

Proposed New Rule 1-710. Member as Temporary Judge, Referee, Court-Appointed Arbitrator, Or Third-Party Neutral in Mediation or Settlement Conferences

(1) 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.

(2) A member serving as a third-party neutral in any mediation or any settlement conference 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.

(3) 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.

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. It also permits the State Bar to discipline members who fail to comply with certain enumerated Judicial Council mediator standards whenever they are serving as third-party neutrals in mediations or settlement conferences.

[2] When members are engaged as temporary judges, arbitrators, referees, or as mediators or settlement conference third-party neutrals, these rules and the State Bar Act apply, including, without limitation, Rule 2-100 [communications with a represented party], 3-110 [failing to act competently], 3-310 [avoiding the representation of adverse interests], and Business and Professions Code 6068(e) [confidentiality].

[3] No inference is intended that the service of members as temporary judges, arbitrators, referees, or as mediators or settlement conference third-party neutrals, constitutes the practice of law. Jurisdiction to discipline members under this rule exists pursuant to case law requiring members to adhere to the rules of professional conduct while engaged in business or professional activities ancillary to the practice of law (*Kelly v. State Bar* (1991) 53 Cal.3d 509 [280 Cal.Rptr. 298].)

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

Ruvolo's Commentary:

I have revised this proposed rule based on the comments made during the February 20th meeting. All of it is new except for Paragraph (1), and the last sentence of the discussion.

First, per the discussion at the last meeting, you will note that I have ended paragraph 1 after the word "canon," while referencing several of the more potentially applicable rules of professional conduct in the discussion section.

New Paragraph 2 is copied from ABA Model Rule 2.4 (b) (except for the use of "member" for "lawyer," until that issue is sorted out by the Commission).

New Paragraph 3 references those Judicial Council mediation standards that seem to be the more important, and which are stated in the standards in a mandatory manner.

I have added the last paragraph to make it clear that the basis for imposing state bar disciplinary jurisdiction over members while acting as neutrals is based on the belief that these services are ancillary to the practice of law, but that they are not necessarily the

practice of law. This should avoid the knotty problem we discussed at the beginning of the discussion on this proposed rule at the February meeting.