of the Discussion, which explain the effect of subjecting members to the reach of these standards.
3. Paragraph [3] of the proposed Discussion is identical to comment [3] to Model Rule 2.4, except that the last sentence of comment [4] was deleted as surplusage.
4. Paragraph [4] of the proposed Discussion, whose first sentence is identical to the first sentence of comment [4] to Model Rule 4.2, clarifies that a lawyer who has served as a third-party neutral may be precluded from subsequently representing one of the parties in the same matter. The second sentence of comment [4] to the Model Rule was replaced because California has no rule that is analogous to Model Rule 1.12, which governs conflicts of interest involving a former judge, arbitrator, mediator or other third-party neutral. The second sentence of paragraph [4] instead cites to the analogous situation of *Cho v. Superior Court* (1995) 39 Cal. App.4th 113 [45 Cal.Rptr.2d 863] which involved a lawyer who had become privy to confidential information while serving as the judge in the same matter. It should be noted that the California Rules Revision Commission has not yet addressed whether to adopt a rule similar to Model Rule 1.12. That issue is a topic that the Commission will address at a future meeting.
5. The first sentence of paragraph [5] of the proposed Discussion is nearly identical to comment [5] to Model Rule 2.4 and clarifies that members who represent clients in alternative dispute-resolution processes remain governed by the Rules of Professional Conduct and the State Bar Act. The remainder of comment [5] has been deleted because California has no counterparts to the rules referenced in that sentence: Model Rules 1.0(m), 3.3 and 4.1. It should be noted that the California Rules Revision Commission has not yet addressed whether to adopt the concepts contained in these rules. The issues raised by those rules are topics that the Commission will address at a future meeting.
6. Paragraph [6] of the proposed Discussion alerts members to the fact that they will be subject to discipline if, when serving as a third-party neutral in any mediation or any settlement conference, whether by appointment by a court or pursuant to an agreement of the parties, they fail to comply with the Judicial Council mediator standards enumerated in paragraph (C). Paragraph [6] has no counterpart in Model Rule 2.4.
7. Paragraph [7] of the proposed Discussion alerts members to the fact that they will be subject to discipline if, when serving as a third-party neutral arbitrator pursuant to an arbitration, they fail to comply with the Judicial Council ethics standards enumerated in paragraph (D). Paragraph [7] has no counterpart in Model Rule 2.4.
8. Paragraph [8] of the proposed Discussion clarifies that the rule is not intended to abrogate other applicable law.
9. Paragraph [9] of the proposed Discussion has been added to clarify that rule 1-720 applies only to members when they serve as third-party neutrals in any mediation or settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. Paragraph [9] further notes that the conduct of members who have been appointed by a court to serve as a temporary judge, referee or arbitrator is governed under proposed amended rule 1-710. At its May 7-8, 2004 meeting, the Commission requested that the drafters prepare two rules, one for temporary judges and referees, and one for third party neutrals as defined in Model Rule 2.4, which would have included mediators and all arbitrators, whether appointed by court or by agreement of the parties. After consideration of the request, however, the reference to "*court-appointed* arbitrator" (emphasis added) was left in rule 1-710, as the history of that rule reflects the California Supreme Court's preference that lawyers appointed by courts in adjudicative capacities be subject to discipline under the rules of professional

conduct for failure to adhere to Canon D of the California Code of Judicial Ethics. Arbitrators appointed pursuant to an arbitration agreement between the parties, as well as lawyers serving in mediations and settlement conferences are covered under proposed new rule 1-720 that addresses attorney conduct as third-party neutrals, and governed by either the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration or the Judicial Council Standards for Mediators in Court Connected Mediation Programs.

*Concepts Considered but Rejected or Postponed for Future Consideration:*

At its February 20, 2004 meeting, the Commission considered whether regulation of lawyer conduct as a mediator required a determination that such conduct constituted the “practice of law.” It was the sense of the Commission that members of the State Bar are subject to discipline regardless of whether or not the misconduct occurs in the course of the practice of law. The Commission was persuaded that the issue is not whether mediation conduct constitutes the practice of law but whether the conduct of members as neutrals has demonstrated problems that warrant promulgation of a lawyer disciplinary rule.

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

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**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**

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**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. Mr. Ruvolo indicated that proposed new rule 1-720 (A), (B), and (C), are essentially the same as the prior draft when that rule was combined in rule 1-710. Also regarding proposed new rule 1-720, it was indicated that Mr. Mohr and Mr. Ruvolo extracted from the Judicial Council mediation standards, those provisions that they felt were the fundamental tenets of impartial arbitration. \* \* \* \* \* Among the points raised during this discussion were the following:

- (1) MR 2.4 has been incorporated into the rule. There are also references to specific Judicial Council standards for mediators that were left in the rule.
- (2) The Legislature passed Code of Civil Procedure §1281.85 inviting the Judicial Council to develop standards for private arbitration. The non-aspirational standards at the core of the ethical tenets of impartial arbitrators were extracted following consideration of the entirety of the standards.
- (3) It should be made clear in the text and in the record that the scope of the former standard has been broadened beyond court-appointed neutrals to cover non-court appointed neutrals.
- (4) There should be an emphasis on the complete neutrality of arbitrators. Consideration should be given to changing the first line of proposed 1-720(A) to "when the member is engaged to impartially assist two or more. . ."
- (5) By having disbarment as a possible punishment, this rule is discouraging lawyers from accepting appointment in arbitration proceedings. This unfairly penalizes the pool of prospective neutrals who are lawyers. Many mediators are not lawyers and would not have to assume a similar risk of punishment. Singling-out lawyers for violating these rules is making lawyers a disfavored class.
- (6) Paragraph (D) does not relate at all to anyone serving on a panel for a court. This is not singling-out lawyers anymore than they are already singled-out. When you talk about singling-out lawyers, it is a misnomer because the State Bar has a mandate to regulate lawyers. This is an issue of what is in the best interest of the public. This is not something where lawyers will be subjected to discipline for picky things; these are fundamental duties that go to the fairness of the system.
- (7) This is an area begging for regulation. It is well settled that lawyers must follow applicable rules in whatever capacity they act. Whenever a lawyer holds himself or herself out to be a lawyer in any context, then they should be required to abide by applicable rules or pay the consequences.

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.

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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](http://www.calbar.ca.gov/ethics) and access the link to the "Commission for the Revision of the Rules of Professional Conduct."