

State Bar Rule 2.4

More than twenty years ago, the California State Bar's Special Commission for the Revision of the Rules of Professional Conduct ("RRC") completed the last major overhaul of the California Rules. In 2001, the State Bar reactivated the RRC to review changes to the ABA Model Rules suggested by the ABA's Ethics 2000 Task Force. Among the 27 different rule changes contemplated was the addition of Rule 2.4, a rule directed at regulating the conduct of lawyers who act as third party neutrals.

The ABA Task Force recommended adoption of its Model Rule 2.4, providing generally that a "lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them." The Comment to this rule underscores that its purpose is to allay any confusion that might be engendered in a non-lawyer, non-represented party participating for the first time in an ADR process where the neutral is a lawyer. Of course this purpose pre-supposes that non-lawyer, non-represented, first-time participants in an ADR process will believe that a lawyer-neutral is there to represent that party against the other lawyer and her client. The Rule also assumes the participant will not be so confused if the neutral is not a lawyer. Both the ABA and the California State Bar believe that "lawyers" as neutrals are different than other neutrals and, therefore different obligations should attach to the lawyer's role as a neutral in ADR processes.

Although the ABA cited no factual support for its concern for first time, unrepresented ADR participants, the RRC must have determined that there was cause for alarm. These fears are reflected in the dramatically more onerous proposed California Rule 2.4 submitted for public comment last fall. Rather than merely singling lawyers out and imposing a special "counseling" obligation on lawyer neutrals, the RRC determined that all lawyers in any ADR process (whether administered by the Courts or the Friends of the La Jolla Library) should be bound by two well-meaning but inexpertly crafted schemes that apply to California mediators in court connected programs and to California arbitrators in contractual arbitration. Although these standards were never intended to form the basis for State Bar discipline, nonetheless they were incorporated into parts (c) and (d) of the proposed Rule.

The response to the initial draft of Rule 2.4 was almost uniformly negative. The State Bar Committee on Alternative Dispute Resolution continued the opposition it had first

expressed in 2004 to the original draft, pointing out that enforcement of the recrafted rule would be impossible because of mediation confidentiality, the disciplinary process “was not intended to be a remedy for violation of Mediator Standards,” ethical standards for other professions should not be enforced through State Bar disciplinary proceedings, two classes of neutrals would be created by the rule, its strictures would encourage frivolous complaints against attorney neutrals, new civil causes of action could be created and the rules would discourage lawyers from volunteering to serve as neutrals. Providers like JAMS, Adjudicate West and ADR Services opposed the measure because it would limit consumer choices in selecting neutrals. Advocacy groups like the California Dispute Resolution Council and the California Judges Association expressed serious concerns grounded in confidentiality and freedom of choice in the marketplace.

In light of these comments, the State Bar Commission proposed three different versions of Rule 2.4 for a January 26 public meeting. All the versions maintained the original parts (a) and (b) from the ABA model rule but differed in how they adopted parts or all of the mediator and arbitrator standards. No one rose in support of the measures in January and so a fourth alternative (D2) was drafted and circulated for discussion at the March 16, 2007 meeting of the RRC. The proposed D2 required that lawyer neutrals act in ways that promote “respect and confidence in the legal profession.” D2 also reserved jurisdiction to the Board of Governors to adopt “standards of conduct” for enforcing the “respect and confidence” component of the rule.

No public traction could be garnered for the adoption of the more benign but still dangerous proposal. As a consequence, the RRC decided to eliminate parts (c) and (d) completely and recommend that the original ABA Model Rule 2.4 be adopted. The Official Comment stills remains incomplete and a revised Comment should be reviewed by the RRC in early June. Final adoption of the Rule in its present form is still many years away, given that it will be one part of the larger package of changes that will ultimately be submitted to the Board of Governors. In the meantime, we can only hope that the RRC will exercise “respect” for ADR professionals and “confidence” in their ability to help thousands of Californians solve their disputes without the intercession of the courts.

--Dick Bayer, April 12, 2007