

**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. Lee Smalley Edmon, Chair
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DATE: October 6, 2008

SUBJECT: Alternative Dispute Resolution: Procedures for Addressing Complaints About Mediators in Court-Connected Mediation Programs for Civil Cases (renumber rules 3.870–3.878 of the California Rules of Court as rules 3.890–3.898, respectively; amend and renumber rules 3.865, 3.866, 3.867, and 3.868 as rules 3.868, 3.867, 3.871, and 3.872, respectively; adopt rules 3.865, 3.866, 3.869, and 3.870; amend rule 10.781; and revise *Attendance Sheet for Court-Program Mediation of Civil Case* (form ADR-107) (Action Required)

Issue Statement

Superior courts that make lists of mediators available to litigants in general civil cases or that recommend, select, appoint, or compensate mediators are required to establish procedures for receiving, investigating, and resolving complaints about these mediators. Interested parties have suggested that the Judicial Council adopt rules establishing a uniform complaint procedure.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective July 1, 2009:

1. Amend and renumber rules 3.865, 3.866, 3.867, and 3.868 as rules 3.868, 3.867, 3.871, and 3.872, respectively, and adopt rules 3.865, 3.866, 3.869, and 3.870 to revise and expand the current general requirements concerning superior court

procedures for addressing complaints about mediators who are required to comply with the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases (Cal. Rules of Court, rule 3.850 et seq.);

2. Renumber current rules 3.870–3.878 as rules 3.890–3.898 to allow the revised general requirements concerning complaint procedures to immediately follow the rules of conduct for mediators;
3. Amend rule 10.781 to provide that inclusion on a court list of alternative dispute resolution (ADR) neutrals and eligibility to be recommended, appointed, or compensated by the court to serve as a neutral are revocable privileges and confer no vested right on the neutral; and
4. Revise *Attendance Sheet for Court-Program Mediation of Civil Case* (form ADR-107) to make this optional attendance sheet more user-friendly.

The text of the proposed rules is attached beginning at page 18, and the revised form is attached at page 29.

The Civil and Small Claims Advisory Committee also recommends that the Administrative Office of the Courts develop model complaint procedures, based on the default complaint procedure set forth in article 4 of the proposal that was circulated for comment, to assist courts in adopting complaint procedures by local rule of court.

Rationale for Recommendation

Amending and adopting complaint procedure requirements

Revising and expanding the general requirements concerning superior court procedures for addressing complaints about court-program mediators will help to ensure that these complaints are addressed in a manner that is fair and respectful to the complainant and the mediator and consistent with the mediation confidentiality laws. This will ultimately help to ensure the quality of court mediation programs and public confidence in the mediation process and the courts.

Amending rule 10.781

Amending rule 10.781 to provide that inclusion on a court list of ADR neutrals and eligibility to be recommended, appointed, or compensated by the court to serve as a neutral are revocable privileges and confer no vested right on the neutral will help to establish appropriate expectations for neutrals and reduce the likelihood of a claim being asserted against a court for actions taken in a complaint proceeding.

Revising form ADR-107

The revisions to this optional *Attendance Sheet for Court-Program Mediation of Civil Case* will make it easier for participants in court-program mediations to provide their names, contact information, and roles in the mediation. The revisions will also make the form more useful to mediators and courts by adding spaces for the dates of the mediation session and the participants' e-mail addresses.

Alternative Actions Considered

The advisory committee considered several different approaches to helping ensure that procedures for addressing complaints about court-program mediators are fair and consistent with mediation confidentiality statutes. These approaches included proposing a uniform complaint procedure that would apply to all courts, proposing a default complaint procedure that would apply in courts that do not adopt another procedure by local rule of court, proposing to expand the general requirements for complaint procedures, and providing a model or guide to assist courts in establishing local complaint procedures. The committee ultimately concluded that revising and expanding the existing general requirements for complaint procedures and providing model complaint procedures to assist courts in adopting local rules consistent with these requirements would be most appropriate at this time. This approach will help to ensure that complaints about mediators are addressed in a manner that is fair and consistent with the mediation confidentiality statutes and reduce the administrative burdens and technical challenges that courts might experience in establishing complaint procedures.

The committee also considered an array of different provisions that might be included in the expanded complaint procedure requirements. Among these, the committee considered whether the requirements should apply to allegations of mediator misconduct that are not submitted in writing. To reduce the courts' administrative burdens and preserve their flexibility in addressing concerns about mediators, the committee concluded that the new general requirements should apply only to allegations that are submitted in writing. The committee also considered whether the rules should require that a person with experience as a mediator participate in resolving complaints about mediator conduct. To assist in the appropriate resolution of complaints and to enhance the credibility of complaint proceedings, the committee concluded that the rules of court should require that, in larger courts, a person with experience as a mediator must participate in investigating and recommending the disposition of any complaints that are not resolved through the preliminary review process, but that the rules should allow courts with eight or fewer authorized judges to waive this requirement under specified circumstances.

Comments From Interested Parties

This proposal was circulated as part of the regular spring 2008 comment cycle. Fifteen organizations or individuals submitted comments. Of these, five indicated that they agreed with the proposal and seven indicated that they agreed with the proposal if modified. Three commentators did not express an overall position on the proposal. The

text of the comments and the advisory committee's responses are attached beginning on page 30.

The invitation to comment specifically requested input concerning (1) whether the California Rules of Court should establish a default complaint procedure that would automatically apply if a court has not adopted a local procedure, (2) whether courts that elect to establish a local complaint procedure should be required to do so by local rule of court, and (3) whether a person with experience as a mediator should participate in conducting the investigation and recommending the final disposition of complaints that are not resolved in the preliminary review. Based on the responses to these questions and input from the Trial Court Presiding Judges/Court Executives Advisory Committees (TCPJAC/CEAC) Joint Rules Subcommittee and from the Judicial Council's Rules and Projects Committee, the advisory committee is not recommending the adoption of a default complaint procedure, but is recommending that the rules of court be amended to provide that courts that are currently required to establish complaint procedures must do so by local rule of court and that, in larger courts, a person with experience as a mediator must participate in conducting the investigation and recommending the disposition of complaints not resolved through the preliminary review.

Commentators suggested a number of specific revisions to the proposal circulated for comment, and the advisory committee has made a number of changes in response to these suggestions. These include excluding organizations that are on court lists from the definition of court-program mediator and clarifying the persons to whom the presiding judge may authorize disclosure of information about complaint procedures.

Implementation Requirements and Costs

The advisory committee does not anticipate that the proposal will result in any significant new administrative requirements or expenses for courts. Courts that make a list of mediators available to litigants in general civil cases or that recommend, select, appoint, or compensate a mediator to mediate a general civil case are already required to establish local procedures for resolving complaints about those mediators and to designate a person who is knowledgeable about mediation to receive and coordinate the investigation of any such complaints. Although the proposal will require some courts to adopt local rules establishing complaint procedures and may require adjustments to some existing local complaint procedures, the committee expects these adjustments to be small, because an effort was made to make this proposal consistent with existing local complaint procedures. Additionally, the model complaint procedures will reduce administrative burdens and technical challenges that courts might otherwise face in developing local complaint procedures.

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Issue Statement

Superior courts that make lists of mediators available to litigants in general civil cases or that recommend, select, appoint, or compensate mediators are currently required to establish procedures for receiving, investigating, and resolving complaints about these mediators. Interested parties have suggested that the Judicial Council adopt rules establishing a uniform complaint procedure.

Rationale for Recommendation

Background

Standard 10.70(a) of the California Standards of Judicial Administration encourages superior courts to establish mediation programs for civil cases. Many courts refer or order cases to mediation, maintain panels of mediators, and provide lists of mediators to litigants.

To promote public confidence in court-connected mediation programs, in 2002 the Judicial Council adopted the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, as rules 3.850–3.859 of the California Rules of Court. Under rule 3.865, superior courts that make lists of mediators available to litigants in general civil cases, or that recommend, select, appoint, or compensate mediators in these cases, are required to establish procedures for receiving, investigating, and resolving complaints about those mediators. Rule 3.865 also provides that the court may reprimand a mediator, require a mediator to complete additional training, or remove a mediator from the court’s panel or list or otherwise prohibit a mediator from receiving future mediation referrals from the court if the mediator fails to comply with the rules of conduct.

After the Judicial Council adopted rule 3.865, several superior courts requested guidance in designing procedures to address complaints about mediators in a manner consistent with California’s mediation confidentiality statutes.¹ In response to these requests, on the recommendation of the Civil and Small Claims Advisory Committee, the Judicial Council adopted rule 3.860 and rules 3.866–3.868, effective January 1, 2006. Those rules are designed to preserve mediation confidentiality and to protect its underlying purposes when courts receive and address complaints about court-program mediators by (1) establishing the confidentiality of these complaint procedures, (2) prohibiting persons who participated in or received information about a complaint proceeding from subsequently adjudicating related disputes, and (3) aiding courts in obtaining participants’ agreement to disclosure of mediation communications in complaint proceedings.

Many comments submitted when these rules were circulated for comment suggested that the Judicial Council should adopt a uniform procedure for addressing complaints about court-program mediators or suggested elements that should be included in these

¹ The Evidence Code provides, in substance, that:

- (1) Statements made and writings prepared for the purpose of, in the course of, or pursuant to a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings in which testimony can be compelled unless all mediation participants expressly agree to their disclosure. (Evid. Code, §§ 1119(a)–(b) and 1122(a)(1).)
- (2) All communications, negotiations, or settlement discussions in the course of a mediation shall remain confidential unless all mediation participants expressly agree to their disclosure. (Evid. Code, §§ 1119(c) and 1122(a)(1) .)
- (3) No one may submit any kind of mediator report, assessment, evaluation, recommendation, or finding concerning a mediation to a court or other adjudicative body, and a court or adjudicative body may not consider any such report, unless all parties to the mediation expressly agree otherwise. (Evid. Code, § 1121.)
- (4) A mediator is not competent to testify in any subsequent civil proceeding about any statement or conduct occurring at or in connection with the mediation. (Evid. Code, § 703.5.)

complaint procedures. In response to those suggestions, the ADR Subcommittee of the Civil and Small Claims Advisory Committee formed the Working Group on Uniform Procedures for Addressing Complaints About Court-Program Mediators to study whether a uniform complaint procedure would be feasible and beneficial and, if so, to help design such a procedure.² The working group considered procedures that both California courts and other states have established for resolving complaints about mediators. It concluded that it would be beneficial for the Judicial Council to adopt a uniform, flexible, and informal complaint procedure and assisted considerably in developing a proposal for such a procedure.

In 2007, the Civil and Small Claims Advisory Committee circulated for public comment a proposal for a uniform complaint procedure that the working group had assisted in developing. Because of the relatively small number of courts that commented on the proposal and concerns that two court executive officers had raised about the complexity of the proposed uniform complaint procedure, the Judicial Council's Rules and Projects Committee suggested that the advisory committee consider the proposal further and seek additional input about it.

In response to this suggestion, the committee obtained additional input, significantly revised the 2007 complaint procedure proposal, and circulated a revised proposal for public comment in spring 2008. Instead of requiring courts to follow a uniform complaint procedure, the proposal that was circulated for comment in 2008 would have established new general requirements concerning complaint procedures and allowed courts to either establish a complaint procedure that complied with these requirements by local rule or follow a "default" complaint procedure, detailed in the California Rules of Court.

Based on the public comments received on this revised proposal and input from the Trial Court Presiding Judges and Court Executives Advisory Committees' Joint Rules Subcommittee and the Judicial Council's Rules and Projects Committee, the committee further modified its proposal to eliminate the default complaint procedure. Instead, as described more fully below, the committee now recommends expanding the general requirements concerning complaint procedures and requiring courts to adopt a complaint procedure consistent with these general requirements by local rule.

Overview of current proposal

The amendments recommended by the committee would create a new, separate article (article 3) titled Requirements for Addressing Complaints About Court-Program

² The Working Group on Uniform Procedures for Addressing Complaints About Court-Program Mediators included representatives of the ADR Subcommittee, court and noncourt ADR program administrators, mediation trainers, and mediators who serve in court-mediation programs and conduct private mediations. (A roster of the working group is attached at page 68.) The advisory committee considered it important to obtain input from mediators, who frequently serve as volunteers in court-mediation programs, because courts have expressed concerns that complaint procedure requirements might affect willingness to serve on their panels.

Mediators within the title of the rules concerning alternative dispute resolution in civil cases and the chapter of those rules that specifically addresses mediation of civil cases.³ The rules in this article would include expanded general requirements concerning complaint procedures and provide that courts that are currently required to establish complaint procedures must do so by local rule of court. Article 3 would also include the rules that the Judicial Council adopted in 2005 to preserve mediation confidentiality, with some revisions. The committee is also recommending that the Administrative Office of the Courts develop model complaint procedures, based on the default complaint procedure that was circulated for comment, to assist courts in adopting local rules that are consistent with the proposed new general requirements.⁴

The current proposal will promote the quality of court mediation programs and public confidence in the mediation process and the courts by helping to ensure that complaints about court-program mediators are addressed in a manner that is fair and respectful to the interested parties and consistent with the mediation confidentiality laws. Requiring that complaint procedures be established by local rule will allow tailoring these procedures to local circumstances, ensure that there is an opportunity for public comment about the procedures, and facilitate public access to the local procedures. Providing model complaint procedures will reduce the administrative burdens and technical challenges that courts might experience in developing local complaint procedures.

Rules 3.865 and 3.868—Application of article 3 and local rule requirement

New rule 3.865 would provide that article 3 applies to each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates a mediator to mediate any general civil case pending in that court. These are the same courts that are required to establish complaint procedures under current rule 3.865(a). Current rule 3.865(a) would be renumbered as rule 3.868 and amended to provide that these courts must establish, by local rule of court, a complaint procedure that is consistent with article 3.

Rule 3.866—Definitions

Rule 3.866 would list the definitions applicable to article 3. It would define “complaint” as a written communication presented to the court’s complaint coordinator indicating that a mediator may have violated a provision of the rules of conduct for mediators. It would

³ Division 8 of title 3 of the Rules of Court contains the rules concerning ADR in civil cases. Chapter 3 of division 8 includes the general rules regarding the mediation of civil cases. Article 2 of chapter 3 contains the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, including the current requirements concerning superior court procedures for addressing complaints about such mediators.

⁴ The nature and goals of court-connected mediation programs and the mediation confidentiality statutes create special challenges that must be considered and addressed in designing complaint procedures. The default complaint procedure was developed with the guidance of a working group that included court ADR administrators, mediators, and others from around the state who have particular expertise in these issues and has been the subject of considerable public input. (See also footnote 2.)

define “inquiry” as an unwritten communication of the same nature. This distinction is important because this proposal would not require any court action concerning inquiries.

Rule 3.869—General requirements for complaint procedures

The new general requirements for complaint procedures would be stated in new rule 3.869. Subdivision (a) of this rule provides that complaints should be submitted to the complaint coordinator, and subdivision (b) requires the coordinator to acknowledge receipt of all complaints. Under subdivision (c), the complaint coordinator would be required to conduct a preliminary review of all complaints to determine whether they could be resolved informally or would require an investigation. For those rare complaints not resolved in the preliminary review, subdivision (d) would require that (1) the mediator be given notice of the complaint and an opportunity to respond, (2) there be an investigation of the complaint and a recommendation as to the appropriate court action, and (3) the final decision be made by the presiding judge or a person or committee designated by the presiding judge. Subdivision (e) would require the court to notify the complainant and, if the complaint was not resolved during the preliminary review, the mediator of the court’s final action on the complaint. Subdivisions (f) and (g) would, respectively, require that the court process complaints promptly and provide that the court should maintain sufficient records of complaints and inquiries so that they can identify patterns of complaints.

Rule 3.869(d) would also require that, except in courts with eight or fewer authorized judges, a person who has experience as a mediator participate in conducting the investigation and making the recommendation concerning court action. Courts with eight or fewer authorized judges would be authorized to waive this requirement if they were not able to find a suitable person with this experience to perform the investigation and recommendation functions or if it would otherwise be a hardship.

Although rule 3.869 provides for three possible stages in the complaint procedure—preliminary review, investigation, and final decision—the advisory committee anticipates that the investigation and final decision stages will rarely be required. Complaints about court-program mediators in civil cases are infrequent, and most are informally resolved. Nevertheless, the advisory committee considers it important that appropriate procedures be in place in the event that there is a complaint that cannot be informally resolved.

Rule 3.870—Permissible actions on complaints

New rule 3.870 would replace current rule 3.865(b) and provide an expanded list of actions that the court may take after an investigation has been conducted. Advisory committee comments to rules 3.865 and 3.870 would emphasize that article 3 and rule 3.870 do not abrogate or limit a court’s authority, right, or duty to determine who may serve in its mediation program or to follow other procedures to ensure the quality of court-program mediators in contexts other than when addressing a complaint.

Rules 3.867, 3.871, and 3.872—Preserving mediation confidentiality

Current rules 3.866, 3.867, and 3.868, which the Judicial Council adopted in 2005 to help ensure that complaint proceedings are consistent with the mediation confidentiality laws, would be amended and renumbered as rules 3.867, 3.871, and 3.872, respectively. Most of the amendments to these rules are nonsubstantive. However, rule 3.867 (current rule 3.866) would be amended to require that a court make the identity of its complaint coordinator readily accessible to the public. And rule 3.871 (current rule 3.868), which generally provides that a person who has received information about a complaint is disqualified from subsequently adjudicating issues related to the mediation from which the complaint arose, would be amended to clarify that a person who received only information that was publicly disclosed under rule 3.872(d) (current rule 3.867(d)) is not disqualified. These amended and renumbered rules would be included in article 3 so that they continue to apply to all complaint procedures.

Rule 10.781

As noted above, rule 10.781 would be amended to provide that inclusion on a court list of ADR neutrals and eligibility to be recommended, appointed, or compensated by the court to serve as a neutral are revocable privileges and confer no vested right on the neutral. These amendments will help to establish appropriate expectations for complaint procedures and reduce the likelihood of a claim being asserted against a court for actions taken in such proceedings.

Revision of form ADR-107

The optional *Attendance Sheet for Court-Program Mediation of Civil Case* will be revised so that the body of the form is formatted as a table and check boxes are added for the participants to indicate their roles in the mediation. These revisions will make it easier for participants in court-program mediations to provide their names, contact information, and roles. To make the form more useful to mediators and courts, spaces will also be added for the dates of the mediation session and the participants' e-mail addresses.

Alternative Actions Considered

The advisory committee considered several different approaches for helping ensure that procedures for addressing complaints about court-program mediators are fair and consistent with mediation confidentiality statutes. These approaches included proposing a uniform complaint procedure that would apply to all courts, proposing a default complaint procedure that would apply in courts that do not adopt another procedure by local rule of court, proposing to expand the general requirements for complaint procedures, and providing a model or guide to assist courts in establishing local complaint procedures. The committee ultimately concluded that revising and expanding the existing general requirements for complaint procedures, requiring courts to establish a complaint procedure that is consistent with these requirements by local rule, and providing model complaint procedures to assist courts in doing so would be most appropriate at this time. This approach will help to ensure that complaints about

mediators are addressed in a manner that is fair and consistent with the mediation confidentiality statutes and reduce the administrative burdens and technical challenges that courts might experience in establishing complaint procedures.

The committee also considered an array of different provisions that might be included in the expanded complaint procedure requirements. Among these, the committee considered whether the requirements should apply to allegations of mediator misconduct that are not submitted to the court in writing. To reduce the courts' administrative burdens and preserve their flexibility in addressing concerns about mediators, the committee concluded that the new general requirements should apply only to allegations that are submitted in writing. The committee also considered whether the rules should require that a person with experience as a mediator participate in resolving complaints about mediator conduct. To assist in the appropriate resolution of complaints and to enhance the credibility of complaint proceedings, the committee concluded that the rules of court should require that, in larger courts, a person with experience as a mediator participate in investigating and recommending the disposition of any complaints that are not resolved through the preliminary review process, but that the rules should allow courts with eight or fewer authorized judges to waive this requirement under specified circumstances.

Comments From Interested Parties

Overall summary of comments

This proposal was circulated as part of the regular spring 2008 comment cycle. Fifteen organizations or individuals submitted comments. Of these, five indicated that they agree with the proposal and seven indicated that they agree with the proposal if modified. Three commentators did not express an overall position on the proposal. The text of the comments, sorted by topic, and the committee's responses are attached beginning on page 30.

Default complaint procedure

Background

In addition to the general requirements in article 3, the proposal circulated for comment included a "default complaint procedure" that would automatically apply if a court had not adopted a complaint procedure by local rule of court. The invitation to comment specifically requested input concerning whether the California Rules of Court should provide such a default complaint procedure, or whether courts should instead be provided with a model complaint procedure that would only be effective if adopted locally.

Comments Submitted

Five commentators responded to this question. The Superior Court of Ventura County commented that giving courts the flexibility to implement their own complaint procedures consistent with the rules of court or defaulting to the specific procedures

stated in the rules of court is a helpful option. The Superior Court of San Francisco County commented that it is fair to require a default procedure to apply if a court has not adopted a local procedure.

The Trial Court Presiding Judges/Court Executives Advisory Committees Joint Rules Subcommittee; the Superior Court of San Diego County; and Ms. Mary Beth Todd, executive officer of the Superior Court of Calaveras County, expressed concerns about or opposed the proposed default complaint procedure. The Joint Rules Subcommittee expressed concerns about the impact of the default complaint procedure on smaller courts and about including a default complaint procedure in the California Rules of Court.⁵ Ms. Todd commented that the default complaint procedure seems excessive for inclusion in the California Rules of Court and more appropriate as a tool for courts to consider in drafting a local rule. The Superior Court of San Diego County commented that including the default complaint procedure in the rules of court could create unnecessary confusion, because the application of the default procedures to a particular court would not be readily apparent to persons reviewing the rules of court.

Advisory Committee Recommendations

Most of the commentators who specifically addressed this question expressed concerns about establishing a default complaint procedure in the California Rules of Court. Based on the weight of these comments, the advisory committee has revised its proposal to eliminate the default complaint procedure. Instead, the committee recommends that the Administrative Office of the Courts develop one or more model complaint procedures, based on the proposed default procedure that was circulated for comment. These model procedures will assist courts in adopting local rules that are consistent with the new general requirements in rule 3.869. The advisory committee also recommends that staff work with smaller courts to develop model procedures more tailored to their needs and with any other courts that may request assistance in developing local complaint procedures.

Establishing complaint procedures by local rule (rule 3.868)

Background

The invitation to comment specifically requested input concerning whether courts that elect to establish a local complaint procedure, rather than to follow the proposed default complaint procedure, should be required to do so by adoption of a local rule of court.

⁵ On August 19, 2008, after submitting its written comments, the TCPJAC/CEAC Joint Rules Subcommittee expressed continuing concerns about the impact of the proposal on small courts and general concerns about setting a precedent for putting any default procedure in the rules of court.

Comments Submitted

Four commentators specifically addressed this question. The Orange County Bar Association supported requiring local procedures to be adopted by local rule because it would make the procedures readily available, ensure their accuracy and quality (because local rules must be circulated for comment), prevent the procedures from being changed repeatedly or on mere suggestion, and provide the public and mediators with notice and certainty regarding the procedures. Ms. Todd commented that requiring courts to adopt local rules is consistent with other rules of court that require complaint processes.

The Superior Courts of San Diego and San Francisco Counties opposed requiring that local complaint procedures be adopted by a local rule of court. The Superior Court of San Diego County opposed this requirement because local rules cannot be readily revised. The Superior Court of San Francisco County commented that formal local rules should not be required for the purpose of ease of reference, because the public and mediators can be made aware of local complaint procedures through their publication in written form and online.

Advisory Committee Recommendations

Based on the comments received, the advisory committee recommends that the Judicial Council adopt rule 3.868, requiring that the courts adopt complaint procedures by local rule of court. As the Orange County Bar Association noted, establishing local complaint procedures by local rule would not only ensure that interested persons can readily access the rules but would also promote the stability and enhance the quality of the rules. The advisory committee also believes that following the public comment process for adopting local rules will enhance the acceptance of local complaint procedures and trust and confidence in court mediation programs. The committee does not anticipate that it will be necessary for courts to frequently revise local complaint procedures and therefore does not anticipate that following the procedures for amending local rules would be a significant burden.

Investigation and recommendation by a person with experience as a mediator (rule 3.869(d)(2))

Background

The invitation to comment specifically requested input concerning whether the rules should require at least one person with experience as a mediator to participate in conducting any investigation and making a recommendation concerning court action on the complaint, or whether the rules should allow a judicial officer or court staff member who does not have mediation experience to perform these functions.

Comments Submitted

Six commentators specifically addressed this question, and four of them supported including this mediation experience requirement in the rules. The State Bar ADR

Committee responded that, to give the complaint process legitimacy and acceptance, it believes it is “absolutely critical” that an experienced mediator be included on any committee charged with judging the conduct and behavior of mediators in a mediation setting. The Superior Court of San Francisco County commented that it would be “quite beneficial” for the rules to require that at least one person with mediation experience participate in conducting the investigation and recommending the final disposition because a mediation background will be helpful in determining whether the facts surrounding the mediation amount to a violation of the ethical rules or laws. The Superior Court of Riverside County commented that at least one person with experience as a mediator should participate in conducting the investigation and recommending the final disposition, for the reasons described in advisory committee comment to proposed rule 3.869 (rule 3.870 of the proposal circulated for comment). The Orange County Bar Association commented that at least one person with experience as a mediator should participate in any investigation and, in the case of a committee-conducted investigation, preferably more than one person.

Two commentators questioned the necessity for or opposed the experience requirement. The TCPJAC/CEAC Joint Rules Subcommittee questioned whether all investigations would need to be conducted by a person qualified as a mediator and suggested that smaller courts with limited mediator resources may have difficulty complying with this requirement. The Superior Court of San Diego County opposed the requirement and suggested that the rule should allow a judicial officer to conduct the investigation and make a recommendation, regardless of whether he or she has experience as a mediator. The court explained that judicial officers are capable of performing these functions and expressed concern that using a mediator on the court’s panel or a private mediator could raise peer review problems, including the risk of violating the confidentiality of complaint procedures under rule 3.871 (rule 3.868 as circulated).

Advisory Committee Recommendations

The majority of the commentators who specifically addressed this question supported the rules requiring that a person with experience as a mediator participate in conducting any investigation and making a recommendation concerning court action on a complaint that is not resolved through the preliminary review. Based on the comments submitted, the advisory committee recommends that the Judicial Council adopt this requirement but allow smaller courts to waive the requirement if the court cannot find a suitable, qualified individual to perform these functions or for other grounds of hardship. This exception is modeled after rule 10.777, which provides that courts with eight or fewer authorized judges can waive the qualifications of court investigators, probate attorneys, and probate examiners.

As noted in the comments of the Orange County Bar Association, the State Bar ADR Committee, and the Superior Court of San Francisco County, a person with experience as a mediator will provide a helpful perspective in determining whether a mediator’s

conduct was appropriate or violated the rules of conduct and will enhance the legitimacy and acceptance of the complaint process. The advisory committee thinks that the participation of a person with experience as a mediator will also help other committee members who do not have such experience to recommend an appropriate disposition.

Because complaints about mediators are rare and are almost always informally resolved, the advisory committee anticipates that investigations, and thus the necessity for appointment of a person with experience as a mediator to investigate complaints, will very rarely be required, particularly in smaller courts. The committee believes that if this requirement does arise in a court that does not have an available judicial officer or staff with experience as a mediator and the participation of a local mediator is problematic, the court could readily obtain the assistance of a judicial officer, a court staff member, or a mediator from another court.

However, to address commentators' concerns about the impact of this requirement on smaller courts, the advisory committee is recommending that the rule allow courts with eight or fewer authorized judges to waive the requirement that an individual who has experience as a mediator participate in conducting the investigation and making the recommendation concerning complaints not resolved in the preliminary review if the court cannot find a suitable, qualified individual to perform these functions or for other grounds of hardship.

Mediators subject to complaint procedure (rule 3.866)

Background

Rule 3.867(2) of the proposal circulated for comment defined a court-program mediator, to whom the complaint procedure would apply, as follows:

“Court-program mediator” means a person or organization that is on the court’s list of mediators for general civil cases or that is recommended, selected, appointed, or compensated by the court to mediate a general civil case pending in the court.

Comments Submitted

Three commentators raised concerns that the scope of the mediators who would be subject to the complaint procedures is too broad. ADR Services, Inc. and the State Bar ADR Committee suggested that including organizations in the definition of court-program mediator was problematic. ADR Services, Inc. also questioned whether individual mediators who are recommended by the court should be subject to the complaint procedures. The Superior Court of San Diego County commented that the complaint procedures should not be applicable to “private” mediators who may be recommended or appointed by a court based on the parties’ stipulation or mediators who are included on a list that the court makes available to litigants as a resource but who are not on a court panel.

Advisory Committee Recommendations

In response to these comments, the advisory committee revised the definition of “court-program mediator” to delete the reference to organizations. Organizations generally do not directly conduct mediations. The revised definition included in this proposal provides that a court-program mediator is “a person subject to the rules of conduct under rule 3.851.” This revised definition is more consistent with the rules of conduct, which define a mediator as “a neutral person who conducts a mediation.” (See Cal. Rules of Court, rule 3.852(2).)

The committee is recommending that mediators who have agreed to be included on a court’s list or panel or who are recommended, selected, appointed, or compensated by the court remain subject to the complaint procedures. Under rule 3.851, the rules of conduct apply to mediations in which a mediator (1) has agreed to be included on a superior court’s list or panel and has been notified that he or she was selected to mediate a case within that court’s mediation program and (2) has agreed to mediate a case after being notified that he or she was recommended, selected, or appointed by the court or will be compensated by the court to mediate a case in a court’s mediation program. The advisory committee thinks that it is logical and appropriate that the rules of conduct and the complaint procedures used to enforce those rules apply to the same groups of mediators. In addition, narrowing the application of the rules of conduct or of the complaint procedure requirement to exclude mediators who are on court lists or recommended by courts would be a significant substantive change in the current rules and would need to be circulated for public comment before being considered for adoption. The advisory committee will consider whether to circulate possible revisions to the current application of the rules of conduct and required complaint procedures in a future rules cycle.

Implementation Requirements and Costs

The advisory committee does not anticipate that the proposal will result in any significant new administrative requirements or expenses for courts. Courts that make a list of mediators available to litigants in general civil cases or that recommend, select, appoint, or compensate a mediator to mediate a general civil case are already required to establish local procedures for resolving complaints about those mediators and to designate a person who is knowledgeable about mediation to receive and coordinate the investigation of any such complaints. Although the proposal will require some courts to adopt local rules establishing complaint procedures and may require adjustments to some existing local complaint procedures, the committee expects these adjustments to be small, because an effort was made to make this proposal consistent with existing local complaint procedures. Additionally, the model complaint procedures that will be developed will reduce administrative burdens and technical challenges that courts might otherwise face in developing local complaint procedures.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective July 1, 2009:

1. Amend and renumber rules 3.865, 3.866, 3.867, and 3.868 as rules 3.868, 3.867, 3.871, and 3.872, respectively, and adopt rules 3.865, 3.866, 3.869, and 3.870 to revise and expand the current general requirements concerning superior court procedures for addressing complaints about mediators who are required to comply with the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases (Cal. Rules of Court, rule 3.850 et seq.);
2. Renumber current rules 3.870–3.878 as rules 3.890–3.898 to allow the revised general requirements concerning complaint procedures to immediately follow the rules of conduct for mediators;
3. Amend rule 10.781 to provide that inclusion on a court list of alternative dispute resolution neutrals and eligibility to be recommended, appointed, or compensated by the court to serve as a neutral are revocable privileges and confer no vested right on the neutral; and
4. Revise *Attendance Sheet for Court-Program Mediation of Civil Case* (form ADR-107) to make this optional attendance sheet more user-friendly.

The text of the proposed rules is attached beginning at page 18, and the revised form is attached at page 29.

The Civil and Small Claims Advisory Committee also recommends that the Administrative Office of the Courts develop model complaint procedures, based on the default complaint procedure set forth in article 4 of the proposal that was circulated for comment, to assist courts in adopting complaint procedures by local rule of court.

Attachments

1 Rules 3.870–3.878 of the California Rules of Court are renumbered as rules 3.890–3.898,
2 respectively; rules 3.865, 3.866, 3.867, and 3.868 are amended and renumbered as rules
3 3.868, 3.867, 3.871, and 3.872, respectively; rules 3.865, 3.866, 3.869, and 3.870 are
4 adopted; and rule 10.781 is amended, effective July 1, 2009, to read:

5
6
7 **Division 8. Alternative Dispute Resolution**

8
9 **Chapter 3. General Rules Relating to Mediation of Civil Cases**

10
11 **Article 3. Requirements for Addressing Complaints About**
12 **Court-Program Mediators**

13
14 **Rule 3.865. Application and purpose**

15
16 The rules in this article apply to each superior court that makes a list of mediators
17 available to litigants in general civil cases or that recommends, selects, appoints, or
18 compensates a mediator to mediate any general civil case pending in that court. These
19 rules are intended to promote the resolution of complaints that mediators in court-
20 connected mediation programs for civil cases may have violated a provision of the rules
21 of conduct for such mediators in article 2. They are intended to help courts promptly
22 resolve any such complaints in a manner that is respectful and fair to the complainant and
23 the mediator and consistent with the California mediation confidentiality statutes.

24
25 **Advisory Committee Comment**

26
27 As used in this article, complaint means a written communication presented to a court's complaint
28 coordinator indicating that a mediator may have violated a provision of the rules of conduct for mediators
29 in article 2.

30
31 Complaints about mediators are relatively rare. To ensure the quality of court mediation panels and public
32 confidence in the mediation process and the courts, it is, nevertheless, important to ensure that any
33 complaints that do arise are resolved through procedures that are consistent with California mediation
34 confidentiality statutes (Evid. Code, §§ 703.5 and 1115 et seq.), as well as fair and respectful to the
35 interested parties.

36
37 The requirements and procedures in this article do not abrogate or limit a court's inherent or other
38 authority, in its sole and absolute discretion, to determine who may be included on or removed from a
39 court list of mediators; to approve or revoke a mediator's eligibility to be recommended, selected,
40 appointed, or compensated by the court; or to follow other procedures or take other actions to ensure the
41 quality of mediators who serve in the court's mediation program in contexts other than when addressing a
42 complaint. The failure to follow a requirement or procedure in this article will not invalidate any action
43 taken by the court in addressing a complaint.

1
2 **Rule 3.866. Definitions**
3

4 As used in this article, unless the context or subject matter requires otherwise:
5

- 6 (1) “The rules of conduct” means rules 3.850–3.860 of the California Rules of Court in
7 article 2.
8
9 (2) “Court-program mediator” means a person subject to the rules of conduct under rule
10 3.851.
11
12 (3) “Inquiry” means an unwritten communication presented to the court’s complaint
13 coordinator indicating that a mediator may have violated a provision of the rules of
14 conduct.
15
16 (4) “Complaint” means a written communication presented to the court’s complaint
17 coordinator indicating that a mediator may have violated a provision of the rules of
18 conduct.
19
20 (5) “Complainant” means the person who makes or presents a complaint.
21
22 (6) “Complaint coordinator” means the person designated by the presiding judge under
23 rule 3.867(a) to receive complaints and inquiries about the conduct of mediators.
24
25 (7) “Complaint committee” means a committee designated or appointed to investigate
26 and make recommendations concerning complaints under rule 3.869(d)(2).
27
28 (8) “Complaint procedure” means a procedure for presenting, receiving, reviewing,
29 responding to, investigating, and acting on any inquiry or complaint.
30
31 (9) “Complaint proceeding” means all of the proceedings that take place as part of a
32 complaint procedure concerning a specific inquiry or complaint.
33
34 (10) “Mediation communication” means any statement that is made or any writing that is
35 prepared for the purpose of, in the course of, or pursuant to a mediation or a
36 mediation consultation, as defined in Evidence Code section 1115, and includes any
37 communications, negotiations, and settlement discussions between participants in
38 the course of a mediation or a mediation consultation.

39
40 **Advisory Committee Comment**
41

42 **Paragraph (2).** Under rule 3.851, the rules of conduct apply when a mediator, or a firm with which a
43 mediator is affiliated, has agreed to be included on a superior court’s list or panel of mediators for general
44 civil cases and is notified by the court or the parties that he or she has been selected to mediate a case

1 within that court’s mediation program or when a mediator has agreed to mediate a general civil case after
2 being notified that he or she was recommended, selected, or appointed by a court, or will be compensated
3 by a court, to mediate a case within a court’s mediation program.

4
5 **Paragraphs (3) and (4).** The distinction between “inquiries” and “complaints” is significant because
6 some provisions of this article apply only to complaints (i.e., written communications presented to the
7 court’s complaint coordinator indicating that a mediator may have violated a provision of the rules of
8 conduct) and not to inquiries.

9
10
11 **Rule 3.867.3.866. Designation of person to receive inquiries and complaints**
12 **Complaint coordinator**

13
14 **(a) Designation of the complaint coordinator**

15
16 ~~In each superior court that is required to establish a complaint procedure under rule~~
17 ~~3.865, The presiding judge must designate a person who is knowledgeable about~~
18 ~~mediation to receive and coordinate the investigation of any inquiries or complaints~~
19 ~~about the conduct of mediators who are subject to rule 3.865 serve as the complaint~~
20 ~~coordinator.~~

21
22 **(b) Identification of the complaint coordinator**

23
24 The court must make the complaint coordinator’s identity and contact information
25 readily accessible to litigants and the public.

26
27 Advisory Committee Comment

28
29 The alternative dispute resolution program administrator appointed under rule 10.783(a) may also be
30 appointed as the complaint coordinator if that person is knowledgeable about mediation.

31
32
33 **Rule 3.868.3.865. Complaint procedure required**

34
35 **(a) Court procedures required**

36
37 ~~Each superior court that makes a list of mediators available to litigants in general~~
38 ~~civil cases or that recommends, selects, appoints, or compensates a mediator to~~
39 ~~mediate any general civil case pending in the court to which this article applies~~
40 ~~under rule 3.865 must establish a complaint procedures by local rule of court that is~~
41 ~~consistent with this article. for receiving, investigating, and resolving complaints~~
42 ~~that mediators who are on the court's list or who are recommended, selected,~~
43 ~~appointed, or compensated by the court failed to comply with the rules for conduct~~
44 ~~of mediators set forth in this article, when applicable.~~

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

2
3 ~~The court may impose additional mediation training requirements on a mediator,~~
4 ~~reprimand a mediator, remove a mediator from the court's panel or list, or otherwise~~
5 ~~prohibit a mediator from receiving future mediation referrals from the court if the~~
6 ~~mediator fails to comply with the rules of conduct for mediators in this article, when~~
7 ~~applicable.~~
8
9

10 **Rule 3.869. General requirements for complaint procedures and complaint**
11 **proceedings**

12
13 **(a) Submission and referral of inquiries and complaints to the complaint**
14 **coordinator**

15
16 All inquiries and complaints should be submitted or referred to the complaint
17 coordinator.
18

19 **(b) Acknowledgment of complaint**

20
21 The complaint coordinator must send the complainant a written acknowledgment
22 that the court has received the complaint.
23

24 **(c) Preliminary review and disposition of complaints**

25
26 The complaint coordinator must conduct a preliminary review of all complaints to
27 determine whether the complaint can be informally resolved or closed, or whether
28 the complaint warrants investigation.
29

30 **(d) Procedure for complaints not resolved through the preliminary review**

31
32 The following procedures are required only if a complaint is not resolved or closed
33 through the preliminary review.
34

35 **(1) Mediator's notice and opportunity to respond**

36
37 The mediator must be given notice of the complaint and an opportunity to
38 respond.
39
40

1 (2) Investigation and recommendation

2
3 (A) Except as provided in (B), the complaint must be investigated and a
4 recommendation concerning court action on the complaint must be
5 made by either an individual who has experience as a mediator and
6 who is familiar with the rules of conduct stated in article 2 or a
7 complaint committee that has at least one such individual as a member.

8
9 (B) A court with eight or fewer authorized judges may waive the
10 requirement in (A) for participation by an individual who has
11 experience as a mediator in conducting the investigation and making
12 the recommendation if the court cannot find a suitable qualified
13 individual to perform the functions described in (A) or for other
14 grounds of hardship.

15
16 (3) Final decision

17
18 The final decision on the complaint must be made by the presiding judge or
19 his or her designee, who must not be the complaint coordinator or an
20 individual who investigated the complaint before its submission for final
21 decision.

22
23 (e) **Notice of final action**

24
25 (1) The court must send the complainant notice of the final action taken by the
26 court on the complaint.

27
28 (2) If the complaint was not closed during the preliminary review, the court must
29 send notice of the final action to the mediator.

30
31 (f) **Promptness**

32
33 The court must process complaints promptly at all stages.

34
35 (g) **Records of complaints**

36
37 The court should maintain sufficient information about each complaint and its
38 disposition to identify any history or patterns of complaints submitted under these
39 rules.

40
41 **Advisory Committee Comment**

42
43 The Administrative Office of the Courts has developed model local rules that satisfy the requirements of
44 this rule. These model local rules were developed with input from judicial officers, court administrators,

1 alternative dispute resolution (ADR) program administrators, court-program mediators, and public
2 commentators and are designed so that they can be readily adapted to the circumstances of individual
3 courts and specific complaints. Courts are encouraged to adopt rules that follow the model rules, to the
4 extent feasible. Courts can obtain copies of these model rules from civil ADR program staff at the
5 Administrative Office of the Courts.

6
7 **Subdivision (a).** Coordination of inquiries and complaints by a person knowledgeable about mediation is
8 important to help ensure that the requirements of this article are followed and that mediation
9 confidentiality is preserved.

10
11 **Subdivision (c).** Courts are encouraged to resolve inquiries and complaints about mediators using the
12 simplest, least formal procedures that are appropriate under the circumstances, provided that they meet
13 the requirements stated in this article.

14
15 Most complaints can be appropriately resolved during the preliminary review stage of the complaint
16 process, through informal discussions between or among the complaint coordinator, the complainant, and
17 the mediator. Although complaint coordinators are not required to communicate with the mediator during
18 the preliminary review, they are encouraged to consider doing so. For example, some complaints may
19 arise from a misunderstanding of the mediator’s role or from behavior that would not violate the standards
20 of conduct. These types of complaints might appropriately be addressed by providing the complainant
21 with additional information or by informing the mediator that certain behavior was upsetting to a
22 mediation participant.

23
24 The circumstances under which a complaint coordinator might informally resolve or close a complaint
25 include, for example, when (1) the complaint is withdrawn; (2) no violation of the rules of conduct
26 appears to have occurred; (3) the alleged violation of the rules of conduct is very minor and the mediator
27 has provided an acceptable explanation or response; and (4) the complainant, the mediator, and the
28 complaint coordinator have agreed on a resolution. In determining whether to close a complaint, the
29 complaint coordinator might also consider whether there are or have been other complaints about the
30 mediator.

31
32 **Subdivision (d).** At the investigation and recommendation stage, all courts are encouraged to consider
33 using a complaint committee comprised of members with a variety of backgrounds, including at least one
34 person with experience as a mediator, to investigate and make recommendations concerning those rare
35 complaints that are not resolved during the preliminary review.

36
37 Courts are also encouraged to have a judicial officer who is knowledgeable about mediation, or a
38 committee that includes another person who is knowledgeable about mediation, make the final decision
39 on complaints that are not resolved through the preliminary review.

40
41
42 **Rule 3.870. Permissible court actions on complaints**

43
44 After an investigation has been conducted, the presiding judge or his or her designee may
45 do one or more of the following:

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

48
49 (2) Counsel, admonish, or reprimand the mediator;

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

10 **Advisory Committee Comment**

11
12 This rule does not abrogate or limit any existing legal right or duty of the court to take other actions,
13 including interim suspension of a mediator pending final action by the court on a complaint.
14

15
16 **Rule ~~3.871.3.867~~. Confidentiality of complaint procedures proceedings,**
17 **information, and records**
18

- 19 (a) **Intent** ~~This rule’s requirement that rule 3.865 complaint procedures be confidential~~
20 ~~is~~

21 This rule is intended to:
22

- 23 (1) Preserve the confidentiality of mediation communications as required by
24 Evidence Code sections 1115–1128;
25
26 (2) Promote cooperation in the reporting, investigation, and resolution of
27 complaints about court-program mediators ~~on court panels~~; and
28
29 (3) Protect mediators against damage to their reputations that might result from
30 the disclosure of unfounded complaints against them.
31

32 (b) **Preserving the confidentiality of mediation communications**
33

34 ~~All procedures for receiving, investigating, and resolving inquiries or complaints~~
35 ~~about the conduct of mediators~~ complaint procedures and complaint proceedings
36 must be designed and conducted in a manner that ~~to~~ preserves the confidentiality of
37 mediation communications, including but not limited to the confidentiality of any
38 communications between the mediator and individual mediation participants or
39 subgroups of mediation participants.
40

41 (c) **Confidentiality of complaint proceedings**
42

43 ~~All communications, inquiries, complaints, investigations, procedures,~~
44 ~~deliberations, and decisions about the conduct of a mediator under rule 3.865~~

1 complaint proceedings must occur in private and must be kept confidential. No
2 information or records concerning the receipt, investigation, or resolution of an
3 inquiry or a complaint ~~under rule 3.865~~ may be open to the public or disclosed
4 outside the course of the ~~rule 3.865~~ complaint procedure proceeding except as
5 provided in (d) or as otherwise required by law.

6
7 **(d) Authorized disclosures**

8
9 After the decision on a complaint, the presiding judge, or a person designated by
10 whom the presiding judge for this purpose designates to do so, may, in his or her
11 discretion, authorize the public disclosure of information or records concerning rule
12 3.865 the complaint procedures proceeding that do not reveal any mediation
13 communications, including The disclosures that may be authorized under this
14 subdivision include the name of a mediator against whom action has been taken
15 under rule 3.865 3.870, the action taken, and the general basis on which the action
16 was taken. In determining whether to authorize the disclosure of information or
17 records under this subdivision, the presiding judge or the designee should consider
18 the purposes of the confidentiality of rule 3.865-complaint procedures proceedings
19 stated in (a)(2) and (a)(3).

20
21 **(e) Disclosures required by law**

22
23 In determining whether the disclosure of information or records concerning ~~rule~~
24 ~~3.865~~ a complaint procedures proceeding is required by law, courts should consider
25 the purposes of the confidentiality of ~~rule 3.865-complaint procedures proceedings~~
26 stated in (a). Before If it appears that the disclosure of information or records
27 concerning a complaint procedures under rule 3.865 proceeding that would reveal
28 mediation communications is ordered required by law, before the information or
29 records are disclosed, notice should be given to any person whose mediation
30 communications may thereby be revealed.

31
32 **Advisory Committee Comment**

33
34 Under rule 3.866(9), the complaint proceedings covered by this rule include proceedings to address
35 inquiries as well as complaints (i.e., to unwritten as well as written communications indicating that a
36 mediator may have violated a provision of the rules of conduct).

37
38 **Subdivision (a).** See Evidence Code sections 1115 and 1119 concerning the scope and types of mediation
39 communications protected by mediation confidentiality. Rule 3.871 is intended to supplement the
40 confidentiality of mediation communications established by the Evidence Code by ensuring that
41 disclosure of information or records about a complaint proceeding does not reveal confidential mediation
42 communications. Rule 3.871 is not intended to supersede or abrogate the confidentiality of mediation
43 communications established by the Evidence Code.

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

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

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

26 **Rule 3.872.3.868. Disqualification from subsequently serving as an adjudicator**

27

28 A person who has participated in ~~or received information about the receipt, investigation~~
29 ~~or resolution of an inquiry or a complaint under rule 3.865~~ a complaint proceeding or
30 otherwise received information about the substance of a complaint, other than
31 information that is publicly disclosed under rule 3.871(d), must not subsequently hear or
32 determine any contested issue of law, fact, or procedure concerning the dispute that was
33 the subject of the underlying mediation or any other dispute that arises from the
34 mediation as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative
35 capacity, in any court action or proceeding.
36

37 **Advisory Committee Comment**

38

39 Persons who participated in a complaint proceeding are prohibited from subsequently adjudicating the
40 dispute that was the subject of the underlying mediation or any other dispute that arises from the
41 mediation because they may have learned of confidential mediation communications that were disclosed
42 in the complaint proceeding or may have been influenced by what transpired in that proceeding. Because
43 the information that can be disclosed publicly under rule 3.871(d) is limited and excludes mediation
44 communications, it is unnecessary to disqualify persons who received only publicly disclosed information
45 from subsequently adjudicating the dispute.
46

1
2 **Chapter 4. Civil Action Mediation Program Rules**
3

4 **Rule 3.890-3.870. Application**

5
6 ***
7

8
9 **Rule 3.891-3.871. Actions subject to mediation**

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11 ***
12

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14 **Rule 3.892-3.872. Panels of mediators**

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16 ***
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18 **Rule 3.893-3.873. Selection of mediators**

19
20 ***
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23 **Rule 3.894-3.874. Attendance, participant lists, and mediation statements**

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25 ***
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28 **Rule 3.895-3.875. Filing of statement by mediator**

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

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38 **Rule 3.897-3.877. Statistical information**

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Rule ~~3.898~~ 3.878. Educational material

* * *

Rule 10.781. Court-related ADR neutrals

(a)–(b) ***

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

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

Advisory Committee Comment

Subdivision (c). A court has absolute discretion to determine who may be included on a court list of ADR neutrals or is eligible to be recommended, selected, appointed, or compensated by the court to serve as a neutral (except as otherwise expressly provided by statute or rule of court).

ATTENDANCE SHEET FOR COURT-PROGRAM MEDIATION OF CIVIL CASE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

MEDIATOR: _____

PLAINTIFF/PETITIONER: _____

DEFENDANT/RESPONDENT: _____

CASE NUMBER: _____ MEDIATION SESSION DATES: _____

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

Table with 3 columns: NAME AND MAILING ADDRESS, TELEPHONE AND E-MAIL, and ROLE IN MEDIATION. It contains 8 rows for participant information, each with checkboxes for Party, Attorney, Insurance Representative, and Other.

Additional page(s) attached.

SPR08-10

Alternative Dispute Resolution: Procedures for Addressing Complaints About Court-Program Mediators for Civil Cases

(renumber Cal. Rules of Court, rules 3.865-3.868; adopt rules 3.865, 3867, 3.870, 3.871, and 3.881–3.887; amend rule 10.781; revise form ADR-107)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commentators, Overall Positions on the Proposal, and General Comments			
Commentator	Position	Comment	Committee Response
1. ADR Services, Inc. Hon. Gregory C. O’Brien, Jr. (Ret.) Retired Superior Court Judge		<p>We understand the Civil and Small Claims Advisory Committee of the State Judicial Council has circulated draft rules for public comment pertaining to court-directed mediation programs. As a major stakeholder in the private alternative dispute resolution industry, we are disappointed that we were not asked to participate in this process, particularly because a number of our neutrals volunteer regularly as members of Superior Court mediation panels throughout California. In fact, earlier this year, the Los Angeles Superior Court recognized ADR Services, Inc. for having provided more than \$1 million worth of volunteer, no-cost or low-cost, mediator time.</p> <p>ADR Services, Inc. respects the Judicial Council’s interest in promoting minimal qualifications, training and ethics standards for court-connected mediators. As strong supporters of the court’s pro-bono mediation project, we believe it is important that the program remain voluntary, assure quality, and monitor the results to the extent possible while preserving the confidentiality of mediation process.</p> <p>We understand that the draft complaint procedures have been proposed in part to create accountability on the part of panelists and to assure the credibility of the court’s program.</p>	<p>The committee has asked staff to contact the commentator concerning how it may be included on the list of interested parties who receive invitations to comment on proposed Judicial Council actions.</p>
			<p>Please see the responses to the comments of the State Bar of California Committee on Alternative Dispute Resolution, below.</p>

SPR08-10

Alternative Dispute Resolution: Procedures for Addressing Complaints About Court-Program Mediators for Civil Cases

(renumber Cal. Rules of Court, rules 3.865-3.868; adopt rules 3.865, 3867, 3.870, 3.871, and 3.881–3.887; amend rule 10.781; revise form ADR-107)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commentators, Overall Positions on the Proposal, and General Comments			
Commentator	Position	Comment	Committee Response
		While we question whether the unintended consequence of these procedures may have a certain chilling effect on participation, we will defer to the ADR Committees of the State Bar and the California Judges Association to respond in greater detail as to issues in which we share general concern.	
2. California Judges Association Hon. Ira R. Kaufman President		*The California Judges Association shares the concerns expressed by the State Bar of California’s Committee on Alternative Dispute Resolution.	Please see the comments of the State Bar of California, Committee on Alternative Dispute Resolution and the committee’s responses to those comments, below.
3. Pam Moraida Program Manager Superior Court of Solano County	A	No specific comment.	
4. Orange County Bar Association Cathrine Castaldi President	AM	See comments on specific provisions below.	
5. State Bar of California, Committee on Alternative Dispute Resolution Jessica Notini Chair (2007–2008)		The State Bar of California’s Committee on Alternative Dispute Resolution appreciates the opportunity to provide its comments regarding SPR08-10, a proposal for establishing complaint procedures in court-connected mediation programs. We address those issues that were of particular interest or significance to the	Please see the committee’s responses to the specific comments of the State Bar of California, Committee on Alternative Dispute Resolution under the separate subject headings that follow, beginning on page 35

SPR08-10

Alternative Dispute Resolution: Procedures for Addressing Complaints About Court-Program Mediators for Civil Cases

(renumber Cal. Rules of Court, rules 3.865-3.868; adopt rules 3.865, 3867, 3.870, 3.871, and 3.881–3.887; amend rule 10.781; revise form ADR-107)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commentators, Overall Positions on the Proposal, and General Comments		
Commentator	Position	Committee Response
		<p>Committee, and we welcome any inquiry or feedback you may have regarding our comments.</p> <p>I. INTRODUCTION</p> <p>We understand that the current proposal has been modified to incorporate changes suggested by earlier comments, including comments raised by this State Bar ADR Committee (see our letter of June 22, 2007). We appreciate the consideration of our comments, and are pleased to see that a number of modifications were made that address the concerns we previously raised.</p> <p>That said, we also note that there are still provisions of the current rules iteration that give us pause for concern. We understand that some of the provisions we comment upon below are contained in the existing rules; nonetheless, we raise them because they strike us as important issues and perhaps worthy of further review (either now or at a future date) in light of the comprehensive nature of this proposal.</p> <p>The Committee in particular would like to comment on the following areas:</p> <ol style="list-style-type: none"> 1) The need/propriety of disclosures; 2) The need for, and use of, written summaries of oral complaints; 3) Participation of a mediator on the Complaint

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Commentator	Position	Comment	
		Committee; 4) Confidentiality; and 5) A few miscellaneous provisions.	
6. Elizabeth Strickland Attorney-Mediator Superior Court of Santa Clara County	AM	See comments on specific provisions below.	
7. Superior Court of Los Angeles County	A	No specific comment.	
8. Superior Court of Riverside County David Gutknecht Principal Management Analyst	AM	See comments on specific provisions below.	
9. Superior Court of San Bernardino County Debra Meyers Director of Staff Counsel Services and Self-Help Division	A	No specific comment.	
10. Superior Court of San Diego County Michael M. Roddy Executive Officer	AM	See comments on specific provisions below.	
11. Superior Court of San Francisco County Jennifer Alcantara ADR Administrator	AM	See comments on specific provisions below.	
12. Superior Court of Ventura County, Self- Help Legal Access Center Tina Rasnow	A	See comments on specific provisions below.	

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List of All Commentators, Overall Positions on the Proposal, and General Comments			
Commentator	Position	Comment	Committee Response
Senor Attorney/Coordinator			
13. Derek Tabone Law Offices of Tabone APC Van Nuys	A	No specific comment.	
14. Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee (TCPJAC/CEAC) Joint Rules Subcommittee Patrick Danna Court Services Analyst—Lead Staff	AM	See comments on specific provisions below.	
15. Mary Beth Todd Executive Officer Superior Court of Calaveras County	AM	See comments on specific provisions below.	

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Commentator	Comment	Committee Response
<p>Superior Court of San Diego County Michael M. Roddy Executive Officer</p>	<p>The default complaint procedure should NOT be contained in the California Rules of Court as that could easily create unnecessary confusion, especially since it will not be readily apparent to the public, attorneys and/or mediators reviewing the California Rules of Court whether or not those rules apply to a particular court.</p>	<p>In response to this comment and others, the committee has revised its proposal to delete the default complaint procedure from the proposed rules. Instead, the committee is recommending that the Administrative Office of the Courts develop model complaint procedures, based on the default complaint procedure in the proposal circulated for comment, to assist courts in adopting complaint procedures by local rule of court.</p>
<p>Superior Court of San Francisco County Jennifer Alcantara ADR Administrator</p>	<p>It is fair to require a default complaint procedure to automatically apply if a court has not adopted a local procedure since all courts with applicable mediation programs should be required to have an objective system for handling complaints in place.</p>	<p>Please see the committee’s response to the comment of the Superior Court of San Diego County, above.</p>
<p>Superior Court of Ventura County, Self-Help Legal Access Center Tina Rasnow Senior Attorney/Coordinator</p>	<p>Giving courts flexibility to implement their own complaint procedure consistent with the state rules or defaulting to the state procedure is a helpful option.</p>	<p>Please see the committee’s response to the comment of the Superior Court of San Diego County, above.</p>
<p>Mary Beth Todd Executive Officer Superior Court of Calaveras County</p>	<p>... Recommend modify to remove default complaint process from rule. The sample would be more appropriate as a tool that may be made available to courts for consideration in drafting their local rule but seems excessive for inclusion in a rule of court which has the force and effect of law. Provision of essential elements of complaint procedure and requirement to adopt local rule is sufficient and is consistent with other rules of court requiring complaint processes.</p>	<p>Please see the committee’s response to the comment of the Superior Court of San Diego County, above. Additionally, the committee is recommending that the Administrative Office of the Courts work with representatives of small courts to develop a simplified model complaint procedure that might be more suitable for their circumstances.</p>

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Should a default complaint procedure be set forth in the California Rules of Court?	
Commentator	Committee Response

Should courts that elect to establish local complaint procedures be required to do so by local rule of court?	
Commentator	Committee Response
<p>Orange County Bar Association Cathrine Castaldi President</p>	<p>If local complaint procedures are established, they should be set forth in full in the local rules of court. Incorporating the procedures into the local rules would ensure not only their ready availability, but their accuracy and quality, as well, inasmuch as rules unlike guidelines, for example, require that they be put out for public comment prior to their adoption. This would prevent their being changed often or repeatedly or upon mere suggestion, and provide the public and mediators with notice and certainty as regards the procedures which they can anticipate and pursuant to which they operate.</p>
<p>Superior Court of San Diego County Michael M. Roddy Executive Officer</p>	<p>Courts that elect to establish local complaint procedures should NOT be required to establish them by local rule as local rules cannot be readily revised.</p> <p>Based on other comments, the committee is recommending that courts be required to establish their complaint procedures by local rule of court. The committee agrees with the comment of the Orange County Bar Association, above, that establishing any local complaint procedures by local rule of court would ensure that public comment is sought before local procedures are adopted, contribute to stability of complaint procedures, and ensure that the public and mediators can easily find local complaint procedures. The committee does not anticipate that it will be necessary for courts to frequently revise complaint procedures, and therefore does not anticipate that a</p>

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Should courts that elect to establish local complaint procedures be required to do so by local rule of court?		Committee Response
Commentator	Comment	
Superior Court of San Francisco County Jennifer Alcantara ADR Administrator	Courts that do not elect to establish local complaint procedures under Article 4, should not be required to establish complaint procedures by local rule of court since public/mediator awareness can be obtained through the publication of the complaint procedures in written form and online. It is not necessary to establish formal local rules for the mere purpose of ease of reference since that purpose could be achieved through less onerous means.	Please see the committee’s response to the comment of the Superior Court of San Diego County, above.
Mary Beth Todd Executive Officer Superior Court of Calaveras County	Provision of essential elements of complaint procedure and requirement to adopt local rule is sufficient and is consistent with other rules of court requiring complaint processes.	In response to this comment and others, the committee is recommending that courts be required to establish their complaint procedures by local rule of court.

Should the rules require that at least one person with experience as a mediator participate in conducting the investigation and recommending the final disposition of cases that are not resolved in the preliminary review?		Committee Response
Commentator	Comment	
Orange County Bar Association Cathrine Castaldi President	There should be at least one person with experience as a mediator participating in any investigation and, where a committee is anticipated to conduct the investigation, preferably more than one person with experience in order to provide a broader perspective relative to the appropriate conducting of the mediation process and to accommodate the differences in mediation styles. While judicial officers and staff should not be precluded from taking part in the conduct of any	In response to this comment and others, the committee is recommending that a person with experience as a mediator be required to participate in any investigation and in making a recommendation concerning the final action. However, in response to other comments, the committee is also recommending that courts with eight or fewer authorized judges be permitted to waive this qualification if they are not able to find a suitable person

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Should the rules require that at least one person with experience as a mediator participate in conducting the investigation and recommending the final disposition of cases that are not resolved in the preliminary review?		
Commentator	Comment	Committee Response
State Bar of California, Committee on Alternative Dispute Resolution Jessica Notini Chair (2007-2008)	<p>investigation, it is suggested that the person with the mediation experience not be drawn from either of these classes.</p> <p>IV. MEDIATOR PARTICIPATION ON COMPLAINT COMMITTEE Comments were specifically invited on whether a mediator should be a member of the complaint committee. The State Bar’s ADR Committee responds to this with a resounding and emphatic “yes.” We believe it is absolutely critical that an experienced mediator—one who is not just an academic or trainer, but who has been and is in the trenches with parties on a regular basis—be a member of any committee charged with judging the conduct and behavior of mediators in a mediation setting. Experienced mediators will bring to the table a viewpoint that will not necessarily be shared by observers and students of mediation, or administrators of court programs. Indeed, to give the complaint process legitimacy and acceptance, particularly by the mediators being governed and evaluated by the process, it is imperative that the mediators feel as if their perspective is being heard and considered. Without a mediator on the committee, we are concerned that the entire process will be compromised.</p>	<p>with this qualification to perform these functions or if it would otherwise be a hardship.,</p> <p>Please see the committee’s response to the comment of the Orange County Bar Association.</p>
Superior Court of Riverside County David Gutknecht Principal Management Analyst	The rules should require that at least one person with experience as a mediator participate in conducting the investigation and recommending the final disposition, for the reasons described in Advisory Committee Comment to	Please see the committee’s response to the comment of the Orange County Bar Association.

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Commentator	Comment	Committee Response
	<p>proposed Rule 3.870.</p> <p>Consideration should also be given to defining the term “experience as a mediator” for purposes of this rule.</p>	<p>The committee considered this suggestion, but does not recommend defining “experience as a mediator” because the appropriate level of experience for investigating different complaints, or complaints submitted in different jurisdictions, may vary.</p>
<p>Superior Court of San Diego County Michael M. Roddy Executive Officer</p>	<p>The rules should allow a judicial officer to perform these functions, regardless of whether or not the judicial officer has mediation experience. Specifically, California Rules of Court, rules 3.870 (c) (1) and 3.884(a) should be revised to eliminate the requirement of “at least one individual who has experience as a mediator.” [Rule 3.870(c)(1) in the proposal circulated for comment has been revised and renumbered as proposed rule 3.869(d)(2) and rule 3.884 has been deleted.] Judicial Officers are certainly capable of conducting an investigation and recommending the final disposition, and a court may not have court staff or judicial officers who have specific experience as a mediator which would result in the recruitment of outside assistance from a mediator on the court’s panel or a private mediator. This could raise a myriad of problems relating to a mediator investigating one of his peers in what could be a very small community of mediators, including but not limited to the risk of running afoul of the confidentiality requirements of California Rules of Court, rule 3.868 (b) and (c). Moreover, the mediator under investigation will have an opportunity to raise any and all issues that would relate to his experience as a mediator, which further serves to reduce the need for another</p>	<p>Based on the majority of the comments, which support a requirement that a person with experience as a mediator participate in investigating and making a recommendation concerning complaints, the committee is recommending that this requirement be included in the rules. As noted in the comments of the Orange County Bar Association, the State Bar ADR Committee, and the Superior Court of San Francisco County, a person with experience as a mediator will provide a helpful perspective in determining whether a mediator’s conduct was appropriate or violated the rules of conduct and will enhance the legitimacy and acceptance of the complaint process. The committee thinks that the participation of a person with experience as a mediator will also help others who do not have such experience to recommend an appropriate disposition.</p> <p>Because complaints about mediators are themselves rare and are almost always resolved informally, the committee anticipates that participation of a person with experience as a mediator will very rarely be required,</p>

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Should the rules require that at least one person with experience as a mediator participate in conducting the investigation and recommending the final disposition of cases that are not resolved in the preliminary review?		
Commentator	Comment	Committee Response
	<p>mediator’s participation in the process.</p> <p>***</p> <p>[Rule 3.870] (c) (1) should be eliminated or revised to state: “The complaint must be investigated <u>by at least one judicial officer or</u> by at least one individual who has experience as a mediator.”</p>	<p>particularly in smaller courts. If this requirement does arise and the participation of a local individual with experience as a mediator is problematic, the committee believes that the court could readily obtain the assistance of a judicial officer, court staff, or another person with mediation experience from outside the county.</p> <p>To address the concerns of this commentator and others about the potential impact of the mediation experience requirement on small courts, the committee is recommending that the rules of court allow courts with eight or fewer authorized judges to waive this qualification requirement if the court cannot find a suitable qualified individual to perform these functions or for other grounds of hardship.</p>
<p>Superior Court of San Francisco County Jeniffer Alcantara ADR Administrator</p>	<p>In the rare cases that are not resolved in the preliminary review, it would be quite beneficial to require that at least one person with mediation experience participate in conducting the investigation and recommending the final disposition. A mediation background will be helpful in the determination of whether the facts surrounding the mediation amount to some type of violation of the ethical rules/laws.</p>	<p>Please see the committee’s response to the comment of the Orange County Bar Association, above.</p>
<p>TCPJAC/CEAC Joint Rules Subcommittee Patrick Danna Court Services Analyst—Lead Staff</p>	<p>The TCPJAC/CEAC Joint Rules Subcommittee also questions whether all investigations would need to be conducted by a person qualified as a mediator and the compliance difficulties that may be experienced in jurisdictions with limited mediator resources.</p>	<p>Please see the committee’s response to the comment of the Superior Court of San Diego County, above.</p>

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Should the rules require that at least one person with experience as a mediator participate in conducting the investigation and recommending the final disposition of cases that are not resolved in the preliminary review?	
Commentator	Committee Response

Complexity and Suitability for Small Courts	
Commentator	Committee Response
<p>TCPJAC/CEAC Joint Rules Subcommittee Patrick Danna Court Services Analyst—Lead Staff</p>	<p>The Trial Court Presiding Judges Advisory Committee (TCPJAC)/Court Executives Advisory Committee (CEAC) Joint Rules Subcommittee recommends creating a simplified default procedure that would allow larger courts to establish their own complaint committees as well as general policy procedures with instructions that would be important in assisting smaller courts.*</p>
<p>Mary Beth Todd Executive Officer Superior Court of Calaveras County</p>	<p>In response to this comment and others, the committee has revised its proposal to delete the default complaint procedure from the proposed rules. Instead, the committee recommends that the Administrative Office of the Courts develop model complaint procedures, based on the default complaint procedure in the proposal circulated for comment, to assist courts in adopting complaint procedures by local rule of court. The committee is also recommending that staff work with representatives of small courts to develop a simplified model complaint procedure that might be more suitable for their circumstances.</p> <p>Please see the committee’s response to the comment of the TCPJAC/CEAC Joint Rules Subcommittee, above.</p>

Addressing Needs of Self-Represented Litigants

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Commentator	Comment	Committee Response
<p>Superior Court of Riverside County David Gutknecht Principal Management Analyst</p>	<p>Self-Represented Parties—The rules should address the special needs of self-represented parties who wish to make inquiries or complaints.</p>	<p>Article 3, which would apply to all courts that are required to have a complaint procedure, includes several provisions to address the needs of self-represented litigants who wish to make inquiries or complaints. Rule 3.867 would require the presiding judges of these courts to designate a complaint coordinator to receive inquiries and complaints and require the court to make the complaint coordinator’s identity and contact information readily accessible to litigants and the public. Rule 3.869(c) would require that complaint coordinators conduct a preliminary review of all complaints to determine whether they can be informally resolved, and an advisory committee comment would encourage courts to resolve inquiries and complaints using the simplest, least formal procedures that are appropriate under the circumstances. The committee anticipates that complaint coordinators will address self-represented litigants’ needs in connection with the resolution of complaints.</p>

Proposed Rule 3.865. Application and purpose		
Commentator	Comment	Committee Response
<p>Orange County Bar Association Cathrine Castaldi President</p>	<p>As stated in proposed rule 3.865, the purpose of the subject rules is to, inter alia, promote the resolution of complaints in a manner fair to complainant and mediator, and consistent with “... the California mediation statutes.” It is suggested that the statutes to which this rule alludes be expressly set forth. It easily could be presumed that those referred to are Evidence</p>	<p>The committee has revised its proposal to add a reference to Evidence Code sections 703.5 and 1115 et seq. to the comment to proposed rule 3.865.</p>

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Commentator	Proposed Rule 3.865. Application and purpose	Committee Response
	<p>Comment</p> <p>Code sections 703.5 and 1115 to 1128. If they are not, however, the rule should so state as a participant should know what protections will be afforded them should or when they engage in court-connected mediation and a complaint arises.</p> <p>It is possible that characterization of the manner in which existing and proposed rules resolve complaints as “fair” and “consistent” with confidentiality statutes, may be misleading. This is due to the firmly held belief by many in the mediation community that, by its very nature, no complaint procedure can simultaneously preserve mediation confidentiality (witness the provisions of rule 3.860 whereby a mediator must agree to disclose mediation communications) and the due process rights of a mediator. If a mediator cannot disclose the substance of mediation communications, he or she would be hard pressed to defend against accusations of wrongdoing. In order to implement an effective and fair complaint procedure, it would almost seem necessary to require all participants to knowingly and expressly waive their rights to confidentiality in connection with that procedure.</p> <p>Further, as a practical consideration, allowance of disclosure by court procedures which draw distinctions that such complaint proceedings are “informal” or “formal;” that such are non-evidentiary or evidentiary; that such do not rise to the level of “civil action” so as to be covered by subdivisions (a) and (b) of Evidence Code 1119; or that caucus communications are different from those in joint session and only the latter type are deserving of what many argue is the wholly “off limits” nature of all mediation communications (see the Advisory Committee</p>	<p>The committee thinks that the proposed rules are both fair to mediators and consistent with the mediation confidentiality statutes. It is the committee’s view that the mediator and other participants in a complaint procedure that is conducted in accordance with article 3 may disclose mediation communications in that complaint procedure without violating mediation confidentiality because, under the rules (current rule 3.867 and proposed rule 3.871), the complaint procedures are confidential and any mediation communications that may be disclosed in such a complaint procedure may not be publicly disclosed.</p> <p>Court-program mediators might readily protect themselves against breach of contract claims arising from disclosures in a complaint procedure by providing in their mediation confidentiality agreements that mediation communications may be disclosed in a confidential complaint procedure conducted under the California Rules of Court or a local rule of court.</p>

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Proposed Rule 3.865. Application and purpose	
Commentator	Committee Response
<p>Comments to subdivisions (a) and (b) of proposed rule 3.868), will not protect a mediator from a possible breach of contract claim where a confidentiality agreement exists.</p> <p>The complaint procedure and the complaint proceedings are what they are. A statement of purpose as proposed by rule 3.865 can neither ameliorate nor change this. Accordingly, it is suggested that such a statement best be omitted in the interests of clarity and transparency.</p>	<p>The committee thinks that stating the purposes of articles 3 and 4 in rule 3.865 promotes transparency and clarity and will help to ensure that the rules are understood and applied in a manner that is consistent with the goals that they are intended to achieve.</p>

Rule 3.866. Definitions (Rule 3.867 of the proposal circulated for comment)	
Commentator	Committee Response
<p>Orange County Bar Association Cathrine Castaldi President</p>	<p>Proposed Rule 3.867. Definitions [Rule 3.867 of the proposal circulated for comment has been renumbered as rule 3.866.] Discussion of the Proposal, at page 4, first full paragraph, notes the definition of “complaint” and of “inquiry,” and states that, “[t]hese and related changes make most provisions of the proposed complaint procedure applicable only when a concern about mediator conduct is submitted in writing.” Nowhere in the provisions of article 3, however, is this important point succinctly stated. Relying alone on the definitions set forth in proposed rule 3.867 to convey this may prove problematic. This is particularly so, when the introductory sentence to the rule indicates “context or subject matter” may require other interpretation. In order to meet this, it is suggested that this Discussion observation be included as an Advisory Committee Comment to this rule. Alternatively, a more effective approach</p> <p>The committee has added a comment to proposed rule 3.866 to highlight that most provisions of the proposed complaint procedure apply only to concerns that are submitted in writing.</p>

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Rule 3.866. Definitions (Rule 3.867 of the proposal circulated for comment)	
Commentator	Committee Response
<p>might be to incorporate into the provisions of article 3, language substantially similar to that of proposed rule 3.881. Addressing inquiries. [Rule 3.881 in the proposal circulated for comment has been deleted.]</p> <p>Subdivisions (3) and (4)</p> <p>In order to avoid a prejudicial or conclusive tone, it is suggested that within the respective definitions of “complaint” and “inquiry,” the words “has or” be removed so that the relevant phrase in each reads, “...indicating that a mediator may have violated a provision of article 2.”</p>	<p>The committee has deleted the words “has or” from paragraphs (3) and (4).</p>

Rule 3.866. Definitions—Mediators subject to complaint procedure (Rule 3.867 of the proposal circulated for comment)	
Commentator	Committee Response
<p>ADR Services, Inc. Hon. Gregory C. O’Brien, Jr. (Ret.) Retired Superior Court Judge</p>	<p>The purpose of this letter is to focus the attention of the advisory committee on the draft language of CRC 3.867, “Definitions,” which provides in pertinent part:</p> <p>(2) “<i>Court-program mediator</i>” means a person or organization that is on the court’s list of mediators for general civil cases or that is recommended, selected, appointed, or compensated by the courts to mediate a general civil case pending in the court (emphasis supplied).</p> <p>We have three specific concerns with the above-quoted language in the draft mediation rules:</p>

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Rule 3.866. Definitions—Mediators subject to complaint procedure (Rule 3.867 of the proposal circulated for comment)		
Commentator	Comment	Committee Response
	<p>(1) An “organization” does not mediate a case. Is it the intention of the drafters to entertain complaints about alternative dispute resolution providers? If so, what kinds of complaints would the court wish to investigate? Would the provider be expected to respond? If a complaint were sustained, would a provider face potential sanctions by the court?</p>	<p>The committee has revised the proposed definition of “court-program mediator” to clarify that court-program mediators are those who are subject to the rules of conduct for mediators. The reference to an organization being a court-program mediator has been removed from the definition, because the rules of conduct that may be the subject of a complaint procedure define mediator as “a neutral person who conducts a mediation” (see Cal. Rules of Court, rule 3.852(2)) and, as the commentator points out, an organization does not itself mediate a case.</p> <p>However, the rules of conduct contemplate that a court’s panel or list may include firms, as well as individuals, that provide mediation services. (See Cal. Rules of Court, rule 3.851(b).) If a court’s panel or list includes firms that provide mediation services, mediators who are affiliated with a listed firm are currently required to comply with the rules of conduct when they are notified that the firm was selected from the court list to mediate a general civil case within that court’s mediation program. (See Cal. Rules of Court, rule 3.851(b).) Mediators who are affiliated with a provider organization might therefore be the subject of a complaint procedure, although the organization itself might not.</p> <p>If, however, a provider organization engages in any acts or omissions that may render it unsuited to remain on a</p>

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Rule 3.866. Definitions—Mediators subject to complaint procedure (Rule 3.867 of the proposal circulated for comment)	
Commentator	Comment
Committee Response	
	<p>court’s panel or list, the court would not be required to follow the provisions of article 3 to remove the organization. (See, e.g., advisory committee comments to proposed rule 3.865.)</p> <p>The current proposal does not address the means by which courts may create lists of mediators. However, the rules of conduct for mediators set forth in rule 3.850 et seq. apply only to mediators as a result of their inclusion on a court list or panel if they have agreed to be included on the list or panel and have been notified that they were selected to mediate a case within the court’s mediation program. Similarly, in the case of mediators affiliated with a listed provider organization, the rules are only applicable to a mediator who has been notified that the organization was selected from the court list to mediate a general civil case within that court’s mediation program. (See Cal. Rules of Court, rule 3.851.) The committee therefore thinks it is unlikely that a mediator would involuntarily become subject to the rules of conduct or a complaint procedure.</p> <p>Mediators might consider it beneficial to be on court lists for a variety of reasons, and might therefore think there are a variety of adverse consequences for not being on a list. However, the committee is not currently considering amendments to the California Rules of Court that would preclude litigants from selecting mediators who are not on court lists or limit the</p>
	<p>(2) By what means would the court create a “list” of mediators and organizations? Is the list completely voluntary? Suppose an individual or an organization did not wish to be on the court’s list of approved, recommended or recognized mediators. Could they request that their name(s) be removed? If so, would there be any future adverse consequences to <i>not</i> being on the list? For example, do the drafters contemplate future amendments to the Rules of Court by which only court-approved neutrals may mediate the settlement of litigated disputes enforceable under CCP 664.6?</p>

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Alternative Dispute Resolution: Procedures for Addressing Complaints About Court-Program Mediators for Civil Cases

(renumber Cal. Rules of Court, rules 3.865-3.868; adopt rules 3.865, 3.867, 3.870, 3.871, and 3.881–3.887; amend rule 10.781; revise form ADR-107)

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Rule 3.866. Definitions—Mediators subject to complaint procedure (Rule 3.867 of the proposal circulated for comment)		
Commentator	Comment	Committee Response
	<p>(3) Despite that the practice may be questionable, some judges do “recommend” certain mediators or provider firms for certain kinds of cases. If a judge recommended a mediator or provider firm, would that person or organization subject to the court’s complaint procedures? Would the person or organization also be subject to other provisions of the proposed state court rules on mediation?</p> <p>By raising the above issues, we do not wish to imply that the drafters intend to regulate the private alternative dispute resolution industry. By clarifying such ambiguities at the outset, however, we wish to preempt possible future disputes about the meaning and intentions behind the adoption of the proposed rules.</p>	<p>enforceability of agreements mediated by such neutrals.</p> <p>Under current rule 3.851(a), if a mediator agrees to mediate a general civil case pending in a superior court after being notified that he or she was recommended by the court to mediate a case within the court’s mediation program, the mediator would be subject to the rules of conduct and the complaint procedure. And, under rule 3.851(b), if a court’s panel or list includes firms that provide mediation services (i.e., provider organizations), mediators that are affiliated with a listed firm are subject to the rules and the complaint procedures when they are notified that the firm was selected from the court’s list to mediate a general civil case within the court’s mediation program. However, a court recommendation of a firm does not make that firm subject to the rules of conduct or the complaint procedure, and the current proposal would not change this.</p>
State Bar of California, Committee on Alternative Dispute Resolution	<p>Rule 3.867(2): Definitions – The definition of the “Court-program mediator” includes a person “<i>or organization</i>” that is either on the court’s list “<i>or that is recommended</i>, selected, appointed, or compensated by the court to mediate a general civil case pending in the court.” Because this broad definition includes “organizations” that are merely “recommended” by a judge, it has the unintended potential of being unworkably overbroad. Read literally, these rules could be unwittingly imposed on all members of JAMS or Judicate West, for example, simply because a judge “recommended” to the parties</p>	<p>Please see the committee’s response to the comment of ADR Services, Inc., above. As that response explains, the committee has revised the definition of “court-program mediator” to exclude organizations, and the rules of conduct for mediators are not made applicable as the result of a court recommendation of a mediation provider organization.</p>

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Rule 3.866. Definitions—Mediators subject to complaint procedure (Rule 3.867 of the proposal circulated for comment)		
Commentator	Comment	Committee Response
	<p>to mediate their case with one of those organizations. We do not believe the rules were intended to reach mediators who do not affirmatively volunteer to participate in the Court’s mediation program, but the way this definition is worded it may have that unintended consequence. We would suggest that the word “organization” or “recommend” (or both) be removed from this definition and from other rules where this same language is used.</p> <p>Along the same lines, there should be a provision in the rules to allow for mediators to opt off the court panel.</p>	<p>The rules of conduct that may be the subject of a complaint procedure apply only as the result of an individual mediator’s inclusion on a court list or panel if the mediator has agreed to be included on the list or panel and is notified that he or she has been selected to mediate a case within that court’s mediation program. (See Cal. Rules of Court, rule 3.851(a)(1).) If the neutral is affiliated with a provider organization that is included on a court’s list or panel, the neutral must also be informed that the organization was selected to mediate a case within the court’s mediation program in order for the rules of conduct to apply.</p>
<p>Superior Court of San Diego County Michael M. Roddy Executive Officer</p>	<p>California Rules of Court, rules 3.866 (Complaint procedure required), 3.867(2) (Definition of “Court-program mediator”), and 3.880(a) should be revised so that the language expressly limits the application of the complaint procedure to mediators on a court panel or “mediators in court-connected mediation programs for civil cases” (see language in proposed California Rules of Court, rule 3.865). [Rules 3.866 and 3.867 in the</p>	<p>As noted above, the committee has revised the proposed definition of “court-program mediator” to clarify that court program mediators are those who are subject to the rules of conduct for mediators.</p> <p>Proposed rule 3.868 would not change the currently required scope of superior court procedures for</p>

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Rule 3.866. Definitions—Mediators subject to complaint procedure (Rule 3.867 of the proposal circulated for comment)		
Commentator	Comment	Committee Response
	<p>proposal circulated for comment have been renumbered as proposed rules 3.868 and 3.866, respectively, and rule 3.880 has been deleted from the proposal.] “Private” mediators (i.e., retired judicial officers affiliated with organizations such as JAMS, etc.) may be recommended and/or appointed by a court based on the parties’ request and stipulation, but the court would not properly be involved in the receipt, investigation or resolution of complaints against such private mediators. Similarly, if the language is not modified, a court that does not have a court panel of mediators, but merely makes a list of local mediators available to litigants as a resource should not be tasked with the implementation of a complaint procedure relative to mediators on such a list.</p>	<p>addressing complaints about mediators. Rule 3.865 currently requires superior courts to establish procedures for receiving, investigating, and resolving complaints that mediators who are on the court’s list or who are recommended, selected, appointed, or compensated by the court violated the rules of conduct set forth in rule 3.850 et seq.</p> <p>Narrowing of the scope of the current complaint procedure requirement to exclude mediators who are recommended or appointed by the court based on the parties’ request or stipulation or mediators who are on a list made available to litigants by the court as a resource, as proposed by the comment, would be an important substantive change in the current rules and would need to be circulated for public comment before it is considered for adoption. The committee will consider whether to circulate possible revisions to the current application of the complaint procedure requirements in a future rules cycle.</p>

Rule 3.868. Complaint procedure required (Rule 3.866 of the proposal circulated for comment)		
Commentator	Comment	Committee Response
<p>Elizabeth Strickland Attorney-Mediator Superior Court of Santa Clara</p>	<p>Proposed Rule 3.866 (a) needs some clarification that I did not find in the Advisory Committee Comment.</p>	<p>The committee is recommending that staff assist individual courts, on request, in considering whether the complaint procedures that they have adopted or are</p>

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<p>County</p>	<p>If a local rule for processing complaints is established, sentence 2 of Rule 3.866 (a) states that it must be “consistent with” the terms of article 3. In sentence 3, it states that courts “must follow the requirements” of article 3. The Advisory Committee Comment states in paragraph 2 sentence 3 that local court complaint procedures should mirror the state rules “to the extent feasible.”</p> <p>Santa Clara has had our complaint procedure in our local rules since 2003. The provisions of our local rule, while more succinct, are in my opinion very similar to the proposed state rules. (See Santa Clara Local Civil Rule 2D.) However, it’s not clear to me whether they are similar enough to survive review by the state, or whether I should begin the process to amend the local rules to more closely conform to the proposed state rules.</p> <p>Other counties may face the same dilemma. It would be helpful to know, if at all possible, which proposed state rule provisions are considered necessary, and which are considered optional.</p>	<p>considering adopting are consistent with the requirements of article 3.</p>
<p>Superior Court of San Diego County Michael M. Roddy Executive Officer</p>	<p>*See comment below, regarding mediators covered by complaint procedure.</p>	<p>Please see response below.</p>

<p>Rule 3.869. General requirements for complaint procedure and complaint proceedings (Rule 3.870 of the proposal circulated for comment)</p>	
<p>Commentator</p>	<p>Comment</p>
<p>Orange County Bar Association Cathrine Castaldi</p>	<p>Subdivisions (e)(2) and (f) It is suggested that wherever the final disposition of a</p>
<p>Committee Response</p> <p>The committee agrees and has replaced the text “final court action” in the proposal that circulated for comment</p>	

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Commentator	Comment	Committee Response
President	<p>complaint is addressed within the provisions of article 3 or 4, such as at proposed rule 3.870(e)(2) and (f) [and proposed rule 3.885(d)], that the phrase “final court action” be replaced with the phrase “final action taken by the court,” in order that there be no indication of an action at law or special proceeding of a civil nature being or having been prosecuted in or on behalf of the court. [Rule 3.870(e)(2) and (f) in the proposal circulated for comment have been revised and renumbered as rule 3.869(e)(1) and (2) and rule 3.885(d) in the proposal circulated for comment has been deleted.]</p> <p>Subdivision (g)</p> <p>The introductory sentence to proposed rule 3.867 indicates that the definitions set forth therein apply, “unless context or subject matter requires otherwise.” In the event that “complaint/s” as used in proposed rule 3.870(g) constitutes one of these contexts and, accordingly, that the court would track “inquiries,” as well, it is suggested that out of concerns for the quality of the program and the respective reputations of the mediators, a mediator be informed of each inquiry made about their conduct. This notice would be in addition to any as contemplated by subdivision (f) of this proposed rule. [Rules 3.867 and 3.870 of the proposal circulated for comment have been renumbered as rules 3.866 and 3.869, respectively.]</p>	<p>with “final action taken by the court” in rule 3.869(e)(1) and (2).</p> <p>Proposed rule 3.869(g) is not intended to suggest that courts should maintain records about inquiries, but courts may nevertheless elect to do so. The committee does not think that courts should be required to notify mediators about inquiries that may involve questions or concerns that were readily resolved by the complaint coordinator, that do not involve a violation of the rules of conduct, or that the person making the inquiry decides not to pursue. Requiring courts to inform the mediator of every inquiry might impose a significant administrative burden on courts, necessitate disclosures that the person making the inquiry did not want made, and create concerns about mediator impartiality in ongoing mediations.</p>
State Bar of California, Committee on Alternative Dispute Resolution Jessica Notini Chair (2007-2008)	<p>Judge’s Designee: In the expectation that the presiding judges will not always take it upon themselves to review and act upon the recommendations of the complaint committee, but will instead appoint this obligation to a “designee,” we believe the</p>	<p>The committee agrees that it would be preferable if a presiding judge’s designee to make the final decision on a complaint is a judicial officer or a committee that includes a judicial officer. However, the committee does</p>

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Rule 3.869. General requirements for complaint procedure and complaint proceedings (Rule 3.870 of the proposal circulated for comment)	
Commentator	Committee Response
	<p>not think that this should be a requirement for all complaint procedures, because it may be problematic for smaller courts.</p> <p>The committee has revised the comment to proposed rule 3.869(d) to encourage presiding judges to consider designating another judicial officer who is knowledgeable about mediation, or a committee that includes another person who is knowledgeable about mediation, to make the final decision.</p>
<p>Superior Court of San Diego County Michael M. Roddy Executive Officer</p>	<p>In response to other comments, the committee is not recommending that a default complaint procedure (i.e. article 4) be set forth in the California Rules of Court.</p> <p>The 2007 uniform complaint procedure proposal would not have distinguished between written and unwritten communications indicating that a mediator may have violated the rules of conduct and would have required a preliminary review of either. The distinction between complaints and inquiries, and the limitation of the requirement to conduct a preliminary review to the former, was developed because the committee ultimately agreed with commentators who thought that courts should not be required to act on concerns about mediator conduct that were not submitted in writing. Requiring</p>
	<p>judge’s designee must be a judicial officer, and preferably one who serves on the court’s ADR oversight committee and is familiar with the use of, and rules surrounding, ADR. This is because the judge (or the judge’s “designee”) is tasked with making decisions that can have a seriously deleterious effect on a mediator’s livelihood (in those jurisdictions where court-paneled mediators charge a fee) or reputation. We believe the qualifications of the judge’s designee as a judicial officer should be made clear in the rules.</p>
	<p>California Rules of Court, rule 3.870 (General requirements for complaint procedures and proceedings)— for clarity’s sake, it should be expressly stated that this rule applies to courts not electing Article 4 procedure. In addition, the following subsections should be modified (suggested revisions underlined): [Rule 3.870 of the proposal circulated for comment has been renumbered as rule 3.869.]</p> <p>Subsection (b) should be revised to state: “The complaint coordinator must conduct a preliminary review of all <u>inquiries and complaints</u> to determine whether the complaint can be informally resolved or merits <u>further investigation</u>.”</p>

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Rule 3.869. General requirements for complaint procedure and complaint proceedings (Rule 3.870 of the proposal circulated for comment)	
Commentator	Committee Response
<p>Superior Court of Riverside County David Gutknecht Principal Management Analyst</p>	<p>complaint coordinators to conduct a preliminary review of inquiries might impose a significant burden on courts.</p> <p>Proposed rule 3.869(d)(1) [a revision of rule 3.870(f) of the proposal circulated for comment] is intended to ensure that mediators have the opportunity to address complaints about their conduct that are not resolved through the preliminary review, without requiring or implying that courts must conduct a “hearing.” The committee believes that this will allow courts to resolve complaints with or without a hearing, as the circumstances may indicate. When the 2007 uniform complaint procedure proposal was developed and circulated for comment, there was extensive discussion about whether the California Rules of Court should allow, discourage, or prohibit hearings to resolve complaints about mediators. At that time, the committee concluded that the rules should not address this issue, and the committee has not received additional information that would lead it to a different conclusion at this time.</p>

Rule 3.870. Permissible court actions on complaint (Rule 3.871 of the proposal circulated for comment)	
Commentator	Committee Response
<p>Superior Court of San Diego County Michael M. Roddy</p>	<p>The committee has revised rule 3.870 of the proposal circulated for comment to clarify that the presiding judge or designee may take one or more of the specified</p>

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Rule 3.870. Permissible court actions on complaint (Rule 3.871 of the proposal circulated for comment)	
Commentator	Committee Response
Executive Officer	<p>actions and has revised paragraph (4) as suggested by the commentator.</p> <p>The committee has not revised paragraph (5) to expressly provide that the presiding judge or designee may <u>permanently</u> remove the mediator or prohibit the mediator from receiving future referrals, etc., because the committee believes that, as written, paragraph (5) provides courts with the flexibility to permanently remove a mediator or prohibit a mediator from receiving referrals, but also potentially to reinstate a mediator who was previously removed or prohibited from receiving referrals under that paragraph.</p> <p>The committee has not revised rule 3.870 to provide that the action taken by the presiding judge or designee is not subject to review or appeal, because proposed rule 3.869(d)(3) would provide that the final decision on the complaint must be made by the presiding judge or his or her designee.</p>

Rule 3.871. Confidentiality of complaint proceedings, information, and records (Rule 3.868 of the proposal circulated for comment)	
Commentator	Committee Response
State Bar of California, Committee on Alternative Dispute Resolution Jessica Notini Chair (2007-2008)	<p>II. DISCLOSURES</p> <p>As we understand the proposed revisions, once a complaint has been acted upon by the presiding judge, he or she “<i>may</i>” authorize the disclosure of information or records concerning</p>

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	<p>the complaint proceeding that do not reveal any mediation communications. The disclosures that may be authorized under this subdivision include the name of a mediator against whom action has been taken under rule 3.871, the action taken, and the general basis on which the action was taken.” [Rule 3.871 of the proposal circulated for comment has been renumbered as rule 3.870.]</p> <p>Proposed Rule 3.868(d). Rule 3.868 of the proposal circulated for comment has been renumbered as rule 3.871.] Our concerns are multi-fold.</p> <p>First, we do not understand why disclosure is necessary at all (even assuming we knew to whom the disclosure would be made. See the second point below). If the goal of the complaint procedure is to allow the court program to monitor the quality of its panel mediators, then any type of public disclosure would be unnecessary. The court program could take the remedial action necessary (i.e., training, reprimand, removal) based on the confidential results of its investigation. Public disclosure does not seem necessary to satisfy this goal.</p> <p>If the goal of the complaint process is instead (or in addition) to allow for the speedy inquiry into, and resolution of, a party’s complaint, in the hopes of venting some pressure and staving off subsequent litigation, then this goal too would seem to be satisfied without public disclosures. The complainant will have his or her concerns addressed expeditiously, and may feel this is enough to satisfy him or her. Disclosure of the mediator, and of the action taken against that mediator, does not seem</p>	<p>This proposal would not make any substantive revisions to the disclosures that the presiding judge may currently authorize under rule 3.867(d), which was adopted after circulation for public comment in 2005. For reasons stated below, the committee does not think that the authority to authorize disclosures should be eliminated or limited, as the commentator suggests, at this time. Additionally, any such revisions to the current rule would need to be circulated for public comment before being considered for adoption.</p> <p>The committee believes that the presiding judge (or a person designated by the presiding judge for this purpose) should have the flexibility to determine what information about a complaint procedure, if any, should be disclosed, and to whom, as long as the disclosure will not reveal any mediation communications. The purposes of such disclosure might include providing transparency of the complaint procedure, within the confines of mediation confidentiality; educating other panelists and litigants about what type of mediator behavior is or is not considered proper; or publicly acquitting or</p>

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	<p>necessary here either. (The complainant can always bring some other legal challenge if he or she really believes there has been a legal injury.)</p> <p>And if the ultimate goal (or one of the goals) is to help educate other panelists and the public about what type of mediator behavior is considered proper, and what type of behavior could be subject to admonition or other punishment, then <i>anonymous</i> disclosure would suffice. Making the nature of the questionable conduct known, along with the remedial action, would satisfy this goal, whereas publicly naming the mediator would not.</p> <p>The only purpose of disclosing the identity of the mediator that we can see would be to rebuke the mediator publicly, a goal which seems not only unnecessary, but counterproductive. Indeed, public censure may serve to chill any interest in volunteering on a court panel in the first place (or accepting cases on a discounted basis, depending on the jurisdiction).</p> <p>Our second concern is that there is no specification as to <i>whom</i> the disclosures “may” be made. The rule simply allows the judge to “disclose” certain information about a mediator against whom action has been taken. Is any limitation on the disclosure envisioned (e.g., to the complainant, in response to a specific inquiry about an individual mediator, to specified entities only)? (We recognize that some of the comments and other rules reference information that is “publicly disclosed.”) If disclosure is to be allowed, the nature of the disclosure should be specified, and limited, with clarity.</p>	<p>censuring the mediator. The extent of the appropriate disclosure, including whether it identifies the mediator in question, will necessarily depend on the circumstances and the purpose for which the disclosure is being authorized.</p> <p>The committee has revised rule 3.871(d) to clarify the intent that the presiding judge may authorize <i>public</i> disclosure of information or records about complaint proceedings that do not reveal any mediation communications. As with the information to be disclosed, the committee believes that the persons or entities to which information about complaint procedures may be disclosed should be left to the presiding judge or his or her designee to determine on a case-by-case basis.</p>

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Commentator	Comment	Committee Response
	<p>Finally, along the same lines, <i>what standard should the judge apply in making his or her disclosure decision?</i> In other words, should the judge’s discretion be limited or guided by any principles of law, equity, or public policy? As it is now, it appears to be up to the individual judge (or the judge’s designee, whoever that might be) to determine whether to “disclose” disciplinary information regarding a mediator.</p> <p>We would prefer, for the reasons stated above, that there be no disclosures. But if disclosures are necessary, we would suggest (a) that the disclosures omit the mediator’s name; (b) that the rules identify the recipient(s) of the disclosure (and keep this limited); and (c) that the rules provide very strict and straightforward guidelines for when disclosure might be appropriate. Perhaps the comments could also clarify what the purpose of “disclosure” is, which would aid the judges in exercising their discretion in this regard.</p> <p style="text-align: center;">* * *</p> <p>V. CONFIDENTIALITY</p> <p>We are still concerned about confidentiality. We appreciate that the rules state in a number of places that the process is to remain confidential, but this may not be sufficient. We adopt and reassert the comments made in our original letter of June 22, 2007.</p> <p>One suggestion: To avoid the argument that a party or mediator has waived confidentiality by participating in this complaint procedure, a new rule could be added to that effect—</p>	<p>Rule 3.867(d) currently provides that the presiding judge should consider the purposes of the confidentiality of complaint proceedings stated in paragraphs (a)(2) and (a)(3) in determining whether to authorize disclosure. The proposal would retain this provision, without substantive modification</p>
		<p>The committee does not intend that the disclosure of mediation communications in a confidential complaint</p>

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	<p>that any disclosure of mediation communications compelled as a result of the complaint procedures would not serve as a waiver of the confidentiality rights in any subsequent proceeding, and would not be considered a breach of mediation confidentiality by the mediator or any party.</p> <p>* * *</p> <p>Rule 3.868(a)(2): “Promote cooperation in the reporting, investigation, and resolution of complaints about court-program mediators.” We are not sure what this means. Cooperation between whom? For what purpose? Reporting to whom (see above re disclosures)?</p> <p>Rule 3.868(a)(3): We agree that this is an important principle. Rule 3.868(a)(?): We believe consideration should be given to adding a specific reference to the equally important goal of ensuring that parties in court mediation programs receive competent and quality mediation services.</p>	<p>procedure would constitute a waiver or a breach of mediation confidentiality and does not anticipate that such a disclosure would be deemed to have either effect. However, the committee believes that this legal determination would ultimately need to be made by a court and cannot be established by a rule of court. The committee also thinks that mediators and litigants can help to ensure that disclosure in a complaint procedure does not constitute a waiver or breach of mediation confidentiality by including such a provision in their mediation confidentiality agreements.</p> <p>Rule 3.871 (a) would not make any substantive revisions to current rule 3.867(a). Paragraph (a)(2) refers to cooperation by mediation participants, mediators, and court staff in reporting, investigating, and resolving complaints about court-program mediators for the purposes of ensuring the quality of, and public confidence in, court mediation programs.</p> <p>Rule 3.871 (a) is intended to state the specific purposes of the requirements concerning the confidentiality of complaint procedures. The purposes of the rules of conduct that may be the subject of complaint proceedings are stated in rule 3.850 and include guiding the conduct of court-program mediators, informing and protecting participants in court mediation programs, and promoting public confidence in the mediation process and the courts. The purposes of the complaint procedure</p>

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Rule 3.871. Confidentiality of complaint proceedings, information, and records (Rule 3.868 of the proposal circulated for comment)	
Commentator	Committee Response
	requirements are stated in proposed rule 3.865 and include promoting the resolution of complaints indicating that mediators may have violated a provision of the rules of conduct.

Rule 3.872. Disqualification from subsequently serving as an adjudicator	
Commentator	Committee Response
Superior Court of San Diego County Michael M. Roddy Executive Officer	<p>California Rules of Court, rule 3.872 (Disqualification from subsequently serving as an adjudicator)—the following language should be stricken: “or any other dispute that arises from the mediation” as it is overly inclusive and could serve to unnecessarily disqualify a judge from hearing an unrelated matter that arguably “arose” from the mediation.</p> <p>The committee does not recommend amending rule 3.868 (proposed rule 3.872) as suggested by the commentator. Rule 3.868, which was adopted in 2005, disqualifies a person who has “participated in or received information about the receipt, investigation or resolution of an inquiry or a complaint under rule 3.865” from subsequently hearing or determining “any contested issue of law, fact, or procedure concerning the dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation, as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, in any court action or proceeding.” The proposal that was circulated for comment would <i>narrow</i> this disqualification provision by making it inapplicable to persons who only received nonsubstantive information about a complaint or information that was publicly disclosed under rule 3.871(d) (i.e., information that does not include mediation communications). This proposal would not change the types of proceedings that a person who participated in a complaint proceeding or who received substantive information about a complaint that is not</p>

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Rule 3.872. Disqualification from subsequently serving as an adjudicator	
Commentator	Committee Response
	<p>publicly disclosed would be disqualified from hearing. Any such amendment, including that which the commentator suggests, would be an important substantive change to the rule and would need to be circulated for public comment before being considered for adoption.</p> <p>However, the committee thinks that persons who participated in a complaint proceeding or otherwise received information about the substance of a complaint that was not otherwise publicly disclosed under rule 3.871(d) should continue to be disqualified from subsequently adjudicating disputes that arise from the mediation. This provision is intended to ensure that mediation communications are not considered by any adjudicator, which is an important goal of the mediation confidentiality statutes. (See, e.g., Evid. Code, §1121.)</p>

Rule 3.881. Addressing inquiries and Rule 3.883. Initiating an investigation	
Commentator	Committee Response
<p>III. WRITTEN SUMMARIES</p> <p>We note that proposed rule 3.881 allows (but does not require) the complaint coordinator to prepare a “written summary” of any oral “inquiry” he or she receives. While the rule goes on to clarify that this “written summary” does not constitute a complaint, the rule never indicates what this “written summary”</p>	<p>In response to other comments, the committee has revised its proposal to delete the default complaint procedure that was set forth in rules 3.880–3.886 of the proposal circulated for comment (article 4). Instead, the committee is recommending that the Administrative</p>

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Commentator	Comment	Committee Response
	<p>is for or what is to be done with it. Instead, the rule, and those that follow, describes how a written “complaint” is to be investigated and reviewed by the coordinator, complaint committee, and judge (or designee).</p> <p>The only subsequent reference we see to the “written summary” is in rule 3.884(b)(1), which states that the complaint committee must provide the mediator with a copy of the complaint, “any written summary prepared under rule 3.881,” and a list of article 2 violations that apply. [Rule 3.884 of the proposal circulated for comment has been deleted.] From this we gather that the process anticipates that the non-complaint “written summary” will eventually make its way to the complaint committee, and then be shared with the mediator.</p> <p>We are not sure what was intended with respect to the written summary, but we have some suggestions. A written summary should not be the basis for initiating an investigation into a mediator’s conduct. If a party is not concerned enough to put his or her complaint in writing, and to stand behind it, then a mediator should not be put in the position of having to defend against a ghost.</p>	<p>Office of the Courts develop model complaint procedures, based on article 4, to assist courts in adopting complaint procedures by local rule of court.</p> <p>Written summaries of inquiries (i.e., unwritten communications indicating that a mediator may have violated the rules of conduct) may be helpful in conducting a preliminary review or an investigation, if a complaint is subsequently initiated, or in identifying “patterns of conduct” that may not give rise to complaints.</p> <p>The committee thinks that the complaint coordinator should be permitted to initiate a complaint based on information received from any source, including an inquiry, indicating that a mediator may have violated the rules of conduct. (Please see rule 3.884(b) of the proposal circulated for comment.) A person who provides information about a possible violation of the rules may have no motivation for submitting a written complaint or may have reasons for not doing so. But if a court receives information indicating that a mediator who is on its panel or list, or is eligible to be recommended, appointed, or compensated by the court, has violated the rules of conduct, the court may nevertheless have an important interest in investigating</p>

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	<p>However, we do believe the written summary should be placed in the mediator’s “file,” assuming the court keeps files on its volunteer or panel mediators. We submit that the written summary should also be given to the mediator <i>at the same time</i>, and the mediator invited to respond in writing. The written response should also be kept in “the file.” (We think it is important to give the mediator an opportunity to respond to the written summary as soon as possible, while the events giving rise to the inquiry are still fresh in the mediator’s mind. If the written summary is not raised with the mediator until some later date, perhaps years later, the mediator will be seriously disadvantaged in his or her efforts to respond. Fundamental due process would seem to require nothing less.)</p> <p>Subsequently, if a <i>written complaint</i> is ever lodged as to that mediator, and the coordinator is unable to resolve the complaint, then the complaint should be passed on to the complaint committee along with the entire contents of the file, <i>including any prior written summaries</i>. It is at this point that the summaries, along with the mediator’s response, could be considered by the complaint committee in arriving at its recommended resolution. For instance, if a mediator has a number of “written summaries” all addressing the same alleged violation, those summaries, and the mediator’s responses, should be considered by the committee (or judge) in determining what remedy is appropriate.</p>	<p>the matter and taking appropriate action.</p> <p>Article 4 would not have required courts to provide mediators with written summaries of inquiries that are not referred to a complaint committee for investigation because that complaint procedure would not permit action against the mediator unless the complaint is referred for investigation or the mediator agrees to the resolution. However, article 4 would not have prohibited courts from providing mediators with written summaries of inquiries that do not become the subject of investigations on a case-by-case basis or in all cases.</p> <p>The committee suggests that, in developing model complaint procedures, staff consider suggesting that the referral to the complaint committee and the notice to the mediator include copies of any relevant written summaries of inquiries that were prepared.</p>

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<p>Superior Court of San Diego County Michael M. Roddy Executive Officer</p>	<p>Rule 3.881. Addressing inquiries and Rule 3.883. Initiating an investigation</p> <p>California Rules of Court, rule 3.881 (Addressing inquiries)—an inquiry should not automatically be reduced to a writing. Rather, if an inquiry can be preliminarily reviewed and more informally resolved—as stated in California Rules of Court, rule 3.882 (e), the resolution should be reached quickly and efficiently (without having the person making the inquiry provide a written complaint and risking that a minor matter be unnecessarily elevated to a formal complaint when it could otherwise have been more quickly and easily resolved). Only if an inquiry cannot be informally resolved (as stated in Rule 3.882(e)) should it be reduced to a written complaint, triggering a written acknowledgment as stated in Rule 3.882(a).</p>	<p>In response to other comments, the committee has revised its proposal to delete the default complaint procedure that was set forth in rules 3.880–3.886 of the proposal circulated for comment (article 4). Instead, the committee is recommending that the Administrative Office of the Courts develop model complaint procedures, based on article 4, to assist courts in adopting complaint procedures by local rule of court.</p> <p>The committee agrees that inquiries should not automatically be reduced to a writing. Rule 3.881 of article 4 would therefore have provided that the complaint coordinator <i>may</i>, rather than must, prepare a written summary of an inquiry. The committee anticipates that many inquiries will be quickly, efficiently, and satisfactorily resolved without the submission of a complaint or the initiation of a preliminary review and does not think it is necessary to conduct a preliminary review unless a written complaint is submitted.</p>
<p>Orange County Bar Association Cathrine Castaldi President</p>	<p>As proposed, rule 3.883(b) allows for the complaint coordinator to initiate a complaint, based on information, “...from any source, including an inquiry...”</p> <p>“Any source” other than a mediation participant, will have neither first-hand observation nor a legitimate interest in the subject matter of a particular mediation. It is likely such a</p>	<p>In response to other comments, the committee has revised its proposal to delete the default complaint procedure that was set forth in rules 3.880–3.886 of the proposal circulated for comment (article 4). Instead, the committee is recommending that the Administrative Office of the Courts develop model complaint procedures, based on article 4, to assist courts in</p>

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	<p>source would be relying on overheard comments or discussions out of context, and possibly misunderstand or be unfamiliar with a style or process being addressed. The veracity, accuracy and motive of the source are key, and expecting the complainant coordinator to be judge of such seems problematic. To allow a coordinator to base a complaint upon an inquiry would appear to be contrary to the definitions contained in proposed rule 3.867 and to the sound policy distinctions reflected in proposed rule 3.881. The inherent power of a court to control those assisting it is not abridged by any of these rules, as multiple Advisory Committee Comments note, and it is suggested that the delegation of this authority seems premature and unnecessary.</p>	<p>adopting complaint procedures by local rule of court.</p> <p>Rule 3.883(b) in article 4 would have allowed, but not required, complaint coordinators to initiate a complaint. The committee anticipates that coordinators would exercise their judgment and would not initiate complaints based on information that appears to be unreliable.</p> <p>The committee thinks that complaint procedures should authorize a complaint coordinator to initiate a complaint based on information from a source other than a mediation participant. If the coordinator receives information from any reliable source indicating that a court-program mediator may have violated the rules of conduct, it may be important that the court investigate the matter and a complaint is the mechanism for initiating an investigation under proposed article 3. The validity of any complaint, whether initiated by a mediation participant or by a complaint coordinator, will ultimately be determined through an investigation.</p> <p>The committee agrees that courts would have inherent authority to initiate a complaint or another procedure to investigate and address concerns about a court-program mediator without rule 3.883 of article 4. However, the committee thinks it would be beneficial for complaint procedures to expressly provide that the complaint coordinator may initiate a complaint, so that mediation</p>

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Rule 3.881. Addressing inquiries and Rule 3.883. Initiating an investigation	
Commentator	Committee Response
Comment	participants, mediators, and court staff are aware that concerns about mediator conduct may be addressed in this manner.

Rule 3.885. Final decision on a complaint	
Commentator	Committee Response
<p>Orange County Bar Association Cathrine Castaldi President</p>	<p>Comment</p> <p>Proposed rule 3.885(a) provides that the final decision on a complaint may be made by an additional committee. In light of the confidentiality concerns and safeguards which should surround any complaint proceeding, it would seem that a second committee, specifically to be comprised of persons other than those on the initial committee, only invites additional opportunity for disclosure. Accordingly, it is suggested that use of a second committee be discouraged and that this alternative be removed from the proposed rule.</p> <p>Committee Response</p> <p>In response to other comments, the committee revised its proposal to delete the default complaint procedure that was set forth in rules 3.880-3.886 of the proposal circulated for comment (article 4). Instead, the committee is recommending the Administrative Office of the Courts develop model complaint procedures, based on article 4, to assist courts in adopting complaint procedures by local rule of court.</p> <p>Rule 3.885(a) of article 4 would have allowed, but not required, the presiding judge to appoint a committee to make the final decision on a complaint in the expectedly rare cases when a complaint is referred for investigation. The presiding judge could also make the final decision himself or herself, or designate another judicial officer to make this decision. The committee thinks that complaint procedures should give presiding judges this flexibility to determine the most appropriate individual or group to make the final decision on the complaint for the specific court and the specific complaint.</p> <p>The committee also notes that any information that</p>

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Rule 3.885. Final decision on a complaint	
Commentator	Committee Response
	might be disclosed to a committee appointed to make the final decision on a complaint is to remain confidential under rule 3.871 in article 3 (current rule 3.867).
State Bar of California, Committee on Alternative Dispute Resolution Jessica Notini Chair (2007–2008)	The committee has revised the comment to rule 3.869(d) of article 3 (rule 3.870(c)(2) of the proposal circulated for comment) to encourage presiding judges to consider designating another judicial officer who is knowledgeable about mediation, or a committee that includes another person who is knowledgeable about mediation, to make the final decision.
... we believe the judge’s designee must be a judicial officer, and preferably one who serves on the court’s ADR oversight committee and is familiar with the use of, and rules surrounding, ADR. ... (For additional text, please refer to comment under rule 3.870.)	

Form ADR-107	
Commentator	Committee Response
Orange County Bar Association Cathrine Castaldi President	The committee is recommending a reformatted version of form ADR-107 that allows more room for mediation participants to hand write their names and contact information. The committee has not revised the form to indicate that some information is required and that some is optional because mediation participants are not required to provide any of the information.
As it is likely that Form ADR-170 will be filled-out by hand in the course of the mediation conference, it is suggested that the boxes for information be made larger. Additionally, it is suggested that the form indicate, where appropriate, that address information is required, and that the supply of an e-mail address is optional.	

**Civil and Small Claims Advisory Committee,
Alternative Dispute Resolution Subcommittee
Working Group on Uniform Procedures for Addressing
Complaints about Court-Program Mediators**

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