

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report Summary

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Elihu M. Berle, Committee Chair
Hon. Lee Smalley Edmon, Alternative Dispute Resolution Subcommittee
Chair
Heather Anderson, Senior Attorney, 415-865-7691
Alan Wiener, Attorney, 818-558-3051

DATE: August 31, 2006

SUBJECT: Alternative Dispute Resolution: Participation in Court-Ordered Civil
Action Mediation (amend Cal. Rules of Court, rule 3.874) (Action
Required)¹

Issue Statement

Code of Civil Procedure section 1775 et seq. creates the Civil Action Mediation Program, which is mandatory for the courts of Los Angeles County and which the presiding judge of any other court may elect to have apply to that court. Section 1775.3 authorizes courts to submit unlimited civil cases in which the amount in controversy does not exceed \$50,000 for each plaintiff to mediation as an alternative to submitting the case to judicial arbitration under section 1141.11. Courts, litigants, and neutrals have expressed concerns that parties, attorneys, and insurers frequently do not attend or participate in civil action mediation processes as they should. The lack of appropriate attendance and participation undermines the efficacy of the Civil Action Mediation Program.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2007, amend rule 3.874 of the California Rules of Court to:

¹ At the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, effective January 1, 2007. Under the reorganization, rule 1634 has been renumbered as rule 3.874, and new format conventions have been adopted. Hence, the proposed amendments to rule 1634 are shown throughout this proposal as amendments to rule 3.874, which will become effective January 1, 2007.

1. Clarify that parties, attorneys of record, and insurance representatives must attend civil action mediation sessions in person unless excused by the mediator or permitted to attend by telephone;
2. Require the parties to serve lists of mediation participants in advance of the mediation; and
3. Authorize mediators to request that each party submit a short statement summarizing the issues in dispute and possible resolutions of those issues, as well as other information and documents that may appear helpful to resolve the dispute.

The text of the amended rule is attached at pages 18–19.

Rationale for Recommendation

Clarifying that parties, attorneys of record, and insurance representatives must generally attend civil action mediation sessions in person will promote attendance by the persons whose participation is likely to be helpful to resolve the case. Expressly providing that the mediator may permit attendance by telephone will allow a more convenient and less costly method of participation in appropriate cases and will conform the rule to current practice. Providing that an excuse from attendance or an authorization to attend by telephone must be confirmed in writing will help to avoid disagreements about whether such an excuse or authorization was granted.

Requiring the parties to serve lists of the mediation participants on the mediator and other parties in advance of the mediation will help mediators in court-connected mediations to timely identify any relationships or affiliations that they must disclose under rule 1620.5 of the California Rules of Court.² This will help prevent any disruption and delay that might occur if a mediator first learns at the mediation session that he or she has a relationship or an affiliation with a participant. Identifying mediation participants in advance will also help the mediator and the parties ensure that the persons whose participation is likely to be helpful to resolve the case will attend the mediation. Providing these lists will impose a small burden on the mediation participants and will formalize the mediation process to a limited extent. However, the committee believes that the benefits of facilitating required disclosures by mediators and attendance by important participants will outweigh these disadvantages.

Authorizing mediators to request that the parties submit short mediation statements and other pertinent information and documents will help enable mediators who want to receive these materials conduct more effective mediations. Mediation statements may

² Rule 1620.5 requires court-program mediators to disclose personal and professional relationships and affiliations that might reasonably raise a question concerning impartiality as soon as practicable and, to the extent possible, before the first mediation session. Effective January 1, 2007, this rule will be renumbered 3.855.

promote the parties' and the mediators' preparation for mediation, particularly in more complex cases. No statewide rule currently authorizes mediators to request mediation statements or other information that may be helpful to resolve a dispute, and rule 1620.3 of the California Rules of Court³ provides that mediators in court-connected mediation programs must respect the right of each participant to decide the extent of his or her participation in the mediation. A rule of court authorizing mediators to request mediation statements and other pertinent information and documents will underscore the importance of such requests, make it clear that a mediator's request for these items does not violate the mediator's obligation under rule 1620.3, and increase the likelihood that the parties will submit the requested items.

Incorporating these clarifications and new requirements in a statewide rule of court will encourage attendance and participation, promote uniformity of practice, and facilitate compliance with mediator disclosure obligations in civil action mediations. Adopting these provisions is consistent with the requirement of Code of Civil Procedure section 1775.15 that the Judicial Council provide by rule for the procedures to be followed in submitting actions to civil action mediation.

Alternative Actions Considered

The proposal that was circulated for comment also would have established requirements for attendance at and participation in judicial arbitrations conducted under Code of Civil Procedure section 1141.10 et seq. However, based upon strong concerns expressed by both plaintiff and defense bar organizations and some individual practitioners, the committee is not proposing amendments to the judicial arbitration rules at this time.⁴ Instead, the committee and staff plan to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.

Comments From Interested Parties

Forty-five organizations or individuals commented concerning the proposal that was circulated for comment. The commentators' overall positions were fairly balanced and evenly distributed: 11 agreed with the proposal as circulated; 19 agreed with the proposal if modified; 13 did not agree with the proposal; and 2 did not express an overall position. However, both plaintiff and defense practitioner organizations, and some individual practitioners, expressed serious concerns about that proposal. To address these concerns, committee representatives and staff met with bar organization representatives. These

³ Effective January 1, 2007, this rule will be renumbered 3.853.

⁴ Although the committee is not proposing revisions to the judicial arbitration rules at this time, the comments concerning the judicial arbitration proposal that was circulated for comment are set forth in the attached comment chart, beginning on page 57, for those who for those who may wish to review them. (The proposal that was circulated for comment is available online at <http://www.courtinfo.ca.gov/invitationstocomment/documents/spr06-41.pdf>.)

discussions, as well as the written comments, resulted in the committee deferring the proposal to amend the judicial arbitration rules and significantly revising the proposed amendments to rule 3.874, as discussed below.

The committee made a number of significant changes to rule 3.874's provisions regarding attendance and participation in civil action mediation under Code of Civil Procedure section 1775 et seq., based on the public comments received. These changes included expressly authorizing telephonic attendance, with the mediator's permission; authorizing mediators to request, rather than require, submission of mediation statements; and deleting a provision that would have highlighted the existing statutory authority for the court to impose sanctions for failure to attend a civil action mediation as required. A chart that sets forth the commentators' overall positions and their narrative comments and the committee's responses is attached at pages 20–75.

Implementation Requirements and Costs

The amendments to rule 3.874 would not require any implementation actions by, or impose any costs on, the courts or the Administrative Office of the Courts. There would be some additional costs for litigants in cases submitted to civil action mediation associated with the requirements to serve participant lists, to confirm in writing attendance excuses and permission to attend mediation sessions by telephone, and sometimes to prepare and submit mediation statements. The amendments might also result in mediators receiving and needing to address some additional requests for attendance excuses or permission to attend by telephone.

Attachments

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Elihu M. Berle, Committee Chair
Hon. Lee Smalley Edmon, Alternative Dispute Resolution Subcommittee
Chair
Heather Anderson, Senior Attorney, 415-865-7691
Alan Wiener, Attorney, 818-558-3051

DATE: August 31, 2006

SUBJECT: Alternative Dispute Resolution: Participation in Court-Ordered Civil
Action Mediation (amend Cal. Rules of Court, rule 3.874) (Action
Required)⁵

Issue Statement

Code of Civil Procedure section 1775.3 authorizes courts to submit unlimited civil cases in which the amount in controversy does not exceed \$50,000 for each plaintiff to mediation as an alternative to submitting the case to judicial arbitration under section 1141.11. Courts, litigants, and neutrals have expressed concerns that parties, attorneys, and insurers frequently do not attend or participate in civil action mediation processes as they should. The lack of appropriate attendance and participation undermines the efficacy of the Civil Action Mediation Program.

Background

The Civil Action Mediation Program is established by Code of Civil Procedure section 1775 et seq., which creates a mediation program that is mandatory for the courts of Los Angeles County and which the presiding judge of any other court may elect to have apply to that court. At least 12 superior courts have previously elected to have a civil action

⁵ At the June 30, 2006, meeting, the Judicial Council approved the reorganization and renumbering of the California Rules of Court and Standards of Judicial Administration, effective January 1, 2007. Under the reorganization, rule 1634 has been renumbered as rule 3.874, and new format conventions have been adopted. Hence, the proposed amendments to rule 1634 are shown throughout this proposal as amendments to rule 3.874, which will become effective January 1, 2007.

mediation program, including Butte, Contra Costa, El Dorado, Fresno, Nevada, San Diego, San Mateo, Santa Barbara, Shasta, Solano, Stanislaus, and Tulare.⁶

Code of Civil Procedure section 1775.3 provides that, in participating courts, all at-issue civil actions in which judicial arbitration is otherwise required under Code of Civil Procedure section 1141.11⁷ may instead be submitted to mediation. Although the civil action mediation statutes provide that actions may be “submitted to mediation” instead of judicial arbitration, they do not specify how this is to be done or whether or how the litigants in actions submitted to mediation must participate in the mediation process. Instead, Code of Civil Procedure section 1775.15 requires the Judicial Council to provide by rule for the procedures to be followed in submitting actions to civil action mediation. The Judicial Council has adopted rule 1600 et seq. of the California Rules of Court⁸ to implement the Civil Action Mediation Program statutes.

Superior courts have adopted local rules that specify varying requirements for attendance and participation in judicial arbitration. The proposal that was circulated for comment was aimed to establish statewide requirements for participation in both judicial arbitration and civil action mediation, with the goal of making these court-ordered ADR processes more efficient and effective.

Rationale for Recommendation

Rule 3.874(a)—Attendance at mediation sessions

Rule 3.874 currently requires the parties to “personally appear” and counsel and insurance representatives for the parties to be “present or available at” all civil action mediation sessions that concern the party, unless excused by the mediator. The advisory committee recommends revising this rule to require that parties, attorneys, and insurance representatives attend all mediation sessions in person unless they are excused or permitted to attend by telephone, and to require that any such excuse or permission be confirmed in writing, in either a letter or an electronic communication.

Clarifying that parties, attorneys of record, and insurance representatives must generally attend civil action mediation sessions in person will promote attendance by the persons whose participation is likely to be helpful to resolve the case. Expressly providing that the mediator may permit attendance by telephone will allow a more convenient and less

⁶ Some of these courts, including Contra Costa, San Diego, and San Mateo no longer operate mediation programs under the civil action mediation statutes.

⁷ Superior courts with 18 or more judges are required to have judicial arbitration programs, and superior courts with fewer judges may elect to have such programs. In these courts, judicial arbitration is generally required in any nonexempt civil case in which the amount in controversy, in the opinion of the court, will not exceed \$50,000 per party. (See Code Civ. Proc., § 1141.11(a) and (b).) The types of actions that are exempt from judicial arbitration include class actions, small claims actions or appeals, unlawful detainer actions, and Family Law Act proceedings. (See Cal. Rules of Court, rule 1601, which will be renumbered as rule 3.811, effective January 1, 2007.)

⁸ Effective January 1, 2007, rule 1600 et seq. will be renumbered 3.810 et seq.

costly method of participation in appropriate cases and will conform the rule provisions to current practice. Providing that an excuse from attendance or an authorization to attend by telephone must be confirmed in writing will help to avoid disagreements about whether such an excuse or authorization was granted.

Rule 3.874(b)—Submission of participant lists and mediation statements

The California Rules of Court do not currently require the parties to identify the persons who will participate in a civil action mediation or address the submission of information about the dispute. The committee recommends adding provisions to rule 3.874 that would (1) require each party to serve a list of its mediation participants on the mediator and all other parties and (2) authorize the mediator to request that the parties submit a short mediation statement providing information about the issues in dispute and possible resolutions of those issues, as well as other information or documents that may appear helpful to resolve the dispute.

Requiring the parties to serve lists of the mediation participants on the mediator and other parties in advance of the mediation will help mediators in court-connected mediations to timely identify any relationships or affiliations that they must disclose under rule 1620.5 of the California Rules of Court.⁹ This will help prevent any disruption and delay that might occur if a mediator first learns at the mediation session that he or she has a relationship or an affiliation with a participant. Identifying mediation participants in advance will also help the mediator and the parties ensure that the persons whose participation is likely to be helpful to resolve the case will attend the mediation. Providing these lists will impose a small burden on the mediation participants and will formalize the mediation process to a limited extent. However, the committee believes that the benefits of facilitating required disclosures by mediators and attendance by important participants will outweigh these disadvantages.

Authorizing mediators to request that the parties submit short mediation statements and other information and documents that may appear helpful to resolve the dispute will help mediators who want to receive these items conduct more effective mediations. Mediation statements and other pertinent information may promote the parties' and the mediators' preparation for mediation, particularly in more complex cases. However, no statewide rule currently authorizes mediators to request mediation statements or other information that may be helpful to resolve a dispute, and rule 1620.3 of the California Rules of Court¹⁰ provides that mediators in court-connected mediation programs must respect each participant's right to decide the extent of his or her participation in the mediation. A rule of court authorizing mediators to request mediation statements and other pertinent information and documents will underscore the importance of this request, make it clear

⁹ Rule 1620.5 requires court-program mediators to disclose personal and professional relationships and affiliations that might reasonably raise a question concerning impartiality as soon as practicable and, to the extent possible, before the first mediation session. Effective January 1, 2007, this rule will be renumbered 3.855.

¹⁰ Effective January 1, 2007, this rule will be renumbered 3.853.

that a mediator's request for these items does not violate the mediator's obligation under rule 1620.3, and increase the likelihood that the parties will submit the requested items requested.

Sanctions for failure to attend civil action mediation

Existing statutes provide for the imposition of sanctions for failure to comply with applicable state or local rules of court or with a court order. The proposal that was circulated for comment provided that the court may impose sanctions under Code of Civil Procedure section 177.5 or 575.2, or under rule 227 of the California Rules of Court, if any party, attorney, insurer, or representative of an insurer fails to attend a civil action mediation as required by the state or local rules, or by court order.¹¹ This provision was included in the proposal that was circulated for comment—although sanctions could be imposed under the referenced authorities without it—to inform litigants and courts of the potential for sanctions and to encourage compliance with the attendance requirements. However, based on comments received, the committee concluded that these benefits were outweighed by disadvantages of highlighting the sanctioning authority, including the possibilities that this would make civil action mediation appear more coercive, might foster unwarranted sanction requests, and was objectionable to some commentators. For these reasons, and because including the sanction authority in the rule is unnecessary for the imposition of sanctions under the existing statutory authorities, the committee deleted the references to the court's sanctioning authority from the proposed amendments to rule 3.874.

Alternative Actions Considered

The proposal that was circulated for comment would have authorized mediators to require, rather than request, the submission of mediation statements. Authorizing mediators to require mediation statements might make some parties more likely to submit these statements when the mediator considers them important. However, the committee believes that, if the proposal is adopted, most parties who are interested in a successful mediation will submit mediation statements on the mediator's request and that authorizing the mediator to require mediation statements from those who would not do so voluntarily is unlikely to make civil action mediations more successful. The committee also believes that authorizing mediators to require mediation statements could undermine the benefits of a flexible, informal, and voluntary process as well as the policies underlying rule 1620.3(b)'s requirement that the mediator respect the right of each participant to decide the extent of his or her participation in the mediation. Finally, the committee believes that it generally would be difficult to enforce a mediator's requirement that the parties submit mediation statements without violating the

¹¹ Rule 227 generally provides that sanctions can be imposed for failure to comply with applicable California Rules of Court, Code of Civil Procedure section 575.2 provides for the imposition of sanctions for violation of local rules, and Code of Civil Procedure section 177.5 provides for the imposition of sanctions for violation of a lawful court order. Effective January 1, 2007, rule 227 will be renumbered as 2.30.

confidentiality provisions of California Evidence Code sections 1119 and 1121.¹² The committee therefore concluded that the disadvantages that might result from authorizing mediators to require submission of mediation statements would outweigh the potential benefits.

The proposal that was circulated for comment also would have established requirements for attendance at and participation in judicial arbitrations conducted under Code of Civil Procedure section 1141.10 et seq. However, based upon strong concerns expressed by both plaintiff and defense bar organizations and some individual practitioners, the committee is not proposing amendments to the judicial arbitration rules at this time.¹³ Instead, the committee and staff plan to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.

Comments From Interested Parties

Forty-five organizations or individuals commented concerning the proposal that was circulated for comment. The commentators' overall positions were fairly balanced and evenly distributed: 11 agreed with the proposal as circulated; 19 agreed with the proposal if modified; 13 did not agree with the proposal; and 2 did not express an overall position. However, both plaintiff and defense practitioner organizations, and some individual practitioners, expressed serious concerns about that proposal. To address these concerns, an ad hoc group of committee members and staff met with bar organization representatives. These discussions, as well as the written comments, resulted in the committee deferring the proposal to amend the judicial arbitration rules and significantly revising the proposed amendments to rule 3.874, as discussed below.

Rule 3.874(a)—Attendance at mediation sessions

Paragraphs (a)(1) and (a)(2) of the version of rule 3.874 that was circulated for comment would have provided that, unless excused by the mediator, all parties and attorneys of record must “personally attend all mediation sessions” and insurance representatives must “attend all mediation sessions in person.” Paragraph (a)(3) would have provided that the mediator could excuse a party, attorney, or representative from the attendance requirements for good cause and could place conditions on an excuse. Paragraph (a)(3) would also have provided that any such excuse must be confirmed in writing.

¹² Evidence Code section 1119 generally provides that all communications in the course of a mediation shall remain confidential and shall not be admissible in civil proceedings, and section 1121 generally prohibits any kind of mediator reports to the court.

¹³ Although the committee is not proposing revisions to the judicial arbitration rules at this time, the comments concerning the judicial arbitration proposal that was circulated for comment are set forth in the attached comment chart, beginning on page 57, for those who for those who may wish to review them. (The proposal that was circulated for comment is available online at <http://www.courtinfo.ca.gov/invitationstocomment/documents/spr06-41.pdf>.)

Eleven commentators agreed with the entire proposal as circulated for comment, and two other commentators specifically supported the mediation attendance provisions.¹⁴ Eighteen commentators expressed a variety of concerns about the mediation attendance provisions or suggested revisions to them. The principal areas of concern involved the provisions that would have (1) required the parties, counsel, and insurance representatives to attend the mediation in person unless excused by the mediator; (2) generally allowed mediators to place conditions on attendance excuses; and (3) authorized mediators to excuse attendance “for good cause.” These concerns and the revisions that the committee has made to the proposal that was circulated for comment to address or alleviate them are summarized below. Several other concerns are also discussed below.

Attendance in Person or by Telephone

Some practitioners and neutrals expressed concerns about the provisions of the proposal that was circulated for comment that would have required parties, attorneys, and insurance representatives to attend civil action mediation sessions in person unless excused by the mediator.¹⁵ The strongest opposition to these provisions was expressed by commentators who understandably thought that this provision would preclude the current practice of sometimes participating in mediation by telephone. It was not the committee’s intent to eliminate this practice; the committee intended the provision authorizing mediators to place conditions on an excuse from attendance to be a mechanism for mediators to authorize attendance by telephone. Since this was not clear from the rule language, however, the committee has revised the proposal to explicitly provide that mediators may permit attendance by telephone. Based on discussions with bar representatives, the committee and staff believe that this revision will address the commentators’ concerns about the requirements to personally attend mediation sessions.

Attendance Excuses

Paragraph (a)(3) of the version of rule 3.874 that was circulated for comment would have provided that the mediator may excuse a party, attorney, or insurance representative from the attendance requirements for good cause; provided that the mediator may place conditions on attendance excuses; and required that excuses be confirmed in writing.

Several commentators expressed concerns that the provision permitting excuses “for good cause” might give rise to questions about whether good cause existed for an excuse,¹⁶ or would make the mediation process more formal and courtlike,¹⁷ or would

¹⁴ In addition to the list of commentators who agree with the proposal, see comments of Messrs. Attie and Estrada under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

¹⁵ See comments of Messrs. Adler, Allen, Berges, Kirby, Association of Defense Counsel of Northern California and Nevada (ADC), and California Defense Counsel (CDC) under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

¹⁶ See comment of Mr. Berges under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

¹⁷ See comment of Consumer Attorneys of California (CAOC) under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

give mediators coercive powers.¹⁸ To address these concerns, and because the absence of an express good cause provision in the current rule has not been shown to be problematic, the committee has deleted the good cause limitation from the proposal.

Commentators also expressed concerns that authorizing mediators to place conditions on attendance excuses might jeopardize mediation confidentiality¹⁹ or mediator impartiality.²⁰ Because of these concerns, and because the committee has revised the proposal to expressly authorize mediators to permit attendance by telephone, the committee has deleted the provision that would have generally authorized mediators to place conditions on attendance excuses.

One commentator thought that requiring written confirmation of attendance excuses would impose a burden on volunteer mediators.²¹ The committee did not intend to require that the mediator confirm the excuse. To clarify this and to avoid placing such a burden on the mediators, the committee has revised the proposal to require that the person who is excused or permitted to attend by telephone confirm this fact.

Other Concerns

Several commentators expressed concerns that mediators should not be responsible for enforcing attendance requirements or reporting violations of these requirements,²² and another commentator questioned how courts will enforce the attendance requirements.²³ The committee is not proposing any revisions to address these comments because rule 3.874 has required attendance unless excused by the mediator since it was adopted in 1994, and these issues have not been reported as problematic.

As indicated above, rule 3.874 currently provides for the mediator to excuse attendance at civil action mediation sessions, and the proposal that was circulated for comment would not have altered this responsibility. However, three commentators suggested that the court, rather than the mediator, should determine whether to excuse attendance.²⁴ The committee thinks that there are sound policy reasons for making either the mediator or the court responsible for excusing attendance at a civil action mediation. However, rule 3.874 has provided for the mediator to excuse attendance since it was adopted in 1994. This has not been reported to be problematic and changing this responsibility might have significant administrative and policy implications. The committee is therefore not proposing such a change at this time, but may consider doing so in a future proposal.

¹⁸ See comment of Mr. Parselle under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

¹⁹ See comment of Mr. Factor under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

²⁰ See comment of Mr. Parselle under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

²¹ See comment of Ms. Bronson under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

²² See comments of Mr. Finkelstein under the heading *Rule 3.874(a)—Attendance at mediation sessions*, and the comment of Mr. Rainey under the heading *Rule 3.874(c)—Sanctions for noncompliance*.

²³ See comment of Mr. White under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

²⁴ See comments of Mr. Cerny, the Orange County Bar Association, and the State Bar ADR Committee under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

Commentators suggested that attendance should not be required, or that telephonic appearance should be permitted, when a defendant is fully insured,²⁵ in limited jurisdiction cases,²⁶ or when parties or insurance representatives are geographically distant.²⁷ The committee believes that mediators should determine, on a case-by-case basis, whether attendance should be excused or permitted by telephone in these circumstances. The committee also believes that clarifying that mediators may permit attendance by telephone will substantially address the commentators' concerns about distant participants and limited jurisdiction cases.

Rule 3.874(b)—Submission of participant lists and mediation statements

Rule 3.874(b) of the proposal that was circulated for comment would have established a new requirement that each party in a case submitted to civil action mediation serve a list of the names of all persons who will participate in the mediation with or on behalf of that party. The provision circulated for comment would also have authorized the mediator to require each party to submit a short mediation statement providing information about the issues in dispute and possible resolutions of those issues.

As indicated above, 11 commentators agreed with the entire proposal as circulated for comment. Several other comments reflected views that the submission of participant lists and mediation statements may be beneficial.²⁸ However, other commentators indicated that one or both of these requirements are not justified or beneficial²⁹ or expressed other concerns about the provisions circulated for comment. The principal concerns, and revisions that the committee has made to the proposal to address or alleviate these concerns, are discussed below.

Participant Lists

Two commentators indicated that the requirement to submit a participant list set forth in paragraph (b)(1) of the version of rule 3.874 that was circulated for comment would not be beneficial,³⁰ and one of the bar organizations commented that the participant list and briefing requirements would unjustifiably make the mediation process more complicated and time-consuming.³¹ However, the importance of identifying mediation participants in advance, so that mediators can timely identify any relationships or affiliations that they

²⁵ See comment of Mr. Berges under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

²⁶ See comment of Mr. Adler under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

²⁷ See comments of Messrs. Adler and Allen under the heading *Rule 3.874(a)—Attendance at mediation sessions*.

²⁸ See comments of Meses. Self and Yeager, Messrs. Attie and Lauper, and the State Bar Committee on the Administration of Justice under the heading *Rule 3.874(b)—Participant lists and mediation statements*.

²⁹ See comments of Consumer Attorneys of California (CAOC) and Messrs. Levy and Parselle under the heading *Rule 3.874(b)—Participant lists and mediation statements*.

³⁰ See comments of Messrs. Levy and Parselle under the heading *Rule 3.874(b)—Participant lists and mediation statements*.

³¹ See comment of Consumer Attorneys of California (CAOC) under the heading *Rule 3.874(b)—Participant lists and mediation statements*.

must disclose under rule 1620.5 of the California Rules of Court,³² was discussed at the meeting between bar representatives and committee members and staff. Based on this discussion, the committee and staff believe that the bar organization's concerns about the participant list requirement have been alleviated.

Mediation Statements

Nine commentators made suggestions or expressed concerns about paragraph (b)(2) of the version of rule 3.874 that was circulated for comment, which would have authorized mediators to require the submission of short mediation statements. Several commentators indicated that mediators should be permitted to request but not require mediation statements,³³ or should not be authorized to require the parties to serve these statements on the other parties.³⁴ Other commentators suggested that mediators should be permitted to request information or documents beyond what was specified in the proposal,³⁵ or expressed concerns about the timing for submission of mediation statements.³⁶

The committee agrees with the commentators who suggested that mediators should be permitted to request, rather than require, mediation statements. The committee believes that, if the proposal is adopted, most parties who are interested in a successful mediation will submit mediation statements on the mediator's request and that requiring other parties to submit mediation statements is not likely to make civil action mediation more successful. The committee also believes that authorizing mediators to require mediation statements could undermine the benefits of a flexible, informal, and voluntary process as well as the policies underlying rule 1620.3(b), which provides that a mediator must respect the right of each participant to decide the extent of his or her participation in the mediation. Finally, the committee believes that it would be difficult to enforce a mediator's requirement that the parties submit mediation statements without violating the confidentiality provisions of California Evidence Code section 1115 et seq.,³⁷ and that adopting an unenforceable rule could undermine respect for the rules of court. The committee therefore revised the proposal to provide that mediators may *request* short mediation statements and other information or documents that may appear helpful to resolve the dispute.

³² Rule 1620.5 requires court-program mediators to disclose personal and professional relationships and affiliations that might reasonably raise a question concerning impartiality as soon as practicable and, to the extent possible, before the first mediation session.

³³ See comments of Messrs. Brusavich, Factor, Levy, and Parselle under the heading *Rule 3.874(b)—Participant lists and mediation statements*.

³⁴ See comments of Ms. Yeager and Mr. Attie under the heading *Rule 3.874(b)—Participant lists and mediation statements*.

³⁵ See comments of Mr. Factor and the State Bar Committee on the Administration of Justice under the heading *Rule 3.874(b)—Participant lists and mediation statements*.

³⁶ See comments of Messrs. Finkelstein and Lauper under the heading *Rule 3.874(b)—Participant lists and mediation statements*.

³⁷ Evidence Code section 1119 generally provides that all communications in the course of a mediation shall remain confidential and shall not be admissible in civil proceedings, and section 1121 generally prohibits any kind of mediator reports to the court.

Rule 3.874(c)—Sanctions for noncompliance

Subdivision (c) of the version of rule 3.874 that was circulated for comment would have provided that the court may impose sanctions under Code of Civil Procedure section 177.5 or 575.2, or under rule 227 of the California Rules of Court, if any party, attorney, insurer, or representative of an insurer fails to attend a civil action mediation as required by the state or local rules, or by court order.³⁸

The commentators expressed mixed views about this provision. In addition to the 11 commentators who agreed with the entire proposal as circulated for comment, 5 other commentators appeared to generally support including some form of sanction provisions in the civil action mediation rules.³⁹ However, 8 commentators expressed concerns that the sanctions provision in the proposal that was circulated for comment would conflict with the principle of voluntary participation,⁴⁰ place mediators in an inappropriate enforcement role,⁴¹ or contravene California's mediation confidentiality laws.⁴² Additionally, at the meeting with committee representatives and staff, bar organization representatives expressed concerns that subdivision (c) would inappropriately encourage the imposition of sanctions against litigants and urged that this provision is unnecessary because sanctions could be imposed for violating attendance and other requirements without referring to the statutory authority for doing so in the rule.

The committee concluded that the advantages of attempting to encourage compliance with civil action mediation rules and orders by identifying the authority for imposing sanctions for noncompliance in the rule are outweighed by the disadvantages of doing so. First, as previously noted, reference in the rule to the existing statutory authority for imposing sanctions is not necessary for the court to impose sanctions. Additionally, the committee was concerned that referencing the sanction authority in rule 3.874 would make civil action mediation appear more coercive, and might foster unwarranted sanction requests.⁴³ The committee therefore deleted subdivision (c), which referenced the sanction authorities, from the proposal.

³⁸ Rule 227 generally provides that sanctions can be imposed for failure to comply with applicable California Rules of Court, Code of Civil Procedure section 575.2 provides for the imposition of sanctions for violation of local rules, and Code of Civil Procedure section 177.5 provides for the imposition of sanctions for violation of a lawful court order.

³⁹ See comments of Mses. Self and Yeager and Messrs. Attie, Muns, and Rainey under the heading *Rule 3.874(c)—Sanctions for noncompliance*.

⁴⁰ See comment of Orange County Bar Association under the heading *Rule 3.874(c)—Sanctions for noncompliance*. A number of general comments about the proposal reflected concerns about voluntariness and coercion, which may be viscerally associated with the sanctions provision, although they are not expressly associated with subdivision (c). (See, e.g., comments of Consumer Attorneys of California (CAOC), California Dispute Resolution Council, Mses. Self and Yeager, and Messrs. Miller and Parselle under the heading *Mediation proposal, in general*.)

⁴¹ See comments of Messrs. Berges and Rainey under the heading *Rule 3.874(c)—Sanctions for noncompliance*.

⁴² See comments of Messrs. Allen, Attie, and Berges and Consumer Attorneys of California (CAOC) under the heading *Rule 3.874(c)—Sanctions for noncompliance*.

⁴³ The committee does not believe, however, that referring to the court's statutory authority to impose sanctions for failure to attend civil action mediation would make mediators enforcers of the attendance requirements or result in

Judicial arbitration proposal

The statutes and the California Rules of Court do not currently specify whether the litigants must attend or how they must participate in judicial arbitration conducted under Code of Civil Procedure section 1141.10 et seq. The proposal that was circulated for comment would have principally required (1) all parties and attorneys of record to attend the judicial arbitration hearing in person unless excused by the court; (2) each party to submit an arbitration statement, copies of its operative pleadings, and evidence that it plans to offer at the arbitration hearing (under rule 1613 of the California Rules of Court⁴⁴) to the arbitrator before the hearing unless excused by the arbitrator from doing so; and (3) each party to offer evidence concerning the issues raised by the pleadings or arbitration statements on which that party has the burden of proof and to respond, by evidence or argument, to the issues on which an opposing party has the burden of proof and has made a prima facie showing.

As previously noted, 11 commentators agreed with the entire proposal as circulated for comment. Seventeen commentators who either agreed with the proposal if modified or disagreed with the proposal submitted narrative comments about the judicial arbitration provisions.⁴⁵

Both plaintiff and defense practitioners generally thought that the proposal would make judicial arbitration more rigid, formal, time-consuming, and expensive, without improving its efficacy.⁴⁶ Plaintiff practitioners specifically objected to attendance and participation requirements on the basis that the defense uses judicial arbitration to obtain a “free look” at the plaintiff’s case and then routinely requests a trial de novo.⁴⁷ Defense

the violation of California’s mediation confidentiality laws. The Evidence Code generally protects the confidentiality and limits the discovery, admissibility, and disclosure of communications in the course of a mediation (section 1119) and specifically limits mediator reports to courts (section 1121) and mediator competence to testify (section 703.5). However, the committee believes that most questions of compliance with attendance requirements can be resolved without mediator reports, mediator testimony, or the disclosure of mediation communications. Significantly, the California Dispute Resolution Council, which is quite vigilant concerning infringement of mediation confidentiality, did not oppose the proposal or suggest changes. (See comment of California Dispute Resolution Council, under the heading *Mediation proposal, in general*.)

⁴⁴ Effective January 1, 2007, this rule will be renumbered 3.823.

⁴⁵ Some of the commentators who disagree with the judicial arbitration proposal nevertheless noted problems with participation in that process that the proposal aimed to address. See, e.g., comments of Messrs. Chafetz and Fitzpatrick and Consumer Attorneys of California (CAOC) under the heading *Arbitration proposal, in general*, and that of Mr. Brusavich under the heading *Rule 1611.5(a)—Attendance at arbitration hearing*.

⁴⁶ See comments of Messrs. Allen and Chafetz and Consumer Attorneys of California (CAOC) under the heading *Arbitration proposal, in general*, and the comment of California Defense Counsel (CDC) under the heading *Rule 1611.5(a)—Attendance at arbitration hearing*. Similar views were expressed by bar representatives who met with the ADR Subcommittee chair, members, and staff.

⁴⁷ See comments of Consumer Attorneys of California (CAOC) and Mr. Fitzpatrick under the heading *Arbitration proposal, in general*, and the comments of Messrs. Brusavich and Fitzpatrick under the heading *Rule 1611.5(a)—Attendance at arbitration hearing*.

practitioners, in turn, asserted that they are not required to produce witnesses or evidence at trial and should not be required to do so at judicial arbitration because the plaintiff has the burden of proof.⁴⁸ Several superior court judges who commented jointly and two court ADR administrators also expressed concerns about the judicial arbitration proposal, including concerns that it would adversely impact their courts' ability to attract and retain qualified arbitrators.⁴⁹

Based on strong concerns expressed by both plaintiff and defense bar organizations and some individual practitioners, the committee is not proposing amendments to the judicial arbitration rules at this time. Instead, the committee and staff plan to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, may be beneficial.

Implementation Requirements and Costs

The amendments to rule 3.874 would not require any implementation actions by, or impose any costs on, the courts or the Administrative Office of the Courts. There would be some additional costs for litigants in cases submitted to civil action mediation associated with the requirements to serve participant lists, to confirm in writing attendance excuses and permission to attend mediation sessions by telephone, and sometimes to prepare and submit mediation statements. The amendments might also result in mediators receiving and needing to address some additional requests for attendance excuses or permission to attend by telephone.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2007, amend rule 3.874 of the California Rules of Court to:

1. Clarify that parties, attorneys of record, and insurance representatives must attend civil action mediation sessions in person unless excused by the mediator or permitted to attend by telephone;
2. Require the parties to serve lists of mediation participants in advance of the mediation; and

⁴⁸ See comments of Association of Defense Counsel of Northern California and Nevada (ADC) and California Defense Counsel (CDC) under the headings *Rule 1611.5(a)—Attendance at arbitration hearing*, and *Rule 1611.5(c)—Presentation of evidence at arbitration hearing*.

⁴⁹ See comments of Judges Miram, Foiles, and Hall and Ms. Strickland under the heading *Arbitration proposal, in general*, and the comment of Ms. Bronson under the heading *Rule 1611.5(b)—Submission of arbitration statements, pleadings, and evidence*.

3. Authorize mediators to request that each party submit a short statement summarizing the issues in dispute and possible resolutions of those issues, as well as other information and documents that may appear helpful to resolve the dispute.

The text of the amended rule is attached at pages 18–19.

Attachments

Rule 3.874 of the California Rules of Court would be amended, effective January 1, 2007, to read:⁵⁰

1 **Rule 3.874. ~~Appearance at mediation sessions~~ Attendance, participant lists, and**
2 **mediation statements**

3
4 **(a) Attendance**

5
6 (1) The All parties and attorneys of record must personally appear at the first
7 attend all mediation sessions in person and at any subsequent session unless
8 excused by the mediator or permitted to attend by telephone as provided in
9 (3). ~~When a party is other than~~ If a party is not a natural person, it must appear
10 by a representative of that party with authority to resolve the dispute or, in the
11 case of a governmental entity that requires an agreement to be approved by an
12 elected official or a legislative body, by a representative with authority to
13 recommend such agreement, must attend all mediation sessions in person,
14 unless excused or permitted to attend by telephone as provided in (3).

15
16 (2) If any party is insured under a policy of insurance that provides or may
17 provide coverage for a claim that is a subject of the action, a representative of
18 the insurer with authority to settle or recommend settlement of the claim must
19 attend all mediation sessions in person, unless excused or permitted to attend
20 by telephone as provided in (3).

21
22 (3) The mediator may excuse a party, attorney, or representative from the
23 requirement to attend a mediation session under (1) or (2) or permit attendance
24 by telephone. The party, attorney, or representative who is excused or
25 permitted to attend by telephone must promptly send a letter or an electronic
26 communication to the mediator and to all parties confirming the excuse or
27 permission.

28
29 (4) Each party may have counsel present at all mediation sessions that concern it
30 the party. ~~Counsel and an insurance representative of each covered party must~~
31 also be present or available at all mediation sessions that concern the covered
32 party, unless excused by the mediator.

⁵⁰ These recommended amendments have been made to the version of this rule adopted by the Judicial Council at its June 30, 2006, business meeting and reflect the text that will be in effect on January 1, 2007. Any amendments adopted as part of this proposal will be incorporated into the text of the rule that goes into effect on January 1, 2007.

1 **(b) Participant lists and mediation statements**
2

3 (1) At least five court days before the first mediation session, each party must
4 serve a list of its mediation participants on the mediator and all other parties.
5 The list must include the names of all parties, attorneys, representatives of a
6 party that is not a natural person, insurance representatives, and other persons
7 who will attend the mediation with or on behalf of that party. A party must
8 promptly serve a supplemental list if the party subsequently determines that
9 other persons will attend the mediation with or on behalf of the party.
10

11 (2) The mediator may request that each party submit a short mediation statement
12 providing information about the issues in dispute and possible resolutions of
13 those issues and other information or documents that may appear helpful to
14 resolve the dispute.

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])⁵¹**

**TABLE OF CONTENTS FOR
PUBLIC COMMENTS AND ADVISORY COMMITTEE RESPONSES**

	Page
COMMENTATORS’ OVERALL POSITIONS ON THE PROPOSAL.....	21
Commentators who agree with the proposal as circulated for comment.....	21
Commentators who agree with the proposal, if modified.....	21
Commentators who disagree with the proposal.....	23
Commentators who did not specifically state whether they agree or disagree with the proposal.....	23
GENERAL COMMENTS ABOUT THE PROPOSAL	24
CIVIL ACTION MEDIATION RULE.....	27
Mediation proposal, in general	27
Rule 3.874(a) [circulated as rule 1634(a)]—Attendance at mediation sessions.....	34
Rule 3.874(b) [circulated as rule 1634(b)]—Participant lists and mediation statements.....	48
Rule 3.874(c) [circulated as rule 1634(c)]—Sanctions for noncompliance	53
JUDICIAL ARBITRATION PROPOSAL.....	57
Arbitration proposal, in general	57
Rule 1611.5(a)—Attendance at arbitration hearing.....	63
Rule 1611.5(b)—Submission of arbitration statements, pleadings, and evidence	69
Rule 1611.5(c)—Presentation of evidence at arbitration hearing.....	72
Rule 1611.5(d)—Sanctions for noncompliance.....	73
Rule 3.825(a)(2)—The award; form and content	74

⁵¹ The proposal that was circulated for public comment was entitled “Alternative Dispute Resolution: Participation in Court-Ordered Arbitration and Mediation (adopt Cal. Rules of Court, rule 1611.5; and amend rules 3.821 [formerly rule 1611], 3.824 [formerly rule 1614], 3.825 [formerly rule 1615], and 3.874 [formerly rule 1634]).” Based on the public comments received, the advisory committee is not proposing adoption and amendment of the judicial arbitration rules (rule 1611.5 and rules 3.821 [formerly rule 1611], 3.824 [formerly rule 1614], and 3.825 [formerly rule 1615]) at this time. The comments received concerning these rules and the committee’s responses to those comments are, however, set forth beginning on page 57 of this comment chart.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

COMMENTATORS' OVERALL POSITIONS ON THE PROPOSAL

Narrative comments and the committee's responses are set forth on the accompanying comment charts, sorted by subject matter

Commentators who agree with the proposal as circulated for comment		Comment on behalf of group?
1.	Hon. Roger Boren Administrative Presiding Judge Court of Appeal, Second Appellate District	No
2.	Donal Cummins, Esq. Cummins & Holmes San Ramon, California	No
3.	Steven L. Derby, Esq. Walnut Creek, California	No
4.	Angie Gonzalez Supervisor I Superior Court of California, County of Stanislaus	No
5.	Tressa Kentner Chief Executive Officer and Debra Meyers Chief of Staff Counsel Services Superior Court of California, County of San Bernardino	No
6.	Pam Moraida Civil /Small Claims Operations Manager Superior Court of California, County of Solano	No
7.	Iris Stuart Court Operations Manager Superior Court of California, County of Sonoma	No
8.	Superior Court of California, County of Los Angeles	Yes
9.	C. Kanatzar, Deputy Executive Officer Superior Court of California, County of Ventura	Yes
10.	Tom White ADR Grant Administrator Superior Court of California, County of Stanislaus	No
11.	UNKNOWN Faxed from superior court at 209-525-6385	No

Commentators who agree with the proposal, if modified		Comment on behalf of group?
1.	Barry Adler, Esq. Eskanos & Adler Concord, California	No

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentators who agree with the proposal, if modified		Comment on behalf of group?
2.	Maurice Attie, Esq. Arbitrator/Mediator Los Angeles, California	No
3.	Ronald A. Berges, Esq. Attorney-Mediator Toluca Lake, California	No
4.	Julie Bronson ADR Administrator Superior Court of California, County of Los Angeles	No
5.	Ross Cerny, Esq. Mediator Los Angeles, California	No
6.	Armand M. Estrada, Esq. Attorney/Mediator Livermore, California	No
7.	Max Factor, III, Esq. Mediator Los Angeles, California	No
8.	Albert H. Kirby, Esq. Walnut Creek, California	No
9.	David Lauper, Esq. Oxnard, California	No
10.	Leonard S. Levy, Esq. Encino, California	No
11.	Orange County Bar Association	Yes
12.	Kenneth Miller Sherman Oaks, California	No
13.	Daniel Muns Mediator Yorba Linda, California	No
14.	Michael Rainey, Esq. Mediator/Professor Woodland Hills, California	No
15.	Walter A. Rodriguez, Esq. Judicial Arbitrator Los Angeles, California	No
16.	Debra Self, Esq. Mediator Pasadena, California	No
17.	State Bar of California Committee on Alternative Dispute Resolution	Yes
18.	State Bar of California Committee on Administration of Justice	Yes
19.	Robin Yeager, Esq. Mediator El Segundo, California	No

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentators who disagree with the proposal		Comment on behalf of group?
1.	George A. Miram, Presiding Judge Robert Foiles, Assistant Presiding Judge Stephen Hall, Case Management and Trial Judge Judicial Arbitration Bench Bar Advisory Committee Superior Court of California, County of San Mateo	?
2.	Roger F. Allen, Esq. Oakland, California	No
3.	Bruce Brusavich, Esq. Torrance, California	No
4.	California Defense Counsel (CDC)	Yes
5.	Jay Chafetz, Esq. Walnut Creek, California	No
6.	Consumer Attorneys of California (CAOC)	Yes
7.	William A. Finkelstein, Esq. Mediator Santa Monica, California	No
8.	Michael J. Fitzpatrick, Esq. San Jose, California	No
9.	Mark Loeterman, Esq. Los Angeles, California	No
10.	Harvey M. Moore, Esq. Newport Beach, California	No
11.	Beau James Nokes, Esq. Newport Beach, California	No
12.	Charles Parselle, Esq. Sherman Oaks, California	No
13.	Elizabeth A. W. Strickland, Esq. Attorney-Mediator, Civil Division Superior Court of California, County of Santa Clara	No

Commentators who did not specifically state whether they agree or disagree with the proposal		Comment on behalf of group?
1.	Association of Defense Counsel of Northern California and Nevada (ADC) ⁵²	Yes
2.	California Dispute Resolution Council (CDRC) ⁵³	Yes

⁵² ADC agreed with one provision of the proposal if modified and disagreed with other provisions.

⁵³ CDRC commented that mandatory mediation (i.e., Code Civ. Proc., § 1775) is contrary to its principles, but did not suggest any modifications to the proposal or disagree with it.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

GENERAL COMMENTS ABOUT THE PROPOSAL

Commentator	General Comments	Advisory Committee response
<p>Mr. Adler</p>	<p>My firm and I object to the proposed rules to the extent they require parties to appear at mediations and arbitrations unless excused by the ADR provider. The discussion/commentary on the proposals seem to indicate that the Council has not considered the prospective impact on limited jurisdiction cases and the need for parties to appear at arbitrations.</p> <p>My firm and I believe that implementation of these proposed changes would be contrary to the spirit if not the rules of economic litigation (Code of Civil Procedure section 90, et seq.). I can remember attending the Conference of Delegates in the '80s when the economic litigation statutes were adopted. Over a series of years, I heard the incoming presidents of the State Bar and the incoming judges presiding over the state-wide judges association state the compelling interest to make litigation, especially limited jurisdiction (then municipal court) litigation, less expensive and that public policy required affirmative limitations on judicial proceedings to reduce the time and expense of litigation, especially in courts of lesser jurisdiction.</p> <p>The proposed rules would impose substantial expense on litigants who do not reside or maintain a place of business in the county where an action is venued. My firm represents creditors, including assignees of claims who cannot utilize the small claims court (Code of Civil Court Procedure section 116.420), who file unlimited jurisdiction collection actions. Almost all of our clients and client representatives are outside California. Our situation is not unique. There are many distant creditors and other businesses and persons in business arbitrations and mediations would greatly increase the price of litigations and would make the cost of litigation prohibitive in some manners.</p> <p>Historically—i.e., during the 25 or so years since the initiation of court-mandated ADR proceedings—the law initially exempted municipal court litigation from ADR and still exempts matters “not amendable to arbitration” where arbitration “would not reduce the probably time and expense necessary to resolve the litigation” (CRC 1601</p>	<p>As a result of some commentators’ concerns about this proposal and the judicial arbitration program in general, the committee is not proposing any revisions to the judicial arbitration rules at this time. The committee plans to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	General Comments	Advisory Committee response
	<p>(b)(6)). Currently, most courts generally do not require ADR for short cause, but some courts and judges do from time to time and the Contra Costa Superior Court and, we are advised by the Contra Costa Court, the Alameda court are currently considering requiring ADR for all cases.</p> <p>I have been a court-appointed arbitrator for Alameda County since the early '80's. I can say for experience that it is very common for the defendant not to appear at arbitrations often, but not always, in conjunction with a stipulation or concession that the defendant does not contest liability for arbitration purposes only. In some cases, even the plaintiff does not appear, relying instead on documents or depositions. In cases where the counsel is prepared, this has not been a problem for me. In cases where counsel is not prepared, it seldom matters whether the party is present because of counsel's lack of preparation.</p> <p>Judicial arbitration has not required parties to appear or testify. Evidence can be submitted by declaration or even by document without declaration. This has not been a problem for me in deciding a case. I have also attending trials where one or more parties does not appear. I have tried note cases without anything but the note, since the note is self-authenticating. My firm tries almost all of our cases by declaration pursuant to CCP 98 without having a witness present. I also note that some, perhaps many, states permit our clients to appear at trial by telephone. While I have not asked the names of the states or reviewed the statutes, I assume that these rules do not apply to collection actions only, but generally apply to cases where smaller dollar cases are at issue. If a party need not be present at trial, why should they be present at arbitration, and why should their presence depend on what is often the whim and caprice of the arbitrator or opposing party?</p> <p>Many of our clients cases involve pro per defendants. In many the obligation is not disputed. A number—sometimes it seems like many—involve debt protesters. See, for example <i>McElroy v. Chase Manhattan Mortgage Corporation</i> (2005) 134 Cal. App.4th 388, 36 Cal. Rptr.3d 176, and <i>Wells Fargo Bank v. Funk</i>, 2003 WL 22255704 (unpublished opinion). Our general experience is that ADR is not</p>	

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	General Comments	Advisory Committee response
	<p>cost-effective or helpful in these matters. Most settle in any event, and ADR is not necessary to the settlement. Those that do not settle without ADR generally do not settle with it.</p> <p>Finally, in cases where we are subject to ADR, including both arbitration and mediation, our clients almost always do not appear in person, either because the limited jurisdiction court or the ADR officer has not required it. Our practice in these small dollar cases is to have the client on telephone stand by. My firm prepares for and submits basically the same evidence for arbitrations as for trial. My firm and our appearing attorneys always have settlement authority for mediations, and we have clients standing by and available by telephone. A personal appearance is not necessary.</p>	
Mr. Moore	<p>My firm and I object to the proposed rules to the extent they would require parties to appear at mediations and arbitrations unless excused by the ADR provider.</p> <p>The discussion/commentary on the proposals appear to indicate that the Judicial Council has not considered the impact on limited jurisdiction cases and the need for parties to appear at arbitrations. This comment is to attempt to provide our view of the impact and implications on limited jurisdiction matters.</p> <p>We believe that implementation of these proposed changes would be contrary to the spirit if not the letter of the California Code of Civil Procedure, Section 90, et. seq., which seeks to create economic litigation for limited civil matters involving principal amounts under \$25,000. In addition to a number of statutory provisions designed to keep the cost of litigating small matters under control, Section 98 Code favors a party presenting prepared testimony in the form of affidavits or declarations under penalty of perjury.</p> <p>A substantial portion of our litigation practice is the collection of retail and commercial debt for credit issuers and assignees of claims, most of which involve principal amounts under \$10,000. The assignees of claims are barred from using the small claims courts to collect their debts. And because of state and federal regulations relating to retail debt</p>	Please see the response to the comment of Mr. Adler, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	General Comments	Advisory Committee response
	<p>collection, the creditors and assignees file the collection cases in the county where the debtors reside.</p> <p>The proposed rule changes would, in our opinion, be a step backwards in the economic litigation of limited jurisdiction matters. There is a trend in the Courts today to order limited jurisdiction matters to alternative dispute resolution forums, either for mediation or non-binding arbitration. We have found that for the most part, those collection cases that are ordered to mediation do not settle. We have also found that in most cases, the losing party in non-binding arbitration of collection cases files a request for trial de novo. So for collection cases in general the concept of alternative dispute resolution increases the cost of litigation.</p> <p>With respect to the specific rule changes, requiring parties to attend if represented by counsel would impose substantial expense on litigants who do not reside in or maintain a place of business in the county or the state where an action is venued. Almost all of our clients and client representatives are located outside California. Our situation is not unique. There are relatively few assignees of collection accounts with offices in California and even fewer credit grantors are based in or have offices in California. There are many creditors and others who litigate in California courts who do not reside in California. . . .</p>	
Mr. Nokes	I have served both as counsel and as court-appointed arbitrator and mediator. Additional procedural requirements will deter the purpose of furthering “informal resolution” of civil matters. Parties and counsel are best suited to determine when attendance, briefs, etc are necessary.	Please see the response to the comment of Mr. Adler, above.

CIVIL ACTION MEDIATION RULE

Mediation proposal, in general

Commentator	Mediation proposal, in general	Advisory Committee response
California Dispute Resolution Council (CDRC)	We have reviewed the proposed amendments to California Rule of Court 3.874 (former rule 1634). While the concept of "mandatory mediation" goes against the grain of CDRC’s published <i>Dispute Resolution Principles</i> (see	As the comment suggests, the proposed revisions to rule 3.874 (former rule 1634) are intended to promote attendance at court-ordered mediations by the persons whose participation is likely to be necessary or helpful to a resolution of the case.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Mediation proposal, in general	Advisory Committee response
	<p>http://www.cdrc.net/pg1.cfm), we nonetheless agree with the desire to enact rules that will increase the likelihood that parties will attend court-ordered mediations in good faith.</p> <p>We also believe the proposed amendments to Rule 3.874 (former rule 1634) should do nothing to change the protections afforded by Civil Code section 1775.10 and the statutes mentioned therein, and the case law interpreting those statutes.</p>	<p>The committee agrees with the commentator that the proposed revisions should not, and believes that they will not, change or contravene the mediation confidentiality protections afforded by Code Civ. Proc., section 1775.10, the California Evidence Code, or applicable decisional law.</p> <p>The committee recognizes that court-ordered mediation is inconsistent with some commentators' views that mediation should be an <i>entirely</i> voluntary process. However, by adopting Code of Civil Procedure, section 1775 et seq. in 1993, the Legislature required the Superior Court of Los Angeles County and authorized other superior courts to establish programs in which specified categories of cases may be submitted to mediation, without the parties' consent, as an alternative to judicial arbitration. (See Code Civ. Proc. section 1775.3.) At the same time, the Legislature directed the Judicial Council to establish procedures for submitting actions to mediation under the statute. (Code Civ. Proc., section 1775.15). In 1994, the council adopted rule 3.874 (currently rule 1634) of the California Rules of Court, concerning attendance at civil action mediation sessions, and this rule has remained in effect without amendment since that time.</p> <p>The committee believes that the Civil Action Mediation Statute and the implementing California Rules of Court are consistent with the current CDRC Dispute Resolution Principles concerning voluntary participation in ADR. These principles provide, in part:</p> <p style="padding-left: 40px;">To the extent participation in an alternative dispute resolution process is mandated ... the resolution of the dispute should not be binding.⁵⁴</p> <p>Rule 3.874 currently requires that the parties "personally appear" at mediation sessions and that counsel and insurance representatives be "present or available at" such sessions, and the proposed amendment would clarify or require that</p>

⁵⁴ Dispute Resolution Principles Adopted June 17, 1995 and Amended October 7, 1995, Principle 1 (available online at <http://www.cdrc.net/pg73.cfm>). CDRC is currently considering revisions to these principles, including a new provision that "[p]articipation in mediation and mediative processes should be voluntary, and any agreement reached in such a process should be consensual and uncoerced. (See 2005 Proposed Revised Edition A, Principle 1, available online at <http://www.cdrc.net/pg74.cfm>.)

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Mediation proposal, in general	Advisory Committee response
		attendance in person is required, unless excused by the mediator. Rule 1620.3 (new rule 3.853) provides, however, that the mediator must not only inform the parties that any resolution of the dispute requires their voluntary agreement, but must also respect the right of the parties to decide the extent of their participation in the mediation.
Consumer Attorneys of California (CAOC)	CAOC believes mediation should be voluntary. We are very concerned about any proposal that deviates from what should be a voluntary process. Therefore, CAOC opposes the proposed non-technical changes to California Rule of Court 3.874 (former rule 1634).	Please see the response to the comment of CDRC, immediately above. Please also see the responses to the comments concerning the proposed revisions to the attendance requirements, under the heading <i>Rule 3.874(a)—Attendance</i> , below.
Mr. Factor	<p>The Court System seems wedded to the beliefs that strongly encouraging litigants and counsel to participate actively in a mediation process will facilitate a reduction in the time to settle many cases and improve the satisfaction, relatively speaking, of litigants with the judicial process. And these beliefs are probably correct in a great preponderance of the civil cases in which counsel consent to mediation. Mediation works, as advertised, when counsel and clients voluntarily commit to the process.</p> <p>The proposed rules are really part of an evolution of what mediation has become in court connected cases—a process with an increased number of mandatory rules designed to encourage further “good faith participation” and “good faith negotiations.”</p> <p>Simply put, these comments—from my perspective—arise from a belief that there are too many rules creating mandatory mediation preconditions and governing mediation behaviors so that mediation has begun to feel as if it is a required negotiation tool in every litigator’s toolbox. And, sooner or later, the mediator will find himself or herself in Court testifying about mediation communications which were initially intended by our Legislature and the Supreme Court of California to be confidential communications designated to encourage open and truthful dialogue, including the right to “Just Say No.”</p>	<p>The committee appreciates commentators’ concerns that the adoption of rules governing mediation, and the potential imposition of sanctions for violation of those rules, are inconsistent with the voluntary, informal, flexible, and confidential characteristics of this ADR process. However, the committee also believes that the Judicial Council and individual courts have responsibilities for promoting the efficacy of court-ordered mediations. One of the ways that the council has attempted to fulfill this responsibility is through the adoption of circumspect rules governing mediations ordered and conducted under Code Civ. Proc. section 1775.</p> <p>In response to the comments received, the committee has made revisions to the proposal circulated for comment that it believes will address or alleviate many of the commentators’ concerns about interfering with the voluntariness, informality, flexibility, and confidentiality of mediation. These revisions include explicitly authorizing mediators to allow attendance by telephone and deleting the mediators’ general authority to impose conditions on attendance excuses, the “good cause” limitation on attendance excuses, and the reference to the statutory authority for courts to impose sanctions if parties, attorneys, or insurers do not attend mediation sessions as required. Please see the responses to the comments under specific topic headings below.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Mediation proposal, in general	Advisory Committee response
	<p>Many of us believe that “mediation works” to reduce the time it takes to settle many cases and it works to increase litigant satisfaction; however, additional rules designed to encourage “good behaviors” and “good faith negotiations” are likely to backfire and cause a longer term reduction in the quality of the results and degree of litigants satisfaction will be meaningfully diminished over time.</p> <p>Toward the goals of voluntary self determination and the maximum practical confidentiality in the mediation process, the proposed rules would benefit from some modification.</p>	
Mr. Levy	<p>The main problem I have, overall, is that the more rules are adopted governing what parties are required to do, and sanctions are imposed for non-compliance, the more the process becomes one of coercion, and less of self determination, except perhaps for the ultimate decision of whether or not to enter into an agreement resolving the dispute. . . .In short, aside from the fact that rules can be adopted to compel parties to act in particular ways, what are the reasons for the rules?</p>	Please see the response to the comment of Mr. Factor, immediately above.
Mr. Loeterman	I oppose any version of these rules as they relate to mediation. I see nothing beneficial in the rules for any participant, whether mediator, the parties, or their counsel.	Please see the responses to the comments under the headings below, indicating benefits that the committee believes the proposal will have and revisions to the proposal circulated for comment that the committee has made to address commentators’ concerns.
Mr. Miller	I have served for six years as a mediator and arbitrator for the LASC. While I have presided over several hundred cases without a problem and have generally found this to be a gratifying experience, there are cases where counsel or the parties do not cooperate. As mediators in particular, we are helpless to enforce the rules. The general authority of the court to sanction counsel or parties is of little use to a mediator. The proposal would only serve to increase the potential consequences to mediators, in particular, by making us "police" the participants. We would be opened up to additional potential criticism (e.g. for excusing the attendance of a party) while having no ability to enforce compliance where parties do not follow the rules (e.g. failure to submit a timely brief or failure to bring an insurance	The committee recognizes that, because of their obligation to remain impartial, respect the parties’ self-determination, and maintain confidentiality, some mediators are very concerned about requirements that they determine whether parties should be excused from attendance or participation requirements or enforce court rules. Since 1994, rule 3.874 (former rule 1634) has provided for the mediator to excuse attendance at the mediation and the proposal circulated for comment would not change the mediator’s role in this regard. However, based on comments received, the committee plans to consider whether a proposal should be developed in the future to provide that the court, rather than the mediator, must excuse attendance at mediations conducted under Code of Civil Procedure section 1775 et seq.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Mediation proposal, in general	Advisory Committee response
	<p>representative). What really needs to be clarified is the rule of confidentiality, along with a means of enforcing the rules without running afoul of the confidentiality of the mediation process.</p>	<p>In response to the comments received, the subcommittee is proposing revisions to the proposal circulated for comment that it believes will alleviate some of the commentator’s concerns, including deletion of subdivision (c), which set forth the statutory authority for courts to impose sanctions for failure to attend mediation as required. Please see the responses to the comments under specific topic headings below.</p>
<p>Judges Miram, Foiles, and Hall</p>	<p>As to the Mediation issues, we do not operate under the impacted statutory provisions and thus have no comments to add. (Attached please find our most recent ADR Evaluation Report, outlining feedback on our 10 year old, model, voluntary mediation/ADR program.)</p>	<p>No response required.</p>
<p>Mr. Parselle</p>	<p>Mediation is a voluntary process. See Code of Civil Procedure, Section 1775, in which the legislature uses the word “encourage” no less than three times in a single section, viz. “It is in the public interest for mediation to be encouraged....”; “where appropriate, participants in disputes should be encouraged to use mediation...”; “the purpose of this title is to encourage the use of court-annexed mediation.” “Encouragement is one thing, coercion quite another, and ordering parties to mediation is essentially coercive.</p> <hr/> <p>It is clear that CCP, Section 1775 is in direct contrast with Section 1141, which provides for judicial arbitration. Whereas judicial arbitration is unabashedly coercive, mediation is inherently voluntary. The voluntariness of mediation is reinforced by the provision of CRC, Rule 1620.3, that refers to the “principles of voluntary participation and self determination... “ and requires “respect [for] the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time...” and mandates that the mediator “refrain from coercing any party...to continue to participate in the mediation...”</p> <p>Voluntariness and coerciveness are mutually exclusively concepts. Whereas judicial officers and arbitrators possess coercive powers, it has</p>	<p>The committee recognizes that court-ordered mediation is inconsistent with some commentators’ views that mediation should be an <i>entirely</i> voluntary process. However, after repeatedly using the term “encourage” in section 1775, which expresses the <i>intent</i> of the Civil Action Mediation statutes, the Legislature expressly authorized courts to submit (i.e., order) actions to mediation without the parties agreement. Please see the response to the comment of CDRC, above.</p> <hr/> <p>The Advisory Committee Comment to rule 1620.3 indicates that the court may order participants to attend a mediation but that the mediator may not mandate the extent of their participation or coerce any party to settle the case. The committee has revised the proposal circulated for comment to provide that the mediator may request, instead of require, the submission of mediation statements. The committee believes that this provision is consistent with rule 1620.3 (new rule 3.853) and its underlying principles. (Please see the response to the comment of Mr. Miller, above, concerning the mediator’s role in excusing attendance.)</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Mediation proposal, in general	Advisory Committee response
	<p>been the intent of mediation from its inception to operate outside any coercive framework.</p> <p>The proposed Rule 3.874 (former rule 1634) directly contradicts the principal of voluntariness, and also contradicts the principal of neutrality. It puts the mediator in the position, at the very outset of the mediation process, of being a decision maker, and every decision so made by a mediator must necessarily impact one party or the other more or less favorably.</p>	
Ms. Self	<p>While I find it admirable that changes are being proposed that seem intended to add additional structure to and responsibility on the parties and their counsel in mediation, I am concerned that the result will be to place the mediator in an untenable position. Added requirements should not, in general, make seeking enforcement discretionary with the mediator. Mediators serve at the will of the parties, having been chosen by them. Requiring mediators to make decisions about policing party appearances or deciding to apply for sanctions for a party's failure to appear, for example, can easily result in that mediator not being chosen next time, in favor of one who bends to the will of the parties. In other words, the mediator should not be put in the position of being the "bad guy." That is not our role.</p>	<p>This proposal would add some new structure and responsibilities in court-ordered mediations conducted under Code of Civil Procedures section 1775. However, in response to the comments received, the committee has revised the proposal circulated for comment and believes that the only significant new requirements if the revised proposal is adopted would be that the parties must submit lists of their mediation participants, and that excuses from attendance or permission to attend by telephone must be confirmed in writing.</p> <p>This proposal would not require mediators to police party appearances or to make decisions about sanctions for a party's failure to appear. Rule 3.874 (former rule 1634) has provided that parties, counsel, and insurance representatives must personally appear or be present or available at the mediation sessions <i>unless excused by the mediator</i> since 1994. The reference to the existing statutory authority for imposing sanctions in subdivision (c) of the proposal circulated for comment may, however, have given the mediators' responsibility for excusing attendance a somewhat different aura, and may therefore be responsible for a number of commentators' concerns about the mediator enforcing or policing attendance. However, the proposal circulated for comment would not have given the mediator any authority or responsibility to determine whether a failure to attend was unexcused, to report an unexcused failure to attend, or to determine whether sanctions should be imposed as a result.</p> <p>The committee has deleted subdivision (c), which would have recited the statutory authority for imposing sanctions, from the proposal circulated for comment. (Please see the responses to the</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Mediation proposal, in general	Advisory Committee response
		<p>comments under the heading Rule 3.874(c)–Sanctions, below.) The committee believes that this deletion may alleviate commentators’ concerns about mediators being required to police or enforce attendance requirements.</p>
<p>Ms. Yeager</p>	<p>I was an active member of the Los Angeles Superior Court’s Alternative Dispute Resolution Panel for approximately four years and am now an inactive member of the panel.</p> <p>CCP § 1775.3 and 1775.5 permit, but do not require, the Courts to order cases to mediation in which the amount in controversy does not exceed \$50,000. I am providing Comments to the proposed amendments because I believe they will improve the mediation process under the present system. However, I am opposed to requiring parties who do not want to mediate to be forced to attend a mediation session. The very nature of the mediation process—facilitating the participants’ determination of how to resolve their dispute—is and should be voluntary.</p> <p>I agree in principle with the Subcommittee’s goals of clarifying existing attendance requirements at Court-ordered mediations, providing sanctions for unexcused failures to attend, and requiring submission of participant lists. I do not object to allowing mediators to require mediation statements, but I do object to permitting mediators to require that the statement be served on opposing parties as inconsistent with the mediator’s role and the mediation process.</p> <p>I agree with the proposed changes, if modified, as set forth below.</p> <p>* * *</p> <p>Conclusion: These amendments are designed to improve the current Court-ordered mediation process. They should not be used to place mediators in a position where they risk violating their confidentiality obligations or undermining their roles as neutrals. So long as Rule 3.874 (circulated as rule 1634) does not place mediators in a position contrary to their roles, and for the reasons set forth above, I agree with the proposed</p>	<p>Please see the responses to the comments of CDRC and Mr. Parselle, above, concerning the current statutory and rule authority for requiring parties to attend Civil Action Mediation under Code of Civil Procedure section 1775 et seq.</p> <p>The commentator’s specific comments and suggestions and committee’s responses are set forth under separate headings, below.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Mediation proposal, in general	Advisory Committee response
	amendments as modified with respect to cases in which the amount in controversy does not exceed \$50,000 per CCP § 1775.5.	

Rule 3.874(a) [former rule 1634(a)]—Attendance at mediation sessions

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
Mr. Adler	<p>In summary, if the Council wants to consider requiring party presence at ADR, there should be an exception or limitation that permits parties in limited jurisdiction matters to appear by telephone, especially where a party is out-of-state and, in a large state like California, where the party is outside of the country or more than 150 miles from the place of the ADR Proceeding. Consistent with the rules of economic litigation, a compelled personal appearance is not justified. If the Judicial Council decides to require an appearance at any or all ADR procedures, then parties who are out-of-state and parties who are out-of-county and more than 150 miles from the place of the proceeding should be permitted to appear by telephone.</p>	<p>Rule 3.874 (former rule1634) currently requires that parties personally appear at mediation sessions conducted under Code of Civil Procedure section 1775 et seq., unless excused by the mediator (and has so provided since 1994). However, the committee believes that mediators have commonly used the authority to excuse attendance as a basis for permitting attendance by telephone when telephonic appearance is appropriate for geographic or other reasons.</p> <p>The committee intended paragraph (a)(3) of the proposal circulated for comment, which would have allowed the mediator to place conditions on an attendance excuse, to allow the mediator to permit attendance by telephone. However, since this subtlety was not clear and because some commentators were concerned about broadly authorizing mediators to place conditions on attendance excuses, the committee has made revisions to subdivision (a) of the proposal circulated for comment to explicitly authorize mediators to permit attendance by telephone and to delete the conditional excuse provision.</p>
Mr. Allen	<p>As to the proposed rule changes for mediation, as a mediator I want all persons with settlement authority to appear personally. However, I have conducted many mediations where the insurance carrier representative appeared by telephone as that representative was at too great a distance to appear personally. Sometimes these representatives are located on the east coast, midwest, or southern California. Many of these cases settle, especially where I have engaged the insurance client’s professional by telephone. It is my policy as a mediator to talk to counsel before the mediation takes place in order to identify issues and to overcome whatever barriers to settlement might exist. Many mediations require multiple sessions to settle. Often the additional</p>	<p>Please see the response to the comment of Mr. Adler, immediately above.</p>

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	sessions are conducted by telephone and occasionally personally. The proposed change to Rule 3.874 (former rule 1634(a)) may result in only one session where parties attend personally because of the additional burden that is placed upon the parties. . .	
Association of Defense Counsel of Northern California and Nevada (ADC)	<p>Rule 3.874(a) (former rule 1634(a)) would modify the current rule which states that “The parties shall personally appear at the first mediation session ... and ... counsel and an insurance representative of a covered party also shall be present and [sic] available at such sessions unless excused by the mediator,” to, “all parties and attorneys of record must personally attend all mediation sessions unless excused by the mediator...” Proposed 3.874(a)(3) (former rule 1634(a)(a)(3)) includes a similar mandate for insurance representatives. The ADC disagrees with this proposed rule change.</p> <p>We choose not to address the question of adoption by Northern California jurisdictions of the Civil Action Mediation Act (CCP 1775 implemented by Rules of Court section [sic]</p>	<p>Although subdivision (a) of the proposal circulated for comment was intended to clarify rather than change current attendance requirements, the committee recognizes that the proposed revisions may differ from some litigants’ interpretation of the current requirements or their current practice. However, the committee believes that revisions to the proposal circulated for comment explicitly authorizing the mediator to permit attendance by telephone will significantly alleviate the commentator’s concerns.</p> <p>Since its adoption in 1994, rule 3.874 (former rule 1634) has required the parties to “personally appear” and counsel and insurance representatives for the parties to be “present or available at” all civil action program mediation sessions that concern the party. The meaning of the current requirement that counsel and insurance representatives must be “present or <i>available at</i> [mediation sessions]” may not be immediately apparent. However, on its face, the quoted phrase seemingly requires counsel and insurance representatives to be <i>at the mediation</i>, unless excused by the mediator.</p> <p>The proposed amendment would clarify, or in some commentators’ views change, rule 3.874 (former rule 1634) by providing that parties, counsel, and insurance representative are required to “attend in person” unless excused by the mediator. The committee has, however, made revisions to the proposal circulated for comment that would expressly authorize the mediator to permit attendance by telephone.</p> <p>Rule 3.874 (former rule 1634) only applies in mediations conducted under Code of Civil Procedure section 1775 et seq. and does not apply to voluntary, private mediations for which the</p>

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	<p>1630, et seq.) which applies to cases of \$50,000 or less in value per plaintiff. With regard to mandated mediation attendance, many Northern California Courts have instituted court-mandated and supervised mediation programs where attendance requirements are set forth in the local rules for that court. We don't dispute the right of the court to regulate who must attend a court-mandated and supervised mediation. However, private, for-fee mediation is a voluntary process in which the parties paying for mediation services should be permitted to design a flexible program that meets their needs. The court, though, can require the parties selecting mediation to complete mediation by a specified date, as an adjunct to the court's overall case management responsibility.</p> <hr/> <p>Mediation is a voluntary process, in which the parties are permitted to design a flexible dispute resolution process that meets their needs, including the selection of the mediator. Although it has generated a great deal of confusion in recent years, mediation is not a court-ordered process, nor does the court control mediation. The court though can require the parties selecting mediation to complete mediation by a specified date, as an adjunct to the court's overall responsibility for case management.</p> <hr/> <p>In our experience, many mediations are successful because they permit the parties and counsel flexibility, including the flexibility to have clients and insurer representative on telephone standby. Usually, these arrangements are worked out in advance by the mediator, in a pre-mediation conference call, and if counsel is concerned by the fact that a client or representative will not be in attendance, they raise the issue before the mediation. We recognize that this may, at times, present an issue, but we believe it happens infrequently.</p>	<p>parties contract.</p> <hr/> <p>The committee recognizes that court-ordered mediation is inconsistent with some commentators' views that mediation should be an <i>entirely</i> voluntary process. However, by adopting Code of Civil Procedure, section 1775 et seq. in 1993, the Legislature required the Superior Court of Los Angeles County and authorized other superior courts to establish programs in which specified categories of cases may be submitted to mediation, without the parties' consent, as an alternative to judicial arbitration. (See Code Civ. Proc., § 1775.3.) At the same time, the Legislature directed the Judicial Council to establish procedures for submitting actions to mediation under the statute. (Code Civ. Proc., § 1775.15)</p> <hr/> <p>As indicated above, suggested revisions to the proposal circulated for comment would expressly authorize the mediator to permit participants to attend by telephone, rather than in person. As the commentator indicates, arrangements for telephonic participation are typically worked out in advance with the mediator under the current rule, and the committee anticipates that this practice would continue under the revised proposal. The committee therefore does not think that insurance representatives will be required to spend excessive and unnecessary time traveling</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	<p>Implementation of the “personal attendance” rule is also likely to have unintended consequences. Many cases are handled by insurer representatives on the East Coast or elsewhere distant from California. They currently favor mediation because often they can appear by telephone, and limit their travel to mediations involving larger or sensitive cases. They view it as non-productive to spend two days traveling to and from California for a mediation when they rely upon defense counsel to value the case, and work with the mediator on site. If a personal appearance rule is enacted, one of two things is likely to happen. First, insurers will comply with the rule by hiring local, independent adjusters to satisfy the rule; however, such adjusters will not know the case, and will not contribute anything to getting the case settled. Second, mediations will become a far less attractive way to resolve cases. If the insurer claims representative must personally attend mediations, then there is no incentive to use this process any longer; rather, the mediation has turned into a mandatory settlement conference. The insurers will instruct their defense counsel to skip mediation, knowing they must attend the mandatory settlement conference.</p> <p>Finally, it is questionable that a paid private mediator would have the ability to report any violation of the attendance rules given confidentiality of the mediation process.</p>	<p>or become unwilling to participate in mediation.</p> <p>Rule 3.874 (former rule 1634) only applies in mediations conducted under Code of Civil Procedure section 1775 et seq. and does not apply to voluntary, private mediations for which the parties contract.</p>
Mr. Attie	1) All of the proposed changes to Sub-part (a): excellent!	No response required.
Mr. Berges	Re: Mediator’s Discretion to Excuse Attendance – Clear standards needed. A defendant in a fully insured case does not need to be present.	The committee believes that, depending on the circumstances, it may or may not be beneficial for fully insured defendants to attend mediation, and that this determination should therefore be made on a case-by-case basis. For example, insured defendants’ attendance may be important when there is a consent to settlement clause, when there is an issue regarding liability, or when a personal acknowledgement or apology may be helpful.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	<p>Further, mediator’s discretion must be protected. Further, if mediator exercises discretion and excuses attendance, can mediator be sanctioned for abuse of discretion? Who makes determination of Good Cause?</p>	<p>The committee agrees that excuses from attendance should be in the mediator’s discretion and should not be subject to review or sanctions. The committee has therefore revised the proposal circulated for comment to delete the “good cause” provision.</p>
Ms. Bronson	<p>While the mediator should have the authority to excuse a party, attorney or representative, placing conditions on the excuse can lead to challenges by the opposing party and may result in requiring the volunteer to expend additional time without the benefit of compensation. The requirement of written confirmation of the excuse will result in further paperwork for the volunteer.</p> <p>Volunteer mediators have voiced concern that the required paperwork is time consuming and they are incurring personal expense to obtain and complete the forms.</p> <p>The addition of further reporting requirements, without the benefit of compensation, will deter exceptionally well-qualified volunteers from continuing to participate on the Court panel.</p>	<p>The committee intended paragraph (a)(3) of the proposal circulated for comment, which would have allowed the mediator to place conditions on an attendance excuse, to allow the mediator to excuse attendance on such conditions as attendance by telephone. However, since this subtlety was not clear and because some commentators were concerned about broadly authorizing mediators to place conditions on attendance excuses, the committee has revised subdivision (a) of the proposal circulated for comment to explicitly authorize mediators to permit attendance by telephone and to delete the conditional excuse provision.</p> <p>The committee has made revisions to the proposal circulated for comment to specify that the party, attorney, or representative who is excused or permitted to attend by telephone must confirm this excuse or permission in writing. The committee does not think that any remaining aspects of this proposal would impose paperwork requirements on mediators.</p>
California Defense Counsel (CDC)	<p>With respect to mediations, we strongly disagree with proposed changes to Rule 634 [sic], relating to attendance by counsel and representatives of insurers. While much of the proposed change merely restates the existing attendance obligation, the proposal eliminates the ability of counsel and insurers to be “available” for mediations. These sorts of changes add time and expense to mediations, which will make parties and their counsel less likely to participate in a meaningful fashion. This is contrary to the basic concept of mediation, which requires a voluntary commitment to participate. We strongly recommend restoration of the “available” language in the current rule. Subdivision (c)</p>	<p>Although subdivision (a) of the proposal circulated for comment was intended to clarify rather than change current attendance requirements, the committee recognizes that the proposed revisions may differ from some litigants’ interpretation of the current requirements or their current practice. However, the committee believes that revisions to the proposal circulated for comment explicitly authorizing the mediator to permit attendance by telephone will significantly alleviate the commentator’s concerns.</p> <p>Since its adoption in 1994, rule 3.874 (former rule 1634) has required the parties to “personally</p>

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	relating to sanction should be modified accordingly.	<p>appear” and counsel and insurance representatives for the parties to be “present or available at” all civil action program mediation sessions that concern the party. The meaning of the current requirement that counsel and insurance representatives must be “present or <i>available at</i> [mediation sessions]” may not be immediately apparent. However, on its face, the quoted phrase seemingly requires counsel and insurance representatives to be <i>at the mediation</i>, unless excused by the mediator.</p> <p>The proposed amendment would clarify, or in some commentators’ views change, rule 3.874 (former rule 1634) by providing that parties, counsel, and insurance representative are required to “attend in person” unless excused by the mediator. The committee has, however, made revisions to the proposal circulated for comment that would expressly authorize the mediator to permit attendance by telephone, and believes these revisions will significantly alleviate the commentator’s concerns.</p>
Mr. Cerny	Proposed subsections 3.874(a)(1), (2) & (3) (former rule 1634(a)(1), (2) & (3)) should parallel sub-sections 1611.5(a)(1) & (3) by requiring the attendance unless excused by the court; otherwise, litigants, lawyers and insurers will treat the attendance requirements less seriously—as would the proposed rules.	<p>Rule 3.874 (former rule 1634), subdivisions (a)(1), (2) & (3) currently provide for the mediator to excuse attendance at court-ordered mediations. However, based on the comments received, the committee plans to consider whether a proposal providing that the court, rather than the mediator, must excuse attendance at mediations conducted under Code of Civil Procedure section 1775 et seq. should be developed and circulated for public comment.</p> <p>The committee recognizes that there are valid reasons for providing that the court, rather than the mediator, should grant excuses from attendance, including: (1) the possibility that requiring a court excuse might limit “mediator shopping” and promote greater attendance, and (2) concerns that deciding whether to excuse attendance may compromise the mediator’s impartiality or conflict with the principle that a mediator is not the decision-maker.</p> <p>On the other hand: (1) mediators’ styles, preferences, and expectations concerning attendance differ significantly, (2) the court may</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
		<p>be unaware of the mediator’s style and preferences, and (3) the mediator may have a better opportunity than the court to help the parties explore, and potentially agree, whether attendance is important, or to make this decision if the parties do not agree. Additionally, many believe it is appropriate for mediators to make decisions about the mediation <i>process</i>, as opposed to decisions about the outcome of the dispute, provided the mediator does so in a fair and impartial manner. (See Cal. Rules of Ct., rules 1620.5(a) and 1620.7(b).⁵⁵) Finally, rule 3.874 (former rule 1634) has provided that the mediator, rather than the court, may excuse attendance since its adoption in 1994, and the committee is not aware that this has previously raised concerns about compromising the mediator’s role.</p>
<p>Consumer Attorneys of California (CAOC)</p>	<p>Current California Rule of Court 3.874 (former rule 1634) requires the parties to appear, “unless excused by the mediator.” We view the following changes as objectionable.</p> <ul style="list-style-type: none"> • CAOC opposes <u>proposed (a)(3)</u> (and its related references) which give the mediator new powers to excuse parties only for good cause and in writing. Proposed (a)(3) also gives the mediator explicit authority to place conditions on an excuse. We believe the current statute’s language is sufficient and we are troubled by any attempts, such as this, to make the mediation process more court-like. Again, mediation is successful when it is voluntary and where there is adequate flexibility given to the mediator, the parties and the attorneys. This new sanction proposal departs from that goal. 	<p>Based on the comments received, the subcommittee is proposing revisions to subdivision (a) of the proposal circulated for comment to delete the “good cause” requirement for excusing attendance and to expressly authorize mediators to permit attendance by telephone. The subcommittee is also proposing deletion of subdivision (c) of the proposal circulated for comment, which would have recited the statutory authority for imposing sanctions if a party, attorney, or representative did not attend the mediation as required. The subcommittee believes that these revisions would substantially address the commentator’s concerns about the proposed revisions to the attendance requirements.</p>
<p>Mr. Cummins</p>	<p>Having all responsible parties in attendance at arb or med is critical to ADR success</p>	<p>The committee believes that the presence of all involved parties, attorneys, and insurance representatives is often very important or beneficial to a constructive mediation. However, the committee also believes that excuses from attendance and telephonic attendance should be allowed in appropriate circumstances.</p>

⁵⁵ Effective January 1, 2007, rule 1620.3 will be renumbered rule 3.853 and rule 1620.5 will be renumbered 3.855.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
Mr. Estrada	Rule 3.874(a)(1) (former rule 1634(a)(1)) “personally” attend does not equal “physically” attend. Mediations are always more effective if present. So change to “must physically attend” or “must be physically present.”	The committee agrees with the commentator, and has made revisions to the proposal circulated for comment to require that participants “attend in person” unless the mediator excuses attendance or permits attendance by telephone.
Mr. Factor	<p>1. Rule 3.874(a)(3) (former rule 1634(a)(3)) creates a potential problem of confidentiality:</p> <p>One, the mediator excusing a party from attendance must create a writing in which such excuse is confirmed; and in that writing, the mediator “may place conditions on an excuse.” Is that writing admissible without the necessity of the mediator testifying as to its authenticity?</p> <p>Two, and if so, does the existence of that writing somehow waive both the statutory mediation provisions and the Foxgate protection such that the mediator may be required to testify as to mediation communications, such as: whether there has been compliance during the mediation process with the “condition” placed on the excuse from attendance?”</p> <p>For example, in the event a litigant were excused from attendance, provided that the litigant’s spouse, who is also a party, is present and has the full authority to settle is present, is it sanctionable under Rule 3.874(c) (former rule 1634(c)) in the event that the spouse who attends refuses to agree to a proposed settlement on the grounds that the absent spouse must also approve before the attending spouse gives consent?</p> <p>* * *</p> <p>3. It should be clear that the written excuse and any related conditions [proposed rule 3.874(a)(3) (former rule 1634(a)(3))] that are to be confirmed in writing may be a voluntary stipulation of the parties rather than writing directly from the mediator. The reason for this is that many, perhaps most, mediators will turn down a mediation rather than create conditions for participation in a mediation which may create a valid reason for that mediator to be subpoenaed to testify in court as to whether that “condition” has been met.</p>	<p>The committee has made revisions to subdivision (a)(3) of the proposal circulated for comment to specify that the party, attorney, or representative who is excused or permitted to attend by telephone (rather than the mediator) must confirm this excuse or permission in writing. The committee has also deleted the provision that would have allowed the mediator to place conditions on an excuse.</p> <p>The committee does not believe that authorizing the mediator to excuse attendance will contravene mediation confidentiality. Parties, counsel, and insurance representatives have been required to personally appear or be present or available at mediation sessions unless excused by the mediator since rule 3.874 (former rule 1634) was adopted in 1993 and this has not been reported to have caused conflicts with mediation confidentiality.</p> <p>The committee does not believe that the parties to a case that the court orders to mediation should be permitted to excuse a participant’s attendance by a stipulation, unless the mediator also agrees to excuse the attendance.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
Mr. Finkelstein	I am a mediator and it is improper and inappropriate to police attendance at mediations by giving us the power to grant excused absences. Since the court has the power to sanction non-attendance, you are putting us in the position of being accused by a party of improperly granting an excused absence to another party. Mediators cannot be “put in the middle”—that is not our role or responsibility: we need to be free from anything that could result in our being accused of not being impartial or from something that could result in our being liable to be sued by a party.	The committee understands the commentator’s concerns about mediators being required to make decisions that may be perceived as jeopardizing their impartiality. Rule 3.874 (former rule 1634) has provided that parties must attend mediation unless excused by the mediator since 1994 and the statutory provisions allowing the imposition of sanctions for violation of statewide rules, local rules, and court orders have been in effect since before then. However, based on this comment and others, the committee plans to consider whether a proposal providing that the court, rather than the mediator, must excuse attendance at mediations conducted under Code of Civil Procedure section 1775 et seq. should be developed and circulated for public comment.
Mr. Kirby	Insurance representatives are not parties to litigation. The insured and attorney cannot secure their appearance sometimes. Sanctions for non-appearance of an insurance representative unfairly penalizes parties who (a) cannot control their insurance carrier and (b) have [wasting?] insurance policies. Best to require appearance of persons with full settlement authority.	The imposition of sanctions against a defendant’s insurance carrier for not attending a mandatory settlement conference, in violation of a local rule of court, was upheld in <i>City of El Monte v. Takei, et al.</i> (1984) 158 Cal.App.3d 244. The committee believes that this authority would support the imposition of sanctions against a carrier for failure to attend a court-ordered mediation, in violation of rule 3.874 (former rule 1634). The committee also anticipates that a court would consider the extent of a party’s ability to control its insurance carrier in determining whether sanctions should be imposed against the party for the carrier’s failure to attend.
Mr. Levy	1. Proposed Rule 3.874(a) (former rule 1634(a)): Given Rule 1620.3(b) (new rule 3.853(b)), giving any participant the right to “withdraw from the mediation at any time” proposed 3.874(a) (former rule 1634(a)), requiring a party to be excused by the mediator, conflicts with this. It points out the oxymoron of being ordered to participate in a voluntary process, in which any participant has the right to withdraw at any time. Proposed 3.874(c) (former rule 1634(c)) then makes this worse by offering the possibility of sanctions for failure to attend (for how long?) a process from which one can, by Court Rule, withdraw from at any time.	The committee recognizes the tension between court-ordered mediation and voluntary participation in mediation. The committee believes the provisions of rule 3.874 (former rule 1634(a)) concerning excuse from attendance authorize the mediator to allow the parties, counsel, and insurance representatives not to attend in the first instance (i.e. not to “show up”), and do not require the participants to remain until excused by the mediator. Rule 1620.3 (new rule 3.853) provides, in part, that a mediator must respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw, and must refrain from coercing any party to continue to participate in the mediation. Furthermore, the Advisory Committee Comment to rule 1620.3 (new rule

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	<p>2. I agree entirely with Max Factor’s comments about the confidentiality issue created by the proposed Rule 3.874(a)(3) (former rule 1634(a)(3)). Max stated:</p> <p>‘Rule 3.874(a)(3) (former rule 1634(a)(3)) creates a potential problem of confidentiality which I’d like to address.</p> <p>One, the mediator excusing a party from attendance must create a writing in which such excuse is confirmed; and in that writing, the mediator “may place conditions on an excuse.” Is that writing admissible without the necessity of the mediator testifying as to its authenticity?</p> <p>Two, and if so, does the existence of that writing somehow waive both the statutory mediation provisions and the Foxgate protections such that the mediator may be required to testify as to mediation communications, such as: whether there had been compliance during the mediation process with the ‘condition’ placed on the excuse from attendance?”</p> <p>For example, in the event a litigant were excused from attendance, provided that the litigant’s spouse, who is also a party, is present and has the full authority to settle is present, is it sanctionable under 3.874(c) (former rule 1634(c)) in the event that the spouse who attends refuses to agree to a proposed settlement on the grounds that the absent spouse must also approve before the attending spouse gives consent?”</p>	<p>3.853) explains that the <i>court</i> may order participants to attend a mediation but that the <i>mediator</i> may not mandate the extent of their participation.</p> <p>_____ Please see the response to the comment of Mr. Factor, above.</p>
Orange County Bar Association	Rule 3.874(a) (former rule 1634(a)) [Attendance] should be modified to require the Court rather than the mediator, to determine the validity of an	Rule 3.874 (former rule 1634) has provided, since 1994, for the mediator to excuse attendance at court-ordered mediations. However, based on this

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	excuse for non-attendance. The present draft puts an unnecessary burden on the volunteer mediator, whose impartiality should not be compromised by having him “rule” on such issues. Such a “ruling” may cause a party to lose trust in the mediator, a key element for a successful mediation.	comment and others, the committee plans to consider whether a proposal providing that the court, rather than the mediator, must excuse attendance at mediations conducted under Code of Civil Procedure section 1775 et seq. should be developed and circulated for public comment. Please see the response to the comment of Mr. Cerny, above, regarding some possible considerations pertaining to such a change.
Mr. Parselle	<p>The phrase in Rule 3.874(a)(1) (former rule 1634(a)(1)) requiring the presence of “a representative of that party with authority to resolve a dispute...” is, in the real world context, meaningless. Representatives of corporations routinely come to mediations with a given level of authority, but who is to determine whether that level of authority is adequate to resolve the dispute? It is routine for adjusters and corporate representatives to make phone calls during the course of the mediation to someone with more authority. In the last resort, the decision whether or not to settle a case on the part of the corporation would presumably rest with the CEO or the Board of Directors. But what happens if a plaintiff requires someone to appear with a given level of authority? That means that the negotiation starts before the mediation even commences, but a negotiation that puts the mediator in the position of actually having to make a decision potentially affecting outcomes. That is not the mediator’s job.</p> <hr/> <p>An even worse feature of the new rule is 3.874(a)(3) (former rule 1634(a)(3)) which requires the mediator to make a determination of “good cause,” and also purports to give the mediator the authority to “place conditions on an excuse.” This attempt to give mediators a coercive power immediately robs them of their credibility as neutrals, and puts them potentially in the middle of a dispute before the mediation has even begun. It is exactly contrary to what mediation is all about.</p>	<p>The committee acknowledges that the current language of rule 3.874 (former rule 1634), which requires that a representative (of a party that is not a natural person) with “authority to resolve the dispute” attend the mediation, raises potential issues about the amount of authority required. However, the committee believes that, if the issue is presented, a court could determine whether an appropriate person attended the mediation. The committee also acknowledges that parties may sometimes want to negotiate who will attend as the party representatives; however, nothing in the proposal would require the mediator to make such a determination.</p> <hr/> <p>The committee intended paragraph (a)(3) of the proposal circulated for comment, which would have allowed the mediator to place conditions on an attendance excuse, to allow the mediator to permit attendance by telephone. However, since this subtlety was not clear and because some commentators were concerned about broadly authorizing mediators to place conditions on attendance excuses, the committee has made revisions to subdivision (a) to explicitly authorize mediators to permit attendance by telephone and to delete the conditional excuse provision.</p> <p>Based on this comment and others, the committee also plans to consider whether a proposal</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
		<p>providing that the court, rather than the mediator, must excuse attendance at mediations conducted under Code of Civil Procedure section 1775 et seq. should be developed and circulated for public comment. Please see the response to the comment of Mr. Cerny, above, regarding some possible considerations pertaining to such a change.</p>
Ms. Self	<p>3.874(a)(1), (a)(2) (former 1634 (a)(1), (a)(2)) Agree with the language but require that in addition to the mediator, all parties must agree to excuse a party or representative whose appearance is otherwise required.</p> <hr/> <p>3.874(a)(3) (former 1634(a)(3)) Impose this good cause requirement, but make it up to both mediators and the parties to agree that it has been met.</p>	<p>The committee believes that many mediators will attempt to help the parties reach an agreement concerning whether attendance should be excused, and that some may only excuse attendance if such an agreement is reached. Although the committee appreciates the reasoning for only allowing excuses from attendance with the parties’ agreement, the committee believes that ultimately the mediator or the court must be authorized to make this decision.</p> <p>Rule 3.874 (former rule 1634) has provided, since 1994, for the mediator to excuse attendance at court-ordered mediations. However, based on some of the comments received, the committee plans to consider whether a proposal providing that the court, rather than the mediator, must excuse attendance at mediations conducted under Code of Civil Procedure section 1775 et seq. should be developed and circulated for public comment. Please see the response to the comment of Mr. Cerny, above, regarding some possible considerations pertaining to such a change.</p> <hr/> <p>Based on other comments received, the committee has made revisions to the proposal circulated for comment to delete the “good cause” requirement for excusing attendance.</p>
State Bar of California Committee on Alternative Dispute Resolution	<p>Under subdivision (a)(3) of this rule, the mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session, and may place conditions on an excuse. The ADR Committee recognizes that, under the current rule, attendance must be excused by the mediator. The ADR Committee believes, however, that this requirement should be reconsidered in light of this overall proposal.</p>	<p>Based on this comment and others, the committee plans to consider whether a proposal providing that the court, rather than the mediator, must excuse attendance at mediations conducted under Code of Civil Procedure section 1775 et seq. should be developed and circulated for public comment. Please see the response to the comment of Mr. Cerny, above, regarding some possible considerations pertaining to such a change.</p>

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	<p>Under proposed new rule 1611.5(a)(3), the <i>court</i> may excuse a party, a party’s representative, or an attorney from attending an <i>arbitration</i> hearing. The ADR Committee believes that the provision governing mediations should be parallel, and provide that the <i>court</i>—which has ordered mediation—may excuse attendance at a mediation session, instead of placing that obligation on the mediator. Unlike the court, a mediator should not be a decision maker. The determination to excuse (or not to excuse) any particular party or representative may affect the perception of the mediator’s impartiality. This would not be an issue if all the participants in the mediation agree to conduct the mediation without the particular party or representative. However, in the event a disagreement arises about a request to be excused, the mediator’s “ruling” on that request is likely to be seen favoring one side or the other and may affect the mediation adversely.</p>	
Mr. White	<p>How will the Courts enforce attendance at a mediation session?</p> <p>How will the Courts know if someone has not attended a mediation?</p>	<p>The committee believes that another party would typically inform a court of another party’s failure to attend the mediation. Additionally, Judicial Council form ADR-100, <i>Statement of Agreement or Nonagreement</i>, provides a space for the mediator to indicate that a mediation did not take place because a party who was ordered to appear at the mediation did not appear.</p>
Ms. Yeager	<p>I agree in principle with the Subcommittee’s goals of clarifying existing attendance requirements at Court-ordered mediations ...</p> <p>* * *</p> <p>Rule 3.874(a)(3) (former rule 1634(a)(3)) [Proposed revisions] The mediator may excuse a party, attorney or representative from the requirement to attend a mediation session under (1) or (2) for good cause and may place conditions on that excuse. <u>Any excuse and/or any conditions attached to an excuse are not subject to challenge by the excused person or any other participant.</u> Any excuse from attendance must be confirmed in writing. <u>If the excused participant provides the written confirmation, it must be served on the</u></p>	<p>No response required.</p> <p>Based on this comment and others, the committee has revised the proposal circulated for comment to delete the “good cause” requirement for excusing attendance.</p>

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(a) [former rule 1634(a)] —Attendance at mediation sessions	Advisory Committee response
	<p><u>mediator no less than seven days before the relevant mediation session. If a personal emergency prohibits such service, the confirmation must be served on the mediator as soon as possible under the circumstances.</u></p> <p>Rationale: The mediator’s role properly includes the ability to decide whether an individual may be excused from a court-ordered mediation. Written evidence of that exclusion should be required to protect the excused person from being sanctioned for failing to attend a mediation session.</p> <p>By incorporating a “good cause” requirement for excusing a participant from a court-ordered mediation, a mediator would be inappropriately and unfairly placed in the position of serving as a judge. In addition, what constitutes good cause in the context of a court-ordered mediation could become the subject of a tangential yet costly dispute between the parties, which is the antithesis of the mediation process. A “good cause” standard would burden the judicial system as courts become the arbiters of whether participants were properly excused. And, it would be detrimental to the mediator’s ability and willingness to serve as a neutral facilitator due to the risk of being called as a witness at a “good cause” hearing.</p> <p>_____</p> <p>This proposed provision doesn’t mandate whether the mediator or the party to be excused is responsible for providing the written confirmation of the mediator’s decision. Nothing should prohibit a mediator from providing the writing, however, a participant seeking to avoid sanctions for failure to attend a court-ordered mediation should bear the responsibility for the written confirmation. To reduce the likelihood of a post-mediation session dispute as to whether the person was, in fact, excused, participants who submit the written confirmation should serve the confirmation on the mediator in advance if at all possible.</p>	<p>_____</p> <p>Based on this comment and others, the committee has also revised the proposal circulated for comment to specify that the party, attorney, or representative who is excused or permitted to attend by telephone must send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Rule 3.874(b) [former rule 1634(b)]—Participant lists and mediation statements

Commentator	Rule 3.874(b) [former rule 1634(b)] —Participant lists and mediation statements	Advisory Committee response
Mr. Attie	<p>Sub-part (b)(1): There is nothing in the language that requires the parties to serve the MEDIATOR with the list. Was this an intentional omission? Believe me, if that language remains absent, many law firms will NOT serve the Mediator with the list. This misses the point of the requirement, it seems to me.</p> <hr/> <p>Sub-part (b)(1) [sic]: This one has two problems, from my point of view. First, authorizing the Mediator to REQUIRE the serving of the short mediation statement upon the other parties is in direction conflict with canons of confidentiality that are basic to mediation practice. The parties must always be free, in my opinion, to submit their statements to the Mediator marked "Confidential." The boilerplate that such parties would feel comfortable serving on the other side(s) has already been shared in the pleadings.</p> <hr/> <p>Second and far more important to me, this provision has no teeth whatsoever, and therefore is virtually meaningless. Subpart (c) gives at least an aura of enforceability to Subpart (a), but not to Subpart (b)(2).</p>	<p>Paragraph (b)(1) of the proposal circulated for comment provided that the list of participants must be served “on the mediator and on all other parties.” The committee has made revisions to this provision that will make this requirement more apparent.</p> <hr/> <p>Based on this comment and others, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements.</p> <p>The committee has also deleted the sentence in paragraph (b)(2) of the proposal circulated for comment concerning notice of the requirement to serve and timing of service of the mediation statement, to allow more flexibility in these regards. The committee notes that mediator policies and practices vary, and some do not engage in confidential individual communications with the parties. (See, e.g. Cal. Rules of Ct., rule 1620.4(c), requiring the mediator to inform all participants of “the mediator’s practices regarding confidentiality for separate communications with the participants.”)</p> <hr/> <p>The committee has deleted subdivision (c) from the proposal circulated for comment because highlighting the existing statutory authorities for the court to impose sanctions would make Civil Action Mediation appear more coercive, might foster unwarranted sanction requests, and is unnecessary for the imposition of sanctions. (Please see the comments and responses under the heading Rule 3.874(c)—Sanctions, below.)</p> <p>However, failure to comply with the proposed requirements to submit participant lists and mediation statements was not included as a basis for sanctions under the subdivision (c) of the proposal circulated for comment because there is a high likelihood that proceedings to assess such</p>

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(b) [former rule 1634(b)] —Participant lists and mediation statements	Advisory Committee response
		sanctions would require the disclosure of mediation communications and violate mediation confidentiality.
Mr. Brusavich	As to mediations, the mediators should not start mandating the submissions of anything, and they should not be mandating exchanges of information. They can certainly request anything, but giving them powers to force people to do anything violates the basic tenet of mediation....find resolution through non-coercive agreement of the parties.	Based on this comment and others, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements. The committee has also deleted the provisions in the paragraph circulated for comment concerning service of the mediation statement, to allow flexibility in this regard. Please see the response to the comment of Mr. Attie, above.
Consumer Attorneys of California (CAOC)	CAOC opposes <u>proposed (b)</u> which mandates participant lists and mediation statements. Again, the mediation process is not the same as the court process. Our attorneys work on a contingency fee basis and we have seen no justification for turning the mediation process into a complicated, time-consuming event.	Based on this comment and others, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements. The committee considers the submission of participant lists important, to help mediators fully and timely identify any relationships or affiliations that they must disclose under rule 1620.5 of the California Rules of Court. Rule 1620.5 is one of the Rules of Conduct for Mediators in Court Connected Mediation Programs, and requires that the mediator disclose personal and professional relationships and affiliations that might reasonably raise a question concerning impartiality as soon as practicable and, to the extent possible, before the first mediation session.
Mr. Factor	Rule 3.874(b)(2) (former rule 1634(b)(2)) would accomplish its objectives and be more in line with the self determination and voluntariness objectives of mediation were (a) the requested briefs voluntary (“may”), rather than mandatory (“require”) and (b) the mediator is expressly authorized to request briefing on additional and broader requests of material information and/or operative documents or exhibits, rather than simply “issues in dispute and possible resolutions of those issues.	Based on this comment and others, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements.

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(b) [former rule 1634(b)] —Participant lists and mediation statements	Advisory Committee response
Mr. Finkelstein	... Second, the 10 day period can be undoable if the mediation is scheduled for a day less than 10 days out—you have to leave an out for this possibility which often happens.	The committee has deleted the last sentence in paragraph (b)(2) of the proposal circulated for comment, concerning notice of the requirement to serve and service of the mediation statement, to allow more flexibility in these regards.
Mr. Lauper	Implement the use of a “mediation statement” that is served on the mediator at least 2 business days before the hearing. A significant number of clients and lawyers are not prepared to resolve the case b/c they do not have accurate information.	The committee agrees with the commentator that the submission of a mediation statement may be very beneficial in some cases. However, based on other comments received, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements and to delete the provisions concerning service of the mediation statement.
Mr. Levy	<p>I also agree entirely with Max’s [Mr. Factor’s] comments about Rule 3.874(b)(2) (former rule 1634(b)(2)). Max stated:</p> <p>“Rule 3.874(b)(2) (former rule 1634(b)(2)) would accomplish its objectives and be more in line with the self determination and voluntariness objectives of mediation were (a) the requested briefs voluntary (‘may’), rather than mandatory (‘require’) and (b) the mediator is expressly authorized to request briefing on additional and broader requests of material information and/or operative documents or exhibits, rather than simply ‘issues in dispute and possible resolutions of those issues.’”</p> <p>* * *</p> <p>... While it may be a good idea for the parties to let the mediator know who is going to participate (proposed 3.874(b) (former rule 1634(b)) (how many seats do we need), and it is useful to avoid surprise absences (and surprise attendees, in many instances), these are all matters mediators can cover in pre-mediation telephone calls. Why does this have to be a matter of coercion? Does someone think that if you coerce the parties into submitting lists of attendees, the matter is more likely to resolve? . . .</p>	<p>Based on this comment and others, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements and may also request other information or documents that may appear helpful to resolve the dispute.</p> <p>The committee considers the submission of participant lists important to help mediators fully and timely identify any relationships or affiliations that they must disclose under rule 1620.5 of the California Rules of Court. (Please see the response to the comment of CAOC, above.) The committee also does not think that a rule of court requiring the parties to identify the participants in the mediation would be coercive.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(b) [former rule 1634(b)] —Participant lists and mediation statements	Advisory Committee response
Mr. Parselle	<p>Rule 3.874(b) (former rule 1634(b)) simply imposes yet another meaningless paper requirement on the parties. It serves no useful purpose to exchange lists of participants. It is not information that the mediator needs to know, nor is it necessarily information that the parties even possess at the time the exchange is required. What if one such participant suddenly becomes unavailable, and someone else comes instead? Must this require yet more pointless paper exchanges?</p> <p>Rule 3.874(b)(2) (former rule 1634(b)(2)) purports to give the mediator power that is entirely unnecessary to a mediator’s function. If the parties need to submit a brief, they will do so. It is not for the mediator to be imposing requirements on the parties, and in the private mediation field, cases are frequently settled for very large amounts without the mediator sent a written brief in advance. This is yet another provision that violates the principal of voluntary participation and self determination, which not only is the foundational basis of all mediation, but also is an express requirement of CRC Rule 1620.3.</p>	<p>The committee considers the submission of participant lists important to help mediators fully and timely identify any relationships or affiliations that they must disclose under Cal. Rules of Ct., rule 1620.5. The committee does not believe that this requirement would be coercive or unduly burdensome.</p> <p>Based on this comment and others, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements.</p>
Mr. Rainey	<p>Mediation Statement</p> <p>Some mediators like a mediation statement and others do not. I fall into the latter category. I do not want to be tainted by the spin a crafted word miester can put on the facts. Further, in many situations, the first time a party hears the other side’s version is at the mediation. Putting the story in a confidential brief denies the other side a valuable opportunity. Further, putting their story in writing commits them to a position. While this could be helpful, it may also hinder a mediation. Mediation is a forward looking, problem solving process. As parties hear more information about their dispute, they may choose to modify their position. If they have committed their position in writing they may be reticent to change that position even when the dynamics dictate modification.</p>	<p>The committee acknowledges that mediators have different preferences concerning the submission of mediation statements. Paragraph (b)(2) of the proposal circulated for comment was intended to preserve flexibility by allowing mediators to require mediation statements and other documents if they believe that these will be helpful. The committee has revised this paragraph to provide that mediators may request, rather than require, a mediation statement, which would preserve this flexibility.</p>
Ms. Self	<p>Rule 3.874(b)(1), (b)(2) (former rule 1634(b)(1), (b)(2)) What happens if the parties do not comply? The mediator has no power to enforce and should not</p>	<p>The proposal does not contemplate that the mediator will have any responsibilities for enforcing requirements for the submission of participant lists.</p>

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(b) [former rule 1634(b)] —Participant lists and mediation statements	Advisory Committee response
	<p>be put in the position of discretionary enforcement. Recommend that there be sanctions for failure to comply that can only be waived by the court upon a showing of good cause by the party who failed to comply.</p>	<p>The committee plans to consider whether a proposal providing for the automatic assessment of specified sanctions for failure to attend a court-ordered mediation or to submit participant lists should be developed and circulated for public comment in a future cycle.</p>
<p>State Bar of California – Committee on Administration of Justice</p>	<p>CAJ believes proposed rule 3.874(b)(2) (former rule 1634(b)(2)) should be expanded to provide explicitly that the mediator may require each party to submit something beyond “information about the issues in dispute and possible resolution of those issues.” That could be accomplished by adding “and any additional documents or materials that the mediator may deem appropriate” to the rule. This would further the objectives of the proposed rule, by specifically authorizing the mediator to request additional information that may provide for a more effective mediation.</p>	<p>Based on this comment and others, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements and may also request other information or documents that may appear helpful to resolve the dispute.</p>
<p>Ms. Yeager</p>	<p>I agree in principle with ... requiring submission of participant lists. I do not object to allowing mediators to require mediation statements, but I do object to permitting mediators to require that the statement be served on opposing parties as inconsistent with the mediator’s role and the mediation process.</p> <p>Rule 3.874(b)(1) (former rule 1634 (b)(1)) [Proposed text] Each party must serve, on the mediator and all other parties, a list of the names of all persons who will participate in the mediation with or on behalf of that party. The list must include all attorneys, representatives of a party that is not a natural person, insurance representatives and any other persons who will participate in the mediation. This list must be served no later than seven days before the first mediation session. If a party subsequently determines that additional or different persons will participate in the mediation, that party must promptly serve a supplemental list on the mediator and all other parties.</p> <p>Rationale: I do not object to the content of proposed Rule 3.874(b)(1) (former rule 1634(b)(1)) but I found the wording a tad</p>	<p>The committee has revised paragraph (b)(1) of the proposal circulated for comment, to make it easier to read, and to provide as follows:</p> <p>At least five court days before the first mediation session, each party must serve a list of its mediation participants on the mediator and all other parties. The list must include the names of all parties, attorneys, representatives of a party that is not a natural person, insurance representatives, and other persons who will attend the mediation with or on behalf of that party. The parties must promptly serve a supplemental list if they subsequently determine that other persons will attend the mediation with them or on their behalf.</p>

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(b) [former rule 1634(b)] —Participant lists and mediation statements	Advisory Committee response
	<p>confusing. I re-worked the wording in an effort to clarify this provision.</p> <p>Rule 3.874(b)(2) (former rule 1634 (b)(2)) [Proposed text] The mediator may require that each party submit a short mediation statement ... The mediator must notify the parties of any such requirement and of whether the statement is to be served on other parties to the action no less than 10 days before the statement must be submitted.</p> <p>Rationale: In this context, the word “short” is subject to dispute. As a pro bono mediator, I requested a mediation statement no longer than 5 pages, which I consider short. I would not want this provision to put a mediator in the position of arguing with an attorney or a party as to how “short” is “short”.</p> <p>I always give attorneys (or a <i>pro per</i> party) the option of serving their mediation briefs on other parties. While I do not object to a mediator encouraging the parties to serve a mediation statement on opposing counsel, I object to providing a mediator with the power to make a decision that should reside with the attorney and/or party. This dictatorial approach conflicts with the nature and benefits of mediation and is outside the scope of a mediator’s responsibilities.</p>	<p>Based on this comment and others, the committee has revised paragraph (b)(2) of the proposal circulated for comment to provide that the mediator may <i>request</i> rather than <i>require</i> submission of mediation statements and may also request other information or documents that may appear helpful to resolve the dispute. The committee has also deleted the provisions concerning when, and on whom, any mediation statements should be served.</p>

Rule 3.874(c) [former rule 1634(c)]—Sanctions for noncompliance

Commentator	Rule 3.874(c) [former rule 1634(c)] —Sanctions for noncompliance	Advisory Committee response
Mr. Allen	<p>. . . Moreover, the rules proposed will lead to the content of the mediation being the subject matter of law and motion proceedings seeking relief under CCP 177.5 and 575.2 and California Rule of Court 227. On its face, this outcome runs afoul of Evidence Code § 1119 pertaining to the confidentiality of mediation. As a mediator, I do not want to be put in the position of having to give testimony or sworn statements concerning the conduct of the mediation.</p>	<p>The committee has deleted subdivision (c) from the proposal circulated for comment because highlighting the existing statutory authorities for the court to impose sanctions would make Civil Action Mediation appear more coercive, might foster unwarranted sanction requests, and is unnecessary for the imposition of sanctions.</p> <p>However, the committee does not believe that the provision circulated for comment would make mediators enforcers of the attendance requirements or result in the violation of</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(c) [former rule 1634(c)] —Sanctions for noncompliance	Advisory Committee response
		California’s mediation confidentiality laws. The Evidence Code generally protects the confidentiality and limits the discovery, admissibility, and disclosure of communications in the course of a mediation (section 1119) and specifically limits mediator reports to courts (section 1121) and mediator competence to testify (section 703.5). The proposal circulated for comment would not have required or authorized mediators to report or testify concerning a failure to attend mediation. Moreover, the committee believes that most questions of compliance with attendance requirements can be resolved without mediator reports, mediator testimony, or the disclosure of mediation communications.
Mr. Attie	4) Subpart (c): Fine for what it says, except for the problems that Foxgate and Rojas pose when it comes to who may ethically and legally report the "violations" to the Court. Not so fine for what it does not say, specifically in FAILING to include within its scope the potential for sanctions when a party fails to serve the Mediator with the requested mediation statement (see the prior paragraph).	Please see the response to the comment of Mr. Allen, immediately above.
Mr. Berges	Re: Sanctions – Are you making the mediator a policeman to enforce attendance? What about confidentiality. Burden should not be on mediator.	Please see the response to the comment of Mr. Allen, above.
California Defense Counsel (CDC)	... We strongly recommend restoration of the “available” language in the current rule. Subdivision (c) relating to sanction should be modified accordingly.	Please see the response to the comment of Mr. Allen, above.
Consumer Attorneys of California (CAOC)	CAOC opposes <u>proposed (c)</u> which gives the court sanction authority if any party, attorney, insurer, or other representative fails to attend a mediation. This section would undermine the entire nature of successful mediation, turning mediators into court cops who must report attorneys. We do not believe that role is appropriate for a mediator nor conducive to successful mediation participation. The California Supreme Court addressed this issue in <i>Foxgate Homeowners Association v. Bramalea</i> (2001) 26 Cal. Rptr. 2d 642. The court held that courts may not judicially create exceptions to the Evidence Code provisions on the confidentiality of mediator reports and findings. Allowing or requiring	Please see the response to the comment of Mr. Allen, above.

SPR06-41

Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])

Commentator	Rule 3.874(c) [former rule 1634(c)] —Sanctions for noncompliance	Advisory Committee response
	mediators to report allegedly sanctionable conduct eviscerates the entire notion of mediation confidentiality and would severely undermine confidence in the mediation process.	
Mr. Muns	Mediation changes will help, but without more “teeth” the lawyers & clients that are the problem will continue to be the problem. The party(s) failing to appear should lose by default process.	Please see the response to the comment of Mr. Allen, above.
Orange County Bar Association	<p>3. Rule 3.874(c) (former rule 1634(c)) [Sanctions for non-compliance] should be stricken. A party, or an attorney upon instruction from his party client, should not be sanctioned for, in essence, exercising the party’s right to jury trial. If a party, in good faith, wants a jury trial and doesn’t wish to incur the additional time and expense of going through mediation, he should be able to opt out without incurring sanction for failure to participate.</p> <p>The legislative intent to encourage parties to participate more meaningfully in mediation is admirable. However, the concept of ordering a party to mediation and then punishing him for exercising his right not to participate because he prefers a jury trial comes close to infringing on that right, notwithstanding the party’s right to request trial de novo.</p> <p>Also, it should be noted that CRC Rule 1620.3 requires the mediator to conduct the mediation in a manner that supports the principles of voluntary participation and self determination by the parties, which is not accomplished by sanctions. The same rule requires the mediator to: (a) inform the parties at the outset that any resolution requires voluntary agreement of the parties; (b) respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation and any time; and (c) refrain from coercing any party to make a decision or to continue to participate in the</p>	<p>The committee has deleted subdivision (c) from the proposal circulated for comment because highlighting the existing statutory authorities for the court to impose sanctions would make Civil Action Mediation appear more coercive, might foster unwarranted sanction requests, and is unnecessary for the imposition of sanctions.</p> <p>However, the committee does not believe that the provision circulated for comment would interfere with the right to a jury trial. The legislature has authorized, and in some instances mandated, courts to submit certain civil cases to mediation without the parties consent. (See Code Civ. Proc. section 1775.3.) Once at the mediation, the participants can determine the extent and manner of their participation, and whether or not to settle. (See Cal. Rules of Ct., rule 1620.3.) And, the case is returned to active status if it is not entirely resolved by mediation. (See Cal. Rules of Ct., rule 1636.) However, permitting the litigants to decide not attend at all would essentially allow them to overrule the court order submitting the case to mandatory mediation.</p> <p>The committee also recognizes the tension between the concepts of mandatory court-ordered mediation and voluntary participation in mediation. However, the committee does not consider the <i>court’s authority</i> to submit cases to mediation or to impose sanctions for the failure to attend incompatible with the <i>mediator’s duty</i> to respect the principles of voluntary participation and self determination in the mediation process. If sanctions are imposed, this would be done by the court rather than the mediator and any involvement of the mediator would be limited by the mediation confidentiality statutes. (See, e.g.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(c) [former rule 1634(c)] —Sanctions for noncompliance	Advisory Committee response
	mediation. The use of sanctions would seem inappropriate in the accomplishment of these goals.	Evid. Code, §§ 703.5 and 1121.)
Mr. Rainey	<p>In any court ordered ADR, the operative phrase here is court ordered. If the parties ignore the court or fail to adhere to the letter or spirit of the court’s wishes, perhaps there needs to be a reminder in the form of some sanction. It could be in the form of the errant party paying for the arbitrator/mediator’s time and for all other counsel and parties fees, lost time, and expenses. Then the sanction relates to the wrongdoing.</p> <p>However the court intends to enforce its orders, the point is that the enforcement is strictly a matter between the parties, their counsel, and the court. Putting the arbitrator or mediator in the position of being an ersatz judicial officer, for the purpose of enforcing existing judicial orders, may compromise the arbitrator/mediator and runs the risk of creating the perception of bias. Any claim of bad faith or lack of attendance should be an issue between the parties and the court. The arbitrator/mediator should not be a reporting party. The arbitrator/mediator may note for their record who did or did not attend however any reporting responsibility is solely the duty of the aggrieved party and their counsel.</p>	<p>The committee has deleted subdivision (c) from the proposal circulated for comment because highlighting the existing statutory authorities for the court to impose sanctions would make Civil Action Mediation appear more coercive, might foster unwarranted sanction requests, and is unnecessary for the imposition of sanctions.</p> <p>The committee agrees with the commentator that any sanctions that may be imposed for the failure to comply with a requirement should be appropriate in relation to the violation.</p>
Ms. Self	<p>The goal of these revisions is to improve respect for and the quality of the mediation process. This is best accomplished by establishing procedures that have automatic consequences for failure to comply. If a party seeks exemption from requirements or sanctions, the party should have the burden of seeking from the court exemption from the requirements or sanctions.</p> <p>* * *</p> <p>3.874(c) (former rule 1634(c))</p> <p>Sanctions in the form of a set compensation of \$450 to the mediator should be automatic, absent application to the court by the party upon showing of good cause why sanctions should not be imposed.</p> <p>Under the current system which has only been in place for about a year, the mediator must make a</p>	<p>The committee has deleted subdivision (c) from the proposal circulated for comment because highlighting the existing statutory authorities for the court to impose sanctions would make Civil Action Mediation appear more coercive, might foster unwarranted sanction requests, and is unnecessary for the imposition of sanctions.</p> <p>However, the committee may consider whether a proposal providing for the automatic assessment of specified sanctions for failure to attend a court-ordered mediation or to submit participant lists should be developed and circulated for public comment in a future cycle.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Rule 3.874(c) [former rule 1634(c)] —Sanctions for noncompliance	Advisory Committee response
	<p>motion for compensation if the parties fail to notify the mediator of settlement in a timely fashion before the mediation. I have had personal experience with an attorney being outraged that I would make such a motion and the court then requiring that I provide evidence at a hearing that I had foregone paid work for the hours when the mediation was to take place. I never again sought compensation when a party failed to notify me of settlement within the required time. Similarly, the proposed rule will alienate the mediator from the party if the mediator has the audacity to seek compensation for failure of a party to attend and will require the mediator to convince the court at a hearing of foregone earnings. Surely this was not the intention when the provision was added last year nor should be the intention of the proposed revision.</p>	
Ms. Yeager	I agree in principle with ... providing sanctions for unexcused failures to attend ...	No response required.

JUDICIAL ARBITRATION PROPOSAL⁵⁶

Arbitration proposal, in general

Commentator	Arbitration proposal, in general	Advisory Committee response
Mr. Allen	<p>These proposed rules changes will probably lead in some cases to lengthier and fuller arbitration hearings where the issues are fleshed out. To that extent the hearings would be more meaningful. . . . Moreover, to the extent that arbitrations are lengthier this will increase the time commitment of the arbitrator to conduct the hearing. The judicial council should note that in Alameda County the court DOES NOT pay the arbitrator. In this county, the court has requested that all judicial arbitrators waive compensation time for their service including the first three hours of hearing time. Arbitrations in this county are not to exceed three hours absent prior court approval or agreement of the parties and arbitrator. Please see CCP 1141.18(h) and CCP 1141.28(b). The last sentence of 1141(b) provides that “no compensation shall be paid before the filing of the award by the arbitrator</p>	<p>As a result of some commentators’ concerns about this proposal and the judicial arbitration program in general, the committee is not proposing any revisions to the judicial arbitration rules at this time. The committee plans to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.</p>

⁵⁶ Although the committee is not proposing revisions to the judicial arbitration rules at this time, the comments concerning the judicial arbitration proposal that was circulated for comment are set forth in this chart for those who may wish to review them.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Arbitration proposal, in general	Advisory Committee response
	<p>or before the settlement of the case by the parties.”</p> <p>Unless there is some change in the proposal, it is likely that the judicial arbitration system in Alameda County will see the withdrawal of commitment by arbitrators that donate their time. I personally am willing to arbitrate any cases, but I cannot in good conscience provide pro bono service to the court and parties, beyond the two to three hours I typically give each case.</p>	
Mr. Chafetz	<p>I agree that sometimes parties do not participate in Non-Binding Judicial Arbitration in good faith. They will sometimes show up, not put on much of a case or a defense, and then reject the Arbitration Award, effectively wasting everyone’s time.</p> <p>I believe, however, that the proposed changes are the wrong solution to the problem. To my mind, they are overkill, punishing everyone for the transgressions of the few. The approach you are taking is like using a bomb, rather than a fly swatter, to kill a fly. It will cause what is intended to be an inexpensive and flexible dispute resolution mechanism to become more rigid, time-consuming, and expensive.</p> <p>A better approach would simply be to give Judges the power to impose sanctions against those who do not participate in Non-Binding Judicial Arbitration in good faith, as you have proposed to do with regard to mediations under Rule 3.874(c) (circulated as rule1634(c)). The Rules could then go on to state examples of bad faith tactics, which could include not presenting evidence on contested issues, rejecting the award, and then arguing those very same issues later in the case.</p> <p>Penalties could also include that a party who fails to participate in Non-Binding Judicial Arbitration in good faith would not be entitled to the benefits of the cost-shifting provisions of C.C.P. § 1141.21 and C.C.P. § 998.</p>	Please see the response to the comment of Mr. Allen, above.
Consumer Attorneys of California (CAOC)	<p>CAOC OPPOSES NEW REQUIREMENTS FOR MANDATORY ATTENDANCE AND PARTICIPATION IN JUDICIAL ARBITRATION.</p> <p>As stated in Section 1141.10:</p>	Please see the response to the comment of Mr. Allen, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Arbitration proposal, in general	Advisory Committee response
	<p>It is the intent of the Legislature that:</p> <p>(1) Arbitration hearings held pursuant to this chapter shall provide parties with a <i>simplified and economical</i> procedure for obtaining prompt and equitable resolution of their disputes. (Italics added.)</p> <p>(2) <i>Arbitration hearings shall be as informal as possible</i> and shall provide the parties themselves maximum opportunity to participate directly in the resolution of their disputes, and shall be held during nonjudicial hours whenever possible. (Italics added.)</p> <p>The proposed changes are directly contrary to the stated intent of the Legislature. CAOC strongly believes that the changes would make the process more complicated, less economical (particularly for plaintiffs) and more formal. These proposals should be rejected.</p> <p><i>Mandating appearances by attorneys and parties makes judicial arbitrations formal, complicated and expensive, contrary to Section 1141.10's stated intent.</i></p> <p>CAOC members report mixed reviews of the current law, and the divergent opinions do seem to be tied to county experiences. Overall, most members we heard from believe the current system is not working for a variety of reasons, but that the proposed changes do not address the existing problems. Many view the referrals to judicial arbitration as a method for some overburdened courts to "clear their dockets," which is not the goal of judicial arbitration.</p> <p>Our members report that in many instances, the current judicial arbitration referral system does not play a meaningful role in facilitating settlement of claims. First, since the awards are subject to a de novo motion by the defense, most of our members report that it is simply a way for defense attorneys to get a "free look at the case," and then file a de novo motion.</p>	

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Arbitration proposal, in general	Advisory Committee response
	<p>Second, CAOC members work on a contingency fee basis. Unlike our opponents, we do not bill hourly and cannot spend time in the arbitrations and bill for those efforts if the cases are not going to settle. Third, there are cases where the judicial arbitration is unhelpful. For example, liability may be clear and the issue is one of damages that the defense attorney does not want to discuss.</p>	
Mr. Fitzpatrick	<p>Judicial arbitration in most smaller auto negligence cases has been a joke for years, a fact known to both the judges and litigators. I participate as both a plaintiff’s attorney and as an appointed arbitrator. Auto insurers do not care about non-binding awards, and routinely reject even favorable awards so as to hold on to their money longer and profit from the “float”, as well as to delay resolution in hopes that the plaintiff will simply ‘wear out’ and get sick of the whole process. I have many friends in the insurance defense community who confirm that the insurers treat these proceedings as a joke, that they are used to delay resolution of the case, and that the insurers not only do not listen to the arbitrator’s decision but also routinely reject the advice of the very attorneys they have hired to defend the case.</p>	Please see the response to the comment of Mr. Allen, above.
Judges Miram, Foiles, and Hall	<p>The Judicial Council should be commended for considering how to make the Judicial Arbitration system work to its fullest potential. However, we see no documented need for statewide statutory changes (except in the area of arbitrator compensation, which is not addressed), and we are concerned about the impact of these changes on the court’s ability to recruit and retain quality arbitrators. Given this we do not agree with the proposed changes in SPR06-41.</p> <p>***</p> <p><u>Background</u> We thought it important to point out the obvious backdrop to your efforts. Judicial arbitrators serve in something akin to volunteer status, even given the \$150 per case paid by the court. Many arbitrators, while wanting to be helpful to the courts, would, unfortunately, welcome a reason to avoid this time consuming and sometimes-difficult work. We are concerned that these new proposed</p>	Please see the response to the comment of Mr. Allen, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Arbitration proposal, in general	Advisory Committee response
	<p>duties may endanger arbitrators' willingness to serve, while recognizing the intent appears to be to give greater tools to arbitrators and the courts to ensure a meaningful process. We are concerned, however, that this will not be the impact and that the rules will put even more work on both the courts and the arbitrators.</p> <p><u>San Mateo Court's Judicial Arbitration Redesign and Evaluation</u></p> <p>Our court, too, has looked at how to enhance the judicial arbitration process. We undertook an extensive redesign of our system in 2001 with collaborative input from court staff, the bench and the bar. After analyzing the strengths and weaknesses in the system we had in place, we more fully automated several aspects of the process, thus streamlining the process and reducing the staffing needs. In addition we put on a further training for our court arbitrators.</p> <p>It was also important for us to get feedback from the users of the system. To that end, we have also gathered evaluative survey information from the attorneys, the parties and the arbitrators themselves. The attached report, Multi-option ADR Project, Judicial Arbitration Report, October 2003-January 2005 is enclosed. The report documents high levels of satisfaction with our existing, redesigned process. We speculate that offering mediation and other forms of ADR as an alternative to judicial arbitration may also be contributing to some of the positive feedback to our judicial arbitration program, in that parties have more dispute resolution process choices. While some of the same issues you seek to address through rule changes were raised in the comments, we believe that arbitrator training, existing court orders, OSC hearings and sanctions can and have alleviated some of these problems. We are concerned that these rule changes may cause more problems than the stated need requires.</p> <p>First we will address some of the proposed changes and then we will touch a practical matter you did not address, which is the need for greater compensation of arbitrators.</p> <p>* * *</p>	

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	Arbitration proposal, in general	Advisory Committee response
	<p><u>Recruitment and Retention of skillful arbitrators</u> The arbitrators used by our court are highly skilled and experienced. Many arbitrators have been essentially “volunteering” their services to the court, some for nearly 30 years. Several of our most experienced arbitrators have openly expressed that they are considering resigning from our panel if these new rules are implemented.</p> <p>These attorneys are providing extremely pivotal assistance to our courts. While services may continue to be asked for at greatly reduced rates similar to volunteering, the need to address this compensation issue, perhaps in another forum but hopefully in the near future, should be acknowledged.</p>	
Mr. Rainey	It appears, from the tenor of the proposed legislation, some party in the court system is frustrated by some entities who are not using ADR in good faith. Attempting to correct this facet of the process is an excellent choice. The method may need some tweaking.	Please see the response to the comment of Mr. Allen, above.
Ms. Strickland	<p>Thank you for the opportunity to comment on the proposed changes to CRC 1611, 1614, and 1615. I have reviewed these proposed changes with several judges from our Civil Division, and write to express my opinion that the proposed alterations are not appropriate.</p> <p>It is the general consensus of the judges to whom I have spoken that these changes will unduly burden what is essentially a volunteer system, and may provoke seasoned arbitrators to remove themselves from the panel. Such arbitrators are the backbone of the program, and add tremendous value for the users. The courts should be making best efforts to retain them rather than give them additional reasons not to serve. These proposed requirements would complicate and burden what should be an informal process.</p> <p>Arbitrators who are assisting the court in an essentially <i>pro bono</i> capacity should not to deal with sanctions issues. If there are problems such as these proposals are meant to address, they can be handled by a judge without further burdening the arbitration system.</p>	Please see the response to the comment of Mr. Allen, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Rule 1611.5(a)—Attendance at arbitration hearing

Commentator	1611.5(a)—Attendance at arbitration hearing	Advisory Committee response
Mr. Adler	In summary, if the Council wants to consider requiring party presence at ADR, there should be an exception or limitation that permits parties in limited jurisdiction matters to appear by telephone, especially where a party is out-of-state and, in a large state like California, where the party is outside of the country or more than 150 miles from the place of the ADR Proceeding. Consistent with the rules of economic litigation, a compelled personal appearance is not justified. If the Judicial Council decides to require an appearance at any or all ADR procedures, then parties who are out-of-state and parties who are out-of-county and more than 150 miles from the place of the proceeding should be permitted to appear by telephone.	As a result of some commentators’ concerns about this proposal and the judicial arbitration program in general, the committee is not proposing any revisions to the judicial arbitration rules at this time. The committee plans to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.
Association of Defense Counsel of Northern California and Nevada (ADC)	Rule 1611.5(a) would require the attendance of parties and attorneys of record, but impose on one type of defendant (“not a natural person”) the burden of attending by a representative who is knowledgeable about the issues in dispute and authorized to act on behalf of the party.” ... The proposed rule would require a defendant corporation to bring a knowledgeable witness, often from out of state. These hearings are usually no longer than an hour or two. The cost to corporate defendants in this rule change would be substantial. Indeed, it is ironic that with this rule change, a corporation could not be required to produce its knowledgeable, out of state witnesses for trial, but would be required to produce such a witness for a judicial arbitration.	Please see the response to the comment of Mr. Adler, above.
Ms. Bronson	Mandatory attendance by all parties and attorneys of record is reasonable when liability is an issue. If liability is not disputed, there is no reason for the parties to attend the arbitration hearing and it may cause a financial burden on the party. The mechanism for the Court to excuse attendance upon a showing of good cause is not clear. If the Court excuses a litigant, there is not a process to inform the arbitrator. If the arbitrator receives the request to excuse a litigant, there is not a process for requesting the Court to rule on the request. In addition, there is potential for increased cost to both the litigant and Court. Since the arbitrator is	Please see the response to the comment of Mr. Adler, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(a)—Attendance at arbitration hearing	Advisory Committee response
	acting in a “quasi-judicial” position, these requests should remain with the arbitrator.	
Mr. Brusavich	<p>As to judicial arbitrations, too many carriers do not participate in good faith and seek trials regardless of [how] reasonable the award may be.</p> <p>Lawyers should be free, on a case by case basis, to advise a client to lose a day of salary to attend a good faith arbitration or go to work based upon the carrier involved.</p>	Please see the response to the comment of Mr. Adler, above.
California Defense Counsel (CDC)	The first portion of this proposal seeks to create attendance obligations on judicial arbitrations which are similar to current rules relating to mediations. This proposal is inconsistent with the purposely informal nature of judicial arbitrations, fails to recognize the inherent differences between mediation and arbitration, and ignores basic rules relating to burden of proof. ... It is therefore inappropriate to impose a requirement that all parties must attend the arbitration unless excused; for the same reason it is inappropriate to require the non-natural person defendants send a representative authorized to act on behalf of the party. This will also impose a substantial burden on parties and insurers from out of state.	Please see the response to the comment of Mr. Adler, above.
Mr. Chafetz	<p>Rule 1611.5(a)(1): Requiring all parties to attend the Arbitration hearing in person conflicts with the provisions of Rule 1613, which permit parties to present testimony by way of deposition transcripts. Personally, if I represent a plaintiff, I am not going to complain that the defendant has not put on a good case at the Arbitration unless, again, the defendant reflexively rejects the Arbitration Award and was always intending on doing so regardless of the outcome.</p> <p>Furthermore, such a Rule will probably unfairly penalize those defendants who are represented by insurance companies who for one reason or another are unable to present testimony from their insureds at the Arbitration in person. The proposed Rule change will also penalize plaintiffs who are willing to present the Arbitration simply on deposition testimony because they are ill or out of state. I realize that the Rule goes on to state that this requirement is only in effect “unless excused by the Court. . . “but this creates more problems.</p>	Please see the response to the comment of Mr. Adler, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(a)—Attendance at arbitration hearing	Advisory Committee response
	<p>There will not necessarily be uniform standards among Judges for granting such excuses. The procedure is not clear. It is not clear whether a motion fee will be required.</p>	
<p>Consumer Attorneys of California (CAOC)</p>	<p>CAOC OPPOSES NEW REQUIREMENTS FOR MANDATORY ATTENDANCE AND PARTICIPATION IN JUDICIAL ARBITRATION.</p> <p>Current law allows courts to submit unlimited civil cases in which the amount in controversy does not exceed \$50,000 for each plaintiff to judicial arbitration or mediation. (Code of Civil Procedure Section 1141.10 et seq; Code of Civil Procedure Section 1775 et seq.) The statute currently does not mandate appearances.</p> <p>* * *</p> <p><i>Mandating appearances by attorneys and parties makes judicial arbitrations formal, complicated and expensive, contrary to Section 1141.10's stated intent.</i></p> <p>* * *</p> <p>Based on the many scenarios that can occur, it should be left up to the individual attorneys to decide, in good faith, based on the case facts and experiences with the opposing counsel or arbitrator. Further, although in most instances parties do attend the arbitration proceeding, there are situations that arise where it is not desirable or tactically advantageous. We do not believe making the process mandatory would change this unfortunate outcome. And even those CAOC members who report that the system works oppose any changes that would make it more burdensome than it already is.</p> <p>Further, we disagree with the local courts that have adopted local rules that require attendance and do not believe those local rules should be used as precedent for a statewide rule.</p> <p>Last, it similarly does not make policy or fiscal sense to require parties to appear. In many instances, plaintiff's attorneys will bring parties in order to facilitate settlement and because the</p>	<p>Please see the response to the comment of Mr. Adler, above.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(a)—Attendance at arbitration hearing	Advisory Committee response
	<p>judicial arbitration award is often used as a discussion figure in later settlement discussions. However, this decision should be left up to the attorneys. For example, the party may be a person from another state who was injured in California and to whom it would be an expensive hardship to fly in for a judicial arbitration. And even though the proposal allows the Court to excuse a party for good cause, this creates yet another burden on the plaintiff’s attorney working on a contingency fee basis.</p>	
Mr. Cummins	<p>Having all responsible parties in attendance at arb or med is critical to ADR success</p>	<p>Please see the response to the comment of Mr. Adler, above.</p>
Mr. Fitzpatrick	<p>Sometimes the only economically feasible way to handle these arbitrations is to submit a brief with deposition testimony so that the client will not have to lose yet another day of work attending a proceeding that has NO likelihood of leading to a resolution of the case.</p> <p>... Finally, the courts do not want to get involved in deciding when it is appropriate to excuse attendance; that is a job the arbitrator can and should handle with ease.</p>	<p>Please see the response to the comment of Mr. Adler, above.</p>
Orange County Bar Association	<p>1. Section (d) [Sanction for non-compliance] should be stricken. A party, or an attorney upon instruction from his party client, should not be sanctioned for, in essence, exercising the party’s right to jury trial. If a party, in good faith, wants a jury trial and doesn’t wish to incur the additional time and expense of going through arbitration, he should be able to opt out without incurring sanctions for failure to participate.</p> <p>The legislative intent to encourage parties to participate more meaningfully in arbitration is admirable. However, the concept of ordering a party to arbitration and then punishing him for exercising his right not to participate because he prefers a jury trial comes close to infringing upon that right, notwithstanding the party’s right to request trial de novo.</p>	<p>Please see the response to the comment of Mr. Adler, above.</p>
Judges Miram, Foiles, and Hall	<p>1611.5(a) Participation at the hearing While full participation is a laudable goal, it may not always be necessary. For example, where liability is already admitted, the need for parties to</p>	<p>Please see the response to the comment of Mr. Adler, above.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(a)—Attendance at arbitration hearing	Advisory Committee response
	<p>be present may be significantly reduced.</p> <p>The number of cases, parties and potential requests to be excused from personal attendance may substantially increase the amount of paperwork to be processed by both staff and judges. While with effort and the flexibility allowed for in 1611.5(a)(3) this could be accommodated, it could also easily lead to gamesmanship, driving up party costs as attorneys will in turn be needing to bill their client for time spent drafting a request to be excused from attending. These are by definition lower value cases where the amount in controversy may not warrant these small but real extra expenses. Additionally, where it is needed, existing Notice to Appear options are already in place.</p> <p>There is no attendance requirement for parties to attend trials, raising the question as to why it is necessary to make arbitration proceedings more stringent than formalized trial proceedings.</p> <p>An overall comment of the committee was that attorneys are responsible for their cases and should present them as they see fit. Attendance by parties is a tactical and procedural decision that can be entrusted to counsel.</p>	
Mr. Moore	<p>. . . Requiring parties to attend limited jurisdiction arbitrations and mediations would greatly increase the cost of litigation in many cases would make the cost of litigation prohibitive.</p> <p>. . .</p> <p>If anything, the rules should be changed to permit out of state parties to appear by telephone, which is a practice many states have adopted to keep the costs of litigation down.</p> <p>In conclusion, if the Judicial Council wants to consider requiring party presence at ADR, there should be an exception that permits parties in limited jurisdiction matters to appear by telephone if the party is out-of-state or does not have an office in the county or within 150 miles of the courthouse where the matter is venued.</p>	Please see the response to the comment of Mr. Adler, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(a)—Attendance at arbitration hearing	Advisory Committee response
Mr. Rainey	<p>Attendance</p> <p>In any court ordered ADR, the operative phrase here is court ordered. If the parties ignore the court or fail to adhere to the letter or spirit of the court’s wishes, perhaps there needs to be a reminder in the form of some sanction. It could be in the form of the errant party paying for the arbitrator/ mediator’s time and for all other counsel and parties fees, lost time, and expenses. Then the sanction relates to the wrongdoing.</p> <p>However the court intends to enforce its orders, the point is that the enforcement is strictly a matter between the parties, their counsel, and the court. Putting the arbitrator or mediator in the position of being an ersatz judicial officer, for the purpose of enforcing existing judicial orders, may compromise the arbitrator/mediator and runs the risk of creating the perception of bias.</p> <p>Any claim of bad faith or lack of attendance should be an issue between the parties and the court. The arbitrator/mediator should not be a reporting party. The arbitrator/mediator may note for their record who did or did not attend however any reporting responsibility is solely the duty of the aggrieved party and their counsel.</p>	Please see the response to the comment of Mr. Adler, above.
Mr. Rodriguez	<p>The change regarding the attendance by all parties and attorneys of record is appropriate and reasonable when liability is in dispute. For example, in most motor vehicle rear end accidents the issue presented is that of damages and causation and not liability. The changes would require non essential parties as the other drivers who do not contest liability and especially non participant vehicle owners.</p> <p>Attendance by the plaintiff/cross-complainant is appropriate in most cases since these parties have the burden of proof. The modification proposed would impose a financial burden for parties that are not essential to the arbitrator’s decision. The arbitrator is in a position to decide which are the essential parties to the arbitration. The rule could be modified to have the court decide the issue of personal attendance in extraordinary circumstances.</p>	Please see the response to the comment of Mr. Adler, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Rule 1611.5(b)—Submission of arbitration statements, pleadings, and evidence

Commentator	1611.5(b)—Submission of arbitration statements, pleadings, and evidence	Advisory Committee response
Association of Defense Counsel of Northern California and Nevada (ADC)	<p>Rule 1611.5(b) would require the parties to submit an “arbitration statement, copies of its operative pleadings and any evidence that it would offer at the arbitration” seven days prior to the hearing. The ADC agrees with this proposed rule if modified to delete or substantially clarify “any evidence it would offer.” The purpose of this rule change is unclear; if the word “evidence” is simply meant to mean a general, one sentence description of the witnesses to be called, this is acceptable, and consistent with the requirement of submitting witness and exhibit lists at the commencement of a trial. But if the word “evidence” means that parties must submit all of their testimonial evidence in written form prior to the hearing, this is ill conceived. Defendants are not required in trials to submit their testimonial evidence in advance of trial; in fact, defendants can wait until the plaintiff rests to decide if the defendant wants to present witnesses or not. The rule should be no different in judicial arbitrations.</p>	<p>As a result of some commentators’ concerns about this proposal and the judicial arbitration program in general, the committee is not proposing any revisions to the judicial arbitration rules at this time. The committee plans to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.</p>
Ms. Bronson	<p>The requirement for the submission of an arbitration statement, operative pleadings and/or evidence should be at the request of the arbitrator. Although the arbitrator may excuse a party from the requirement, the onus is on the volunteer arbitrator. As such, arbitrators will complain about the extra work and some arbitrators may resign for the Court ADR panel. In addition, if arbitrators fail to read the briefs litigants may complain to the Court ADR program. The complaint will require additional staff time to investigate and to make a recommendation to the ADR Quality Assurance Subcommittee.</p>	<p>Please see the response to the comment of ADC, above.</p>
California Defense Counsel (CDC)	<p>Next, we recommend that the wording of proposed rule 1611.5(b)(2) be modified to clarify the meaning of the obligation to disclose “any evidence” which will be offered at the arbitration hearing. We would object to any suggestions that all evidence, including testamentary evidence by witness, must be submitted to the arbitrator seven days in advance of the hearing. We assume that the intention was to require some general description of testimony to be offered.</p>	<p>Please see the response to the comment of ADC, above.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(b)—Submission of arbitration statements, pleadings, and evidence	Advisory Committee response
Mr. Chafetz	<p>Rule 1611.5(b): Requiring that briefs be served no later than seven days before the Arbitration begins to make preparation for Arbitration as expensive as preparation for trial. Non-Binding Judicial Arbitration is typically reserved for the smaller cases. Attorneys who have smaller cases can only survive economically by having lots of them. They have busy practices which make it difficult to serve briefs an arbitrary number of days before the Arbitration. Such a requirement also causes unnecessary expenditure in those cases where there will be a settlement shortly before the Arbitration. Imposing requirements like this, again, makes the whole procedure more expensive and inflexible than it should be. It is intended to provide a dispute resolution mechanism to save costs not increase them.</p> <p>Imposing a requirement of identifying all proposed witnesses seven days before the Arbitration is also burdensome.</p> <p>The concept behind all of these changes is obviously to force parties to confront the realities of their case as early as possible in order to encourage settlement or more meaningful arbitrations. The problem, however, is that none of these devices will guarantee finality any more than under the current state of the law because the arbitration is not binding. No amount of additional procedural requirements can change that. Therefore, additional requirements only add additional burdens without significant offsetting benefits.</p> <p>Rule 1611.5(b)(2): I see no reason for imposing an additional requirement of submission of evidence 7 days before the hearing when there is already a requirement under Rule 1613 for identifying evidence 20 days before the hearing.</p>	Please see the response to the comment of ADC, above.
Consumer Attorneys of California (CAOC)	<p><i>The proposed change to require mandatory submission of arbitration statements and evidence also conflicts with the statute’s stated goal of simplicity, informality and economy.</i></p> <p>Our members report that the current system has worked reasonably well regarding exchange of information in cases where all attorneys and parties are seeking real discussion in the judicial</p>	Please see the response to the comment of ADC, above.

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(b)—Submission of arbitration statements, pleadings, and evidence	Advisory Committee response
	<p>arbitration process. Most arbitrators are willing to accommodate counsel in accepting briefs and exhibits and to work with the attorneys in a reasonable manner. By imposing the new requirements, the process risks becoming an exercise in paperwork as opposed to substance. CAOC opposes the mandatory proposal.</p>	
<p>Judges Miram, Foiles, and Hall</p>	<p><u>1611.5(b) Submission of arbitration statements, pleadings and evidence</u> The consensus was that generally an arbitration brief is all that is needed. If additional operative pleadings are needed the arbitrator can ask for these.</p> <p>Giving arbitrators the power to excuse parties from submitting various materials while simultaneously pointing to 1610(b) (regarding ex parte communications) does not, in practice, lessen the burden on the arbitrator for managing and orchestrating this compliance. It is the opinion of our committee members that this could in fact promote ex parte phone calls and communication.</p> <p>A committee member also noted that a large percentage of cases settle just prior to a judicial arbitration hearing and thus the 7 days may be too far ahead of time. (It is unclear if the 7 days prior requirement is 7 calendar or business days.)</p>	<p>Please see the response to the comment of ADC, above.</p>
<p>State Bar of California Committee on Alternative Dispute Resolution</p>	<p>Under proposed subdivision (b)(3) of this rule, an arbitrator “may excuse a party from the requirement to submit an arbitration statement, pleadings, or evidence on a showing of good cause in a manner consistent with the ex parte communication provisions of rule 1610(b).” The proposed language may be interpreted to contemplate a situation where an arbitrator excuses a party <i>entirely</i> from the requirement to submit an arbitration statement, pleadings, or evidence. The ADR Committee believes that the rule should unambiguously give the arbitrator more flexibility, and explicitly permit the arbitrator to excuse or modify any of the requirements set forth in subdivision (b). There may, for example, be a situation where a party seeks permission to submit an arbitration statement or evidence less than the required seven days before the hearing, or seeks to modify one</p>	<p>Please see the response to the comment of ADC, above.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(b)—Submission of arbitration statements, pleadings, and evidence	Advisory Committee response
	<p>specific requirement of the arbitration statement. For this reason, the ADR Committee believes that proposed rule 1611.5(b)(3) should be modified to read as follows:</p> <p>“The arbitrator may excuse a party from the <u>or modify any</u> requirement to submit an arbitration statement, pleadings, or evidence set forth in this subdivision on a showing of good cause in a manner consistent with the ex parte communication provisions of rule 1610(b)”</p>	

Rule 1611.5(c)—Presentation of evidence at arbitration hearing

Commentator	1611.5(c)—Presentation of evidence at arbitration hearing	Advisory Committee response
<p>Association of Defense Counsel of Northern California and Nevada (ADC)</p>	<p>... A defendant is not required to present any defense witness at a judicial arbitration or trial; rather, the defense may simply rely upon the plaintiff’s failure to present evidence to meet its burden of proof. Many defendants choose to proceed with judicial arbitrations in this fashion, risking that if they lose, they may end up paying the plaintiff’s costs after a trial, if they do not do better than the arbitration award. ...</p> <p>* * *</p> <p>Rule 1611.5(c) would require each party to offer evidence concerning the issues raised by the pleadings on which that party has the burden of proof. The ADC strongly disagrees with this rule change. As explained, a defendant is not required to present any evidence in its case-in-chief, and may simply rely upon the failure of the plaintiff to present evidence sufficient to meet its burden of proof. This is a non-suit at trial, although the motion is not part of judicial arbitrations. There are many strategic reasons why a defendant and its counsel might not choose to present evidence on one or more defenses at any arbitration. Perhaps the defendant does not wish to draw undue attention to this defense at judicial arbitration, and later wants to make a summary judgment motion on that defense. This rule, as written, requires the defendant to present evidence on every affirmative</p>	<p>As a result of some commentators’ concerns about this proposal and the judicial arbitration program in general, the committee is not proposing any revisions to the judicial arbitration rules at this time. The committee plans to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(c)—Presentation of evidence at arbitration hearing	Advisory Committee response
	<p>defense. In addition, depending on the case, this would greatly lengthen these judicial arbitrations and tax the arbitrators, most of whom serve voluntarily and receive no compensation from their respective courts for which they agree to serve.</p>	
<p>California Defense Counsel (CDC)</p>	<p>... This proposal ... ignores basic rules relating to burden of proof. In arbitrations as at trial, defendants are not required to present evidence to rebut the plaintiff’s case in chief; rather defendants may validly elect to rely on the plaintiff’s failure to carry their burden of proof.</p> <p>* * *</p> <p>Proposed Rule 1611.5(c) is unnecessary. Practitioners understand the concept of burden of proof, and defendants have no obligation to present evidence to rebut the plaintiff’s case in chief.</p>	<p>Please see the response to the comment of ADC, above.</p>
<p>Mr. Chafetz</p>	<p>Rule 161 1.5(c)(1): Again, as a person who is ordinarily representing plaintiffs, I am happy enough to have a defendant put on a skimpy case. All I want to know is that if he does so, he cannot reflexively reject the Arbitrator’s Award without suffering a penalty.</p> <p>As noted above, my view is that what is really needed for Non-Binding Judicial Arbitration is a provision like the one you are proposing for Rule 1613(c) [sic].</p>	<p>Please see the response to the comment of ADC, above.</p>

Rule 1611.5(d)—Sanctions for noncompliance

Commentator	1611.5(d)—Sanctions for noncompliance	Advisory Committee response
<p>Mr. Allen</p>	<p>With regard to the proposed changes to the rules of court for arbitration, it is my view that the proposed Rule 1611.5 would create an obligation on corporate defendants that will probably lead to an increase in litigation costs associated with arbitration and/or an increase in motion practice and litigation expenses by all parties with regard to the subject of whether a party “willfully” failed to participate in judicial arbitrations. The hearings under CCP 575.2 would be a battleground as each party will have to submit evidence by sworn</p>	<p>As a result of some commentators’ concerns about this proposal and the judicial arbitration program in general, the committee is not proposing any revisions to the judicial arbitration rules at this time. The committee plans to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	1611.5(d)—Sanctions for noncompliance	Advisory Committee response
	<p>declaration supporting its position to avoid the “terminating” sanctions of the section. ... There will be no record of the arbitration hearings and, therefore, the arbitrator and counsel will be drawn into subsequent law and motion proceedings by way of declaration and perhaps even personal testimony on the subject of whether any party fulfilled its obligations as set out in the proposed rule. ...</p>	
Mr. Fitzpatrick	<p>The courts seem to be gutless in awarding sanctions, and usually it is simply a waste of time asking for them (if you have the time to begin with to waste on issues like making the other side PRETEND to take an arbitration seriously).</p>	<p>Please see the response to the comment of Mr. Allen, above.</p>
Judges Miram, Foiles, and Hall	<p>1611.5(d) Sanctions for noncompliance Sanctions can already be imposed without the benefit of a new rule. Now a mechanism will have to be put in place for the judges to consult the arbitrator as to failure to participate in arbitration, again straining the thin desire many attorneys have for serving as arbitrators.</p>	<p>Please see the response to the comment of Mr. Allen, above.</p>

Rule 3.825(a)(2) [former rule 1615(a)(2)]—The award; form and content

Commentator	3.825(a)(2) [former rule 1615(a)(2)]— The award; form and content	Advisory Committee response
Ms. Bronson	<p>If the arbitrators did not resign from the Court panel due to the proposed requirement of Rule 1611.5(b), this requirement would result in more volunteers resigning from the panel. As additional requirements and paperwork are, implemented, volunteer arbitrators will become more disillusioned. The requirement that the arbitrator, on request of any party, state in the arbitrator’s award whether a party failed to offer evidence or respond to a prima facie showing made by another party will be burdensome for the arbitrator. In addition, if the party fails to prevail at the arbitration, he/she may inappropriately use the process.</p> <p>Overall, the proposed requirements may preclude the volunteer’s willingness to serve on the Court panel.</p>	<p>As a result of some commentators’ concerns about this proposal and the judicial arbitration program in general, the committee is not proposing any revisions to the judicial arbitration rules at this time. The committee plans to work informally with bar representatives and other stakeholder groups to assess the efficacy of the current judicial arbitration program and to determine what changes to that program, or what new court-connected ADR programs, might be beneficial.</p>

SPR06-41

**Alternative Dispute Resolution: Participation in Court-Ordered Civil Action Mediation
(amend Cal. Rules of Court, rule 3.874 [formerly rule 1634])**

Commentator	3.825(a)(2) [former rule 1615(a)(2)]— The award; form and content	Advisory Committee response
Judges Miram, Foiles, and Hall	<p><u>3.825(a)(2) [former 1615(a)(2)] The award</u> Our court’s judicial arbitration training strongly encourages arbitrators to write up meaningful awards, while also being cognizant of the fact that these are smaller cases in a non-binding setting and not, as one committee member noted, appellate decisions. The thought of potentially being REQUIRED to address each element of the prima facie case was unanimously considered too burdensome and seemed to provide room for attorney gamesmanship in the request.</p>	Please see the response to the comment of Ms. Bronson, above.
Mr. Rainey	<p>Award It is both fair and a positive step toward the administration of justice to require the arbitrator to provide a reasoned opinion with his/her award. Parties deserve to know the basis of the award. Understanding an arbitrator can be mistaken about the law and the facts, nevertheless, they have a moral and professional obligation to show the users of the system, the parties, by example, that the system is transparent. My sense is this will enhance users faith in the system.</p>	Please see the response to the comment of Ms. Bronson, above.
Mr. Rodriguez	<p>This provision is not clear as to what degree of specificity the arbitrator must state if a party fails to meet their burden of proof. For example, is the arbitrator required to provide a detailed statement on the basis for his/her decision? If so, this might be used inappropriately by the losing party. This change should be clarified prior to its approval.</p> <p>Overall, these new requirements may also reduce the number the arbitrators willing to volunteer on a pro bono basis. This might also may [sic] lead to litigants’ unwillingness to participate in the already scarce arbitration process.</p>	Please see the response to the comment of Ms. Bronson, above.