

Proposed Rule 2.4 [n/a] “Lawyer as Third-Party Neutral”

(Draft #7, 9/13/07)

Summary: Proposed Rule 2.4, which closely tracks Model Rule 2.4, applies to lawyers when they serve as third party neutrals.

Comparison with ABA Counterpart	
Rule	Comment
<input checked="" 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 checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" 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
- | | |
|----------|--|
| Rule | |
| Statute | |
| Case law | |

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

- Other Primary Factor(s)
- Judicial Council Standards for Mediators in Court Connected Mediation Programs; Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 0

Abstain/Not Voting 0

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:

ADR Services, Inc., Alternative Resolution Centers, California Dispute Resolution Council, California Judges Association, JAMS, Judicate West, NASD, NYSE, State Bar Committee on Alternative Dispute Resolution, State Bar of California

Very Controversial – Explanation:

Stakeholders maintain that the services they provide are not the practice of law and therefore, the State Bar should not regulate third party neutral lawyers. See Introduction, ¶¶ 2 & 3. See also Comment [4] to proposed Rule & Explanation of Changes to Comment [4].

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.4* Lawyer as Third-Party Neutral

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 2.4 substantially follows ABA Model Rule 2.4, except that the Rule has been modified to emphasize that it applies to “neutral” arbitrators but not to “party” arbitrators, whose duties are different. See Explanation of Changes for paragraph (a). In addition, a few changes have been made to conform the Rule to current California law, and to reference the State Bar Act, where appropriate.

A minority of the Commission believes that Rule 2.4 should go further in providing a means by which the State Bar can discipline lawyers who engage in misconduct while acting as a third party neutral, whether through appointment by a court or by agreement of the parties. In light of the reality that many lawyers in California now provide services as third party neutrals, either in supplement to or in place of their traditional services, the public comment version of the Rule tracked Model Rule 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 a non-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 current California rules 1-700 and 1-710, both of which both incorporate by reference selected provisions of the Code of Judicial Ethics.

* Proposed Rule, Draft 7 (9/13/07)

INTRODUCTION (Continued):

Nearly all of the public comment received opposed the Commission's approach of incorporating Judicial Council standards as disciplinary rules. Following consideration of the public comment and presentations at Commission meetings made by several of the commentators, the Commission voted 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 when acting as a third-party neutral. Neither option 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.

Minority. A minority of the Commission believes that incorporating by reference the Judicial Council standards, as was done in earlier drafts of proposed Rule 2.4, is the appropriate approach to regulating conduct of lawyers serving as neutrals, and that it would provide better public protection. The minority also points out that virtually all of the public comment that opposed the original version of the rule came from individuals or entities offering commercial ADR services, or from professional organizations which represent the interests of such individuals or entities.

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 2.4 Lawyer as Third-Party Neutral</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer 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 arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.</p>	<p>(a) A lawyer serves as a third-party neutral when the lawyer assists<u>is engaged to assist impartially</u> two or more persons who are not clients of the lawyer 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 a<u>a neutral</u> arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.</p>	<p>This section is nearly identical to the corresponding Model Rule 2.4(a). Changes have been made to clarify that this Rule is applicable only when the lawyer is acting as a <i>neutral</i> arbitrator. Party arbitrators owe different duties to the parties that have retained them and should not necessarily be subject to the same standards as neutral arbitrators.</p>
<p>(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.</p>	<p>(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.</p>	<p>This section is identical to ABA Model Rule 2.4(b).</p>

* Proposed Rule 4.2, Draft 7 (9/13/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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, 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.</p>	<p>[1] Alternative dispute resolution has become a substantial part of the civil justice system. <u>Aside</u> from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. <u>A</u> third-party neutral is a person, such as a mediator, <u>neutral</u> arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. <u>Whether</u> 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.</p>	<p>Comment [1] is nearly identical to comment [1] to Model Rule 2.4. The word "neutral" has been added to emphasize that the Rule applies when a lawyer is acting as an <i>impartial</i> neutral. See Explanation of Changes for paragraph (a).</p>
<p>[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.</p>	<p>[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. <u>In</u> 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. <u>Judicial Council</u></p>	<p>Comment [2] is identical to Model Rule 2.4, cmt. [2], except that the standards applicable to lawyers acting as third party neutrals in California have been substituted in place of the corresponding ABA standards.</p>

<p align="center"><u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.</p>	
<p>[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. 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.</p>	<p>[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. 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.</p>	<p>Comment [3] is identical to Model Rule 2.4, cmt. [3].</p>

<p align="center"><u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[4] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. <i>In re Scott</i> (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Nothing in this rule is intended to address the issue of whether a lawyer's conduct as a third-party neutral constitutes the practice of law.</p>	<p>Comment [4] has no counterpart in Model Rule 2.4. It has been added to emphasize the California Supreme Court's authority to regulate lawyers when acting as third party neutrals, regardless of whether such conduct constitutes the practice of law.</p>
<p>[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.</p>	<p>[4][5] 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. <i>Cho v. Superior Court</i> (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.)</p>	<p>The second sentence of Model Rule 2.4, cmt. [4], has been deleted and replaced with a reference to California case law relating to when a former third party neutral is precluded from accepting a later representation of one of the parties because of a conflict of interest. Comment [5] is identical to Model Rule 2.4, cmt. [4].</p>

<p align="center"><u>ABA Model Rule</u> Rule 2.4 Lawyer Serving as Third-Party Neutral Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.4 Lawyer as Third-Party Neutral Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the 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.</p>	<p>[5]^[6] Lawyers who represent clients in alternative dispute-resolution processes are governed by the<u>these</u> Rules of Professional Conduct and the State Bar Act. When the 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.</p>	<p>Comment [6] is identical to Model Rule 2.4, cmt. [5], except that it references the Rules of Professional Conduct and the State Bar Act generally, rather than Model Rules 1.0(m) and 3.3.</p>
	<p><u>[7] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.</u></p>	<p>Comment [7] has no counterpart in Model Rule 2.4. This Comment has been added in recognition that the conduct of lawyers who serve as third party neutrals may also be subject to other regulation.</p>
	<p><u>[8] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.</u></p>	<p>Comment [8] has no counterpart in Model Rule 2.4. The comment has been included to reference proposed Rule 2.4.1 and clarify that when lawyers act as temporary judges, referees, or court-appointed arbitrators, Rule 2.4.1, and not this Rule, applies.</p>

Rule 2.4 Lawyer as Third-Party Neutral

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer 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 to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.
- ~~(c) A lawyer serving as a third-party neutral in any mediation or any settlement conference shall comply with Rules 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. A lawyer serving as a third-party neutral in a mediation shall also comply with Rule 1620.4 [confidentiality] of those Standards.~~
- ~~(d) A lawyer 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

- [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~~decision maker 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 Comment [6] and Comment [7].

- [3] Unlike ~~nonlawyers~~non lawyers 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. 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] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. *In re Scott* (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Nothing in this rule is intended to address the issue of whether a lawyer's conduct as a third-party neutral constitutes the practice of law.
- [45] 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~~The conflicts of interest ~~may preclude~~that arise for both the individual

~~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~~the lawyer's law firm are addressed in Rule 1.12.)

- [56] Lawyers who represent clients in alternative dispute- resolution processes are governed by ~~the~~these Rules ~~of Professional Conduct~~ and the State Bar Act.
- [6] ~~Paragraph (c) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council mediator standards whenever the lawyer is serving as a third-party neutral in a mediation or settlement conference. As indicated in paragraph (c), Rule 1620.4 [confidentiality] of the mediator standards is intended to apply to a lawyer serving in a mediation but it is not intended to apply to a lawyer serving in a settlement conference (see Evidence Code section 1117 and Rule 222 of the California Rules of Court).~~
- [7] ~~Paragraph (d) is intended to permit discipline of a lawyer who fails to comply with certain enumerated Judicial Council arbitration ethics standards promulgated pursuant to Code of Civil Procedure, section 1281.85 whenever the lawyer is serving as a third-party neutral arbitrator pursuant to an arbitration agreement.~~
- [87] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.
- [98] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

Rule 2.4 Lawyer as Third-Party Neutral (Commission's Proposed Rule – Clean Version)

- (a) A lawyer serves as a third-party neutral when the lawyer is engaged to assist impartially two or more persons who are not clients of the lawyer 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 a neutral arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

- [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 decision maker 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.

- [3] Unlike non lawyers 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. 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] This Rule recognizes the inherent power of the Supreme Court of California to discipline a lawyer for conduct in which the lawyer engages either in or out of the legal profession. *In re Scott* (1991) 52 Cal.3d 968 [277 Cal.Rptr. 201]. The Supreme Court's inherent power is

not diminished simply because a lawyer acts as a third-party neutral as opposed to an advocate for a client. Nothing in this rule is intended to address the issue of whether a lawyer's conduct as a third-party neutral constitutes the practice of law.

- [5] 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.
- [6] Lawyers who represent clients in alternative dispute resolution processes are governed by these Rules and the State Bar Act.
- [7] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.
- [8] This Rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. See Rule 2.4.1.

Rule 2.4: Lawyer as Third-Party Neutral

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

New York has no counterpart to ABA Model Rule 2.4 in its Disciplinary Rules, but New York's EC 5-20 provides as follows:

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity after disclosing such present or former relationships. A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved.

South Carolina: Rule 2.4 adds a new subparagraph (c) that permits a lawyer to serve as a neutral only if the lawyer or law firm does not represent (and has not previously represented) any party in the matter.

Tennessee: Rule 2.4 defines the circumstances under which a lawyer may act as a "dispute resolution neutral," the limitations on a lawyer who assumes that position, the circumstances under which the lawyer must withdraw from the position, and the lawyer's responsibilities following withdrawal. The rule and its comment are much more extensive than Model Rule 2.4.

Virginia: Long before the ABA adopted Model Rule 2.4 in 2002, Virginia adopted its (own Rule 2.10 (Third Party Neutral) and Rule 2.11 (Mediator), which provide as follows:

Virginia Rule 2.10 Third Party Neutral

(a) A third party neutral assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding. The third party neutral does not represent any party.

(b) A lawyer who serves as a third party neutral

(1) shall inform the parties of the difference between the lawyer's role as third party neutral and the lawyer's role as one who represents a client;

(2) shall encourage unrepresented parties to seek legal counsel before an agreement is executed; and

(3) may encourage and assist the parties in reaching a resolution of their dispute; but

(4) may not compel or coerce the parties to make an agreement.

(c) A lawyer may serve as a third party neutral only if the lawyer has not previously represented and is not currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding....

(g) A lawyer who serves as a third party neutral shall not charge a fee contingent on the outcome of the resolution proceeding.

(h) This Rule does not apply to joint representation, which is covered by Rule 1.7.

Virginia Rule 2.11 Mediator

(a) A lawyer-mediator is a third party neutral (see Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.

(b) Prior to agreeing to mediate and throughout the mediation process a lawyer-mediator should reasonably determine that:

(1) mediation is an appropriate process for the parties;

(2) each party is able to participate effectively within the context of the mediation process; and

(3) each party is willing to enter and participate in the process in good faith.

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent. The lawyer-mediator shall inform unrepresented parties or those parties who are not accompanied by

legal counsel about the importance of reviewing the lawyer-mediator's legal information with legal counsel.

(d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties....

**Rule 2.4 Lawyers as Third-Party Neutral.
[Sorted by Commenter]**

TOTAL = 16 **Agree = 1**
Disagree = 12
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	ADR Services, Inc.	D			<p>Regulation of fees would drive neutrals into other fields and harm the ADR industry and its benefits to California.</p> <p>State Bar rule-making authority should not be delegated to the Judicial Council.</p> <p>A retired judicial officer should be free to note previous association with a court.</p>	Commission revised the proposed rule to track MR 2.4
2	Alternative Resolution Centers	D			<p>Agrees with the comments submitted by JAMS, ADR Services and Judicate West, there are constitutional issues including equal protection and interstate commerce.</p>	Commission revised the proposed rule to track MR 2.4
3	California Dispute Resolution Council (1st Letter)	D			<p>Proposed rule and the threat of State Bar discipline would deter qualified lawyers from serving in ADR.</p> <p>There is no compelling reason for the use of the Judicial Council standards as State Bar disciplinary rules.</p> <p>Statutory mediation confidentiality is an obstacle.</p> <p>The costs of ADR will increase due to additional bases for challenging ADR and the increased costs of malpractice coverage.</p> <p>Proposed rule implies that ADR constitutes a practice of law activity.</p>	Commission revised the proposed rule to track MR 2.4

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

**Rule 2.4 Lawyers as Third-Party Neutral.
[Sorted by Commenter]**

TOTAL = 16 **Agree = 1**
Disagree = 12
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	California Dispute Resolution Council (2nd Letter)	D			<p>Appropriate sanctions are already available for violations of the Judicial Council standards.</p> <p>Collaborative law practitioners should not be regulated by the same rules as other neutrals.</p> <p>Neutrals and parties should have a clear expectation of what will justify a State Bar complaint.</p> <p>The standards require technical modifications if they are to be used as disciplinary rules.</p>	Commission revised the proposed rule to track MR 2.4
5	California Judges Association (1st Letter)	D			<p>State Bar rule-making authority should not be delegated to the Judicial Council.</p> <p>Application of the court-connected mediation standards to private mediation is at odds with the intended purpose of those standards.</p> <p>State Bar regulation is unwarranted and duplicative.</p>	Commission revised the proposed rule to track MR 2.4
6	California Judges Association (2nd Letter)	D			<p>Compensation and marketing provisions should not apply to private mediators and arbitrators.</p> <p>The consequences of changes to the standards by the Judicial Council are not adequately handled in the proposed rule</p>	Commission revised the proposed rule to track MR 2.4

**Rule 2.4 Lawyers as Third-Party Neutral.
[Sorted by Commenter]**

TOTAL = 16 Agree = 1
Disagree = 12
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	California Judges Association (3rd Letter)	D			(Note: this comment was received during the Commission's process of redrafting the rule in response to public comments received, including earlier comment letters from the California Judges Association.) Even as modified, the proposed rule is not justified or necessary and it should not be adopted in any form.	Commission revised the proposed rule to track MR 2.4
8	JAMS	D			ADR is diverse but the proposed rule inaccurately suggests that ADR is susceptible to "one size fits all" regulation. Burdensome disclosure duties are misguided. State Bar involvement in fees charged for private ADR is wrong.	Commission revised the proposed rule to track MR 2.4
9	Judicate West	D			The proposed rule would increase the costs and expenses of ADR, imposing an unnecessary burden on the parties. Many ADR professionals already abide by the high ethical guidelines set by ADR organizations.	Commission revised the proposed rule to track MR 2.4
10	Kennedy, Hon. John	NI			No substantive comment offered. Judge Kennedy appeared at a Commission public hearing for the limited purpose of asking that the Commission postpone any decision on this Rule until the California Judges' Association and California Judges' Executive Committee have an opportunity to submit a written comment.	At the hearing, the Commission indicated that there was more time to provide comment.

**Rule 2.4 Lawyers as Third-Party Neutral.
[Sorted by Commenter]**

TOTAL = 16 **Agree = 1**
Disagree = 12
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
11	Konig, Alan	M			Rule requires addition of a provision dealing with federal preemption.	Commission revised the proposed rule to track MR 2.4
12	Marcus, Hon. Michael (ADR Services)	D			State Bar discipline is not an intended remedy for a violation of the Judicial Council standards. A rule that leads to discipline for an unintentional, negligent failure to disclose is a dramatic policy shift. Statutory mediation confidentiality is an obstacle.	Commission revised the proposed rule to track MR 2.4
13	Moreno, Elizabeth A.	A			It is time for the ADR profession to be regulated, including standards that would promote fairness, inclusiveness, and diversity in the selection of mediators.	Commission revised the proposed rule to track MR 2.4
14	NASD & NYSE	M			California standards are preempted by federal law, proposed rule should make clear that it does not apply to NASD and NYSE arbitrators.	Commission revised the proposed rule to track MR 2.4
15	Orange County Bar Association	D			Mediators who have no power to impose a ruling should not be subject to the same rules as a neutral who does have that power. The proposed rule will discourage lawyers from acting as neutrals.	Commission revised the proposed rule to track MR 2.4

**Rule 2.4 Lawyers as Third-Party Neutral.
[Sorted by Commenter]**

TOTAL = 16 **Agree = 1**
Disagree = 12
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
16	State Bar Committee on Alternative Dispute Resolution, State Bar of California	D			Statutory mediation confidentiality is an obstacle. State Bar discipline was not contemplated as a remedy for a violation of Judicial Council standards. Rule would create 2 classes of neutrals and discourage lawyer activity. New civil causes of action may result.	Commission revised the proposed rule to track MR 2.4