

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Saturday, September 05, 2009 7:29 PM
To: McCurdy, Lauren
Cc: Hollins, Audrey; avoogd@stanfordalumni.org; CommissionerJ2@gmail.com; Ellen Peck (E-mail); hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; Jerome Sapiro Jr. (E-mail); Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Work) (E-mail); Kurt Melchior (E-mail); Lee, Mimi; linda.foy@jud.ca.gov; Mark L. Tuft (E-mail); martinez@lbbsslaw.com; Paul W. Vapnek (E-mail); Difuntorum, Randall; rlkehr@kscllp.com; snyderlaw@charter.net; Stan Lamport (E-mail); Yen, Mary
Subject: Re: RRC - 1-700 [2.4.2] Sept. Meeting Agenda Materials - III.J. 2.4.2 [1-700]
Attachments: RRC - 1-700 [2-4-2] - Dash, Intro, Rule & Comment - COMBO - DFT2 (09-05-09)-KEM.pdf

Greetings all:

~~I've attached a scaled PDF file that suggests revisions to Introduction, Rule & Comparison Charts for Rule 2.4.2 [1-700].~~

~~I've also attached a proposed Dashboard, which was not included w/ the original circulation (the drafters did not have the revised dashboard template to work with).~~

Comments:

1. This Rule probably belongs in a proposed Rule 8.2 rather than as Rule 2.4.2. I've made a recommendation concerning this Rule, i.e., to point out to BOG that we considered it as part of the set of rules (2.4, 2.4.1, 2.4.2) that apply to lawyers acting in an adjudicative capacity. See Explanation of Changes for MR 8.2(a). When we started review of the "adjudicative" rules, however, we were still reviewing the Rules by California rule number. There is, however, no compelling reason why Rules 2.4.2 [1-700] and 2.4.1 [1-710] (re serving as a temporary judge) should be linked to Rule 2.4 (Lawyers serving as TPNs). I would note for the BOG that although we are presenting this Rule as Rule 2.4.2, we may eventually recommend inserting it in Rule 8.2. We also might recommend inserting 2.4.1 in Rule 8.2 or number it 8.2.1 and place it after Rule 8.2.
2. As an alternative, I recommend that we consider and sign off on the dashboard and charts at the September meeting, but then hold off on submitting 2.4.1 and 2.4.2 until after we have had an opportunity to consider MR 8.2(a). The work will be done. The only decision that will be left is whether to associate the rules w/ 2.4 or with 8.2.

Please let me know if you have any questions. Thanks,

Kevin

McCurdy, Lauren wrote:
RE: III.J. Rule 2.4.2 [1-700]

Proposed Rule 8.2 [1-700] “Judicial and Legal Officials”

(Draft #1, 10/28/09)

Summary: Proposed Rule 8.2(a) adopts Model Rule 8.2(a) without any changes. It prohibits a lawyer from making false statements about the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of candidates for such offices. Proposed Rule 8.2(b) largely carries forward current California Rule 1-700 and tracks Model Rule 8.2(b). It applies when lawyers are seeking appointment or election to, or retention of, judicial office.

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

RPC 1-700.

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Stakeholders and Level of Controversy

Minority/Position Included on Model Rule Comparison Chart: Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

<p align="center"><u>ABA Model Rule</u> Rule 8.2 Judicial and Legal Officials</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.2 Judicial and Legal Officials</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.</p>	<p>(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.</p>	<p>This language is identical to Model Rule 8.2(a).</p>
<p>[(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.]</p>	<p>{SEE RULE 2.4.2 COMPARISON CHART}</p>	
<p>[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.</p>	<p>[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.</p>	<p>Comment [1] adopts Model Rule 8.2, comment [1].</p>

* Proposed Rule 8.2, Draft 1 (10/28/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 8.2 Judicial and Legal Officials</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.2 Judicial and Legal Officials</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.]</p>	<p>{SEE RULE 2.4.2 COMPARISON CHART}</p>	
<p>[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.</p>	<p>[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.</p>	<p>Comment [3] adopts Model Rule 8.2, comment [3].</p>

Proposed Rule 2.4.2 [RPC 1-700] “Lawyer as Candidate for Judicial Office”

(Draft #4, 6/23/07)

Summary: Proposed Rule 1-700 largely carries forward current California Rule 1-700 and tracks Model Rule 8.2(b). It applies when lawyers are seeking appointment or election to, or retention of, judicial office.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input checked="" type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

RPC 1-700.

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain/Not Voting _____

Approved on Consent Calendar

Approved by consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial – Explanation:

This Rule for the most part carries forward current rule 1-700, which has not proven controversial.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.4.2* Lawyer as Candidate for Judicial Office

~~{Month}~~September 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

This ~~rule~~-Rule, which largely carries forward current California Rule 1-700, ~~follows tracks~~ ABA Model ~~Code~~-Rule 8.2(b), and applies when lawyers are seeking appointment or election ~~to, or~~ retention ~~of, to~~ judicial office. The ~~rule~~-Rule provides a means by which the State Bar can discipline lawyers who violate ethical duties imposed by Canons 5 and 5B of the California Code of Judicial Ethics when seeking appointment or election ~~to, or~~ retention ~~to~~-of judicial office.

The Commission has not yet considered whether to recommend adoption of Model Rule 8.2(a). See Explanation of Changes for Model Rule 8.2(a).

* Proposed Rule 2.4.2, Draft 4 (6/23/07).

<p align="center"><u>ABA Model Rule</u> Rule 8.2(b)</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 2.4.2</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) — A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.</p>		<p>The Commission has not yet considered whether to recommend adoption of Model Rule 8.2(a). Proposed Rule 2.4.2, which has a counterpart in Model Rule 8.2(b), was considered separately as part of the Commission's consideration of rules governing the conduct of lawyers acting in an adjudicative capacity, most of which were rules carried over from the current California Rules of Professional Conduct. In the event the Commission recommend Model Rule 8.2(a) for adoption, it may also recommend placement of proposed Rule 2.4.2 in that Rule.</p>
<p>(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.</p>	<p>(b)(a) A lawyer who is a candidate for election to or retention of judicial office <u>in California</u> shall comply with the applicable provisions of the Code of Judicial Conduct <u>Canon 5 of the Code of Judicial Ethics</u>.</p>	<p>This rule Paragraph (a) substantially follows <u>ABA-Model Rule 8.2(b)</u>, and It has been modified only to reference the applicable California Code of Judicial Ethics <u>when a lawyer seeks office in California</u>.</p>

* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 8.2(b)</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 2.4.2</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(b) <u>A lawyer who seeks appointment to judicial office shall comply with Canon 5B of the Code of Judicial Ethics. A lawyer commences to become an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.</u></p>	<p>There is no counterpart in the ABA-Model Rules to this subpartparagraph (b). It is included to provide a disciplinary path for lawyers who violate their duty as applicants for appointment to judicial office to comply with<u>by requiring compliance with</u> Canon 5B, as currently provided in the <u>California</u> Code of Judicial Ethics. This subpart-paragraph also includes definitions of<u>sets forth</u> when a lawyer <u>is deemed to have commences-commenced and-or terminates-terminated</u> his or her status as an applicant for appointment.</p>
	<p>(c) <u>The determination of when a lawyer is a candidate for judicial office by election or retention is defined in the terminology section of the California Code of Judicial Ethics. A lawyer's duty to comply with paragraph (a) shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first.</u></p>	<p>There is no counterpart in the ABA-Model Rules to this subpartparagraph (c). It references the terminology used in the Code of Judicial Ethics, and adds to that definition<u>expands on the Code section's explanation as to</u> when <u>a</u> candidacy for election or retention to judicial office endss.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.2(b) Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.4.2 Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.</p>	<p>[1] This Rule applies to lawyers who are candidates for election to judicial office and to lawyers who have applied for appointment to judicial office. (See California Code of Judicial Ethics, Canon 5B.)</p>	<p>This comment states the obvious and is unnecessary, but we always include comments to our rules. Comment [1] has no counterpart in the Model Rules.¹</p> <p>The comment to Model Rule 8.2(b), Comment [2], has been deleted. This hortatory comment conflicts with the mandatory black letter of this Rule that sets a standard for discipline.²</p>
	<p>[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.</p>	<p>I don't know what the RCC was thinking when we included this comment. Comment [2] carries forward Discussion paragraph 1 of current rule 1-700.</p>

¹ **Drafters' Recommendation:** Delete Comment [1]. It is blindingly obvious and unnecessary. Instead, we recommend striking through MR 8.2, cmt. [2], and including the Comment in the following paragraph.

² See footnote 1.

**RRC – Rules 2.4 [1-720]; 8.2 & 2.4.1 [1-710]; 2.4.2 [1-720]
E-mails, etc. – Revised (11/3/2009)**

September 1, 2009 Marlaud E-mail to Drafters (Melchior & KEM), cc Chair & Difuntorum re Rule 2.4 [1-720]:	39
September 4, 2009 McCurdy E-mail to RRC (w/ Attachments) re Rule 2.4:	40
September 4, 2009 McCurdy E-mail to RRC (w/ Attachments) re Rule 2.4.1:	40
September 4, 2009 McCurdy E-mail to RRC (w/ Attachments) re Rule 2.4.2:	40
September 5, 2009 KEM E-mail to RRC re Rule 2.4:	40
September 5, 2009 KEM E-mail to RRC re Rule 2.4.1:	41
September 5, 2009 KEM E-mail to RRC re Rule 2.4.2:	41
September 7, 2009 Ruvolo E-mail to KEM, cc RRC re Rule 2.4:	42
September 7, 2009 Sapiro E-mail to RRC List re Rule 2.4:	42
September 7, 2009 Sapiro E-mail to RRC List re Rule 2.4.2:	42
September 7, 2009 Sondheim E-mail to RRC re Rule 2.4:	43
September 7, 2009 Sondheim E-mail to RRC re Rule 2.4.1:	43
September 7, 2009 Sondheim E-mail to RRC re Rule 2.4.2:	43
September 7, 2009 KEM E-mail to Ruvolo, cc RRC re Rule 2.4:	44
September 8, 2009 Difuntorum E-mail to KEM, cc RRC re Rule 2.4:	44
September 8, 2009 Ruvolo E-mail to Difuntorum, cc RRC re Rule 2.4:	44
September 8, 2009 KEM E-mail to Difuntorum, cc Sondheim, McCurdy & Lee:	45
September 8, 2009 Sondheim E-mail to Difuntorum & KEM, cc McCurdy & Lee:	45
September 8, 2009 Difuntorum E-mail to Saul Bercovitch, cc McCurdy, Lee & KEM:	45
September 14, 2009 KEM E-mail to Drafters (Ruvolo, Melchior), cc Chair & Staff re 2.4:	46
September 15, 2009 Sondheim E-mail to Drafters, cc Staff re 2.4:	46
September 16, 2009 Ruvolo E-mail to KEM, cc Drafters, Chair & Staff re 2.4:	46
September 16, 2009 KEM E-mail to Ruvolo, cc Drafters, Chair & Staff:	46
September 16, 2009 Ruvolo E-mail to Drafters, cc Chair & Staff:	46
September 16, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff re 2.4.1:	47
September 16, 2009 Ruvolo E-mail to Drafters, cc Chair & Staff re 2.4.1:	48
September 16, 2009 Melchior E-mail to Drafters, cc Chair & Staff re Rule 2.4:	48
September 16, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff re 2.4.1:	48
September 16, 2009 Sondheim E-mail to Melchior, cc Drafters & Staff re 2.4.1:	48
September 16, 2009 Sondheim E-mail to Drafters & Staff re 2.4:	49
September 16, 2009 Ruvolo E-mail to Drafters, cc Chair & Staff re 2.4:	49
September 16, 2009 Melchior E-mail to Sondheim, cc Drafters & Staff re 2.4:	49
September 16, 2009 KEM E-mail to Drafters, cc Chair & Staff re 2.4:	49
September 17, 2009 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff re 2.4.1:	50
September 17, 2009 Difuntorum E-mail to KEM, cc Drafters, Chair & Staff re 2.4.2:	50
September 21, 2009 Melchior E-mail to Sondheim, cc Drafters & Staff re 2.4.1:	50
September 21, 2009 Sondheim E-mail to Staff, cc Drafters:	50
September 21, 2009 KEM E-mail #1 to Difuntorum, McCurdy & Lee re 2.4:	50
September 21, 2009 KEM E-mail #2 to Difuntorum, McCurdy & Lee re 2.4:	51
September 21, 2009 Difuntorum E-mail to KEM, cc McCurdy & Lee re 2.4:	51
September 21, 2009 Difuntorum E-mail to KEM, cc McCurdy & Lee re 2.4.1:	51
September 21, 2009 KEM E-mail to Difuntorum, cc McCurdy & Lee re 2.4:	51
September 21, 2009 McCurdy E-mail to RRC re 2.4:	51
September 21, 2009 Difuntorum 10-Day Ballot to RRC re 2.4:	51

**RRC – Rules 2.4 [1-720]; 8.2 & 2.4.1 [1-710]; 2.4.2 [1-720]
E-mails, etc. – Revised (11/3/2009)**

10-DAY BALLOT E-MAILS for Rule 2.4:.....	52
<i>September 21, 2009 Peck E-mail to RRC:</i>	<i>52</i>
<i>September 22, 2009 Snyder E-mail to RRC:.....</i>	<i>52</i>
<i>September 22, 2009 Julien E-mail to RRC:.....</i>	<i>52</i>
<i>September 25, 2009 Sapiro E-mail to RRC:.....</i>	<i>52</i>
<i>September 25, 2009 Vapnek E-mail to RRC:.....</i>	<i>53</i>
<i>September 26, 2009 Sondheim E-mail to RRC:</i>	<i>53</i>
<i>September 27, 2009 Kehr E-mail to RRC:.....</i>	<i>53</i>
<i>September 29, 2009 Melchior E-mail to RRC:.....</i>	<i>53</i>
<i>September 30, 2009 Sondheim E-mail to RRC:.....</i>	<i>53</i>
<i>September 30, 2009 Melchior E-mail to RRC:.....</i>	<i>53</i>
September 21, 2009 KEM E-mail to Difuntorum, cc McCurdy & Lee re 2.4.1:.....	54
September 22, 2009 Difuntorum E-mail to KEM, cc McCurdy & Lee re 2.4.1:.....	54
September 22, 2009 McCurdy E-mail to RRC re 2.4.1:.....	54
September 22, 2009 Difuntorum 10-Day Ballot Memo to RRC:	54
10-DAY BALLOT E-MAILS for Rule 2.4.1:.....	55
<i>September 25, 2009 Sapiro E-mail to RRC:.....</i>	<i>55</i>
<i>September 25, 2009 Vapnek E-mail to RRC:.....</i>	<i>55</i>
<i>September 25, 2009 Snyder E-mail to RRC:.....</i>	<i>55</i>
<i>September 29, 2009 Melchior E-mail to RRC:.....</i>	<i>55</i>
<i>September 30, 2009 Kehr E-mail to RRC:.....</i>	<i>55</i>
<i>September 30, 2009 Sondheim E-mail to RRC:.....</i>	<i>55</i>
October 9, 2009 Difuntorum E-mail to KEM, cc Chair & Staff:	55
October 9, 2009 KEM E-mail to Difuntorum, cc Chair & Staff:	56
October 26, 2009 McCurdy E-mail to Drafters (Ruvolo, Sapiro, Vapnek), cc Chair, Tuft & Staff:.....	56
October 28, 2009 Lee E-mail to KEM:	56
October 28, 2009 KEM E-mail to Lee:	56
October 31, 2009 Kehr E-mail to RRC:.....	56
November 1, 2009 Sapiro E-mail #1 to RRC List:	57
November 1, 2009 Sapiro E-mail #2 to RRC List:	57
November 2, 2009 Ruvolo E-mail to RRC List:.....	57

**RRC – Rules 2.4 [1-720]; 8.2 & 2.4.1 [1-710]; 2.4.2 [1-720]
E-mails, etc. – Revised (11/3/2009)**

2. In addition, on the attached Dashboard, I've listed the Rule as "moderately controversial." I realize the earlier drafts were "highly controversial," but the revisions seemed to have placated the stakeholders to some extent (though not all; I recall at least one commenter at our meetings telling us they did not need to be regulated at all) and rendered the rule less controversial. The question I have is whether the rule is sufficiently less controversial that it is now "moderately" controversial, or is it only less "highly" controversial?

Please let me know if you have any questions.

Attachment: A single PDF file w/ the following:

- Dashboard, Draft 2 (9/5/09)KEM
- Introduction, Draft 2 (9/5/09)KEM
- Rule Chart, Draft 2 (9/5/09)KEM
- Comment Chart, Draft 2 (9/5/09)KEM

September 5, 2009 KEM E-mail to RRC re Rule 2.4.1:

I've attached a scaled PDF file the suggests revisions to Introduction, Rule & Comparison Charts for Rule 2.4.1 [1-710].

I've also attached a revised Dashboard (the drafters did not have the revised dashboard template to work with).

Comments:

1. The attached are self-explanatory. However, in the e-mail I'm sending contemporaneously concerning proposed Rule 2.4.2, I've suggested that we might want to reconsider the placement of this Rule and, in any event, hold off on submitting this Rule to the BOG until after we've had an opportunity to consider 8.2(a). Please refer to that e-mail.

Please let me know if you have any questions.

Attachment: A single PDF file w/ the following:

- Dashboard, Draft 2 (9/5/09)KEM
- Introduction, Draft 2 (9/5/09)KEM
- Rule & Comment Chart, Draft 2 (9/5/09)KEM

September 5, 2009 KEM E-mail to RRC re Rule 2.4.2:

I've attached a scaled PDF file the suggests revisions to Introduction, Rule & Comparison Charts for Rule 2.4.2 [1-700].

I've also attached a proposed Dashboard, which was not included w/ the original circulation (the drafters did not have the revised dashboard template to work with).

Comments:

1. This Rule probably belongs in a proposed Rule 8.2 rather than as Rule 2.4.2. I've made a recommendation concerning this Rule, i.e., to point out to BOG that we considered it as part of the set of rules (2.4, 2.4.1, 2.4.2) that apply to lawyers acting in an adjudicative capacity. See Explanation of Changes for MR 8.2(a). When we started review of the "adjudicative" rules, however, we were still reviewing the Rules by California rule number. There is, however, no compelling reason why Rules 2.4.2 [1-700] and 2.4.1 [1-710] (re serving as a temporary judge) should be linked to Rule 2.4 (Lawyers serving as TPNs). I would note for the BOG that although we are presenting this Rule as Rule 2.4.2, we may eventually recommend inserting it in Rule 8.2. We also might recommend inserting 2.4.1 in Rule 8.2 or number it 8.2.1 and place it after Rule 8.2.

2. As an alternative, I recommend that we consider and sign off on the dashboard and charts at the September meeting, but then hold off on submitting 2.4.1 and 2.4.2 until after we have had an opportunity to consider MR 8.2(a). The work will be done. The only decision that will be left is whether to associate the rules w/ 2.4 or with 8.2.

Please let me know if you have any questions.

Attachment: A single PDF file w/ the following:

- Dashboard, Draft 2 (9/5/09)KEM
- Introduction, Draft 2 (9/5/09)KEM
- Rule & Comment Chart, Draft 2 (9/5/09)KEM

September 7, 2009 Ruvolo E-mail to KEM, cc RRC re Rule 2.4:

I think this rule is still highly controversial, particularly given our early work on a more comprehensive rule which was scuttled by a majority vote after the ADR community's full court press. Also, I would like to ensure that the BOG is at least aware of our earlier work and I wasn't sure how best to present it (In the introduction?)

September 7, 2009 Sapiro E-mail to RRC List re Rule 2.4:

I would reword the explanation of changes for paragraph (a) of the black letter rule. We should say that we made the changes to make clear that the rule only applies when the lawyer is acting as an impartial neutral. The Model Rule does not recognize that the lawyer's duties are different if the lawyer is hired to, for example, be a partisan arbitrator. Because that is an improvement to the Model Rule, I would add statements about it to the Introduction.

I have not had time to review the email chain Kevin sent. I hope to do so later in the week.

September 7, 2009 Sapiro E-mail to RRC List re Rule 2.4.2:

On reading this rule cold, I find that the second sentence of paragraph (b) is awkward. I recommend that we change the phrase, "A lawyer commences to become an applicant seeking

judicial office by appointment at the time” I would revise it as follows: “As used in this rule, a lawyer begins to seek appointment to judicial office at the time of”

In the third sentence of paragraph (b), I would change the phrase “shall end” to the word “ends.”

September 7, 2009 Sondheim E-mail to RRC re Rule 2.4:

Dashboard:

We will briefly discuss and then vote on whether this rule is "very controversial" or "moderately controversial."

Introduction:

We will discuss Jerry's suggestion and perhaps, prior to the meeting, the staff and/or co-drafters can draft language to cover his suggestion.

Rule:

See Introduction, supra.

Comment:

1. We will vote, without discussion, on footnote 1. page 3 of 5.
2. We will briefly discuss and then vote on fn. 2, page 5 of 5.

Commentator Chart:

Were there no commentators? It is my recollection that the stakeholders listed comments and we therefore need a chart.

September 7, 2009 Sondheim E-mail to RRC re Rule 2.4.1:

We will discuss the placement of this rule and its submission to BOG until after we have considered 8.2 as suggested by Kevin.

September 7, 2009 Sondheim E-mail to RRC re Rule 2.4.2:

As with 2.4.1, we will discuss Kevin's suggestions.

Rule:

1. We will discuss the first suggestion in Jerry's e-mail.
2. The second suggestion in Jerry's e-mail is a nit and will be deemed approved.

Comment:

Since there were no objections, the Drafters' Recommendation in fns. 1 and 2 (page 3 or 3) will be deemed adopted.

Were there no commentators?

September 7, 2009 KEM E-mail to Ruvolo, cc RRC re Rule 2.4:

I would agree that the best place to explain the earlier work would be in the Introduction. I would defer to Randy, however, on that.

September 8, 2009 Difuntorum E-mail to KEM, cc RRC re Rule 2.4:

I agree that the Rule 2.4 introduction is an appropriate place to consider summarizing the public comment draft of the rule. Pasted below is language derived from the Batch 1 interim report to the Supreme Court that can be adapted (shortened) for the Rule 2.4 introduction. –Randy D.

“The public comment version of the Rule tracked MR 2.4 but also incorporated by reference selected provisions of the Judicial Council Standards for Mediators in Court Connected Mediation Programs and the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Thus, under the public comment version of the proposed rule, a lawyer serving as a third party neutral would have been subject to discipline for violating any of the selected standards incorporated in the rule. The Judicial Council standards selected by the Commission included provisions addressing conflicts of interest, confidentiality, ex parte communication and other standards that the Commission believed were relevant to the particular context of a lawyer, as opposed to anon-lawyer, serving as a third party neutral. The Commission’s regulatory strategy of setting a lawyer disciplinary standard by incorporating by reference provisions found outside of the Rules of Professional Conduct was based on RPC 1-700 and RPC 1-710 which both incorporate by reference selected provisions of the Code of Judicial Ethics.

Nearly all of the public comment opposed adoption of the Commission’s approach of incorporating Judicial Council standards as disciplinary rules. Following consideration of the public comment, and also presentations at open session Commission meetings made by some of the commentators, the Commission determined to delete those portions of the proposed rule that would incorporate the Judicial Council standards as disciplinary rules. In taking this action, the Commission considered alternate approaches of: (1) “codifying” in the rule itself, the language of the selected standards; and (2) restructuring the rule, along the lines of California’s current trust accounting rule 4-100, to include an enabling provision authorizing the Board to adopt standards for regulating lawyer conduct as a third-party neutral. Neither of the options garnered the support of a majority of the Commission members. In addition, concerns about the practical obstacle of statutory mediation confidentiality would have persisted even under these alternatives to formulating a broader rule.”

September 8, 2009 Ruvolo E-mail to Difuntorum, cc RRC re Rule 2.4:

Thanks Randy. I'd also like to include the minority view as to why we initially agreed to a broader rule. Like a minority comment.

**RRC – Rules 2.4 [1-720]; 8.2 & 2.4.1 [1-710]; 2.4.2 [1-720]
E-mails, etc. – Revised (11/3/2009)**

September 17, 2009 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff re 2.4.1:

I had your version of the Intro open when I received Nace's e-mail, below, so I simply revised your version (3A) by substituting Nace's proposed changes. I've attached new Draft 3B (9/16/09)RD-IR, to this e-mail.

September 17, 2009 Difuntorum E-mail to KEM, cc Drafters, Chair & Staff re 2.4.2:

Attached is a revised Rule 2.4.2 (1-700) Introduction. I have adapted the Rule 2.4.1 (1-710) Supreme Court background language for this rule because both rules share the same origin. I know that Rule 2.4.2 is being postponed until the Batch 6 consideration of MR 8.2(a) but I wanted to do this before it was forgotten due to the many balls that are in air right now.

Proposed Rule 2.4.2* Lawyer as Candidate for Judicial Office

September 2009
(Draft rule following consideration of public comment.)

INTRODUCTION:

This rule amends current Rule 1-700 to follow ABA Model Code 8.2, and applies when lawyers are seeking appointment or election/retention to judicial office. The rule provides a means by which the State Bar can discipline lawyers who violate ethical duties imposed by Canons 5 and 5B of the California Code of Judicial Ethics when seeking appointment or election/retention to judicial office.

Current Rule 1-700 originated from a Supreme Court request sent to the State Bar in 1996, following the Supreme Court's consideration of a report and recommendation of the Supreme Court Advisory Committee on Judicial Ethics, the body which drafted the CA Code of Judicial Ethics that became effective on January 15, 1996. In drafting that Code, the Advisory Committee determined that while standards could be imposed on a lawyer when acting as a candidate for a judicial office, the Commission on Judicial Performance would lack disciplinary jurisdiction over the conduct of a lawyer if the lawyer is not appointed or elected to a judicial office. Accordingly, the Supreme Court directed the State Bar to consider a new Rule of Professional Conduct that would permit the Bar to discipline a lawyer who violates Canon 5 of the Code. In response to the Supreme Court's request, Rule 1-700 was developed and adopted by the Board of Governors and subsequently approved by the Supreme Court.

September 21, 2009 Melchior E-mail to Sondheim, cc Drafters & Staff re 2.4.1:

Yes: fine with me.

September 21, 2009 Sondheim E-mail to Staff, cc Drafters:

This rule is then ready for a 10-day ballot.

September 21, 2009 KEM E-mail #1 to Difuntorum, McCurdy & Lee re 2.4:

I believe the files attached are the last word on Rule 2.4, except for the public comment chart, which I will send in a minute. No further comments were submitted.

Please let me know if you have any questions.

October 9, 2009 KEM E-mail to Difuntorum, cc Chair & Staff:

Here's the Rule & Comment Chart, Draft 2 (9/5/09)KEM. That should give all of us a complete set of files.

October 26, 009 McCurdy E-mail to Drafters (Ruvolo, Sapiro, Vapnek), cc Chair, Tuft & Staff:

Rule 2.4.2/8.2(b) Codrafters:

The first draft of the rule & comment comparison table for this rule is attached.

The assignments for the November meeting are due this Wednesday, October 28th.

Attachment:

RRC - 1-700 [2-4-2 & 8-2] - Compare - Rule & Comment Explanation - DFT 1.doc

October 28, 2009 Lee E-mail to KEM:

I was wondering if you could send me the most current version our Rule 2.4.2 post-September 2009 meeting. Randy would like me to drop it into the 8.2 comparison table.

October 28, 2009 KEM E-mail to Lee:

Please see attached.

RRC - 1-700 [2-4-2] - Rule - Post PCD [4] (06-23-07)2.doc

October 31, 2009 Kehr E-mail to RRC:

I have these suggestions on the draft materials:

1. These drafts in several places say that the Commission's proposal "largely carries forward current California Rule 1-700 and tracks Model Rule 8.2(b)". I don't believe the quoted language is likely to communicate anything about the substance of the Commission's proposal. I certainly didn't understand it until I reread 2.4.2 aka 8.2(b). I suggest the following instead (which assumes we will place 2.4.2 in 8.2): "Proposed Rule 8.2(b) adopts the Model Rule 8.2(b) requirement that a candidate for election to or retention of judicial office must comply with the applicable provision of the California Code of Judicial Ethics, but it expands the requirement to include a lawyer who seeks appointment to judicial office."

**RRC – Rules 2.4 [1-720]; 8.2 & 2.4.1 [1-710]; 2.4.2 [1-720]
E-mails, etc. – Revised (11/3/2009)**

2. There is a small disparity between Rule 8.2(a) and Rule 2.4.2, Comment [1]. The latter overlooks elections for retention of judicial office. I think the Comment should begin: “This Rule applies to lawyers who are candidates for election to or retention of judicial office, and to”

November 1, 2009 Sapiro E-mail #1 to RRC List:

I would reword Comment [3]. It does not state our duties strong enough. I would delete “encouraged to continue traditional efforts” and substitute for that phrase the word “obliged.” At the end of the same sentence, I would cite Business & Professions Code section 6068(b).

November 1, 2009 Sapiro E-mail #2 to RRC List:

1. Although I agree with the substance of this proposed rule, I question the use of the phrase “or retention of” in paragraphs (a) and (c). The person who is a candidate in a retention election is a judge, not a lawyer.
2. If we intend that the judge who stands for retention and violates the rule can be disciplined in the State Bar Court after he or she has been defeated, we should say that and not use the proposed wording.

November 2, 2009 Ruvolo E-mail to RRC List:

Jerry is correct, lawyers are not involved as candidates in judicial retention elections, only justices of the courts of appeal and the supreme court are candidates. The rule should be amended accordingly. Justices running in retention elections (as well as judges involved in contested elections) are already bound by the California Code of Judicial Ethics, including Canon 5B. Of course, alleged violations of the canons invoke the independent disciplinary jurisdiction of the CJP, and not the state bar. This includes judges who are defeated in judicial elections. Rule 1-700 was enacted at the specific request of the Supreme Court to provide disciplinary authority over lawyers who were candidates or applicants for judicial office.