THE STATE BAR OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING, AND DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2116

DATE: September 21, 2009

TO: Members of the Commission for the Revision of the Rules of Professional Conduct

FROM: Randall Difuntorum, Commission Staff Counsel

SUBJECT: 10-day Ballot Circulation of Proposed Rule 2.4.1 [1-710]

Proposed Rule 2.4.1 [1-710] is being distributed for your consideration. The revisions adopted at the Commission's September 11, 2009 meeting have been implemented and approval of parts of the rule submission is being sought through a 10-day ballot procedure. At the meeting, the rule itself was approved but the Chair indicated that the Introduction and Dashboard would be handled by a 10-day ballot.

Approval means that the proposed new rule would be cleared for transmission to the Board of Governors with a request that the rule be adopted subject to input received on the Commission's comprehensive Final Report.

In accordance with the guidance provided by the Board, the proposed rule is presented in a comparison chart. As there is no ABA Model Rule counterpart, the chart compares the proposed rule to current California Rule 1-710. The comparison chart is provided as Enclosure 1. A clean version of proposed Rule 2.4.1, Draft 5 (6/23/07), is provided as Enclosure 2. A draft dashboard is provided as Enclosure 3. A draft public commenter chart is provided as Enclosure 4.

Pursuant to the Commission's 10-day ballot procedure, if six or more members object to this proposed rule, then the proposed rule will be placed on the Commission's next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me with copies to Lauren McCurdy and Kevin Mohr. **If less than six objections are received by 5 p.m. on Thursday, October 1, 2009, proposed Rule 2.4.1 [1-710] will be deemed approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161

Thank you.

Encs.

Enclosure 1

Proposed Rule 2.4.1 [1-710]
(Comparison Chart Showing Changes to California Rule 1-710)

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.4.1* Lawyer as Temporary Judge

September 2009
(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 2.4.1 has no ABA Model Rule counterpart. This Rule currently exists as California Rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics when they act as temporary judges, referees, or court-appointed neutrals. The Rule also requires compliance with Canon 6D, and provides a disciplinary path for lawyers who violate the Canon.

Current Rule 1-710 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 lawyers serving as temporary judges, the Commission on Judicial Performance lacked disciplinary jurisdiction over the conduct of lawyers. Accordingly, the Supreme Court directed the State Bar to consider a new Rule of Professional Conduct that would permit the Bar to discipline lawyers who violate Canon 6D while acting in a judicial capacity. In response to the Supreme Court's request, Rule 1-710 was developed and adopted by the Board of Governors and subsequently approved by the Supreme Court.

* Proposed Rule 2.4.1, Draft 5 (6/23/07).

No Comparable ABA Model Rule (Text provided is current California Rule 1-710)	**Commission's Proposed Rule*** **Rule 2.4.1 Lawyer as Temporary Judge**	**Explanation of Changes to the California Rule of Professional Conduct**
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.	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.	There is no ABA Model Rule counterpart to proposed ~~rule~~ Rule 2.4.1. This ~~rule~~ Rule currently appears as California Rule 1-710, and the ~~RCC~~ Commission recommends that it be carried over into the new rules. The ~~RCC~~ Commission recommends only a few ~~cosmetic~~ changes be made to ~~the~~ current rule 1-710 to conform to California rule drafting style.

* Redline/strikeout showing changes to the ABA Model Rule

No Comparable ABA Model Rule (Text provided is current California Rule 1-710)	**Commission's Proposed Rule*** **Rule 2.4.1 Lawyer as Temporary Judge Comment**	**Explanation of Changes to the California Rule of Professional Conduct**
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.	[1] This ~~rule~~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 or quasi-judicial capacity pursuant to an order or appointment by a court.	Comment [1] is based on paragraph 1 of the Discussion to current rule 1-710. The only substantive change recommended is the expansion of the comment to make clear the rule covers lawyers acting in "quasi-judicial" capacities as well as acting as temporary judges.
Nothing in rule 1-710 shall be deemed to limit the applicability of any other rule or law. (Added by order of the Supreme Court, operative March 18, 1999.)	[2] Nothing in ~~rule 1-710~~this Rule shall be deemed to limit the applicability of any other rule or law.	Comment [2] is based on paragraph 2 of the Discussion to current rule 1-710. The ~~RCC~~ Commission recommends that ~~comment [2] of rule 1-710~~it be carried over into the new rule. No substantive changes are recommended to comment [2].
	[3] 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.	Comment [3] is a new comment, and has been included to cross-reference new ~~rule~~ Rule 2.4 relating to lawyers when acting as third party neutrals.

* Redline/strikeout showing changes to the ABA Model Rule

Enclosure 2

Proposed Rule 2.4 [1-710]
Clean Version of Draft 5 (6/23/07)

Rule 2.4.1 Lawyer as Temporary Judge

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

[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[3] 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.

Enclosure 3

Proposed Rule 2.4.1 [1-710]
Draft “Dashboard”

Proposed Rule 2.4.1 [RPC 1-710]
"Lawyer as Temporary Judge"

(Draft #5, 6/23/07)

Summary: Proposed Rule 2.4.1 carries forward current California Rule 1-710, which clarifies that lawyers are subject to Canon 6D of the Code of Judicial Ethics, when they act as temporary judges, etc.

☐ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☐ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☑ No ABA Model Rule counterpart	☑ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 1-710.
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:

Carries forward current rule 1-710, which has proven uncontroversial.

Enclosure 4

Proposed Rule 2.4.1 [1-710]
(Public Commenter Chart)

Rule 2.4.1 Lawyers as Temporary Judge, Referee, or Court-Appointed Arbitrator.
[Sorted by Commenter]

TOTAL =__ **Agree = __**
Disagree = __
Modify = __
NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	agree			Support s as drafted	No action needed
2	Phillip Feldman	disagree			lawyers who serve as part time judges and referees, should be treated the same as their full time brethren and answer to the same regulatory body	Commission disagreed
3						
4						
5						

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED