

**Invitation to Comment**

<p>Title</p>	<p>Alternative Dispute Resolution (ADR): Procedures for Addressing Complaints About Court-Program Mediators for Civil Cases (renumber rules 3.870–3.878 of the California Rules of Court as rules 3.890–3.898, respectively; amend and renumber rules 3.865, 3.866, 3.867, and 3.868 as rules 3.866, 3.869, 3.868, and 3.872, respectively; adopt rules 3.865, 3.867, 3.870, 3.871, and 3.880–3.886; amend rule 10.781; and revise form ADR-107).</p>
<p>Summary</p>	<p>This proposal would expand existing general requirements concerning superior court procedures for addressing complaints about court-program mediators for civil cases. It would allow courts to either (1) establish a complaint procedure that is consistent with these requirements by local rule of court or (2) follow a “default” complaint procedure established by proposed new rules 3.880–3.886. This is a revision of a proposal circulated for public comment in 2007, which proposed a uniform statewide procedure for addressing such complaints.</p> <p>A related amendment to rule 10.781 would clarify that being included on a court list or panel of ADR neutrals and being eligible to be recommended, appointed, or compensated by the court to serve as a neutral are revocable privileges and confer no vested right on the neutral.</p> <p>Revision of <i>Attendance Sheet for Court-Program Mediation of Civil Case</i> (form ADR-107) would shorten and simplify this optional form.</p>
<p>Source</p>	<p>Civil and Small Claims Advisory Committee Hon. Lee Smalley Edmon, Chair</p>
<p>Staff</p>	<p>Heather Anderson, 415-865-7691, heather.anderson@jud.ca.gov Alan Wiener, 818-558-3051, alan.wiener@jud.ca.gov</p>
<p>Discussion</p>	<p><u>Introduction</u> Last year, the Civil and Small Claims Advisory Committee circulated for public comment a proposal to establish a procedure for handling complaints about mediators in court-connected mediation programs for civil cases. The committee has made significant revisions to that proposal in response to the comments received and is now seeking public comment on the revised proposal.</p> <p><u>Background</u> The Judicial Council encourages superior courts to establish mediation programs for civil cases. (See Cal. Stds. Jud. Admin., std. 10.70(a).)</p>

Many courts refer or order cases to mediation, maintain panels of mediators, provide lists of mediators to litigants, or refer cases to specific mediators. To promote public confidence in the mediation process and the courts, the Judicial Council previously adopted rules of conduct governing mediators serving in court-connected mediation programs for general civil cases, which are set forth in rule 3.850 et seq. of the California Rules of Court.

Complaints about court-program mediators are infrequent and most such complaints are resolved through informal discussions between court staff, complainants, and mediators. To further promote public confidence in court mediation programs, however, rule 3.865 requires superior courts that make lists of mediators available to litigants in general civil cases, or that recommend, select, appoint, or compensate mediators in these cases, to establish procedures for receiving, investigating, and resolving complaints that mediators violated the rules of conduct. Rule 3.865 also provides that the court may reprimand a mediator, require a mediator to complete additional training, or remove a mediator from the court's panel or list or otherwise prohibit a mediator from receiving future mediation referrals from the court if the mediator fails to comply with the rules of conduct.

In 2005, the Civil and Small Claims Advisory Committee circulated for public comment a proposal designed to help ensure that superior court procedures for resolving complaints about mediators under rule 3.865 would be consistent with and preserve the confidentiality of mediation communications established by Evidence Code sections 703.5 and 1115 et seq.<sup>1</sup> Many comments submitted by members of the mediation community in response to that proposal suggested that the Judicial Council should adopt a statewide procedure for addressing complaints about court-program mediators, or suggested elements that should be included in mediator complaint procedures.

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<sup>1</sup> The 2005 proposal resulted in the Judicial Council's adoption of rules 3.860, 3.866, 3.867, and 3.868 (former rules 1621, 1622.1, 1622.2, and 1622.3), effective January 1, 2006. Those rules are designed to preserve mediation confidentiality and to protect its underlying purposes when courts receive and address complaints about court-program mediators by (1) establishing the confidentiality of these complaint procedures, (2) prohibiting persons who participated in or received information about a complaint procedure from subsequently adjudicating related disputes, and (3) aiding courts in obtaining the mediation participants' agreement to disclosure of mediation communications in complaint procedures.

A proposed statewide complaint procedure was developed in response to these suggestions, with guidance and assistance from a working group that included representatives of the Civil and Small Claims Advisory Committee's Subcommittee on Alternative Dispute Resolution, court and noncourt ADR program administrators, mediation trainers, and mediators who serve in court mediation programs and conduct private mediations. That proposal was circulated for public comment in spring 2007, and nine organizations or individuals submitted comments.

### The Revised Proposal

The Civil and Small Claims Advisory Committee has extensively revised the complaint procedure that was proposed in 2007 in response to the comments that it received. Most significantly, the revised proposal would not require that superior courts follow a uniform statewide procedure for addressing complaints about court-program mediators. Instead, this new proposal would expand the current general requirements concerning mediator complaint procedures and allow courts to either (1) establish a complaint procedure that is consistent with these requirements by local rule of court or (2) follow a default complaint procedure established by the Rules of Court.

The proposed amendment to rule 10.781 and the proposed revisions to the *Attendance Sheet for Court-Program Mediation of Civil Case* (form ADR-107), are substantially the same as those circulated for comment in 2007. The amendment to rule 10.781 would clarify that being included on a court list or panel of ADR neutrals and being eligible to be recommended, appointed, or compensated by the court to serve as a neutral are revocable privileges and confer no vested right on the neutral. Revisions to the *Attendance Sheet for Court-Program Mediation of Civil Case* would shorten and simplify this optional form.

Key provisions of the proposal are summarized below.

### Complaint Procedure

#### *Article 3—Provisions applicable to all complaint procedures*

Article 3, like current rule 3.865, would apply to each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates a mediator to mediate any general civil case pending in that court. Rule 3.865 would be renumbered as rule 3.866 and amended to require these courts to either establish a complaint procedure by local rule that

is consistent with article 3 or to follow the default complaint procedure stated in article 4. In either case, courts would also be required to follow the requirements of article 3 when addressing complaints about court-program mediators.

Rule 3.867 would define certain terms used in articles 3 and 4. Significant changes to the 2007 proposal include revising the definition of “complaint” to include only written communications about the conduct of a mediator and adding a definition of “inquiry.” These and related changes make most provisions of the proposed complaint procedure applicable only when a concern about mediator conduct is submitted in writing.

Current rules 3.866, 3.867, and 3.868 were adopted by the Judicial Council in 2005 to help ensure that mediation confidentiality is preserved when addressing concerns about mediator conduct. These rules would be renumbered as rules 3.869, 3.868, and 3.872, respectively, and would be included in article 3 so that they apply to all courts. The proposed amendments to these rules and the related advisory committee comments primarily clarify that the rules are intended to supplement rather than abrogate the confidentiality of mediation communications under the Evidence Code. The proposal does include two substantive amendments to these rules. Rule 3.869 (current rule 3.866) would be amended to require that a court make the identity of its complaint coordinator readily accessible to the public. Rule 3.872 (current rule 3.868), which generally provides that a person who has received information about a complaint is disqualified from subsequently adjudicating issues related to the dispute that was the subject of the mediation from which the complaint arose, would be amended to clarify that a person who received only information that was publicly disclosed under rule 3.868(d) (current rule 3.867(d)) is not disqualified.

Proposed new rule 3.870 establishes the general requirements that would apply to all procedures for addressing complaints about court-program mediators. This rule would:

- Encourage submission or referral of inquiries and complaints to the complaint coordinator;
- Require the complaint coordinator to conduct a preliminary review of all complaints to determine whether they can be resolved informally or merit an investigation (as indicated in the proposed Advisory Committee Comment to this rule, it is contemplated that

most complaints will be resolved during this preliminary stage);

- Require any complaints that are not resolved through the preliminary review to be investigated by at least one individual who has experience as a mediator (as indicated in the proposed Advisory Committee Comment to this rule, this investigation procedure will only be needed for those rare complaints that are not resolved through the preliminary review);
- Require the presiding judge or his or her designee to make the final decision on all complaints that are investigated;
- Require promptness in addressing complaints at all stages;
- Require courts to provide complainants with written acknowledgment that their complaints were received and notice of the court's final action on the complaint;
- Require courts to give mediators notice of any complaint that is not resolved through the preliminary inquiry, an opportunity to respond to the complaint, and notice of the court's final action on the complaint; and
- Encourage courts to maintain records of complaints.

Current rule 3.865(b) lists the actions a court can take in response to a complaint about a mediator. Proposed new rule 3.871 would expand these actions to also allow a court to direct that no action be taken, admonish the mediator, require the mediator to take training other than mediation training, or suspend the mediator from the court's panel or list.

*Article 4—Procedures in courts that do not adopt a complaint procedure by local rule*

Proposed new article 4 would establish a default complaint procedure that would apply only in courts that do not elect to establish a complaint procedure by local rule. This article therefore contains more detailed, operational procedures for addressing complaints. These provisions are designed to implement the general requirements for all complaint procedures stated in rule 3.870 and policy recommendations that underlay the 2007 proposal.

Proposed new rule 3.882 would require the complaint coordinator to acknowledge the receipt of complaints and conduct a preliminary review. It would also encourage the informal resolution of complaints at this preliminary stage and would authorize the coordinator to close

the complaint if (1) it is withdrawn by the complainant; (2) no violation of the rules of conduct appears to have occurred or the complaint is without sufficient merit to warrant an investigation; (3) the conduct alleged would constitute a very minor violation of the rules of conduct and the mediator has provided an acceptable response; or (4) the complainant, the complaint coordinator, and the mediator have agreed on a resolution.

Rule 3.883 would require the complaint coordinator to refer complaints that are not closed as a result of the preliminary review to a complaint committee for investigation. It would also authorize the coordinator to initiate a complaint, based on information received from any source indicating that the mediator may have violated the rules of conduct, and refer it to a complaint committee for investigation.

Rule 3.884 would require the presiding judge to appoint a complaint committee that includes at least one person with experience as a mediator to investigate and make recommendations concerning any complaint referred by the complaint coordinator. The complaint committee would be required to give the mediator a copy of the complaint, a list of any violations that it appears may have occurred, and an opportunity to respond. After conducting an investigation that it considers appropriate, the committee would be required to prepare a report that summarizes its investigation and includes a recommendation concerning the disposition of the complaint.

Rule 3.885 would provide that the presiding judge is responsible for making the final decision on the complaint or for designating another judicial officer or a committee (other than the complaint committee) that includes a judicial officer to perform this function. The presiding judge or the designee could affirmatively adopt the complaint committee's recommendation or direct a different disposition within 30 days after the complaint committee's recommendation is forwarded to it. So that presiding judges and their designees would not be required to affirmatively act upon all recommendations, rule 3.885 would also allow them to adopt a recommendation by taking no action within 30 days. In any of these events, the complaint coordinator would be required to notify the complainant and the mediator, in writing, of the final court action on the complaint.

#### Related Rule Change

Rule 10.781 addresses requirements for inclusion on court lists of ADR neutrals. Proposed new subdivision (c) of this rule would

provide that inclusion on such court lists and eligibility to be recommended, appointed, or compensated by the court to serve as a neutral are revocable privileges and confer no vested right on the neutral.

#### Form ADR-107

*Attendance Sheet for Court-Program Mediation of Civil Case* (form ADR-107) would be modified to include a space at the top of the form for the dates of the mediation sessions. The body of the form would be reformatted to make it easier to complete and to request the participants' e-mail addresses. A check box to indicate the attachment of additional pages would be added, and the spaces for additional participant information on the reverse side of the form would be deleted to make this a one-page form. The revised form is attached at page 23.

#### Comments

Comments are invited concerning all aspects of the proposed new and amended rules and the revised form. However, comments are particularly requested concerning the following issues:

1. To insure that the public and mediators can easily find local complaint procedures, should courts that elect to establish local complaint procedures rather than following the procedures established in article 4 be required to establish these procedures by local rule of court?
2. Should a default complaint procedure which would automatically apply if a court has not adopted a local procedure be set forth in the California Rules of Court (such as in article 4), or should courts be provided with a model complaint procedure that would only apply if adopted locally?
3. In the rare cases that are not resolved in the preliminary review, should the rules require that at least one person with experience as a mediator participate in conducting the investigation and recommending the final disposition, or should the rules allow a judicial officer or court staff who does not have mediation experience to perform these functions?

Rules 3.870–3.878 of the California Rules of Court would be renumbered as rules 3.890–3.898, respectively; rules 3.865, 3.866, 3.867, and 3.868 would be amended and renumbered as rules 3.866, 3.869, 3.868, and 3.872, respectively; rules 3.865, 3.867, 3.870, 3.871, and 3.880–3.886 would be adopted; and rule 10.781 would be amended, effective July 1, 2009, to read:

1 **Division 8. Alternative Dispute Resolution**

2  
3 **Chapter 3. General Rules Relating to Mediation of Civil Cases**

4  
5 **Article 3. Requirements for Addressing Complaints About**  
6 **Court-Program Mediators**

7  
8 **Rule 3.865. Purpose**

9  
10 The rules in this article and article 4 are intended to promote the resolution of complaints  
11 indicating that mediators in court-connected mediation programs for civil cases may have  
12 violated a provision of article 2. They are intended to help courts promptly resolve any  
13 such complaints in a manner that is respectful and fair to the complainant and the  
14 mediator and consistent with the California mediation confidentiality statutes.

15  
16 **Advisory Committee Comment**

17  
18 Complaints about mediators are rare. To ensure the quality of court mediation panels and public  
19 confidence in the mediation process and the courts, it is, nevertheless, important to ensure that those  
20 complaints that do arise are resolved through procedures that are consistent with the mediation  
21 confidentiality statutes, as well as fair and respectful to the interested parties.

22  
23  
24 **Rule 3.866. 3.865. Complaint procedure required**

25  
26 **(a) — Court procedures required**

27  
28 Each superior court that makes a list of mediators available to litigants in general  
29 civil cases or that recommends, selects, appoints, or compensates a mediator to  
30 mediate any general civil case pending in ~~the~~ that court must ~~establish procedures~~  
31 have a procedure for receiving, investigating, and resolving complaints ~~that~~  
32 ~~mediators who are on the court's list or who are recommended, selected, appointed,~~  
33 ~~or compensated by the court failed to comply with the rules for conduct of~~  
34 ~~mediators set forth in this article, when applicable~~ about those mediators. Courts  
35 may either establish a complaint procedure that is consistent with this article by  
36 local rule of court or follow the complaint procedure that is set forth in article 4. In  
37 either case, courts must also follow the requirements of this article when addressing  
38 these inquiries and complaints.



1 **(b) Actions court may take**

2  
3 ~~The court may impose additional mediation training requirements on a mediator,~~  
4 ~~reprimand a mediator, remove a mediator from the court's panel or list, or otherwise~~  
5 ~~prohibit a mediator from receiving future mediation referrals from the court if the~~  
6 ~~mediator fails to comply with the rules of conduct for mediators in this article, when~~  
7 ~~applicable.~~

8  
9 **Advisory Committee Comment**

10  
11 As used in this article and article 4, inquiries and complaints mean communications presented to the  
12 court's complaint coordinator indicating that a mediator may have violated a provision of article 2. This  
13 article and article 4 do not abrogate or limit a court's inherent or other authority to take other actions to  
14 ensure the quality of mediators who serve in its program in other contexts.

15  
16 This article establishes general, minimum requirements for all superior court procedures for receiving,  
17 investigating, and resolving complaints about court-program mediators. Article 4 establishes a "default"  
18 procedure that will apply if a court does not establish another procedure by local rule. Superior courts that  
19 choose to establish a complaint procedure by local rule are encouraged to adopt rules that follow the  
20 complaint procedures set forth in article 4, to the extent feasible. Those procedures were developed with  
21 input from judicial officers, court alternative dispute resolution (ADR) administrators, court-program  
22 mediators, and others with expertise in mediation confidentiality and are designed so that they can be  
23 readily used or adapted to the circumstances of individual courts and specific complaints.

24  
25  
26 **Rule 3.867. Definitions**

27  
28 As used in this article and article 4, unless the context or subject matter requires  
29 otherwise:

30  
31 (1) "Article 2" means rules 3.850 through 3.860 of the California Rules of Court.

32  
33 (2) "Court-program mediator" means a person or organization that is on the court's list  
34 of mediators for general civil cases or that is recommended, selected, appointed, or  
35 compensated by the court to mediate a general civil case pending in the court.

36  
37 (3) "Inquiry" means an unwritten communication presented to the court's complaint  
38 coordinator indicating that a mediator has or may have violated a provision of  
39 article 2.

40  
41 (4) "Complaint" means a written communication presented to the court's complaint  
42 coordinator indicating that a mediator has or may have violated a provision of  
43 article 2.

44  
45 (5) "Complainant" means the person who makes or presents a complaint.

- 1  
2 (6) “Complaint coordinator” means the person designated by the presiding judge under  
3 rule 3.869(a) to receive complaints and inquiries about the conduct of mediators.  
4  
5 (7) “Complaint committee” means a committee designated or appointed to investigate  
6 and make recommendations concerning complaints, under rule 3.884(a) or local  
7 rules of court.  
8  
9 (8) “Complaint procedure” means a procedure established by article 4 or local rules of  
10 court for presenting, receiving, reviewing, responding to, investigating, or acting on  
11 any inquiry or complaint.  
12  
13 (9) “Complaint proceeding” means all of the proceedings that take place as part of a  
14 complaint procedure concerning a specific inquiry or complaint.  
15  
16 (10) “Mediation communication” means any statement that is made or any writing that is  
17 prepared for the purpose of, in the course of, or pursuant to a mediation or a  
18 mediation consultation, as defined in Evidence Code section 1115, and includes any  
19 communications, negotiations, and settlement discussions between participants in  
20 the course of a mediation or a mediation consultation.

21  
22  
23 **Rule ~~3.868,3.867~~. Confidentiality of complaint ~~procedures~~ proceedings,**  
24 **information, and records**

- 25  
26 (a) **Intent** ~~This rule’s requirement that rule 3.865 complaint procedures be confidential~~  
27 ~~is~~

28 This rule is intended to:

- 29  
30 (1) Preserve the confidentiality of mediation communications as required by  
31 Evidence Code sections 1115–1128;  
32  
33 (2) Promote cooperation in the reporting, investigation, and resolution of  
34 complaints about court-program mediators ~~on court panels~~; and  
35  
36 (3) Protect mediators against damage to their reputations that might result from  
37 the disclosure of unfounded complaints against them.  
38

- 39 (b) **Preserving the confidentiality of mediation communications**

40  
41 ~~All procedures for receiving, investigating, and resolving inquiries or complaints~~  
42 ~~about the conduct of mediators~~ complaint procedures and complaint proceedings  
43 must be designed and conducted in a manner that ~~to~~ preserves the confidentiality of

1 mediation communications, including but not limited to the confidentiality of any  
2 communications between the mediator and individual mediation participants or  
3 subgroups of mediation participants.  
4

5 **(c) Confidentiality of complaint proceedings**

6  
7 All ~~communications, inquiries, complaints, investigations, procedures,~~  
8 ~~deliberations, and decisions about the conduct of a mediator under rule 3.865~~  
9 complaint proceedings must occur in private and must be kept confidential. No  
10 information or records concerning the receipt, investigation, or resolution of an  
11 inquiry or a complaint ~~under rule 3.865~~ may be open to the public or disclosed  
12 outside the course of the ~~rule 3.865 complaint procedure proceeding~~ proceeding except as  
13 provided in (d) or as otherwise required by law.  
14

15 **(d) Authorized disclosures**

16  
17 After the decision on a complaint, the presiding judge, or a person designated by  
18 whom the presiding judge for this purpose designates to do so, may, in his or her  
19 discretion, authorize the disclosure of information or records concerning ~~rule 3.865~~  
20 the complaint procedures proceeding that do not reveal any mediation  
21 communications, ~~including~~ The disclosures that may be authorized under this  
22 subdivision include the name of a mediator against whom action has been taken  
23 under rule ~~3.865~~ 3.871, the action taken, and the general basis on which the action  
24 was taken. In determining whether to authorize the disclosure of information or  
25 records under this subdivision, the presiding judge or the designee should consider  
26 the purposes of the confidentiality of ~~rule 3.865-complaint procedures proceedings~~  
27 stated in (a)(2) and (a)(3).  
28

29 **(e) Disclosures required by law**

30  
31 In determining whether the disclosure of information or records concerning ~~rule~~  
32 ~~3.865~~ a complaint procedures proceeding is required by law, courts should consider  
33 the purposes of the confidentiality of ~~rule 3.865-complaint procedures proceedings~~  
34 stated in (a). ~~Before~~ If it appears that the disclosure of information or records  
35 concerning a complaint procedures under rule 3.865 proceeding that would reveal  
36 mediation communications is ordered required by law, before the information or  
37 records are disclosed, notice should be given to any person whose mediation  
38 communications may thereby be revealed.  
39

40 **Advisory Committee Comment**

41  
42 **Subdivision (a).** See Evidence Code sections 1115 and 1119 concerning the scope and types of mediation  
43 communications protected by mediation confidentiality. Rule 3.868 is intended to supplement the  
44 confidentiality of mediation communications established by the Evidence Code by ensuring that

1 disclosure of information or records about a complaint proceeding does not reveal confidential mediation  
2 communications. Rule 3.868 is not intended to supersede or abrogate the confidentiality of mediation  
3 communications established by the Evidence Code.

4  
5 **Subdivision (b).** Private meetings, or “caucuses,” between a mediator and subgroups of participants are  
6 common in court-connected mediations, and it is frequently understood that these communications will  
7 not be disclosed to other participants in the mediation. (See Cal. Rules of Court, rule 3.854(c).) It is  
8 important to protect the confidentiality of these communications in ~~rule 3.865 complaint procedures,~~  
9 proceedings so that one participant in the mediation does not learn what another participant discussed in  
10 confidence with the mediator without the consent of the participants in the caucus communication.

11  
12 **Subdivisions (c)–(e).** The provisions of (c)–(e) that authorize the disclosure of information and records  
13 related to ~~rule 3.865 complaint procedures~~ proceedings do not create any new exceptions to mediation  
14 confidentiality. Although disclosure of information and records about complaint proceedings that do not  
15 reveal mediation communications may be authorized under (d), information and records about rule 3.865  
16 complaint procedures that would reveal mediation communications should only may be publicly disclosed  
17 only as required by law (e.g., in response to a subpoena or court order) and consistent with the statutes  
18 and case law governing mediation confidentiality. A person who is knowledgeable about California’s  
19 mediation confidentiality laws should determine whether the disclosure of mediation communications is  
20 required by law.

21  
22 Evidence Code sections 915 and 1040 establish procedures and criteria for deciding whether information  
23 acquired in confidence by a public employee in the course of his or her duty is subject to disclosure.  
24 These sections may be applicable or helpful in determining whether the disclosure of information or  
25 records acquired by judicial officers, court staff, and other persons ~~while receiving, investigating, or~~  
26 ~~resolving complaints under rule 3.865 in the course of a complaint proceeding~~ is required by law or  
27 should be authorized in the discretion of the presiding judge.  
28

29  
30 **Rule 3.869,3.866- Designation of person to receive complaints Complaint**  
31 **coordinator**

32  
33 **(a) Designation of the complaint coordinator**

34  
35 ~~In each superior court that is required to establish a complaint procedure under rule~~  
36 ~~3.865, The presiding judge must designate a person who is knowledgeable about~~  
37 ~~mediation to receive and coordinate the investigation of any inquiries or complaints~~  
38 ~~about the conduct of mediators who are subject to rule 3.865 serve as the complaint~~  
39 ~~coordinator.~~  
40

41 **(b) Identification of the complaint coordinator**

42  
43 The court must make the complaint coordinator’s identity and contact information  
44 readily accessible to litigants and the public.  
45

1 Advisory Committee Comment

2  
3 The ADR program administrator appointed under rule 10.783(a) may also be appointed as the complaint  
4 coordinator if that person is knowledgeable about mediation.

5  
6  
7 **Rule 3.870. General requirements for complaint procedures and complaint**  
8 **proceedings**

9  
10 **(a) Submission and referral of inquiries and complaints to the complaint**  
11 **coordinator**

12  
13 All inquiries and complaints should be submitted or referred to the complaint  
14 coordinator.

15  
16 **(b) Preliminary review of complaints**

17  
18 The complaint coordinator must conduct a preliminary review of all complaints to  
19 determine whether the complaint can be informally resolved or merits investigation.

20  
21 **(c) Investigation and determination of any unresolved complaints**

22  
23 If a complaint is not resolved or closed during the preliminary review:

24  
25 (1) The complaint must be investigated and a recommendation must be made by  
26 at least one individual who has experience as a mediator and who is familiar  
27 with the rules of conduct stated in article 2; and

28  
29 (2) The final decision on the complaint must be made by the presiding judge or  
30 his or her designee, who must not be the complaint coordinator, an individual  
31 who investigated the complaint, or a member of a committee that investigated  
32 the complaint.

33  
34 **(d) Promptness**

35  
36 The court must process complaints promptly at all stages.

37  
38 **(e) Communication with the complainant**

39  
40 (1) The court must send the complainant a written acknowledgment that it has  
41 received the complaint.

1           (2) The court must notify the complainant in writing of the final court action on  
2           the complaint.

3  
4 **(f) Mediator’s notice and opportunity to respond**

5  
6 If a complaint is not closed as a result of the preliminary review, the mediator must  
7 be given notice of the complaint, an opportunity to respond, and notice of the final  
8 court action on the complaint.

9  
10 **(g) Records of complaints**

11  
12 The court should maintain sufficient information about each complaint and its  
13 disposition to identify any history or patterns of complaints submitted under these  
14 rules.

15  
16 **Advisory Committee Comment**

17  
18 **Subdivision (a).** Coordination of inquiries and complaints by a person knowledgeable about mediation is  
19 important to help ensure that the requirements of this article are followed and that mediation  
20 confidentiality is preserved.

21  
22 **Subdivision (b).** The court should resolve inquiries and complaints about mediators using the simplest,  
23 least formal procedures that are appropriate under the circumstances, provided that they meet the  
24 minimum requirements stated in this article. Most complaints can be appropriately resolved during the  
25 preliminary review stage of the complaint process, through informal discussions between or among the  
26 complaint coordinator, the complainant, and the mediator. For example, some complaints may arise from  
27 a misunderstanding of the mediator’s role or from behavior that would not violate the standards of  
28 conduct. These types of complaints might appropriately be addressed by providing the complainant with  
29 additional information or by informing the mediator that certain behavior was upsetting to a mediation  
30 participant.

31  
32 **Subdivision (c).** For those rare complaints that are not resolved or closed during the preliminary review  
33 and need to be investigated, courts are encouraged to use a complaint committee appointed by the  
34 presiding judge, such as provided for under rule 3.884(a), that is comprised of members with a variety of  
35 backgrounds, including at least one person with experience as a mediator. Just as (c)(2) requires that  
36 someone other than the complaint coordinator or a person who investigated a complaint be the final  
37 decision maker, courts are encouraged to use someone other than the complaint coordinator to perform  
38 any investigation, because this will enhance trust and confidence in the complaint procedure and in the  
39 outcome of specific complaint proceedings.

40  
41  
42 **Rule 3.871. Permissible court actions on complaint**

43  
44 After an investigation has been conducted, the presiding judge or his or her designee  
45 may:

46  
47 (1) Direct that no action be taken on the complaint;

- 1  
2 (2) Admonish or reprimand the mediator;  
3  
4 (3) Impose additional training requirements as a condition of the mediator remaining on  
5 the court’s panel or list;  
6  
7 (4) Suspend the mediator from the court’s panel or list or otherwise prohibit the  
8 mediator from receiving future mediation referrals from the court; or  
9  
10 (5) Remove the mediator from the court’s panel or list or otherwise prohibit the  
11 mediator from receiving future mediation referrals from the court.  
12

13 **Advisory Committee Comment**  
14

15 This rule does not abrogate or limit any existing legal right or duty that the court may have to take other  
16 actions or limit interim suspension of a mediator under rule 3.886 or an equivalent local rule of court.  
17

18  
19 **Rule ~~3.872~~. 3.868. Disqualification from subsequently serving as an adjudicator**  
20

21 ~~A person who has participated in or received information about the receipt, investigation~~  
22 ~~or resolution of an inquiry or a complaint under rule 3.865~~ a complaint proceeding or  
23 otherwise received information about the substance of a complaint, other than  
24 information that is publicly disclosed under rule 3.868(d), must not subsequently hear or  
25 determine any contested issue of law, fact, or procedure concerning the dispute that was  
26 the subject of the underlying mediation or any other dispute that arises from the  
27 mediation as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative  
28 capacity, in any court action or proceeding.  
29

30 **Advisory Committee Comment**  
31

32 Persons who participated in a complaint proceeding are prohibited from subsequently adjudicating the  
33 dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation because  
34 they may have learned of confidential mediation communications that were disclosed in the complaint  
35 proceeding or may have been influenced by what transpired in that proceeding. Since the information that  
36 can be publicly disclosed under rule 3.868(d) is limited and excludes mediation communications, it is  
37 unnecessary to disqualify persons who received only publicly disclosed information from subsequently  
38 adjudicating the dispute.  
39

1 **Article 4. Procedures for Addressing Complaints About Court-Program Mediators**  
2 **in Courts That Have Not Adopted a Complaint Procedure by Local Rule**

3  
4 **Rule 3.880. Definitions and application**

5  
6 **(a) Definitions**

7  
8 The definitions in rule 3.867 apply to this article.

9  
10 **(b) Application**

11  
12 Each superior court that makes a list of mediators available to litigants in general  
13 civil cases or that recommends, selects, appoints, or compensates a mediator to  
14 mediate any general civil case pending in that court must follow the procedures in  
15 this article for receiving, investigating, and resolving inquiries and complaints about  
16 its court-program mediators, unless the court has adopted local rules establishing a  
17 different complaint procedure that is consistent with the requirements of article 3.

18  
19 **Advisory Committee Comment**

20  
21 Subdivision (b). All superior courts that make a list of mediators available or that recommend, select,  
22 appoint, or compensate a mediator to mediate any general civil case pending in that court are required to  
23 comply with article 3, regardless of whether or not they have adopted a complaint procedure by local rule.

24  
25  
26 **Rule 3.881. Addressing inquiries**

27  
28 If the complaint coordinator receives an inquiry, the coordinator must inform the person  
29 making the inquiry that the complaint procedure provides for investigation of written  
30 complaints only and that the person should submit a written complaint if he or she wants  
31 the court to conduct an investigation or take action. If the person does not submit a  
32 complaint, the complaint coordinator may prepare a written summary of the inquiry,  
33 which summary shall not itself constitute a complaint.

34  
35 **Advisory Committee Comment**

36  
37 As defined in rule 3.867, an “inquiry” is an unwritten communication and a “complaint” is a written  
38 communication. Article 3 requires only that the court have a procedure for addressing complaints, but rule  
39 3.883(b) permits the complaint coordinator to initiate a complaint based on an inquiry.



1 **Rule 3.882. Acknowledgment and preliminary review of complaints**

2  
3 **(a) Acknowledgment of complaints**

4  
5 The court must send the complainant a written acknowledgment that it has received  
6 the complaint. The acknowledgment must provide a Web site address at which the  
7 rules of conduct for mediators and these complaint procedures can be obtained and  
8 offer to provide these materials on request.

9  
10 **(b) Nature and purpose**

11  
12 The preliminary review is the stage of the complaint proceeding in which the  
13 complaint coordinator reviews the complaint and may communicate informally with  
14 the complainant, the mediator, or both to clarify the complaint, obtain the  
15 complainant's and the mediator's perspectives, and determine whether the  
16 complaint should be closed or referred to a complaint committee to conduct an  
17 investigation. The purpose of the review is to promptly, informally, and amicably  
18 resolve complaints, when possible.

19  
20 **(c) Review of the complaint and consultation with the complainant**

21  
22 The complaint coordinator must review each complaint. The coordinator may  
23 informally contact the complainant to obtain clarification or additional information  
24 or to provide information that may address the complainant's concern.

25  
26 **(d) Consultation with the mediator**

27  
28 If the complaint or information obtained from the complainant indicates that the  
29 mediator has or may have violated a provision of article 2, the complaint  
30 coordinator must inform the mediator about the complaint and give the mediator an  
31 opportunity to provide an informal response.

32  
33 **(e) Resolution of the complaint at the preliminary review stage**

34  
35 The complaint coordinator may close a complaint without making a referral under  
36 rule 3.883 if:

- 37  
38 (1) The complaint is withdrawn by the complainant;  
39  
40 (2) No violation of article 2 appears to have occurred or the complaint is without  
41 sufficient merit to warrant an investigation;  
42



1 **Rule 3.884. Investigation and recommendation by a complaint committee**

2  
3 **(a) Complaint committee appointment and responsibility**

4  
5 The presiding judge must appoint a complaint committee that includes at least one  
6 individual with experience as a mediator to investigate and make recommendations  
7 concerning the final decision on any complaint that is referred or initiated under  
8 rule 3.883. The complaint coordinator must not be a member of the complaint  
9 committee.

10  
11 **(b) Mediator’s notice and opportunity to respond**

12  
13 (1) The complaint committee must provide the mediator with a copy of any  
14 complaint submitted, any written summary prepared under rule 3.881, and a  
15 list of any violations of article 2 that it appears may have occurred.

16  
17 (2) The mediator must be provided an opportunity to respond to the complaint and  
18 the list of apparent violations.

19  
20 **(c) Report and recommendation**

21  
22 (1) After conducting an investigation that the complaint committee considers  
23 appropriate, the committee must make a written report that summarizes the  
24 investigation and states the committee’s recommendation concerning the final  
25 decision on the complaint. The committee may recommend one or more  
26 actions that are permissible under rule 3.871.

27  
28 (2) The committee may inform the mediator of its recommendation and inquire  
29 whether the mediator accepts that recommendation. If the mediator accepts the  
30 recommendation, the committee’s report must indicate this.

31  
32 (3) The complaint committee must submit its report and recommendation to the  
33 complaint coordinator.

34  
35 **Advisory Committee Comment**

36  
37 **Subdivision (a).** The presiding judge may appoint a standing complaint committee or appoint complaint  
38 committees on a case-by-case basis.

39  
40 **Subdivision (c).** It may be helpful for the presiding judge or the presiding judge’s designee to know  
41 whether the complaint committee’s recommendation is acceptable to the mediator. However, in some  
42 situations, the complaint committee may conclude that it would not be beneficial to inform the mediator  
43 of the recommendation.

1 **Rule 3.885. Final decision on a complaint**

2  
3 **(a) Responsibility for final decision**

4  
5 The presiding judge is responsible for making the final decision on the complaint or  
6 for designating another judicial officer, or a committee that includes a judicial  
7 officer, other than the complaint committee, to perform this function.  
8

9 **(b) Forwarding of the complaint committee's recommendation**

10  
11 The complaint coordinator must promptly forward a copy of the complaint  
12 committee's report and recommendation to the presiding judge or to his or her  
13 designee under (a).  
14

15 **(c) Considering and acting on recommendation**

16  
17 (1) After considering the complaint committee's recommendation, the presiding  
18 judge or the designee may affirmatively adopt the committee's  
19 recommendation as the final decision on the complaint or may direct a  
20 different disposition that is permissible under rule 3.871 by submitting this  
21 decision to the complaint coordinator within 30 days after the committee's  
22 recommendation was forwarded. The presiding judge or the designee may also  
23 adopt the committee's recommendation by allowing it to become the final  
24 decision on the complaint as provided in (2).  
25

26 (2) If the presiding judge or his or her designee does not affirmatively adopt the  
27 complaint committee's recommendation or submit a different decision to the  
28 complaint coordinator within 30 days after the recommendation was  
29 forwarded, the committee's recommendation will become the final decision on  
30 the complaint.  
31

32 **(d) Notification to the complainant and the mediator**

33  
34 The complaint coordinator must promptly notify the complainant and the mediator  
35 in writing of the final court action on the complaint.  
36

37 **Advisory Committee Comment**

38  
39 Subdivision (a). The presiding judge may appoint another judicial officer or a committee, other than the  
40 complaint coordinator or the complaint committee, to make the final decision concerning complaints on a  
41 continuing or on a case-by-case basis.  
42  
43

1 **Rule 3.886. Interim suspension pending a final decision on a complaint**

2  
3 If the preliminary review or the investigation indicates that a mediator may pose a threat  
4 of harm to mediation participants or to the integrity of the court’s mediation program, the  
5 presiding judge or his or her designee under rule 3.885(a) may suspend the mediator  
6 pending final decision on the complaint. The complaint coordinator or the complaint  
7 committee may make a recommendation to the presiding judge or the designee regarding  
8 such a suspension.  
9

10  
11 **Chapter 4. Civil Action Mediation Program Rules**

12  
13 **Rule 3.890-3.870. Application**

14  
15 \*\*\*

16  
17  
18 **Rule 3.891-3.871. Actions subject to mediation**

19  
20 \*\*\*

21  
22  
23 **Rule 3.892-3.872. Panels of mediators**

24  
25 \*\*\*

26  
27  
28 **Rule 3.893-3.873. Selection of mediators**

29  
30 \*\*\*

31  
32  
33 **Rule 3.894-3.874. Attendance, participant lists, and mediation statements**

34  
35 \*\*\*

36  
37  
38 **Rule 3.895-3.875. Filing of statement by mediator**

39  
40 \*\*\*

1 **Rule ~~3.896-3.876~~. Coordination with Trial Court Delay Reduction Act**

2  
3 \*\*\*

4  
5  
6 **Rule ~~3.897-3.877~~. Statistical information**

7  
8 \*\*\*

9  
10  
11 **Rule ~~3.898-3.878~~. Educational material**

12  
13 \* \* \*

14  
15  
16 **Rule 10.781. Court-related ADR neutrals**

17  
18 (a)–(b) \*\*\*

19  
20 **(c) Privilege to serve as a court-program neutral**

21  
22 Inclusion on a court list of ADR neutrals and eligibility to be recommended,  
23 appointed, or compensated by the court to serve as a neutral are privileges that are  
24 revocable and confer no vested right on the neutral.  
25

ATTENDANCE SHEET FOR COURT-PROGRAM MEDIATION OF CIVIL CASE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

MEDIATOR:

PLAINTIFF/PETITIONER:

DEFENDANT/RESPONDENT:

CASE NUMBER:

MEDIATION SESSION DATES:

DRAFT 3/21/2008
Not Approved by the
Judicial Council

Please provide your name, mailing address, and telephone number and indicate your role in the mediation so that the mediator or the court may contact you concerning this mediation if the need arises. This information will not be released or used for other purposes. (Multiple attendance sheets may be used to preserve the confidentiality of the participants' contact information.)

Table with 4 columns: NAME, MAILING ADDRESS, TELEPHONE AND E-MAIL, and ROLE. Each row contains fields for name, address, phone number, email, and role selection (Party, Attorney, Insurance Representative, Other).

Additional page(s) attached.

## Item SPR08-10 Response Form

**Title:** **Alternative Dispute Resolution: Procedures for Addressing Complaints About Court-Program Mediators for Civil Cases** (renumber Cal. Rules of Court, rules 3.865-3.868; adopt rules 3.865, 3867, 3.870, 3.871, and 3.881-3.886; amend rule 10.781; revise form ADR-107)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Name:** \_\_\_\_\_ **Title:** \_\_\_\_\_

**Organization:** \_\_\_\_\_

- Commenting on behalf of an organization**

**Address:** \_\_\_\_\_

**City, State, Zip:** \_\_\_\_\_

### **To Submit Comments**

Comments may be written on this form, prepared in a letter format, or submitted online. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments.

**Internet:** [www.courtinfo.ca.gov/invitationstocomment](http://www.courtinfo.ca.gov/invitationstocomment)

**Email:** [invitations@jud.ca.gov](mailto:invitations@jud.ca.gov)

**Mail:** Ms. Camilla Kieliger  
Judicial Council, 455 Golden Gate Avenue  
San Francisco, CA 94102

**Fax:** (415) 865-7664, Attn: Camilla Kieliger

<b>DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 20, 2008</b>
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*Circulation for comment does not imply endorsement by the Judicial Council  
or the Rules and Projects Committee.  
All comments will become part of the public record of the council's action.*