JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
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DATE: September 18, 2007

SUBJECT: Alternative Dispute Resolution: Mandatory Settlement Conferences (amend Cal. Rules of Court, rule 3.1380) (Action Required)

Issue Statement
Rule 3.1380 currently provides that on the court's own motion or at the request of any party, the court may set a mandatory settlement conference. A recent case, *Jeld-Wen v. Superior Court of San Diego County* (2007) 146 Cal.App.4th 536, has raised concerns that rule 3.1380 could be read as authorizing only a single settlement conference in a case. The *Jeld-Wen* case has also highlighted recurring problems with proceedings in which a person has been appointed to simultaneously serve as a mediator and to conduct a settlement conference.

Recommendation
The Civil and Small Claims Advisory Committee recommends that the Judicial Council effective January 1, 2008, amend rule 3.1380 to:

1. Clarify that courts have the authority to set more than one settlement conference;

2. Prohibit courts from appointing a person to conduct a settlement conference under this rule at the same time that the person is serving as a mediator in the same action;

3. Prohibit courts from appointing a person to conduct a mediation under this rule; and

4. Add an advisory committee comment explaining that these prohibitions are intended to prevent confusion about whether the Evidence Code sections establishing the confidentiality of mediations apply.

The text of the proposed amendments to the rules is attached beginning at page 6.

Rationale for Recommendation

In its *Jeld-Wen* decision, the Court of Appeal, Fourth Appellate District considered the validity of a case management order in a complex case that appointed an individual as the "Mediator and/or MSC [Mandatory Settlement Conference] Judge" to "mediate and conduct settlement conferences" for up to a maximum of 100 hours at the parties' expense. Among the arguments made by the petitioner in opposition to this order was that rule 3.1380, regarding settlement conferences, authorizes courts to set only a single mandatory settlement conference in a case. While the appellate court's decision overturning the case management order in *Jeld-Wen* was not specifically based on this interpretation of rule 3.1380, the opinion has raised concerns that rule 3.1380 could be read as authorizing only a single settlement conference in a case.

To address these concerns, the committee recommends that rule 3.1380 be amended to clarify that courts have the authority to set more than one settlement conference in a case. This is consistent with both current practice and with the historical intent of rule 3.1380. Many courts currently offer early settlement conference programs as well as settlement conferences close to the date of trial. Many also offer additional settlement conference opportunities if a trial date is reset in a case. Before 2001, the predecessor to rule 3.1380—rule 222—authorized courts to set a mandatory settlement conference before trial and also specifically authorized courts to set other or additional settlement conferences. In 2001, this rule was amended as part of a comprehensive revision of the rules and forms relating to case management. The 2001 amendments eliminated both the specific references to setting a conference before trial and to setting other or additional conferences. Nothing in the history of this amendment, however, indicates that the intent was to eliminate courts' authority to set more than one mandatory settlement conference in a case.[1]

The *Jeld-Wen* case also illustrates how mixing different alternative dispute resolution (ADR) processes can cause confusion for both parties and the courts. In *Jeld-Wen*, the case management order appointed one individual to simultaneously serve as a mediator

[1] It normally is not necessary to specify in the rules that where a rule refers to a single hearing or other event, it includes multiple such hearings or events. In general, in the California Rules of Court, the singular (e.g., "party," "court," "hearing") is used rather than the plural (e.g., "parties," "courts," "hearings"). Under rule 1.5(d)(3), the Rules of Court are to be construed so that a reference to something in the singular includes the plural. (See Cal. Rules of Court, rule 1.5(d)(3) [each number (singular or plural) includes the other].) Nonetheless, an exception is appropriate in the case of rule 3.1380. Because of the history of rule 3.1380 described above and the discussion of it in the *Jeld-Wen* decision, the rule should be amended to clearly state that the court may set more than one mandatory settlement conference.

and as a settlement conference judge. Because there are different authorities relating to these different ADR processes, the appellate court had to decide which process was being ordered before it could determine the validity of the order. Other recent cases involving disputes about the confidentiality of ADR discussions also stemmed from court orders that similarly mixed mediation and other ADR processes (see, e.g., *Foxgate Homeowners' Assn., Inc. v. Bramalea California* (2001) 26 Cal.4th 1 [the case management order appointed one person to conduct both discovery reference and mediation] and *Doe 1 v. Superior Court* (2005) 132 Cal.App.4th 1160 [the case management order appointed a judge for both mediation and settlement purposes]). Lack of clarity about what ADR process is being conducted can be particularly problematic in the context of confidentiality because Evidence Code sections 1115–1128 establish a comprehensive set of confidentiality requirements for mediation, but expressly exclude settlement conferences under rule 3.1380 from coverage by these confidentiality requirements.

To help eliminate this type of confusion, the committee recommends amending rule 3.1380 to prohibit courts from appointing a person to conduct a settlement conference under this rule at the same time that the person is serving as a mediator in the same action. The proposed amendments would also prohibit a court from appointing a person to conduct a mediation under the authority of this settlement conference rule. The language proposed is similar to that already in rules 3.900 and 3.920 that prohibits a court from appointing a person to conduct a mediation under the Code of Civil Procedure sections that authorize the appointment of referees. An advisory committee comment would explain that this prohibition is intended to prevent confusion about whether the Evidence Code sections establishing the confidentiality of mediations apply and would also indicate that this prohibition is not intended to prohibit a court from appointing a person who previously served as a mediator in a case to conduct a settlement conference in that case after the mediation has ended.

Alternative Actions Considered

As discussed more fully below, in response to public comments, the committee considered whether to recommend that rule 3.1380 prohibit not only appointment of a person to simultaneously serve as a mediator and settlement facilitator in the same case, but also prohibit appointment of a person who has served as a mediator from *subsequently* serving as a settlement facilitator. For the reasons discussed below, the committee decided not to recommend such a prohibition.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2007 comment cycle. Fourteen individuals or organizations submitted comments on this proposal. Six commentators agreed with the proposal, seven agreed with the proposal if amended, and one disagreed with the proposal. The full text of the comments received and the committee's responses are attached beginning on page 8.

Of those commentators who submitted narrative comments concerning the proposal to clarify that courts may set more than one settlement conference in a case, all except one supported the proposal. The comments concerning the proposal to prohibit simultaneous service as a mediator and a settlement facilitator under rule 3.1380 were more mixed. About half those who submitted narrative comments on this part of the proposal did not agree with it. Some of these commentators suggested that parties should not be prevented from agreeing to use an ADR process in which a mediator takes part in settlement conferences or that an exception should be made for complex cases. Some also suggested that parties, particularly those in complex cases, could come to an agreement about the confidentiality of communications in such a process.

The other half of those who submitted narrative comments on this part of the proposal supported it. In fact, most of these commentators suggested that the committee should expand this prohibition. Two of these commentators suggested that the rule should provide that a person who has served as a mediator in a case cannot subsequently be appointed to conduct a settlement conference in the same case. These commentators believed that allowing a person who had served as a mediator in a case to subsequently serve as a settlement facilitator creates too great a risk that confidential mediation communications would be revealed or used in a way that contravenes the mediation confidentiality statutes. Another commentator suggested that such subsequent service should be permitted only with the parties' consent.

Ultimately, the committee decided not to revise its proposal. The committee feels that, given the current Evidence Code provisions concerning mediation confidentiality, it is important that court orders clearly distinguish between appointment of a person to conduct a settlement conference and appointment of a person to conduct mediation. When a court order appoints a person to be both a mediator and a settlement facilitator under rule 3.1380, it is not clear (for the parties or for a court) if any of the communications that occur during the dual process conducted by that person are confidential under the Evidence Code sections establishing the confidentiality of mediation communications. This is true regardless of whether or not a case is complex. The committee believes that courts can find ways other than simultaneous appointments as both a mediator and settlement facilitator to provide helpful settlement services in these cases.

While the committee also understands the concern that even subsequent service as a settlement facilitator after having served as a mediator in the same case could raise concerns about confidentiality, the committee believes that simultaneous service in dual capacities is of the greatest concern. As noted above, when a person is appointed to serve simultaneously as a mediator and settlement facilitator, it is not clear if any of the communications that occur during the process conducted by this person are covered by mediation confidentiality. In contrast, when a person has conducted a mediation and that mediation has ended, the communications that occurred in mediation continue to be protected under the Evidence Code mediation confidentiality sections; the former

mediator's subsequent service as a settlement facilitator would not alter the confidentiality of the communications that occurred during the mediation. The committee notes that the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases (rules 3.850 et seq.) do not prohibit a mediator from subsequently serving in another ADR capacity, although they require a mediator to obtain the informed consent of the parties.[2] Because prohibiting a person who has served as a mediator from subsequently serving as a settlement facilitator would be a substantive change and would raise issues about subsequent service in other ADR capacities as well, the committee believes that additional study and input is needed before any decision is made about recommending adoption of such a provision.

Implementation Requirements and Costs

The committee does not anticipate that there will be any appreciable implementation costs associated with clarifying that courts can set more than one settlement conference in a case. There are likely to be some implementation costs associated with prohibiting simultaneous appointment of a person as a mediator and settlement facilitator, particularly for courts and litigants who have used standardized case management orders that incorporated such dual appointments. This amendment will require those courts and litigants to alter their case management orders.

Attachments

[2] Rule 3.857(g) provides: "A mediator must exercise caution in combining mediation with other alternative dispute resolution (ADR) processes and may do so only with the informed consent of the parties and in a manner consistent with any applicable law or court order. The mediator must inform the parties of the general natures of the different processes and the consequences of revealing information during any one process that might be used for decision making in another process, and must give the parties the opportunity to select another neutral for the subsequent process. If the parties consent to a combination of processes, the mediator must clearly inform the participants when the transition from one process to another is occurring."

Rule 3.1380 of the California Rules of Court is amended effective January 1, 2008, to read:

Rule 3.1380. Mandatory settlement conferences

(a) ~~Settlement~~ Setting conferences

On the court's own motion or at the request of any party, the court may set ~~a~~ one or more mandatory settlement conferences.

(b) * * *

(c) Settlement conference statement

No later than five court days before the initial date set for the settlement conference, each party must submit to the court and serve on each party a mandatory settlement conference statement containing:

(1) A good faith settlement demand;

(2) An itemization of economic and noneconomic damages by each plaintiff;

(3) A good faith offer of settlement by each defendant; and

(4) A statement identifying and discussing in detail all facts and law pertinent to the issues of liability and damages involved in the case as to that party.

The settlement conference statement must comply with any additional requirement imposed by local rule.

(d) Restrictions on appointments

A court must not:

(1) Appoint a person to conduct a settlement conference under this rule at the same time as that person is serving as a mediator in the same action; or

(2) Appoint a person to conduct a mediation under this rule.

Advisory Committee Comment

Subdivision (d) This provision is not intended to discourage settlement conferences or mediations. However, problems have arisen in several cases, such as *Jeld-Wen v. Superior Court of San Diego County* (2007) 146 Cal.App.4th 536, when distinctions between different ADR processes have been blurred. To prevent confusion about the confidentiality of the proceedings, it is important to clearly distinguish between settlement conferences held under this rule and mediations. The special confidentiality requirements for mediations established by Evidence Code sections 1115–1128 expressly do not apply to settlement conferences under this rule. This provision is not intended to prohibit a court from appointing a person who has previously served as a mediator in a case to conduct a settlement conference in that case following the conclusion of the mediation.

SPR07-12

Alternative Dispute Resolution: Mandatory Settlement Conferences (amend Cal. Rules of Court, rule 3.1380)

List of All Commentators, Overall Positions on the Proposal, and General Comments

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
1.	Katherine L. Gallo, Esq. Discovery Referee	A	N	See comments on specific provisions below.	
2.	Anne Lawlor Goyette Attorney	AM	N	See comments on specific provisions below.	
3.	Jeff G. Harmeyer Attorney	N	N	See comments on specific provisions below.	
4.	Hon. Carolyn B. Kuhl Superior Court of Los Angeles County	AM	N	See comments on specific provisions below.	
5.	Pam Moraida Program Manager Superior Court of Solano County	A	N	No narrative comments submitted.	No response required.
6.	William Nagle Attorney	AM	N	See comments on specific provisions below.	
7.	Orange County Bar Association Joseph Chairez, President	AM	Y	See comments on specific provisions below.	
8.	Santa Clara County Bar Association Hana S. Callaghan	A	Y	No narrative comments submitted.	No response required.
9.	State Bar of California ADR Committee	A	Y	No narrative comments submitted.	No response required.
10.	Ivan K. Stevenson	AM	N	See comments on specific provisions below.	

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Alternative Dispute Resolution: Mandatory Settlement Conferences (amend Cal. Rules of Court, rule 3.1380)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
	Attorney				
11.	Sharol Strickland Executive Officer Superior Court of Butte County	A	N	No narrative comments submitted.	No response required.
12.	Superior Court of Los Angeles County (no name provided)	A	Y	See comments on specific provisions below.	
13.	Superior Court of Orange County Rules and Forms Committee Hon. Ronald L. Bauer, Chair	AM	Y	See comments on specific provisions below.	
14.	Superior Court of San Diego County Michael M. Roddy, Executive Officer	AM	Y	See comments on specific provisions below.	

 Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Alternative Dispute Resolution: Mandatory Settlement Conferences (amend Cal. Rules of Court, rule 3.1380)

Rule 3.1380(a) – Allowing more than one settlement conference

Rule/Issue	Commentator	Comment	Committee response
Rule 3.1380(a) Allowing more than one settlement conference	Anne Lawlor Goyette Attorney	Agree that the Court has authority to conduct multiple mandatory settlement conferences.	No response required.
Rule 3.1380(a) Allowing more than one settlement conference	Jeff G. Harmeyer Attorney	**3/19/07 e-mail** I am the attorney that represented the petitioner in *Jeld-Wen v. Superior Court* (2007) 146 Cal.App.4th 536. I was recently made aware of a proposed amendment to Rule of Court, Rule 3.1380 by the Judicial Council. I am concerned about the proposed revisions for several reasons. It is no secret that an industry of mediation professionals is not happy with the *Jeld-Wen* decision since it has the potential to reduce mediation revenues. I understand the revisions to Rule 3.1380 were spearheaded by Michael P. Carbone, a full time neutral, who focuses on construction defect claims. (See www.mediate.com). Mr. Carbone recently wrote an article that is not particularly complimentary of the *Jeld-Wen* opinion. (See *Jeld-Wen, Inc. v. Superior Court*: Lessons In Mediation of Complex Litigation). Some of Mr. Carbone's statements regarding the opinion's reference to mandatory settlement conferences are incorrect. Mr. Carbone also wrote: "It may be advisable to consider an amendment to Rule 3.1380 that would allow the courts the flexibility in complex litigation	The committee received suggestions for amending this rule from several sources. Although the *Jeld-Wen* case did not hold that multiple settlement conferences are impermissible, the opinion has raised concerns that rule 3.1380 could be read as authorizing only a single settlement conference in a case. Based on current practice and the history of this rule, the committee believes that multiple settlement conferences are permissible and that rule 3.1380 should be amended to expressly authorize them. Before 2001, the predecessor to rule 3.1380 authorized courts to set a mandatory settlement conference before trial and also specifically authorized courts to set other or additional settlement conferences. We are not aware of any allegation that courts abused their authority to order such settlement conferences when the rule previously contained this explicit authority.

 Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Rule/Issue	Commentator	Comment	Committee response
		to set more than one settlement conference, but without abusing the right to do so. This avenue may prove to be more fruitful than seeking Supreme Court review. In the meantime, or in the absence of such amendment, creative courts may simply set a mandatory settlement conference that will be continued from day to day or week to week until the case is settled." The amendment by the Judicial Council appears to assist courts in scheduling multiple, potentially abusive, settlement conferences, with the potential intent to coerce settlement rather than allow the parties their constitutional right to a jury trial. Although Mr. Carbone, through his article, is keenly aware of this potential abuse, the amendment does nothing to address it. I trust the article written by Mr. Carbone was reviewed by the Committee prior to ruling on the proposed amendment. I am troubled that the amendment could be interpreted to bolster the mediation industry in the face of the *Jeld-Wen* threat. It is our responsibility as attorneys to "Preserve and improve our justice system in order to assure a free and just society under law." (See State Bar of California Mission Statement.) I'm not certain this amendment, or the reasons for it, comply with this Mission Statement. There is at least the appearance of impropriety with this maneuver in response to the *Jeld-Wen* decision. **4/10/07 e-mail** In furtherance of my previous correspondence on the proposed revisions to rule 3.1380, I provide the following for consideration by the Judicial Council when determining whether the proposal has merit for circulation.	

Rule/Issue	Commentator	Comment	Committee response
		Multiple Mandatory Settlement Conferences Amendment to rule 3.1380 subdivision (a) is unnecessary. Although current rule 3.1380 does not authorize multiple mandatory settlement conferences, there is nothing within the rule which expressly prohibits a court from ordering additional conferences. Amending the provision to expressly authorize multiple mandatory settlement conferences will invite abuse. If parties fail to settle at the initial mandatory settlement conference, the court can simply order another, and another, and so on. Without this amendment, court's will only resort to multiple mandatory settlement conferences in unique circumstances. The historical purpose of a mandatory settlement conference is to allow the court to make a final attempt at resolution before a jury or court trial. It should not be conducted early in the litigation when discovery isn't complete. Mandatory Settlement Conferences must not develop into a form of punishment for parties who desire resolution of their dispute through their constitutional right to a trial on the merits. Finally, *Jeld-Wen v. Superior Court* (2007) 146 Cal App 4th 536 ("*Jeld-Wen*") does not confine rule 3.1380 in any way. The only reference to rule 3.1380 is at page 539 of the opinion, under the heading "Factual and Procedural Background," and is simply a recitation of a ground on which *Jeld-Wen* objected to the provisions of the proposed Case Management order. This reference is not part of the analysis or holding. The *Jeld-Wen* case presents no basis for the proposed amendment to rule 3.1380 (a).	

 Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Alternative Dispute Resolution: Mandatory Settlement Conferences (amend Cal. Rules of Court, rule 3.1380)

Rule/Issue	Commentator	Comment	Committee response
Rule 3.1380(a) Allowing more than one settlement conference	Hon. Carolyn B. Kuhl Superior Court of Los Angeles County	The proposed amendment to Rule 3.1380(a) is very helpful in clarifying that a court may order a subsequent MSC (in situations where settlement discussions may prove fruitful) even if a prior MSC was unsuccessful.	No response required.
Rule 3.1380(a) Allowing more than one settlement conference	William Nagle Attorney	I agree that a court has the authority to conduct as many settlement conferences as the court deems necessary.	No response required.
Rule 3.1380(a) Allowing more than one settlement conference	Ivan K. Stevenson Attorney	There is absolutely nothing wrong with having more than one Mandatory Settlement Conference. It really depends on the financial and manpower wherewithal of the court to be able to spend that much time handling settlement conferences, as opposed to handling trials. Years ago, in Orange County, there were Mandatory Settlement Conference weeks and then just before trial there would be another Mandatory Settlement Conference. As a result, I believe there is nothing wrong with allowing more than one settlement conference and I support the parties' right to have more than one settlement conference, if necessary.	No response required.

 Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Rule 3.1380(d) – Prohibiting Conncurrent Service as Mediator & Settlement Officer

Rule/Issue	Commentator	Comment	Committee response
Rule 3.1380(d) Prohibiting Concurrent Service as Mediator & Settlement Officer	Anne Lawlor Goyette Attorney	Disagree that the Court should be prohibited from appointing a mediator to assist settlement negotiations at a settlement conference if all parties to the proceeding request and/or approve of the appointment. If the judge and the parties agree that the mediator's involvement would save judicial time and resources, they should be able to enlist the mediator's assistance – especially in complex cases.	This rule does not prevent the court from appointing a person who is trained as a mediator to conduct a settlement conference; it prohibits a court only from appointing a person who is already serving as a mediator in a case to concurrently conduct a settlement conference. The Evidence Code expressly makes mediation confidentiality provisions of section 1115 et seq. inapplicable to settlement conferences conducted under rule 3.1380. (See Evidence Code section 1117.) When a person is appointed to concurrently serve as a rule 3.1380 settlement officer and a mediator in the same case, it creates confusion about whether the mediation confidentiality statutes apply. This is true regardless of whether the case is complex. The committee believes that courts can find ways of providing helpful settlement services without relying on such dual appointments. No response required.
		Agree that the rules regarding mandatory settlement conferences should not be used to force a party to mediation. It is "the strong public policy of this state to encourage the voluntary settlement of litigation." *Osumi v. Sutton* (June 13, 2007) 07 C.D.O.S. 6739 (Citations.) Confidentiality agreements encourage parties to be candid during settlement negotiations and further this public policy. Settlement is encouraged by allowing the parties to communicate	These are suggestions for changes that were not included in the invitation to comment. It is the policy of the Judicial Council that changes to the rules of court, other than minor or technical changes, should not be adopted without first being circulated for public comment. Therefore, the committee

Rule/Issue	Commentator	Comment	Committee response
		freely, without fear that their communications may be used against them if settlement negotiations are not successful. *Tower Acton Holdings LLC v. Los Angeles County Waterworks District* (2002) 105 Cal.App.4th 590, 602 To clarify the rules governing settlement conferences, the following language should be included in the Advisory Committee Comment to Rule 3.1380: "The special confidentiality requirements for mediations established by Evidence Code sections 1115–1128 do not apply to settlement conferences under this rule; nothing in this rule prevents the parties from stipulating in writing to the application of the confidentiality requirements established by Evidence Code sections 1115–1128 to settlement conferences conducted in the parties' case. This provision…"	will consider these suggestions during another rules cycle.
Rule 3.1380(d) Prohibiting Concurrent Service as Mediator & Settlement Officer	Jeff G. Harmeyer Attorney	**4/10/07 e-mail** The Mediation Privilege The proposed amendment also addresses purported confusion of mediation with mandatory settlement conference for the purpose of application of the mediation privilege. (See Evid. Code sections 1115-1128). This alleged confusion is not explained by the proposed amendment, and is not easily discerned. What is clear is that a mandatory settlement conference is excluded from the mediation privilege. (See Evid. Code section 1117). Apparently the proponents of the amendment believe it is difficult for practitioners to differentiate mandatory settlement conference from mediation. The *Jeld-Wen* decision emphasizes the difference between mediation and mandatory settlement conference. Parties *voluntarily* conduct mediation with the protection of the privilege. Mandatory settlement	As the commentator points out, the Evidence Code expressly makes mediation confidentiality provisions of section 1115 et seq. inapplicable to settlement conferences conducted under rule 3.1380. (See Evidence Code, §1117.) When a person is appointed to concurrently serve as a rule 3.1380 settlement officer and a mediator in the same case, it therefore creates confusion, both for the parties and the courts, about the applicability of the mediation confidentiality statutes. The committee understands that these dual appointments currently occur with some frequency. The case management order at issue in the *Jeld-Wen* case mixed service as a mediator and settlement officer in just this way, as did the

Rule/Issue	Commentator	Comment	Committee response
		conferences are ordered by the court and the privilege does not apply. Since "mandatory" court ordered mediations are not authorized by law, any pre-existing confusion is nullified by the *Jeld-Wen* holding. Neither of the cases cited in support of the amendment uphold the idea that mediation and mandatory settlement conference are indistinguishable. In *Foxgate v. Bramalea* (2001) 26 Cal 4th 1, the Supreme Court does not even discuss mandatory settlement conference. There is no suggestion of confusion on these different resolution procedures. In *Doe 1 v. Superior Court* (2005) 132 Cal App 4th 1160, there is only this brief statement: "We also recognize the conceptual difficulties in distinguishing between a mediation and a settlement conference *when a bench officer is presiding at those talks*. Because the record so clearly shows that the parties were mediating, we do not believe those abstract distinctions apply here." (Emphasis added, Id. at 1166). With the *Jeld-Wen* holding, the abstract distinctions are further ameliorated since a bench officer will not be conducting a court ordered "mandatory mediation." In any event, the law provides many instances where attorneys must appreciate the context of their representation. Certainly discerning between a mediation and mandatory settlement conference for purposes of application of the mediation privilege is not so difficult to warrant the assistance of the Rules of Court. The confusion on mediation versus mandatory settlement conference is largely imaginary, and easily mitigated by alert lawyering. The proposed amendment seems directed at a problem that does not exist. Finally, the proposed revision does nothing to make mediation more distinguishable from mandatory settlement conference. Instead, it simply disallows a voluntary mediator from simultaneously serving as a court appointed settlement conference referee. (See proposed rule 3.1380(d)(1)). Since mandatory court ordered mediations are no longer	case management order in *Doe 1 v. Superior Court* (2005) 132 Cal.App.4th 1160. Because the orders made dual appointments, disputes arose about the nature of the proceedings and, in both these cases, the parties had to go the appellate court to sort out what process was actually being used and what confidentiality law was therefore applicable. While the court in *Jeld-Wen* did discuss the voluntary nature of mediation, the court also recognized that mandatory mediation is explicitly authorized by law in some cases. (see Code of Civ. Proc. §1775 et seq.) The problems associated with mixing service as a mediator and settlement officer that this proposal is designed to address occur regardless of whether participation in mediation is ordered or is voluntary.

Rule/Issue	Commentator	Comment	Committee response
		allowed, it is hard to conceive of a situation where private mediations and a court ordered mandatory settlement conference are conducted at the same time by the same person.	
Rule 3.1380(d) Prohibiting Concurrent Service as Mediator & Settlement Officer	Hon. Carolyn B. Kuhl Superior Court of Los Angeles County	I recommend deleting the addition of subsection (d), however, pending further study and opportunity for the law to evolve. Subsection (d) would freeze the law that places a clear divide between mediations and settlement conferences. It seems to me a better course would be to allow *Jeld-Wen* to stand as the warning to counsel and courts about the need to be clear on the ground rules for a discussion of settlement. Directing judges that they "must not" allow an MSC by the same person who is serving as a mediator unnecessarily curbs the discretion of the court to assist the parties in crafting a settlement device that is best suited for a particular case. This is particularly true in complex litigation. An example may be helpful. A court sometimes will conduct a mandatory settlement conference at which the court and the parties will have access to "early expert reports" that the parties have stipulated will not be permitted to be used at trial. (In complex litigation case management the court and the parties sometimes determine that expert issues in the case are central to case resolution, but the parties are reluctant to commit their expert to a final position early in the litigation. Using "early expert reports" in a mediation context can be a useful tool in such a situation.) Because the "early expert reports" are subject to a nondisclosure agreement analogous to a mediation privilege, a judge might be reluctant to order or to conduct an MSC under these ground rules, for fear of violating subsection (d)(l). Yet there seems to be nothing wrong with such a settlement conference, so long as the parties and the court understand the ground rules. Subsection (d)(l) also would halt the practice of so-called "co-mediation" that is sometimes used (often with substantial success) in	The committee does not believe that this rule would interfere with the practices described by the commentator or prevent experimentation in the ADR field. This rule prohibits a court only from using rule 3.1380, which authorizes mandatory settlement conferences, as the authority for appointing a person to conduct a mediation or from appointing a person to conduct a settlement conference in a case while that person is serving as a mediator in the same case. The Evidence Code creates an important legal distinction between mediation and settlement conferences by expressly making mediation confidentiality provisions of section 1115 et seq. inapplicable to settlement conferences conducted under rule 3.1380. (See Evid. Code, §1117.) Within this current statutory framework, when a person is appointed to concurrently serve as a rule 3.1380 settlement officer and a mediator in the same case, it creates confusion about whether the mediation confidentiality statutes apply to that proceeding. This is true regardless of whether the case is complex. The committee believes that courts can find ways of providing helpful settlement services without relying on such dual appointments.

Rule/Issue	Commentator	Comment	Committee response
		complex litigation cases. Sometimes the parties ask the trial judge (or another judge) to work together with a private mediator that the parties have hired. When that occurs, the parties, the court and the mediator set the ground rules for when communications are and are not confidential pursuant to the mediation privilege. Or the court might order the parties to an MSC after they have had their own privately-arranged mediation. In that situation, the parties might ask for permission to allow the mediator to participate with the judge in the MSC in order to utilize the expertise the mediator has gained with respect to the particular case in prior mediation sessions. Again, under the proposed subsection (d)(l) the parties' proposal likely could not be accommodated. The field of ADR has evolved with great success because experimentation has been permitted and encouraged for nearly three decades. I suggest that the Court Rules should not cut off this experimentation. With more experience, it may be that the Rules of Evidence should be modified to address ADR in hybrid situations that are not "pure" mediations or "pure" mandatory settlement conferences. A clear-cut, immediate and global approach does not always favor long-term just solutions.	
Rule 3.1380(d) Prohibiting Concurrent Service as Mediator & Settlement Officer	William Nagle Attorney	I agree that a mediation is voluntary and cannot be court ordered. I agree that a mediator should not conduct a judicial settlement conference.	The committee notes that mandatory mediation is explicitly authorized by law in some cases. (see, e.g., Code of Civ. Proc. §1775 et seq.) No response required.

Alternative Dispute Resolution: Mandatory Settlement Conferences (amend Cal. Rules of Court, rule 3.1380)

Rule/Issue	Commentator	Comment	Committee response
Rule 3.1380(d) Prohibiting Concurrent Service as Mediator & Settlement Officer	Orange County Bar Association Joseph Chairez, President	The discussion in connection with this proposal indicates that, in part, it seeks to eliminate confusion caused by mixing different ADR processes. Accordingly, the proposal prohibits courts from appointing a person to conduct a settlement conference at the same time that the person is serving as a mediator in the same action. Point in time, however, is arguably not sufficient to eliminate this confusion and ensure that the confines attendant to each ADR process are recognized and respected. Given the over-arching concerns of the Civil and Small Claims Advisory Committee on behalf of the Judicial Council regarding the integrity of court-affiliated ADR as expressed in this and other amendments effecting processes and panels, allowing a person to serve as a mediator and then, in the same case, serve as a settlement judge would seem to call into question the nature of the process and/or the neutrality of that person. Consequently, and with all due respect to the Advisory Committee's comment on this point, an additional provision should be inserted in subdivision (d) of Section 3.1380, whereby a court must not, "[a]ppoint a person to conduct a settlement conference under this rule who has served as a mediator in the same action;..."	While the committee understands the concern that even subsequent service as a settlement officer by a person who served as a mediator in the same case could raise concerns about confidentiality, the committee believes that simultaneous service in dual capacities is of the greatest concern. When a court order appoints a person to be both a mediator and a settlement facilitator under rule 3.1380, it is not clear if any of the communications that occur during that dual process will be considered confidential mediation communications. In contrast, when a person has conducted a mediation and that mediation has ended, the communications that occurred in mediation continue to be protected under the Evidence Code mediation confidentiality sections; the subsequent service as a settlement officer by the former mediator would not alter the confidentiality of the mediation communications. Because prohibiting a person who has served as a mediator from subsequently serving as a settlement facilitator would be a substantive change and would raise issues about subsequent service in other ADR capacities as well, the committee believes that additional study and input is needed before any decision is made about recommending adoption of such a provision.

 Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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Rule 3.1380(d) Prohibiting Concurrent Service as Mediator and Settlement Officer	State Bar of California ADR Committee	The ADR Committee supports this proposal and suggests the addition of the following language at the end of the last sentence in the Advisory Committee Comment: ", provided the appointment is made with the fully informed consent of the parties." The purpose of this language is to protect the litigants from possible misuse by the mediator of confidential information acquired during the mediation.	Because requiring the parties to consent before a court could appoint a person who as served as a mediator in a case to serve as a settlement officer would be a substantive change and would raise issues about subsequent service in other ADR capacities as well, the committee believes that additional study and input is needed before any decision is made about recommending adoption of such a provision.
Rule 3.1380(d) Prohibiting Concurrent Service as Mediator & Settlement Officer	Ivan K. Stevenson Attorney	I was the appellant in the Supreme Court case *Foxgate Homeowners' Assoc. v. Bramalea California, Inc.*, (2001) 26 Cal.4th 1. I was also an Amicus Curiae in the case of *Rojas v. Superior Court*, (2004) 33 Cal.4th 407. As a lawyer, mediator and arbitrator, I am greatly concerned over the issues raised within these proposed changes to the California Rules of Court. I have lectured on the subject of confidentiality in the mediation context, as a Fellow with the Center for International Legal Studies, as well as a lecturer concerning mediation for the Orange County Bar Association, the Los Angeles County Bar Association and the American Bar Association. I provide mediation and arbitration services through my company entitled Confidential Mediation & Dispute Resolution (CMDR). I provide those services not only as a professional, but also as a volunteer mediator for the Los Angeles County Superior Court and the Court of Appeals, Second Appellate Division and the U.S. Central District Court. I was recently granted permission to be an Amicus Curiae in the Supreme Court case of *Simmons v. Ghaderi*, Case Number S147848. I am concerned with issues raised by the proposed rules changes. If mediation is to be a successful alternative to a trial, parties and their	See response above to comments of the Orange County Bar Association concerning this issue.

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		counsel must know that discussions and documents prepared for and during the mediation process will be protected from disclosure. These rules create a potential problem on the confidentiality front. At the same time, mediators must be prevented from sitting in dual capacity in any case. SPR07-12 apparently developed as a result of the ridiculous situation created by a Case Management Order filed in the *Jeld-Wen v. Superior Court of San Diego County* case which ran contra to the decision in Foxgate, which basically stated a mediator could not wear two hats. The problem with the *Jeld-Wen* case is that the court appointed the person as a "mediator and/or as an MSC judge." This allowed the appointed person to choose which hat that person wanted to wear on any given day and threatened the parties and counsels perception of confidentiality. One must remember where the lynchpin of mediation is confidentiality, there is absolutely no confidentiality rules in a mandatory settlement conference other than Evidence Code, §1152 to prevent liability from being proven through an Offer to Compromise. As far as the comments made under Section 3.1380(d)(1), in which there is an indication that the Rules would specifically state that a person cannot sit in dual capacities as a mediator and MSC judge, would follow the dictates of the Judicial Council Rules that came out following *Foxgate* in which a neutral could not sit as a mediator and as a person having decisional authority, such as a discovery referee. The reason you do not want the same person in both capacities as a mediator and an MSC judge, is that in Mandatory Settlement Conferences there is absolutely no confidentiality. Whereas, a mediator provides and safeguards confidentiality. A problem occurs by having one person sitting in two capacities. By specifically precluding the ability of a person to sit in a dual capacity, you avoid future	

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		problems. As a result, it would make better sense to strengthen the wording of Rule 3.1380(d)1 to ensure that the problem will never occur. I would suggest strengthening the wording so as to avoid any misinterpretation. "(1) Appoint a person to conduct a settlement conference under this rule who has previously served as a mediator in the same action." This wording would completely avoid one person sitting in two capacities during the life of the case. That would be the only change I would suggest for this rule.	
Rule 3.1380(d) Prohibiting Concurrent Service as Mediator and Settlement Officer	Superior Court of Orange County, Rules and Forms Committee Hon. Ronald Bauer, Chair	Section (d) of the proposed revision should be deleted since it does not apply to complex litigation cases. The parties may agree to mediation themselves; this provision would not allow this. If this section remains, it should include language to except complex litigation cases or by agreement of the parties.	This rule would not prevent parties in complex cases or any other cases from agreeing to mediation; it prohibits a court only from using rule 3.1380, which authorizes mandatory settlement conferences, as the authority for appointing a person to conduct a mediation or from appointing a person to conduct a settlement conference in a case while that person is serving as a mediator in the same case. Courts are free to appoint mediators under other authority. Rule 3.1380 currently applies in complex cases, and the committee believes that this amendment should be equally applicable in such cases. The concerns about the confusion created by dual appointments arise equally in complex and noncomplex

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			cases; many of the appellate cases in which these issues have arisen, including the *Jeld-Wen* case, have been complex cases.
Rule 3.1380(d) Prohibiting Concurrent Service as Mediator and Settlement Officer	Superior Court of San Diego County Michael M. Roddy Executive Officer	To avoid ambiguity on its face, Rule 3.1380(d)(2) should include the following italicized portion (as modified) of the proposed Advisory Committee Comment and should read as follows: "Appoint a person to conduct a mediation under this rule. *This provision does not prohibit a court from appointing a person who has previously served as a mediator in a case to conduct a settlement conference in that case following the conclusion of the mediation.*"	Including this provision in the comment, rather than in the rule text, parallels the structure in rules 3.900 and 3.920, relating to references.

Rules 3.900 et seq. - References

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Rules 3.900 et seq. References	Katherine L. Gallo, Discovery Referee	I have been a private discovery referee since 1994 in the San Francisco Bay Area. I am greatly concerned that this CRC rule will not pass because a few special masters in the construction defect arena want to keep their power that the obtained out of whole cloth other then the Code of Civil Procedure. Many special masters take the power of CCP Section 638 and 639 and also get appointed as a mediator through a court order before all parties are in the case. They stay discovery and then order "settlement Conferences." Some have anywhere from 10 - 25 settlement conferences in the life of the case. This is abuse. Parties are stuck in this vicious cycle where they can't get the information they need for their carrier or for a MSJ but are spending thousands of dollars a day attending these mediations with no end in sight. When discovery is finally open because the case will not settle it is usually just months before trial and no MSJ motion can be filed and depositions are double and triple tracked. The CRC says that the court can appoint a settlement referee. However, there is no explanation in the CRC as to what a settlement referee is. Also, there is no authority in either the CCP or the CRC as to whether or not a settlement referee can get paid. However, many special master's are using that terminology to get around *Jeld-Wen* and call themselves settlement referees and charge anywhere from $500 to $750 an hour. The mediation process is voluntary. The same person who is pushing mediation can not be the discovery referee pursuant to the CRC's. Yet that is still happening. Cloaking the discovery referee with powers of a Settlement judge is a conflict as the discovery referee can not pull the trigger on a discovery motion when he/she is asking for a couple hundred thousand dollars from the same person who should be	The committee is recommending adoption of the amendments to rule 3.1380 relating to concurrent appointment of a person as a mediator and settlement officer. However, these amendments do not address settlement conferences conducted by referees appointed under Code of Civil Procedure sections 638 or 639. The provisions concerning referees are found in rules 3.900 et seq., which were not part of this proposal. The committee will consider the concerns raised by the commentator about referees during the 2008 committee year.

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		sanctioned. Furthermore, a private mediator should not be able to force parties to attend their so called "mandatory settlement conferences" and force the parties to pay his/her hourly rate of $500 - $750 hour. These are not mandatory settlement conferences even though they call them that. These are mediations and are voluntary by statute and case law just under a different name. If it was a mandatory settlement conference then the fees of the mediator need to paid for by the court not the parties. Parties in this special master program are not getting due process--they are being held hostage as they have no where to go to get justice.	
Rules 3.900 et seq. References	Anne Lawlor Goyette Attorney	1. To further clarify the rules governing settlement conferences, the following language should be added to Rule 3.1380: A court may use the reference procedure under Code of Civil Procedure section 638 to appoint a person to conduct settlement conferences. This amendment simply formalizes the Advisory Committee Comment to Rule 3.900: Advisory Committee Comment Rule 3.900 is not intended to prohibit a court from appointing a referee to conduct a mandatory settlement conference or, following the conclusion of a reference, from appointing a person who previously served as a referee to conduct mediation.	These are suggestions for changes that were not included in the invitation to comment. It is the policy of the Judicial Council that changes to the rules of court, other than minor or technical changes, should not be adopted without first being circulated for public comment. Therefore the committee will consider these suggestions during the 2008 committee year.
Rules 3.900 et seq. References	Jeff G. Harmeyer Attorney	**4/10/07 e-mail** As a preliminary matter, the Judicial Council is authorized to adopt rules only "for court administration, practice and procedure,. . . The	Rule 3.1380, which the committee is recommending be amended, addresses mandatory settlement conferences; it does not, and is not intended to, address

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		rules adopted shall not be inconsistent with statute." (California Constitution, Article 6, Sec. 6 (d).) The Judicial Council is not authorized to change, amend or circumvent any statute. In this context, I provide comment on the proposed revisions as well as the purported need for these revisions. ___ Authority for appointment of referee The proposed amendment seeks to circumvent the limitations to an order of reference set forth in CCP section 639. Section 639 allows reference (without the parties consent) in just five situations (section 639(a)(1)–(5)). None of these situations allows a reference for the purpose of conducting a mediation or a mandatory settlement conference. Proposed subdivision (d) of the amendment to rule 3.1380 implies the opposite, stating: "A court must not: (1) Appoint a person to conduct a settlement conference under this rule at the same time as that person is serving as a mediator." In other words, the proposed amendment first assumes the court has the power to appoint a referee to conduct a settlement conference when there is no such mandate, and then limits this unauthorized power. This revision to rule 3.1380 is an attempt to amend section 639 to expand the situations where reference without the consent of the parties is available. The proposed amendment is also in direct conflict with rule 3.920 which sets forth the purposes and conditions for appointment of a referee. Rule 3.920(a) states: "A court may order the appointment of a referee under Code of Civil Procedure section 639 only for the purposes specified in that section." (Emphasis added.) (The Advisory Committee Comment to rule 3.920 conflicts with the rule itself since it again implies, in reverse logic, that 639 can be used to appoint a referee to conduct a mandatory settlement conference). Finally, proposed subdivision (d) to rule 3.1380 is inappropriate	references under Code of Civil Procedure sections 638 or 639. Thus, the committee does not believe that this amendment creates any implication about the purposes for which a referee may be appointed. As the commentator notes, the rules relating to references are 3.900 et seq.

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		because it is misplaced within the framework of the Rules of Court. Rule 3.1380 et. seq. relates to the authorized process of a mandatory settlement conference, not the appointment of a referee. Rule 3.920 et. seq. provides the procedure for and limitations of reference, along with qualifications and disqualifications. Conclusion The proposed amendments to rule 3.1380 are not necessary and they improperly assume that a court has the power to appoint a referee to conduct a mandatory settlement conference. Consequently, it appears the true purpose of the proposed revision is to expand the mandatory settlement conference procedure and allow courts to appoint private mediators to conduct them. While this may serve the interests of the private mediation industry, it does nothing to improve our justice system or secure free access to the courts by litigants. The *Jeld-Wen* decision is a very positive development for litigants, giving them the freedom to choose how to resolve their disputes. Replacing mandatory mediations with multiple court ordered mandatory settlement conferences would improperly circumvent *Jeld-Wen* and allow the private mediation industry to obtain additional work by court order. For these reasons, the Judicial Council should not approve the proposed amendment for circulation.	
Rules 3.900 et seq. References	William Nagle Attorney	Attached is an article I was asked to write about our Northern California Special Master system that will appear in the next publication of the Association of Defense Counsel magazine. It addresses the issues of concern in this proposed change. However, in Northern California our orders have always permitted a referee or Special Master appointed by the Court to conduct settlement conferences in our complex cases. This proposed amendment is silent on the subject. Perhaps an (e) section should be added that states:	These are suggestions for changes that were not included in the invitation to comment. It is the policy of the Judicial Council that changes to the rules of court, other than minor or technical changes, should not be adopted without first being circulated for public comment. Therefore the committee will consider these suggestions during the next committee year.

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		(e) Special Masters and Referees Nothing in this section prohibits the appointment of a Special Master or Referee appointed by the Court in a complex case from conducting a settlement conference pursuant to Order of the Court. This would avoid any possible confusion created by the practices of confusing mediators and court appointed special masters and referees.	