

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

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report Summary

TO: Members of the Judicial Council

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

DATE: September 27, 2005

SUBJECT: Alternative Dispute Resolution: Preserving Mediation Confidentiality in Rule 1622 Proceedings (amend Cal. Rules of Court, rules 1580.1 and 1622; adopt rules 1621, 1622.1, 1622.2, and 1622.3; approve form ADR-107) (Action Required)

Issue Statement

Rule 1622(a) of the California Rules of Court currently requires superior courts that make lists of mediators available to litigants in general civil cases, or that recommend, select, appoint, or compensate mediators, to establish procedures for receiving, investigating, and resolving complaints against those mediators. At the same time, the Evidence Code establishes the confidentiality of communications, conduct, and writings in connection with a mediation (hereafter collectively referred to as “mediation communications”). The rules of court do not currently specify how superior courts should address complaints against mediators in a manner consistent with the mediation confidentiality statutes, and several courts have requested such guidance.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council:

1. Effective January 1, 2006:
 - a. Adopt rule 1621 of the California Rules of Court, requiring that mediators in court-program mediations (1) request that mediation participants complete an attendance sheet, (2) retain the attendance sheet for two years and submit it to the court upon request, and (3) agree that mediation communications may be disclosed solely for purposes of a procedure conducted pursuant to rule 1622 to address an inquiry or a complaint about the mediator;

- b. Approve form ADR-107, *Attendance Sheet for Court-Program Mediation of Civil Case*, for mediators' optional use in obtaining the participants' names and contact information as required by rule 1621;
 - c. Adopt rule 1622.1 of the California Rules of Court, requiring that the presiding judge of each superior court that is mandated by rule 1622 to establish a complaint procedure designate a person who is knowledgeable about mediation to receive and coordinate the investigation of any inquiries or complaints about the conduct of mediators subject to rule 1622;
 - d. Adopt rule 1622.2 of the California Rules of Court, establishing the confidentiality and limiting the disclosure of information and records regarding rule 1622 complaint procedures;
 - e. Adopt rule 1622.3 of the California Rules of Court, disqualifying any person who has participated in or received information about a rule 1622 complaint procedure from subsequently adjudicating the dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation; and
 - f. Amend rule 1622 of the California Rules of Court to (1) clarify that the complaint procedures required by that rule are to address complaints that a mediator violated the standards of conduct set forth in rule 1620 et seq. while conducting a court-program mediation, and (2) authorize a court to require a mediator who failed to comply with the rules of conduct for mediators in rule 1620 et seq. to participate in additional mediation training, in addition to or instead of the other sanctions already permitted.
2. Effective January 1, 2007, amend rule 1580.1 of the California Rules of Court to require that, to be included on a court list of alternative dispute resolution (ADR) neutrals, a neutral must sign a statement or certificate agreeing to comply with all applicable rules of court and current pro bono service requirements as well as with applicable ethical requirements.

The texts of the rules is attached at pages 24–27; the text of form ADR-107 is attached at pages 28 and 29.

Rationale for Recommendation

Rules 1621, 1622.1, 1622.2, and 1622.3 and form ADR-107

Adopting rules 1621, 1622.1, 1622.2, and 1622.3 and approving form ADR-107 will help ensure that superior court procedures for receiving, investigating, and resolving complaints against court-program mediators are consistent with the requirements and underlying purposes of the mediation confidentiality statutes.

- Rule 1621 and form ADR-107 will help courts obtain mediation participants' agreement to the disclosure of mediation communications if that is needed to address a complaint under rule 1622. Evidence Code section 1122(a)(1) provides that mediation communications are not protected from disclosure if all persons who conduct or otherwise participate in the mediation expressly agree. By requiring mediators in court-program mediations to request the participants' names and contact information and to provide this information to the court upon request, rule 1621(a) would enable courts to contact the participants and request their agreement to disclosure of mediation communications in a rule 1622 complaint procedure, if necessary. Optional form ADR-107, *Attendance Sheet for Court-Program Mediation of Civil Case*, would assist mediators in obtaining the participants' names and contact information. By requiring court-program mediators' agreement that mediation communications may be disclosed solely for purposes of addressing an inquiry or a complaint pursuant to rule 1622, rule 1621(b) would ensure that the absence of a court-program mediator's agreement to disclosure does not impede the resolution of a complaint against him or her.
- Rule 1622.1 would ensure that any necessary disclosure of mediation communications is strictly limited by requiring that a single person be appointed to receive and coordinate the investigation of complaints under rule 1622.
- Rule 1622.2 would ensure that the disclosure of information about a complaint procedure does not reveal mediation communications by establishing the confidentiality and limiting the disclosure of information and records regarding rule 1622 complaint procedures.
- Rule 1622.3 would prevent the disclosure of mediation communications and mediators opinions or reports to adjudicators by disqualifying all persons who participated in or received information about a rule 1622 complaint from subsequently hearing or determining any contested issue of law, fact, or procedure in related court actions or proceedings.

Rule 1622

Amending rule 1622(a) will clarify that the rule only requires procedures to address complaints that mediators failed to comply with the rules of conduct set forth in rule 1620 et seq., when applicable. While this limitation is implicit from rules 1620.1 and 1622(b), amending rule 1622(a) to include language parallel to that already in 1622(b) will make the scope of the existing rule 1622 complaint process requirement more readily apparent.

Amending rule 1622(b) will give courts a broader range of disciplinary options. In some circumstances, requiring the mediator to complete additional mediation training may be more appropriate than giving a reprimand or preventing the mediator from receiving future mediation referrals from the court.

Rule 1580.1(b)

Rule 1580.1(b) currently requires that, to be included on a court list of alternative dispute resolution (ADR) neutrals, neutrals must (1) sign a certificate agreeing to comply with all applicable ethical requirements, and (2) agree to serve on a pro bono or modest-means basis in at least one case per year, if requested by the court. The neutrals' agreement to serve pro bono is not currently required to be in writing and neutrals are not currently required to agree to comply with all applicable rules of court. Requiring ADR neutrals' written agreement to satisfy the current pro bono service requirement and to comply with all applicable rules of court will facilitate compliance with and enforcement of those requirements.

Alternative Actions Considered

In addition to requiring mediators to ask mediation participants to request the participants' names and contact information, the proposal circulated for comment would have required mediators to complete, sign, and present a proposed new mandatory form, ADR-108, *Information and Agreement for Court-Program Mediation of Civil Case*, to participants in court-program mediations, retain the form for two years, and provide it to the court upon request. One purpose of the proposed ADR-108 form was to request the participants' advance agreement to the disclosure of mediation communications in the event of an ensuing rule 1622 proceeding. The Civil and Small Claims Advisory Committee is not recommending adoption of form ADR-108 or the implementing rule. Based on the public comments received, the committee concluded that the potential negative consequences of requiring the mediator to present such a form in all court-program mediations outweigh the benefits of obtaining the participants' advance agreement to disclosure of mediation communications in the very small number of court-program mediations where there is an inquiry or a complaint about the mediator.

Based on several comments, the advisory committee considered recommending a requirement that mediators forward the participants' names and contact information to the courts upon completion of each court-program mediation, instead of having mediators retain that information for two years and forward it to the court upon request. However, because such an alternative approach might have significant administrative and policy implications, the committee concluded that it should not be recommended without first being circulated for public comment. To ensure that this information is available to courts, the committee recommends that mediators be required to request and retain the participants' names and contact information at this time. The committee will consider this alternative approach at a later date.

The advisory committee also considered proposing legislation that would specifically allow the disclosure of mediation communications in rule 1622 complaint procedures and establish the confidentiality of rule 1622 procedures, information, and records. If enacted, such a statute might provide a less administratively burdensome and more comprehensive way of ensuring that mediation communications can be disclosed and considered by the

court in all rule 1622 complaint procedures and that rule 1622 information and records would be protected from disclosure under the absolute privilege for official information established by Evidence Code section 1040(b)(1). However, it is uncertain whether, and, if so, when the goals of the current proposal might be achieved through legislation. The committee therefore concluded that it would be best to proceed with this set of proposed rules and forms.

Comments From Interested Parties

Thirty-seven individuals and organizations submitted comments on this proposal. Of these, 33 expressed concerns about the proposal, either disagreeing with the proposal or supporting it only if amended. Only 4 commentators supported adoption of the proposal as circulated.

The greatest number and intensity of concerns involved the requirement that mediators present proposed form ADR-108 to the participants. Most commentators either supported or did not comment about the other aspects of the proposal. Overall, the commentators were most troubled that form ADR-108 requested the participants' advance agreement to the disclosure of mediation communications to address a complaint against the mediator. As noted above, in response to these comments, the committee eliminated from its proposal both form ADR-108 and the rule that would have required mediators to present it to court-program mediation participants.

A chart of the comments and the committee's responses is attached at pages 30–81.

Implementation Requirements and Costs

Rule 1622 currently requires that certain superior courts have procedures for addressing complaints against court-program mediators. The amendment of rule 1622 and the adoption of rules 1621, 1622.1, 1622.2, and 1622.3 would require those courts to review, and potentially to modify, their complaint procedures, but is not expected to require any significant new ongoing administrative action or costs.

The amendment of rule 1580.1 would require some or all superior courts with existing panels of ADR neutrals for general civil cases to obtain updated statements or agreements from their panel members. To give courts more time to implement this requirement, the Civil and Small Claims Advisory Committee recommends that the amendment of rule 1580.1 not take effect until January 1, 2007.

Attachments

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SUBJECT: Alternative Dispute Resolution: Preserving Mediation Confidentiality in Rule 1622 Proceedings (amend Cal. Rules of Court, rules 1580.1 and 1622; adopt rules 6121, 1622.1, 1622.2, and 1622.3; approve form ADR-107) (Action Required)

Issue Statement

Rule 1622(a) of the California Rules of Court currently requires superior courts that make lists of mediators available to litigants in general civil cases, or that recommend, select, appoint, or compensate mediators, to establish procedures for receiving, investigating, and resolving complaints against those mediators. At the same time, the Evidence Code establishes the confidentiality of communications, conduct, and writings in connection with a mediation (hereafter collectively referred to as “mediation communications”). The rules of court do not currently specify how superior courts should address complaints against mediators in a manner consistent with the mediation confidentiality statutes, and several courts have requested such guidance.

Background

Trial courts throughout California increasingly promote mediation to assist civil litigants in resolving their disputes. Many courts refer or order cases to mediation, maintain panels of mediators, provide lists of mediators to litigants, or refer cases to specific mediators.

Mediators are not licensed, certified, or regulated by the state of California. To inform and protect mediation participants and promote public confidence in court mediation programs, the Judicial Council has adopted standards of conduct for mediators in court-connected mediation programs for civil cases and required courts to establish procedures for resolving complaints against these mediators. (Cal. Rules of Court, rule 1620 et seq.) These standards of conduct address voluntary participation and self-determination;

confidentiality; impartiality, conflicts of interest and disclosure; competence; quality of the mediation process; marketing; and compensation and gifts. While complaints regarding mediator conduct are infrequent, rule 1622(a) requires superior courts that make lists of mediators available to litigants in general civil cases, or that recommend, select, appoint, or compensate mediators, to establish procedures for receiving, investigating, and resolving complaints against those mediators. Rule 1622(b) provides that the court may reprimand a mediator, 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 rules 1620–1620.9.

Evidence Code sections 703.5 and 1115–1128 establish the confidentiality of mediation communications. In general and in pertinent part, they provide that:

- 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) and (b) and 1122(a)(1).)
- All communications, negotiations, or settlement offers 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).)
- 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.)
- 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.)

Some courts expressed concerns that presenting, investigating, and resolving a complaint about a mediator might require the disclosure of mediation communications and they requested guidance regarding how to design a rule 1622 procedure that is consistent with the confidentiality provisions of Evidence Code sections 703.5 and 1115–1128. This proposal was developed in response to those requests. The primary objective of the proposal is to preserve mediation confidentiality and protect its underlying purposes when courts receive and address complaints against court-program mediators. The proposed rules and form seek to accomplish this objective in two main ways:

1. By establishing the confidentiality of rule 1622 complaint procedures and records and prohibiting participants in those procedures from subsequently adjudicating

related disputes; and

2. By enabling courts, if necessary, to obtain mediation participants' agreement to the disclosure of mediation communications in a rule 1622 complaint procedure. (See Evid. Code, §§ 1121, 1122(a).)

Rationale for Recommendation

Establishing the confidentiality of rule 1622 complaint procedures— rules 1622.1, 1622.2, and 1622.3

The proposal seeks to establish the confidentiality of rule 1622 complaint procedures and limit the disclosure of records from these procedures for several reasons. Evidence Code section 1119(c) provides that communications in the course of a mediation “shall remain confidential.” If the rule 1622 complaint procedure is confidential, any mediation communications discussed in that complaint procedure would remain confidential. In addition, as noted above, the confidentiality statutes prohibit a court or other adjudicative body from receiving mediator reports or opinions (see Evid. Code, § 1121). Establishing the confidentiality of rule 1622 procedures would prevent the judicial officer assigned to hear a case from inadvertently learning the mediator's opinions.

The proposal establishes the confidentiality of rule 1622 procedures and records in three principal ways. First, rule 1622.1 would require the presiding judge of each court that must establish a rule 1622 procedure to designate a single person to receive and coordinate the investigation of complaints under rule 1622. The designation of a single person to perform these functions will help ensure that inquiries and complaints about mediators are appropriately addressed and that the disclosure of mediation communications is strictly limited. By requiring that the designee be knowledgeable about mediation, the proposal is designed to ensure that the designee is familiar with the confidentiality of mediation communications and rule 1622 procedures and records and can inform others who participate in the complaint procedure about the limitations on disclosure. The designee could also ensure that judicial officers with adjudicatory responsibility for the underlying dispute do not participate in the complaint process.

Second, rule 1622.2 would establish the confidentiality and limit the disclosure of information and records about rule 1622 complaint procedures to ensure that mediation communications shared in those complaint procedures are not subsequently revealed. Rule 1622.2(b) provides that all procedures for receiving, investigating, and resolving inquiries or complaints about mediators must be designed to preserve the confidentiality of mediation communications. Rule 1622.2(c) provides that all communications, procedures, and decisions under rule 1622 must occur in private and be kept confidential and that information or records about a rule 1622 complaint process may be open to the public only as provided in rule 1622.2(d) or as otherwise required by law. Rule 1622.2(d) gives the presiding judge or his or her designee discretion to authorize the disclosure of

only information or records regarding rule 1622 procedures that do not reveal any mediation communications.

Third, rule 1622.3 would disqualify all persons who participated in or received information about a rule 1622 complaint from subsequently hearing or determining any contested issue of law, fact, or procedure in related court actions or proceedings. This would promote one of the principal purposes of mediation confidentiality: to prevent the disclosure of mediator opinions or reports to the adjudicator of the underlying dispute.

Enabling courts to obtain mediation participants' agreement to the disclosure of mediation communications in a rule 1622 complaint procedure—rule 1621 and form ADR-107

As discussed above, Evidence Code section 1122(a)(1) establishes an exception to mediation confidentiality when all persons who conduct or otherwise participate in the mediation expressly agree to the disclosure of the mediation communication. Additionally, section 1121 allows a mediator's report to be submitted to and considered by a court if all parties to the mediation expressly agree.

Proposed rule 1621 and form ADR-107 would help courts invoke these statutory exceptions to mediation confidentiality, if this is considered necessary or desirable to resolve a complaint under rule 1622. First, rule 1621(a) would require mediators in court-program mediations to (1) ask the participants to provide their names and contact information on an attendance sheet, (2) retain the attendance sheet for two years, and (3) submit this sheet to the court on request. Proposed form ADR-107 is an optional attendance sheet that mediators could use to satisfy this requirement. The attendance-sheet requirement and form would enable courts to request the mediation participants' agreement to the disclosure of mediation communications if there was an ensuing rule 1622 complaint procedure. Second, rule 1621(b) would require court-program mediators' agreement that mediation communications may be disclosed solely for purposes of addressing an inquiry or a complaint pursuant to rule 1622. This will ensure that the absence of a court-program mediator's agreement to disclosure does not impede the resolution of a complaint against him or her.

Other related changes

Clarifying the scope of required complaint procedures—rule 1622(a)

Rule 1622(a) currently requires superior courts that make lists of mediators available to litigants in general civil cases, or that recommend, select, appoint, or compensate mediators, to establish procedures for receiving, investigating, and resolving complaints against these mediators. This subdivision does not explicitly state whether these courts must address complaints that emanate from private mediations conducted by court-program mediators or complaints that court-program mediators did something that is not

prohibited by the rules of conduct for mediators set forth in rule 1620 et seq. Several commentators suggested that the scope of this requirement be clarified.

The amendment to rule 1622(a) would clarify that a complaint procedure is only required for complaints that a mediator violated rule 1620 et seq. while conducting a court-program mediation. This limitation is already implicit from rules 1620.1 and 1622(b). Rule 1620.1 essentially provides that rules 1620 through 1622, including the requirement for a complaint procedure, apply only when a mediator is notified that a mediation is to be conducted as part of a court's mediation program. Additionally, rule 1622(b) authorizes a court to take action only against a mediator who fails to comply with the rules of conduct set forth in rule 1620 et seq., when applicable. The amendment to rule 1622(a) would simply make these limitations on the scope of the required complaint procedure explicit, by mirroring the limiting language of rule 1622(b).

Authorizing courts to require additional mediation training—rule 1622(b)

Rule 1622(b) currently provides that the court may reprimand a mediator, 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 rules 1620–1620.9, when applicable. However, in some circumstances, requiring the mediator to complete additional mediation training may be more appropriate than giving a reprimand or preventing the mediator from receiving future referrals. The amendment to rule 1622(b) will broaden the courts' disciplinary options to include requiring that a mediator participate in additional mediation training.

Requiring neutrals' written agreement to comply with current requirements for inclusion on a court list and with applicable rules of court—rule 1580.1(b)

Rule 1580.1(b) currently requires that, to be included on a court list of ADR neutrals, a neutral must (1) sign a certificate agreeing to comply with all applicable ethical requirements and (2) agree to serve on a pro bono or modest-means basis in at least one case per year, if requested by the court. The amendment to this rule will require ADR neutrals' written agreement to comply with all applicable rules of court and with pro bono service requirements, as well as with applicable ethical requirements. This will facilitate compliance with and enforcement of these requirements and help ensure the efficacy and smooth operation of court ADR programs.

Alternative Actions Considered

In addition to requiring mediators to ask mediation participants to request the participants' names and contact information, the proposal circulated for comment would have required mediators to complete, sign, and present a proposed new mandatory form, ADR-108, *Information and Agreement for Court-Program Mediation of Civil Case*, to participants in court-program mediations, retain the form for two years, and provide it to the court upon request. One purpose of the proposed ADR-108 form was to request the participants' advance agreement to the disclosure of mediation communications in the

event of an ensuing rule 1622 proceeding. The Civil and Small Claims Advisory Committee is not recommending adoption of form ADR-108 or the implementing rule. Based on the public comments received, the committee concluded that the potential negative consequences of requiring the mediator to present such a form in all court-program mediations outweigh the benefits of obtaining the participants' advance agreement to disclosure of mediation communications in the very small number of court-program mediations where there is an inquiry or a complaint about the mediator.

Based on several comments, the advisory committee considered recommending a requirement that mediators forward the participants' names and contact information to the courts upon completion of each court-program mediation, instead of having mediators retain that information for two years and forward it to the court upon request. However, because such an alternative approach might have significant administrative and policy implications, the committee concluded that it should not be recommended without first being circulated for public comment. To ensure that this information is available to courts, the committee recommends that mediators be required to request and retain the participants' names and contact information at this time. The committee will consider this alternative approach at a later date.

The advisory committee also considered proposing legislation that would specifically allow the disclosure of mediation communications in rule 1622 complaint procedures and establish the confidentiality of rule 1622 procedures, information, and records. If enacted, such a statute might provide a less administratively burdensome and more comprehensive way of ensuring that mediation communications can be disclosed and considered by the court in all rule 1622 complaint procedures and that rule 1622 information and records would be protected from disclosure under the absolute privilege for official information established by Evidence Code section 1040(b)(1). However, it is uncertain whether, and, if so, when the goals of the current proposal might be achieved through legislation. The committee therefore concluded that it would be best to proceed with this set of proposed rules and forms.

Comments From Interested Parties

Overview of the comments

We received 37 comments about the proposal. Of these, 24 were from mediators, private mediation program administrators, and attorneys; 10 were from courts, judicial officers and court staff; 2 were from state or local bar organizations; and 1 was from a statewide, nonprofit organization of ADR neutrals, providers, and educators. Of the 37 comments, 33 expressed concerns about the proposal, either disagreeing with the proposal or supporting it only if amended. Only 4 comments supported adoption of the proposal as circulated.

Form ADR-108—Information and Agreement for Court-Program Mediation of Civil Case

As indicated above, the proposal that was circulated for comment would have required mediators to complete, sign, and present form ADR-108, *Information and Agreement for Court-Program Mediation of Civil Case*, to participants in all court-program mediations. However, as a result of the public comments received, the Civil and Small Claims Advisory Committee is not recommending adoption of form ADR-108 or the rule that would have implemented this requirement (1621(b), as circulated for comment).

The requirement that mediators present ADR-108 to the mediation participants was, by far, the aspect of the proposal that concerned most commentators.¹ Overall, the commentators were particularly troubled that form ADR-108 requested the participants' advance agreement to the disclosure of mediation communications in any potential complaint proceeding against the mediator. Principally, they thought this would undermine trust in the mediator, the mediation process, and the confidentiality of mediation communications, all of which are considered essential to a successful mediation.² They were also concerned that presenting and explaining the form would take up mediation time and divert attention from resolving the dispute.³ In addition, some were concerned about imposing additional administrative burdens on court-program mediators (many of whom serve pro bono)⁴ and the possibility that some mediators would no longer be willing to serve in court mediation programs.⁵ Finally, a few were concerned that this requirement would cause an increase in the number of complaints against mediators or that parties with "buyers' remorse" would assert defects in the preparation or presentation of the form as a basis for challenging a settlement agreement.⁶

¹ The following discussion summarizes the primary reasons the commentators gave for opposing this requirement. The commentators and the location in the comment chart where their comments are summarized are identified in subsequent footnotes. While some of these commentators stated objections to the proposal without explicitly referring to the requirement to present form ADR-108, and their comments therefore appear under the general comments in the comment chart, the nature and context of their comments suggested that their objections stemmed primarily from the form ADR-108 requirements.

² See, e.g., comments of Judge Miram, Mss. Bullock and Lyster, and Messrs. Blackman, Brand, Denver, Durkin, Fagone, Madison, and Zipser (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Impact on the "Tenor" of the Mediation*, which begins at page 54) and comments of Mss. Glick and Lyster and Messrs. Brand, Smith, Spiro, and Zipser (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Waiver of Confidentiality*, which begins at page 57).

³ See, e.g., comments of Messrs. Blackman, Madison, McClintock, Spiro, and Zipser (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Position and General Concerns*, which begins at page 44).

⁴ See, e.g., comments of Ms. Rothman and Messrs. Barrett and Brand (summarized in the comment chart under the heading *General Comments About the Proposal*, which begins at page 31).

⁵ See, e.g., comments of Judge Miram, and Messrs. Blackman, Laurie, Levy, and Smith (summarized in the comment chart under the heading *General Comments About the Proposal*, which begins at page 31).

⁶ See, e.g., comments of Mss. Culbert and Rothman, and Messrs. Laurie, Stevenson, and Zipser (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Position and General Concerns*, which begins at page 44).

Many commentators challenged the necessity for requesting advance agreements to disclosure of mediation communications in all court-program mediations to address the possibility that there might be a subsequent rule 1622 proceeding. Some suggested that the volume of complaints against mediators (perhaps 50 per year statewide) does not warrant the adoption of procedures that might detrimentally affect all the court-program mediations that are conducted (more than 30,000 per year statewide).⁷ Some commentators suggested, based on various interpretations of the confidentiality statutes, that the participants' agreement is not required for disclosure and court consideration of mediation communications in some or all types of rule 1622 proceedings.⁸ Some commentators also suggested that the participants' agreement to disclosure should be requested by the court, rather than the mediator, either before the mediation or only if and when a complaint arises.⁹

Some commentators expressed concerns about other aspects of form ADR-108. Many did not like the length, complexity, or "density" of the form.¹⁰ Some commented that the form would be particularly difficult for self-represented litigants to understand and expressed concerns that mediators would be called upon to answer questions that might be regarded as giving legal advice.¹¹ Two court ADR administrators thought that represented parties would be unlikely to review the form and that therefore the intended benefits of providing information to them would not be obtained.¹² Some commentators suggested that specific provisions of ADR-108 should be modified if the form were to be adopted.¹³

As a result of the weight and force of the comments received, the Civil and Small Claims Advisory Committee is not recommending adoption of form ADR-108 or the implementing rule at this time. This decision was based principally on the view that the

⁷ See, e.g., comments of Mss. Bullock, Lyster and Strickland and Messrs. Blackman, Fagone, Simon, and Smith (summarized in the comment chart under the heading *Necessity for Proposal, in General*, which begins at page 35).

⁸ See, e.g., comments of Ms. Culbert and Messrs. Carbone, Madison, Smith, Spiro, and Zipser (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Necessity for Disclosure Agreement*, which begins at page 60).

⁹ See, e.g., comments of Bar Association of San Francisco and Messrs. Brand and Madison (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Waiver of Confidentiality*, which begins at page 57) and of Messrs. Durkin and Spiro (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Position and General Concerns*, which begins at page 44).

¹⁰ See, e.g., comments of Mss. Bullock and Culbert and Messrs. Brand, Love, and Zipser (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Position and General Concerns*, which begins at page 44).

¹¹ See, e.g., comments of Mss. Bronson and Strickland and Messrs. Brand and Zipser (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Position and General Concerns*, which begins at page 44).

¹² See, e.g., comments of Mss. Bronson and Strickland (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Position and General Concerns*, which begins at page 44).

¹³ See, e.g., comments of Bar Association of San Francisco, Mss. Rothman and Shartzter and Mr. Zipser (summarized in the comment chart under the heading *Rule 1621(b) and Form ADR-108—Position and General Concerns*, which begins at page 44).

low number of complaints historically made about mediators does not justify the potentially adverse impacts identified by commentators of requiring the presentation of form ADR-108 in all court-program mediations.

Rule 1621(a) and form ADR-107—Attendance Sheet

As noted above, rule 1621(a) would require mediators to ask court-program mediation participants to complete an attendance sheet, to enable courts to request the participants' agreement to the disclosure of mediation communications in a rule 1622 complaint procedure if that is determined to be necessary or desirable. Proposed form ADR-107 is an optional attendance sheet that mediators may use to satisfy this requirement.

Relatively few of the commentators specifically addressed the proposed requirement that mediators ask participants to complete an attendance sheet. Those who did comment were equally divided: six generally supported the requirement and six generally opposed it; however, the opposition to the attendance-sheet requirement was not nearly as vigorous as the opposition to form ADR-108. These comments and the advisory committee's responses are summarized in the comment chart under the heading *Rule 1621(a) and Form ADR-107—Attendance Sheet*, which begins at page 41.

In general, supporters commented that the attendance-sheet requirement would be necessary or beneficial for courts to contact participants in the event of a complaint, for courts to conduct post-mediation surveys, and for mediators to identify potential conflicts in future mediations.¹⁴ They also indicated that the current use of attendance sheets in some court mediation programs and in construction-defect special-master cases has not been problematic.¹⁵ In general, opponents commented that the attendance-sheet requirement and proposed form were unnecessary and burdensome.¹⁶ One commentator, Ms. Shartzer suggested that submitting an attendance sheet to the court would be contrary to the Supreme Court's decision in *Foxgate Homeowners Association v. Bramalea* ((2001) 26 Cal.4th 1) by opening the possibility of court punishment of a party who does not appear at a mediation.

The committee believes it is important that mediators ask court-program mediation participants to provide their names and contact information, retain this information, and provide it to the court upon request. The only way that a court can obtain the participants' consent to disclosure of mediation communications, if this is necessary or beneficial in the event of a rule 1622 complaint, is if there is a record the participants and their contact information. As the person who conducts the mediation, the mediator is the most appropriate person to request this information from the participants.

¹⁴ See comments of Judge Miram, the Bar Association of San Francisco, and Ms. Bronson.

¹⁵ See comments of Judge Miram and Ms. Strickland.

¹⁶ See comments of the California Dispute Resolution Council (CDRC) and Messrs. Brand, Love, and McClintock.

The committee recognizes that the attendance-sheet requirement imposes some administrative burden on mediators and may intrude slightly upon the mediation process. As some commentators have noted, however, attendance or sign-in sheets are already used in some mediations and special-master proceedings without causing significant problems. Furthermore, if ADR-107 is approved, it would provide mediators with a convenient, optional form to obtain participants' names and contact information.

The committee also recognizes that some mediators do not currently maintain any records of the mediations that they conduct and will object to any requirement that they maintain attendance sheets for the court. However, the committee believes there are ways to retain these attendance sheets that would minimize the administrative burden¹⁷ and that this burden is justified by the possible need for participant contact information. The advisory committee therefore recommends approval of form ADR-107 as circulated for comment and adoption of rule 1621(a) as circulated for public comment except for nonsubstantive structural revisions.

Rule 1621(b)—Mediator agreement to disclosure

Five commentators specifically addressed rule 1621(b) (subdivision (c) as circulated for comment), which would require court-program mediators to agree that, if an inquiry or a complaint about his or her conduct were made, mediation communications could be disclosed solely for purposes of addressing that complaint under rule 1622. All of these commentators suggested that this provision should be modified or deleted. These comments and the advisory committee's responses are summarized in the comment chart under the heading *Rule 1621(c)—Mediator Agreement to Allow Disclosure in Rule 1622 Procedures*, which begins at page 63.

The State Bar ADR Committee commented that this provision and several others refer to a "proceeding" and expressed concern that this term might be interpreted as contemplating an evidentiary hearing. The proposal circulated for comment was intended to leave the question of whether rule 1622 procedures might include an evidentiary hearing to individual courts for determination. To address the State Bar committee's concern, the advisory committee has replaced the term "proceeding" with "procedure" or "complaint procedure" throughout the proposed rules.

Several commentators apparently considered the requirement that mediators agree to the disclosure of mediation communications in rule 1622 procedures to be inconsistent with the mediation confidentiality statutes.¹⁸ The advisory committee agrees that any disclosure of mediation communications must be consistent with the confidentiality

¹⁷ A mediator who maintains no other records could maintain a single file containing the attendance sheets for all court-program mediations that he or she conducts.

¹⁸ See comments of the Bar Association of San Francisco and Mss. Bronson and Strickland (summarized in the comment chart under the heading *Rule 1621(c)—Mediator Agreement to Allow Disclosure in Rule 1622 Procedures*, which begins at page 63).

statutes and believes that rule 1622(b) is consistent with these statutory requirements. Evidence Code section 1122(a)(1) provides that mediation communications can be disclosed “[if] all persons *who conduct* or otherwise participate in the mediation expressly agree in writing” (italics added), and therefore contemplates that mediators agree to any disclosure of mediation communications. Although the mediators’ agreement alone would not be sufficient to authorize disclosure, rule 1621(b) would ensure that the absence of a court-program mediator’s agreement to disclosure does not impede the resolution of a complaint against him or her.

Rule 1622.1. Designation of person to receive inquiries and complaints

Nine commentators addressed rule 1622.1, which, as circulated for comment, would have required the presiding judges to designate a person who is knowledgeable about mediation to receive and investigate any inquiries or complaints about the conduct of mediators subject to rule 1622. Of these, five commentators generally supported the provision, two thought it should be modified, and two generally opposed it. These comments and the advisory committee’s responses are summarized in the comment chart under the heading *Rule 1622.1 —Designation of Knowledgeable Person to Receive and Investigate Complaints*, which begins at page 66.

Of the five commentators who generally supported rule 1622.1, three did so without qualification¹⁹ and two qualified their support. Mr. Levy supported the provision as long as any investigator would be precluded from disclosing any confidential information received, a condition which would be addressed by proposed rule 1622.2(c). Ms. Bronson (ADR Administrator for the Superior Court of Los Angeles County) supported this rule as long as resources were made available to comply with the requirement; however, the advisory committee does not anticipate that rule 1622.1 would impose significant new administrative burdens or costs on the courts.²⁰

Messrs. Stevenson and Zipser questioned the ability of a single person to receive and investigate all complaints against mediators in large counties. The advisory committee believes it is feasible and important for courts that are required to establish a rule 1622 procedure to have a single person designated to *receive* all inquiries and complaints about the conduct of mediators. This will help ensure that the confidentiality of mediation communications is preserved and that inquiries and complaints about mediators conduct

¹⁹ See comments of the Judge Miram, Ms. Lyster, and Ms. Strickland.

²⁰ The presiding judges of all the trial courts are already required to designate the clerk, executive officer, or another court employee who is knowledgeable about ADR processes to serve as ADR program administrator and the duties of this designee include supervising the maintenance of any court panels of ADR neutrals. (Cal. Rules of Ct., rule 1580.3.) Additionally, courts that are operating mediation programs should already have court staff who are knowledgeable about mediation, and these staff are probably the ones currently receiving any inquiries or complaints about court-program mediators. The committee anticipates that the presiding judges of these courts would satisfy the requirement of 1622.1 by designating the court’s ADR administrator or other existing mediation program staff to receive and investigate any rule 1622 complaints. Additionally, as noted above, the overall number of complaints against mediators historically received by the courts is small.

are appropriately addressed. However, the committee believes that it may be necessary or beneficial for more than one person to *investigate* any inquiries or complaints that may be received. The committee therefore revised proposed rule 1622.1 to provide that the presiding judge must designate a single person to receive and *coordinate the investigation of* complaints and inquiries.

Four commentators made suggestions or expressed concerns about the identity or qualifications of the person designated under rule 1622.1.²¹ Because of variations in the size, structure, and staffing of court mediation programs, the committee thinks that the presiding judge should determine the most appropriate person to receive and investigate complaints about mediators. Additionally, because rule 1622.1 would require the designation of an individual to receive and coordinate the investigation, rather than to *resolve* complaints, the committee does not think it is necessary for the designee to be experienced in mediation or knowledgeable in the particular techniques a mediator may have used.

Rule 1622.2. Confidentiality of complaint proceedings, information, and records

Eight commentators addressed rule 1622.2, which would establish the confidentiality of rule 1622 complaint procedures, information, and records. Of these, four supported the rule; two supported the rule in part and suggested modifications; and two apparently opposed the rule. These comments and the advisory committee's responses are summarized in the comment chart under the heading *Rule 1622.2—Confidentiality of Rule 1622 Procedures and Records*, which begins at page 68.

As circulated for comment, rule 1622.2(d) provided that “the presiding judge or the presiding judge’s designee” may authorize the disclosure of information and records about rule 1622 procedures that do not reveal mediation communications, including “the name of a mediator against whom action has been taken under rule 1622, the action taken, and the ground on which the action was taken.” The Bar Association of San Francisco (BASF) commented that the ground on which the action was taken should be eliminated from the information or records that can be disclosed under rule 1622.2(d) because this would likely disclose confidential mediation communications. The advisory committee believes that, if the name of a mediator against whom action is taken under rule 1622 and the action taken are disclosed, disclosure of the basis for that action may be important to the mediator and the public. The committee also believes that this can be accomplished in a generic way that does not reveal confidential mediation communications, such as “failed to respect self-determination,” “violated confidentiality,” or “failed to comply with compensation requirements.” To address BASF’s concern, however, the committee revised the proposal to replace “the ground on which the action was taken” with “the general basis on which the action was taken.”

²¹ See comments of the California Dispute Resolution Council, the Bar Association of San Francisco, and Messrs. Zipser and Stevenson.

BASF also suggested that disclosures authorized under rule 1622.2(d) should be made only upon order of the presiding judge, and not upon the determination of the court's designee, because it believes that determining whether a disclosure of rule 1622 procedures or records would reveal mediation communications will involve the drawing of fine lines. Some presiding judges may prefer to delegate this responsibility, and the advisory committee believes they should have the flexibility to do so. However, the committee made a minor revision to rule 1622.2(d) to clarify that it refers to a person specifically designated by the presiding judge to authorize the disclosure of rule 1622 records and information, and does not automatically authorize such disclosures by the person designated to receive and coordinate the investigation of complaints under rule 1622.1.

BASF also expressed concerns about the reference to disclosures of communications “required by law” in rule 1622.2(c) and (e) and in the advisory committee comment to 1622.2(c)–(e). The advisory committee agrees with the BASF that rule 1622.2 and Evidence Code sections 915 and 1040 do not create exceptions to mediation confidentiality and added the first paragraph of the comment to rule 1622.2(c)–(e) to clarify this.

Finally, BASF suggested that the advisory committee comment to rule 1622.2(c)–(e), which stated that Evidence Code sections 915 and 1040 may provide guidance in determining whether to authorize the disclosure of “information acquired in confidence,” should be amended to clarify that these provisions apply only to information acquired in confidence in a rule 1622 complaint process and not to information acquired in confidence in a mediation. The advisory committee agrees that Evidence Code section 1040 is only pertinent to whether information acquired in confidence in a rule 1622 procedure (i.e., “official information”), and not information acquired in confidence in a mediation, is subject to disclosure and has revised the comment to rule 1622.2(c)–(e) to clarify this.

Ms. Lyster (ADR Administrator for the Superior Court of Contra Costa County) opposed rule 1622.2, and commented that it does not provide adequate protection against a mediation participant’s use of the complaint process to discover the substance of otherwise confidential conversations between the mediator and other parties in caucus, and she suggested the addition of language to rule 1622(a). However, the committee believes that this issue is adequately addressed by proposed rule 1622.2(b), which would specifically require that courts’ rule 1622 procedures be designed to preserve the confidentiality of communications between the mediator and individual mediation participants or subgroups of participants.

Ms. Shartzer disagreed with several aspects of rule 1622.2. Among these, she commented that the provision in rule 1622.2(e) that notice should be given to any persons whose

mediation communications may be revealed is inconsistent with the repeated statements that mediation confidentiality will not be violated. The advisory committee disagrees, because all mediation communications are not protected by mediation confidentiality in all circumstances.²² Rule 1622(e) provides that notice should be given to persons whose mediation communications might be revealed by the disclosure of rule 1622 information or records to give such persons the opportunity to present any arguments that the disclosure should not be made.

Rule 1622.3. Disqualification from subsequently serving as an adjudicator

Six commentators addressed rule 1622.3, which would provide that a person who has participated in or received information about a rule 1622 complaint procedure must not subsequently serve as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, concerning the dispute that was the subject of the underlying mediation. Of these, five supported the rule, and one requested clarifications and raised concerns about the potential impact of disqualifying judges who receive information about a complaint. These comments and the advisory committee's responses are summarized in the comment chart under the heading *Rule 1622.3—Disqualification From Subsequently Serving as Adjudicator*, which begins at page 72.

Mr. Love (formerly Executive Officer of the Superior Court of San Diego County) commented that it was unclear who was being referred to by the term “adjudicator” in the title and in the body of the rule. In response to this comment, the committee revised the proposal to provide that a person who has participated in or received information about a complaint under rule 1622 must not subsequently *hear or determine any contested issue of law, fact, or procedure* (rather than “serve”) as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, concerning the dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation. Proposed rule 1622.3 was also revised to clarify that it only prohibits serving as an adjudicator in a court action or proceeding, since rules of court generally govern only court administration, practice, and procedure.

Mr. Love also commented that the disqualification of the judge assigned to a case who becomes aware of a complaint about the mediator, either inadvertently or through the intentional conduct of a party or attorney, could greatly impact the court's ability to control its processes and lead to abuse by those who want to obtain a change in the assigned judge. The advisory committee agrees that the disqualification of a judge who learns about a complaint against the mediator could create administrative problems for courts. However, the designation of a single person to receive and coordinate the investigation of complaints (under rule 1622.1) and the confidentiality of rule 1622

²² For example, the disclosure of mediation communications may be compelled in criminal proceedings. The disclosure of rule 1622 information or records that reveal mediation communications, as well as information and records from the mediation itself, may therefore be requested, produced, and admitted in evidence in a criminal proceeding.

complaint procedures (under rule 1622.2) should prevent a judge who is assigned to the case from inadvertently or intentionally being informed about a complaint procedure. Furthermore, one of the primary purposes of the mediation confidentiality statutes is to prevent adjudicators from learning what transpired in a mediation and this purpose could be defeated if judges who learn what transpired in a rule 1622 complaint procedure subsequently hear or determine contested issues in the case. The committee therefore believes that judges who receive information about an inquiry or a complaint under rule 1622 should be disqualified from subsequently adjudicating the dispute that was the subject of the mediation or any other dispute that arises from the mediation.

Rule 1622. Complaint procedure required

As noted above, rule 1622(a) currently requires superior courts that make lists of mediators available, or that recommend, select, appoint, or compensate mediators, to establish procedures for addressing complaints against those mediators. Rule 1622(b) currently provides that the court may reprimand a mediator, 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 rules 1620–1620.9, when applicable. The proposal circulated for comment included an amendment to rule 1622(b) to permit a court to require a mediator to participate in additional mediation training, in addition to or instead of the sanctions currently permitted. Five commentators addressed this amendment, and all of them generally supported it. These comments and the advisory committee's response are summarized in the comment chart on page 65, under the heading *Rule 1622(b)—Authority to Require Additional Training*.

A number of other comments about rule 1622 did not focus on the proposed amendment to rule 1622(a), but rather on the scope of the complaint procedure currently required by rule 1622(a). Ms. Bronson and Mr. Fagone commented that it is not clear whether rule 1622 procedures are only required to address complaints arising from court-program mediations or must also address complaints that arise from private mediations conducted by court-program mediators. BASF, CDRC, and the State Bar ADR Committee commented that it is not clear whether rule 1622 procedures encompass any and all complaints about the conduct of court-program mediators or only complaints that may involve a violation of the rules of conduct set forth in rule 1620 et seq. These comments and the committee's responses are summarized in the comment chart under the heading *Application and Scope of Rule 1622 Requirement*, which begins at page 73.

The advisory committee believes that, read together with rules 1620.1 and 1622(b), rule 1622(a) requires only that courts have procedures to address complaints that a mediator violated the standards of conduct set forth in rule 1620 et seq. while conducting a court-program mediation. First, rule 1620.1 essentially limits the application of rule 1620 et seq., including the complaint-procedure requirement of rule 1622, to mediations which the mediator is notified are court-program mediations. Additionally, as noted above, rule 1622(b) authorizes the court to reprimand or prohibit a mediator from receiving future

mediation referrals from the court only if the mediator fails to comply with the rules of conduct for mediators set forth in rule 1620 et seq., *when applicable*. The committee believes, however, that the limited scope of the rule 1622 complaint process requirement could be stated more explicitly and therefore recommends the amendment of rule 1622(a) to parallel subdivision (b).

Many commentators suggested that uniform statewide procedures for receiving, investigating, and resolving complaints against court-program mediators should be developed. Mr. Blackman drafted and submitted a proposed statewide procedure, modeled after the guidelines set forth in section 16 of the Standards of Judicial Administration, which was endorsed in whole or in part by some commentators. Other commentators suggested that a statewide complaint process should be modeled after procedures used by Dispute Resolution Program Act programs or the Equal Employment Opportunity Commission. These comments and the committee's responses are summarized in the comment chart under the heading *Complaint Process*, which begins at page 75.

Currently, rule 1622(a) requires individual superior courts to develop their own complaint procedures, and the accompanying advisory committee comment suggests that the recommended procedures for receiving, investigating, and resolving complaints against commissioners and referees set out in section 16 of the California Standards of Judicial Administration may serve as guidance in doing so. A proposal for a uniform statewide complaint procedure would require significant time to develop and would need to be circulated for public comment. Such provisions therefore could not be recommended for adoption as part of the current proposal; however, based on the strong sentiment of the mediation community, the advisory committee intends to consider development of such a proposal in a future rules cycle.

Rule 1580.1. Court-related ADR neutrals

Rule 1580.1(b) currently requires that, to be included on a court's list of ADR neutrals, a neutral must (a) sign a certificate agreeing to comply with all applicable ethical requirements, and (b) agree to serve on a pro bono or modest-means basis in at least one case per year, not to exceed eight hours, if requested by the court. The proposal circulated for comment included minor amendments to rule 1580.1 that would require neutrals to comply with all applicable rules of court, as well as with applicable ethical requirements, and require that they sign a statement or certificate agreeing to all three of these requirements, rather than only a certificate agreeing to comply with ethical requirements.

Two superior court ADR administrators commented on the proposed amendment to rule 1580.1. These comments and the committee's responses are summarized in the comment chart on page 38, under the heading *Rule 1580.1—Requirements to be on Lists of Court ADR Neutrals*.

Ms. Strickland supported the amendment and indicated that the Superior Court of Santa Clara County already obtains such agreements from its neutrals. Ms. Bronson commented that the Superior Court of Los Angeles County currently requires neutrals to sign a statement agreeing to comply with the applicable rules of court and ethical standards, but would need to amend its panel qualification requirements and obtain updated statements from its neutrals to comply with the pro bono service requirement.

To avoid misunderstandings and for purposes of enforcement, the advisory committee believes that neutrals should sign a statement agreeing to comply with all of the statewide requirements for panel membership. The committee believes this is particularly advantageous for courts that are establishing new mediation panels and for new mediators who join existing court panels. However, to reduce the administrative burden on courts that would need to establish a new procedure for obtaining written agreements from neutrals, or that would need to update their current neutrals' agreements, the advisory committee recommends that proposed amendment to rule 1580.1 not be effective until January 1, 2007.

Implementation Requirements and Costs

Rule 1622 currently requires that some superior courts have procedures for addressing complaints against court-program mediators. The amendment of rule 1622 and the adoption of rules 1621, 1622.1, 1622.2, and 1622.3 would require those courts to review, and potentially to modify, their complaint procedures but is not expected to require any significant new ongoing administrative action or costs.

The adoption of rule 1621 would require presiding judges of superior courts subject to rule 1622 to designate a person to receive and coordinate the investigation of rule 1622 complaints. However, as discussed above, the committee anticipates that the court staff who currently receive and investigate complaints about mediators would be designated under rule 1621 and the workload in performing these functions is not expected to increase significantly as a result of this proposal.

The adoption of rule 1622.3, which would disqualify persons who participated in or received information about a rule 1622 complaint procedure from adjudicating certain related disputes, might make it difficult for smaller courts to have judicial officers participate in their complaint procedures. This provision might also necessitate reassignment of a case if the judge to whom it is assigned receives information about the complaint procedure. However, as discussed above, the designation of a single person to receive and coordinate the investigation of complaints and the confidentiality of rule 1622 procedures under rules 1621 and 1622.2 should minimize the likelihood of this occurring.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council:

1. Effective January 1, 2006:
 - a. Adopt rule 1621 of the California Rules of Court, requiring that mediators in court-program mediations (1) request that mediation participants complete an attendance sheet, (2) retain the attendance sheet for two years and submit it to the court upon request, and (3) agree that mediation communications may be disclosed solely for purposes of a procedure conducted pursuant to rule 1622 to address an inquiry or a complaint about the mediator;
 - b. Approve form ADR-107, *Attendance Sheet for Court-Program Mediation of Civil Case*, for mediators' optional use in obtaining the participants' names and contact information as required by rule 1621;
 - c. Adopt rule 1622.1 of the California Rules of Court, requiring that the presiding judge of each superior court that is mandated by rule 1622 to establish a complaint procedure designate a person who is knowledgeable about mediation to receive and coordinate the investigation of any inquiries or complaints about the conduct of mediators subject to rule 1622;
 - d. Adopt rule 1622.2 of the California Rules of Court, establishing the confidentiality and limiting the disclosure of information and records regarding rule 1622 complaint procedures;
 - e. Adopt rule 1622.3 of the California Rules of Court, disqualifying any person who has participated in or received information about a rule 1622 complaint procedure from subsequently adjudicating the dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation; and
 - f. Amend rule 1622 of the California Rules of Court to (1) clarify that the complaint procedures required by that rule are to address complaints that a mediator violated the standards of conduct set forth in rule 1620 et seq. while conducting a court-program mediation, and (2) authorize a court to require a mediator who failed to comply with the rules of conduct for mediators in rule 1620 et seq. to participate in additional mediation training, in addition to or instead of the other sanctions already permitted.
2. Effective January 1, 2007, amend rule 1580.1 of the California Rules of Court to require that, to be included on a court list of alternative dispute resolution (ADR) neutrals, a neutral must sign a statement or certificate agreeing to comply with all applicable rules of court and current pro bono service requirements as well as with applicable ethical requirements.

The texts of the rules is attached at pages 24–27; the text of form ADR-107 is attached at pages 28 and 29.

Rules 1580.1 and 1622 of the California Rules of Court are amended, and rules 1621, 1622.1, 1622.2, and 1622.3 are adopted, effective January 1, 2006, to read:

1 **Rule 1580.1. Court-related ADR neutrals**

2
3 (a) ***

4
5 (b) **[Requirements to be on lists]** In order to be included on a court list of ADR
6 neutrals, an ADR neutral must sign a statement or certificate agreeing to:

7
8 (1) ~~Sign a certificate agreeing to~~ Comply with all applicable ethical ethics
9 requirements and rules of court; and

10
11 (2) ~~Agree to~~ Serve as an ADR neutral on a pro bono or modest-means basis in at
12 least one case per year, not to exceed eight hours, if requested by the court. The
13 court shall establish the eligibility requirements for litigants to receive, and the
14 application process for them to request, ADR services on a pro bono or modest-
15 means basis.

16
17 **Rule 1621. Attendance sheet and agreement to disclosure**

18
19 (a) **[Attendance sheet]** In each mediation to which these rules apply under rule
20 1620.1(a), the mediator must request that all participants in the mediation complete
21 an attendance sheet stating their names, mailing addresses, and telephone numbers;
22 retain the attendance sheet for at least two years; and submit it to the court on
23 request.

24
25 (b) **[Agreement to disclosure]** The mediator must agree, in each mediation to which
26 these rules apply under rule 1620.1(a), that if an inquiry or a complaint is made
27 about the conduct of the mediator, mediation communications may be disclosed
28 solely for purposes of a complaint procedure conducted pursuant to rule 1622 to
29 address that complaint or inquiry.

30
31
32 **Rule 1622. Complaint procedure required**

33
34 (a) Each superior court that makes a list of mediators available to litigants in general
35 civil cases or that recommends, selects, appoints, or compensates a mediator to
36 mediate any general civil case pending in the court must establish procedures for
37 receiving, investigating, and resolving complaints ~~against the~~ that mediators who are
38 on the court's list or who are recommended, selected, appointed, or compensated by

1 (c) All communications, inquiries, complaints, investigations, procedures, deliberations,
2 and decisions about the conduct of a mediator under rule 1622 must occur in private
3 and must be kept confidential. No information or records concerning the receipt,
4 investigation, or resolution of an inquiry or a complaint under rule 1622 may be
5 open to the public or disclosed outside the course of the rule 1622 complaint
6 procedure except as provided in (d) or as otherwise required by law.

7
8 (d) The presiding judge or a person designated by the presiding judge for this purpose
9 may, in his or her discretion, authorize the disclosure of information or records
10 concerning rule 1622 complaint procedures that do not reveal any mediation
11 communications, including the name of a mediator against whom action has been
12 taken under rule 1622, the action taken, and the general basis on which the action
13 was taken. In determining whether to authorize the disclosure of information or
14 records under this subdivision, the presiding judge or designee should consider the
15 purposes of the confidentiality of rule 1622 complaint procedures stated in (a)(2) and
16 (a)(3).

17
18 (e) In determining whether the disclosure of information or records concerning rule
19 1622 complaint procedures is required by law, courts should consider the purposes
20 of the confidentiality of rule 1622 complaint procedures stated in (a). Before the
21 disclosure of information or records concerning procedures under rule 1622 is
22 ordered, notice should be given to any persons whose mediation communications
23 may be revealed.

24
25 **Advisory Committee Comment**

26
27 See Evidence Code sections 1115 and 1119 concerning the scope and types of mediation communications
28 protected by mediation confidentiality.

29
30 Subdivision (b). Private meetings, or “caucuses,” between a mediator and subgroups of participants are
31 common in court-connected mediations, and it is frequently understood that these communications will
32 not be disclosed to other participants in the mediation. (See Cal. Rules of Court, rule 1620.4(c).) It is
33 important to protect the confidentiality of these communications in rule 1622 complaint procedures, so
34 that one participant in the mediation does not learn what another participant discussed in confidence with
35 the mediator.

36
37 Subdivisions (c)–(e). The provisions of (c)–(e) that authorize the disclosure of information and records
38 related to rule 1622 complaint procedures do not create any new exceptions to mediation confidentiality.
39 Information and records about rule 1622 complaint procedures that would reveal mediation
40 communications should only be publicly disclosed consistent with the statutes and case law governing
41 mediation confidentiality.

42
43 Evidence Code sections 915 and 1040 establish procedures and criteria for deciding whether information
44 acquired in confidence by a public employee in the course of his or her duty is subject to disclosure.
45 These sections may be applicable or helpful in determining whether the disclosure of information or
46 records acquired by judicial officers, court staff, and other persons while receiving, investigating, or

1 resolving complaints under rule 1622 is required by law or should be authorized in the discretion of the
2 presiding judge.

3
4 **Rule 1622.3. Disqualification from subsequently serving as an adjudicator**

5
6 A person who has participated in or received information about the receipt, investigation or
7 resolution of an inquiry or a complaint under rule 1622 must not subsequently hear or
8 determine any contested issue of law, fact, or procedure concerning the dispute that was the
9 subject of the underlying mediation or any other dispute that arises from the mediation, as a
10 judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, in any court
11 action or proceeding.
12

ATTENDANCE SHEET FOR COURT-PROGRAM MEDIATION OF CIVIL CASE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

MEDIATOR:

PLAINTIFF/PETITIONER:

DEFENDANT/RESPONDENT:

CASE NUMBER:

Please provide your name, mailing address, and telephone number 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.)

(NAME) (AREA CODE AND TELEPHONE NUMBER) (MAILING ADDRESS)

(ROLE IN MEDIATION) (CITY, STATE, AND ZIP CODE)

(NAME) (AREA CODE AND TELEPHONE NUMBER) (MAILING ADDRESS)

(ROLE IN MEDIATION) (CITY, STATE, AND ZIP CODE)

(NAME) (AREA CODE AND TELEPHONE NUMBER) (MAILING ADDRESS)

(ROLE IN MEDIATION) (CITY, STATE, AND ZIP CODE)

(NAME) (AREA CODE AND TELEPHONE NUMBER) (MAILING ADDRESS)

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(ROLE IN MEDIATION) (CITY, STATE, AND ZIP CODE)

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(ROLE IN MEDIATION) (CITY, STATE, AND ZIP CODE)

(NAME) (AREA CODE AND TELEPHONE NUMBER) (MAILING ADDRESS)

(ROLE IN MEDIATION) (CITY, STATE, AND ZIP CODE)

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)
(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)
(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)
(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)
(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)
(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)
(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)
(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)
(NAME)	(AREA CODE AND TELEPHONE NUMBER)	(MAILING ADDRESS)
	(ROLE IN MEDIATION)	(CITY, STATE, AND ZIP CODE)

SP05-03: Alternative Dispute Resolution: Preserving Mediation Confidentiality in Rule 1622 Proceedings (amend Cal. Rules of Court, rules 1580.1 and 1622; adopt rules 1621, 1622.1, 1622.2, and 1622.3; and approve form ADR-107)

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GENERAL POSITIONS AND COMMENTS

List of All Commentators and Their Overall Positions on the Proposal

	Commentator	Position	Comment on behalf of group?	Please see comment excerpts and summaries under specific topic headings below	Please see committee responses under specific topic headings below
1	Mr. Robert Barrett	AM	No		
2	Bar Association of San Francisco (BASF)	Not Stated	Yes		
3	Hon. Helen Bendix	AM	No		
4	Mr. John S. Blackman	N	No		
5	Mr. Norman Brand	N	No		
6	Ms. Julie Bronson	Not Stated	No		
7	Ms. Jennifer Bullock	N	No		
8	Mr. Michael B. Carbone	N	No		
9	Ms. Mary B. Culbert	N	No		
10	Mr. Thomas H.R. Denver	N	No		
11	Mr. Dennis Durkin	AM	No		
12	Mr. Philip Fagone	N	No		
13	Ms. Ruth V. Glick	N	No		
14	Mr. Michael Johnston	N	No		
15	Mr. Howard Kraslow	N	No		
16	Mr. Jason Krestoff	A	No		
17	Mr. John Laurie	Not stated	No		
18	Mr. David A. Levy	AM	No		
19	Hon. David W. Long Superior Court of Ventura County	AM	Yes		
20	Mr. Stephen V. Love Superior Court of San Diego County	AM	Yes		
21	Ms. Mimi Lyster Superior Court of Contra Costa County	AM	Yes		
22	Mr. James R. Madison California Dispute Resolution Council (CDRC)	AM	Yes		
23	Ms. Sandra J. McNabb	N	No		

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	Commentator	Position	Comment on behalf of group?	Please see comment excerpts and summaries under specific topic headings below	Please see committee responses under specific topic headings below
24	Mr. Gordon McClintock	N	No		
25	Hon. George A. Miram Superior Court of San Mateo County	N	Yes		
26	Ms. Pam Moraida Superior Court of Solano County	A	No		
27	Ms. Deborah Rothman Beverly Hills Bar Association, ADR Section	Not Stated	Yes		
28	Ms. Sandy Shartzter	N	No		
29	M . Lee R. Shealy	N	No		
30	Mr. Alan Simon	N	No		
31	Mr. Wayne Smith	N	No		
32	Mr. Ira Spiro State Bar ADR Committee	Not Stated	Yes		
33	Mr. Ivan K. Stevenson	N	No		
34	Ms. Elizabeth Strickland Superior Court of Santa Clara County	AM	Yes		
35	Superior Court of Los Angeles County	A	Yes		
36	Hon. Martin J. Tangeman Superior Court of San Louis Obispo County	A	Yes		
37	Mr. Dean Zipser Orange County Bar Association	N	Yes		

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General Comments About the Proposal

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: General Comments About the Proposal	Advisory Committee Response
Mr. Robert Barrett	General comments		Burdening pro bono mediators with constraints and administrative duties will defeat the purpose of relieving the courts workload.	The committee believes that most mediators will remain willing to participate in court mediation programs, especially with the elimination of the form ADR-108 requirements from the proposal.
Hon. Helen Bendix	General comments		The proposal does not accomplish the goal of allowing mediators to defend themselves if a complaint is lodged against them, but puts the onus of handling the conflict on the mediator and court staff. If all parties do not sign ADR-108 agreeing to the disclosure of mediation communications in a rule 1622 complaint procedure, the mediator does not even have the bare minimum “due process” right to defend him or herself.	The committee believes that establishing the confidentiality of rule 1622 procedures, information, and records should allow the disclosure of mediation communications in many complaint procedures. Although the attendance sheet requirement of proposed rule 1621(a) imposes some burden on mediators, it should enable the court to obtain mediation participants’ agreement to allow disclosure of mediation communications in rule 1622 procedures when that is determined to be necessary. Elimination of the requirement that mediators present form ADR-108 to the mediation participants will reduce the burden on mediators, but may increase the administrative burden on the courts when it is deemed necessary to obtain the participants’ agreement to the disclosure of mediation communications.
Mr. John S. Blackman	General comments		Many of the best and brightest mediators will withdraw from court panels if the proposed rules and forms are adopted, and this may result in more complaints against mediators.	Please see response above.
Mr. Norman Brand	General comments		The proposal places new administrative burdens on mediators, rather than on the courts.	Eliminating the form ADR-108 requirements from the proposal should substantially address the commentator’s concern.
Mr. Thomas H.R. Denver	General comments		The may cause the success rate in mediations to drop close to zero.	Please see response above.
Mr. John Laurie	General comments		(1) The proposal will unduly burden volunteer mediators and litigants with additional paperwork. (2) This commentator would "most likely" not be	(1) Please see response to comment of Mr. Brand, above. (2) Please see response to comment of Mr. Barrett, above.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: General Comments About the Proposal	Advisory Committee Response
			willing to serve if this rule were in effect.	
Mr. David A. Levy	General comments		The proposal will probably not deter this commentator from serving on court panels, but several other reputable mediators have told him they will remove their names from court lists rather than serve under these rules.	Please see response to comment of Mr. Barrett, above.
Superior Court of Los Angeles County	General comments		The court agrees with the proposal and does not advocate a modification but believes the comment by Judge Bendix merits consideration.	No response required.
Mr. James R. Madison California Dispute Resolution Council (CDRC)	General comments		CDRC opposes adoption of the proposed amendments because it believes the damage to mediation that will result from adoption of the amendments far outweighs their potential benefit.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.
Hon. George A. Miram Superior Court of San Mateo County	General comments		The court is deeply concerned that some of its experienced and frequently chosen senior mediators have indicated that they would likely leave the court panel rather than comply with these new rules.	Please see response to comment of Mr. Barrett, above.
Ms. Deborah Rothman Beverly Hills Bar Association, ADR Section	General comments		The additional administrative burdens on uncompensated mediators may be the "straw that breaks the back" of altruistic mediators, who may move on and leave the panel to the most inexperienced mediators.	Please see response to comment of Mr. Barrett, above.
Mr. Wayne Smith	General comments		Such a complex rule will discourage volunteer mediators.	Please see response to comment of Mr. Barrett, above.
Mr. Ira Spiro State Bar ADR Committee	General comments		There may be alternative ways to achieve the important goal of preserving mediation confidentiality which would alleviate concerns raised by some aspects of the current proposal.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns. The committee also plans to consider the development of uniform statewide standards for addressing complaints against mediators.
Mr. Ivan K. Stevenson	General comments		Foundational issues, including governmental regulation of mediators, whether courts should administer mediation programs, and minimum	This proposal was developed in recognition of the fact that many courts already have court-connected mediation programs. These courts have set minimum qualifications

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: General Comments About the Proposal	Advisory Committee Response
			qualification requirements for court-program mediators need to be addressed before the issues raised by this proposal can be addressed.	to serve in their programs. The committee believes it is important that courts that have mediation programs be given some guidance in structuring their complaint procedures.

Necessity for the Proposal, in General

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Necessity for Proposal, in General	Advisory Committee Response
Mr. John S. Blackman	Necessity in general		<p>(1) The current proposals are more complicated and far-reaching than necessary, because there have been very few complaints in comparison to the number of mediations. The commentator also believes that the majority of the complaints have more to do with program flaws than with ethical violations.</p> <p>(2) Because he believes that mediation is 100% voluntary and parties are not forced to accept a mediator or a settlement, the commentator considers the continued viability of mediation more important than the ability to hear a complaint that might be made someday about mediator.</p> <p>(3) The commentator believes courts with mediation panels should devise ways to ensure the integrity of those panels, and proposes complaint procedures modeled after the suggested guidelines for dealing with complaints against commissioners and referee. (Please see comments and responses under the heading Complaint Process.)</p> <p>(4) If court programs screen and educate their panel members, and court panels are completely free market,</p>	<p>(1) Although the number of complaints is relatively small, the committee believes it is important that courts have established procedures to address those complaints that are received in a manner consistent with the confidentiality statutes. However, elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.</p> <p>(2) In some court mediation programs, the parties' participation in the mediation is not 100% voluntary, and the parties do always have control over the selection of the mediator.</p> <p>(3) The committee intends to consider the development of uniform statewide standards for addressing complaints against mediators in a future rules cycle and believes this may ultimately address the commentator's concerns.</p> <p>(4) Notwithstanding any "marketplace regulation," the committee believes courts need to have procedures to</p>

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Necessity for Proposal, in General	Advisory Committee Response
			there will be very few complaints and mediators who truly violate ethical standards will find themselves on the street, whether or not any rule 1622 proceedings are formally convened.	address complaints against mediators in a manner consistent with the confidentiality statutes, to ensure the quality of and public confidence in court mediation programs.
Ms. Jennifer Bullock	Necessity in general		It is necessary to have a mechanism to register complaints, and to assure that confidentiality isn't breached in this process. However, this may be more of a legal conundrum than a tangible issue that has presented real-life problems for any mediation program.	Please see response (1) to comment of Mr. Blackman, above.
Ms. Mary B. Culbert	Necessity in general		The commentator believes the need to review what mediators do in court-connected mediations is substantial, that there is significant unreported over-reaching by mediators in court-connected mediations, and that a grievance process is necessary.	Please see response (1) to comment of Mr. Blackman, above.
Mr. Thomas H.R. Denver	Necessity in general		"...there is no apparent problem actually existing."	Some courts have received complaints about mediators who participate in their programs, and the committee believes it is important to establish procedures for courts to address such complaints in a manner consistent with the confidentiality statutes.
Mr. Philip Fagone	Necessity in general		The number of complaints does not appear to justify the procedures, and a "less severe method" of allowing the courts to remove mediators who violate applicable ethical standards should be identified.	Please see response (1) to comment of Mr. Blackman, above.
Mr. Howard Kraslow	Necessity in general		The commentator knows of no problems in Riverside which necessitate changes.	Please see response to comment of Mr. Denver, above.
Mr. David A. Levy	Necessity in general		The commentator believes that the proposed changes are deleterious and far in excess of what is necessary.	Please see response (1) to comment of Mr. Blackman, above.
Ms. Mimi Lyster Superior Court of Contra Costa County	Necessity in general		The Contra Costa County Superior Court periodically receives complaints about individual mediations and mediators, which almost always involve concerns about fees or that the mediator allowed the mediation to continue longer than necessary. Complaints that a mediator had engaged in behavior that would violate the rules 1620.3-7 are quite rare. In four years, no	Please see response (1) to comment of Mr. Blackman, above.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Necessity for Proposal, in General	Advisory Committee Response
			complainant has asked the court to conduct an investigation or take action against a mediator and the court has not found it necessary to initiate an investigation of a mediator's conduct during a particular mediation.	
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Necessity in general		The interests of disputants and courts, as well as public confidence in court-sponsored mediation, requires that mediators on a court panel be accountable for their conduct; they should be subject to discipline up to and including removal from the panel.	No response required.
Hon. George A. Miram Superior Court of San Mateo County	Necessity in general		The commentator believes the potential for serious complaints against panel mediators exists and that court administrators need to be able to address these problems for the benefit of mediation participants and mediators. However, the San Mateo County court has not had to investigate a serious complaint against a program mediator to the point where either the confidentiality statute has been impacted or it has needed to convene a disciplinary committee to take up the matter.	The committee agrees that the potential for serious complaints exists and believes it is important to establish procedures for courts to address complaints in a manner consistent with the confidentiality statutes.
Ms. Sandy Shartzter	Necessity in general		The parties' right to walk out of any mediation at any time and for any reason or no reason gives them veto power over mediator conduct and should be carefully preserved.	This proposal would not impair the parties' right to terminate a mediation.
Mr. Alan Simon	Necessity in general		The number of complaints and "problem mediators" appear to be small and don't justify such drastic action at this time.	Please see response (1) to comment of Mr. Blackman, above.
Mr. Wayne Smith	Necessity in general		The commentator has heard very few complaints about mediators.	Please see response (1) to comment of Mr. Blackman, above.
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Necessity in general		This proposal is a burdensome solution to a very small problem, given the low percentage of mediations that result in a complaint. The problem of mediator ethical violations is serious and should be addressed, but another approach should be considered.	Please see response (1) to comment of Mr. Blackman, above.

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COMMENTS ABOUT SPECIFIC RULES AND FORMS

Rule 1580.1(b)—Requirements to be on Lists of Court ADR Neutrals

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1580.1	Advisory Committee Response
Ms. Julie Bronson	Rule 1580.1(b)		The Los Angeles County Superior Court currently requires neutrals to sign a statement agreeing to comply with all pertinent statutes and rules of court and to provide 3 hours hearing time per case without compensation but does not currently require mediators to sign a statement agreeing to serve on at least one case per year. The proposed amendment would require the court to amend its panel qualification requirements and obtain updated agreements from its panelists.	<p>Rule 1580.1(b)(2) currently requires that, to be included on a court list of ADR neutrals, a neutral must agree to serve as an ADR neutral on a pro bono or modest means basis in at least one case per year, not to exceed eight hours, if requested by the court.</p> <p>The committee believes that to avoid misunderstandings, facilitate compliance, and enforce the requirements, neutrals should agree in writing to comply with all of the statewide requirements for inclusion on a court list. However, to help ease the administrative burden on courts that will be required to obtain updated agreements from current panelists, the committee recommends that the effective date of the amendments to rule 1580.1 be deferred until January 1, 2007.</p>
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Rule 1580.1(b)	Support	The commentator supports the proposed amendment to 1580.1(b).	No response required.

Rule 1621 and Related Forms

Rule 1621, in General

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: General Comments About Rule 1621	Advisory Committee Response
Mr. Robert Barrett	1621, in general	Oppose	(1) If complaints are infrequent, a lot of time will be unnecessarily consumed by pro bono mediators.	(1) Although the number of complaints is relatively small, the committee believes it is important that courts have established procedures to address those complaints

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: General Comments About Rule 1621	Advisory Committee Response
			<p>(2) The case file would reveal all necessary information.</p> <p>(3) The commentator questioned who would keep the records for the required two years.</p>	<p>that are received in a manner consistent with the confidentiality statutes. However, elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.</p> <p>(2) The agreement of all participants in the mediation is required for the disclosure of mediation communications under Evidence Code section 1122(a)(1) and, in most general civil cases, the court file is unlikely to contain the names or contact information for all mediation participants.</p> <p>(3) Under rule 1621(a), the mediator would be required to keep the attendance sheet for two years. However, the committee plans to consider, in a future rules cycle, whether mediators should forward the attendance sheets to the court for retention at the conclusion of the mediation.</p>
Hon. Helen Bendix	Rule 1621(a) and (b) and forms ADR-107 and ADR-108	Oppose	Keeping track of the proposed forms and whether all the required consents were obtained is staff intensive, and the proposal does not provide any funding.	Elimination of the requirement that mediators complete and present form ADR-108 to the mediation participants should partially address the commentator's concern. However, there may be an increased burden on court staff if it is determined that it is necessary to contact the mediation participants to obtain their consent to disclosure of mediation communications in a rule 1622 procedure.
Mr. Norman Brand	1621, in general	Oppose	Many mediators shred their notes and any documents provided by the parties at the end of the mediation. If mediators have to save the attendance sheet and ADR-108, they would also need to save their notes to avoid the assumption that they destroyed them because they might support the disciplinary claim. Mediators will also need to censor their notes because they might be discoverable in subsequent disciplinary proceedings.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should partially address the commentator's concern. The committee does not believe that a mediator's retention of an attendance sheet to comply with rule 1621(a) is likely to cause many mediators to censor their notes or result in an inference that mediators who routinely destroy their notes at the end of the mediation did so because they might support a disciplinary claim.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: General Comments About Rule 1621	Advisory Committee Response
Mr. Michael Johnston	1621, in general	Oppose	No further regulation should be imposed on mediators or the mediation process.	Elimination of the requirement that mediators complete and present form ADR-108 to the mediation participants should partially address the commentator's concern. The committee believes that the attendance sheet requirement is necessary so that the court can request the mediation participants' agreement to allow disclosure of mediation communications in a rule 1622 complaint procedure, if needed, and is not unduly burdensome.
Mr. Howard Kraslow	1621, in general	Oppose	Increased paperwork is unacceptable to this commentator.	Please see response above.
Hon. David W. Long Superior Court of Ventura County	Rule 1621(a) and (b) and forms ADR-107 and ADR-108		The requirements that mediators take roll and fill out more forms are unnecessary because the court will be able to determine the necessary information in the rare instance of complaints.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants will partially address the commentator's concern. However, the committee also believes it will be difficult for courts to identify and contact the mediation participants, in the event of a complaint, unless their names and contact information are obtained at the time of the mediation.
Mr. Stephen V. Love Superior Court of San Diego County	Rule 1621(a) and (b) and forms ADR-107 and ADR-108		Creating and distributing a form to mediators to address infrequent complaints seems unnecessary.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.
Mr. Gordon McClintock	1621, in general	Oppose	(1) The rule would work fine in a two or three party case, but would be a nightmare to administer in larger cases. (2) It is unnecessary to retain records for two years, because any complaint will arise very soon after the session is completed.	(1) Elimination of the requirement that mediators present form ADR-108 to the mediation participants should partially address the commentator's concern. Other commentators have indicated that attendance or sign-in sheets have been successfully used in construction-defect special-master cases and court-program mediations. (See comments of Judge Miram and Ms. Strickland, summarized below under the heading Rule 1621(a) and Form ADR-107.) (2) The committee believes that some complaints about mediators may be presented later. A mediator may violate rule 1620 et seq. after a mediation is concluded (e.g., by breaching confidentiality) or a participant may

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: General Comments About Rule 1621	Advisory Committee Response
				not immediately learn or complain of a violation. Also, if mediators are required to retain an attendance sheet, it would not appear significantly more burdensome to do so for two years than for a shorter period of time.
Ms. Sandra J. McNabb	Rule 1621 and form ADR-108		The commentator would like to think that confidentiality can be appropriately addressed by the parties if and when there is a complaint about the mediator.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.
Mr. Wayne Smith	1621, in general		Advocates will figure out how to use this process to their advantage.	The committee believes elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.

Rule 1621(a) and Form ADR-107—Attendance Sheet

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(a) and Form ADR-107	Advisory Committee Response
Bar Association of San Francisco (BASF)	Rule 1621(a) and Form ADR-107	Support ADR-107 Modify rule 1621(a)	(1) Agree to proposed form ADR-107. (2) Rule 1621(a) should be amended to make completion of an attendance sheet mandatory, so that the court can obtain information about who attended mediation where necessary.	(1) No response required. (2) Rule 1621(a) would require mediators to ask participants to provide their names and contact information on an attendance sheet, but not mandate the use of the Judicial Council form for this purpose. The committee believes that making the use of this particular form mandatory would be difficult to enforce and might be objectionable to many court-program mediators.
Ms. Julie Bronson	Rule 1621(a) and Form ADR-107	Support	Some mediators already keep attendance records for the purpose of determining conflicts in future mediations. It would be a good idea to require all mediators to do so, but non-attorney mediators may have difficulty complying.	Optional form ADR-107, if approved, will provide mediators with a convenient method to obtain the mediation participants' names and contact information.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(a) and Form ADR-107	Advisory Committee Response
Mr. Michael B. Carbone	Rule 1621(a) and Form ADR-107	Support	Whenever a mediator is assigned a case to which the ethical standards apply, the court should have the parties complete an information sheet with their contact information.	No response required.
Mr. David A. Levy	Rule 1621(a) and Form ADR-107	Support	It is fair to prepare a list of individuals who have attended a mediation, and that information could be forwarded to the Court's ADR administrator. The commentator would also be willing to retain a copy for two years, but would probably not remember anything of significance that happened that long ago.	No response required.
Mr. Stephen V. Love Superior Court of San Diego County	Rule 1621(a) and Form ADR-107	Oppose	(1) Creating and distributing a form to mediators to address infrequent complaints seems unnecessary, and may be ineffective because it is not mandatory for all participants to sign. (2) If sign-in sheets are considered necessary, consider making them an attachment to ADR-108.	(1) The committee believes it is important for mediators to request the mediation participants' names and contact information, so that the court may be able to identify and contact them if a complaint arises. The committee believes that most participants will provide their names and contact information. (2) The committee has eliminated form ADR-108 from the current proposal.
Ms. Mimi Lyster Superior Court of Contra Costa County	ADR-107	Oppose	Do not adopt.	The committee believes it is important to obtain the participants' names and contact information so that the courts can request their agreement to disclosure of mediation communications in a rule 1622 procedure if this is determined to be necessary or desirable. Other commentators have noted that many neutrals already use attendance or sign-in sheets, and that this does not appear problematic. (See comment of Judge Miram and Ms. Strickland, summarized below.)
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Rule 1621(a) and Form ADR-107	Oppose	(1) ADR-107 is time consuming, unnecessary and potentially an invasion of privacy. Encouraging the use of ADR-107, even without making it mandatory, will intrude upon mediations and decrease the likelihood of their success. (2) Most mediators don't need a form like ADR-107 to see that a record is made of the identity of the	(1) Please see response above. (2) Form ADR-107 would be optional, and mediators could request participants' names and contact

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(a) and Form ADR-107	Advisory Committee Response
			participants in any mediation, but typically obtain contact information only for the disputants or their representatives.	information on another form, if they prefer. However, courts will need the ability to contact all participants in the mediation, not just the parties, in order to use Evidence Code section 1122(a)(1) as the basis for disclosure of mediation communications in a rule 1622 complaint procedure.
Mr. Gordon McClintock	Rule 1621(a) and Form ADR-107	Oppose	It is difficult to enforce the requirement that participants sign an attendance sheet; particularly at mediation sessions with up to 100 participants, and it would be even more difficult if parties were required to provide their full address. Administering the attendance sheet would require administrative staff and would add to the expense of the mediation.	The committee believes that the court program mediations with very large numbers of participants are the exception, and that the attendance sheet requirement would not be problematic in most cases. Additionally, other commentators have noted that many neutrals already use attendance or sign-in sheets, without apparent problems, including in construction defect special master cases. (See comments of Judge Miram and Ms. Strickland, below.)
Hon. George A. Miram Superior Court of San Mateo County	Rule 1621(a) and Form ADR-107	Support	<p>(1) The San Mateo Superior Court supports ADR-107, and would consider it helpful for conducting post-mediation evaluations as well as for complaint investigation. It is standard practice for participants to sign such forms in construction-defect special-master cases, and the commentator is aware of no objections or problems with this practice.</p> <p>(2) The commentators recommend that the attendance sheets be returned to the court, rather than retained by the mediator.</p>	<p>(1) No response required.</p> <p>(2) The committee recommends adopting the requirement that mediators retain the form for two years at this time, so that collection of the information that may be necessary for courts to address complaints against mediators is not delayed. However, in a future rules cycle the committee intends to consider whether mediators should submit the attendance sheets to the court at the conclusion of the mediation.</p>
Ms. Sandy Shartzter	Rule 1621(a) and Form ADR-107	Oppose	Having an attendance record to "submit to the court on request" violates <i>Foxgate</i> by opening the possibility of court retaliation against a non-attende.	ADR-107 is intended to identify and enable courts to contact participants in the mediation, rather than to identify persons who did not attend. The committee does not think that the submission of an attendance sheet would be found to violate <i>Foxgate Homeowners Association v. Bramalea</i> , (2001) 26 Cal.4th 1, because it

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(a) and Form ADR-107	Advisory Committee Response
				would not disclose mediation communications or conduct.
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Rule 1621(a) and Form ADR-107	Support	The commentator supports the requirement of 1621(a) that mediators request participants to sign an attendance sheet and retain the attendance sheet. The Santa Clara Superior Court's mediators already sign, and have parties and counsel sign, a sign-in sheet.	No response required.

Rule 1621(b) and Form ADR-108—Information and Agreement for Court-Program Mediation

Position and General Concerns

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(b) and Form ADR-108— Position and General Concerns	Advisory Committee Response
Bar Association of San Francisco (BASF)	Rule 1621(b) and Form ADR-108	Modify	(1) Amend rule 1621(b) to allow the court, in addition to the mediator, to distribute ADR-108 prior to the mediation. (2) In item 5b(2) and (3), the word "verbal" should be "oral." (3) Item 7 (the agreement to disclosure provision) should be deleted and the box above the signature blocks, and the text between the signature blocks, and Section 11 should be modified accordingly.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.
Hon. Helen Bendix	Rule 1621(b) and Form ADR-108	Oppose	(1) If all parties do not sign ADR-108 agreeing to the disclosure of mediation communications in a rule 1622 complaint procedure, the mediator does not even have the bare minimum "due process" right to defend him or herself.	(1) The committee believes that establishing the confidentiality of rule 1622 procedures, information, and records should allow the disclosure of mediation communications in nonevidentiary complaint procedures, and that requiring mediators to request that participants provide their names and contact information

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(amend Cal. Rules of Court, rules 1580.1 and 1622; adopt rules 1621, 1622.1, 1622.2, and 1622.3; and approve form ADR-107)

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			<p>(2) Pro bono mediators may recuse themselves if all participants do not agree to the disclosure of mediation communications in a rule 1622 procedure, rather than take risk of being unable to respond to a complaint. This would impose additional administrative burdens on court staff.</p> <p>(3) The proposed forms are too complicated for pro per litigants.</p>	<p>should enable the court to obtain mediation participants’ agreement to allow disclosure of mediation communications in rule 1622 procedures when that is determined to be necessary.</p> <p>(2)–(3) Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.</p>
Mr. John S. Blackman	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) Form ADR-108 would be impossible to adequately explain and “terribly distracting” at the mediation session, would require a lengthy explanation by the parties’ attorneys, and would impose a huge expense on the parties.</p> <p>(2) It would be difficult to obtain the signatures of mediation participants who come and go throughout the day, and attempting to do so could result in the loss of settlement momentum.</p> <p>(3) It would create an aura of distrust, which could “tank the mediation,” if some participants sign and others do not.</p>	Please see response above.
Mr. Norman Brand	Rule 1621(b) and Form ADR-108	Oppose	Form ADR 108 is not likely to be understood by many participants in mediation, and explanation of the form may be regarded as providing legal advice.	Please see response above.
Ms. Julie Bronson	Rule 1621(b) and Form ADR-108	Oppose	<p>Rule 1621(b) and form ADR-108 present a number of problems, including:</p> <p>(a) If the mediator reviews the form with the parties (and particularly with self-represented litigants), this</p>	Please see response above.

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			<p>might be construed as giving legal advice. Additionally, if the time spent presenting ADR-108 counts toward the mediator’s 3-hour pro bono requirement, mediators may prolong the procedure to ensure monetary gain, and the parties may feel taken advantage of. Therefore if approved, the rule should provide that a mediator is not required to review this form with the parties, and that the form may be sent to parties before the mediation.</p> <p>(b) ADR-108 would increase the burden of overwhelming documentation and scheduling requirements already placed on volunteers. This may reduce the number of panelists or cases they are willing to handle.</p> <p>(c) No one will know whether the mediator presents the form until a complaint is received and the consequences if the mediator did not are uncertain.</p> <p>(d) Mediators may recuse themselves if a participant refuses to agree to disclosure of mediation communications in a rule 1622 procedure, because mediators may be unwilling to risk a complaint without the opportunity to defend him or herself.</p> <p>(e) The form contains good information but could be confusing, particularly for self-represented litigants.</p> <p>(f) It is doubtful whether represented parties will see ADR-108 or review it in detail. If parties don’t carefully review this form and don’t sign that they agree to item 7a, the form will be a wasted effort.</p> <p>(g) Much of the information in ADR-108 duplicates other ADR informational materials that the Los Angeles County court distributes and, additionally,</p>	

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			<p>most mediators have their own confidentiality statements or agreements.</p> <p>(h) Consider reducing ADR-108 to items 5, 7 and 9, and merging ADR-107 and ADR-108.</p> <p>To address these problems, the rule and form should be amended and the form should be made optional.</p>	
Ms. Jennifer Bullock	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) ADR-108 is cumbersome, dense and legalistic, and sets the wrong tone. Going through the form point by point would take a lot of time when the parties want to get to the real issues.</p> <p>(2) The form covers many important points that mediators go through at or before the mediation. This can be done in a better way than with a series of boxes to check.</p> <p>(3) Only one part of the form addresses confidentiality in case of a complaint.</p>	Please see response above.
Ms. Mary B. Culbert	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) ADR-108 is too complicated and dense, and could be improved by providing a simple and separate explanation of mediation confidentiality and a check box to verify receipt of the confidentiality information sheet.</p> <p>(2) The language in paragraph 6, which suggests that a balancing approach is what the courts are doing generally when carving out exceptions to confidentiality, is a misstatement of the law. Courts will balance the assertion of a constitutional right versus another right but <i>Rojas</i> specifically clarified that the court should not balance to find additional exceptions, as they are specifically enumerated in the statute. Only in <i>Olam</i>, a federal case, did the court do a balancing test, and this was after all parties waived confidentiality</p>	(1)–(2) Please see response above.

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			<p>and wanted the mediator to testify.</p> <p>(3) The waiver provision is likely to create a significant amount of satellite litigation, burden the courts, and defeat the “docket-clearing” goal of mediation.</p>	<p>(3) The committee believes it is important that courts with mediation programs consider bona fide complaints that court-program mediators violated the rules of conduct set forth in rule 1620 et seq. However, the committee believes that elimination of the requirement that mediators present form ADR-108 to mediation participants should substantially address concerns about baseless complaints.</p>
Mr. Dennis Durkin	Rule 1621(b) and Form ADR-108	Modify	ADR-108 should be completed at the courthouse and provided to the mediator.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.
Mr. Philip Fagone	Rule 1621(b) and Form ADR-108	Oppose (Modify)	<p>Many mediators might withdraw from court panels rather than comply with these new procedures, and especially the disclosures required by form ADR-108. If you move forward with the proposal, consider limiting ADR-108 to the [agreement to disclosure] provisions in item 7, since the other provisions vary from the specific purposes of the new rule.</p>	Please see response above.
Mr. John Laurie	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) The proposal may cause conflict between mediators and participants with regard to negotiating and agreeing on the operative language, and the mediation might not go forward if the parties can't agree on the language of the form.</p> <p>(2) Because form ADR-108 spells out the aspects of the mediation in detail, it may force mediators to put everything in writing to protect themselves, and may require stopping the mediation to amend the agreement during the mediation process.</p> <p>(3) The proposal may encourage complaints against mediators by litigants who have "buyer's remorse." This could require that courts investigate and mediators defend frivolous complaints against mediators and court</p>	<p>(1)–(2) Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.</p> <p>(3) The committee believes it is important that courts with mediation programs consider bona fide complaints that court-program mediators violated the rules of conduct set forth in rule 1620 et seq.</p>

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			hearings to determine if a settlement is binding.	Additionally, rule 1620(b) provides that the rules of conduct are not intended to create a basis for challenging a settlement agreement reached in connection with a mediation or for a civil cause of action against a mediator. However, the committee believes that the elimination of the requirement that mediators present form ADR-108 to mediation participants should substantially address concerns about baseless complaints.
Mr. David A. Levy	Rule 1621(b) and Form ADR-108	Oppose	(1) The commentator is offended by ADR-108 and considers it totally inappropriate for a mediator to present such a form at the outset of the mediation. (2) Parties may go through the mediation process and then attempt to repudiate an agreement by claiming a procedural error in the execution of ADR-108.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.
Mr. Stephen V. Love Superior Court of San Diego County	Rule 1621(b) and Form ADR-108	Oppose	(1) Form ADR-108 is fairly intimidating, especially to individuals participating in mediation for the first time and is not consistent with the informal and interactive nature of the mediation process. (2) Presenting the form could create doubts as to the mediator's impartiality and the mediation process. (3) Form ADR-108 may be ineffective because it is not mandatory for all participants to sign.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.
Ms. Mimi Lyster Superior Court of Contra Costa County	ADR-108	Oppose	Do not adopt.	Please see response above.
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Rule 1621(b) and Form ADR-108	Oppose	(1) ADR-108 is one of the most objectionable components of the proposal. (2) Meaningful discussion of each of the required items and options offered will expand the time required for mediation, try the patience of knowledgeable lawyers	Please see response above.

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			and clients, and increase complaints about mediations not being completed within the time allotted for pro bono service.	
Mr. Gordon McClintock	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) The commentator gave up using mediation agreements in complex multi-party mediations because this can take a long time and disrupts the free flow of the process, particularly when new participants arrive during the mediation.</p> <p>(2) Mediators should be allowed to continue to make the required disclosures in their opening statements without stopping to get documents signed.</p>	Please see response above.
Hon. George A. Miram Superior Court of San Mateo County	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) The commentators have serious concerns about the practical and philosophical implications of form ADR-108, and believe there may be less onerous and equally effective ways to assure that mediation participants make informed decisions about the possible future investigation of complaints against court-panel mediators.</p> <p>(2) The commentators are concerned that the requirement to use this form may cause their best mediators to leave the panel.</p>	Please see response above.
Ms. Deborah Rothman Beverly Hills Bar Association, ADR Section	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) ADR-108 oversimplifies mediation confidentiality by suggesting that all communications in mediation must remain confidential, when the Evidence Code limits disclosure only in regard to discovery and admissibility.</p> <p>(2) The procedure may encourage negligence complaints against the mediator as the first step by a party suffering "mediation settlement agreement remorse." Even if such claims would be precluded, the participants belief that they might be brought could be detrimental to the court mediation program.</p>	<p>(1) Please see response above.</p> <p>(2) Please see response (3) to the comment of Mr. Laurie, above.</p>

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Ms. Sandy Shartzter	Form ADR-108	Oppose	<p>(1) The commentator believes it is unethical for a mediator to offer an evaluation, opinion, or assessment of the parties’ claims, defenses, or positions, and thinks the statement in item 2b that the mediator may sometimes do so would mislead the parties and might cause misunderstandings if the mediator is facilitative.</p> <p>(2) The explanation of the exceptions to confidentiality in item 6 are likely to frighten off mediation participants or cause them not to fully participate. The emphasis on confidentiality not applying in criminal cases implies that speaking up in a mediation may result in prosecution and the mediator will be a witness for the prosecutor. The reference to "other important considerations" would lead a reasonable person to believe that anything they say can and may be used against them unpredictably.</p> <p>(3) If it is optional for participants to sign form ADR-108, what is the purpose for having it?</p>	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator’s concerns.
Mr. Ira Spiro State Bar ADR Committee	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) Form ADR-108 and implementing rule 1621 should not be adopted because the form might cause the participants to become bogged down in a protracted explanation of its contents, and particularly the provisions concerning complaints against mediators. This discussion may undermine the mediator's efforts to develop trust and cause unwarranted concerns about the mediation process. [Please see comments under the heading <i>Impact on the Tenor of the Mediation</i>, below.]</p> <p>(2) If a confidentiality waiver form is adopted, it should be a modified version of the Los Angeles County Superior Court “Acknowledgment of Confidentiality for Mediation Process.” The modified form would give participants the option of waiving confidentiality by permitting an inquiry by the administrator about allegations of mediator conduct that would constitute</p>	(1)–(2) Please see response above.

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			<p>violations of the Rules of Conduct set forth in rule 1620 et seq. The form should be sent in advance of the mediation session to counsel or self-represented parties by the court, rather than by the mediator. Mediators should also be given the option of using their own forms so long as they contain whatever information is required by the guidelines and the ethical standards.</p> <p>(3) It would be preferable to provide information about the matters that mediators are currently required to inform participants about (e.g., voluntary participation, confidentiality, and the provision of advice by the mediator) in a different format that did not include the waiver provisions.</p>	<p>(3) The committee will consider other methods of providing the information contained in ADR-108 to court-program mediation participants in a future rules cycle.</p>
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) Form ADR-108 contains good information but is too complicated for unrepresented parties. The form needs to be simplified, if kept.</p> <p>(2) The form is intended to give information to parties, but it will not achieve this goal because represented parties are unlikely to see or carefully review it. If parties don't carefully review the form but merely take the advice of counsel and don't sign that they agree to item 7a, the form will be an unnecessary complication and a wasted effort.</p> <p>(3) If the form is approved, rule 1621(b) should provide for it to be sent to parties before hand, rather than presented at the mediation. At a minimum, the rule should clearly state that a mediator is not required to review the form with the parties, since doing so might put the mediator in the position of having to give a detailed explanation to unrepresented parties.</p>	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.
Mr. Ivan Stevenson	Rule 1621(b) and Form ADR-108	Oppose	The proposal would open up an attack on mediated settlement agreements by allowing parties with "buyers remorse" to challenge the mediator's ethics.	Please see response (3) to the comment of Mr. Laurie, above.

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Mr. Dean Zipser	Rule 1621(b) and Form ADR-108	Oppose	<p>(1) Requiring mediators to request the participants’ advance agreement to disclosure of mediation communications in a rule 1622 process would adversely impact trust in the mediator, the mediation process, and the confidentiality of the process. This requirement is likely to decrease the success of mediation and increase complaints, and may also enable parties to renege on a settlement by subsequently attacking the mediation.</p> <p>(2) The proposal is likely to draw the mediator, who may not be an attorney, into a protracted discussion of the ramifications and implications of the agreement [to disclosure] and place the mediator in the untenable position of providing legal advice.</p> <p>(3) ADR-108 is too legalistic and possibly incorrect. Specifically: (a) Terms within the form (e.g. participant and party) are used inconsistently and appear inconsistent with the definitions in 1620.2; (b) The form should recognize that there may be a variety of different types of participants in a mediation (e.g. parties, adjusters, supportive spouses, friends) and should discriminate among them and not collectively refer to all as "participants;" (c) Item 2b should include the entire sentence from 1620.7(h), to avoid the implication that a mediator should draft the parties' agreement: (d) "writing" in Item 4 should indicate it is as defined in Evidence Code Section 250, to put the parties on notice of the breadth of the term; (e) use of the phrase "in connection" within Item 4 does not accurately reflect the language of Evidence Code Section 1119; (f) Items 4 and 7 dealing with confidentiality are certain to draw the mediator into legal discussion with potentially disastrous results; and (g) Items 7b and 9 should be eliminated as they would only create a distraction for those unrepresented or unfamiliar with mediation and are unnecessary for those sophisticated in mediation.</p>	Please see response to the comment of Mr. Laurie, above.

Rule 1621(b) and Form ADR-108—Information and Agreement for Court-Program Mediation

Impact on the Tenor of the Mediation

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(b) and Form ADR-108— Impact on the Tenor of the Mediation	Advisory Committee Response
Mr. John S. Blackman	Tenor of the mediation		<p>(1) The proposal is 'litigational' in form, and may encourage “gaming the system,” including attempts to undo a 'bad' mediated settlement by “taking on the mediator.”</p> <p>(2) The first half-hour of the mediation is crucial for building trust; however this proposal would turn mediation into an adversarial process by forcing mediators to start out talking about how the parties can make formal complaints against mediators who do horrible things to them.</p> <p>(3) The proposal could introduce a layer of coercion by the mediator and the forms could make the mediator look like a cop working for the court.</p>	<p>(1) The committee believes it is important that courts with mediation programs consider bona fide complaints that court-program mediators violated the rules of conduct set forth in rule 1620 et seq. Additionally, rule 1620(b) provides that the rules of conduct are not intended to create a basis for challenging a settlement agreement reached in connection with a mediation or for a civil cause of action against a mediator. However, the committee believes that elimination of the requirement that mediators present form ADR-108 to mediation participants should substantially address concerns about baseless complaints.</p> <p>(2)–(3) Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.</p>
Mr. Norman Brand	Tenor of the mediation		Requiring mediators to “encourage” parties to waive confidentiality runs the risk of destroying the atmosphere of trust that is essential to beginning a successful mediation.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.
Ms. Jennifer Bullock	Tenor of the mediation		(1) Form ADR-108 is counter to efforts to set a positive, collaborative tone at the start of a mediation session. Starting mediation with an in-depth conversation about complaints against mediators sets the wrong tone;	(1) Please see response above.

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			<p>parties should be informed about the process for complaining in another way.</p> <p>(2) At the start of the mediation many parties are limited in their patience for “housekeeping” tasks because they are anxious to get to the “real” issues.</p>	<p>(2) Although mediators would still be required to ask participants to complete an attendance sheet, the committee believes this is (a) unlikely to try the parties' patience and (b) necessary so the court can request the participants' agreement to allow disclosure of mediation communications, if this is deemed necessary to address a complaint.</p>
Mr. Thomas H.R. Denver	Tenor of the mediation		The proposal will infect a voluntary, cooperative process aimed at settlement with the concept that it might well fail and be subject to challenge.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.
Mr. Dennis Durkin	Tenor of the mediation		Form ADR-108 interjects an inappropriate tone to the beginning of mediation.	Please see response above.
Mr. Philip Fagone	Tenor of the mediation		ADR-I08 would create a barrier to the trust that mediators need to establish at the beginning of each mediation.	Please see response above.
Ms. Mimi Lyster Superior Court of Contra Costa County	Tenor of the mediation		The proposed changes might undermine the mediator's ability to earn the parties' trust.	Please see response above.
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Tenor of the mediation		<p>(1) The proposal would have a chilling effect on the friendly environment that leads to settlement of cases.</p> <p>(2) ADR-108 will obstruct most mediators' goal of establishing trust in the mediator and confidence that the process will resolve the dispute at the outset of the mediation.</p>	Please see response above.
Hon. George A. Miram Superior Court of San Mateo County	Tenor of the mediation		Reviewing ADR-108 with participants at the beginning of a mediation session will set the wrong tone when mediators are trying to establish trust and confidence in the mediation process.	Please see response above.
Ms. Sandy Shartzter	Tenor of the		The explanation of the exceptions to mediation	Please see response above.

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	mediation		confidentiality in ADR-108, item 6, might frighten off mediation participants or cause them not to participate fully.	
M. Lee Shealy	Tenor of the mediation		Asking participants to sign such voluminous documents would be a bad way to open a mediation. It may make participants wary and clam up.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern. Although participants would still be requested to complete an attendance sheet, the committee does not believe this is likely to have a significant chilling effect.
Mr. Ira Spiro State Bar ADR Committee	Tenor of the mediation		(1) ADR-108 would diminish the mediator's ability to establish rapport with the participants through the oral introduction of the process, primarily because the form is so lengthy and complex, and devotes such a prominent place to rule 1622 proceedings. (2) ADR-108 may cause the participants to become bogged down in a protracted explanation of its contents, and particularly the provisions concerning complaints against mediators. This discussion may undermine the mediator's efforts to develop trust and cause unwarranted concerns about the mediation process.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.
Mr. Dean Zipser	Tenor of the mediation		Trust in the mediator and the process—and the confidentiality of the process—are paramount in mediation. This proposal would adversely impact this trust and confidentiality.	Please see response above.

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Rule 1621(b) and Form ADR-108—Information and Agreement for Court-Program Mediation

Waiver of Confidentiality

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(b) and Form ADR-108— Waiver of Confidentiality	Advisory Committee Response
Bar Association of San Francisco (BASF)	Waiver of confidentiality		BASF believes it is a mistake for the court to encourage a waiver through the use of a mandatory form and inappropriate to require mediators to begin a mediation with a discussion of why the participants may or may not want to agree to waive confidentiality and why the mediator must agree to waive confidentiality. It would be more appropriate, and less burdensome and potentially harmful, for the court to request a waiver of this kind only in the event that a complaint arises.	Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern. The committee will consider alternative approaches to obtaining mediation participants' informed consent to the disclosure of mediation communications in rule 1622 procedures, in its consideration of uniform statewide procedures for addressing complaints against court-program mediators.
Mr. Norman Brand	Waiver of confidentiality		(1) One of the strongest inducements to party candor is the explanation mediators give of confidentiality at the beginning of the session and, if the proposal is adopted, that explanation will come just before or after the mediator “encourages” the participants to waive confidentiality. It will not reassure them when a mediator begins by asking them to waive rights. (2) If a waiver of confidentiality is to be requested, this should be done by a court functionary, rather than by the mediator. Mediators are ethically committed to confidentiality and should not be forced to encourage participants to waive it.	Please see response above.
Mr. Michael B. Carbone	Waiver of confidentiality		Informed consent to the disclosure of mediation communications requires that the participants be made aware, at a minimum: (a) that the ethical standards exist, (b) what they provide; (c) the type of complaint that could be made; and (d) the process by which the complaint would be handled. The court rather than the mediator should provide and explain this information.	Please see response above.
Ms. Mary B. Culbert	Waiver of confidentiality		(1) The waiver concept is extremely problematic because:	Please see response above.

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			<p>(a) It makes a mediation participant’s right to complain about the mediator dependent upon all other participants’ agreement to disclose, which is unlikely;</p> <p>(b) A pre-mediation waiver can not truly be knowing and voluntary;</p> <p>(c) Waivers by self-represented litigants are particularly problematic;</p> <p>(d) If waivers become automatic, there will be a significant chilling impact on mediation communications, the relationships of the participants with the mediator, and the process itself;</p> <p>(e) Requiring mediators to request a waiver for rule 1622 procedures will interfere with the development of trust in the early part of the mediation;</p> <p>(f) Civil proceedings regarding mediator conduct will be burdensome on the courts, which will defeat the reason courts embrace mediation (to clear their dockets); and</p> <p>(g) In an egregious case, waiver can be secured post-mediation.</p> <p>(2) Mediators should not be required to simultaneously explain mediation confidentiality and the need for a 1622 waiver. The most that the court should require of mediators is that they inform the parties that there is a number to call if they have any concerns about any part of the mediation process.</p>	
Ms. Ruth V. Glick	Waiver of confidentiality		Waiving confidentiality at the outset would seriously undermine the long held and valued California public	Please see response above.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(b) and Form ADR-108— Waiver of Confidentiality	Advisory Committee Response
			policy of encouraging settlement through confidential negotiations.	
Mr. John Laurie	Waiver of confidentiality		The waiver of confidentiality will require mediators to take detailed notes to protect themselves, which will impose an additional burden.	Please see response above.
Ms. Mimi Lyster Superior Court of Contra Costa County	Waiver of confidentiality		The proposed changes might undermine the mediator’s ability to foster the parties’ open communication and preserve their ability to explore and discard settlement options without consequence.	Please see response above.
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Waiver of confidentiality		(1) Because of the small number of complaints, it would be overkill to require obtaining confidentiality waivers at the outset of every mediation. If waivers are available and considered necessary, they could be obtained when a complaint is made, as a condition of making and responding to a complaint. (2) In any event, the court, not the mediator, should have the responsibility for dealing with any waiver of mediation confidentiality.	Please see response above.
Mr. Wayne Smith	Waiver of confidentiality		Confidentiality is at the core of how a good mediator helps people resolve disputes. A rule requiring mediators to tell participants that he or she might have to share what they say with third parties if a complaint is brought will defeat this.	Please see response above.
Mr. Ira Spiro State Bar ADR Committee	Waiver of confidentiality		(1) Requiring mediators to request advance waivers of confidentiality would raise many problems, including: impairment of the mediator's ability to establish rapport; a chilling effect on open and candid communication; and actual or perceived conflicts of interest on the part of the mediator. (2) If a waiver of confidentiality will be requested, a shorter and simpler form than ADR-108 should be used.	Please see response above.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(b) and Form ADR-108— Waiver of Confidentiality	Advisory Committee Response
Mr. Dean Zipser	Waiver of confidentiality		Agreeing to an exception to confidentiality in advance of any complaint undermines the hallmark of mediation. Exceptions to mediation confidentiality should be made, if at all, on a case-by-case basis and not in a wholesale manner.	Please see response above.

Rule 1621(b) and Form ADR-108—Information and Agreement for Court-Program Mediation

Necessity for Disclosure Agreement

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(b) and Form ADR-108— Necessity for Disclosure Agreement	Advisory Committee Response
Mr. Michael B. Carbone	Necessity for agreement to allow disclosure		<p>(1) The proposed agreement to disclosure is not necessary in the vast majority of cases, because the number of complaints received to date appears to be a miniscule percentage of all mediations.</p> <p>(2) Complaints against mediators will not always require disclosure of mediation communications. Apparently most complaints have alleged overcharging or coercion, and these allegations are really about conduct rather than communications. Under <i>Foxgate</i>, a party can report the conduct of another participant in the mediation and this can be done with repeating what the mediator said.</p>	<p>(1) Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.</p> <p>(2) While the committee agrees that some complaints can be addressed without the disclosure of mediation communications, it believes that addressing complaints about overcharging or coercion may raise confidentiality issues. (See Evid. Code, § 1115(c), defining “mediation consultation” and Cal. Rules of Ct., rules 1620.3 and 1620.9.) However, elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.</p>
Ms. Mary B. Culbert	Necessity for agreement to allow disclosure		(1) The Evidence Code already provides for the confidentiality of these internal procedures, if they occur within 10 days post-mediation or if section 1125(a)(5) is waived because: A) they are conversations	It is not certain that the commentator’s suggested interpretations of the mediation confidentiality statutes would ultimately prevail. Therefore, the committee believes it is important to help courts structure

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(b) and Form ADR-108— Necessity for Disclosure Agreement	Advisory Committee Response
			<p>and writings “pursuant to, a mediation or mediation consultation” and are therefore confidential under 1119 (a) and (b) and B) they are handled by trained mediators who are program staff and who fall within the expanded definition of a mediator in Section 1115(b).</p> <p>(2) Section 1119 (c) does not create an affirmative duty to maintain mediation communications as confidential outside of a later proceeding. California Evidence Code sections are rules of admissibility and inadmissibility that apply to later proceedings, and do not create affirmative duties outside of later proceedings.</p>	<p>complaint procedures in a manner consistent with the mediation confidentiality statutes.</p>
Ms. Ruth V. Glick	Necessity for agreement to allow disclosure		<p>It is entirely appropriate for courts to establish procedures to address complaints against mediators on their panels. However, this can be accomplished without having participants "waive" confidentiality at the outset.</p>	<p>Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.</p>
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Necessity for agreement to allow disclosure		<p>(1) Confidentiality waivers for the purposes of rule 1622 procedures may not be necessary or available because: (a) if the confidentiality statutes are regarded as a rule of evidence, a waiver would not be necessary to permit disclosure of mediation communications in a rule 1622 proceeding; (b) if the confidentiality statutes are regarded as a substantive rule of law for the public benefit, they might not be waivable by the mediation participants; (c) if confidentiality is a substantive rule of law and is waivable by the participants, many complaints might nevertheless be resolved without disclosing confidential mediation communications; and (d) communications in a rule 1622 proceeding might be regarded as mediation consultations within the meaning of Evidence Code Section 1115(c) and, accordingly, within the tent of mediation confidentiality.</p> <p>(2) There should be additional study, in cooperation with the mediation community, concerning whether it is necessary to accommodate mediation confidentiality in</p>	<p>(1) It is not certain that the commentator’s suggested interpretations of the mediation confidentiality statutes would ultimately prevail. Therefore, the committee believes it is important to help courts structure complaint procedures in a manner consistent with the mediation confidentiality statutes.</p> <p>(2) Elimination of the requirement that mediators present form ADR-108 to the mediation participants and consulting with the mediation community in the</p>

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Rule 1621(b) and Form ADR-108— Necessity for Disclosure Agreement	Advisory Committee Response
			rule 1622 proceedings and, if so, how, before any particular course of action is adopted.	consideration of uniform statewide standards for addressing complaints against mediators should substantially address the commentator's concerns.
Mr. Wayne Smith	Necessity for agreement to allow disclosure		Most complaints involve either procedural or training issues. Procedural complaints (e.g. fees) don't raise confidentiality issues, and training issues can be resolved by the ADR administrator in a confidential and informal manner, without making a record that is accessible to others.	Complaints about mediator fees and other procedural issues may raise confidentiality issues, because the confidentiality statutes encompass all communications between a mediator, or a person designated to assist the mediator, in the course of a mediation consultation, including communications for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator. (See Evid. Code, § 1115.) Additionally, current rule 1620.9 contains specific requirements concerning the mediator's fees, which could be the subject of a complaint under rule 1622. An informal and confidential complaint process may address some of the confidentiality statutes but may not satisfactorily address all of them (see, e.g., Evid. Code, § 1121).
Mr. Ira Spiro State Bar ADR Committee	Necessity for agreement to allow disclosure		A waiver of confidentiality is not necessary because an informal (i.e. "non-evidentiary") and confidential complaint process might satisfy Evidence Code section 1119. (The State Bar ADR Committee was unable to agree on the interpretation of 1119(c) but believes a reasonable interpretation would allow courts to receive and address complaints against mediators in a private and confidential process.)	As the comment indicates, the application of the confidentiality statutes to various types of complaint procedures is uncertain. Therefore, the committee believes it is important to help courts structure complaint procedures in a manner consistent with the mediation confidentiality statutes and to require the mediator to obtain names and contact information for mediation participants so that their agreement to disclosure of mediation communications in a rule 1622 procedure can be requested, if deemed necessary.
Mr. Dean Zipser Orange County Bar Association	Necessity for agreement to allow disclosure		An exception to confidentiality may not always be necessary because often the complaints involve an ethical procedural point, such as where a volunteer mediator then attempts to receive compensation.	The committee believes that addressing complaints that a volunteer mediator attempted to receive compensation may raise confidentiality issues. (See Evid. Code, § 1115(b) and (c).) However, elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concern.

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Rule 1621(c)—Mediator Agreement to Allow Disclosure in Rule 1622 Procedures

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1621(c)	Advisory Committee Response
Bar Association of San Francisco (BASF)	Rule 1621(c)	Oppose	Delete (c) because any mediator disclosures must be consistent with the goals and limitations in proposed rule 1622.2 and the current confidentiality statutes	The committee believes that the mediator’s agreement to disclosure of mediation communications in a rule 1622 complaint process would be consistent with the confidentiality statutes because Evidence Code section 1122(a)(1) provides that mediation communications can be disclosed “[i]f all persons <i>who conduct</i> or otherwise participate in the mediation expressly agree in writing” (Italics added.) Section 1122(a)(1) therefore not only contemplates but also requires both the participants’ and the mediators’ agreement to allow disclosure of mediation communications.
Ms. Julie Bronson	Rule 1621(c)	Oppose	<p>(1) Rule 1621(c) is problematic because it would require mediators to waive confidentiality for purposes of a complaint, when mediators are not capable of making such a waiver. Evidence Code § 1121 and § 1123(c) allow parties, not the mediator, to waive confidentiality; § 703.5 states that a mediator is not competent to testify; § 1127 states that a mediator can’t be compelled to produce evidence; and § 1128 provides that referring to mediations can lead to reversals and/or sanctions in later proceedings.</p> <p>(2) Subd. (c) should be amended to state that a mediator cannot testify in a complaint proceeding unless the parties waive confidentiality for that purpose.</p>	<p>(1) See response to comment of BASF, above.</p> <p>Additionally, the code sections referred to by the commentator do not prevent a mediator from agreeing to disclosure of mediation communications under section 1122(a)(1). Section 1123 provides that a settlement agreement prepared in the course of a mediation is not admissible or protected from disclosure if the parties to the agreement agree to its disclosure. Section 1127 provides for the award of attorney fees and costs to a mediator from a party who seeks to compel a mediator to testify or produce a writing if it is determined that the testimony or writing is inadmissible or protected from disclosure.</p> <p>(2) The proposal does not address mediator testimony, and rule 1621(c) does not allow the mediator to disclose mediation communications without the other participants’ agreement. Rather, the subdivision would ensure that a court-program mediator’s refusal to agree to disclosure does not prevent a disclosure that would otherwise be permissible under Evidence Code section 1122(a)(1).</p>
Mr. Gordon McClintock	Rule 1621(c)		Mediators can agree, as a condition of being included on	Rule 1621(c) would provide that, in cases subject to rule

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1621(c)	Advisory Committee Response
			a court list, that the proposed rules apply in the event of a complaint.	1620 et seq., the mediator must agree that mediation communications may be disclosed in a proceeding to address an inquiry or a complaint about the mediator.
Ms. Sandy Shartzter	Rule 1621(c)	Oppose	Mediators would apparently be required to agree to everything whether they actually agree or not.	The committee believes that mediators who participate in court-mediation programs must agree that mediation communications can be disclosed in complaint procedures conducted under rule 1622 so that they cannot prevent courts from addressing complaints against them when disclosure of mediation communications is otherwise permissible.
Mr. Ira Spiro State Bar ADR Committee	Rule 1621(c)	Modify	Rule 1621(c) should be revised to clarify that the 1622 proceeding is not an evidentiary hearing.	The proposal circulated for comment was intended to allow individual courts to determine whether, and if so under what circumstances, their rule 1622 procedures should include evidentiary hearings. Because use of the term “proceeding” might be interpreted as contemplating an evidentiary hearing, however, the committee has modified its proposal to replace “proceeding” with “procedure” or “complaint procedure” throughout the proposal.
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Rule 1621(c)	Oppose (Modify)	<p>(1) The weight of the rules re: confidentiality goes heavily against any disclosures by anyone involved in mediation, but is particularly strenuous in preventing mediator disclosure. Rule 1621(c) should either be deleted or amended to make the mediator competent to testify under Evidence Code section 703.5, for purposes of the complaint process only, if the parties waive confidentiality. If retained, the subdivision should state that mediator cannot testify if parties don’t waive confidentiality.</p> <p>(2) The subdivision should not refer to the mediator’s agreement to disclosure because Evidence Code sections 1121 and 1123(c) address agreements to disclosure by the parties, rather than by the mediator. Also, Evidence Code § 1127 states that a mediator can’t be compelled to produce evidence, and § 1128 provides that referring to mediations can lead to reversals and/or</p>	Please see response to comments of BASF and Ms. Bronson, above.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1621(c)	Advisory Committee Response
			sanctions in later proceedings.	

Rule 1622(b)—Authority to Require Additional Training

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622(b)	Advisory Committee Response
Bar Association of San Francisco (BASF)	Rule 1622(b)	Support	The commentator agrees with the proposed revision to rule 1622(b).	No response required.
Ms. Julie Bronson	Rule 1622(b)	Support	The proposed change is already in effect in Los Angeles, and is supported by the commentator.	No response required.
Mr. David A. Levy	Rule 1622(b)	Support	This proposed rule seems reasonable, as long as any investigator for the court would be precluded from disclosing confidential information.	The confidentiality of information acquired by the investigator would be established by rule 1622.2(c).
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Rule 1622(b)	Support	CDRC believes the proposed revision to 1622(b) is constructive.	No response required.
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Rule 1622(b)	Support	Requiring additional training by a mediator who is found to have violated the Rules of Conduct would not be practical for the Santa Clara County court, because it does not exercise much direct control over its mediators and could not enforce this remedy. However, the amendment would not pose a practical problem and could provide greater quality control for counties that exercise more direct oversight.	No response required.

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Rule 1622.1—Designation of Knowledgeable Person to Receive and Investigate Complaints

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.1	Advisory Committee Response
Bar Association of San Francisco (BASF)	Rule 1622.1	Modify	The person designated to receive complaints should be experienced with, as well as knowledgeable about, mediation.	Because the rule requires the designation of an individual to <i>receive and investigate</i> rather than to <i>resolve</i> complaints, the committee does not believe it is necessary that the designee be experienced in mediation.
Ms. Julie Bronson	Rule 1622.1	Support if funded	This has already been done to some extent, in that the current rules require courts to have a designated ADR administrator; however, that requirement was not accompanied by funding. The commentator supports 1622.1, provided resources are made available to support it.	The committee does not think rule 1622.1 would impose significant new administrative burdens or costs on most courts, since under rule 1580.3 all the trial courts are already required to designate the clerk or executive officer, or another court employee who is knowledgeable about ADR processes, to serve as ADR program administrator and the duties of this designee include supervising the maintenance of any court panels of ADR neutrals. In addition, courts that are operating mediation programs should already have court staff who are specifically knowledgeable about mediation, and these staff are probably the ones currently receiving any inquiries or complaints about court-program mediators. The committee anticipates that the presiding judges of these courts would satisfy the requirement of rule 1622.1 by designating the court’s ADR Administrator or the other existing mediation program staff person to receive and coordinate the investigation of any rule 1622 complaints.
Mr. David A. Levy	Rule 1622.1	Support	This proposed rule seems reasonable, as long as any investigator for the court would be precluded from disclosing confidential information.	The confidentiality of information acquired by the investigator would be established by rule 1622.2(c).
Ms. Mimi Lyster Superior Court of Contra Costa County	Rule 1622.1	Support	Support as proposed.	No response required.
Mr. James R. Madison California Dispute Resolution Council	Rule 1622.1	Modify	Proposed Rule 1622.1 should be revised to specify that the individual who is designated by the presiding judge to receive and investigate complaints about mediators	Because of variations in the size, structure, and staffing of court mediation programs, the committee thinks that the presiding judge should determine the most

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.1	Advisory Committee Response
(CDRC)			(i) be the individual who is responsible for administration of the court’s mediation program and (ii) report directly to the presiding judge.	appropriate person to receive and investigate complaints about mediators and the most appropriate reporting relationship.
Hon. George A. Miram Superior Court of San Mateo County	Rule 1622.1	Support	The commentators agree with the proposed rule.	No response required.
Mr. Ivan K. Stevenson	Rule 1622.1	Oppose	<p>(1) It is not appropriate for the court to appoint a single person to determine whether a mediator has acted properly or improperly because mediators themselves cannot agree as to basic concepts of what is right or wrong in mediation.</p> <p>(2) Rule 1622.1 also raises questions about the qualifications of the person selected to review complaints.</p> <p>(3) It is questionable whether a single person could be hired to perform these functions at every court where this program is in place.</p>	<p>(1)–(2) The committee believes it is important and feasible for each superior court that is required to establish a rule 1622 procedure to designate a single person to receive all inquiries and complaints about the conduct of mediators. This will help ensure that the confidentiality of mediation communications is preserved and that inquiries and complaints about mediators’ conduct are appropriately addressed. However, the committee believes it may be necessary or beneficial for more than one person to investigate any inquiries or complaints that a court may receive. The committee therefore modified proposed rule 1622.1 to provide that the presiding judge must designate a single person to receive and <i>coordinate the investigation of</i> complaints and inquiries.</p> <p>Because the designee’s function is to <i>receive and investigate</i> rather than to <i>resolve</i> complaints, the committee does not think that the variation in mediator practices makes the appointment of a single person problematic. Additionally, since a recommended amendment to rule 1622(a) would clarify that rule 1622 complaint procedures are limited to determining whether the mediator violated rule 1620 et seq., less expertise in mediation may be required to resolve these complaints than the commentator contemplates.</p> <p>(3) Based on the number of complaints historically received about mediators, the committee believes that one person can receive and coordinate the investigation of complaints for each court, even in the larger counties.</p>

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.1	Advisory Committee Response
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Rule 1622.1	Support	The commentator supports this rule.	No response required.
Mr. Dean Zipser	Rule 1622.1	Oppose	(1) The variety of mediation styles and techniques make it problematic for one person to determine what is or is not proper in mediation. (2) No standards are set regarding the qualifications or training of this person. (3) Designation of a single person to receive inquiries and complaints is not practicable, particularly for large counties such as Los Angeles.	Please see response to comments of Mr. Stevenson, above.

Rule 1622.2—Confidentiality of Rule 1622 Procedures and Records

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.2	Advisory Committee Response
Bar Association of San Francisco (BASF)	Rule 1622.2	Support and Modify	(1) Agree with (a) and (b). (2) Subsection (d) should be modified to eliminate disclosure of "the ground on which the action [against the mediator] was taken" because it is difficult to conceive of a situation in which that disclosure would not involve disclosing mediation confidentialities.	(1) No response required. (2) If the name of a mediator against whom action is taken under rule 1622 and the action taken are disclosed, disclosure of the basis for that action may be important to the mediator and the public. This can be accomplished in a generic way that does not reveal confidential mediation communications, such as "failed to respect self-determination," "violated confidentiality," or "failed to comply with compensation requirements." However, to clarify that any such disclosure should be generic, the committee modified the proposal to replace "the ground on which the action was taken" with "the general basis on which the action was taken."

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.2	Advisory Committee Response
			<p>(3) Disclosure should be made only upon order of the presiding judge, not upon the determination of the court's designated person.</p> <p>(4) The comment to (c)–(e) suggests that Evidence Code sections 915 and 1040 may provide guidance in determining whether "information acquired in confidence" in a mediation, as well as information acquired in confidence in a rule 1622 proceeding, may be disclosed. This is misleading and erroneous because the disclosure of mediation communications is authorized only pursuant to consent or to existing statutory exceptions (per <i>Foxgate</i> and <i>Rojas</i>).</p> <p>(5) The phrase "or as otherwise required by law" in subsection (c), which is picked up in subsection (e), contains the same ambiguity. It should be clarified and stressed that these subsections relate only to information and records from a rule 1622 proceeding, and that mediation confidentiality should not be disclosed unless consented to or pursuant to statutory exceptions</p>	<p>(3) Some presiding judges may prefer to delegate the authority to disclose information about rule 1622 information and records, and the committee believes they should have the flexibility to do so. However, to clarify that rule 1622.2(c) does not automatically authorize the person whom the presiding judge designates to receive and coordinate the investigation of complaints under rule 1622.1 to make such disclosures, the committee modified the proposed rule to replace "the presiding judge's designee" to "a person designated by the presiding judge for this purpose."</p> <p>(4) The committee agrees that Evidence Code sections 915 and 1040 are not pertinent to the determination of whether confidential mediation communications should be disclosed. To clarify this, the committee modified a portion of the text of the comment to subdivisions (c)–(e) that was circulated for comment as follows:</p> <p style="padding-left: 40px;">Evidence Code sections 915 and 1040 establish procedures and criteria for deciding whether information acquired in confidence <u>by a public employee in the course of his or her duty</u> is subject to disclosure. These sections and may be applicable or helpful in determining whether the disclosure of information or records concerning complaints, investigations, or proceedings acquired by judicial officers, court staff, and other persons while receiving, investigating, or resolving complaints under rule 1622 is required by law or should be authorized in the discretion of the presiding judge.</p> <p>(5) To clarify that rule 1622.2 does not create any new exceptions to mediation confidentiality, the committee added the following new paragraph to the text of the comment to subdivision (c)–(e) that was circulated for comment:</p> <p style="padding-left: 40px;">The provisions of (c)–(e) that authorize the</p>

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.2	Advisory Committee Response
			to confidentiality.	disclosure of information and records related to rule 1622 complaint procedures do not create any new exceptions to mediation confidentiality. Information and records about rule 1622 complaint procedures that would reveal mediation communications should only be publicly disclosed consistent with the statutes and case law governing mediation confidentiality.
Ms. Julie Bronson	Rule 1622.2	Support	This new provision is a good protective measure.	No response required.
Mr. David A. Levy	Rule 1622.2	Support	This proposed rule seems reasonable, as long as any investigator for the court would be precluded from disclosing confidential information.	The confidentiality of information acquired by the investigator would be established by rule 1622.2(c).
Ms. Mimi Lyster Superior Court of Contra Costa County	Rule 1622.2	Oppose	The proposed changes do not provide adequate protection against a mediation participant’s use of the complaint process to discover the substance of otherwise confidential conversations between the mediator and other parties in caucus. Rule 1622(a) should provide that complaint procedures “must not allow any party to the original mediation to gain information that was otherwise withheld from them during mediation.”	Proposed rule 1622.2(b) would specifically require that courts’ rule 1622 procedures be designed to preserve the confidentiality of communications between the mediator and individual mediation participants or subgroups of participants. The comment to this subdivision also explains the importance of protecting the confidentiality of these caucus communications.
Hon. George A. Miram Superior Court of San Mateo County	Rule 1622.2	Support	The commentators agree with the proposed rule.	No response required.
Ms. Sandy Shartzner	Rule 1622.2	Oppose	(1) Rule 1622.2(a)(2) promotes complaints against mediators and encourages parties to be adversarial toward the mediator and 1622.2(a)(3) encourages mediator-bashing by implying that mediators want to hide damage to their reputation.	(1) Rule 1622.2(a) sets forth the reasons underlying the confidentiality of rule 1622 procedures so those reasons will be readily available to courts when considering whether to authorize public disclosure of rule 1622 information and records. Paragraph (a)(1) provides that the confidentiality of rule 1622 proceedings is intended to preserve the confidentiality of mediation communications; paragraph (a)(2) provides that it is intended to promote cooperation in the reporting, investigation, and resolution of complaints about mediators on court panels; and paragraph (a)(3) provides that it is intended

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.2	Advisory Committee Response
			(2) The provision of rule 1622.2(d) that allows the presiding judge to authorize disclosure of information about rule 1622 procedures and the provision of subdivision (e) that notice should be given to any persons whose mediation communications may be revealed are inconsistent with the repeated statements that mediation confidentiality will not be violated.	to protect mediators against damage to their reputations that might result from unfounded complaints. The committee does not think that paragraph (a)(2) would encourage participants to be adversarial toward mediators or that (a)(3) implies that mediators want to hide damage to their reputations. (2) Rule 1622.2(d) only allows the presiding judge or his or her designee to authorize the disclosure of information or records concerning rule 1622 procedures that do <i>not</i> reveal any mediation communications. Additionally, all mediation communications are not protected by mediation confidentiality in all circumstances. For example, mediators can testify and mediation communications can be admitted in evidence in criminal proceedings. (See Evid. Code, §§ 703.5 and 1119.) The provision of rule 1622(e) referred to by the commentator provides that notice should be given to persons whose mediation communications might be disclosed by the release of rule 1622 records or information so that such persons have the opportunity to assert any objections to the disclosure.
Mr. Ira Spiro State Bar ADR Committee	Rule 1622.2	Modify	Rule 1622.2(a) should be revised to clarify that the 1622 proceeding is not an evidentiary hearing.	The proposal circulated for comment was intended to allow individual courts to determine whether, and if so under what circumstances, their rule 1622 procedures should include evidentiary hearings. Because use of the term “proceeding” might be interpreted as contemplating an evidentiary hearing, however, the committee has modified its proposal to replace “proceeding” with “procedure” or “complaint procedure” throughout the proposal.
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Rule 1622.2	Support	The Santa Clara County court has adopted a local rule providing that complaint processes are confidential, and supports the proposed rule because "it has more teeth and is less likely to be challenged and litigated."	No response required.

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Rule 1622.3—Disqualification From Subsequently Serving as Adjudicator

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.3	Advisory Committee Response
Bar Association of San Francisco (BASF)	Rule 1622.3	Support	The commentator approves of proposed rule 1622.3.	No response required.
Ms. Julie Bronson	Rule 1622.3	Support	The proposed rule is a very good idea, and keeps mediation confidentiality from being violated by the complaint procedure. However, the proposal would require modification of the LASC ADR Quality Assurance Committee Guidelines.	No response required.
Mr. Stephen V. Love Superior Court of San Diego County	Rule 1622.3	Modify	<p>(1) The term "adjudicator" in the title and body of rule 1622.3 needs to be clarified.</p> <p>(2) Disqualification of a judge assigned to hear the case who becomes aware of a complaint about a mediator who attempted to settle the case, either inadvertently or through the intentional conduct of a party or attorney, could greatly impact the court's ability to control its processes, and could lead to abuse by litigants who want a change in the assigned judge.</p>	<p>(1) The committee has modified the rule that was circulated for comment as follows:</p> <p>A person who has participated in or received information about the receipt, investigation or resolution of an inquiry or a complaint under rule 1622 must not subsequently <u>serve hear or determine 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</u>, as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, concerning the dispute that was the subject of the underlying mediation or any other dispute that arises from the mediation <u>in any court action or proceeding</u>.</p> <p>(2) The committee agrees that the disqualification of a judge who learns about a complaint against the mediator could lead to abuse and create administrative problems for courts. However, the confidentiality of rule 1622 complaint procedures under rule 1622.2 should provide some protection against judges assigned to the case inadvertently or intentionally receiving such information. Furthermore, one of the primary purposes of the confidentiality statutes is to prevent adjudicators from learning what transpired in a mediation, and this purpose would be defeated if judges who learn about a</p>

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Comments About Rule 1622.3	Advisory Committee Response
				rule 1622 complaint procedure subsequently hear or determine contested issues in the case.
Ms. Mimi Lyster Superior Court of Contra Costa County	Rule 1622.3	Support	Support as proposed.	No response required.
Hon. George A. Miram Superior Court of San Mateo County	Rule 1622.3	Support	The commentators agree with the proposed rule.	No response required.
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Rule 1622.3	Support	The proposed rule is a very good idea because it keeps mediation confidentiality from being violated by the complaint procedure.	No response required.

OTHER SUGGESTIONS AND COMMENTS

Application and Scope of Rule 1622 Requirement

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Application and Scope of Rule 1622 Requirement	Advisory Committee Response
Bar Association of San Francisco (BASF)	Application of rule 1622		Amend rule 1622 and proposed 1622.1 to provide that only complaints that a mediator has violated rule 1620 et seq. are within the scope of these provisions.	The committee has modified its proposal to include an amendment to rule 1622(a), which would clarify that the required complaint procedures are to address complaints that a mediator violated the standards of conduct set forth in rule 1620 et seq., when applicable.
Julie Bronson	Application of rule 1622		Rule 1622(a) could be interpreted to encompass all complaints against court panel mediators, rather than court program cases. Mediators might therefore need to follow the proposed procedures in all general civil cases (or risk the possibility that they might be unable to defend themselves) and court staff may need to determine who was present at non-court program mediations and get their permission after the fact.	Please see response above.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Application and Scope of Rule 1622 Requirement	Advisory Committee Response
Mr. Philip Fagone	Application of rule 1622		The application of the rules is not clear. Would they apply if a court orders mediation by way of a stipulation between the parties?	Pursuant to rule 1620.1, the rules would apply to mediators who have either (a) agreed to be included on the court's list or panel of mediators and are notified that they have been selected to mediate a case within that court's program; or (b) agreed to mediate a general civil case after being notified that they were recommended, selected, or appointed by the court or will be compensated by the court to mediate a general civil case within the court's mediation program. Application of the rules would not depend upon whether participation in a court-program mediation was pursuant to stipulation of the parties.
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Scope of rule 1622 procedures		The proposal should make it clear that only complaints of violation of the standards of conduct will be considered.	Please see response to comment of BASF, above.
Mr. Gordon McClintock	Application of rule 1622		It is difficult to know whether a case is a court-program case.	Pursuant to rule 1620.1, the requirements will only apply if a mediator is notified, by the parties or the court, that he or she was recommended, selected, or appointed, or will be compensated by the court, to mediate a case within a court's mediation program. The committee will consider, in a future rules cycle, whether <i>written</i> notification to the mediator that a mediation is to be conducted pursuant to a court mediation program should be required for rule 1620 et seq. to apply.
Mr. Ira Spiro State Bar ADR Committee	Scope of rule 1622 procedures		Rule 1622 complaint procedures should be limited to alleged violations of the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, rules 1620 through 1620.9.	Please see response to comment of BASF, above.

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Complaint Process

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Complaint Process	Advisory Committee Response
Bar Association of San Francisco (BASF)	Complaint process		<p>(1) Subdivision (c) should be added to rule 1622, providing: "Any action taken by the court pursuant to subsection (b) may be taken only after the mediator has been provided with notice of the complaint and an opportunity to be heard."</p> <p>(2) A mediator should be able to short-circuit the complaint process by resigning from a court's panel of mediators.</p>	In a future rule cycle, the committee will consider commentators' suggestions that a uniform statewide procedure be adopted for addressing complaints against court-program mediators. In doing so, the committee will consider the commentators' suggestions concerning specific characteristics of the complaint procedure.
Mr. John S. Blackman	Complaint process		Mr. Blackman proposes guidelines that courts should consider in establishing procedures for receiving and resolving complaints against court-program mediators. These guidelines are modeled after section 16 of the Standards of Judicial Administration, which sets forth suggested guidelines for addressing complaints against commissioners and referees.	Please see response above.
Mr. Michael B. Carbone	Complaint process		A simplified complaint process, as outlined by the commentator, should be considered.	Please see response above.
Ms. Mary B. Culbert	Complaint process		The proposal should specify a uniform, simple, clear, and confidential internal grievance process for resolving rule 1622 complaints. A confidential, internal review process like that used by DRPA programs and the EEOC is more suitable for court-mediation programs than seeking a waiver of mediation confidentiality.	Please see response above.
Ms. Ruth V. Glick	Complaint process		The Judicial Council should provide guidelines to the courts not inconsistent with section 16 of the Standards of Judicial Administration.	Please see response above.
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Complaint process		<p>(1) Any process for assuring that mediators on court panels adhere to ethical standards of conduct should be uniform statewide, i.e., made part of the Rules of Court.</p> <p>(2) The proposal should prescribe a statewide procedure, modeled after Standards of Judicial</p>	Please see response above.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Complaint Process	Advisory Committee Response
			<p>Administration, section 16, for addressing complaints that a mediator has violated the standards of conduct. CDRC generally supports the proposal outlined by Mr. Blackman, but believes the procedure should be managed by the person designated pursuant to rule 1621, rather than by the presiding judge.</p> <p>(3) Mediators should not be required to respond to a complaint unless it is in writing and specifies which Standard of Conduct the mediator is claimed to have violated and how.</p> <p>(4) Courts should be precluded from adopting complaint procedures that include such features as the taking of testimony.</p>	
Mr. Wayne Smith	Complaint process		<p>(1) All complaints should be handled off the record and in camera, and should be kept in a sealed file available only to the ADR supervisor and the presiding judge.</p> <p>(2) The mediator should only be permitted to reveal what a party said if that party is there making the complaint and consents to the disclosure, and the mediator should have the right to refuse to divulge anything that transpired in the mediation.</p>	Please see response above. Additionally, proposed rule 1622.2 provides for the confidentiality of rule 1622 procedures and records.
Mr. Ira Spiro State Bar ADR Committee	Complaint process		<p>(1) An informal and confidential complaint process should be required by rule of court. The process should be modeled after the procedures set forth in Standards of Judicial Administration, section 16. Other existing models of informal complaint processes, such as those used by DRPA programs and the EEOC, should also be considered.</p> <p>(2) Rather than creating a process in which waivers of confidentiality need to be sought before a mediation begins, the guidelines should address how confidentiality will continue to be protected, while affording parties the right to complain if they feel that</p>	Please see response to the comment of BASF, above.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Complaint Process	Advisory Committee Response
			the mediator may have violated the Rules of Conduct. The guidelines should include the features outlined by the commentator.	
Mr. Ivan K. Stevenson	Complaint process		Giving courts latitude to develop individual rule 1622 procedures eliminates any possibility of consistency [of control] over conduct of mediators.	Please see response to the comment of BASF, above.
Mr. Dean Zipser	Complaint process		(1) Allowing courts "considerable latitude" in developing their complaint procedures would eliminate certainty and consistency for mediators and parties operating among counties. (2) The complaint procedures should be facilitated by a participating mediator. (3) Provision should be made for a determination that a complaint is frivolous or unfounded, without launching a full investigation.	Please see response to the comment of BASF, above.

Other Suggestions

Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Other Suggestions	Advisory Committee Response
Bar Association of San Francisco (BASF)	Requiring written notice for application of rule 1620 et seq.		Amend rule 1620.1 to require that notification to the mediator that a mediation is a court program mediation which is necessary to make 1620 et seq. applicable must be in writing.	The committee will consider, in a future rules cycle, whether <i>written</i> notification to the mediator that a mediation is to be conducted pursuant to a court mediation program should be required for rule 1620 et seq. to apply.
Ms. Julie Bronson	Statutory amendment		Consider something similar to the implied waiver used in attorney malpractice.	The exception to the lawyer-client privilege for communications relevant to a breach of duty arising out of the lawyer-client relationship is established by Evidence Code section 958. There is no such exception in the mediation confidentiality statutes.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Other Suggestions	Advisory Committee Response
Ms. Jennifer Bullock	<p>Providing information about complaint process</p> <p>Other approaches for addressing confidentiality in rule 1622 procedures</p>		<p>(1) Participants should be informed about the complaint process outside the mediation session; either in information provided by the court prior to the session or as part of a post-mediation evaluation process.</p> <p>(2) Other ways for maintaining mediation confidentiality while allowing courts to address complaints without jeopardizing the tone of the mediation should be explored by the AOC and the mediation community. These might include: (a) defining court staff as within the bounds of confidentiality; (b) considering "conduct" that is not protected by confidentiality; and (c) allowing parties to waive confidentiality after a complaint has been filed.</p> <p>(3) Some members of the California Coalition for Community Mediation believe that the Judicial Council should wait and gather more information before moving forward on this issue.</p>	<p>(1)–(2) The committee will consider these suggestions in a future rules cycle, when considering uniform statewide procedures for addressing complaints against court-program mediators.</p> <p>(3) Elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns. The committee will also continue to seek input about this issue when considering uniform statewide procedures for addressing complaints against court-program mediators.</p>
Mr. Michael B. Carbone	Reducing complaints through ethics training		<p>(1) Whenever a mediator is assigned a case to which the ethical standards apply, the court should have the parties complete an information sheet with their contact information.</p> <p>(2) Requiring mediators to complete two or three hours of ethics in order to be on a panel and one or two hours of continuing education in the subject every three years would not be unreasonable and might serve to prevent some of the complaints.</p>	<p>(1) The committee will consider this suggestion in a future rules cycle, when considering uniform statewide procedures for addressing complaints against court-program mediators.</p> <p>(2) The committee agrees that ethics training for mediators may be an effective way to prevent some complaints against court-program mediators.</p>
Ms. Ruth V. Glick	Providing information about complaint process		Instead of requiring a waiver of confidentiality at the outset, courts should inform participants that any complaint about a mediation conducted under its auspices could be subject to an established procedure for receiving and resolving disputes that may involve a	The committee will consider methods of providing information about the rule 1622 complaint process to court-program mediation participants.

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Other Suggestions	Advisory Committee Response
			confidential inquiry by court personnel and the presiding judge if so warranted.	
Mr. David A. Levy	Providing information about mediation		If the Judicial Council believes the concepts of mediation procedures, confidentiality, and impartiality are important, the council could prepare a simple English pamphlet to give parties or counsel at the time they agree to mediation, rather than requiring mediators to present form ADR-108. It is more appropriate for the attorneys, rather than mediators, to explain these matters.	The committee will consider methods of providing information about the rule 1622 complaint process to court-program mediation participants. However, elimination of the requirement that mediators present form ADR-108 to the mediation participants should substantially address the commentator's concerns.
Ms. Mimi Lyster Superior Court of Contra Costa County	Providing information about complaint process		Add a new subdivision to rule 1620.6 requiring the mediator to inform the parties of the procedures in that jurisdiction for receiving, investigating, and resolving complaints against a mediator serving on the court's panel or appearing on the court's list of approved mediators.	The committee will consider this suggestion in a future rules cycle, when considering uniform statewide procedures for addressing complaints against court-program mediators.
Mr. James R. Madison California Dispute Resolution Council (CDRC)	Requiring written notice for application of rule 1620 et seq. Providing information about complaint process		(1) Rule 1620.1(a), (b) and (c) should be amended to provide that the standards of conduct apply only if a mediator is notified in writing before accepting a mediation engagement that the mediation will be within the mediation program of the court in which the case is pending. (2) Information about the availability of a complaint process can be made available outside of the mediation, by posting in on the court's website or including it with information distributed when a case is to be mediated under the court's program.	(1) Please see response to comment of BASF, above. (2) Please see response to comment of Ms. Glick, above.
Mr. Gordon McClintock	Implied agreement to complaint procedure		Local rules can provide that selection of a mediator from a court list constitutes an agreement that the rules will apply in the event of a complaint against the mediator.	The suggested approach might not result in a knowing and voluntary agreement to the disclosure of mediation communications in a rule 1622 procedure.
Hon. George A. Miram Superior Court of San Mateo County	Other approaches for addressing confidentiality in		(1) A revised proposal should require court panel mediators to designate court ADR staff as an extension of the mediator's office staff, and thus encompass them	(1) It is not certain whether the designation of court ADR staff would either permit the disclosure of mediation communications in a rule 1622 complaint

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	<p>rule 1622 procedures</p> <p>Providing information about mediation</p>		<p>within the scope of mediation confidentiality.</p> <p>(2) ADR-108 contains useful and concise information and could be converted into a checklist for mediators to use as a reminder of issues that should be addressed with mediation participants</p> <p>(3) Adopt rules permitting ADR administrators to request but not require agreement to disclosure in event of complaint. Although this may leave a complaint unresolved, the possible problem has been brought to the administrator’s attention and the allegation can be addressed directly with the mediator in question.</p>	<p>process or protect the confidentiality of those procedures. However, the committee will continue to examine this and other alternative methods of allowing the disclosure and protecting the confidentiality of mediation communications in rule 1622 proceedings.</p> <p>(2) The committee will consider using ADR-108 to develop materials that may useful or informative to mediators and mediation participants.</p> <p>(3) The committee will consider this suggestion in a future rules cycle, when considering uniform statewide procedures for addressing complaints against court-program mediators.</p>
M. Lee Shealy	Providing information about mediation		Instead of asking participants to sign the forms, ask the mediator to sign a form stating that he or she told the participants about the required points. The participants could also be given a copy of the written document, but not required to sign it.	Please see response to comment of Ms. Glick, above.
Mr. Ivan K. Stevenson	<p>Obtaining information about participants before mediation</p> <p>Qualifications for court-program mediators</p> <p>Elimination of mandatory mediation</p>		<p>(1) In court-mediation programs, once the names of the participants are provided to the mediator, the mediator must notify the parties of any conflicts. However, only minimal information is submitted by the court to the mediator, so sometimes the conflict is not discovered until everyone shows up.</p> <p>(2) If you do not have good quality people acting as mediators, you are going to have problems. Maybe the court needs to increase its qualifications to be admitted to the panel.</p>	<p>(1) This concern is outside the scope of the proposal that was circulated for comment; however, the committee will consider whether the issue might be addressed in a later rules cycle.</p> <p>(2) Public comments were recently requested concerning whether any of the criteria for including or retaining a neutral on a court’s ADR panel should be set forth in mandatory statewide rules of court. (See Proposal SPR05-08, Alternative Dispute Resolution: Recommendations About Alternative Dispute Resolution Programs and Referrals to Dispute Resolution Neutrals.) The majority of the commentators</p>

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Commentator	Issue or Provision	Position	Comment Excerpt or Summary: Other Suggestions	Advisory Committee Response
			(3) The Judicial Council should consider stopping the mandated programs, which in and of itself, will provide a financial savings to the court system because at the present time there are no less than two to three ADR persons in every courthouse and their only job is to process ADR matters.	<p>who shared their views on this issue suggested that it is preferable to address the qualifications in the standards of judicial administration, rather than in rules of court.</p> <p>(3) It is not clear that eliminating mandatory mediation programs will result in financial savings to the courts. Civil Action Mediation Programs, in which the court is authorized to order certain cases to mediation in lieu of judicial arbitration, are authorized by statute (Code Civ. Proc., § 1775 et seq.) and have been beneficially implemented in some courts. Mandatory mediation programs conducted under the Early Mediation Pilot Program were also found to have resulted in substantial time and cost savings for courts and litigants and increased satisfaction with the courts, among other benefits.</p>
Ms. Elizabeth Strickland Superior Court of Santa Clara County	Consultation with mediation community		There should be further dialogue with members of the mediation community to build consensus regarding the best solution to this concern.	The committee recommends that staff continue discussions with the mediation community to develop ways to permit the disclosure and preserve the confidentiality of mediation communications in rule 1622 procedures.
Mr. Dean Zipser	Providing information about complaint process		The parties should be informed of the complaint procedures in advance of the mediation.	Please see response to comment of Ms. Glick, above.